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BILL ANALYSIS

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Senate Bill 595 (Substitute S-2 as reported)
Sponsor: Senator Joel D. Gougeon
Committee: Families, Mental Health and Human Services

Date Completed: 2-12-96

RATIONALE

The Child Custody Act provides that, in a custody dispute between parents, the parents must be advised of joint custody and, at the request of either parent, the court must consider awarding joint custody; in other cases, the court may consider joint custody. The Act also requires the court to determine whether joint custody is in the best interest of the child by considering factors enumerated in the Act (described below in BACKGROUND), and considering whether the parents will be able to cooperate and generally agree concerning important decisions affecting the child's welfare. Despite these provisions, many people believe that sole custody continues to be awarded to one parent, usually the mother, in a disproportionate number of cases. According to some, joint custody promotes cooperation between parents; increases involvement with the child by the parent who otherwise would not have custody; and improves children's adjustment to their parents' divorce, which in turn averts later incidents of depression, misconduct, drug use, and school problems. These people believe that the law should include a presumption that joint custody would be awarded, unless the court found that it was not in a child's best interest.

CONTENT

The bill would amend the Child Custody Act to provide that, in a custody dispute between parents, the court would have to presume that joint custody should be ordered, and the parents would have to be advised of the presumption of joint custody. The court would have to state on the record the reasons for granting or denying joint custody. The court would have to order joint custody unless it determined on the record that joint custody was not in the best interest of the child, considering the factors enumerated in the Act and the parents' ability to cooperate and generally agree on important decisions affecting the child's welfare.

The bill would replace current provisions that require the parents in a custody dispute to be advised of joint custody; require the court, at the request of either party, to consider an award of joint custody, and state on the record the reasons for granting or denying a request; permit the court to consider joint custody in all other cases; and require the court to determine whether joint custody is in the best interests of the child.

The bill would retain a provision that, if the parents agree on joint custody, the court must award joint custody unless it determines on the record, based upon clear and convincing evidence, that joint custody is not in the child's best interests. The bill also provides that if the parents agreed to custody other than joint custody, the presumption of joint custody would not apply, and the court would have to order custody as provided in the agreement, unless it determined on the record, based on clear and convincing evidence, that custody as specified in the agreement would not be in the child's best interests.

Currently, if the court awards joint custody, it may include in its award a statement regarding when the child will reside with each parent, or may provide that physical custody is to be shared by the parents in a manner to assure the child continuing contact with both parents. The bill, instead, would require the court to include in its joint custody award a statement regarding when the child would reside with each parent to assure the child continuing contact with both parents. The bill also specifies that if the parents had an agreed-upon parenting schedule, the court would have to order parenting time as provided in the agreement unless it determined on the record, based on clear and convincing evidence, that the agreement was not in the best interests of the child.

Currently, "joint custody" means a court order in which "1 or both" of the following are specified: (a) that the child shall reside alternately for specific periods with each of the parents; (b) that the parents shall share decision-making authority as to the important decisions affecting the child's welfare. Under the bill, "joint custody" would mean a court order in which *both* of those were specified.

The bill would retain provisions that joint custody does not eliminate the responsibility for child support, and that a joint custody order, in and of itself, does not constitute grounds for modifying a support order.

MCL 722.26a

BACKGROUND

Section 3 of the Child Custody Act (MCL 722.23) defines "best interests of the child" as "the sum total of the following factors to be considered, evaluated, and determined by the court":

- The love, affection, and other emotional ties existing between the parties involved and the child.
- The parties' capacity and disposition to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
- The parties' capacity and disposition to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this State in place of medical care, and other material needs.
- The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- The permanence, as a family unit, of the existing or proposed custodial home or homes.
- The moral fitness of the parties involved.
- The mental and physical health of the parties involved.
- The home, school, and community record of the child.
- The child's reasonable preference, if the court considers the child old enough to express preference.
- The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

- Domestic violence, regardless of whether it was directed against or witnessed by the child.
- Any other factor considered by the court to be relevant to a particular child custody dispute.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

By creating a statutory presumption that joint custody should be ordered, unless a court determined that it was not in a child's best interests, the State would be adopting a policy that favored equal parenting, and the equal involvement of *both* of a child's parents, rather than a combination of sole custody and visitation. Divorce is very hard on children and, according to testimony, it has been observed that they go through a classic mourning process after divorce. Reportedly, the results of a 10-year study of children of divorce show that if children are deprived of one of their parents, or if the parents quarrel and compete with each other, children are more likely to have lower self-esteem and psychological damage. Further, how children do in life after divorce depends to a large degree on how their parents behave and on the parents' attitude toward each other. According to an article presented to the American Bar Association Family Law Section (August 1987) by a Frank S. Williams, M.D., "...joint custody provides one of the best methods of stimulating a degree of significant and meaningful cooperation in warring parents who would otherwise continue years of battling to the detriment of their children... The main hope for averting the later depression, conduct disorders, drug usage, school and peer problems in these children is for their parents to learn how to cooperate." The article states that there is a greater failure of development and growth of parental cooperation in unilateral sole legal and sole physical custody situations for various reasons, including the noncustodial parent's feeling of being "erased", and his or her rage over the loss of parental identity. Sometimes, according to the article, the parents who feel this rage, depression, and powerlessness adapt by abandoning their children financially, physically, and psychologically. More frequently, however, the parent continues to fight viciously with the other parent.

Joint custody not only promotes parental cooperation, but also increases the involvement of both parents with their children. The American Psychological Association's Division of School Psychology evaluated the major research concerning joint custody and its impact on children's welfare. According to the results, "The weight of evidence...unambiguously found increased father contact and involvement with children in joint custody versus sole maternal custody in divorced families... A major advantage of joint custody may be its ability to address the high rate of current father absence subsequent to divorce...". The results also found that "...the present research supports joint custody for facilitating children's adjustment..."; "...child support to mothers is either increased in joint custody families or not significantly different from those with sole maternal custody..."; "[t]he studies...consistently indicated decreased relitigation for joint custody versus sole maternal custody..."; and "...joint custody results in either less or no greater conflict than sole maternal custody...". The report concluded, "The need for improved policy to reduce the present adversarial approach that has resulted in primarily sole maternal custody, limited father involvement and maladjustment of both children and parents is critical."

Response: The bill could do more to encourage co-parenting after divorce. According to the National Congress for Men and Children, Michigan Chapter, the law should include specific provisions that an established custodial environment would be presumed to exist in a joint custody situation; provide for a rebuttable presumption that the split of parenting time in joint physical custody arrangements would be as close to 50-50 as possible; provide that a joint physical custody environment could not be changed without clear and convincing evidence; prohibit one parent from changing residence to frustrate or reduce contact between the other parent and the child; prohibit ex parte orders granting sole custody, little or no parental contact, and child support payments to a parent without notice of hearing; and provide procedures under which a parent could reestablish a joint physical custody environment and reconnect with his or her child.

Supporting Argument

Statistics reportedly show that single-parent households are responsible for the majority of social problems. According to testimony, single-parent homes produce the following: 71% of teenage pregnancies; 63% of youth suicides; 90% of runaway children; 75% of children in chemical

abuse centers; 85% of children with behavioral disorders; 71% of high school dropouts; 70% of children in state-operated institutions; 85% of incarcerated juveniles; 84% of reported sexual abuse; a 500% increase in the likelihood of a child's being poor; 80% of adolescents hospitalized for psychiatric reasons; 60% higher rates of divorce for girls and 35% for boys; 50% higher rates of learning disabilities; and children, especially boys, who score lower on reading and math tests. While presumptive joint custody would not be a panacea, it should serve as a starting point to minimize the adverse consequences to children from growing up outside of a stable intact family.

Additional testimony indicates that single-parent households are responsible for 63% of all child abuse, despite constituting a minority of households with children. Joint custody can reduce child abuse in at least three ways: 1) it reduces single-parent overload, a major cause of child abuse; 2) it reduces the amount of time children spend in unsupervised settings with unrelated adults; and 3) each parent in a joint custody arrangement serves as an "early-warning system" to monitor and report signs that the other parent may be losing control.

Supporting Argument

According to the Children's Rights Council, Michigan Chapter, a number of Federal judicial decisions, including several by the United States Supreme Court, affirm that the right of parents to the care and custody of, and to nurture, their children is of such character that it cannot be denied without violating the fundamental principles of liberty and justice, and this right is protected by the First, Fifth, Ninth, and 14th Amendments to the U.S. Constitution. A statutory presumption of joint custody would help ensure that parents were not denied their fundamental, constitutionally protected rights.

Opposing Argument

A presumption of joint custody is not necessary and could, in fact, be harmful. The law already requires the court to consider joint custody if either parent requests it, and allows the court to consider joint custody in any other case. In practice, joint custody can be and is being awarded. Since parties who agree to joint custody currently are getting it, the bill primarily would affect those who cannot agree to co-parenting. Furthermore, even when the parents are cooperative, committed to their children, and able to communicate with each other on a regular basis, joint physical custody can

be difficult to implement. While the concept might be fair to the mother and fair to the father, it is not fair to the child. A child whose life, time, and belongings are split between two homes ends up with no “homebase” and no sense of security or stability. The difficulties of sharing physical custody would only be exacerbated, and conflicts would only increase, in situations in which the parents did not get along and could not communicate. Moreover, by requiring every joint custody order to specify that the child “shall reside alternately for specific periods with each of the parents”, the bill would require joint *physical* custody in every case and eliminate the concept of joint *legal* custody, which awards physical custody to one parent but gives both parents joint decision-making authority. Evidently, joint legal custody is the most common form of joint custody. This change would eliminate an important option for families. Even the author of the article presented to the American Bar Association (cited above) stated, “...the essential minimal cooperation needed to best help children through their post-divorce problems develops more rapidly and is sustained more often when there is joint legal custody, and when there is carefully structured, very clearly defined shared or joint physical custody” (emphasis in original). While joint physical custody might be advisable in some situations, it should not be mandated in every case.

Further, while a large percentage of custody awards are granted to mothers, these numbers reflect all custody orders, not merely disputed cases. Reportedly, since the mother is still the primary caregiver in most families, the parties agree that she should have custody in the vast majority of cases. Although figures are not available for Michigan, studies in other parts of the country show that when custody is disputed, fathers win sole custody at least 50% of the time. A North Carolina survey of contested custody decisions revealed that in 62% of the cases, sole custody was awarded to the father, with 22% of the cases resulting in mandated joint custody, and a mere 15% of the cases granting sole custody to the mother. Thus, 84% of the fathers were granted either sole or joint custody.

Even if there are judges who refuse to consider joint custody, as some allege, the answer is not to change the law. Rather than instituting a measure that could increase conflict in an already tense situation, the State should make efforts to help parties reduce conflict, such as through mediation programs and mandatory divorce education

classes. The State also should consider the experience of California, which evidently enacted a joint custody presumption in 1980, only to repeal it in 1989.

Opposing Argument

Joint custody should not be presumed to be in a child’s best interests unless the parents agree to it. Under current law, whenever the court is considering joint custody, it must determine whether the best interests of the child would be served. Under the bill, however, the court would have to consider the child’s best interests *only* if the joint custody presumption were challenged. Judges no longer would have to look at what each particular child needs or how capable each parent is relative to the other in parenting. In addition, the parent opposing joint custody probably would have to bear the burden of overcoming the presumption. This parent also could be “punished” by the court for challenging joint custody, since one of the factors considered in determining a child’s best interests is the willingness of a party to encourage a continuing relationship between the child and the other parent. Even if a parent were justified in challenging the presumption, he or she could be seen as interfering with that relationship.

Response: The bill says nothing about burden or standard of proof. Rather, if a parent opposed joint custody, the court would have to engage in exactly the same best interests analysis that is must now make.

Opposing Argument

According to testimony submitted by a member of the Michigan Domestic Violence Prevention and Treatment Board, despite the bill’s good intentions, in practice it would create a dangerous situation and put victims of domestic violence, and their children, at risk. The written testimony states, “All experts agree that in an abusive family the risk of violence may increase at divorce. There is a great deal of overlap between spousal abuse and child abuse, but the experts agree that the presence of domestic violence, whether or not it is directed at the child, and whether or not the child witnesses the abuse, is harmful to the child. In fact, law enforcement and victims advocates agree that the exchange of children during visitation can be the most dangerous time for the victim and her children.” In situations in which abuse has occurred in a marriage, forced joint custody would grant batterers frequent and continuing access to the victim.

Although the Child Custody Act requires domestic violence to be considered in the determination of

a child's best interests, it is only one of several factors, with no greater weight or priority than any other. The presumption for joint custody in the bill "...is much stronger legal language than the Child Custody Act's domestic violence factor and would represent a giant step backwards for victims of domestic violence and their children", according to the testimony. Furthermore, despite recent changes in the law, victims still are not routinely believed, and if abuse has not been reported, victims could have difficulty establishing evidence of violence to the satisfaction of the court. It should not be presumed that judges would consider undocumented psychological, emotional, or verbal abuse and unprosecuted physical violence, or that battered women would feel safe from retaliation to disclose this abuse.

Opposing Argument

The bill could result in reduced child support payments or collections. According to an article in *The Women's Advocate* (September 1992), published by the National Center on Women and Family Law, Inc., "...the very use of the term 'joint custody' results in much lower child support awards, but even these lowered amounts are not more likely to be paid. The net impact is that the mothers who bear the real burden of raising children in joint custody arrangements are far worse off economically, which in turn hurts the children." According to testimony submitted by the National Organization of Women, Michigan Conference, a 1992 study in *Dividing the Child; Social and Legal Dilemmas of Custody* (Harvard University Press) followed more than 1,000 families for over three years after the parents filed for divorce. This study apparently found that joint custody reduces the probability that a mother will be awarded child support, and that only half of the fathers who were ordered to pay child support fully complied, even though almost all of them could have afforded to pay more.

In addition, written testimony submitted on behalf of the Friend of the Court Association indicates that a joint custody presumption would have a "dramatic" effect on child support orders. This testimony also points out that some parents could fully exercise a 50-50 parenting plan, but fail or refuse to clothe the children adequately, pay for school supplies, or make other provisions for them on the basis that the child support they pay is for these items. Evidently, this is often heard now concerning children on extended parenting time (such as summer periods), and the situation could become extreme if one-half of every year were spent with a parent who would not adequately

provide for a child. Additional areas of concern involve the recommended "rate of exchange" for the parenting time; problems a parent could have qualifying for public assistance; the difficulty of maintaining child care arrangements; situations in which a parent is out of State or moves away; and whether there would be a "threshold" test for reviewing a joint custody arrangement that was not working.

Response: The Act provides that joint custody does not eliminate the responsibility for child support, and that a joint custody order is not grounds for modifying a support order. The bill would not change these provisions.

Legislative Analyst: S. Margules

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: M. Bain

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.