

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

SFA**BILL ANALYSIS**

Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

Senate Bill 33 (Substitute S-1 as passed by the Senate)
Sponsor: Senator Joel D. Gougeon
Committee: Families, Mental Health and Human Services

Date Completed: 3-5-97

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 shared parental responsibility 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 create a presumption of shared parental responsibility and provide for parenting plans in child custody cases. The bill specifies that it could not be used as a basis to petition for a modification of an order governing child custody or parenting time that was issued before the bill's effective date.

"Shared parental responsibility" would mean an order of the court that specified that the parents would have to share decision-making authority and

responsibility for the important decisions affecting the child's welfare and that the child would have to reside with each parent for specified periods of time. The bill would not require, however, that the child reside with each parent for an equal or nearly equal amount of time during any given time period.

Joint Custody/Shared Parental Responsibility

The bill would delete current provisions concerning joint custody and, instead, create a presumption of shared parental responsibility. Under the Act's current provisions, parents in a custody dispute must be advised of joint custody. At the request of either parent, the court must consider an award of joint custody and state on the record the reasons for granting or denying a request for joint custody. The court must determine whether joint custody is in the best interest of the child. 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. If the court awards joint custody, it may include in the award a statement regarding when the child is to reside with each parent.

Under the bill, instead, the court would have to presume that shared parental responsibility should be ordered and the parents would have to be advised of that presumption. The court would have to order shared parental responsibility unless it determined on the record that shared parental responsibility was not in the best interests of the child. The court would have to state on the record the reasons for granting or denying shared parental responsibility. If the court awarded shared parental responsibility, it would have to include in its award a statement regarding when the child would have to reside with each parent.

The bill specifies that it would not prohibit the court

from awarding joint legal custody that ordered the parents to share decision-making authority and responsibility as to the important decisions affecting the child's welfare, without making an award of shared parental responsibility.

Parenting Plan

If the parents agreed to a parenting plan other than shared parental responsibility, the bill's presumption would not apply. In that case, the court would have to order the parenting plan as provided in the parents' agreement, unless the court determined on the record, based on clear and convincing evidence, that the parenting plan was not in the child's best interests.

The parents could submit to the court a parenting plan, which could include provisions regarding the following:

- The child's residence; education, including postsecondary education; religious affiliation; and medical care.
- Each parent's decision-making authority.
- Other related issues consistent with the Act, including proposed alternative dispute resolution mechanisms to resolve further disputes without litigation.

MCL 722.23 et al.

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 shared parental responsibility 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.

A system of shared parental responsibility not only would promote parental cooperation, but also would increase 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. It should not adopt the term “shared parental responsibility”, which has no established meaning in the context of case law in custody situations, but should use the established term “joint custody”, which legal practitioners understand to mean a combination of joint *legal* and joint *physical* custody. The bill also should not specify that it would not require a child to reside with each parent for an equal or nearly equal amount of time. This limitation would make shared parental responsibility a distinction without a difference compared with the typical arrangement of sole custody for one parent and limited parenting time for the other.

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.

In addition, the bill should specify that it would apply retroactively, so that all of those parents who may have been victims of any gender bias in the current system could seek redress.

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 shared parental responsibility 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 indicated 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 shared parental responsibility would help ensure that parents were not denied their fundamental, constitutionally protected rights.

Opposing Argument

A presumption of shared parental responsibility 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.

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 who contested custody cases 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

By requiring every order of shared parental responsibility to specify that the child "shall reside with each parent for specified periods of time", the bill would essentially 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.

Response: The bill contains specific language preserving the court's authority to award joint legal custody without an award of shared parental responsibility, and specifies that shared parental responsibility would not require that a child reside with each parent for an equal amount of time.

Opposing Argument

Shared parental responsibility 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 shared parental responsibility 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 shared parental responsibility probably would have to bear the burden of overcoming the presumption. This parent also could be "punished" by the court for challenging the presumption, 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 shared responsibility, the court would have to

engage in exactly the same best interests analysis that it must now make.

Opposing Argument

According to testimony submitted on a similar bill last session (Senate Bill 595 of 1995-96) by a member of the Michigan Domestic Violence Prevention and Treatment Board, despite the bill's good intentions, in practice it could 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 shared parental responsibility 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 bill's presumption "...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.

Legislative Analyst: P. Affholter

FISCAL IMPACT

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

Fiscal Analyst: M. Ortiz

A9798\S33A

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.