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2003 HOUSE POLITICAL SUBDIVISIONS

HB 1402

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1402

House Political Subdivisions Committee

☐ Conference Committee

Hearing Date: February 13, 2003

Tape Number	Side A	Side B	Meter #
1	X		29.5-54.0
1		X	0.0-11.9
Committee Clerk Signature Mikki Schmidt			2-20-03

Minutes:

TAPE 1; SIDE A:

(29.1) CHAIRMAN GLEN FROSETH: We will open the hearing on HB 1402.

(29.6) REP. ANDREW MARAGOS: This is a companion bill to 1401 which was heard in Judiciary about a week ago.

(30.7) LUKE DAVIS: (Testimony in support) (See attachment #1 & #2)

(47.7) ALLEN RIEMERS: I agree with Mr. Davis on amending the bill on the word "may" to "shall." Explained about the shared custody and how judges don't want the extra work. (See attachment #3- amendment & #4) Explained the amendment. **(53.9)**

TAPE 1; SIDE B:

(3.8) ALLEN RIEMERS: (Continued testimony)

(4.2) ROLAND RIEMERS: (Testimony in support)

(7.0) SHERRY MILLS MOORE; STATE BAR ASSOCIATION: (Testimony in opposition)

(See attachment #5)

(9.9) CHAIRMAN GLEN FROSETH: The custody agreements, are they reviewed by the courts.

(10.1) SHERRY MILLS MOORE: The courts don't get involved, so yes.

(10.5) REP. ANDREW MARAGOS: If we change the "may' to "shall", what kind of problems would that create?

(10.7) SHERRY MILLS MOORE: Taking away authority. (Can't hear)

(11.4) CHAIRMAN GLEN FROSETH: Any further testimony? Hearing none, we will close the hearing on HB1402. **(11.9)**

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1402

House Political Subdivisions Committee

❑ Conference Committee

Hearing Date: February 13, 2003

Tape Number	Side A	Side B	Meter #
2	**X**		**32.3-34.9**

Committee Clerk Signature Mickei Schmidt 2-28-03

Minutes:

TAPE 2; SIDE A;

(32.3) CHAIRMAN GLEN FROSETH: We will open the hearing on HB 1402.

(32.4) REP. ANDREW MARAGOS: I WOULD MOVE ONE SMALL AMENDMENT TO CHANGE SHALL TO MAY.

(32.5) REP. MARY EKSTROM: I SECOND IT.

(32.5) CHAIRMAN GLEN FROSETH: We have a motion to amend on page 1, line 11 after parts, the word may to shall. We will have our Intern draft that amendment and I think we could go ahead and take action on it. I'll take a voice vote on the amendment: 12-y; 2-n; 0-absent. The amendment passes.

(33.3) REP. MARY EKSTROM: I MOVE A DO NOT PASS.

(33.5) REP. WILLIAM KRETSCHMAR: I SECOND IT.

(33.6) CHAIRMAN GLEN FROSETH: Any further discussion? Hearing none, I will have the clerk call the **Roll Call Vote: 12-y; 2-n; 0-absent; Carrier: Rep. Kretschmar.**

30711.0101
Title.0200

Adopted by the Political Subdivisions Committee
February 13, 2003

YK
2/14/03

HOUSE AMENDMENTS TO HOUSE BILL NO. 1402 **Pol Sub 1-14-03**

Page 1, line 11, replace "may" with "shall"

Renumber accordingly

Date: 2-13-03

Roll Call Vote #: 3

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1402

House **"POLITICAL SUBDIVISION"** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 30711.0101

Action Taken Do Not Pass As Amended

Motion Made By Rep. EKstrom Seconded By Rep.

Representatives	Yes	No	Representatives	Yes	No
Chairman Glen Froseth	✓				
Vice-Chairman Nancy Johnson	✓				
Mike Grosz	✓				
Gil Herbel	✓				
Ron Iverson	✓				
William E. Kretschmar	✓				
Andrew Maragos		✓			
Dale Severson	✓				
Alon Wieland	✓				
Bruce Eckre	✓				
Mary Ekstrom	✓				
Carol A. Niemeier		✓			
Sally M. Sandvig	✓				
Vonnie Pietsch	✓				

Total (Yes) 12 No 2

Absent 0

Floor Assignment Rep. Kretschmar

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

REPORT OF STANDING COMMITTEE (410)
February 14, 2003 3:44 p.m.

Module No: HR-29-2846
Carrier: Kretschmar
Insert LC: 30711.0101 Title: .0200

REPORT OF STANDING COMMITTEE

HB 1402: Political Subdivisions Committee (Rep. Froseth, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (12 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). HB 1402 was placed on the Sixth order on the calendar.

Page 1, line 11, replace "may" with "shall"

Renumber accordingly

2003 TESTIMONY

HB 1402

#1 HB 1402

Reasons for Mandatory Co-Parenting
Excerpts from Responsible Fathering
Doherty, Kouneski, Erickson UMM/SP Sep 96

Luke Davis P O Box 5731 Grand Forks, ND 58206-5731
218-779-8525

Evolution of social consciousness will involve mothering to mean support father bond
Page 13
Fathering sensitive to economic forces and shifts in public policy
Page 13
Highly involved fathers encounter negative attitudes from friends, family, and workers
Page 14
Multiple factors influence fathering-individual to relational to contextual
Page 15
Factors are additive i.e. involvement and income will overcome mothers low expectations
Page 15
Fathers should have advocates and brokers to deal with problems related to; court, child support, child protection, social service agencies, schools, hospitals, youth programs
Page 18
Mothers expectations and behaviors, quality of co-parental relationship, economic factors, institutional, practices, and employment all affect fatherhood.
Page 19

RESPONSIBLE FATHERING: AN OVERVIEW AND CONCEPTUAL FRAMEWORK

William J. Doherty, Ph.D., Edward F. Kouneski, M.A., and Martha Farrell Erickson, Ph.D. of the University of Minnesota. September, 1996.

This report was prepared for the Administration for Children and Families and the Office of the Assistant Secretary for Planning and Evaluation of the U.S. Department of Health & Human Services under contract HHS-100-93-0012 to The Lewin Group.

EXECUTIVE SUMMARY

A consensus is emerging that responsible fathering means establishing paternity, being present in the child's life (even if divorced or unmarried), sharing economic support, and being personally involved in the child's life in collaboration with the mother. The research literature on fathering has been long on empirical studies of specific fathering behaviors and notably short on theory and the bigger picture. And while innovative programs to promote better fathering have multiplied in the past decade, they are often not connected to either research or theory. This report summarizes the research on factors that influence fathering and presents a systemic, contextual framework that highlights multiple interacting influences on the fatherchild relationship: father factors, mother factors, child factors, coparental factors, and broader contextual factors. A principal finding of this report is that fathering is influenced, even more than mothering, by contextual forces in the family and the community. A father who lacks a good relationship with the mother is at risk to be a nonresponsible father, especially if he does not reside with the child, as is a father who lacks adequate employment and income. On the other hand, this contextual sensitivity means that fathering can change in response to shifts in cultural, economic, institutional, and interpersonal influences.

The principal implication for fathering programs is that these programs should involve a wide range of interventions, reflecting the multiple domains of responsible fathering, the varied residential and marital circumstances of fathers, and the array of personal, relational, and ecological factors that influence men as fathers. In particular, fathering programs should:

a. involve mothers where feasible and, especially for unmarried fathers, families of origin;
b. promote collaborative coparenting inside and outside marriage;
c. emphasize critical transitions such as birth of the child and divorce of the parents;
d. deal with employment, economic issues, and community systems;
e. provide opportunities for fathers to learn from other fathers; and
f. promote the viability of caring, committed, and collaborative marriages.

FULL REPORT

#0 2-13-03
3 HB 1402

14-09-06.1. Awarding custody - Best interests and welfare of child.

An order for custody of an unmarried minor child entered pursuant to this chapter must award the custody of the child to a person, agency, organization, or institution as will, in the opinion of the judge, promote the best interests and welfare of the child. Between the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the best interests and welfare of the child. *The court, unless given clear and convincing evidence that the child would suffer serious physical, mental, moral, or emotional harm, shall presume that a shared custody arrangement is in the best interest of the child. And shall require the parents to submit a shared parenting plan to that effect.*

By: Roland Riemers, Box 14702, Grand Forks, ND 58208, 701-885-1555

#042-13-03
HB 1402

1402

KNUTSON v. KNUTSON, 2002 ND 29, 639 N.W.2d 495, 501

CURRENT SHARED CUSTODY LAW

[¶ 17] Jacqueline Knutson asserts the decree should be set aside because the provision giving the parties joint physical custody of Ashley and awarding neither party child support renders the decree unconscionable.

[¶ 18] The parties each have custody of Ashley on alternating weekends, from Friday after school until Monday morning. Jacqueline Knutson has custody of Ashley on Mondays and Wednesdays and Richard Knutson has custody of Ashley on Tuesdays and Thursdays. The parties alternate custody on holidays, and each has an uninterrupted period of custody for four weeks during the summer. In its order denying the motion to vacate, the trial court found, in part:

> *When determining custody, the Court must consider what is in the best interest of the child. . . . Although the existing custody arrangement and schedule may not be the most stable, the record shows that Ashley is thriving under the current arrangement. Ashley continues to succeed in school and her extracurricular activities, while at the same time maintaining her individual relationship with each parent. In addition, there do not appear to be any difficulties between Richard and Jacqueline in complying with the custody schedule. Based on these facts, the Court concludes that the custodial arrangement as it currently exists serves Ashley's best interests. Thus, the Court finds no reason to vacate the settlement agreements (sic) as to custody. Accordingly, Jacqueline's motion to vacate the settlement agreement as to custody of Ashley is denied. Based on these findings, the Court need not consider whether Jacqueline is entitled to child support because Ashley will continue to reside with each party fifty percent of the time.*

The Court concludes that neither the custody arrangement nor the waiver of child support are unconscionable.

Page 502

[¶ 19] **It is not generally in the best interest of a child to be bandied back and forth between parents in a rotating physical custody arrangement.** Peek v. Berning, 2001 ND 34, ¶ 19, 622 N.W.2d 186. However, **rotating custody arrangements are not per se erroneous when supported by findings that alternating custody is in the best interest of the child.** Id. at ¶ 20. Generally, rotating custody is only in the child's best interest if parents are able to cooperate and set aside their differences and conflicts in their roles as parents. Id. at ¶ 22. The **evidence supports the trial court's findings that Ashley is "thriving" under the current custody arrangement** and that Richard and Jacqueline Knutson have fully cooperated in their roles as parents, making the rotating custody arrangement work.

[¶ 20] Child support determinations involve questions of law subject to the de novo standard of review, findings of fact subject to the clearly erroneous standard of review, and, in some limited areas, matters of discretion subject to the abuse of discretion review. Buchholz v. Buchholz, 1999 ND 36, ¶ 11, 590 N.W.2d 215. A court errs as a matter of law when it fails to comply with the requirements of the child support guidelines in determining an obligor's child support obligation. Id. The child support guidelines provide a schedule of child support to be paid by the noncustodial parent to the custodial parent. However, the guidelines do not address the issue of support when parents jointly share physical custody of their child for equal amounts of time. When the guidelines do not address a situation, the trial court must enter an order appropriate to the needs of the child and the ability of the parent to pay. See Montgomery v. Montgomery, 481 N.W.2d 234, 235 (N.D. 1992).

[¶ 21] Under N.D.C.C. § 14-05-24, the trial court retains continuing jurisdiction to modify child support and child custody upon a showing of changed circumstances. Toni, 2001 ND 193, ¶¶ 9, 11, 636 N.W.2d 396. We conclude the trial court did not abuse its discretion in refusing to vacate the divorce decree on the ground that the child custody and child support provisions are unconscionable. The decree need not be vacated for the court to revisit those issues.

[¶ 20] **Rotating physical custody is not clearly erroneous when supported by a district court's findings that alternating custody is in the best interests of a child.** Kasprowicz, 1998 ND 68, ¶ 15, 575 N.W.2d 921. For example, in Lapp v. Lapp, 293 N.W.2d 121, 128 (N.D. 1980), **we affirmed a physical custody award rotating on a six-month basis. We noted both disadvantages and advantages of this Solomonic arrangement.** Id. at 130. **On the one hand, frequent shifting of a child from home to home affects the child's emotional stability. Id. But on the other hand, children need interaction with both parents. Id. We noted several viable alternatives to rotating custody, such as awarding sole custody to one parent and liberal visitation to the other.** Id. at 129. **Ultimately, the paramount consideration in custody determinations is the best interests of the child.** Id. at 130.

[¶ 21] Nevertheless, in Kasprowicz, 1998 ND 68, ¶ 15, 575 N.W.2d 921, **we remanded for reconsideration of a rotating custody arrangement. Because the trial court had not made a specific finding that alternating physical custody was in the child's best interests, we suspected this arrangement was made either to "punish or reward the parents."** Id. Similarly, in In re Lukens, 1998 ND 224, ¶¶ 3, 17, 587 N.W.2d 141, **we reversed and remanded when a trial court did not make findings indicating the child's best interests warranted rotating physical custody monthly until the child was a year and a half and then alternating every four months until school age. We indicated rotating custody orders are often disapproved by the courts and presumptively not in the interests of very young children.** Id. at ¶ 15. The trial court's purposes in ordering rotating custody were to force the parents to assume parental responsibility, encourage them to reopen direct communication, and allow equal sharing of the child's upbringing; but we concluded these goals could be substantially achieved with less disruption by granting one of the parents primary physical custody and the other liberal visitation. Id. at ¶ 16.

[¶ 22] **Generally, rotating custody arrangements are only in the child's best interests if parents are able to cooperate and set aside their differences and conflicts in their role as parents.** Jarvis v. Jarvis, 1998 ND 163, ¶ 36, 584 N.W.2d 84. In Jarvis, we affirmed the trial court's denial of a father's request for alternating joint physical custody because of the father's anger, hostility, and lack of communication. Id. at ¶ 37. We explained the parents would need to communicate frequently **Page 194** in such a custody arrangement, and under these circumstances splitting custody and authority over decisions affecting the children could only continue the animosity between the parents and the innocent child would most surely suffer. Id. at ¶¶ 36-37.

[¶ 23] Here, the trial court found the child's best interests would be served by a 28-day schedule of rotating shared custody before the child starts kindergarten, after which custody alternates on a monthly basis. The trial court justified this custody arrangement because the child's best interests involve spending as much time as possible with each parent. **However, the court did not make a specific finding that Peek and Berning could communicate and cooperate sufficiently to set aside their differences.** The trial court's scant findings of cooperation between the parties are contradictory. For example, under the best interests factor (a) the trial court found Peek and Berning "disagree on discipline methods," but under factor (j) found Berning "agreed to not spank [the child], and there is no evidence she has done so since the discussion." The trial court also stated Berning is concerned the child will face racial discrimination at the elementary school of Peek's choice, yet the court also stated Berning "described the school as excellent." **We remand for the trial court to make definitive findings regarding the ability of Peek and Berning to cooperate and communicate before awarding rotating physical custody.** See Jarvis, 1998 ND 163, ¶ 36, 584 N.W.2d 84 (stating as a general rule, rotating custody arrangements are only in the child's best interests if parents are able to cooperate and set aside their differences and conflicts in their role as parents). If the trial court is unable to make such findings, the trial court may need to revisit the issues of custody and visitation.

CHILDREN'S CONSTITUTIONAL RIGHTS

Interest of T.K., 2001 ND 127 No. 20000328

HEADNOTE: http://www.court.state.nd.us/court/opinions/20000328.htm

Parents' fundamental and natural rights to their children are of constitutional dimension, but they are not absolute, and parents must at least provide care to their children that satisfies the minimum community standards.

When the mental and physical health of a child are the concerns, it is not enough that a mother indicates a desire to improve, and her failure to cooperate with social service assistance programs is a relevant factor in terminating parental rights.

In the Interest of T.K., a Minor Child Lonnie Olson, Ramsey County State's Attorney, Petitioner and Appellee v. T.K., and his parents, M.F. and M.K., and his guardian ad litem, Sharon Hendrickson, Respondents M.F., Respondent and Appellant

In the Interest of D.F., a/k/a D.K., a Minor Child Marlys K. Joramo, LSW, Petitioner and Appellee v.D.F., a/k/a/ D.K., and his guardian ad litem, Sharon Hendrickson, and his parents, M.F. and M.K., Respondents F., Respondent and Appellant

No. 20000329

Appeals from the Juvenile Court of Ramsey County, Northeast Judicial District, the Honorable Donovan Foughty, Judge.AFFIRMED.Opinion of the Court by Maring, Justice.Lonnie Olson, State's Attorney, 524 4th Avenue #16, Devils Lake, N.D. 58301, for petitioners and appellees; submitted on brief.Coral Joan Mahler, 3159 Highway 281, Sheyenne, N.D. 58374, for respondent and appellant; submitted on brief.

InInterest of T.K. Nos. 20000328 & 20000329

Maring, Justice.

[¶¶1] M.F. ("Mary")[1] appealed from orders terminating her parental rights to her children, T.K. ("Tim") and D.F. ("David"). We hold there is clear and convincing evidence the children are deprived, the causes and conditions of the deprivation are likely to continue, and, as a result of the continued deprivation, the children will probably suffer serious physical, mental, or emotional harm if Mary's parental rights are not terminated. We affirm.

I

[¶¶2] **On appeal, Mary asserts the State has failed to prove the three elements for parental termination by clear and convincing evidence and the trial court, therefore, erred in terminating her parental rights. Under N.D.C.C. §§ 27-20-44(1)(b)(1) a juvenile court may terminate parental rights providing: (1) the child is a deprived child; (2) the conditions and causes of the deprivation are likely to continue; and (3) the child is suffering, or will in the future, probably suffer serious physical, mental, moral, or emotional harm. The party seeking parental termination must prove all elements by clear and convincing evidence. In re D.N., 2001 ND 71, ¶¶ 2, 624 N.W.2d 686. On appeal, we review the juvenile court's decision and examine the evidence in a manner similar to a trial de novo.** Id. We review the files, records, and transcript of the evidence in the juvenile court,

CONSTITUTIONALITY OF REMOVING A FIT PARENT QUESTIONED

On Sept. 24, 2002, Federal Magistrate Judge Michael Merz, United States District Court for the Southern District of Ohio, Western Division at Dayton, (Michael A. Galluzzo vs. Champaign County Court of Common Pleas, et al., Case No. C-3-01-174) filed an order joining the State of Ohio as a party into a case to defend the constitutionality of Ohio statues that allow courts to deny due process in removing custody from a fit parent in divorce situations without a finding of substantial harm to the child.

. . .

This is the first time that a federal court has issued a certified question to rule on the merits of a presumption of equal custody in a divorce situation. This is the only case that has ever happened in a federal court that specifically addresses the federal rights of divorcing parents, fitness, the evidentiary standard required by federal law to prove unfitness {clear & convincing evidence-which is already part of the juvenile code in Ohio, but not the domestic code} and equal custody.

On April 27, 2001, a complaint was filed in U.S. District Court, Dayton, Ohio against Champaign County Common Pleas Court. The suit filed by Michael Galluzzo (C-3-01-174) claims the court deprived him of his constitutional right to due process in a divorce action that deprived him of custody of his children without a finding of substantial harm to the children. In June of 1993, Mr. Galluzzo was designated a non-custodial parent and ordered to pay child support and his ex-wife was given full custody of the children.

What are the 'merits'? THAT IN A DIVORCE ACTION, A FIT PARENT MAY NOT BE DENIED EQUAL LEGAL AND PHYSICAL CUSTODY OF A MINOR CHILD WITHOUT A FINDING BY CLEAR AND CONVINCING EVIDENCE OF PARENTAL UNFITNESS AND SUBSTANTIAL HARM TO THE CHILD.

The problems stem from the unconstitutionality of Ohio Revised Code 3109.04, the Allocation of Parental Rights and Responsibilities for Care. The statute is discretionary and permit an Ohio domestic relations court to deprive a biological parent, in a divorce situation, of equal custodial parent status without a finding by clear and convincing evidence that the parent so deprived is an unfit parent." This is a violation of an individual's right to due process, the challenge set forth in the Galluzzo challenge.

The Ohio 2nd District Appellate Court in Dayton, in Esch v. Esch, (2001 Ohio App. Lexis 679, Feb. 2001), found that R.C. 3109.04(D)(2) was unconstitutional by only utilizing the best interest of the child standard. The same language permeates the entire statute of 3109.04.

The U.S. Supreme Court has upheld the rights of parents to raise their children without undue interference from the state for the past 70 + years. In such cases as Stanley v. Illinois (1971), Santosky v. Kramer (1982), and Troxel v. Granville (2000), parental rights are paramount.

#5 2-13-03

STATE BAR ASSOCIATION OF NORTH DAKOTA

TESTIMONY ON HB 1402
Sherry Mills Moore

On behalf of the State Bar Association of North Dakota I want to offer some thoughts for your consideration. HB1402 does not allow anything to happen that does not already happen, frequently. In other words, it is not necessary. When I first read it I thought but it doesn't hurt anything, and then I read it again and decided that in fact it does restrict the options open to the court.

The practice now is that courts order shared custody (often termed *joint custody*) both with an agreement of the parties, and without. If law is passed which permits them to do so **if the parties have an agreement**, the implication is that they cannot do so **unless the parties have an agreement.** This would remove the ability of the court to order shared custody. You would remove shared custody from the options open to the court. Granted it is less likely a court would grant shared custody to people who cannot agree, they still do, in some fashion or another.

To sum up, this adds nothing to the options available to the court but, in fact, removes a good viable option. Rather than to give the noncustodial parent more rights, it restricts them.

If I can answer any questions, please feel free to ask and if any arise in the future you may either contact me at my office at 222-4777, or through my e-mail at esther@btinet.net. Thank you.