

JOINT CUSTODY OF CHILDREN ACT OF 1995

DISTRICT OF COLUMBIA

MAY 10, 1995 HEARING

TESTIMONY OF RONALD K. HENRY

Good afternoon, Mr. Chairman, it's good to see you again and I again marvel at your patience and diligence. This *is* an important set of issues and you've had a very long day. I thank you for doing this.

Mr. Chairman, I had initially hoped to be one of the first to testify on this subject, because I was going to warn you about some of the things you would be hearing from the opponents; some of which are stereotypes and distortions, some which I view as outright falsehoods. Instead, I'm actually glad that I have come to testify late in the day because now I don't have to just warn you about them, now I can point out some of them to you.

Mr. Chairman, I came today to talk entirely about the best interests of children because that is what we are here for and that is what this bill attempts to foster and encourage. Mr. Chairman, children are born with two parents. Children want, love and need two parents. Children are in the joint custody of both parents during the marriage.

During the marriage, we know that the status of the child is to have a pure and unrestricted joint custody with unlimited access to both parents. The question for us, Mr. Chairman, is what should the law do when that marriage breaks apart? Who should have the burden of proof? The one who wants to continue the involvement of both parents or the one who wants to claim sole ownership of the child? Where should the burden of proof lie when there's going to be a change from the existing unrestricted access to both parents?

Mr. Chairman, when you think about a custody order, bear in mind that it's a very simple legal concept. A custody order is just an injunction. We take people who previously had unrestricted freedom, people who previously had unrestricted access to their children, and now we enjoin them from exercising part of that prior right. Well, Mr. Chairman, we're both lawyers. In fact, I think that most of the folks at the front of the room right now are lawyers, and we know the rule for dealing with injunctions in every other area of the law. That is, you impose the minimum restriction on the parties' prior freedom. You put only the smallest imposition, the smallest restriction on them necessary to resolve the dispute at hand. You don't go to a disruptive extreme.

If, as we all know, those children were in joint custody during the marriage, my submission to you, Mr. Chairman, is that we ought to work very hard to preserve for the children, for their best interest, as much of that preexisting joint custody, as much of that access to both parents as we can. Mr. Chairman, when a divorce comes, does a child have less need or more need for the involvement of both parents? I submit to you, Mr. Chairman, the child's need for both parents is actually greater because of the insecurity created by the divorce itself. If we care about children's best interests, we need to send a message through our law that encourages the continued involvement of both parents, that encourages continued shared parenting, and that imposes only the minimum necessary restrictions just as we would do with any other kind of injunction.

Mr. Chairman, think about what a custody battle is. Two parents go into court and stand before a judge, each of them begging to spend more time with the child. What message do we want to send to people in this community? Have you heard one witness come forward today and say that the District of Columbia's citizens are suffering from an excess of parenting or an excess of fathering or that children spend too much time with either of their parents? Of course not. We know that just the opposite is true.

We know that children are suffering from the absence of their parents. We know that our children are suffering from insufficient parenting. What is the message that we should be sending through our courts? I submit to you, Mr. Chairman, that if we care about the best interests of children, the message we should send is that we want to

encourage the maximum continued involvement of both parents. Continue for them the joint custody that existed during the marriage, take away from those children as little as you absolutely must, presume a continuation of two parents.

We have a saying in our community, "It takes a whole village to raise a child." By what theory of the child's best interests should a court come in and issue an order restricting one parent to mere visitor status? When you have fit and loving parents, when you have two parents in a society that cares about children coming in front of the court and saying, "please give me more time with my child," shouldn't we throw up our hands and say, hallelujah!, here is a child who is loved, here is a child who has two parents who want to be involved, let us see what we can do to maximize the contributions of both?

Instead we have a very perverse system, Mr. Chairman, under which the judge says, "No, no, I'm sorry, my job is to pick a winner and pick a loser here." Well, Mr. Chairman, when you pick a winner and pick a loser in a custody fight, all you've done is guarantee that the child is the loser, because that child walked into court with two parents and walks out with only one. The winner-loser mentality that has driven child custody in the District of Columbia is antithetical to the best interests of the child. The proposed legislation is designed to preserve for children what we know they need. It doesn't matter what social pathology you look at, teenage pregnancies, drug abuse, suicide, low self-esteem, school dropout . . . You can go through the litany of pathology that the government has to spend money to try to cure. Every single one of them is linked to family breakdown and parental absence. We don't have an excess of parenting. We have a shortage of parenting.

Let's put into place a law which says it is the policy of the District of Columbia to encourage the maximum involvement of both parents, to preserve for each child the joint custody in which that child was born and which continues by nature and by the law until a foolish judge intervenes and takes it away. We don't need to take it away. We need to have a law that says you both are still Mom and Dad.

Look at the situations that are in the newspapers right now, such as the *Prost v. Green* litigation. I've talked with people on both sides of that case. You know what they both tell me, they both tell me they're scared. They're scared that they might lose custody, that they might be reduced to visitor status. So rather than run that risk, they each go in and fight like crazy. You've seen some of that in the newspapers. Each of them has said they would be willing to accept joint custody, but both remain fearful that if they go into court and acknowledge a willingness to accept joint custody, they will be deemed to have already given away half the loaf while they still run the risk of losing everything. These people run the risk of being reduced to a mere visitor to their own child, so they feel that they have to fight to be the one who emerges as the winner out of a desperate fear that otherwise they'll end up being the one who's the loser.

Mr. Chairman, the purpose of this bill is to get past winners and losers. To say to both litigants, "Relax, at the end of this you're both still going to be Mom and Dad. You're both going to have substantial relationships with your children." Now, Mr. Chairman, I really need to talk about some of the distortions and stereotypes and outright falsifications that occurred in the testimony of the small group of opponents you heard from earlier today.

Let's start with the claims that are made about cases where conflict exists between the parents. Mr. Chairman, you keep hearing the notion of, "oh, well, if the parents are in conflict, oh, tsk, tsk, we can't possibly have joint custody." Of course conflict is bad for children. Conflict during a marriage is bad for children, conflict in sole custody is bad for children, conflict anywhere is bad for children. But none of the people who argued about conflict ever asked you to directly compare the logic of the choices that are actually in front of you. We're not comparing joint custody against Ozzie and Harriet, we're comparing joint custody against sole custody, Mr. Chairman.

Think for a moment which is more likely to engender hostility, which is more likely to create conflict -- a situation in which both parents are told, "Relax, you're not going to lose your role as a parent," or a situation in which the court says, "I'm going to pick a winner and pick a loser. Choose your weapons and come out fighting,

the last one left standing is the winner." Sole custody determinations, Mr. Chairman, are the source of the conflict. This legislation is designed to reduce that conflict, reduce fear and work for the best interests of the children. Ask the opponents of joint custody which is more likely to create conflict -- a winner/loser dichotomy or sharing. That's an easy choice.

A related claim was that joint custody forces unwilling parents to interact with each other. Again, they are comparing joint custody against Ozzie and Harriet, they are not comparing it against sole custody. The parents also have to interact with each other in a sole custody situation. In sole custody, however, they interact from a basis of hostility. They interact from a basis of power and powerlessness. They interact from a basis in which one parent has been declared to be the loser and that parent is ever fearful of losing still more, of losing every last shred of contact and is ever struggling to try to get back into the child's life and restore what was taken away by a piece of paper, a judicial decree. Shared parenting, Mr. Chairman, gets away from all those conflicts. Shared parenting says you're both still Mom and Dad. Neither of you has lost your child. Neither of you is the owner of the child with power to exclude the other. Mr. Chairman, there is no doubt that the shared parenting approach is more healthy for children.

Let me turn now to the "veto" power that's been proposed by some of the opponents of shared parenting. Can you think of any other area of law where the statute grants permission for one of the litigants to come in and veto a proposed remedy that was in the best interests of the parties and otherwise permitted by the law? Can you imagine, in any other setting, the audacity of this demand, the hubris of daring to come forward and say that the most hostile parent ought to have the power to veto the other parent's involvement, ought to have the power to veto the child's best interest in shared parenting? What theory of best interest could ever suggest that one parent can veto the child's best interest and reject shared parenting?

Mr. Chairman, the opponents of this legislation acknowledge that 42 states have shared parenting in their statutes and the rest have it in case law. They didn't cite to you a single one that allows this veto that they are urging you to adopt. They talked about California. Mr. Chairman, that's one of their greatest falsehoods. California didn't retreat from shared parenting. California is in the forefront of shared parenting; 75 to 80 percent of all custody decrees in California include joint parenting and it's even higher in some other states. In Minnesota, for example, it's in excess of 90 percent. Shared parenting is here; the revolution has arrived and it's *time* for D.C. to catch up.

California's status is particularly interesting because of the way that it was distorted in the earlier testimony. California was under siege a few years ago. Several groups that didn't like joint custody went to the California legislature with an agenda of approximately 30 separate amendments trying to gut the joint custody provisions in California's law. They utterly failed. What California did instead, was that it passed a very simple clarification of its statute which said that shared parenting was equally available as an alternative to sole custody. California has one of the clearest laws repudiating the notion that sole custody is preferred and that shared parenting is, somehow, an ugly stepchild.

California went two steps further, Mr. Chairman, that none of the opponents of shared parenting ever want to talk about and you'll be able to find this very easily. It's both cited in my prepared testimony and is easily found in California statutes. They do two things. They say right up front that it is the policy of the State of California to encourage frequent and continuing contact of the child with both parents. Then they go further; they say we like shared parenting, but we know sometimes we may not be able to have equal time with both parents; perhaps distance doesn't allow it. In those cases where we have to give the majority of the residential time to one parent, we are going to give a preference to that parent who shows the greater willingness and ability to cooperate in keeping the other parent involved. Mr. Chairman, it is on this point that the real fraud of some of the opponents becomes apparent.

You heard opponents earlier today saying that they didn't like the cooperative parent provisions of this proposed statute. Can you imagine that? How dare they demand that we ought not to encourage cooperation, that we ought not to encourage demilitarization of divorce. You've heard all day long of the horrors of divorce for

children. Of course, we should encourage cooperation. Of course, we should teach both of the parents to get along with one another and to work for the child's best interest. Our current sole custody situation doesn't do that. It says only one parent is going to be left standing at the end of the day. We need to get to the other side, Mr. Chairman, we need to recognize what these kids are born with, want, love and need: two parents.

Another set of issues the opponents raised is about control. They say that parents asking for shared parenting are just trying to control the other parent. Well, think about the fraud, the illogic of that for a moment. If you are asking a question about who's trying to control whom and one parent comes to you and says, "Mr. Judge, I would like to have shared parenting, so my child can have two parents" and the other parent says, "I want sole custody, I want to own this child," who's trying to exercise power? Who's trying to exercise control? Who is it that wants to be the one who's dominant and who is the one that has the interest of the child at heart? Turning to the question of abuse, Mr. Chairman, I won't trouble you with the statistics, but, in Exhibit E of my testimony, you'll find the frequency of child abuse, jurisdiction by jurisdiction. You'll find it quite contrary to the stereotypes and myths that have been set forth in earlier testimony. Anywhere from two-thirds to three-quarters of all child abuse is committed by mothers, not by fathers. Are the opponents of this bill saying that as many mothers should be disqualified from custody or do they want to be selective again and say that it is only fathers who should be disqualified? Let's be honest, let's be logical, let's look at this consistently.

The opposition to the Parenting Plan, Mr. Chairman, is the one that I find to be the most despicable among the arguments by the opponents of this legislation. I think there ought to be no room at all in this city for racist, classist, elitist arguments that the city's residents are too stupid to fill out a form that indicates their desires for the upbringing of their own children. There is nothing difficult about letting parents indicate for themselves how they would care for their children and providing that information to judges. There is nothing that requires this all to be done magically by lawyers or in a black box by a judge.

We should be encouraging our parents to come forward and look at the issues, look at the burdens of raising a child and fill out that form. When they sit down and look at that form and they realize how big a job it is to properly care for a child, they step back and think, "You know, this is a job that's kind of hard to take on all by myself. It's to my advantage, as well as to the child's advantage, to share this burden, because two parents can do a better job." Mr. Chairman, child custody law should apply one of the very simple propositions in mathematics; two is more than one. Two parents can do more than one. A single parent may do all that he or she can, but there's no doubt that the active involvement of a second parent adds a lot and makes it better for the child.

Mr. Chairman, you also heard noise about child support and how terribly that was going to be impacted if we had shared parenting. One of the things that I handed to you, Mr. Chairman, is a summary of a study by Professor Sanford Braver, which is to my knowledge the only controlled study in the nation of what happens to child support when you have shared parenting. You'll see, on the back side of that summary, a highlight of Professor Braver's findings. He said, "We found that the groups differed significantly in terms of how much financial support was paid. When sole custody was the arrangement, despite the father's wishes, only 80 percent was paid; when joint custody was awarded, despite opposition by one of the parents, child support zoomed to almost perfect compliance, 97 percent compliance." Mr. Chairman, if you care about child support, if you care about reducing welfare dependency, joint custody does it. Don't allow people to come to you and make policy by anecdote. Look at the research, and look at what you know is a matter of simple logic. An involved parent is more likely to provide financial support along with emotional and physical support.

Finally, Mr. Chairman, I'm going to close with the issue of gender bias, because you raised a little while ago the point that this debate has gotten somewhat fragmented along gender lines. Well, I submit to you, that's not quite right. What you find is that the people in favor of shared parenting include both men and women, mothers, fathers, children, advocates, a broad range of people. Where you find a very limited opposition, where you find a very limited perspective is in the people who are opposed to shared parenting. They do come at it from a single perspective, from the winner-take-all mentality that says that one parent should own that child, that one parent should have power over that child.

When you look at the testimony from today, think about who has the interests of children at heart. Who is it that wants the children to have the benefit of two parents and who is it that wants to use the children as a lever of power in the battle of the sexes? I would also ask you, Mr. Chairman, to look at the exhibits to my testimony because this is not a gender issue, this is an issue for some people who want to have power. Look, for example, at Exhibit A to my testimony where you will find Karen DeCrow, the former president of the National Organization for Women and look at what she says:

"If there is a divorce in the family, I urge a presumption of joint custody of the children. Shared parenting is not only fair to men and children, it is the best option for women. After observing women's rights and responsibilities for more than a quarter of a century of feminist activism, I conclude that shared parenting is great for women, giving time and opportunity for female parents to pursue education, training, jobs, careers, profession and leisure. There is nothing scientific, logical or rational in excluding men or forever holding women and children as if in swaddling clothes in an eternally loving bondage. Most of us have acknowledged that women can do everything that men can do. It is time now for us to acknowledge that men can do everything women can do."

Men can be parents, Mr. Chairman. Look also at Exhibit B, where Supreme Court Justice Ginsburg states her view and her goal for the future, her desire to see men taking a greater role in child care and child custody. Look at Exhibit C from the National Center for Women, an organization of more than 100,000 members and its endorsement of this legislation. Mr. Chairman, this is not a gender issue, but there is a special interest group, there is a limited opposition, there are people who want to have control over children. I respectfully suggest that you reject their arguments for control and, if you care about the best interests of children, give them two parents; let them keep the two parents that they had during the marriage. Don't allow sole custody to take that away from them. Thank you.

Chairman Lightfoot: Thank you, Mr. Henry, that was quite an excellent statement. I think you have covered all the bases.

Let me ask you a question about the presumption and whether we should have a presumption of shared custody. As you say, the presumption in the proposed legislation we are talking about just states that the pre-existing joint custody will continue in the event that neither parent comes forward with a reason for sole custody. I think that does apply in the situation of a divorce where there is a marriage that is dissolved. There, you are talking about a presumption of continuing the pre-existing relationship to the child. But where we have a situation where there is a child out-of-wedlock, where there is no marital relationship, I find that the rationale does not seem to apply for the presumption because you are no longer continuing a pre-existing relationship. I would like it, if you can, for you to elaborate for me why we should apply the presumption of shared custody to a situation where the parents are living out-of-wedlock and really where they are not living together in a shared relationship.

Ronald Henry: Let me begin by thanking you because it is important to recognize and get the law to recognize that shared parenting is what pre-exists during the marital relationship. We ought to back away from that only with the greatest reluctance and it is very important that we get this concept recognized in the law very clearly and unambiguously. Now let me talk to you about the non-marital situation because frankly, in my view, there is no difference in terms of the outcome or the proper legal status. Bear in mind that each child is born with two parents. That child is born with two legal parents. We have child support proceedings regardless of marital status. There is no distinction made between the legal obligations imposed upon a marital father and a non-marital father.

In fact, if you look at the Supreme Court cases, *Clark v. Jeter*, for example, about seven years ago, the Supreme Court established in a unanimous ruling that it was unconstitutional to treat a non-marital child in a way that was inferior to a marital child. What the court said there dealt with a statute that had a shorter statute of limitations for commencing a child support action for non-marital children than the statute of limitations for marital children. I think the state allowed something like nine years for marital children and only three years for nonmarital children. The Supreme Court said, "Time out. You can't do that. You can't discriminate against non-marital children. They have got every bit as much right to the involvement, the resources, the wherewithal of

the father. They have got every bit as much right to those two parents that they were born with as a marital child."

So, Mr. Chairman, I would submit to you that as a constitutional matter, we would be very hard pressed to discriminate against the non-marital child. I would go further and put it into pragmatic terms. Most of the children who are born into a non-marital situation are not the result of casual one-night stands. These are parents who have known one another a long time. They have got a relationship. They are frequently and, perhaps in the majority of the cases, actually living together. They are involved, both of them, with respect to the child. Why in the world would we have a law that presumes that one of the parents is uninvolved? I think that just the opposite should be presumed.

We should, as a matter of the law serving as a moral force, as a matter of the law encouraging the best in all of our citizens, start with the presumption that we do want, we do expect, that we do believe both parents are going to be involved. Surely, that won't be the case in all situations but isn't that where we want to start out? Don't we want to believe, don't we want to encourage that dual parent involvement, and don't we again get back to the problem of there being no excess of parenting in this town? We should encourage more parenting.

Chairman Lightfoot: Very good. I have nothing further to cover just now. Thank you. We will talk again before this bill moves forward. I would ask you one favor in respect to the study that you have given to us, regarding the impact of joint custody child support. This is the only study you are aware of, I gather?

Ronald Henry: That is the only empirical study I am aware of which has put side by side sole custody settings and joint custody settings where the joint custody was imposed over the objection of one of the parties. Remember the objection you have heard from opponents is that while they admit joint custody works where it is agreed to, they argue that it can't work where it is imposed. This is the only study that has put side by side forced sole custody versus forced joint custody.

Chairman Lightfoot: I would appreciate it if you could tell us where it was published.

Ronald Henry: I will be happy to get the full survey and report for the Committee.

Chairman Lightfoot: Is it a volume or book of some type?

Ronald Henry: I can tell you briefly. Professor Sanford Braver has been working in this area for a good many years, principally under grants from the National Institutes for Health. He has found, for example, in the area of child support that there are three principal predictors of child support compliance: the fairness of the original order; the obligor's frequent access to the child; and the obligor's work stability. A lot of this gets lost in our stereotypes, in the name-calling that goes back and forth. The research does exist to show us and give us some guidance on these policy issues and I will be happy to get Professor's Braver's study to you.

Chairman Lightfoot: I would appreciate it. Thank you.