

1999 HOUSE HUMAN SERVICES

HB 1213

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1213

House Human Services Committee

Conference Committee

Hearing Date February 8, 1999

Tape Number	Side A	Side B	Meter #
1	X		0.0 - 24.9

Committee Clerk Signature *Susann Lindteigen*

Minutes:

Chairman Rep. CLARA SUE PRICE called the committee to order. Present were Reps. Clara Sue Price, Robin Weisz, William Devlin, Pat Galvin, Dale Henegar, Roxanne Jensen, Amy Kliniske, Chet Pollert, Todd Porter, Blair Thoreson, Bruce Eckre, Ralph Metcalf, Carol Niemeier, Wanda Rose, and Sally Sandvig.

Vice-chairman Rep. ROBIN WEISZ conducted the hearing.

Rep. NANCY JOHNSON, District 37, testified (Testimony attached).

Rep. AMY KLINISKE asked what happens if you have a child in a school setting and a permission slip is needed; one parent signs the slip and the other parent says no, you're not going; are we trapping the school in the middle or are we going to have to go back to court for every little decision? NANCY JOHNSON stated since I'm a school board member, I don't want

to get the school district trapped in there. I see this bill for major issues that come up. I'm looking at the custodial parent having the day-to-day input.

Rep. CAROL NIEMEIER asked is the residence of the child a separate issue or is there a statute in other states that address that? Rep. NANCY JOHNSON said I'm sorry, I don't know.

Rep. WILLIAM DEVLIN stated this concept had a lot of support for fine details. We need to narrow it for the welfare of the child. Rep. NANCY JOHNSON stated that's why it says "the courts making the determination" whether to give joint legal custody. This was written to give the court latitude.

Rep. ANDREW MARAGOS, District 3, testified as cosponsor of the bill. This is a bill who's time has come. Courts, in their infinite wisdom, could settle a lot of those issues you bring before us on what happens when the parents differ. I think enunciating the need for this legislation so that the courts do have the authority to award joint custody if they think its in the best interest of the child. Remember, all of this is really in the best interests of the child.

Rep. AMY KLINISKE stated the courts can currently award joint custody and asked are you looking for a definition of what joint-custody is? Rep. ANDREW MARAGOS stated I'm not sure that's true. The indication I get is that its not specifically stated in statute. They cannot award some custody. Rep. AMY KLINISKE stated that's not what we heard in the interim.

Rep. ANDREW MARAGOS stated I think you heard Rep. Johnson testify to the comments made by the district judge in her district about that fact.

WARREN KEENE, physician, Minot, testified (Testimony attached).

Rep. BRUCE ECKRE asked do you work with children? WARREN KEENE stated yes.

Rep. CAROL NIEMEIER asked are you saying that joint custody would be assigned only if both parents agree to it? WARREN KEENE stated that's currently the way the divorce decree is.

This allows the court to take in testimony from the parents, the guardian ad litem, social worker, psychologist, or physician to make a decision of custody if one parent is better or both.

OPPOSITION

SHERRY MILLS MOORE, Chair, Joint Family Law Task Force, testified (Testimony attached).

Referred to Zueger vs. Zueger case during testimony presentation.

Rep. ROBIN WEISZ said to clarify, according to your interpretation of the Supreme Court ruling, the Supreme Court did not throw out joint custody but merely said that parents would have to define the terms of joint custody. Do I understand you that this bill then would in a sense throw it back into the definition of being the court's responsibility? SHERRY MILLS MOORE said what this says either the parents or their attorney must define what joint custody means or court must define what joint custody means. But you cannot shortcut it. What HB 1213 does is they're saying that they must share the right in response that joint legal custody means both that both parents must share the right and responsibility to make decisions relating to the health, education, and welfare. It says both adults but it doesn't delineate anything further. My concern is that the courts already have the power to do joint custody, both legal and physical, but if this is what courts are given then parties will use; the result will be agreements and probably some court orders. This isn't going to answer any questions for people who get along. For people who cannot get along and go to divorce this is not going to answer questions when you have people fighting over haircuts ... and all of the rest of it.

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Rep. CLARA SUE PRICE asked what is the status of SB 2040. SHERRY MILLS MOORE

stated its been heard in the Judiciary Committee and it's coming out of committee and it has a lot of support.

Rep. ROXANNE JENSEN stated I was encouraged by Rep. Johnson's testimony by the fact that joint custody has been defined in this part of the statute in a number of states. Please comment on how your position reconciles with that. SHERRY MILLS MOORE stated the definitions that were given by Rep. Johnson in those various states actually come from the discussion of the definitions in the Supreme Court case of Dickson versus Dickson. In those cases that is how they defined them. Without having the whole package of those other states as to how they will be applied and when and what happens and more definition, you're not getting the benefit of all the checks and balances that go with it but merely the definition. There are a lot of states that do not define it all and operate just fine. And our state, since Dickson, has operated just fine. What did Dickson do? All we really done was make trouble for existing court orders that didn't bother to define what joint legal custody or joint custody was. There is SCR 4032 that is requesting a study of statutes in the state of North Dakota on family law and mediation.

Hearing closed.

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1213

House Human Services Committee

Conference Committee

Hearing Date February 9, 1999

Tape Number	Side A	Side B	Meter #
1	X		30.4 - End
1		X	0.0 - 2.2
Committee Clerk Signature <i>Susann Lindteigen</i>			

Minutes:

Committee Discussion.

Rep. CLARA SUE PRICE distributed amendment (attached) prepared by department of human services. She explained this is the joint child custody bill. Sherry Mills Moore and Sandi Tabor were opposed to it as it was written originally. They said it can already be done. I asked if we could clarify it with language to read "the court may order joint custody of the child as defined by the court." They submitted an e-mail which says we feel its in there; we feel its the courts option but apparently being the bill is here somebody isn't. Apparently, some judge had a different interpretation of Dickson versus Dickson.

Rep. WILLIAM DEVLIN asked could we expand it further to say "as defined by the parents or by the court?"

Further Committee Discussion.

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Rep. TODD PORTER moved to ADOPT AMENDMENT prepared by the department of human services, place period after child; delete lines 11, 12, and 13.

Rep. BLAIR THORESON second the motion.

Further Committee Discussion.

ROLL CALL VOTE #2: 7 yeas, 8 nays, 0 absent.

Motion Failed.

Further Committee Discussion.

Rep. CHET POLLERT moved DO NOT PASS.

Rep. CAROL NIEMEIER second the motion.

ROLL CALL VOTE #3: 11 yeas, 4 nays, 0 absent

CARRIER: Rep. AMY KLINISKE

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1213

Page 1, line 1, after "Act" insert: "To create and enact a new subdivision to subsection 1 of section 14-09-09.7 of the North Dakota Century Code, relating to requirements for child support guidelines; and"

Page 1, after line 13, insert:

"SECTION 2. A new subdivision to subsection 1 of section 14-09-09.7 of the North Dakota Century Code is created and enacted as follows:

Provide that the presumption described in subsection 3 may be rebutted if the custodial parent has an income of at least three times the obligor's income, and the other requirements of subsection 3 are met."

Renumber accordingly

Date: 2-9-99
 Roll Call Vote #: 2

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 1213

House Human Services Committee

Subcommittee on _____
 or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Adopt Amendment by HS; place period after child; delete lines 11, 12, & 13
 Motion Made By Todd Porter Seconded By Blair Thoreson

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman	X		Bruce A. Eckre		X
Robin Weisz - Vice Chairman	X		Ralph Metcalf	X	
William R. Devlin		X	Carol A. Niemeier		X
Pat Galvin		X	Wanda Rose	X	
Dale L. Henegar		X	Sally M. Sandvig		X
Roxanne Jensen	X				
Amy N. Kliniske	X				
Chet Pollert		X			
Todd Porter	X				
Blair Thoreson		X			

Total Yes 7 No 8 Failed
 Absent _____

Floor Assignment _____

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

Date: 2-9-99
Roll Call Vote #: 3

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1213

House Human Services Committee

Subcommittee on _____
or
 Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Chet Pollert Seconded By Carol Niemeier

Representatives	Yes	No	Representatives	Yes	No
Clara Sue Price - Chairwoman		X	Bruce A. Eckre	X	
Robin Weisz - Vice Chairman		X	Ralph Metcalf	X	
William R. Devlin	X		Carol A. Niemeier	X	
Pat Galvin	X		Wanda Rose	X	
Dale L. Henegar	X		Sally M. Sandvig	X	
Roxanne Jensen		X			
Amy N. Kliniske	X				
Chet Pollert	X				
Todd Porter		X			
Blair Thoreson	X				

Total Yes 11 No 4
Absent 0

Floor Assignment Amy Kliniske

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

REPORT OF STANDING COMMITTEE (410)
February 9, 1999 12:36 p.m.

Module No: HR-26-2331
Carrier: Kliniske
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1213: Human Services Committee (Rep. Price, Chairman) recommends **DO NOT PASS** (11 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1213 was placed on the Eleventh order on the calendar.

1999 TESTIMONY

HB 1213

Testimony on HB 1213
February 8, 1999
Human Services Committee

Thank you Chairwoman Price and members of the Human Services Committee. My name is Nancy Johnson. I am a Representative from District 37, Dickinson.

HB 1213 comes before you at the request of a ND citizen. He was informed that shared custody wasn't allowed for in ND statute. This bill would allow the court to order 'joint legal custody.' It does not require the court to do so. It only allows the court to do it, if the court feels that joint legal custody would be in the best interest and welfare of the child.

In preparing for this bill I contacted a local district judge. He told me that about half of his cases are divorces. He confirmed that ND law does not have a definition for joint legal custody. He indicated that joint legal custody would provide more flexibility for the court to determine what is in the best interest of the child and by using "*The court may...*" it left the option to the court and did not require joint legal custody.

ND law does not separate "physical custody" from "legal custody." The majority of states which recognize a distinct "legal custody" define the term by statute. For example:

Minnesota defines it as ("'legal custody' means the right to determine the child's upbringing, including education, health care, and religious training");

Iowa ... ("Rights and responsibilities as legal custodian of the child include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction");

Wisconsin .. ("'Legal custody' means: (a)... the right and responsibility to make major decisions concerning the child," including "decisions regarding consent to marry, consent to enter military service, consent to obtain a motor vehicle operator's license, authorization for nonemergency health care and choice of school and religion");

South Dakota .. (“the courts may order joint legal custody so that both parents retain full parental rights and responsibilities with respect to their child and so that both parents must confer on major decisions affecting the welfare of the child”);

California ... (“Joint legal custody’ means that both parents shall share the right and responsibility to make the decisions relating to the health, education, and welfare of a child”).

24 states define “legal custody” by statute. 5 states define “legal custody” in case law. The remaining 21 states, including ND, do not provide for “joint legal custody” by statute or by case law. This bill would allow the non-custodial parent in ND to continue to have some say in major decisions in his or her child’s life ...if the court agrees.

After my testimony there is a parent here who can share with you why this bill is needed.

Members of the Human Services Committee I respectfully ask for your favorable consideration of HB 1213 and will try to answer any questions you may have. Thank you.

Madam Chairman and distinguished House Representatives:

I am here to speak in favor of HB1213. In the dissolution of a contract between two partners, a divorce takes place under the supervision of the courts. No matter what else has happened, the final decree is the one of the judiciary. In fairness to the different roles and responsibilities of each partner, the court has limited choices to equitably separate the individuals. House Bill 1213 is about choice, the right choice. In the past, the courts had only one choice with respect to the children. It is one parent or the other parent. House Bill 1213 provides another choice.

We have all heard of the horror stories of custody battles. We haven't heard as much of the children after the battle. The professional literature is full of studies documenting their progress. In general one third of the children do well, one third do poorly and one third do well initially but have relapses later on. Numerous authorities on children of divorce have shown that joint custody with shared parental rights helps the children the most. However, the North Dakota Supreme Court in *Dickinson v Dickinson* ruled that since the legislature had not defined "joint custody" as separate legal and physical custody of minor children, it would not rule on joint custody.

House Bill 1213 is about choice. Currently one parent loses their parental rights when custody is granted to the other parent. The courts declare that the noncustodial parent has input in regards to health, education and welfare of the child, but no rights. In defining joint legal custody for the courts, it provides another choice. It maintains the normal parental roles even though physically separated. The courts may still grant physical custody to one parent with visitation by the other. With this choice the courts may have less antagonistic parents. The children may have better parents with joint custody and have a greater chance of being in the two thirds that can do well.

Choice is important. The courts need to have another option other than the current wars of custody fights. The children need to have another option. The parents need to have another option. House Bill 1213 gives us that choice. I urge you to vote in favor of this bill. Thank you for your time.

A handwritten signature in cursive script, appearing to read "Warren Beane". The signature is written in dark ink and is slanted slightly to the right. It is located in the lower-left quadrant of the page.

STATE BAR ASSOCIATION OF NORTH DAKOTA

TESTIMONY ON HB1213

Sherry Mills Moore

Good Morning. I am Sherry Mills Moore, an attorney in private practice in Bismarck, Chair of the Joint Family Law Task Force and a volunteer lobbyist for the State Bar Association of North Dakota. We come to you to oppose **HB1213**, and here is why.

HB1213 grants the courts the power to order joint legal custody of children but the courts already have that power. **HB1213** also defines joint legal custody, "both parents must share the right and responsibility to make decisions relating to the health, education and welfare of the child." This definition is too vague and leaves too many questions unanswered to be helpful. Let me explain.

Custody of a child may be "sole" or "joint" and may be further defined as physical" or "legal." **Sole** custody means that one parent has all of the power, rights, and responsibilities of parenting the child. **Joint** custody generally refers to a sharing of the parenting. **Physical** custody defines where the child spends his time and **legal** custody usually refers to who has the power to make the decisions regarding the child.

With restrictively exercised sole custody, only one parent can talk to teachers, doctors, and other professionals and only one parent can make decisions. Usually sole custody is exercised more loosely but, that depends on the family. Technically, however, the parent with sole custody could cut the other parent out of the parenting process. Fortunately, as a practical matter, most custodial parents do not and if it becomes a problem, the court may expand the role of the noncustodial parent. With sole custody, one parent has custody and the other has "visitation."

Until 1997 joint custody was ordered by courts when people agreed to it, and in rare occasions without an agreement.¹ The idea behind the rarity is that if people cannot agree upon the concept they probably cannot effectively cooperate and communicate sufficiently to make joint custody work. Typically joint custody was defined by the parents, or the court, in the order. Sometimes, however, parties simply agreed to the

¹"Legal writers and child development professionals are in general agreement that a joint custody arrangement can work only if the parents are able to cooperate." 2 John P. McCahey et al., *Child Custody & Visitation Law and Practice* § 13.01[1] (1998). 'The success of any custody resolution must ultimately rest with the parents. If they cannot set aside their differences and conflict[s] when dealing with their roles as parents, the innocent child will most surely suffer.' *Kaloupek*, 440 N.W.2d at 499. *Jarvis v. Jarvis*, 584 N.W.2d 84, 92 (N.D. 1998).

term "joint custody". In 1997, however, in the case of *Dickson v. Dickson*, the North Dakota Supreme Court said that without definition, joint custody was meaningless. The court further said that our state does not legally distinguish between "legal" custody and "physical" custody. The result of *Dickson* was not to throw out joint custody, but rather to say to the trial courts in essence, if the parties have not defined what they mean by joint custody, by legal custody, by physical custody, they you cannot order it. Just as before *Dickson*, many many joint custody agreements have been approved by the courts, and ordered by trial courts. The Supreme Court also has upheld joint custody orders since *Dickson*.

Dickson did not strip parents of anything except the right to use shorthand. If parents want joint custody they have to tell each other, and the court, what they mean by it.

As a part of its work, the Joint Family Law Task Force discussed whether *Dickson* created a need to have a legislative definition of joint custody. The conclusion was a resounding, "no". Please understand this is not any kind of question of your authority or wisdom. Rather it is a recognition that the parents who are divorcing need to define it for themselves rather than to try to apply a blanket definition to all families. Children are far better off if the parents decide before a crisis who will be involved. Because **HB1213** gives such a general definition, it does not add anything to the mix. In fact, because it does not designate any process in the event of an inability to agree on a decisions, it will create chaos rather than to help sort it out.

A custody order which grants joint custody needs to designate what happens if there is disagreement. Parents don't always agree as to what is best for a child even when they are happily married. Divorce doesn't improve the situation. Suppose dad thinks that the child should spend the summer working on the uncle's farm and mom thinks the child should be in summer school and then hockey camp. If the parents have joint custody as defined in 1213 who decides? Does the child go to summer school during the time mom has him and the farm when dad does? What if dad's time is only alternating weekends and two weeks a month? What if the question is to have tubes implanted in the child's ears versus long-term antibiotics? Does the child go on antibiotics on dad's days and off on mom's? Does the court decide?

Back when joint custody first hit this state, the agreements mandated that the parents would agree, just like HB1213. Then we figured out that wouldn't work so we said the court would decide. The ineffectiveness of this was made clear to me by, now retired, Judge Glasser who asked, "if these two parents cannot decide whether the child is to go to summer camp, how am I to? " The next question he could have asked was, do we want parental decisions made by judges through litigation? Do we have the resources to do so? No, not only is it a poor fit it is very inefficient. For that reason parents with joint custody have to designate a process for disagreement.

Let me give you some of the alternatives we use.

“The father and mother agree that either parent is a fit and proper person to have the care and responsibility for the custody of their children. The parties shall consult with each other and share responsibility for all major questions concerning the upbringing, educational, extracurricular, psychological, vacation, social environment, child care, health and dental care, spiritual care and other matters concerning the general welfare of their children. **The parties recognize, however, that circumstances may not always allow for them to come to an agreement on all such matters. The parties further recognize that any such lack of agreement could adversely affect their children. In that light, in the event that the parties cannot agree it is agreed that the father shall ultimately decide these matters.**

A more watered down version is as follows:

“The mother **will advise** the father of all major questions concerning the upbringing, educational, extracurricular, psychological, vacation, social environment, child care, health and dental care, spiritual care and other matters concerning the general welfare of their children.

Another alternative is not to designate the parent who will ultimately decide but to require mediation.

“The parties recognize, however, that circumstances may not always allow for them to come to an agreement on all such matters. The parties further recognize that any such lack of agreement could adversely affect their children. In that light, in the event that the parties cannot agree, **the parties will use a mediator to help them** reach an agreement. If that is not successful, the father shall ultimately decide these matters. ”

In still other situations the decisions themselves are divided between the parents.

The parties recognize, however, that circumstances may not always allow for them to come to an agreement on all such matters. The parties further recognize that any such lack of agreement could adversely affect their children. In that light, in the event that the parties cannot agree it is agreed that the father shall **ultimately decide all medical matters and the mother all educational, social, religious, and legal matters.**”

Because joint custody has to be defined, it takes on many forms. I have seen many cases where plain old "sole" custody was far more "shared" than many cases of "joint" custody. Sometimes a parent with "joint physical custody" sees his or her child far less than parents with "visitation". The use of the term "joint" custody carries with it no insignificant amount of feel-good baggage. It is far more acceptable and comfortable for a parent to say he has joint custody than not. This is particularly true for woman who do not have primary custody.

If **HB1213** does not pass, parents will continue to have joint custody, both joint legal custody and joint physical custody. Before they are imbued with the authority of the state, through a court order, however, they have to agree upon what that entails. This is the state of the law in this state. In the opinion of the State Bar Association, and the Joint Family Law Task Force, **HB1213** is not needed. Because it requires something which cannot be performed -- mandated agreement -- it is harmful.

Here is what you can do for parents who want to continue to participate in their child's life even if they do not reside with the other parent. Hold that thought until **SB 2040** comes over. **SB2040** gives both parents rights and responsibilities. Each parent has the right to access to records (educational, medical, and the like). Each parent can attend educational conferences and have the right to reasonable access to the child by letter or phone. Each parent must tell the other where they live and a phone number and the name and address of the school the child attends. Each parent has to tell the other of any serious accident or illness. These are rights and responsibilities that work for most families and so they would be granted by law to all, unless a court finds it is contrary to the child's interest.

We urge a do not pass on **HB1213**. I am happy to try to answer any questions that you might have.