Testimony on the Proposed Modifications to the Child Custody Statutes

Sept. 2, 1999

Judy Parejko, Mediator
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I've been a mediator for four years and have worked with some 300 families, court-ordered in divorce, paternity and post-divorce actions to try to mediate their child placement and custody disputes.

Let me first say that I think the whole divorce/child custody adversarial process is **toxic** to families. When a couple falls in love, marries, and has children together, and then finds themselves facing divorce, they are in a place of torment not unlike hell. Let me tell a short version of the story:

1. One of them decides they want a divorce, usually because they were hurt by the other person through an affair or through years of unkind behavior by the other.
2. The other, more times than not, is shocked and dismayed by the divorce action.
3. One or both of them realizes that the last card they have in their hands to "get even" for being hurt, is by using the children. Even though they both talk about having the "best interests of the child" in mind, if that were true, they would have worked harder on the marriage.
4. So each of their attorneys begins to break down what was a unit of the couple and turn it back into its original individual units - a man and a woman. Two hearts that beat as one, now must go through heart surgery to separate them!
5. Alas, what to do with the children now, who were the product of this union. Messy! But that is what attorneys are there for - to take care of "messy" business and get the best deal for their clients.
6. So the couple is sent to a mediator to "help" them with these decisions. If both want the divorce, and the level of hurt and anger is not too intense, an agreement can be reached about how they will operate as parents after the divorce.
7. If they don't reach an agreement, then a third attorney - a guardian ad litem - is added to help resolve things so the divorce can eventually be finished.

First, I understand that the business of attorneys is to advocate for their clients' rights and to get the best deal possible for them. BUT, the best deal possible for kids is having ***both*** parents in the same household ***and*** getting along

with each other. If they cannot live together, then the next best thing is for them to get along even if they are ***not*** together. Parents not getting along well together, whether married or divorced, should be part of a new zero-tolerance campaign in this country! Sounds pretty harsh but there is help for couples that we have not been acknowledging.

When a divorce is taking place, what we offer the two wounded people who are often already poisoned by their anger towards the other, is more poison, not medicine to help detoxify and to heal. The adversarial divorce process that has been the practice since Roman times, is **TOXIC** to already-injured families. In the worst cases, we lose children (and their parents) to alcohol/drug abuse, criminal activities, violent acting-out, homicide, and suicide, sometimes because of how we further poison them with the process they must go through. So what are we to do? I cannot offer answers but I do have ideas.

Dealing with injured and broken families needs the resolve of all of us to stop any further poisoning of them in this adversarial approach. In addition, we must begin to look at ***why*** there is so much divorce and how we might offer hope to future and present marriages, ***before*** divorce. There are proven skills that can be taught that will reduce the divorce rate and increase marital satisfaction. It just needs our resolve to make this a priority. The proposed budget language, or any other bill that only looks at how to make adjustments to this toxic process, will not do much to improve things for divorcing families who are in crisis. We need to start looking at the ***big picture*** and what we might offer distressed families - whether facing divorce or not. Children should not be viewed as just more marital property to be divided up!

I have reached the point of despair about trying to just fix things with some new statute language. The whole family law section must be re-done to reflect our compassion for those families who have reached this kind of despair. Please begin to look at the ***bigger*** picture.

Some further thoughts:

- One east-coast mediator has a 30-50% reconciliation rate, as a byproduct of the technique he uses. We should ***not assume*** all couples really want a divorce when they file; it is just the ***only***way they can imagine to reduce their pain and suffering. Sometimes the process offers them hope and they choose to turn things around.
- Skills-based marital-education programs need to be introduced in high school, college, pre-maritally, during marital crisis, and pre-divorce to reduce the divorce rate and increase family-life quality.
- Children should not be viewed as just more ***marital property***.

- Attorneys have no special expertise in deciding the best interests of the child ***just*** because they attended law school!
- Couples should not be allowed to fight over children. They should be made to dialogue or receive counseling until they can reduce the hostility, resolve their conflicts and begin to work together.
- The "for better or for worse" language in our marital vows is about just this issue. The "for worse" includes, when a divorce is filed, doing whatever it takes to increase a couple's understanding about why the divorce is happening or to explore how the marriage might be successfully restored before allowing the decisions to be made about the children.
- Giving children greater rights to be parented successfully; allowing them to call for help for their families when they are in distress - before it is too late.
- Eliminating the only answer of divorce for marriages that are in distress - giving a "third option" of skills/communication-building. (Third from the present two choices of therapy or divorce).
- Beginning to look at naming child custody battles a national disgrace that needs to end!
- Giving more than just lip-service to the idea of "family values". Beginning to admit that we aren't doing very well by families by not encouraging and offering the skills that could reduce divorce rates and increase the number of strong families and healthy kids.

Let's start looking at the BIG picture.

WCSEA

Wisconsin Child Support Enforcement Association
320 S. Main Street ♦ Room 219
Jefferson, WI 53549
920-674-7377

To: Assembly Family Law and Children And Families Committees

From: Wisconsin Child Support Enforcement Association
Elaine E. Richmond, President

Re: Family Law Changes in the Budget Bill

Date: September 2, 1999

I am submitting this memorandum on behalf of the 72 county-members of the Wisconsin Child Support Enforcement Association. On a daily basis, the personnel of our agencies deal in some way with nearly all matters related to children decided through the family courts. As such, I feel that we are in a unique position to offer observations on the possible effects of some of the proposed changes to the current family laws.

Presumption in favor of Joint Legal Custody.

The current law provides that the "best interest of the child" shall be the main consideration of the court when determining legal custody. The state of Wisconsin has an interest in promoting the welfare of the children, especially since they often have no voice in the proceedings. Although the "best interest of the child" standard is restored by the Senate version of the budget bill, this standard is inappropriately undercut by the strong presumption in favor of joint legal custody and the burdensome findings that a court must make to award sole legal custody.

Our experience is that children are often used as pawns in parental struggles for control, either over the other or over money. Requiring that a court make the above findings would have the effect of giving some parents more tools in their power struggles with the other. For example, a parent could (and sometimes does) threaten to insist on joint legal custody so that that parent could interfere with the other parent's ability to make

timely and appropriate decisions. The threat of this may cause the other parent to concede on issues of child support, which results in a child being deprived of financial support to which the child is entitled.

The Presumption of Shared Placement

The proposed law would presume that placement of a child be equally split between his or her parents. This presumption seems to treat children as though they were marital property to be divided, rather than individuals with identifiable and unique needs.

The proposal would not reduce the potential conflict for the court by qualifying the requirement for physical placement with both parents with the words "as appropriate." This, at least, would provide some direction for the court when physical placement with one parent is inappropriate.

Additionally, the budget bill sets some very high requirements for the parties to produce a "parenting plan" where custody and placement are contested, or lose the right to object to the other party's plan if they fail to produce their own on time. The content of these plans is very inclusive and most likely will be more complex than many parents can develop without technical assistance. This raises a concern because many people we deal with on a daily basis are not able to do such a plan by themselves, do not have an organized group to advocate for them, and may financially not be able seek help from attorneys. (It must be noted that, as of now, the services provided by representatives of the child support agencies does not extend to matters of custody and placement, much as some of us think that would be appropriate.)

Paternity Adjudication and Child Support

The budget bill would limit child support to the period after a paternity action was commenced, implying notice, as opposed to filing of an action. This may encourage avoidance of service by the alleged father and would serve to truncate the support a child could receive, for no apparent good reason. Certainly a man who has had sex with a woman, such that a child could be created, has notice that a child might be borne of such act, and should be held just as responsible for the financial support of the child as the woman who bore the child.

The budget bill would also make public all information contained in court files related to paternity. It is unclear what purpose this would serve. It would, however, expose men to potentially embarrassing and harassing situations by making public the names of any man a woman lists as a potential father. By subjecting the records of past paternity proceedings to public inspection, the names of alleged fathers against whom actions had

been commenced and *subsequently dismissed* would become open records.

Also, the budget provision would require the court to establish temporary orders for legal custody and physical placement in paternity cases. Studies show that this provision would be a measurable deterrent to mothers to sign voluntary statements of paternity, or to cooperate with the efforts of the child support agencies to establish paternity through the legal process, thereby jeopardizing the state's compliance with federally required paternity establishment rates. The impact could be significant when we consider that as of July 31, 1999, Wisconsin had 206,628 cases that needed paternity established. It also seems this would leave mothers to support the children without the financial help from the fathers.

Testimony in Support of the Equal Shared Parenting Bill.

By: Robin E. Childers
937 Main Street
Union Grove, WI 53182
414.878.9709

e-mailto: robinc7@juno.com

My name is Robin Childers. I am the proud father of Kristopher Childers, who is eight years old and in the third grade at Union Grove Elementary School. I am pleased and honored to address this committee today. I have contacted Rep. Ladwig and Senator Plache to register my support for equal shared parenting.

Right next to my relationship with God, my relationship with my son has been the highest priority of my life. We have been and are close to each other emotionally and geographically. We live about six blocks from each other in the village of Union Grove. We always greet each other with a hug and say goodbye with "I love you" verbally and with the American sign-language sign of "I love You". To say that I am committed to his "best interests" would be an understatement.

Yet the current legal system in Wisconsin has in the past and presently does systematically deprive my son of the full personal support that he deserves from me, his Dad. The signing into law of this proposed bill and state budget is a necessary step in the right direction to give my son a better opportunity to benefit from the personal and financial support of both his father and mother.

First, by giving my son the opportunity for equal time with each of his parents he would gain the maximum possible time for nurturing from both parents who are divorced. Personally, my eight-year old son asks me frequently why he cannot be with me as much as he is with his mother. He wonders aloud, "Why can't things be fair?" The only honest answer for my son is, "because the Court says it must be this way". He certainly does not believe that his visits with me only every other weekend are in his best interests. I would not advocate that an eight-year old should make public policy. Yet, it is imminently clear that my son values both of his parents attention fully and does not deserve to be misled by our state that time shared with his father is not as important as time with his mother. Our Governor Thompson agrees that fathers should be encouraged toward real, positive participation in the lives of their children; the legal system needs to be an advocate of and not a deterrent to genuine parenting by both parents. My son deserves to receive what I could more effectively and affectionately give him directly from me as we could share more of life's experiences together.

It is an obvious reality, minimized personal time and financial (so called) "child support" are not a valid substitute for a loving father or mother who is systematically separated from his or her son.

Secondly, this bill provides for the security of my son to no more be moved from school district to school district. His primary physical custodial parent is obviously not committed to his social and geographical stability. His mother already moved from another state to Wisconsin. His mother has further threatened to move up to 150 miles, which she knows is the legal limit, if she does not get her way in parental disagreements. This bill would better provide for my son to have the equal opportunity for nurturing by both parents at a stable "home" area, where he would not have to fear being separated from his Dad, his extended family, or established friendships again without both parents' approval.

Simply put this bill provides for a child of divorced parents to be given a better opportunity to be loved and nurtured by both parents. That is all that the vast majority of parents desire in Wisconsin, or anywhere else for that matter. The present system facilitates the mirage of winners and losers. I use the mirage metaphor to emphasize the understanding that at first glance the court commissioners, attorneys for the parents, guardians ad litem, social workers and Department of Workforce Development appear to win because they generate income for themselves by encouraging unnecessary litigation, psycho/social analysis, and paper shuffling. Just one example of unnecessary and wasteful redundancy is the perpetual, monthly statement of financial "child support" by the Department of Workforce Development which has been already automatically deducted and documented by my employer. Morally, however, this metaphor of the mirage becomes starkly, even cruelly, true when our legal system functions truly for it's selfish best interests as its representatives attempt to rationalize their actions and not address the true best interests of the children involved in custody disputes.

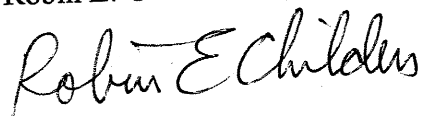
The present legal system benefits from custody disputes and is therefore in a conflict of interest between itself and my son's best interests by. My son has been prejudicially precluded from equal personal support by both of his parents; the present legal system creates and perpetuates litigation by its obvious prejudice away from fatherhood. The passage of this budget would assert that children such as my son would have a better opportunity for pro-active genuine two-parent care. The current litigation driven and gender-biased process fosters fighting and promotes aggressive and selfishly defensive behavior by fathers and mothers. Legal battles that waste taxpayers' and parents' time and money would be curtailed and parental cooperation would be encouraged.

Both parents need all the encouragement they can get to be as positively involved with their children throughout the entire lives of their children. Frankly, I ,with a full-time day job, was up at all hours of the night more than my son's mother, who worked part-time, was when he was an infant. I changed his diapers. I bathed him every night. Now, I coach his teams and teach him how to read and use a computer. My son, as well as other children of all ages, needs to experience both parents as equally as is reasonable at all stages of his development. This bill deliberately considers both parents as active participants during the entire child rearing years.

I appear before you today in an attempt to be first and foremost the best Dad I can be for my son. Secondly, I testify today to support and advocate this progressive budget which would help children from broken homes, their parents, and our society to better manage the care of our children.

I respectfully submit this Testimony.

Robin E. Childers



I am in the middle of a divorce right now. I am also a stay at home mother and have been for ~~13~~ 14 years. I have a masters degree, but after having my first baby, I chose to stay at home to raise our children. I gave up a career. I felt the most important thing I could give society, would be well-adjusted, respectful, and promising children. I have so far devoted ~~13~~ 14 years of my life to raising children of good moral character. I have taken them everywhere, sat through all their piano, dance, soccer, basketball, art, etc. lessons, and went to all their performances and activities. I have gotten involved in their activities. I have taught in their church classes, helped with musicals they were in, become a leader (~~10~~ 11 years now) in their kids' clubs, organized activities for them, coached their teams, etc. I have also homeschooled them for the past 7 years. I spend almost all of my time with the children - probably all but 2-3 hours per week is spent with them. My husband, on the other hand, probably spent less than 2 hours per week with the children. He eats supper with us, and maybe takes the kids to the movies or the book store on the weekend. Most of his ~~13~~ 14 years have been spent in our basement with his musical instruments and his computer. He has not developed any kind of relationship with the children. He has no idea who they are, what they like, or what makes them tick. And now, all of a sudden, he should be able to have shared placement of the children? Why? If the kids weren't important to him before, why should they be important now? He doesn't really care about having the kids half of the time. He just wants custody and placement to be mean to me and to not have to pay me child support. The kids don't want to live with him. The older kids have said, "We never had a relationship with Dad before, why should we have one now?" They don't want to be bouncing back and forth and living out of a suitcase. They want the stability of a home. They need to have a place they can call home and be comfortable with it. They need to have someone they can count on, someone who knows and understands them, and someone they can turn to.

Rossmiller, Dan

From: Lange, Cathy
Sent: Thursday, September 02, 1999 8:53 AM
To: Rossmiller, Dan
Subject: FW: State Budget Child Custody Provision

-----Original Message-----
From: AmykMWC@aol.com [mailto:AmykMWC@aol.com]
Sent: Wednesday, September 01, 1999 9:03 AM
To: sen.chvala@legis.state.wi.us; sen.burke@legis.state.wi.us; sen.george@legis.state.wi.us; sen.decker@legis.state.wi.us; rep.jensen@legis.state.wi.us; rep.gard@legis.state.wi.us; rep.porter@legis.state.wi.us; rep.foti@legis.state.wi.us
Subject: State Budget Child Custody Provision

September 1, 1999

To: All members of the Conference Committee

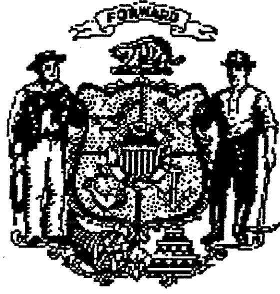
From: Amy Krymkowski
Director of Government Relations
The Milwaukee Women's Center
611 N. Broadway, Suite 230
Milwaukee, WI 53202

Please register this correspondence in the official minutes of the hearings (on 9/1/99 and 9/2/99) regarding the budget amendment regarding equal shared custody and other related provisions.

After learning more information about the potential impact this proposed budget provision would have on children and families across Wisconsin, we join in support of the following agencies/organizations who are asking the governor to veto the provision: The Milwaukee Commission on Family Violence & Sexual Assault, the Milwaukee Task Force on Family Violence, the WI Council on Children & Families, the WI Coalition Against Domestic Violence, and the Governor's Council on Domestic Violence.

It is imperative that such complex change in public policy be addressed in the full legislative process. More time is needed to research the potential short term and long term effects of the proposed changes in custody, physical placement, and paternity on the lives of children, families, and parents in Wisconsin. More public hearings should be held across the state of Wisconsin (especially Milwaukee, Racine, Kenosha and other major metropolitians) to listen to the voices of families who for many reasons cannot travel to Madison today and tomorrow to be heard.

We ask that you listen to all the representatives from the agencies/organizations and other interested parties on how this budget provision, in its current form, does not provide support and promote building stronger children, adults, and unique family units throughout Wisconsin.



Senator Gary R. George
State of Wisconsin
Sixth Senate District

FOR IMMEDIATE RELEASE
AUGUST 23, 1999

CONTACT: DAN ROSSMILLER
(608) 266-2500

PRESS RELEASE

LEGISLATIVE COMMITTEES SCHEDULE HEARINGS ON CHILD CUSTODY AND PLACEMENT PROPOSAL

INFORMATIONAL HEARINGS DESIGNED TO PROMOTE BETTER UNDERSTANDING OF PROVISIONS IN BUDGET BILL

MADISON - State Senator Gary R. George (D-Milwaukee) announced that the Senate Committee on Judiciary and Consumer Affairs will join with the Assembly Committee on Children and Families and the Assembly Committee on Family Law to hold a joint hearing on provisions in the state budget bill relating to child custody and placement. The hearing is scheduled to begin at 9:00 A.M. Thursday morning, September 2, 1999 in Room 417 North of the State Capitol Building in Madison.

This informational hearing is designed to provide the public an opportunity to better understand these proposed family law changes. The budget bill includes language that would, among other things, change the standards used to determine legal custody and physical placement of children in divorce cases, establish new mechanisms for enforcing placement, and harmonize paternity laws with divorce laws. The hearing is expected to last for several hours.

According to Senator George, the provisions in the budget bill are <u>considerably different</u> than those proposed in an earlier bill, Senate Bill 107, and reflect a workable balancing of various considerations.

The budget language retains the "best interest of the child" standard, which had been removed in Senate Bill 107, and ensures that this standard is the primary consideration in child custody matters. The role of the guardian ad litem as the legal representative of the child is also retained virtually unchanged. The equal shared placement language of Senate Bill 107 is eliminated in favor of a more modest change to placement that will favor more equitable sharing in most cases but <u>does not</u> mandate a 50/50 placement. Existing statutory protections for victims of domestic abuse and sexual assault and protections for children of such relationships are maintained.

The Senate Committee on Judiciary and Consumer Affairs, which Senator George chairs, will also hold a separate hearing on the child custody and placement provisions in the state budget bill. That hearing is scheduled to begin at 9:30 A.M. Wednesday morning, September 1, 1999 in Room 201 South East of the State Capitol Building in Madison. Those wishing to testify at this Senate Committee hearing are asked to try to keep their comments brief and are encouraged to submit their testimony in writing.

Testimony on Reformed SB 107 Budget Amendment
Joint Assembly Committees on Family Law and Children and Families
September 2, 1999
9:00 am
State Capitol, 417 North

My name is Jo Ann Gray-Murray and I am Policy Development Coordinator for the Wisconsin Coalition Against Domestic Violence. The Coalition is a statewide membership organization of battered women, formerly battered women, domestic abuse programs and individuals committed to ending domestic violence. Currently made up of over sixty member organizations and more than 200 individuals and other groups representing the state's seventy-two counties and eleven Native American tribes, the Coalition has worked to eliminate domestic violence through education, advocacy, and social action since 1978. Thank you for this opportunity to speak truth to power and ensure that the voices of the victims of the crimes of domestic violence will be heard.

After careful review and consideration of the provisions contained in the reformed version of Senate Bill 107, we conclude that this amendment is overwhelming negative for battered women and their children. We are extremely concerned with 1) the increased risks of physical, psychological and financial harm for battered women and their children, 2) the decreased ability of battered women and children to choose and/or influence proposed options, 3) the decreased safety options for battered women and their children, and 4) the increased potential and opportunities for abusive partners to use this proposed legislation to continue victimization of battered women and their children. More specifically,

- Policy changes of this magnitude should go through the full legislative process.
- Any presumptions in favor of equal legal custody diminish the courts' ability to determine what is in the best interests of children.
- The presumption of joint legal custody requires a court to grant equal legal custody rights in a number of inappropriate cases.
- Providing that a child has a right to "the same amount of time or substantial periods of time with each parent" is likely to result in reduced child support.
- Many women will be discouraged from establishing paternity because this law also applies in paternity cases. This threatens to undermine a key component of welfare reform – increasing the number of cases with child support orders.
- This provision would throw more children into poverty by reducing child support and discouraging the establishment of paternity.
- Because it applies to modifications of current orders, this legislation will open the floodgates for changed orders affecting long-settled custody arrangements, including changes sought by individuals whose sole purpose is to reduce their child support payments.

As a result of our analysis and concerns, the Coalition continues to oppose this proposed budget amendment and currently recommends either its removal from the budget by the Conference Committee or a gubernatorial veto.

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Our position is based on the following:

- The analysis of possible risks for battered women of continued/increased physical injury and death, short and long term psychological harm, physical and psychological harm to their children, loss of child/ren, negative financial repercussions and prosecution

- Twenty years of direct service to battered women and their children through shelters, legal and legislative advocacy, counseling, medical and economic support, and other forms of service provision and advocacy

- The stories and experiences of the thousands of battered women and their children across the state who we serve twenty-four hours a day, every day of the year

- Legal trends, research findings and recommendations regarding child custody and visitation decisions in domestic violence cases

- Recommendations from an recent Legislative Council study advising **against** mandated joint custody

- Recommendations for effective standards to address family violence and child custody from the National Council on Juvenile and Family Court Judges that advise against many of the provisions of this budget amendment

- The American Bar Association's 1994 recommendations that custody not be awarded, in whole or in part, to a parent with a history of inflicting domestic violence, that visitation be awarded to such parent only if the safety and well-being of the abused parent and child/ren can be protected, and that all awards of visitation incorporate explicit protections for the child/ren and the abused parent.

- The results and recommendations of the Coalition's continuing collaborative effort across systems and throughout the state to assess the efficacy of existing state family law as it relates to issues of child custody and visitation and determine areas for legislative change.

The Coalition is aware of and appreciates the work of State Bar, along with Senator George's office and other concerned groups to reach this compromise. However, our experience, research, advice and analysis do not indicate that it is in the best interest of battered women or their children to support the budget amendment as it currently exists.

DOMESTIC VIOLENCE STATISTICS: SEPARATION; DIVORCE AND CHILD CUSTODY/PLACEMENT/VISITATION

SEPARATION STATISTICS

- Filing for a divorce signals her intent to leave the relationship, putting her at high risk of abuse or even death. The pattern is so prevalent that it is refered to as "separation violence". (Meuer, T. and Webster, K. *Effects of Domestic Abuse on Child Witnesses,* Wiley Family Law Update (1997)).

- Although divorced and separated women compose only seven percent of the population in the United States, they account for over 75 percent of all battered women, and report being battered fourteen times as often as women still living with their partners. (P. Klaus and M. Rand, Family Violence, Bureau of Justice Statistics Special Report(1992)).

- Domestic abuse generally escalates when the abusive parent discovers or believes that the victim is about to leave him or has left him. (L.Walker, The Battered Women pg. 25-26(1979)).

- Separated battered women reported being battered 14 times as often as women still living with their partners. (*Victiomology interview: A refuge for battered women: A conversation with Erin Pizzey.* Victimology, 4, 100-112. Harlow, C. W. (1991)).

- Separated women are three times more likely than divorced women and twenty five times more likely than married women still living with their husbands to be victimized by the batterer. (Bachman and Slazman, Violence Against Women: Estimates From the Redesigned Survey 3,4 (construing U.S. Dept. Of Justice Bureau of Justice Statistics (1995)).

DIVORCE STATISTICS

- Approximately half of all divorces in the U.S. follow a history of spouse abuse in the relationship. (Cites, L. and Coker, D., What Therapists See That Judges May Miss: A unique guide to custody decisions when spouse abuse is charged, The Judge's Journal, Spring (1988)).

- FBI statistics indicate that, during the course of their marriages, at least half of all women are abused seriously enough to require medical attention. (R. Geffner & M. Pagelow, Spouse Abuse in Treatment of Family Violence: A Sourcebook (R. Ammerman & M. Hersen eds., 1990); S. Buel, Confronting Violence in the Family, presentation at Conference on Courts and Communities (Apr. 20, 1995); see also M. Rosenberg & B. Russman, The Child Witness to Marital Violence, in Treatment of Family Violence 185 (R. Ammerman & M. Hersen eds., 1990).

- In the first year after divorce, a woman's standard of living drops by 73% while a man's improves by an average of 42%. (National Woman Abuse Prevention Project).

- When fathers fight they win custody 70 percent of the time, whether or not they have been absentee or violent fathers. (Excerpted from the new introduction to the 1991 edition of *Mothers on Trial* by Chesler, P.; (Harcourt Brace Jovanovich, Inc.)).

- Although 80-85 percent of custodial parents are mothers, this doesn't mean that mothers have won their children. Rather, mothers often retain custody when fathers choose not to fight. (Excerpted from the new introduction to the 1991 edition of *Mothers on Trial* by Chesler, P. (Harcourt Brace Jovanovich, Inc.)).

- When the husband was the plaintiff, he was more likely to be awarded custody. (Fox, G.L. and R. F. Kelly, 1995, *"Determinations of Child Custody Arrangements at Divorce."* Journal of Marriage and the Family 57:693-708).

- Father-sole custody may also be increasing: Father-only families with children grew nationally by 42% over the 1980s, whereas mother-only families increased by 15%. (Garasky, S. and D.R. Meyer, 1996, *"Reconsidering the Increase in Father-Only Families,"* Demography 33:385-93).

CUSTODY/PLACEMENT/VISITATION STATISTICS

- Mothers are typically the primary caretakers of the children before and after divorce; batters have nothing to lose by using custody as a bargaining tactic. (Paeglow, M. D, " *Effects of Domestic Violence on children and Their Consequences for Custody and Visitation Agreements*", Mediation Quarterly, Vol. 7. No. 4, Summer 1990).

- Battering men use custodial access to children as a tool to terrorize battered women or to retaliate for the separation. Custodial interference is one of the few battering tactics available to an abuser after separation; thus it is not surprising that it is used extensively. (Hunt, B., *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 323, Mediation Quarterly, vol 7, no., Summer (1990)).

- Each year 350,000 children are abducted by parents in this country; that is, 40.4 children are abducted per hour. Fifty-four percent of these abductions are short-term manipulations around orders, but 46% involve concealment the whereabouts of the child or taking the child out of state. Most of these abductions are perpetrated by fathers.(Hunt, B., *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation,* 323, Mediation Quarterly, vol 7, no., Summer (1990)).

- Custodial solutions must be designed to mitigate against the risks of further violence by the batterer . The more legal access the batterer has to the mother and the more legitimate power he exercises over her daily life, the greater the risk of continued, escalating violence. (Presley, E. and W., "*Wife abuse among Separated Women: The impact of Lawyering Styles.*" Chicago,1986).

- If the product of a custody mediation locks the mother into frequent contact and compulsory consultation with the batterer about every aspect of the children's lives, his continuing use of violence and terroristic controls will preclude the autonomy and safety she sought in leaving the relationship. (Woods, L. *"Mediation: A Backlash to Women's Progress on Family Law Issues."* Clearinghouse Review, Summer 1985, pp.431-436.)

- Visitation should minimize contact between the victim and the abuser, easy access to the victim is not in the children's best interest. (Kuehl, S.J., and Lerman, L.G. *"Mediators' response to abusive men and battered women: guidelines for policy makers and mediators."* May 27, 1988.)

- Fathers who batter the mother are twice as likely to seek sole custody of their children than are nonviolent fathers, and are three times a likely to be arrears in child support. (American Psychological Association Presidential Task Force on Violence and The Family 40(1996)).

- Given that abusive fathers are so likely to fight for custody, it is surprising that a larger proportion of batterers than nonbatterers actually win custody. (Zorza, J. *Protecting the Children in Custody Disputes When One Parent Abuses the Other*, Clearinghouse Review, Vol. 29, April 1996).

- An abusive parent is likely to disrupt court-ordered visitation schedules as a way to continue the abuse of his former partner. (Field, K.J., *Visiting Danger: Keeping Battered Women and Their Children Safe*, 30 Clearinghouse Rev. 295, 303(1996)).

WISCONSIN MODEL CODE PROPOSAL

In January of 1996, the Wisconsin Coalition Against Domestic Violence (WCADV) embarked on a project to compare Wisconsin's domestic violence related statutes to a "model code" developed by the National Council of Juvenile and Family Court Judges (NCJFCJ). The Model Code was crafted to facilitate parallel statutory development with respect to domestic and family violence among the States and the District of Columbia. The enactment of similar codes by all jurisdictions will enhance both the uniformity and quality of justice for victims and perpetrators of domestic and family violence throughout the nation.

Replicating the NCJFCJ process, the WCADV organized a Wisconsin Model Code Committee that consisted of more than thirty representatives of the criminal, family and civil law divisions plus private attorneys, advocates for battered women and law enforcement. The committee held nine day-long meetings reviewing the details of the NCJFCJ Model Code and Wisconsin laws.

The result of this work is the Wisconsin Model Code proposal. It includes changes to Wisconsin family, civil and criminal laws. In some instances the changes are sweeping in restructuring the civil restraining order process. Others are housekeeping in nature, designed to address aged-old problems with Wisconsin laws.

Currently, the WCADV is circulating the proposal throughout the state and nation for review and comment. Presentations have been made to numerous coordinated community response teams in Wisconsin. Input was solicited and incorporated where appropriate. The final version will be introduced during the 1999-2000 Wisconsin legislative session.

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WISCONSIN MODEL CODE PROPOSAL HIGHLIGHTS

FAMILY LAW

- Add a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint custody or joint physical placement with the perpetrator of family violence.
- Add that the court shall consider as primary the safety and well-being of the child and that of the parent who is the victim of domestic violence in all orders.
- In physical placement orders with perpetrators, the court may order conditions to address the safety of the non-abusing parent and the child.
- The family court system shall have the duty to ask about any history of domestic violence.

CIVIL LAW

- Include adult dating relationships to types of relationships that are eligible for a domestic abuse restraining order.
- Maintain confidentiality of petitioner's address in domestic abuse restraining orders.
- Remove two-year limit on duration of domestic abuse restraining orders.
- Remove automatic permanent injunction hearing, replace with option provided to respondent to request a hearing.

CRIMINAL LAW

- Add a structure of accountability when prosecutorial systems use deferred prosecution with domestic abuse offenders.
- Restructure charging and sentencing structure for repeat offenders of domestic abuse-related crimes.
- Make violations of the mandatory 72-hour no-contact a criminal violation.
- Include domestic violence as a "danger to the community" as consideration for release on bail or bond for domestic violence-related crimes where appropriate.

WISCONSIN MODEL CODE PROPOSAL

FAMILY LAW

Current Law

I. Wisconsin identifies two areas in Chapter 767 Family Law regarding the role of domestic abuse in custody and physical placement determinations. Both are weak.

A. Joint Custody - Creates a rebuttable presumption that domestic violence will interfere with future decision making and therefore the parents may not be good candidates for joint custody. The determination may be rebutted by clear and convincing evidence.

B. Physical Placement - States that the courts shall consider domestic violence, along with other factors, when determining allocations of physical placement. There is no rebuttable presumption requirement nor any other guidance about how to consider this factor.

REBUTTABLE PRESUMPTION

It requires the court to presume that the presence of this factor weighs somewhat against awarding custody and placement to the offending parent. It is weighed with other factors. It also places the responsibility of rebuttal or reversing that presumption on the abusing parent. The parent must present clear and convincing evidence to rebut the presumption.

The Proposal

In every proceeding where there is at issue a dispute as to the **custody** and/or physical placement of a child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical placement with the perpetrator of family violence. This presumption may be rebutted by clear and convincing evidence.

In addition to other factors that a court must consider in a proceeding in which the custody or physical placement of a child is at issue and in which the court has made a finding of domestic or family violence:

The court shall consider as primary the safety and well-being of the child and the parent who is the victim of domestic violence.
The court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily harm, bodily injury, or assault, to another person.

In making an order contrary to the standards listed above the court shall state in writing why its findings are in the best interest of the child.

Factors in determining physical placement schedules

In every proceeding where there is at issue a dispute as to the custody and/or **physical placement** of a child, a determination by a court that domestic or family violence has occurred raises a rebuttable presumption that is in the best interest of the child to reside with the parent who is not a perpetrator of domestic or family violence. This presumption may be rebutted by clear and convincing evidence.
Safety for the custodial parent and child will be a factor in any relocation request.

Conditions of physical placement in cases involving domestic and family violence

A court may award periods physical placement to a parent who committed domestic or family violence only if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.

In a placement order, the court may:
Order an exchange of a child to occur in a protected setting;
Order specific times for placement and exchange of a child;
Order physical placement in a supervised environment; If a court allows a family or household member to supervise visitation, the court shall establish conditions to be followed during visitation.
Order the perpetrator of domestic or family violence to attend and complete, to the satisfaction of the court, a batterers treatment program that has been authorized by a recognized regional batterers treatment review committee.
Order the perpetrator of domestic or family violence to abstain from possession or consumption of alcohol or controlled substances during the physical placement and for 24 hours preceding the placement.
Order the perpetrator of domestic or family violence to pay a fee to defray the costs of supervised visitation.
If a parent is absent or relocates because of an act of domestic or family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or physical placement.
Impose any other condition that is deemed necessary to provide for the safety of the child, the victim of domestic or family violence, or other family or household member.

948.20
Current - Abandonment of a child - Whoever, with intent to abandon the child, leaves any child in a place where the child may suffer because of the neglect is guilty of a Class D felony.

Add: If a parent is absent or relocates because of an act of domestic or family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or physical placement.

In every proceeding in which there is at issue the modification of an order for custody or physical placement of a child, the findings that domestic or family violence has occurred since the last custody determination constitutes a finding of a change of circumstances.

Confidentiality

Whether or not shared physical placement is allowed, the court may order the address of the child and the victim to be kept confidential.

Add
Family court commissioner; appointment; powers; oaths; assistants (767.13);
Family court commissioners have a duty to ask about any history of domestic abuse.
Temporary orders for support of spouse and children; suit money; attorney fees (767.23);
The court or family court commissioner has a duty to ask about any history of domestic abuse.
Custody and physical placement (767.24);
The court or family court commissioner has a duty to ask about any history of domestic abuse.
Revision of legal custody and physical placement orders (767.325):
The court or family court commissioner has a duty to ask about any history of domestic abuse.
Guardian ad litem for minor children (767.045);
The guardian ad litem as the duty to investigate and inform the court of any
history of domestic violence.

Evidence - Judicial notice (901.02) -
OR
Family law

A judge or court may take judicial notice of any circuit court judgements and/or convictions relating to domestic violence when determining that domestic violence has occurred.

Mediation

In order to address the concerns of battered women who wish to have an advocate with them in mediation but do not wish to have a breach of confidentiality the following statutes should be revised:

Communications in Mediation (904.085)

Add service representative's presence during a compromise or offer to compromise in mediation under 767.11 subject to 802.12 (alternative to dispute resolution). This would make evidence of conduct or statements made in compromise negotiations not admissible. This statement would be cross referenced in all three statutes.

Propose an advocate-victim privilege applicable in cases involving domestic or family violence with the language used in the model code.

767.115 - **Educational program on the effects of divorce on children**

Add provision where domestic violence has been identified the parties may not be required to attend the same session.

The issues surrounding the cost of divorce and custody determinations, guardians ad litem and other associated costs that prohibit battered women from securing legal counsel were never resolved.
The issue regarding pro se procedures and accessibility to forms in court actions was not resolved.

In discussing costs of divorce and custody, it was determined that the committee could not statutorily propose solutions to this problem.

We will attempt to include information about domestic violence in any developing legislation regarding the role of GALs' in the children's code.

The committee decided it could not mandate use of supervised visitation centers but wholly support the concept. When possible, visitation centers provide safety, protection, counseling and parent education.

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CIVIL LAW

Proposed changes to 813.12 - Temporary Restraining Order/Injunction statute

Add

1. An act, word, gesture or any other behavior that may cause the other person to fear imminent engagement in the conduct described in subd 1, 2, or 3.
2. Dating relationship means an adult who is, or has been, in a sexual or otherwise intimate relationship with an adult petitioner.
3. Adult or minor spouse against an adult or minor spouse
4. Adult or minor against adult or minor with whom the person has a child in common

Require automatic no contact with bond with a violation of a restraining order. The violation would require arrest for bail jumping, not a civil forfeiture.

Add confidentiality of address of petitioner.
Language could state:
A petitioner many omit her or his address from all documents filed with the court. If a petitioner omits her or his address, the petitioner must provide the court a mailing address. If disclosure of petitioner's address is necessary to determine jurisdiction or consider venue, the court may order the disclosure to be made:
After receiving the petitioner's consent;
Orally and in chambers, out of the presence of the respondent and a sealed record to be made;
after a hearing, if the court takes into consideration the safety of the petitioner and finds such disclosure is in the interest of justice.

Proposed types of Relief

	Procedure		**Duration**
Enjoin from threats or acts	EX		UFO
Prohibit harassment or contact	EX		UFO
Remove from residence	EX		UFO
Stay away order	EX		
Possession of auto and personal effects, supervised removal of personal effects	EX		UFO
Temporary custody of children	EX		UFO
Specify visitation		**H**	UFO
Pay attorney fees		**H**	UFO
Pay rent/mortgage, medical expenses		**H**	UFO
Relief deemed necessary	EX	**H**	UFO

EX - Ex parte
H - Hearing required
UFO - Until further notice
With expansion of remedies, the law will continue to prohibit courts from changing reliefs requested.
We will continue to research ways to increase access to courts in evening hours and on weekends to file orders and secure temporary relief?

CRIMINAL LAW

Add to mandatory arrest statute

A threat to engage in conduct listed in 968.075.

Use of deferred prosecution

If deferred prosecution is used in cases related to 968.075 the following standards must be used:
notice must be given to victim;
defendant must admit to act;
the defendant must waive right to challenge evidence at a later date;
the defendant must waive right to jury trial;
no deferral without referral to a batterers treatment program as authorized by a recognized regional batterers treatment program review committee;
the court must have monitoring system.

Develop a system where the charge is not adjudicated as guilty but found guilty staying adjudication for one year.
Perhaps a separate statute could be used.

If deferred, the first offense would be noted as a civil **conviction** as in drunk driving to be used as a first offense if violence is repeated.

Add a new classification of misdemeanor to be used for 968.075 related crimes with a sentence of up to 2 years.

A proposed new charging and sentencing structure would include:
First offense related to 968.075 could be a deferred with a civil conviction; OR
First offense related to 968.075 could require jail time if offense warrants it;
Second offense related to 968.075 could be a two year misdemeanor or felony if offense warrants it;
Third offense related to 968.075 would be charged and the batterer could be classified as a habitual batterer if convictions occurred in a five year period. This would add more jail time and/or extend probation or parole.
Criminal records must indicate conviction was 968.075 related.

It must be clarified that the felony enhancer for a second domestic abuse offense will not be altered because of a new charging and/or sentencing structures.

The bail bond schedule should state D.V. is considered a danger to another person.
Revise the bail statute to indicating that arrests under 968.075 require cash bail at the time of arrest.
Require, through statute, that violations of the no contact is a criminal violation as a condition of bond and the no contact remains until the charging decision or 72 hours, which ever comes first.
The civil forfeiture remains in 968.075

Mandatory arrest (968.075)

May seize a weapon discovered pursuant to a lawful search as necessary for the protection of the

officer or other person.

Place current **(3)** b, c, and d pertaining to primary physical aggressor under **(2)** circumstances requiring arrest.

Batterers Treatment Standards

Programs must be certified by a regional team, reviewed and evaluated periodically and use a curriculum.

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HB133

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WOMEN'S CHILD SUPPORT ASSISTANCE
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DATE: September 2, 1999

TO: Senate and Assembly Members

FROM: Nancy Picha-Lawrence

SUBJECT: **WISCONSIN 1999-2001 BUDGET**
1999 SENATE BILL 107 AND 1999 ASSEMBLY BILL 133

This memorandum is to state my opposition to the passing of the above Bill 107 and Bill 133 with the State Budget. The passing of this legislation will have a negative effect on the lives of the children in the State of Wisconsin. The general public needs to be aware of the far reaching effects of this legislation and must be provided an ample opportunity to respond.

This memorandum is to state my opposition to reducing the interest rate on child support arrearages from the current 1.5% per month (18% annually) to 1.0% per month (12% annually). Current interest at 1.5% is SIMPLE interest and if the interest is ultimately lowered to 1.0 % it should then be COMPOUND interest.

I will be submitting a detailed written response following the hearing today.

"For these are all our children . . .
we will all profit by, or pay for,
whatever they become." James Baldwin

Assembly Committee on Children and Families
Assembly Comittee on Family Law
Senate Committee on Judiciary and Consumer Affairs

STATEMENT IN OPPOSITION TO THE JOINT CUSTODY AMENDMENTS TO 1999-01 BUDGET BILL

Carol W. Medaris
Project Attorney
September 2, 1999

This amendment to the budget bill makes substantial changes in child custody law in this state. The most far-reaching changes establish a very strong presumption of joint legal custody, and set forth a strong preference for equal or substantially equal placement of children when parents separate. The amendment will affect nearly every child in Wisconsin whose parents are parties to a divorce or paternity action. Yet it was added to the budget bill in the Joint Finance Committee, thus avoiding the thoughtful consideration and public hearing procedures normally accorded the development of separate legislation of this magnitude. In addition to the Council's concerns about the procedural shortcomings of including such a comprehensive scheme in the budget bill, we have substantial concerns about the merits of the amendment.

1. <u>State statutes governing legal custody currently allow judges to order joint legal custody over the objection of one party when it is in the child's best interest to do so, and while safeguarding victims of child abuse and domestic violence.</u>

Under current law, the court may order joint legal custody even when one party objects, if the court finds that such an order is in the child's best interest, that both parties are capable and willing to raise the child, that no conditions exist that would substantially interfere with joint legal custody, and that the parties will be able to cooperate in future decision making. In making the latter determination, the court must consider any reasons offered by the party objecting to joint custody. Evidence that child abuse or domestic violence has occurred creates a rebuttable presumption that the parties will not be able to cooperate and precludes a joint custody order

unless the alleged abuser presents clear evidence that the abuse will not interfere with the parties' ability to cooperate.

Allowing courts to order joint custody in the absence of agreement was very controversial when proposed. Proponents succeeded in their argument that such a provision was necessary to curb the ability of one parent to defeat a joint custody order by registering an objection, without having to make any showing as to reasonableness. However, the provision was carefully crafted to respond to concerns of advocates for victims of domestic violence and child abuse, who argued that it was absolutely essential that the burden in such cases not be on victims to show why joint custody is not appropriate. Thus, current law places the burden on the party seeking to obtain a joint custody order over the objection of the other party to show that the parties will be able to cooperate *and*, if there is evidence of abuse, that the abuse will not interfere with the parties' ability to cooperate. Thus the competing interests of allowing joint custody orders over the unreasonable objection of one party and protecting victims of abuse were addressed.

2. A presumption that joint legal custody is in the best interest of the child increases the potential for harm by shifting the burden to victims to prove that the parties are not able to cooperate.

The proposed custody changes in the budget bill establish a presumption "that joint legal custody is in the best interest of the child." That language will *mandate* that courts order joint custody *unless* the victim persuades the court that the parties are unable to cooperate. Thus it will be up to the victim to show, by a preponderance of the evidence, that the parties will not be able to cooperate. Though evidence of abuse will still raise a presumption of inability to cooperate, placing the initial burden upon the victim makes it much more likely that joint custody will be ordered in cases of domestic violence or child abuse. (Domestic violence and child abuse are often crimes of isolation, with third-party evidence difficult or impossible to obtain.)

Joint legal custody requires that the parties be in frequent contact, working together to make decisions about their children. In cases of domestic violence, ordering joint custody will result in keeping victims in close proximity to perpetrators, thus greatly increasing the risk of harm. This change to the statutes upsets the delicate balance in current law between protecting victims of abuse and ordering joint custody where appropriate, even if over the objection of one of the parties.

3. Although a change is contemplated, the best interest of the child is so far degraded under the current budget language, that even if domestic violence or child abuse is *proven*, and the court is persuaded that that *will*

interfere with the parties ability to cooperate, that will not be enough to overcome the presumption of joint legal custody.

Current budget language establishing a presumption of legal custody requires the judge to order joint legal custody *unless* the judge finds *two out of three* statutory standards are met: 1) that one party is not capable of performing parental duties or does not wish an active role in raising the child; 2) that one or more conditions exist that would substantially interfere with joint custody; and 3) that the parties will not be able to cooperate. (As stated earlier, evidence that domestic abuse or child abuse has occurred creates a rebuttable presumption that the parties will not be able to cooperate.)

In other words, even if a judge finds that domestic abuse has occurred so as to interfere with the parties' ability to cooperate and the perpetrator does not even try to counter this, the judge must still order joint legal custody if another factor mitigating against joint custody is not found. Similarly, a court finding that one parent is either incapable of performing parental duties or unwilling to have an active role in childrearing is not enough, without more, to order anything but joint legal custody. It should be clear that the best interest of the child is no longer the focus of the custody decision.

4. Similarly, the strength of the "best interest of the child" standard is diminished by creating a near presumption of equal physical placement with both parties.

Current law states that a child is entitled to placement with both parents unless the judge finds that physical placement with a parent would endanger the child's physical, mental or emotional health. The judge must consider all facts relevant to the best interest of the child, including the wishes of the parents and the child, the child's interrelationship with siblings and other family members, the child's adjustment to the home, school, religion and community, the parties' and children's mental health, the availability of child care, whether one party is likely to interfere with the child's relationship with the other party, whether there is a history of child or spousal abuse or AODA, and any other relevant factors. Finally, the statutes specify that the judge may not prefer one custodian over another based upon sex or race, and must consider reports of appropriate professionals. These provisions set an absolute standard of gender neutrality and a strong presumption of placement with both parties.

The budget amendment instructs courts to set a placement schedule that "maximizes" the amount of time the child spends with each parent, and sets forth as a factor to be considered, the "right of the child to spend the same amount of time or substantial periods of time with each parent." "Substantial

periods of time" is not defined. In the child support context, it has been interpreted by the Department of Workforce Development to mean at least 30% with each parent. (See discussion below.)

Although not specifically stated as a "presumption" of nearly equal time, the placement of the language in the statute is likely to cause judges to believe that equal or substantially equal time is to be ordered unless there is a good reason not to do so. It is placed so as to take precedence over even the requirement that courts consider all facts relevant to the best interest of the child. (In SB 107, the shared parenting bill which was an earlier version of this custody amendment, the best interest of the child standard was eliminated.)

As with the legal custody presumption, equal or substantially equal time with both parents may not be in the child's best interest, yet the proposed changes are likely to produce such a result. For example, young children may need the stability of staying in one primary home with frequent visits from the other parent. See "Don't Split The Baby, Physical Placement And the Developmental Needs of Children," Kenneth H. Waldron, Ph.D., submitted following a hearing of the Legislative Council's Special Committee on Child Custody, Support and Visitation Laws on September 14, 1994, in which the author details the special needs of children as they relate to custody and placement decisions at various stages of children's development.

5. Application of the proposed custody changes to paternity cases may well result in fewer fathers being named and fewer children receiving child support.

Currently, the court can order joint legal custody and equal or substantial time with both parents under the same circumstances in paternity cases as in the case of a marriage. If that is the pattern of the relationship between the parents and the child such an order is likely -- especially if the parents agree, but even if they do not.

However, in many paternity cases the relationship between the parents is slight and between the father and child non-existent. Sometimes this is with the agreement of the parties.

In the proposed custody amendment, both the presumption of joint legal custody and the near presumption of substantially equal placement applies to paternity cases. Under the proposed language, at the time of the paternity action if the father, for example, does not state an unwillingness to help raise the child and there is no violence, joint legal custody would be practically automatic. Again, the focus here is not on what is best for the child.

One should anticipate that mothers in paternity cases will be less willing to name the father if the result is almost certain to mean both parents will have an equal responsibility for child-rearing, regardless of its appropriateness. This will not only mean that some children will be denied knowledge of their fathers, but will also result in reduced financial support for non-marital children. (Cynics might argue that that is the goal of this legislation for some proponents.)

6. The near presumption of equal or "substantial periods of time with each parent," by itself, is likely to lead to reduced child support.

Current law provides that child support will be set based upon a percentage of the income of the parent that spends less time with the child, but allows the court to find that the use of the percentage standard is "unfair" if there is an "award of *substantial* periods of physical placement to both parents." This has been interpreted by the Department of Workforce Development so that orders of physical placement of 30% or more with each parent reduces the amount of child support owed. See DWD 40.04(2), Wis. Adm. Code for how the percentage of income owed drops with each additional increment of time ordered.

As courts order "substantial" periods of time with both parents pursuant to the proposed custody language, an argument for reduced child support is bound to be successful. This will occur *regardless* of whether the more equal time sharing actually occurs.

Some parents now don't begin to spend the time with their children that is ordered by the court. The parent who turns out to be the primary custodian *in fact* may silently acquiesce, believing that the child is better off with a less equal time split and forgoing the missed child support in order to maintain the status quo. Or the de facto primary custodian may lack the resources needed to go back into court to change the custody order to reflect the real time-sharing that is occurring. Such arrangements, with lower child support orders than are appropriate, will be encouraged with the new instructions for a more equal time split.

7. Application of the proposed changes to actions to revise prior custody orders is likely to increase motions to reopen prior orders by parties seeking to reduce child support orders, thus risking changes in long-standing arrangements for children.

The proposed changes will also apply to old cases which are reopened after the effective date of the changes (six months after the budget bill's effective date). While the new language cannot be a *basis* to reopen a prior custody or

placement decision, if a party can show a substantial change of circumstances since the last legal custody or physical placement order, thus meeting the statutory burden for the judge to reconsider the prior order, then the presumption of joint legal custody will apply as well as the overriding instruction to maximize placements with both parents. This risks changes in longstanding arrangements for children which may have served them very well. It also risks reduced child support orders.

8. The custody amendment contains other related changes which need the more thoughtful analysis that a separate bill, with public notice and regular legislative committee hearings, is more likely to provide.

a. Judges are required to make temporary legal custody and physical placement orders within 30 days after a request for a temporary order is filed. At this stage the court may order sole *legal* custody without meeting the standards that apply to permanent orders. Temporary *placement* orders, on the other hand, must follow the same criteria as apply to permanent orders: maximizing placement and considering the child's right to equal or substantial time periods with both parents. Temporary orders would also be required in paternity cases, on the motion of a party, if genetic tests showed the probability of the alleged father's paternity to be 99% or higher. *At this point in the proceedings, maintaining stability for young children and reducing transfers between parents' homes may be even more important than in final orders.*

b. Parties seeking joint or sole legal custody or physical placement in a contested custody action must file detailed parenting plans. If a party fails to do so, he or she loses the right to object to the other party's parenting plan. *This may favor parties with the most money, who are able to hire specialized legal help. It may also result in orders which are not in the best interest of the child.*

c. The importance of professional opinions in deciding custody appears to be reduced, from being a major consideration to simply one of a number of factors the judge is to consider. *It may be important to maintain the standing of professional opinions in a legal proceeding so often fraught with emotion and subjectivity.*

d. There are strong new measures to enforce physical placement orders. Not only may the court find a party in contempt for denying or substantially interfering with one or more periods of physical placement, the court may grant an injunction for up to two years, the violation of which could result in up to two years imprisonment, up to

$10,000 in fines, or both. *These provisions need to be compared to other court enforcement proceedings to determine whether they represent a balanced approach here.*

e. Child support orders are no longer retroactive to the child's birth in paternity actions, but are limited to the period beginning with the date of filing the paternity action, except in certain circumstances, for example, a showing that the other party caused the delay. *This may unduly deny necessary support for children when the filing is delayed through no fault of the parent.*

f. Interest on child support arrears is reduced from 1.5% to 1%. *This may or may not be fair, depending upon the circumstances of why the payments are late.*

g. A new factor is added to those considered when one party wishes to move beyond 150 miles or out of state over the objection of the other party: the child's adjustment to home, school, community and religion. *As with joint custody, this has been an area of contention, and the current statute may be a better balance of interests.*

h. Paternity records, once paternity is established, will all be open records, instead of sealed, as now. *The need for such a change needs to be balanced with the privacy needs of the parents and children.*

CONCLUSION

Most experts agree that children, particularly young children, are least at risk if their normal living patterns are maintained as much as possible when parents separate, and conflict between the parents is minimized. Most parents pursue these goals and reach agreement at the time of divorce or separation. And, judges generally honor these agreements. In cases where parties do not agree, judges, themselves, generally try to maintain the patterns that existed prior to the separation, considering the factors set forth in the statutes. *If both parties share decision-making prior to the separation and share equally in the actual care of the child, the judge's order is likely to reflect that, whether both parties agree with that outcome or not, unless there is some compelling reason not to do so.*

Forcing parties to share custody, particularly where there are good reasons not to order it (as is bound to happen under the proposed language), will almost surely increase parental conflict.

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August 31, 1999

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Children and Families Committee
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Re: 1999-2000 STATE BUDGET BILL

Dear Sirs and Madames:

I am an attorney in Racine, Wisconsin and have practiced Family Law since 1970. For the past 20 years, my practice has probably been 75%-80% family law practice. I am a member and past-president of the Wisconsin Chapter of the American Academy of Matrimonial Lawyers.

As it relates to the Amendment to the State Budget Bill, I will be unable to appear at the September 1st Senate Judiciary Committee hearing or the September 2nd Assembly Family Law and Children and Families Committees hearing due to a temporary disability.

I would like to express my concern as it relates to a few aspects of the Senate Amendment to the State Budget Bill as it relates to Family Law changes. It is my understanding that the proposed Amendment desires to add placement factors to the existing factors of §767.24(5).

1. One of the factors is the *"right"* of the child to spend the same or substantial amounts of time with each parent. I believe that this is a total inaccuracy. A child has no such right. In intact families, seldom does a child spend the same or substantially the same amount of time with both parents.

This is a decision of the parents on how they are going to allocate their time between work, children and other commitments. Merely because a child's parents are divorcing does not create a right to time with parents that doesn't coincide with what is in the child's best interest. I would suggest that the clause read:

> *"Whether it is in the child's interest and practical to spend the same or substantial amounts of time with each parent based on the parent's respective parenting plan."*

2. I understand that another proposed consideration under §767.24(5) is to be *"the amount and quality of time that each parent has spent with the child in the past, any necessary changes to each parent's custodial roles, and any reasonable lifestyle changes that a parent proposes to be able to spend time with the child in the future;".*

I think the term *"necessary changes"* places an undue burden upon fathers -- generally the one who were not predominately involved in the pre-divorce rearing of the children. By having to prove that the change that that parent proposes to make is a necessary change, leaves it open for the court to say, "Even though you as the parent want to change your involvement with your child now that there will be two separate homes, and now that the family goals of income producing and saving are no longer the primary goals, you won't be able to change the pattern unless you can show it is necessary."

3. I understand that another proposed consideration under §767.24(5) is: *"whether the parent can facilitate the child's relationship with the other parent."* I believe that is duplication of the already-existing §767.24(5)(g) where it states, *"whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party."* For that reason I think it adds undue emphasis to this particular consideration and the one proposed should be deleted.

I understand that a further proposal would *"require the court to award make-up time, costs and attorney fees for intentional and unreasonable interference with placement.."* The remedy is currently available to Judges. The wording would require the Judge to assess cost and attorney's fees for unreasonable interference.

This may hinder a parent's choice when there are questions of safety (other parent obviously having used intoxicants).

More importantly, is that if the court is going to be required to assess attorney fees and costs for violations of this nature, they should be required to asses attorney fees and costs for nonsupport situations. Both areas should be treated alike.

I understand that it is proposed that the court *"resolve all issues including custody and placement in a paternity judgment or acknowledgement."* I question whether that should be limited to cases in which father has appeared.

"Applying child support, custody and placement statutes uniformly in both divorce and paternity cases" would make mothers hostages to fathers who have not fully committed to the child by marrying the mother. The failure of this commitment should be recognized. In marriage cases, both parents have committed to a course of conduct regarding the raising of their children by their marriage vows and contract. Currently, the paternity law has a presumption that all things being equal in all other respects, the child will stay with the mother. To me that is the *quid pro quo* for the lack of full commitment by the father.

Further, the requirements of the Statute proscribing removal of the child from State of Wisconsin or 150 miles from father should continue to not apply in paternity cases. There should be a provision that allows the father at a hearing for paternity wherein which placement is established to demonstrate to the court the extent of his commitment and the court should be able to impose the removal requirements in a case such as that.

Without such affirmative action on the father, mothers of a child born of a father who is not committed or may have his whereabouts unknown or who may be extremely delinquent in child support will have to be given notice. That father could then object to the move even if it was only as a bargaining chip to have the mother waive or discount future support or back child support arrearages. That leverage should not be given to a father who is less than totally committed to the child.

I thank you for your considerations given to my thoughts based on my many years of experience in these areas.

Yours truly,

STEWART, PEYTON, CRAWFORD, CRAWFORD & STUTT

COPY

Gerald M. Crawford

GMC-M(ds):GMC.L2
bcc: Judith Hartig-Osanka

Wisconsin Coalition Against Sexual Assault

Testimony on Proposed Child Custody Changes in the Budget Bill

Joint Assembly Committees on Family Law and Children and Families
Senate Committee on Judiciary and Consumer Affairs

September 2, 1999

My name is Cheri Dubiel and I am the Policy Specialist for the Wisconsin Coalition Against Sexual Assault. Our membership consists of individuals, agencies, and 36 sexual assault service providers from around the state. I am here to express our deep concern with the proposed child custody changes included in the Budget Bill and to register against it.

After hearing testimony yesterday on both sides of this issue, our coalition continues to feel that this legislation will take us a step backward in protecting children in the state of Wisconsin. Our biggest concerns are with protecting children who are the victims of incest. Statistics show us that incest is a problem that can not be ignored. In 1997, 19% of all sexual assaults reported to the criminal justice system were perpetrated by a family member. According to the Department of Health and Family Services, Division of Children and Family Services, there were 11,148 child sexual abuse reports made to Child Protective Services in the State of Wisconsin in 1995. Considering that it is estimated that only 31% of rapes and sexual assaults are reported, we can see that this problem is far reaching.

Other national statistics show us:

- A survey of adolescent boys health revealed that one in eight (13%) high school boys had been physically or sexually abused or both. Of sexually abused boys, one-third (35%) said the abuse happened at home and 45% said the abuser was a family member. Forty-eight percent of physically or sexually abused boys said they had not talked to anyone about their abuse and only 7% had discussed their abuse with a doctor (Schoen & Davis, et al, 1998).

- One in five (21%) of the high school girls surveyed reported that she had been physically or sexually abused. The majority of the abuse occurred at home (53%) and more than once (65%). Twenty-nine percent of girls who had been physically or sexually abused have not told anyone about the abuse. (The Commonwealth Fund, 1997).

These statistics do not tell us specifically if the abuser was a parent, and they also don't specifically state how often these situations are a factor in a divorce. They are, though, a clear indication of what is going on in families and a clear indication that this is not an insignificant proportion of society that does not need to be considered when making policy changes of this magnitude. It is the duty of policy makers to write responsible legislation that will protect all families with a variety of different dynamics. We can not write legislation that only benefits the majority.

Generally, sexual assaults are the most underreported crime in the country. Children in incest situations are even less likely to report a parent for sexually abusing them. There are many complex power factors involved in situations of incest. The perpetrator uses direct and implied threats of further violence and often manipulates children into believing that if they do tell, they will break the family apart. Our coalition needs to know how these changes in child custody will affect children who have been sexually abused by a parent. Specifically, what is the burden of proof in this legislation? In these proposed changes, how can we be certain that children who have been sexually abused by a parent will not be forced into contact with their abusers.

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Legislation is being introduced stating that joint legal custody is in the best interest of the child, when there is very little support to back it up. Recommendations from a recent Legislative Council study, in fact, advised against mandated joint custody. Any presumptions in favor of joint legal custody diminish the court's ability to determine what is in the best interest of the child. This change in policy will require courts to grant equal legal custody rights in a number of inappropriate situations, putting children at risk. Incest cases are hard to prove and often rely on the testimony of children. How will these children be protected under these new provisions?

This change in policy sends a message that children are no longer first. While we recognize the efforts being made to address concerns raised with current law dealing with child custody during divorce, a switch in this state's presumption of what is best for children demands that this body consider the very real dangers so many children face at home. The rush at this stage in the process to make such wide-sweeping change may have very serious unintended consequences for children. Changing the legal standard for awarding custody in divorce cases is a major shift in public policy that deserves far more research and public input than has been allowed up to this point. When this concern was brought up yesterday, other examples of policy changes were pointed to that also passed through the budget process. Two wrongs do not make a right.

Unfortunately, this debate has been sidelined by discussion about which parent's rights are more important. However it remains and should remain a children's issue and our children deserve more.

Wisconsin Legislative Council Staff Memorandum

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DATE: August 26, 1999

TO: SENATOR GARY R. GEORGE

FROM: Ronald Sklansky, Senior Staff Attorney

SUBJECT: Amendment to 1999 Assembly Bill 133

This memorandum, prepared at your request, describes Senate Amendment __ (LRBb1703/2) to 1999 Assembly Bill 133, the Executive Budget Bill (the "Budget"), as the Budget proposal was adopted by the Senate on June 30, 1999. The Senate amendment amends that part of the Budget generally relating to the treatment of certain actions affecting the family as described in a memorandum to you dated August 23, 1999.

The Senate amendment makes the following changes in the Budget:

1. The Senate amendment creates s. 767.045 (4m), Stats., to provide that at any time after 120 days following the appointment of a guardian ad litem for a minor child in any action affecting the family, a party may request that the court schedule a status hearing regarding the activities of the guardian ad litem. Also, a party may make additional requests for a status hearing if a request is made at least 120 days following the most previous status hearing.

2. The Budget provides that in certain actions affecting the family in which legal custody or physical placement is contested, a family seeking sole or joint legal custody for periods of physical placement must file a parenting plan before any pretrial conference. The parenting plan must include a description of where the parent lives currently, where the parent intends to live during the next two years, where the parent works and the hours of the parent's employment. The Senate amendment provides that if there is evidence that the other parent has engaged in interspousal battery or domestic abuse with respect to the parent providing the parenting plan, the parent providing the parenting plan is not required to disclose any specific addresses, but need only provide a general description of where he or she currently lives, intends to live during the next two years or works. The Senate amendment also creates a new provision to state that if there is evidence that either party has engaged in interspousal battery or domestic abuse with respect to the other party, a parenting plan must describe how a child will be

transferred between the parties for the exercise of physical placement to ensure the safety of the child and the parties.

3. The Budget provides that a court may give sole legal custody to a parent if the parties do not agree to sole legal custody with the same party, but at least one party requests sole legal custody and the court specifically finds two or more of the following:

a. One party is not capable of performing parental duties and responsibilities or does not wish to have an active role in raising the child.

b. One or more conditions exist at the time that would substantially interfere with the exercise of joint legal custody.

c. The parties will not be able to cooperate in future decision-making.

The Senate amendment provides that sole legal custody may be awarded if the court specifically finds any ***one*** of the above-described conditions.

RS:tlu;wu

TESTIMONY TO ASSEMBLY FAMILY LAW AND CHILDREN AND FAMILIES COMMITTEES
September 2, 1999

Judith M. Hartig-Osanka
Hartig, Bjelajac, Cabranes & Koenen
601 Lake Avenue
Racine, Wisconsin 53403

As a family law attorney, I represent men and women, rich and poor, and parents with primary placement, shared placement, and periods of placement. I don't come before this committee today advocating for a particular constituency such as battered women or fathers who believe they have been treated unfairly. I am on the Family Law Section Board of Directors and the Liaison Committee that worked on revisions to the statute. As one who works with the statute on a daily basis and am in tune with the changing family patterns and expectations of the '90s, I endorse the modifications to Section 767 in the Budget Bill.

Some of the changes simply bring the statute into the reality of practice such as a change from the presumption of sole custody to a presumption of joint legal custody. Both parents should have the right to share in major decision making for their children except in extreme cases. This is assumed today and is the result in 95% of divorce cases, but the statute still

presumed sole legal custody. I believe a minor change has been agreed to which should satisfy the concern in those extreme cases.

The new requirement for a parenting plan and a parenting class will force parents to seriously consider life after divorce for their children, not just themselves. Some of the new factors to consider in placement will require more consideration of the other parent's role in the future for children and will stop rewarding parents who unreasonably refuse to communicate regarding the children. The present statute does not recognize the possibility of shared placement. As more parents today share raising children during the marriage, the additions to the statute will recognize sharing as an alternative in divorce.

The present statute has pages on child support enforcement and the department in my county was 42 employees plus 13 contact employees to enforce it. There has been virtually nothing in the statute on enforcement of placement except to bring a contempt action. There has been concern by my Family Court Commissioner that the new provisions in this area are an unfunded mandate which will increase demands on their limited personnel. These provisions will give a variety of new tools which can be used beyond the traditional slap on the hand. I

believe they may reduce violations because there is a clear message that placement will be enforced.

The Budget Bill changes respond to the societal change that paternities are now half of the cases and are the divorce of the future. By providing for custody and placement provisions in the judgment, children of paternities will have the same rights to relationships with both parents that children of divorce have. I believe this may add to Family Court Commissioner caseloads, but it must be done. I reject concerns of the DWD that this provision would be a deterrent to mothers signing voluntary statements. Children have a right to two parents and every means should be taken to promote that right and encourage a relationship with both parents. I have reviewed some of the other concerns of the DWD and have no objection to defining commencement of the action to be the time of filing. I object, however, to deleting the sections they refer to. Fathers should not be held liable for support back to the birth of a child where a mother waits years to file an action. Their second concern regarding contribution of both parents for birth expenses should conform to federal law. Finally, I see no reason to continue to close paternity files once paternity is established. I have also reviewed the new Senate Amendment that addresses the concerns of victims of domestic abuse in their paternity

plans. I don't have any objection to that language, but I do object to the language relating to Guardians ad Litem and status hearings. The statute should not micro-manage status hearings or the work done by Guardians ad Litem.

Our committee has responded to some of the concerns of the fathers groups because they were also our concerns. We have done it while retaining the basic best interest of children standard in the statute and the role of guardians ad litem to protect their best interest. We have not adopted a cookie cutter "one size fits all" approach. We have, however, expanded the placement considerations. I tell all of my clients that children have a right to a relationship with both parents and they are going to share raising their children. The only question is how the time will be allocated and every family will be different.

This proposal is a negotiated compromise. In its totality, it is a good package. All of the statistics show that children of divorce can thrive where both parents remain active in their lives. Child support also gets paid. These modifications are meant to reduce litigation and promote joint decision making by parents in the best interest of children.

Sen. George

Rep. Bonnie Ladwig
Rep. Carol Owens

Governor Thompson should sign the budget bill containing the Equal Shared Parenting Bill the present system is not good for children.

My ex-wife and I have joint legal custody of our 2 Sons ages 12 and 13 for the last three years. My ex-wife and I are equal under the divorce agreement. Being equal is an important part of the making 50-50 placement work. It takes care of the need, desire or opportunity to fight in court.

We do alternating weeks and alternating Wednesdays. Our two sons get along with this quite well. I think because they are young. We did have six hours of co-parenting classes. Even though my ex-wife hates me, we are able to get along concerning our children. My ex-wife is supposed to pay ½ of the actual expenses for our children. She has paid nothing to date. I have paid all of the expenses myself health insurance, medical – dental – shoes – haircuts and school expense. My boys do have their needs provided for. Equal placement lowers the stress on us parents because the demands of parenting are shared. Equal placement keeps both of us parents highly involved because of the alternating week placement. Equal placement allows my boys to have the benefit of my parenting skills in a similar manner as if their mother and I were still married. Having a 50 – 50 placement arrangement was very important to me because my ex-wife was an alcoholic for the last approximate 6 years of our marriage. She was a closet alcoholic. My ex-wife quite drinking after I filed for divorce. This impressed those involved in the family court. Alcohol experts say it takes 5 years of sobriety to be trust worth. My ex-wife was a stay at home mom, so she was declared the primary car taker. Mother gets the kids. I did take care of my boys a lot of the time. Even though I was not declared a bad dad. I was a real good dad. The family court system fought me. I spent a lot of money to have my boys 50% of the time. My ex-wife also spent a lot, of money to win I am sure because the court was on her side. The lawyers got money that my boys should have now for a better life. It was either spend the money to protect my sons from an alcoholic mother or let them live 74% of their life with an alcoholic mother and take their chances. I am sure they will be much better men and fathers in the future because of my ~~[illegible]~~ parenting. Common sense clearly indicates children need to be parented by their father. Every other weekend and Wednesdays 24% is not enough.

Also I am afraid that with out Equal Shared Custody. My ex-wife could decide to move back to Detroit, MI., her hometown. Then she could go back to court to get the court to rescind the divorce agreement. And take my boys to Michigan. I have heard of this being done.

Equal Placement would help protect children from abusive live in boyfriends. The children would be with their father ½ the time.

The Equal Shared Parenting Bill is a good bill for children. Governor Thompson should sign it

Fred Strehmel
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