MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-third Session
March 9, 2005

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9:37 a.m. on Wednesday, March 9, 2005, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chair
Senator Maurice E. Washington, Vice Chair
Senator Mike McGinness
Senator Valerie Wiener
Senator Terry Care
Senator Steven Horsford

COMMITTEE MEMBERS ABSENT:

Senator Dennis Nolan (Excused)

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Kelly Lee, Committee Counsel
Barbara Moss, Committee Secretary

OTHERS PRESENT:

Brent Howard
Alan DiCicco
Dan Foster
Frances Doherty, District Judge, Department 12, Family Division, Second Judicial District
Ron Leiken

Gerald W. Hardcastle, District Judge, Department D, Family Division, Eighth Judicial District
Tony Tharp
Mike Nance
Myra A. Sheehan, Attorney

CHAIR AMODEI:
The first order of business is introduction of two bill draft requests (BDR): BDR 9-1029 and BDR 10-616.

BILL DRAFT REQUEST 9-1029: Provides that sale of real property under deed of trust must take place at courthouse of county where property is located. (Later introduced as Senate Bill 172.)

BILL DRAFT REQUEST 10-616: Increases amount of homestead exemption and makes various changes relating to property which is exempt from execution by creditors. (Later introduced as Senate Bill 173.)

SENATOR WIENER MOVED TO INTRODUCE BDR 9-1029.

SENATOR McGINNESS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS NOLAN AND WASHINGTON WERE ABSENT FOR THE VOTE.)

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SENATOR WIENER MOVED TO INTRODUCE BDR 10-616.

SENATOR HORSFORD SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR NOLAN WAS ABSENT FOR THE VOTE.)

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CHAIR AMODEI:
The hearing is open on Senate Bill (S.B.) 109.

SENATE BILL 109: Revises provisions concerning presumption that joint custody is in best interest of minor child. (BDR 11-620)

SENATOR MAURICE E. WASHINGTON (Washoe County Senatorial District No. 2):
I have given the technical and emotional aspects of S.B. 109 a great deal of thought. We are all familiar with what goes on in society, particularly with families and children. The Committee has dealt with a number of issues concerning children, including juveniles, courts, foster parents and grandparents. The issues concerning families and the custody of children are vast, broad and emotional and the impact is felt in the increased caseloads at both family courts in the Second and Eighth Judicial Districts.

Senate Bill 109 is not an attempt to undermine the discretion of judges. I would not want to sit in their place. They hear both sides of issues and make decisions that impact families. Some of the decisions are favorable, some are not, some members will agree, some will not. We think the impact affects mothers and fathers; however, there are far-reaching consequences that concern grandparents, nephews, nieces, aunts and uncles, as well as extended families involved in these issues.

I appeal to the Committee to remain sensitive to the forthcoming testimony. It will be far-reaching, wrenching and emotionally charged, but they are real-life stories. The testifiers are involved in these issues on a day-to-day basis. Some live with them every moment of their lives on both ends of the spectrum.

There are times this issue is used as a political football in order to advance agendas or persuasions. Senate Bill 109 is not an attempt to do that; rather, it attempts to look at what is in the best interests of children. In the course of deciding custody, alimony and support, we lose sight of the children. We seldom hear what children think is best or how they feel about a situation. We use the courts to get at each other, become vindictive, vengeful and ping-pong children.

Somebody said the best way to heal a sore is to learn to forgive, reconcile, mend our differences and work through the issues. There was a time in our society when separation or divorce was not as prevalent as it is today. It impacts everything we do or say, the laws we legislate and the courts. Unfortunately, we live in a different day and time and must deal with these issues as legislators, judges, lawyers and parents.

The intent of S.B. 109 is to raise the level of parenthood. It says to parents, "Just because you cannot get along together, the interests of the children will not be forsaken." It says both parents are responsible for raising their offspring and both should be engaged in the effort. We have seen, read and heard the statistics. When a father is involved with his daughter and keeps her off the street and away from prostitution, it lowers the runaway rate; and when a mother is involved with her son, he becomes more respectful of women.

This bill attempts to presume joint custody unless there are mitigating circumstances negating the presumption. It raises the fact that parents need to be involved with their children. I understand there are situations in which both parents cannot be involved; however, S.B. 109 will remove the volatility of parents using children in order to get at one another and exact revenge. It says both parents presumptively have joint custody unless the courts find differently.

Some judges in family court do not support S.B. 109 because they feel their discretion would be taken away. In my understanding, there already is presumption of joint custody. Judges go through a litany of circumstances to determine why there should not be joint custody, then determine what will be in the best interest of the child. That being the case, judges should not have a problem with S.B. 109 because it takes what is already presumed and codifies it. It raises the level of parenthood and ensures parents are involved in the lives of their children.

Senate Bill 109 does not raise the level of fatherhood; rather, it lets fathers know their plight is recognized, and there is an attempt to readjust the pendulum. It is not to diminish or demean the role of motherhood, but says motherhood is just as important. It says whether or not parents abide together, they will make decisions for the common good of their children.

The bill will bring testimony, for and against, and debate in both Houses. The intent is not to diminish the discretion of family court judges. They work hard and do a tremendous job; however, their decisions are not always agreed upon. People are hurt, and sometimes hurt is difficult to overcome. I close my remarks by saying this issue is important to children and families, as well as to the future of our State and country.

BRENT HOWARD:
I support S.B. 109 and will present my written testimony regarding my experience with divorce and joint physical custody (Exhibit C).

ALAN DICICCO:
I support S.B. 109 and will present my written testimony in regard to reducing the harm that comes from litigation in family court (Exhibit D).

DAN FOSTER:
I support S.B. 109 and will present my written testimony regarding my experience with joint custody, divorce and family court (Exhibit E).

SENATOR CARE:
I am unclear about the mechanics of S.B. 109. I understand it contemplates a presumption; however, I am unsure whether it means it would necessarily follow that, as a threshold matter, there would be an award of joint custody. It seems to me it is trumped; ultimately, by *Nevada Revised Statute* (NRS) 125.480, where the sole consideration of the court is the best interest of the child, which I think is appropriate. My fundamental question to the bench is, how do we read an amended NRS 125.490 when the court still has sole discretion in determining the best interest of the child? I do not know how those two statutes can be read in tandem. It is unclear to me how the bill would function.

FRANCES DOHERTY (District Judge, Department 12, Family Division, Second Judicial District):
I am present in my own capacity, as well as on behalf of the Judicial Council of the State of Nevada, to express both opposition and concern with respect to S.B. 109. Before I go further, however, I would like to make a couple of points.

In our community, Senator Washington honors the importance of family and children and is personally concerned about cases involving children. My comments are not meant to disrespect his commitment or what he believes is in the best interest of children. All the judges associated with the Judicial Council's legislative committee, including those on the Supreme Court, Commission on Judicial Selection, as well as district judges statewide, justices of the peace and municipal court judges, oppose this bill for the reason identified by Senator Care.

Although opposed to S.B. 109, we still honor family and recognize every child deserves family and parenting to the fullest extent possible. Consistent with public policy set forth by the Legislature, every child needs strong bonds with members of his or her family, as well as access to both parents in a way that is nurturing, emotionally supportive and in an environment that is in the child's best interest.

Family court attempts to grow and develop relationships. Two weeks ago, an angry young father of a 4-month-old daughter, who had never seen his child and had denied fatherhood, came to court. After holding his baby for two hours, he signed paternity papers. The family court will work toward growing a relationship and providing the baby with two caring and nurturing parents. The little girl will brag about these two parents even though they live in different houses. That is a child-parent relationship to which every child is entitled.

My comments are not meant to undermine those relationships. Families are the center of our work in family court. Judges in certain jurisdictions have been requested to develop expertise in families because they are the important foundation to the roots of our community and State. We take public policy with respect to parenting very seriously. Each case is unique and every family special. The family court determines the children's best interest in their post-dissolution existence.

With respect to Senator Care's question, assuming a presumption of custody, whether joint or primary, would diminish the function to which family courts have been legislated. Family courts that recognize the importance of the parent-child relationship are ordinarily asked to hear evidence and make determinations in the best interest of the child. Presumptions skip over the evidentiary component of the judicial conclusion and ask the court, without evidence, to make a conclusion. In our view, it is not in the best interest of children to skip that step. Family courts have been legislated to apply the law in a way that honors children.

If we put children at the center of the courtroom and begin with an adult-based premise rather than a child-based premise, we recognize and validate the significance and importance of the adult position in the child's eyes. The family court looks at the needs through the eyes of the child and what is in his or her best interest. When parents agree, judicial officers effectuate joint custody agreements through service mediation, settlement conference discussions and

additional joint-custody arrangements. When parents request sole custody, we work toward accomplishing it. This is what the Legislature has vested in family court.

Should this presumption be imposed, the family court must determine every case the same, and not all cases will work under the same scenario. We are being asked to disregard evidence and begin with a conclusion. It is not only counterintuitive, it is counter to the best interest of the children. Allow us the opportunity to develop the evidence that supports the healthiest plan and recognize it for what it is. Presumptions in this area are not in the best interest of the children. Give us the ability to determine primary or joint custody with the expertise given us. The majority of the Judicial Council opposes S.B. 109 for that reason. We are not opposed from a power base or fear of losing discretion, our fear is for the focus of the custodial decision to change from child to parent. Allow us to keep the child at the center of decision-making, and we will continue to effectuate public policy.

RON LEIKEN:
I will present my written testimony regarding my experience with equal parenting and joint custody (Exhibit F).

SENATOR WIENER:
Is the intent of S.B. 109 to have an even split on the physical custody of children? Joint custody does not necessarily mean equal.

SENATOR WASHINGTON:
The intent is 50-50 custody of the children.

GERALD W. HARDCASTLE (District Judge, Department D, Family Division, Eighth Judicial District):
The position of the Eighth Judicial District family court judges was presented at its recent meeting. With the exception of one abstention, the judges voted against the proposition that Nevada's law become a joint-custody presumption. The family court judges feel this is not in the best interest of children or State policy, and it limits and distracts us from doing the job we think is most important, which is acting in the best interests of the children.

I would like to approach the issue from a different aspect. Let me start by telling you a story. I have practiced law for 19 years, largely in the area of domestic

law, and have been a family court judge for 12 years, which is a total of 31 years. When I became a judge, my experience with joint custody and the arguments thereof troubled me to some degree. Although it did not matter to me one way or the other, I felt there should be a way of analyzing the arguments, particularly in the social sciences, to ascertain what was happening and the meaning of joint custody. Much like Senator Wiener, I was concerned about what was meant by joint custody.

I was fortunate to take a class at the University of Nevada, Reno, with Professor James T. Richardson, Ph.D., who asked us to write a paper on joint custody. I put together all the research I could find, including cases and research from social scientists. My paper was published by the American Bar Association's, *Family Law Quarterly*, and titled "Joint Custody: A Family Court Judge's Perspective" (Exhibit G). Some people are kind enough to cite it periodically. It is important to understand some of the conclusions reached and what I learned as a result of going through the process.

There is a new concept called "bird nesting," which means children stay in the house and parents go back and forth. By and large, it is a disaster.

I will present my written statement regarding my thoughts on the definition of joint custody (Exhibit H).

SENATOR WASHINGTON:
How much battling and animosity would be negated if the presumption of joint custody was at the beginning of the hearing, as opposed to granting joint custody at the back of the hearing?

JUDGE HARDCASTLE:
Are you asking whether the existence of presumption will lead parties to be more agreeable? There has always been some form of presumption in the law about what happens in custody cases; however, presumptions do not lead to cooperative co-parenting. Additionally, when people talk about their children, they are actually talking about other things, such as an affair or unfair treatment during the marriage. My concern is whether any front-end benefit could exist from the presumption of joint custody, as well as the amount of damage done when the presumption is applied to contested cases. Parties still have the right to agree. People entering a divorce case know they can agree to joint custody, and it will be accepted by the court.

SENATOR WASHINGTON:
I know family court judges do a remarkable job under the circumstances. On page 2 of Exhibit G, "Joint Custody: A Family Court Judge's Perspective," you indicate mothers receive primary physical custody in dispute cases 66 percent of the time, fathers 9 percent of the time and dual physical custody 20 percent of the time. You mentioned 10 percent are hard cases that, for one reason or another, are usually charged. Is the 10 percent derived out of the 66 percent and 9 percent awarded primary physical custody, or the 20 percent awarded dual physical custody?

JUDGE HARDCASTLE:
Not necessarily. That poll was in regard to what people were doing by their own agreement. You begin to see joint custody agreements as a result of mediation.

SENATOR WASHINGTON:
Is the trend starting to swing more equally?

JUDGE HARDCASTLE:
There is a small shift in the trend and a significant increase in mediated joint custody settlements. Parties are aware of the right to joint custody. Father's rights groups have pointed out if joint custody can work for children and the parties can agree, it is a good thing. That is not my dispute. My dispute is judges are being asked to apply a presumption in hotly contested cases where parties are unable to agree on anything. We are being asked to allow the process to be continued.

SENATOR WASHINGTON:
I understand; however, Judge Doherty indicated the evidentiary process of the proceeding is precluded if the presumption is in place. There has to be somewhat of a presumption going into court, whether stated in law or perceptually, that primary custody will be awarded one of the parents, with the pendulum swinging toward the mother. Although I understand the mother-child relationship, I wonder whether there is a presumption that primary care will be focused on the mother.

JUDGE HARDCASTLE:
When we divorced, my ex-wife and I agreed to joint custody. Most parties agree to it, not because of what the court is or is not going to do, but because they feel it is best for their children. Is that not how the world works?

JUDGE DOHERTY:
This is not an insignificant issue. I take my responsibility seriously in conveying to you what we, in the judicial branch, think is the most appropriate decision. Twelve states have joint legal custody presumption and 42 states, including Nevada, have some form of joint legal custody language. Quite frankly, I believe Nevada is one of the more progressive states in that regard. Maryland has just rejected the presumption of joint custody for many of the reasons discussed today. To the best of my understanding of the information, California originally contemplated joint custody, voted in its initial family code, never implemented it and reversed the code to our presumption where parties agree.

The American Bar Association reviewed S.B. 109 and recommended no legal presumption be made. The National Council of Juvenile and Family Court Judges recommend the issue not start on that premise. We are all in the business of growing healthy families and relationships. We are dealing with terms that will ultimately be considered antiquated; however, there is no question we are evolving. This is not the right step in the evolutionary process. This should not be a win-or-lose situation. We need to create a healthy family parenting plan. This direction hardens older terms and prevents us from looking at the family as a unit for the child to access on both sides.

TONY THARP:
Judges say they have been asked to decide what is in the best interest of children, and they have done so. It is in the best interest of children to have both parents. The courts have failed children and parents by not ordering joint custody. Therefore, as a result of their quest, the citizens of the State of Nevada have brought S.B. 109 before this Committee. People in Nevada are overwhelmingly in favor of this bill. It will encourage parents to cooperate and is in the best interest of the children.

I find it interesting that judges are against S.B. 109 when they do not have a personal stake in these situations. People are overwhelmingly for it, and judges should listen to the will of the people. The presumption of joint custody does not take away the ability of parents to agree to sole custody, if they so choose.

MIKE NANCE:
I support S.B. 109 and will present my written testimony regarding my experience with joint custody, family court and my relationship with my children (Exhibit I).

MYRA A. SHEEHAN (Attorney):
I am an attorney in Reno representing myself and no special interest group. I am opposed to S.B. 109 and believe the time is ripe for the Legislature to seriously look at the issue. I will present my written testimony regarding joint custody, citing Nevada statutes (Exhibit J).

CHAIR AMODEI:
Are there any questions of Ms. Sheehan? If not, the hearing is adjourned at 11 a.m.

RESPECTFULLY SUBMITTED:

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Barbara Moss,
Committee Secretary

APPROVED BY:

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Senator Mark E. Amodei, Chair

DATE:______________________________________