

**2013 HOUSE HUMAN SERVICES**

**HB 1351**

# 2013 HOUSE STANDING COMMITTEE MINUTES

## House Human Services Committee Fort Union Room, State Capitol

HB 1351  
February 5, 2013  
Job #18277

Conference Committee

Committee Clerk Signature



### Explanation or reason for introduction of bill/resolution:

Relating to the duties of the sheriff and state's attorney and to parenting rights and responsibilities.

### Minutes:

See Testimonies #1-8

Chairman Weisz called the hearing to order on HB 1351.

Rep. Chuck Damschen: Introduced the bill and handed out testimony for the sponsor of the bill, Rep. David Monson. (See Testimony #1)

4:53 Rep. Fehr: On page 5 of the bill in paragraph 2 on line 7. What does clear and convincing evidence mean?

Rep. Damschen: Someone with more technical knowledge can answer that.

7:03 Sandra Barbie: Testified in support of the bill. (See Testimony #2) Non-custodial parent. Spoke of her situation and having very little time with her children and having no rights to her children. She pays child support and he is wealthy and her children where holey shoes and raggedy clothes. When they left me they were well behaved and now they are unruly.

13:28 Rep. Fehr: If this bill is passed, how will it change things in your situation?

Barbie: It would give people equal time or give the court the opportunity to allow equal time. It would give me the opportunity to go back to court to fight for equal time.

14:20 Ryan Dietz: I would like a couple of amendments on the bill. Some problems in divorces are that visits are denied. You can hire a lawyer, but you lost your visit that can never get back. I went five years without seeing my kids. This whole system is about making money. It is about lawyers and the judges and has nothing to do with the kids.

19:30 Shad Cuslor: Talked about his divorce 11 ½ years ago. A judge told him that because of his job duties and being on the road he couldn't have custody of his children. He reinvented himself and took another job where he works 60 hours a week and was told

he works too much and still couldn't have custody and was told that custody share isn't done here. He almost lost his house because of the legal bills. Wanted to know why they don't do a 50/50 custody and sort out the bad apples from there.

24:00 Arnie Fleck: An attorney and going through a divorce and lost his children. The system is biased in my opinion. In recent studies the adult that were children of divorce are not really happy. Most European countries have adopted the shared parenting policy. This bill is a good step in going in the right direction. I don't know what the bill means, "the court shall award parenting time and residential responsibility that is as equitable as reasonably possible", I don't know what that equitable as reasonably possible is. Equitable is not a term used currently in the system of deciding custody. I have some proposed revisions to the bill. (See Handout #3) (Explained proposed amendments.) Referring to Rep. Fehr's question earlier about the standards of proof, four standards of proof are proof beyond a reasonable doubt that you have in criminal proceedings, clear and convincing, preponderance of the evidence and then there is probable cause.

40:22 Rep. Oversen: With the proposed amendment with the share parenting time; the assumption is automatically all things being equal each parent will get 50% of the time?

Arnie: Unless it can be rebutted.

Rep. Oversen: Does it make the assumption the parents live in the same town?

Fleck: That is an issue. That is why it says, "under the circumstances that exist." If there is a distance between parents, I would like to see the parent who doesn't live in the child's school district should get most of the summer, Christmas break and make up the time that way.

#### OPPOSITION:

42:15 Jeff Ubben: Assistant Burleigh County State's Attorney testified in opposition of this bill. (See Testimony #4)

44:22 Rep. Porter: How is a clear violation of a court order and a criminal act that has been committed, or a misdemeanor or felony committed handled? When it is handed over to the state's attorney's office, you have the right to say no we don't want to do that because you feel it is a civil matter?

Ubben: That is essentially correct. We do have prosecution discretion.

Rep. Porter: The one described today about the parent crossing the state line and the law was ignored. How do we, who make the laws you are supposed to be following, make sure you are doing what we are telling you to do?

Ubben: We are elected too and if people are not happy with us they can vote us out. You need to trust these officers of knowing when it is appropriate and when it is not.

Rep. Fehr: In your testimony you said, break our back, can you tell us what you mean? Are you saying these types of cases shouldn't be that high a priority?

Ubben: We only have 9 where we should have 14 prosecutors and we are overwhelmed. When we feel children are in danger than we act.

Rep. Fehr: When you say in danger do you mean of immediate harm or not having a connection with the non-custodian parent?

Ubben: Physical harm or needs not being met.

Rep. Fehr: You mean immediate welfare, not the long term welfare coming from the limited contact with that non-custodial parent.

Ubben: That is correct.

Rep. Fehr: For requirements for sheriff and enforcement of parenting time; might we expect that if we pass this law that in fact the state's attorneys and sheriff's will basically disregard it?

Ubben: I don't want to go there and answer that.

Rep. Kiefert: Where is the statute where you are getting to choose what laws you enforced?

Ubben: We are here to enforce the laws, but can't do every one.

Rep. Kiefert: Is there a floor mat you follow that covers the gray area? Who decides is it is worthwhile?

Ubben: Prosecutors and law enforcement make that call if criminal charges are warranted.

Rep. Mooney: If a spouse is divorced in ND and moves out of state are they required to go through the court system to ask permission?

Ubben: I believe you are correct.

Chairman Weisz: You have a whole area here that you have a contempt of court and the only way for these people to resolve it is to spend thousands of dollars on legal fees to go back to court. Your office feels you aren't going to charge them because they do fall down in the low priority area. We are putting the fullness of enforcement back onto the person who is being harmed by lack of enforcement by that court order.

Ubben: There are other remedies to enforce these orders. There is contempt of court in the civil law arena. These should stay in the civil law arena.

58:00 Jim Thoreson: Chief Deputy of Cass County Sheriff's Office in Fargo testified in opposition of the bill. (See Testimony #5)

59:54 Rep. Laning: Who enforces civil law? If they can't call the sheriff's department to enforce the law, then who should they call to enforce the law?

Thoreson: We have eight judges and 2 referees in our judicial district. The referees hear all of the child support and administrative traffic cases. Perhaps these custody issues should be treated like traffic citation where no lawyers are required and the referee could hear these cases. At least then it would be less costly to the two parties involved and no lawyers.

Rep. Laning: That doesn't help the situation of the non-custodial parent. And there is no rapid method for the visitation parent to get those rights. If they can't call law enforcement there must be a way to get ahold of these violating parents and make them comply with the law.

Thoreson: I don't think either parent should be arrested as it is not in the best interest of the child.

Rep. Kiefert: Wouldn't stand to reason you would have more compliance if these people were prosecuted?

Thoreson: Compared speed limits to the situation of a non-compliant parent.

Rep. Kiefert: I don't think you can compare that to a court order violation. A court ordered violation is more than a driving violation. If you fail to enforce a court order, why enforce any of them? I don't understand where you have the discretion to determine which laws you will and will not enforce. We pass laws here for a reason and I don't think it is up to your office to decide which ones you are going to enforce or not.

Thoreson: There is discretion among law enforcement and prosecutors.

Terry Traynor: Turned in testimony for (Testimony #6)

1:05 Bill Neumann: Executive Director of the State Bar Association of ND testified in opposition of the bill. We oppose Section 4 of the bill. (See Testimony #7)

1:12:44 Rep. Fehr: If we would like to get away from the gender bias the judges have. How can we set a mind set to doing things more equal and from there for what is in the best interest of the child?

Neumann: It says already there can be no gender bias. I reject there is a gender bias in the courts. Judges bring to their job what they are and what they know.

1:19:11 Rep. Fehr: I thought you said in law there is to be no gender bias in custody decisions. Can you tell me where that is?

Neumann: I think it is somewhere in Title 1409. (From the audience someone one suggested 1409.29)

Chairman Weisz: We will check that out.

Rep. Fehr: There have been suggestions in terms of how to remedy this and this bill says let's draw in the sheriff's department and so on. Previous testimony said that referees can do that. You are suggesting parenting coordinators. What is the best that will work in the state?

Neumann: I don't know the answer to that. I don't think referees are the answer. You could train law enforcement officers to be parenting coordinators and then fund that. It is worth studying.

1:24:34 Chairman Weisz: Much concern has been with the court orders being ignored so they are in contempt of court. I do see in 1409.24 where it talks about interference with visitation. Have the courts ever awarded these? It also says you any remedy that is available to enforce the child support order and which is appropriate to enforce visitation.

Neumann: I am not aware of that, but I don't practice law.

Rep. Damschen: It is frustrating for me is that we pass a law and it doesn't get enforced. Somewhere a line has to be drawn between discretionary authority and doing what is being legislated. What do you suggest?

Neumann: Judges. There used to be a gender bias on the bench and I don't believe it is there anymore.

1:30: Sherry Mills Moore: An attorney testified in opposition of the bill. (See Testimony #8). Primary concern is with section 4.

1:43:20 Rep. Anderson: A parent coordinator has no legal authority?

Mills Moore: They can apply the court order. They cannot undo a court order.

Rep. Mooney: This person has ability to initiate court proceedings?

Mills Moore: No they can't.

Rep. Mooney: Can they help two parties come together?

Mills Moore: They have limitations. They are to know how things work in each person's situation.

Rep. Mooney: Do they follow through with a documentation process that helps to lay the foundation?

Mills Moore: There work is confidential. There is no documentation.



1:47:42 Chairman Weisz: You say that section of code is being used at times for judges to reimburse those who aren't getting visitation enforced?

Mills Moore: Are you talking about the willful interference?

Chairman Weisz: 1409.24

Mills Moor: (Answer to question.) Absolutely, that is a ticket in.

1:49:05 Christina Sanbor: An attorney. There is a Section 1409.04 that talks about whether or not the parenting coordinator's decision is binding. In that section it says, "the agreement of the parties or decision of the parenting coordinator is binding on the parties until further order by the court."

1:50:03 Rosanna Larson: (See Testimony #6)

Chairman Weisz closed the hearing on HB 1351.

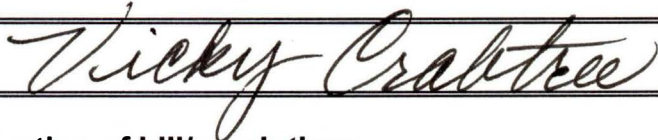
# 2013 HOUSE STANDING COMMITTEE MINUTES

House Human Services Committee  
Fort Union Room, State Capitol

HB1351  
February 12, 2013  
Job #18831

Conference Committee

Committee Clerk Signature



## Explanation or reason for introduction of bill/resolution:

The duties of the sheriff and state's attorney and to parenting rights and responsibilities.

## Minutes:

Chairman Weisz: HB 1351

Rep. Laning: I move a Do Pass on HB 1351.

Rep. Kiefert: Second.

Rep. Mooney: Have huge issues with the bill; enforcement issues and put's children in the middle. I recommend a do not pass on this one.

Rep. Fehr: I echo that. I don't know any way to amend this bill to fix it I encourage voting no on it.

Rep. Mooney: I think a parent coordinator is the way to go. The parent coordinator program seems to be effective.

Rep. Hofstad: The overburden we put on our court system would be problematic. I can't support it either.

Chairman Weisz: The child support bills are never easy. I think we have made many improvements over the years, but the system isn't perfect. The number one issue that comes up often has to do with visitation. Putting the sheriff in the middle be in the best interest of the child? I don't know.

Rep. Laning: I feel you are looking at this wrong. We have already discussed in this bill that one of the parents is violating a court order. No way for the non-custodial parent to get possession of that child for the weekend when the law won't do anything about it. The civil court I think is a joke. They wait months to have a case heard there. Seems very unfair to the one who has a court order allowing them partial time and yet the other parent takes the kid and runs off for the weekend or for the week to make sure they don't get them. I don't like children being used as a weapon. It is totally wrong. The non-custodial parent should



have some rights here too. Our system is so screwed up on this; they don't have any way of getting their time.

Rep. Kiefert: I echo Rep. Laning. The testimony was they had the law on their side and a court decision and order and it wasn't being enforced. What are they supposed to do now? The state's attorney and sheriff's office were here and said they were not going to enforce the law. Where are they supposed to go? If anything this bill would try and bring order to it so if they start enforcing the law I would hope they would have more compliance to the court orders.

Rep. Damschen: I'm not married to this bill. I can't disagree on things said on both sides. I believe we have a system that allows for shared parenting in place. I know there are cases that could be handled better by the state's attorney, law enforcement and the courts. The problem is the job is not being done and the law we have is not being implemented. I'm not sure how to accomplish that. Against my better judgment, I'm probably going to vote for it.

Chairman Weisz: If a non-custodial parent brings back a child 15 minutes after the appointed time of return, are we to enforce that? As stated in the hearing about the child being taken out of state, I am disappointed that state's attorney didn't get involved. They had every ability to get involved in that case and they should have. I don't know how we can fix distress and animosity between two spouses for the best interest of the child.

Rep. Anderson: They had a legislative study on this in 2009 and one of the people involved with that said that the parent coordinator worked well and they thought we should put more emphasis on that.

Rep. Mooney: I can compassion for every story I heard. Our system will not be perfect. There are two sides to every story and we didn't hear the other story and don't know all the details. That is an important factor to take in as well.

Rep. Oversen: To persuade you to vote against this one more point. This is not a good route to take for the best interest of the children.

Rep. Kiefert: We all want to do what is best for the kids, but if we are going to make a decision not to honor what the court decides, how can that be a good answer? This bill addresses when the court makes a decision and we are not going honor that, how can we ever have any type of settlement?

Rep. Fehr: That is not accurate to say we are not going to honor it. We are not going to honor it in terms of giving it to law enforcement. The best answer is the parenting coordinators. We should give that system a try.

Chairman Weisz: The clerk will call the roll on a Do Pass on HB 1351.

ROLL CALL VOTE: 3 y 9 n 1 absent

MOTION FAILED

House Human Services Committee

HB 1351

February 12, 2013

Page 3

Rep. Fehr: I motion a Do Not Pass on HB 1351.

Rep. Hofstad: Second.

ROLL CALL VOTE: 9 y 3 n 1 absent

MOTION CARRIED - DO NOT PASS

Bill Carrier: Rep. Mooney

Date: 2-12-13  
Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 1351

House Human Services Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Rep. Laning Seconded By Rep. Kiefert

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN WEISZ		✓	REP. MOONEY		✓
VICE-CHAIRMAN HOFSTAD		✓	REP. MUSCHA		✓
REP. ANDERSON		✓	REP. OVERSEN		✓
REP. DAMSCHEN	✓				
REP. FEHR		✓			
REP. KIEFERT	✓				
REP. LANING	✓				
REP. LOOYSEN		✓			
REP. PORTER	A				
REP. SILBERNAGEL		✓			

Total (Yes) 3 No 9

Absent 1

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:  
Motion Failed

Date: 2-12-13  
 Roll Call Vote #: 2

**2013 HOUSE STANDING COMMITTEE  
 ROLL CALL VOTES  
 BILL/RESOLUTION NO. 1351**

House Human Services Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken:  Do Pass  Do Not Pass  Amended  Adopt Amendment  
 Rerefer to Appropriations  Reconsider

Motion Made By Rep. Lehr Seconded By Rep. Hofstad

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN WEISZ	✓	✓	REP. MOONEY	✓	✓
VICE-CHAIRMAN HOFSTAD	✓	✓	REP. MUSCHA	✓	✓
REP. ANDERSON	✓		REP. OVERSEN	✓	
REP. DAMSCHEN		✓			
REP. FEHR	✓	✓			
REP. KIEFERT		✓			
REP. LANING		✓			
REP. LOOYSEN	✓	✓			
REP. PORTER	A				
REP. SILBERNAGEL	✓				

Total (Yes) 9 No 3

Absent 1

Floor Assignment Rep. Mooney

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1351: Human Services Committee (Rep. Weisz, Chairman)** recommends **DO NOT PASS** (9 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING). HB 1351 was placed on the Eleventh order on the calendar.

**2013 TESTIMONY**

**HB 1351**



#1

Testimony on HB 1351

House Human Services Committee

Rep. David Monson, Dist. 10

Mr. Chairman and members of the House Human Services Committee, I am Rep. David Monson from Dist. 10 in NE ND. This bill is before you today for several reasons. First of all, some of my new constituents in Western Walsh Co. asked me to put a bill in for them. This is a bill meant to address some of their concerns. Secondly, Walsh Co. passed an initiated measure in November that is similar to what this bill tries to address, although I believe that measure is much more sweeping with less room to negotiate than this bill would allow. Thirdly, I believe there is something wrong with the system. When as many people complain about this problem of inequitable sharing of parental duties in divorce cases, there is a problem. The system, if not broken, is seriously troubling. Someone needs to listen and try to adjust the system. This bill may or may not be the solution, but at least it is an attempt to give the people involved a chance to be heard. I am no expert in this field, by any means. My area of expertise is more along the lines of education. Speaking of that, I just finished one bill in the Education Committee and have another up over there as we speak. Therefore, please don't ask me any hard questions as I probably can't answer them anyway, and I need to get back to my next bill. Thanks for your time and consideration. There are several people who are waiting to testify and know much more about this subject than I.

#2

Sandra Barbie

Mr Chairman & Committee, I am a noncustodial parent

I left my abusive Marriage October 20, 2006 taking my 3 young children from Hazen to Bismarck; back to where I am from. They were ages 2 and 5 at the time. The court threw out all of my abuse charges, even with testimony; the guardian et litem did not do follow-up with my group of people who were to give testimony on my parenting, and the court gave my babies to my then husband. He took custody the day after Christmas in 2006. The only reason my ex-husband wanted my children was to hurt me, but he is hurting all 3 of my babies by not spending time with them, teaching them life-skills and how to get along with each other.

Since that time, I have had very little opportunity to see my children other than the every other weekend/holiday. I have missed countless and irreplaceable times, events, and memories with my children who are now just visitors in my life. They are now 8 and 12 years old.

I miss my children and they miss me. My youngest son who is 8 has a hard time fitting in, paying attention and has no friends. He tells me he is yelled at by his dad all of the time. They hear stories about me from him that are not positive. When they are sick and with me, I cannot take them to the doctor, unless he gives me permission. I had counseling sessions set up with my abuse counselor for my oldest son and was taking him until my ex-husband threatened to take her license away. I was going to start taking my twins to the counselor as well, but was no longer allowed. I was taking my youngest son to see a chiropractor for an issue with his back until my ex-husband threatened to sue them for treating my son without his permission. When my daughter had adenoid surgery, I was invited to come to the clinic and I was thrilled she chose me to come in with her while she was being put under anesthesia. I have not been invited to any further appointments. I receive no notification of their health.

I pay child support and live in poverty while my ex-husband builds new buildings on his land in Hazen, buys my kids every electronic toy under the sun so they can occupy themselves. I barely make enough to survive while he makes 25 dollars an hour or more at his job. I cannot claim a deduction on my income taxes for my child support. He went through child support to try to get me to pay for health insurance for my kids; I don't even have health insurance. I would like to have my children one at a time occasionally, so I can spend time alone with each one and get to know them, but he won't allow that to happen. When I call my children every evening between 4:30 & 8:30 pm, we are on speaker phone. 6 years of speaker phone and it frustrates me and my children because background noise is intense. I cannot even have a private conversation with my children so they don't ever have much to say.

As a mother who carried her children inside of her, to have them ripped from my arms by the court system, almost killed me. I went through a dark place and almost did not make it out alive. I have lost all of my rights to my children who were just babies then, and have lived under my ex-husbands control since I left him. I live in poverty, receive SNAP benefits, drive a 13 year old car I cannot afford to have upkeep on, and drive on near desolate highways to pick up my kids for visitation. They are always beating each other up, even my daughter who is 8 is sometimes quite violent. They tear my heart out because they are not taught how to get along with each other, but what can I do? I have no say to my

youngest son being put on meds to control his behavior when all he needs is some attention from his primary parent who is too busy working and living his life.

Why is it that this state does not allow me to have my children even half of the time, to claim a deduction on my taxes for even one of my children that I pay child support for, or look at the mental health of the primary parent I will never know? Why must my children be the ones who suffer? When they left me, they had manners, and behaved well. It has all gone downhill and even my family here, can't handle how they behave with their constant fighting. It hurts me to the core that I am unable to teach them. All I have the power to do is to pray for them.

I am tired of having no money to fix my car, tired of having not time with my children, tired of paying child support to a wealthy man, I am sickened by our court system and just plain frustrated that I have no power or rights! I am tired of my children ~~not~~ not being a part of my life,

I am tired of being a broken hearted mother who has limited access to her children.

#3

Proposed Amendments to HOUSE BILL NO. 1351  
February 5, 2013

**Page No. 1**

- After the reference to section "11-16-01," on line 1 of page 1, insert "14-09-00.1,"

**Page No. 2**

- After the last word, "time," on line 8 of page 2 insert the phrase, "which shall include, if necessary to obtain compliance, upon the request of the non-offending party, the arrest of the offending party and charging of the offending party with disobeying a court order under section 12.1-10-05

**Page No. 3**

- After the last word, "time," on line 27 of page 3 insert the phrase, "which shall include, when there are grounds for doing so, charging and prosecuting an offending party with disobeying a court order under section 12.1-10-05

**Page No. 4**

- Insert the following new section to the Bill in place of the existing **Section 4** of Bill, and renumber the existing Section 4 to be **Section 5**:

**SECTION 4. AMENDMENT.** Section 14-09-00.1 of the North Dakota Century Code is amended and reenacted as follows:

**14-09-00.1 Definitions.**

As used in this chapter, unless the context otherwise requires:

1. "Decisionmaking responsibility" means the responsibility to make decisions concerning the child. The term may refer to decisions on all issues or on specified issues, but not child support issues.

2. “Shared parenting time and residential responsibility” means each parent has their child or children in his or her care for a significant amount of the time that is equal to or as close to fifty percent of the time for each child as can be arranged based on the circumstances of each child and the parents, but in no event may a child be placed in the care of one parent for less than thirty-five percent of the time, and each parent has the responsibility to provide a home for their child or children exactly fifty percent of the time, and the monthly child support payment in the action is to be determined as if the child or children are in each parent’s care exactly fifty percent of the time, subject to the court’s ability to apportion between the parents specific expenses related to the care of the child or children, such as child care, school activity fees, health insurance costs, health care expenses not covered by insurance or other source, and travel expenses related to exchanging the actual physical custody of the child or children between the parents.
3. “Parental rights and responsibilities” means all rights and responsibilities a parent has concerning the parent's child.
34. “Parenting plan” means a written plan describing each parent's rights and responsibilities.
45. “Parenting schedule” means the schedule of when the child is in the care of each parent.
56. “Parenting time” means the time when the child is to be in the care of a parent.
67. “Primary residential responsibility” means a parent with more than fifty percent of the residential responsibility.
78. “Residential responsibility” means a parent's responsibility to provide a home for the child.

**Page No. 5**

- After the coma that follows the word, "rebutted," on line 5 of page 5, insert the phrase, "upon the request of either parent,"
- After the word, "award," on line 5 of page 5, insert the word, "shared"
- After the word, "responsibility," on line 6 of page 5, delete the phrase, "that is as equitable as reasonably possible"
- After the last sentence on line 9 on page 5, insert the following new sentence:  
This presumption does not supercede and is inferior to the presumption on domestic violence that is created under subdivision j of subsection 1 of section 14-09-06.2.

**Page No. 6**

- After line 2 on page 6, insert the following as a new subsection to section 14-09-29 of Section 4 of the Bill:  

6. In any proceeding dealing with parental rights and responsibilities in which the court finds that an allegation of domestic violence by one parent against the other or that an allegation of sexual abuse of a child by a parent is false and not made in good faith, all court costs, attorney's fees, evaluation fees, and expert witness fees must be paid by the parent making the false allegation unless those costs would place an undue financial hardship on that parent. However, if the false allegation includes an allegation that a child was the alleged victim or was one of the alleged victims of the domestic violence or of the sexual abuse and the court does not order the parent who made the false allegation to pay all court costs, attorney's fees,




evaluation fees, and expert witness fees under the mandate of the preceding sentence, the court shall order the parent making the false allegation, at a minimum, to pay all court costs, attorney's fees, evaluation fees, and expert witness fees that are incurred by the other parent in responding to or defending against the false allegation or allegations.

- At the end of Bill, insert the following as two new sections to the Bill:

**SECTION 6. RETROACTIVE APPLICATION OF ACT.** This Act applies retroactively to each pending and past civil action that involves or involved a determination of the parental rights and responsibilities of a child or children in which one or more of the children are younger than eighteen years old as of the effective date of this Act and over which determination the State of North Dakota has jurisdiction as of the effective date of this Act. The limitations under section 14-09-06.6 of the North Dakota Century Code on post-judgment modifications of primary residential responsibility and under Rule 8.2 of the North Dakota Rules of Court on amending an interim order shall not apply to the first motion filed in an action on or after the effective date of this Act wherein the moving party seeks a redetermination of the parenting rights and responsibilities of a child or children under the presumption and evidentiary burden established by the enactment of this Act.

**SECTION 7. EMERGENCY.** This Act is declared to be an emergency measure.



**Testimony in Opposition to HB 1351**  
by  
**Jeff Ubben**  
**Assistant Burleigh County State's Attorney**

Good morning Chairman Weisz and members of the House Human Services Committee. My name is Jeff Ubben, I am an Assistant Burleigh County State's Attorney here in Bismarck. I am here to testify in opposition to HB 1351.

Parenting issues are civil law issues and there are civil law remedies such as contempt of court for a civil Order that are already available to the parties in this type of case. Moreover, State's Attorneys are prosecutors, not divorce attorneys. I don't know of a single prosecutor in North Dakota that is in support of this bill.

In addition, as you may have heard, the number of criminal acts committed, especially in the western part of this State, have skyrocketed over the last few years. Prosecutors and law enforcement officers are overwhelmed, we have no room in our jails and prisons. To require prosecutors and law enforcement to become deeply involved in these burdensome civil law cases would simply break our backs. For all of the foregoing reasons, I urge a DO NOT PASS recommendation for this bill.

I would stand for any questions the committee may have.

#5

## TESTIMONY IN OPPOSITION OF HOUSE BILL 1351

Mr. Chairman and members of the Human Services Committee; my name is Jim Thoreson and I serve as the Chief Deputy of the Cass County Sheriff's Office in Fargo, ND. I am here to testify in opposition to House Bill 1351 for the following reasons:

1. The new proposal of the duties of the Sheriff are extremely vague. What does "assisting the district court in enforcing compliance with a decree or order of the court regarding primary residential responsibility and parenting time" mean?
2. Two examples our office has been called to in the last weeks... over the weekend a child was with the father and the mother called to say the child has asthma and adults were smoking in the fathers residence. The mother wanted her removed and the incident documented for court purposes. The second example was that of a teenage daughter whose mother had a court order that indicated that she was to have primary residency rights of the child. She had allowed the child to live with the father for an extended period of time (months) but wanted us to take the child and place with the mother due to the child not doing well in school as well as missing school.
3. Who are we to decide who should take custody of a child in a divorce case where joint custody is ordered?
4. How would we know if a copy of a court order is the most recent? What if the court order is from another state?

This bill would put Sheriffs across North Dakota in a very difficult situation wherein Sheriffs are deciding the custodial arrangements for children. These decisions should be left with the Courts where they belong.

Mr. Chairman and members of the Committee, I urge you to vote no on this bill.

# Office of State's Attorney

## WARD COUNTY

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NIKOS C. BERKOWITZ

February 5, 2013

Rep. Robin Weisz, Chair  
Human Services Committee  
ND Legislature  
Bismarck, ND 58501

RE: House Bill No. 1351

Chairman Weisz and Committee Members,

This is to state my opposition to House Bill 1351 and respectfully request you kill the amendments that include statutorily requiring State's Attorney's Office and Sheriff's Departments the responsibility of enforcing primary residential responsibilities and parenting time.

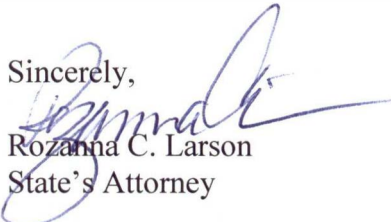
The State's Attorney's Office does not get involved in private matters. We become involved in custody and child matters when there is a legitimate safety concern for the children. Our duties should be left as is for those situations, not increase with the expectation that we will enforce all disputes involving the care and visitation of children of divorce. The amendments to the duties to enforce court orders involving the custody and visitation time of minor children of divorce would be requiring the State's Attorney's Office and the Sheriff's Office in interpreting the Court's Orders, and placing our offices into the realm of refereeing all disputes between the parties.

There are already remedies in place for parties to be able to enforce the Court's Orders in these matters. The proposed amendments could open an area of law that would allow our offices to be used for purposes of abusing the system and harassing the other parties that may not have merit. If there is an emergency situation that pertains to the welfare of the children there are already safe guards in place. The concerned party can already report possible safety issues for Social Services and/or law enforcement to investigate. The amendment, as written would allow any party to the Court's judgments and orders to come into my office and expect enforcement on a matter at any time. This means, one party is two minutes late in dropping a child off, there was an "agreement off the books", but now one party got upset with the other party, and wants to enforce the actual judgment, they would be allowed to come in and expect my office to enforce a judgment that wasn't be followed by either party.

Such amended duties upon the State's Attorney's Office would be such that it would require the office to hire a full time attorney just to handle those matters. It could envision that an attorney

would be required to take immediate action, (ie: “drop everything”) to file ex parte motions, affidavits and seek ex parte interim judicial orders, and then represent private individuals at subsequent hearings. Family law is a specific area of law that requires expertise of attorneys versed in that area of law and interpretation of Court Orders. This expertise is not an area the State’s Attorney’s Office practices in, to require representation of private individuals in private parental rights matters could expose the State’s Attorney’s Office and Counties to malpractice suits from disgruntled clients. It could also expose the attorney’s to disciplinary complaints and investigations by both sides. The State’s Attorney’s Offices are not investigating agencies. We do not bring charges against a person without through investigation or probable cause. This amendment would require us, to on the face of a judgment, enforce an order without knowing the whole story or the reason for any alleged violation.

Sincerely,

  
Rozanna C. Larson  
State’s Attorney

# 7

February 5, 2013

House Human Services Committee

House Bill No. 1351

CHAIRMAN WEISZ AND COMMITTEE MEMBERS:

I'm Bill Neumann, Executive Director of the State Bar Association of North Dakota. The Bar Association has no problem with much of H.B. 1351, but we oppose Section 4 of the Bill. I know the bill's sponsors only want to do what's right for divorcing families. Unfortunately, their good intentions carry the seeds of a bad unintended consequence.

Section 4 of the bill seeks to change section 14-09-29 of the Century Code. Right now subsection 1 of 14-09-29 says (leaving out a lot of extra words) "A court . . . shall award the parental rights and responsibilities concerning the child . . . to a person . . . as will . . . promote the best interests and welfare of the child." For many years now, here in North Dakota and throughout the rest of the United States, the best interests of the child have been the overriding number one consideration in awarding what we used to call child custody.

Section 4 of H.B. 1351 would change that. Section 4 adds a second subsection to 14-09-29, one that creates a presumption that each parent is fit to care for the child. It says if the presumption is not rebutted, the court must make an award of parenting time and residential responsibility that is "as equitable as reasonably possible." And it says the presumption of equal fitness can only be rebutted "by clear and convincing evidence that awarding equitable parenting time and residential responsibility would cause serious harm or detriment to the physical or emotional health of the child." That proposed change is a totally new and different standard for awarding what we used to call custody, it's a major change from the best interests of the child standard in subsection 1 of 14-09-29. The new standard would elevate the rights of the parents over the best interests of the child. Instead of saying we must do what's best for the child, it says we now can only avoid doing what's worst for the child. The two standards are different, they are not consistent with each other, and yet, if Section 4 of H. B. 1351 is enacted, the two inconsistent standards will both be in 14-09-29.

We can't have both standards at the same time. Proponents may try to tell you the two standards can exist side by side, but they simply can't. There will be a



few cases in which splitting custody “as equitably as reasonably possible” may be in the best interests of the child, but in a great number of cases, probably most of them, that’s just not going to be the situation. In all cases where the facts don’t match up, one standard is going to have to trump the other.

Now let me be perfectly clear: I am not suggesting you should repeal the best interests standard in subsection 1. The last thing we want is national headlines blaring “NORTH DAKOTA ABOLISHES CHILDREN’S BEST INTERESTS!” But I don’t see how we can expect our courts to make sense of a statute that directs them to apply two different, inconsistent standards at the same time.

A second problem I have is with the word “equitable.” That word appears in lots of family law Supreme Court opinions, but it’s always applied to property division, not child custody. More times than I can count, the Court has said a property division should be equitable, but equitable does not necessarily mean equal. Dragging a property division concept into child custody law tells us what is really wrong with this proposal. It promotes the “ownership” rights of the parties in their children over the best interests of those children, and that’s simply wrong.

Since I came to this job I’ve worked hard to reduce the stress and trauma of the divorce experience. The Bar has supported family law mediation in the courts, a program enacted and funded by the Legislative Assembly that has had a wonderful effect on divorcing parties, helping them to communicate with one another and settle many of their problems. We’ve supported legislative changes that have helped divorcing parents refocus their attention on their children, instead of on their grievances with one another. We will never make divorce a pleasant thing, but we should at least do all we can to avoid unnecessary trauma.

As I said, I know the sponsors of this bill only want to do what’s right for divorcing families. The problem is, the effect section 4 will have on divorcing families isn’t right for anybody. It will lead to more angry disagreements, more trials, and more appeals as we try to sort out two inconsistent standards. The Bar doesn’t want that, and I’m sure neither do you. I urge you to amend H.B. 1351 by deleting Section 4.

If you have any questions, I will try to answer them.

#8

**STATE BAR ASSOCIATION OF NORTH DAKOTA**

**TESTIMONY ON HOUSE BILL 1351  
SHERRY MILLS MOORE**

Good Morning, I am Sherry Mills Moore, a volunteer lobbyist for the State Bar Association of North Dakota (SBAND), on behalf of SBAND here today to oppose HB 1351. I am an attorney in private practice in Bismarck, with a focus on family law. In the past I have chaired many of the SBAND family law studies, often working with the legislature in doing so.

Our primary concern is with Section 4. Right now we have one standard – what is best for the children. What is best for a child is set out by statute in NDCC 14-09-06.2. In fact this legislative body spruced those up in the 2009 session.

HB 1351 would have us look to the parents – what is equitable for the parents. Equitable is a property term. People equitably divide their cattle, their furniture, their debts. You cannot equitably divide a child.

Section 4 creates a sea-change in the measure of custody. And, it creates two conflicting measures for deciding custody – are they fit and if so what is equitable.

HB 1351 starts with the presumption that all parents are fit. To overcome that presumption the court has to find a parent unfit by clear and convincing evidence, which is a very high level of proof. Nearly everything in family law requires a “preponderance of the evidence. To go away from an equitable division of the children, the court would have to also decide that an equitable arrangement would harm the child.

Under HB 1351 the first the point of decision will be the “fitness” of the parent. The second point is what is equitable. We have best interest of the child now, but would have what is equitable. In property equitable does not have to be equal. We have best interest and we would have equitable, which has no meaning at all in the world of children and divorce.

Parental fitness has been used as grounds to terminate parental rights, not award custody, it will take years to develop a definition of “unfitness” through

the court system. The concept of “unfitness” is broad and subjective and will lead to significant litigation, which is rarely good for children or parents.

There are lots of fit parents who may not act in the best interests of their children and don’t have the capacity or disposition to undertake the day-to-day raising of a child.

If parents are found to be fit, the court is to craft an arrangement that is equitable and reasonable. But “equitable” has no meaning in the world of custody only for property. Used for property equitable is refined by what are called the Ruff-Fisher factors and include – is the asset income producing, how long was the marriage, how old are the parties and what is their health, what does each person earn, and where did the asset come from. These are not measures for children. Children are not pension plans and savings accounts and cattle and furniture.

So, if we change from looking at what is best for the children to what is fair to the parents, we are left with a blank slate for deciding what to do with children of divorce. We have no law, no rules, no practice, no guidance. This means more litigation, longer litigation, which in turn means more stress to parents, more stress to the court system, less effective mediation and worst of all, much more stress to the children.

If this isn’t confusing enough, this bill says that custody will be made equitably and reasonably. But it doesn’t entirely get rid of the best interest standard because that part of the statute is still in place. So the courts have to decide are they parents fit, if so, what is equitable. Nowhere does “equitable” tie into the best interest standards. So what do they mean? We would have one law that says do what is fair to the parents and another that talks about what is best for the children but cuts them out of the process.

Let me talk for a minute more about what we have now. Currently, under NDCC 14-09-06.2, parenting time is based upon the following factors:

- a. The love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurture, love, affection, and guidance.
- b. The ability of each parent to assure that the child receives

adequate food, clothing, shelter, medical care, and a safe environment.

c. The child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future.

d. The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community.

e. The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

f. The moral fitness of the parents, as that fitness impacts the child.

g. The mental and physical health of the parents, as that health impacts the child.

h. The home, school, and community record of the child and the potential effect of any change.

i. If the court finds by clear and convincing evidence that a child is of sufficient maturity to make a sound judgment, the court may give substantial weight to the preference of the mature child. The court also shall give due consideration to other factors that may have affected the child's preference, including whether the child's preference was based on undesirable or improper influences.

These factors are about the children, all about the children and what parenting arrangement can best meet the needs of the children.

If custody is determined not on what the children need, but on what is equitable to the parents, the children will shoulder the burden of making it work. The children will have to adapt to a situation which doesn't work for them in order to make it fair for the parents.

Part of the problem is that even though our courts have said over and over that with regard to property, equitable is not equal, there seems to be some sense that perhaps this bill is intended to cloak "equal" time under the name of

“equitable”. We know what equal means. We know what the best interest is. We don’t know what equitable means. Let me give you some examples:

**Example 1.** Mom has been a stay at home parent, primarily responsible for all the details of the children’s lives. They turn to her for their joys, their concerns, their needs, their nightmares, their injuries. She knows their friends, arranges their activities, transports them, talks out their problems. She alone monitors their homework, communicates with the teachers, takes them to the physician, dentist, orthodontist. Dad is a good guy but he works a lot and has left most of the care to mom. They divorce. What happens? With the best interest standard, the children would more likely than not be primarily with mom with lots of time to dad. Under either equitable and equal time presumption, no consideration is given to the love, affection and other emotional ties between the children and their mother. No consideration is given to their respective abilities to nurture and show affection to the children. Under an equitable division of the children, it may or may not be equal, but it wouldn’t be tailored to the children’s needs.

**Example 2.** Mom and Dad were never married, dated only for 3 months, are both still in high school. Dad lives at home with a supportive, loving, involved extended family. Mom’s family was dysfunctional from the beginning and lives on the east coast. Mom lives with three friends. For six months after the child is born the father has the lion’s share of time with the child, mom is more involved in her high school social activities. Currently, the court would look to which parent and which division of parenting time would best meet the children’s needs. Under equal time, this six month old child would spend half time with each parent. And with equitable time, we have no idea what would happen, but what is best for this infant, including that child’s developmental needs and the very different support systems, would not be part of the equation.

**Example 3.** Mom and Dad divorce with three children after 10 years of marriage. Mom is a good parent except she demeans dad, both directly and more subtly. Dad is a good and involved parent but refuses to



retaliate with negative information about Mom. Mom sabotages Dad's parenting time in the interim period. Under the best interest factors, the court can consider Mom's behavior, but it does not rise to the level of "unfit" nor cause serious harm or detriment to the physical or emotional well-being of the child it would not come in under equitable or equal time.

**Example 4.** Dad has had 15 affairs during the marriage. Mom leaves him and wants primary residential responsibility of the two children. The children are aware of the affairs because while he was to be caring for the children, he took them to the girlfriend's house, leaving them in with her 15 year old daughter. He has brought women home when his wife was gone but his children were present. He is a terrible husband but a pretty decent father. Again, under equal or equitable, the court would not consider this behavior.

**Example 5.** Mom and Dad have a high conflict marriage. They argue about money, children's discipline, dad's affair and mom's temper. They go through a nasty divorce trial in which each highlights the weaknesses of the other and their extended family backs each of them up. Neither is unfit. Now the court could consider whether parents who have so little ability to cooperate can share parenting. Under an equitable division of the children, that would not be a factor. Now this couple who were high conflict before, must coordinate raising their children from two different houses. The burden then falls on the children to do what their parents could not, to make it work .

**Example 6.** Mom and Dad have two children ages 15 and 16. The children are mature, responsible, well-adjusted. Both want to reside with their father for reasons they are able to articulate without any pressure or enticement. Mom is a fit parent. Nothing in HB1351 provides for the court to consider the children's preference.

**Example 7.** And perhaps the most obvious, Mom lives in Bismarck, Dad lives in Fargo. Both are good parents. They have a 4 year old, and a 15 year old. The 4 year old has been in the same day care from birth. The 15 year old plays basketball and track, has a part-time job at the hospital,

and is on student counsel. Neither is unfit so custody must be equitable. The children move from Bismarck to Fargo every six months. The 15 year old has two schools with six teachers each. He cannot play any sport that spans two semesters because of school rules. He has to leave his job because he cannot reliably attend. He is not re-elected to student counsel because he is only there part of a year. Each child has two pediatricians, two dentists, two counselors, two sets of friends, two neighborhoods. The 4-year old also has two day care providers. The 4 year old would either spend great periods of time away from each parent, which by all measures is hard on his development, or bounce back and forth frequently being separated from his sibling. Being divided between the two parents might well be equitable for the parents, but it does not meet the needs of the children.

### **Retroactive Application**

It is fundamental that children thrive in an environment of stability and continuity of care. Current law deters parents from use of the courthouse as a weapon to further frustrate the other parent by requiring that something has to have substantially changed for residential responsibility to be litigated again.

By saying "In any proceeding dealing with parenting rights and responsibilities..."this bill seemingly would allow all custody cases to be re-opened and residential responsibility to be changed to equitable, unless the parent is then found unfit. This would not only clog the court system, but place many, many families back into litigation, months and even years after their divorce was completed.

HB1351 will have an economic impact on parties and on the state. While it is true that some parents will simply capitulate to the presumption, many will simply digger deeper and throw mud harder to get to the very high standard of "clear and convincing". In addition, because we will be anchorless – not knowing what "equitable" means, not knowing the role of the best interest standard -- litigation will be more extensive and more expensive.

Currently out of about 27,000 child support orders, nearly 900 of them involve equal custody. This information came from the Department of Human



Services. Last session the number of equal custody orders was about half that. Because there is no such thing now, the Department cannot report on “equitable” divisions of children. With HB1351, all then open cases would be vulnerable to reopening.

Any reopened parenting time case has to go to mediation. The mediation program has turned out to be very successful. How successful it can be if swamped with re-opened case is certainly debatable. Of course they will not all go to trial, but each case that is reopened means cost to the system, cost to the parties and cost to the children.

### **CONCLUSION**

Ideally, children being raised by parents who do not live together would be raised by two involved and loving parents. This is not always the case. Forcing children into parenting arrangements that ignore what children need would be devastating and the tension and uncertainty for the children would be enormous. All-in-all, by turning our law on its head, the HB1351 would disadvantage children. We have to continue to look at what is best for children not equitable to the parents.

Thank you for giving me the opportunity to speak with you today. If you have any questions I am here to answer them. If any arise in the future feel free to contact SBAND through Bill Neumann at 255-1404 or [bill@sband.org](mailto:bill@sband.org), or me at 222-4777 or by email to [sherry@millsmoorelaw.com](mailto:sherry@millsmoorelaw.com). Thank you.

Part  
of #8

## EQUAL CUSTODY

The quest to require equal custody has a history in North Dakota and I provide that as follows:

Back in 2006, Initiated Measure 3 was rejected by the voters of this state with 56.41% of the vote. At that time, and now, the State Bar Association of North Dakota asked members who practice family law to analyze the provisions. In drafting this testimony, we include their analysis. In 2006 Initiated Measure 3 was placed on the ballot and soundly rejected. Recognizing that the very fact of the measure and the vote demonstrated concern with the current system, SBAND asked for a study resolution in the 2007 session.

House Concurrent Resolution 3008 was passed, picked for study and assigned to an Interim Judicial Process Committee. SBAND formed a task force of parents, lawyers, guardians ad litem, legislators, custody investigators, and mediators. The SBAND committee considered the issue of a presumption of equal physical custody, even meeting with and soliciting comments from the supporters of the failed initiated measure. From this work came a recommendation for an overhaul of our custody system. For the 2009 session, as a result of its work, the Interim Judicial Process Committee submitted SB 2042 which passed this legislature resoundingly. It was made into law and has been in effect since August of 2009, over three years. As you recall, that law changed the vocabulary, introduced the use of parenting plans, changed some of the best interest factors, and provided for use of parenting coordinators for high conflict cases.

### **Concerns.**

Currently, courts can and do order that parents have equal residential parenting time. Although it may not be possible to have an exact count, child support does keep track because these situations result in a different computation of child support. I believe that nearly 900 orders are in effect which involve an offset (typically equal parenting time although it may include split parenting time). Most commonly this occurs when the parents agree to this arrangement, but even then it must be in the best interest of the child. Parenting plans can now be crafted to meet the children's individual growth and development. HB1351 would ignore that.

## **Review Of Joint Physical Child Custody Impact**

Joint physical custody can work and be in the best interests of children. This is commonly found where parents are low conflict and personally committed to raising the children together, have good to excellent communication and methods in place to resolve disputes. Most importantly, they develop a schedule that is workable for the children.

Equal physical custody can be very difficult for parents, and children, to implement. Research indicates that children of divorce are best served in a stable and routine environment with frequent contact with the other parent.

Johnston (1995) concluded from her most recent review that "highly conflictual parents" (not necessarily violent) had a poor prognosis for becoming cooperative parents and there is increasing evidence that children of divorce have more problems because of the conflict between the parents before the divorce and not because of the divorce itself (Kelly, 1993). "High conflict" parents should be allowed to develop separate parenting relationships with their children. Frequent visits and joint custody schedules led to more verbal and physical abuse. More frequent transitions between high-conflict parents were related to more emotional and behavioral problems of the children. Concerns should also exist for instances where there are issues of domestic violence. Will joint physical custody be presumed then too? Johnston, J. R. (1995). Research update: Children's adjustment in sole custody compared to joint custody families and principles for custody decision making. *Family and Conciliation Courts Review*, 33, 415-425.

In 2009 Minnesota studied the merits of a joint physical child custody presumption. The cite to this report is <http://www.leg.state.mn.us/docs/2009/mandated/090065.pdf>.

One of the contributors to the study is Mindy F. Mitnick, Ed.M, M.A, a highly recognized well respected psychologist from Minneapolis. She particularly emphasized the misfits that come along with using a one-size-fits-all equal custody presumption.

First, she succinctly stated the obvious, that those parents best suited for equal parenting time, don't need a presumption. Beyond the failure to tailor a parenting schedule to meet the needs of the individual family, she had major concerns for infants and toddlers and never-married parents.

Mitnick says, parents who do best with joint custody are low conflict, have good communication skills, are flexible, put their children's needs first and live in geographic proximity.

Children of high conflict parents do poorly, Mitnick reports. The children show heightened aggression, impulsivity, anxiety, poor social skills and other emotional problems. Adolescents in high conflict families show increased depression, decreased school effort, social withdrawal and poorer self-awareness. They are subject to parents who cannot separate what the children need from their own needs, who use their children in ongoing disputes and sabotage parental relations.

Forced equal custody would increase the numbers of children exposed to high and moderate levels of conflict while their parents negotiate the details of their lives. She says, "conflict, even at moderate levels, can disrupt children's ability to accomplish the developmental milestones of learning to trust, to manage their own impulses, to achieve emotional regulation, and to develop a positive self- concept." Minnesota Report, p. 40.

Equal parenting time does not meet the developmental needs of young children. North Dakota just added consideration of children's developmental needs as one of the best interest factors. Children under age 6 in cooperative divorcing families who had a greater number of overnights with the non-residential parent, also had significantly more emotional distress and behavioral disruption. Mitnick, Minnesota Report, p. 41.

Even when the non residential parent has been involved in care of the young child, the security attachment is negatively impacted. "Without secure attachments children start life on the rockiest of foundations and remain at risk throughout their lives for all forms of emotional and behavioral disorders", Mitnick, Minnesota Report, p. 41.

For infants and toddlers Mitnick concludes, "only the most mature, cooperative and flexible separated parents can successfully share physical custody of infants and toddlers without disrupting their attachments to both parents." Much as we respect and appreciate our good old North Dakota values and manners, we cannot presume that our citizens so squarely fall into that definition – mature, cooperative, flexible—that the one-size-fits-all equal custody will not harm our young children.

The most recent long term studies on joint parenting have come out of Australia. Included with my testimony is the executive summary of the "Post-Separation Parenting Arrangements: Patterns and Developmental Outcomes For Infants and Children, Synopsis Of Two Studies, (abbreviated as Australian Report). Here is what they said,

"Children read their parents' emotions as they move between households and experience each parent's emotional availability and capacities. The relationships within each household and the space between become the soil within which children develop post separation, with outcomes significantly determined by the richness or toxicity of that soil. Consistent with two decades of international research from the high conflict divorce arena, these two new Australian studies show that for school-age children, nurturing relationships with each parent and supportive relationships between parents



had greater bearing on many outcomes than the pattern of overnight care itself. While children in shared care arrangements reported more inter-parental conflict than children in other arrangements, and reported lower contentment with their arrangements, neither a child's living arrangement at any single point in time, nor their pattern of care across time, independently predicted total mental health scores after four years. Rather, it is the manner in which the living arrangements are maintained that affects the child's emotional well-being. Rigid arrangements often fueled by acrimony and poor cooperation and set out in court orders were associated with higher depressive and anxiety symptoms in children as reported by their parents and this form of living became something children often sought to change." Australian Report p. 8

The Australian report, too, concluded that children under the age of 5 were negatively impacted by a shared parenting arrangement. Children who have reached age 4-5 years old are better able to handle frequently shared overnight arrangements because they can self soothe and organize their own behavior, be capable of representational thought and anticipation, have adequate receptive language, anticipate and communicate about past and future events. Australian report, p. 9

Never-married parents have their own set of issues. This group, as a whole, have often not had an ongoing relationship where they learned to communicate, trust each other, mutually support each other, work out the balance of power. Many have had little to no discussion of how to raise their children or even viewing the children as "ours". They tend to be younger parents with younger children, multiplying the concern for younger children.

Joint custody is not a stable mode of custody. Of 1,000 joint custody families, nearly half did not maintain the arrangement but rather had custodial drift. Eleanor E. MacCoby & Robert H. Mnooking, *Dividing the Child: Social and Legal Dilemmas of Custody* (1992).

From a study comparing the success of joint physical custody agreed to by parties or ordered by the court, 27% were successful, 42% maintained it only under great stress and 31% were unable to retain the arrangement. Children who adapted well were those who had agreements negotiated outside the court system. Susan Stenman et al, *A Study of Parents Who sought Joint Custody following Divorce: Who reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. Am. Acad. Child Psychiatry 554 (1975).

California had a presumption of equal custody. In a survey of their family court judges, 2/3's concluded that it led to mixed or worse result for children because of lack of parental cooperation, continuing parental conflict, instability caused by moving between

households and logistical difficulties for parents, Thomas J. Reidy, et.al. Child Custody Decisions, A Survey of Judges, 23 Fam.L.Q.75, 80 (1989).

Think of it from the child's perspective. They have two homes, two neighborhoods, two sets of friends. A 7 year old wrote, "Children don't keep 'pointment books. They forget that I am coming and no one invites me to birthday parties or sleepovers." Minnesota Study. Or "another 7 year old who loved to play baseball had to give it up. His coach said, 'Son you have a fine pitching arm but you have to be here'." Unless parents can arrange their lives to live close by each other, children in joint custody give up a lot of their extra-curricular activities and feel they are paying the price of their parent's divorce.