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MINNESOTA SUPREME COURT

PARENTAL COOPERATION TASK FORCE

FINAL REPORT

JANUARY 14, 2000

- 1998 Minn. Laws Chap. 367 -
Art. 1 Sec. 17

MINNESOTA SUPREME COURT

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FINAL REPORT

JANUARY 14, 2000

STATE OF MINNESOTA
IN SUPREME COURT
C8-98-1335

MINNESOTA SUPREME COURT

MINNESOTA SUPREME COURT
STATE COURT ADMINISTRATION
COURT SERVICES DIVISION
120 MINNESOTA JUDICIAL CENTER
25 CONSTITUTION AVENUE
SAINT PAUL, MN 55155
(651) 297-7587

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PART I: INTRODUCTION

A. ACKNOWLEDGEMENTS

The members of the Minnesota Supreme Court Advisory Task Force on Parental Cooperation wish to thank all who assisted in and supported the work of the Task Force. In particular:

- Special appreciation is expressed to those individuals who made presentations to the Task Force regarding use of parenting plans in other states and background information regarding domestic abuse.

- We are grateful to those individuals who helped the Task Force refine its work product by submitting written and oral comments at the public hearing regarding the preliminary recommendations proposed by the Task Force.

- Finally, thank you to those legal professionals who significantly contributed to the work of the Task Force by responding to a detailed questionnaire at the 1999 Annual Family Law Institute sponsored by the Minnesota State Bar Association, Continuing Legal Education Office. Thank you also to CLE staff who helped distribute and collect the questionnaire at the conference.

B. TASK FORCE MEMBERS

TASK FORCE CHAIR:	**Honorable Sharon Hall.** District Court Judge, Tenth Judicial District.
SUBCOMMITTEE CHAIRS:	
Parenting Plan Subcommittee	**Honorable William Howard.** District Court Judge, Fourth Judicial District.
Fiscal Review Subcommittee	**Christa Anders.** Attorney at Law; Child Support Enforcement Division, Department of Human Services.
Conflict Reduction Subcommittee	**Honorable Donald Rysavy.** District Court Judge, Third Judicial District.

TASK FORCE MEMBERS:

Mary Ackerman, Associate Director of National Initiatives, Search Institute
Christa Anders, Child Support Enforcement Division, Department of Human Services
Honorable Paul Benshoof, District Court Judge, Ninth Judicial District
Paul Bergstrom, Attorney At Law, Guardian Ad Litem
Representative Len Biernat, Minnesota House of Representatives
Representative David Bishop, Minnesota House of Representatives
Suzanne Born, Attorney at Law
Robert A. Carrillo, Director of Communications, RKIDS of Minnesota, Inc.
Honorable Jim Clark, District Court Judge, Second Judicial District
Representative Andy Dawkins, Minnesota House of Representatives
Jacquelin Evans, Guardian Ad Litem Services, Inc.
Rosemary Frazel, Director of Public Policy, Children's Defense Fund
Guadalupe Alba-Guintero, Life-Work Planning
Honorable Sharon Hall, District Court Judge, Tenth Judicial District
Honorable William Howard, District Court Judge, Fourth Judicial District
Eileen Hudon, Minnesota Coalition for Battered Women[1]
Carol Jensen, Court Administrator, Swift County
A.M. "Sandy" Keith, Attorney at Law[2]
Steve King, Cooperation for the Children Program, Ramsey County
Senator Sheila Kiscaden, Minnesota Senate

[1]Eileen Hudon withdrew from the Task Force in September 1998.
[2] Sandy Keith resigned from the Task Force on May 6, 1999.

Senator David Knutson, Minnesota Senate
Ronald Longtin, Court Administrator, Stearns County
Alice Lynch, Black, Indian, Hispanic & Asian Women in Action
Honorable Leslie Metzen, District Court Judge, First Judicial District
Nancy Mischel, Legal Services Advocacy Project[3]
Mindy Mitnick, Uptown Mental Health Center
Dr. C.L. Moore, Pediatric and Family Psychology Center
William E. Mullin, Attorney At Law, Maslon, Edelman, Borman & Brand, LLP
Maria Pastoor, Minnesota Coalition for Battered Women[4]
Iweda Riddley, Phyllis Wheatley Community Center[5]
Honorable Donald Rysavy, District Court Judge, Third Judicial District
Senator David TenEyck, Minnesota Senate[6]
Charles Thomas, Attorney At Law, Southern Minnesota Regional Legal Services
Honorable Steven Youngquist, Attorney At Law, Administrative Law Judge, Office of Administrative Hearings

SUPREME COURT LIAISON:
Honorable Paul C. Anderson, Associate Justice Minnesota Supreme Court

STAFF:
Janet K. Marshall, Director Research and Planning, Court Services Division, State Court Administration
Tori Jo Wible, Staff Attorney, Court Services Division, State Court Administration

SUPPORT STAFF:
Melissa Garlington, Project Specialist, Court Services Division, State Court Administration
Matt Grosser, Senior Research Analyst, Court Services Division, State Court Administration
Christine Salaba, Administrative Secretary, Court Services Division, State Court Administration

[3] Nancy Mischel began representing the Legal Services Advocacy Project upon Iweda Riddley's withdrawal from the Task Force in October 1998.
[4] Maria Pastoor began representing the Minnesota Coalition for Battered Women upon Eileen Hudon's withdrawal from the Task Force in September 1998.
[5] Iweda Riddley withdrew from the Task Force in October 1998 and was replaced by Nancy Mischel.
[6] Senator TenEyck was appointed to the district court bench and resigned from the Senate in November 1999.

PART II: EXECUTIVE SUMMARY

A. THE ISSUES

Focus has long been directed toward reduction of conflict in dissolution, annulment, legal separation and paternity proceedings, specifically those involving children, in order to reduce acrimony in dissolution and related proceedings and to foster collaborative parenting arrangements. The Minnesota Supreme Court Advisory Task Force on Visitation and Child Support Enforcement made several recommendations in their final report of January 1997 which it believed would serve as tools to reduce conflict. Those recommendations included mandatory parent education classes, additional education for judges and attorneys and experimentation with programs aimed at providing intensive services to parents in conflict situations.

In Minnesota, some custodial and noncustodial parents are often unable to resolve custody disputes. Some custodial and noncustodial parents fail to comply with visitation orders, often causing or escalating conflict between the parents. Some parents, in an effort to get the legal proceedings "over with" agree to nothing more specific than "reasonable visitation" which causes conflict when the parents later have differing views of what is "reasonable". Regardless of the issue or reason, escalation of conflict regarding ongoing parenting issues can cause emotional harm to the innocent children involved.

B. PURPOSE OF TASK FORCE

Over the past decade the Minnesota Legislature has dealt with issues of visitation, custody and conflict in dissolution, annulment, legal separation and paternity cases. The concern was renewed during the 1998 legislative session as several legislators considered the concept of parenting plans. As a result of this consideration, the Minnesota Supreme Court was requested to establish a Task Force to evaluate methods of reducing conflict in dissolution, annulment, legal separation and paternity cases, and to specifically evaluate the use of parenting plans.

Pursuant to the Legislature's request, on August 10, 1998, the Minnesota Supreme Court issued an Order establishing the Advisory Task Force on Parental Cooperation ["Task Force"]. The Order establishing the Task Force directed the Task Force to:

- research and evaluate ways to reduce conflict between parents in marriage dissolution, annulment, legal separation, and paternity proceedings;
- research and evaluate the use of parenting plans as a tool for encouraging cooperation between parents relating to their parental obligations, decision-making authority, and schedules for the upbringing of children;
- research and evaluate the programs and experiences in other states that have implemented parenting plans; and
- research and evaluate the fiscal impact of parenting plans upon parties and the judicial system.

Upon completion of its study, the Task Force was directed to make recommendations regarding:

- reducing conflict between parents in marriage dissolution, annulment, legal separation, and paternity proceedings;
- the use of parenting plans;
- programs and experiences in other states that have implemented parenting plans; and
- the fiscal impact of parenting plans upon parties and the judicial system.

C. OVERVIEW OF TASK FORCE ORGANIZATION AND PROCEDURES

The Parental Cooperation Task Force explored a number of issues related to possible changes in the current family law system. The Task Force has attempted to utilize a number of underlying principles in its work of analyzing proposed changes:

- Facilitating child-focused strategies;
- Maintaining and/or establishing children's relationships with both parents when appropriate;
- Reducing conflict and the impact of conflict on children;
- Protecting children from violence and abuse;
- Ensuring the economic well-being of children; and
- Making parenting education opportunities universally available in Minnesota

To more efficiently carry out the Supreme Court's charge, the Task Force divided into three subcommittees: Parenting Plan Review, Fiscal Review, and Conflict Reduction. The Parenting Plan Subcommittee reviewed statutes providing for parenting plans from other states, examined some parenting plan forms, drafted a sample parenting plan form[7] and debated the pros and cons of implementing mandatory or optional Parenting Plans in Minnesota. The Fiscal Review Subcommittee researched and analyzed the relationship between parenting plans and the delegation of financial responsibilities for children as well as the fiscal impact of the various options under consideration by the other two subcommittees upon the judicial system and parents. The Conflict Review Subcommittee discussed areas of

[7] A sample form was distributed to interested parties for discussion purposes only. Some attorneys and parents throughout the state have used this or other forms. The sample form distributed by the Task Force does not conform with Task Force recommendations. The Task Force does not approve or endorse the use of any particular form. The Task Force recommends that the Supreme Court establish a workgroup to develop a sample parenting plan form for use in Minnesota courts.

conflict in dissolution, annulment, legal separation and paternity cases and reviewed various methods of reducing conflict.

The full Task Force worked with Matt Grosser, Court Services Division, State Court Administration, to develop and execute a questionnaire for persons attending the Minnesota State Bar Association Continuing Legal Education Office's Annual Family Law Institute. The questionnaire covered areas the Task Force believed to be of highest conflict and included an opinion question regarding whether certain statutory changes might reduce conflict: specifically the areas of custody and visitation terminology and standards for removal of children from the state. The results are attached as Appendix A.

The full Task Force met together each month and in February 1999 met for a full day for a presentation by Seattle, Washington attorney John Kydd. Mr. Kydd presented the results of much academic and professional study of conflict and violence in families, and explained how treating violence as a public health and prevention issue seems most appropriate.

The full Task Force met in September 1999 to discuss the subcommittees' findings. The results of the various subcommittees' discussions and research formed the basis of the Task Force's preliminary recommendations. The task force deliberated on and approved the preliminary recommendations that were distributed for review and comment to over 500 individuals and advocacy groups throughout Minnesota. On October 14, 1999, the Task Force held a public hearing during which oral comments regarding the provisions of the preliminary recommendations were received. The Task Force also received written comments from over 50 people.

During the November and December meetings, the Task Force members carefully considered the comments of the public as they continued to debate the preliminary recommendations. Through this process the Task Force members refined and finalized their recommendations, which are summarized below in Section E of this *Executive Summary* and which are fully set forth in Part IV of this Report: *Deliberations and Recommendations.*

D. NOTE ON TERMINOLOGY

The Task Force recommendations allow for parents within the context of a parenting plan to replace traditional terminology of custody and visitation with other terms. For purposes of this report, the report will use these terms while recognizing that parents may ultimately use other words.

E. SUMMARY OF RECOMMENDATIONS

The Task Force has considered a number of recommendations designed to change the focus of family law from parents to children. The following recommendations seek to facilitate this shift in attitudes and practice.

Language Modification

1. Current statutory language should be amended to substitute the term "parenting time" for "visitation" wherever it appears in relationship to parents.

2. Current statutory language providing for legal and physical custody should be expanded to provide:
   a. Parents voluntarily agreeing to parenting plans can use other terminology for physical and legal custody and visitation.
   b. When parents cannot agree, the Court shall use traditional terminology for physical and legal custody.
   c. For purposes of enforcement in other jurisdictions, every final judgment and decree in Parenting Plan cases must designate whether one parent or the other has sole or joint custody or both.

Implementation of Parenting Plans Concept

1. All actions, judgments and decrees involving issues of custody and visitation for minor children may include parenting plans.

2. The Legislature should request and fund the development of a budget and implementation plan for parenting plans. The Judiciary should develop the budget and implementation plan. Implementation of recommendations with a fiscal impact should be delayed until the funds for new services are appropriated.

3. Parents may, in a parenting plan, stipulate to a best interests modification standard in cases involving sole physical custody.

4. If the Court determines that an act(s) of domestic abuse has occurred at any time, the court must make detailed findings if it concludes that removal is not in the child's best interest.

5. The Court shall accept a proposed parenting plan agreed to by both parties unless the court makes detailed findings why the proposed plan is not in the best interests of the child(ren).

6. Parents may include in their parenting plan an allocation of expenses not covered by child support guidelines, including but not limited to education and extracurricular

activities (*e.g.,* post-secondary education, lessons, camp, fees, drivers' training, athletic activities). The financial responsibility for these expenses should be detailed in the parenting plan. These agreements should be enforceable as contracts between the parents.

7. To the extent allowable under federal and state law, parenting plans should recommend and the Court should award the dependency exemption to the parent such that it increases the total benefits available to the family and taking into consideration all of the credits and refunds due to the family to the extent the monetary impact of these items is made known to the Court.

8. If a parenting plan is going to make a current recipient of public assistance ineligible for public assistance, the Court can only approve the parenting plan if it makes specific findings that the parenting plan is in the best interests of the child.

9. Parents may modify the custody provisions of a parenting plan if the parties agree to the modification, with or without the use of the dispute resolution process. Unless agreed to in writing by the parents, no motion to modify the custody provisions may be made earlier than one year after the date of entry of a decree of dissolution or judgment in a Parentage Act case containing a parenting plan except where the Court finds a persistent and willful denial or interference with visitation, or has reason to believe that the present environment may endanger the child's physical or emotional health or impair the child's emotional development. Parents must file modifications in writing with the Court to ensure enforcement of the change(s).

10. The Court may modify the physical custody or legal custody provisions specified in a parenting plan if:
    a. The child has been integrated into the family of the parent requesting modification with the consent of the other parent in substantial deviation from the parenting plan;
    b. The child's present environment endangers the child's physical or emotional health or impairs the child's emotional development; or
    c. The Court has found the non-moving parent to have substantially, willfully, or wrongfully failed to comply with the custody schedule in the court-ordered parenting plan.

11. The Court may modify the visitation provision of a parenting plan whenever modification would serve the best interests of the child.

12. The Court may not require that parenting plans provide for joint legal custody or use of dispute resolution processes, other than court action, if the Court finds that either parent has engaged in the following:
    a. Act(s) of domestic abuse; physical harm, bodily injury, infliction of fear of physical harm, assault, terroristic threats, or criminal sexual conduct;
    b. Physical, sexual or a pattern of emotional abuse of a child;

c. Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions;

d. Conviction of one of the following crimes if the conviction occurred within the preceding five years; the person is currently incarcerated, on probation, or under supervised release for the offense; or the victim of the crime was a family or household member as defined in M. S. § 518B.01, subdivision 2:

i. murder in the first, second, or third degree under section 609.185, 609.19, or 609.195;
ii. manslaughter in the first degree under section 609.20;
iii. assault in the first, second, or third degree under section 609.221, 609.222 or 609.223;
iv. kidnapping under section 609.25;
v. depriving another of custodial or parental rights under section 609.26;
vi. soliciting, inducing, promoting, or receiving profit derived from prostitution involving a minor under section 609.322;
vii. criminal sexual conduct in the first degree under section 609.342;
viii. criminal sexual conduct in the second degree under section 609.343;
ix. criminal sexual conduct in the third degree under section 609.344, subdivision 1, paragraph (c), (f), or (g);
x. solicitation of a child to engage in sexual conduct under section 609.352;
xi. incest under section 609.365;
xii. malicious punishment of a child under section 609.377;
xiii. neglect of a child under section 609.378;
xiv. terroristic threats under section 609.713; or
xv. felony harassment or stalking under section 609.749, subdivision 4.

13. When allegations of domestic violence exist, the parents shall not be required to participate in mediation to develop a parenting plan. Each parent may still submit his or her proposed parenting plan. In these matters, the Court should consider the appointment of a guardian ad litem, and/or a custody evaluator.

14. A determination by the Court that domestic abuse has occurred raises a rebuttable presumption that it is detrimental to the child and not in the child's best interests to be placed (a) in sole legal custody or in sole physical custody with the perpetrator of family violence; or (b) in joint legal custody or joint physical custody with the perpetrator of family violence.

15. In addition to other factors that a Court must consider in a proceeding in which the custody of a child or visitation is at issue and in which the Court has made a finding of domestic abuse:

a. The Court shall consider as primary the safety and well being of the child and of the parent who is the victim of domestic abuse. The Court shall make specific findings of fact to show that the custody or visitation arrangement best protects the

child and the parent or other family member who is the victim of domestic violence.

b. The Court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person. In determining the existence of domestic abuse, the Court's consideration shall include, but is not limited to testimony of witnesses, the issuance of a final or temporary order for protection under section 518B.01, subd. 6 or subd. 7, violations of an order for protection, the response of a peace officer to the scene of alleged domestic abuse, the arrest of a parent following response to a report of alleged domestic abuse, or a conviction of a crime against a family or household member

c. If the Court finds that both parties have perpetrated domestic abuse, the Court shall consider which of the parties was the primary aggressor and shall consider the primary aggressor to have acted contrary to the child's best interests. Perpetration of domestic abuse by a non-primary aggressor does not rebut the presumption in recommendation 14 above. In determining whether a person is the primary aggressor the Court shall consider:
   i. The considerations listed in paragraph (ii) above;
   ii. Who has made prior reports to law enforcement of domestic violence;
   iii. The relative severity of the injuries inflicted on each person;
   iv. The likelihood of future injury to each person;
   v. Whether one of the persons acted in self-defense; and
   vi. Whether one of the persons has used methods of power and control over the other person.

16. If a parent is absent or relocates because of an act of domestic abuse by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or visitation.

Child Support and Parenting Plans

1. Child support should be separated from the parenting plan and should be determined in accordance with the child support guidelines.

2. The issue of child support should be detached from time and residence issues.

3. The development of parenting plans shall not preclude the ordering of temporary child support.

Services to Children and Families

1. The Minnesota Legislature should continue funding for the Cooperation of the Children Program, provided that the pilot programs continue to screen for domestic

violence, mental health issues, and chemical dependency issues. The State Court Administrator's Office should require program staff to contact the non-applying party as part of the screening process. Recognizing that an evaluation of the pilot programs is being done, if the program reduces parental conflict and litigation, the program should be expanded to provide services on a statewide basis.

2. The Minnesota Legislature should increase visitation center funding for (a) the development of additional visitation centers; (b) increased access by low-income families; (c) expanded service hours; and (d) adequate security.

3. The Minnesota Legislature should review ways to improve the visitation expeditor statute to increase its utilization.

Education

1. All law schools in Minnesota should offer alternative dispute resolution (ADR) as a part of its curriculum.

2. Family Law should be a required course in all law schools. The curriculum should include, but not be limited to dissolution of marriage, paternity, custody, visitation, parenting plans, child support, alternative dispute resolution options, child development, family dynamics, domestic abuse and the impact of domestic violence on children.

3. Minimum levels of education regarding family law should be established for judges, lawyers, ADR providers, guardians ad litem, custody evaluators, court personnel, family therapists, social workers, and other licensed professionals involved with children. Each professional board should develop education requirements for their respective professions. This education should include but not be limited to the developmental stages of children, domestic abuse, custody, visitation, parenting plans, mental illness, chemical dependency, and the impact of domestic violence on children.

Research and Evaluation

1. The Supreme Court should commission a study on the use of alternative dispute resolution (ADR) in family matters: specifically, Rule 114 as it relates to family law and Rule 310 (ADR in Family Law Cases) of the Minnesota Rules of General Practice. The study should include an analysis of whether ADR is used, the types of ADR employed, the outcome of ADR, access to ADR by low income families, and the existence of screening for chemical dependency, mental illness, and domestic violence.

2. The Supreme Court should develop a periodic review or assessment regarding the effectiveness of the various programs addressing parental conflicts in paternity and dissolution matters.

3. The Supreme Court should develop a methodology to allow compilation of data from court files to facilitate the study and review of family conflicts and methods of reducing that conflict.

4. The Supreme Court, in conjunction with the Department of Human Services or other appropriate entities, should conduct an evaluation of the use of voluntary parenting plans. Such an evaluation should include, but not be limited to, the impact of parenting plans on financial support, the well being of parents, and indicators of child well being.

5. The Legislature should provide funding for the research and evaluation efforts recommended in this section.

Other Recommendations

1. Minnesota statutes should be amended to permit parties, who have in the past or may in the future, to stipulate to a best interests modification standard in cases involving sole physical custody.

F. OVERVIEW OF REPORT

This report summarizes the background, duties, findings, deliberations, and recommendations of the Task Force. The report is divided into five parts, including the ***Introduction*** (Part I) and this ***Executive Summary*** (Part II).

Part III. ***Overview of Issues and Task Force*** frames the issues giving rise to the establishment of the Task Force. Part III also provides an overview of the Task Force, including its duties, organization, and procedures.

Part IV. ***Deliberations and Recommendations*** summarize the discussions and policy considerations of the Task Force. Included is a statement of each issue identified by the Supreme Court in its Order establishing the Task Force, a summary of the Task Force's deliberations regarding each issue, and the Task Force's recommendations regarding the issues.

Part V. ***Minority Reports*** contains the minority opinions pertaining to recommendations agreed upon by the Task Force; and

Part VI. ***Appendix A*** sets forth the analysis of the questionnaire distributed by the Task Force at the Annual Family Law Institute.

PART III: OVERVIEW OF ISSUES AND TASK FORCE

A. FRAMING THE ISSUES

Focus has long been directed toward reduction of conflict in dissolution, annulment, legal separation and paternity proceedings, specifically those involving children, in order to reduce acrimony in dissolution and related proceedings and to foster collaborative parenting arrangements. The Minnesota Supreme Court Advisory Task Force on Visitation and Child Support Enforcement made several recommendations in their final report of January 1997 which it believed would serve as tools to reduce conflict. Those recommendations included mandatory parent education classes, additional education for judges and attorneys and experimentation with programs aimed at providing intensive services to parents in conflict situations.

In Minnesota, some custodial and noncustodial parents are often unable to resolve custody disputes. Some custodial and noncustodial parents fail to comply with visitation orders, often causing or escalating conflict between the parents. Some parents, in an effort to get the legal proceedings "over with" agree to nothing more specific than "reasonable visitation" which causes conflict when the parents later have differing views of what is "reasonable". Regardless of the issue or reason, escalation of conflict regarding ongoing parenting issues can cause emotional harm to the innocent children involved.

B. PURPOSE OF TASK FORCE

Over the past decade the Minnesota Legislature has dealt with issues of visitation, custody and conflict in dissolution, annulment, legal separation and paternity cases. The concern was renewed during the 1998 legislative session as several legislators considered the concept of parenting plans. As a result of this consideration, the Minnesota Supreme Court was requested to establish a Task Force to evaluate methods of reducing conflict in dissolution, annulment, legal separation and paternity cases, and to specifically evaluate the use of parenting plans.

Pursuant to the Legislature's request, on August 10, 1998, the Minnesota Supreme Court issued an Order establishing the Advisory Task Force on Parental Cooperation ["Task Force"][8]. The provisions of the Order mirror the Legislature's language regarding the duties and charge of the Task Force, and provide that:

The Minnesota Supreme Court Advisory Task Force on Parental Cooperation be and hereby is established to:

(1) research and evaluate ways to reduce conflict between parents in marriage dissolution, annulment, legal separation, and paternity proceedings;

[8] Minnesota Supreme Court Order, *In Re the Advisory Task Force on Parental Cooperation,* File No. C8-98-1335 (August 10, 1998).

(2) research and evaluate the use of parenting plans as a tool for encouraging cooperation between parents relating to their parental obligations, decision-making authority, and schedules for the upbringing of children; as part of its deliberations the Task Force may consider the unofficial engrossment of 1998 H.F. No. 2784, Article 3;

(3) research and evaluate the programs and experiences in other states that have implemented parenting plans; and

(4) research and evaluate the fiscal impact of parenting plans upon parties and the judicial system.

Upon completion of its study, the Task Force was directed to make recommendations regarding:

(1) reducing conflict between parents in marriage dissolution, annulment, legal separation, and paternity proceedings;

(2) use of parenting plans;

(3) programs and experiences in other states that have implemented parenting plans; and

(4) the fiscal impact of parenting plans upon parties and the judicial system.

The Supreme Court directed the Task Force to report to the Court by December 15, 1999.[9]

C. TASK FORCE ORGANIZATION AND PROCEDURES

The thirty-two individuals appointed by the Supreme Court to the Task Force come from diverse backgrounds and include child advocates, a non-custodial parents' advocate, judges, court administrators, senators, representatives, a child support enforcement official, administrative law judges, legal aid attorneys, private family law attorneys, mediators, advocates for battered women, psychologists, and a guardian ad litem.

At the initial Task Force meetings on September 3, and October 8, 1998, Task Force members discussed the objectives of the Task Force, the Supreme Court's charge to the Task Force, as well as the members' general questions and concerns. There was vigorous discussion of parents' rights versus parents' responsibilities with respect to their children's lives with the Task Force reaching consensus that the focus of its work would be parenting responsibilities.

The Task Force members also agreed that many parents are able to work together to resolve conflict both initially and later. The Task Force specifically wanted to craft solutions that did not needlessly complicate proceedings for those parents.

[9] On December 1, 1999 the Task Force deadline for reporting to the Supreme Court was extended to January 15, 2000.

The Parental Cooperation Task Force explored a number of issues related to possible changes in the current family law system. The Task Force has attempted to utilize a number of underlying principles in its work of analyzing proposed changes:

- Facilitating child-focused strategies;
- Maintaining and/or establishing children's relationships with both parents when appropriate;
- Reducing conflict and the impact of conflict on children;
- Protecting children from violence and abuse;
- Ensuring the economic well-being of children; and
- Making parenting education opportunities universally available in Minnesota

To more efficiently carry out the Supreme Court's charge, the Task Force divided into three subcommittees: Parenting Plan Review, Fiscal Review and Conflict Reduction. The subcommittees discussed ground rules for discussion and decision making. Those included:

- Respectful communication; participants will focus on positions, not people, particularly in expressing disagreement;
- Egalitarian participation; all members should have the opportunity to express their views, and each members' views will be given equal weight;
- Openness; the subcommittees assumed that its discussions were public; and
- Preference for consensus[10]; the subcommittees and full Task Force endeavored to reach consensus in its reports and recommendations.

From October 1998 through August 1999, the subcommittees held separate meetings, in addition to meeting with the larger group, giving progress reports on a monthly basis. The Parenting Plan Subcommittee reviewed statutes providing for parenting plans from other states, examined some parenting plan forms, drafted a sample parenting plan form[11] and debated the pros and cons of implementing mandatory or optional Parenting Plans in Minnesota. The Fiscal Review Subcommittee researched and analyzed the relationship between parenting plans and the delegation of financial responsibilities for children as well as the fiscal impact of the various options under consideration by the other two subcommittees upon the judicial system and parents. The Conflict Review Subcommittee discussed areas of conflict in dissolution, annulment, legal separation and paternity cases and reviewed various methods of reducing conflict.

[10] The Task Force defined "consensus" as unanimous support for any given recommendation.

[11] A sample form was distributed to interested parties for discussion purposes only. Some attorneys and parents throughout the state have used this or other forms. The sample form distributed by the Task Force does not conform with Task Force recommendations. The Task Force does not approve or endorse the use of any particular form. The Task Force recommends that the Supreme Court establish a workgroup to develop a sample parenting plan form for use in Minnesota courts.

The full Task Force worked with Matt Grosser, Senior Research Analyst, State Court Administration, to develop and execute a questionnaire for participants at the Minnesota State Bar Association Continuing Legal Education Office's Annual Family Law Institute. The questionnaire covered areas the Task Force believed to be of highest conflict and an opinion question regarding whether certain statutory changes might reduce conflict: specifically the areas of custody and visitation terminology and standards for removal of children from the state. The responses were analyzed by Mr. Grosser and are attached as Appendix A.

The full Task Force met together each month and in February met for a full day for a presentation by Seattle, Washington attorney John Kydd. Mr. Kydd presented the results of much academic and professional study of conflict and violence in families, and explained how treating violence as a public health and prevention issue seems most appropriate.

The full Task Force met in September 1999 to discuss the subcommittees' findings. The results of the various subcommittees' discussions and research results formed the basis of the Task Force's preliminary recommendations. The draft recommendations were subsequently distributed for review and comment to over 500 judicial system stakeholders, interested individuals, public and private organizations, advocacy groups, and interest groups throughout Minnesota.

The Task Force held a public hearing on October 14, 1999. During the public hearing, Task Force members heard nearly four hours of comments from 34 speakers. In addition, written comments were received from over 50 stakeholders and interested persons and organizations.

During the November and December 1999 meetings the Task Force members carefully considered the comments of the public as they continued to debate the preliminary recommendations and issues. Through this process the Task Force members refined and finalized their recommendations, which are fully set forth in Part IV of this Report: *Deliberations and Recommendations.*

The Task Force has considered a number of recommendations designed to change the focus of family law from parents to children. The final recommendations seek to facilitate this shift in attitudes and practice.

D. NOTE ON TERMINOLOGY

The Task Force recommendations allow for parents within the context of a parenting plan to replace traditional terminology of custody and visitation with other terms. For purposes of this report, the report will use these terms while recognizing that parents may ultimately use other words.

PART IV: DELIBERATIONS AND RECOMMENDATIONS

After lengthy discussion and debate regarding numerous policy issues that were raised, a significant majority of the Task Force supports the recommendations responding to the issues identified in the Supreme Court Order establishing the Task Force. Other recommendations are the result of a majority vote.

A. LANGUAGE MODIFICATION

1. Current statutory language should be amended to substitute the term "parenting time" for "visitation" wherever it appears in relationship to parents.

2. Current statutory language providing for legal and physical custody should be expanded to provide:
   a. Parents voluntarily agreeing to parenting plans can use other terminology for physical and legal custody and visitation.
   b. When parents cannot agree, the Court shall use traditional terminology for physical and legal custody.
   c. For purposes of enforcement in other jurisdictions, every final judgment and decree in Parenting Plan cases must designate whether one parent or the other has sole or joint custody or both.

Comment:

The Task Force recommends that current statutory language which provides for legal and physical custody and visitation of minor children be expanded. While the current language in statute does not prohibit the use of different terminology, many attorneys are reluctant to use words not recognized by the statutes. Members of the Task Force have been divided over the issue of whether the terms 'custody" and "visitation" should be replaced by "residence" and "parenting time."

Those in support of the language modification believe new terms would be more conducive to both parents maintaining a co-equal status as parents to their children. Those who support maintaining the current language do not believe there is data to demonstrate any increase in parental cooperation or any benefit from replacing current terms. A complete discussion of this opinion can be found in Minority Report F.

In cases where parents agree to a parenting plan, it is appropriate to use alternative terminology that provides for custody of children and shared visitation. In cases where there has been a finding of domestic abuse, it is appropriate to use the traditional language regarding legal and physical custody of minor children.

In addition, Task Force members discussed whether changing the language may result in increased litigation because a long history of delineating the meaning of the current language

exists in case law and there are clear differences in the standards which are applied by the court in modifying custody which are different from the standard applied in modifying visitation.

There is also concern that cases involving the Uniform Child Custody Jurisdiction and Enforcement Act, Minn. Stat. § 518D.101-.317; the Parental Kidnapping Prevention Act, 28 U.S.C.A. § 1738A; and the [Hague] Convention on the Civil Aspects of International Child Abduction (25 October 1980), as implemented by the International Child Abduction Remedies Act, 42 U.S.C.A. § 11601 *et seq.*, could result in a lack of understanding and enforceability of decrees in different jurisdictions due to new terminology. The Task Force recommendation at A. 2.c. above, providing that "For purposes of enforcement in other jurisdictions, every final judgment and decree in Parenting Plan cases must designate whether one parent or the other has sole or joint custody or both" is designed to address this concern.

There is a strong concern that in cases where there has been domestic abuse that children and victims are best protected by maintaining the current language regarding custody and visitation. This language is important in cases across jurisdictional lines, and it may be important in equalizing the power and control in abusive relationships.

Therefore, the Task Force believes it would be appropriate in cases where parenting plans are developed and employed by the parties that they be permitted to use alternative language which would provide for a sole or primary residence, sole or shared decision making, shared parenting, and shared decision making.

B. IMPLEMENTATION OF PARENTING PLANS CONCEPT

1. All actions, judgments and decrees involving issues of custody and visitation for minor children may include parenting plans.

2. The Legislature should request and fund the development of a budget and implementation plan for parenting plans. The Judiciary should develop the budget and implementation plan. Implementation of recommendations with a fiscal impact should be delayed until the funds for new services are appropriated.

3. Parents may, in a parenting plan, stipulate to a best interests modification standard in cases involving sole physical custody.

4. If the Court determines that an act(s) of domestic abuse has occurred at any time, the court must make detailed findings if it concludes that removal is not in the child's best interest.

5. The Court shall accept a proposed parenting plan agreed to by both parties unless the court makes detailed findings why the proposed plan is not in the best interests of the child(ren).

6. Parents may include in their parenting plan an allocation of expenses not covered by child support guidelines, including but not limited to education and extracurricular activities (*e.g.,* post-secondary education, lessons, camp, fees, drivers' training, athletic activities). The financial responsibility for these expenses should be detailed in the parenting plan. These agreements should be enforceable as contracts between the parents.

7. To the extent allowable under federal and state law, parenting plans should recommend and the Court should award the dependency exemption to the parent such that it increases the total benefits available to the family and taking into consideration all of the credits and refunds due to the family to the extent the monetary impact of these items is made known to the Court.

8. If a parenting plan is going to make a current recipient of public assistance ineligible for public assistance, the Court can only approve the parenting plan if it makes specific findings that the parenting plan is in the best interests of the child.

9. Parents may modify the custody provisions of a parenting plan if the parties agree to the modification, with or without the use of the dispute resolution process. Unless agreed to in writing by the parents, no motion to modify the custody provisions may be made earlier than one year after the date of entry of a decree of dissolution or judgment in a Parentage Act case containing a parenting plan except where the Court finds a persistent and willful denial or interference with visitation, or has reason to believe that the present environment may endanger the child's physical or emotional health or impair the child's emotional development. Parents must file modifications in writing with the Court to ensure enforcement of the change(s).

10. The Court may modify the physical custody or legal custody provisions specified in a parenting plan if:
    a. The child has been integrated into the family of the parent requesting modification with the consent of the other parent in substantial deviation from the parenting plan;
    b. The child's present environment endangers the child's physical or emotional health or impairs the child's emotional development; or
    c. The Court has found the non-moving parent to have substantially, willfully, or wrongfully failed to comply with the custody schedule in the court-ordered parenting plan.

11. The Court may modify the visitation provision of a parenting plan whenever modification would serve the best interests of the child.

Comment:

Variations of parenting plans are used in at least 20 states with Tennessee and Washington being the most commonly cited examples. Under a parenting plan

system, parents are encouraged to reach their own agreement concerning the upbringing of their children, consistent with the best interests of the child.

In general, a parenting plan is a plan developed and agreed to by both parents or decided by the court. A parenting plan should contain three essential components: a) a residential schedule, b) a designation of decision-making responsibilities, and c) a method for dispute resolution. Parents who are able to agree on all or some of these issues on their own may file a plan jointly that states their agreement on these three issues.

A parenting plan may also address the following:

a. the duties of each parent concerning the child's upbringing, including daily care, education, health care, religious training, and other parental duties;
b. the time a child spends with each parent, as well as transportation arrangements and provisions for exchange of the child between parents, including restrictions, such as supervised parenting; and
c. the designation of each parent's responsibility for decisions regarding the child(ren) including, but not limited to daily care; schoolwork and activities; participation in religious activities and extra-curricular activities; consistent discipline and behavioral consequences; the special needs of a child; the time, place or manner of communication between the parents; deviations from the regular parenting schedule; and future resolution of parental conflict.

Parenting plans are intended to be a tool for helping parents reach a more cooperative, child-centered solution. The use of parenting plans is not appropriate or safe for all parties, and use of parenting plans is not intended to require shared physical or legal custody.

The emphasis on parenting plans is intended to shift the focus from parenting "rights" to parenting "responsibilities." This shift flows from the change in emphasis on parents' needs, wishes, etc. to an emphasis on children's needs, including their developmental stages, activities and interests. Parenting plans may provide for review of the custody schedule as children grow and their developmental needs and/or activities and interests change.

In addition to voluntarily agreed upon parenting plans, the Court may require that proposed parenting plans be submitted by each party prior to or at the time of the final judgment and decree.

Parenting plans that are decided following a contested hearing or reviewed pursuant to a stipulation by judicial officers will continue to be based on the "Best Interests" criteria currently found in Minn. Stat. 518 and Minn. Stat. 257.

Parents who seek the Court's involvement in deciding the child(ren)'s physical custody schedule and/or legal custody may submit proposed parenting plan(s) if the

parent believes it is in the child(ren)'s best interests. The Court may order a custody evaluation and should consider the appointment of a guardian ad litem.

Parents who seek a modification of a prior order or decree, with respect to physical custody, visitation, and/or legal custody, may submit a proposed parenting plan. If the modification is contested, each may be required to submit their proposed plan. The Court may order a custody evaluation and should consider the appointment of a guardian ad litem.

Parenting plans may provide for restricted visitation based on the factors included in Minn. Stat. §518.175, §518.179, and any other provisions of existing law.

The Court may limit or preclude any provisions of the parenting plan if any of the following factors exist:

a. The parent's neglect or substantial non-performance of parenting functions;
b. A long-term emotional or physical impairment that interferes with the parent's performance of parenting functions;
c. A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;
d. The absence of or substantial impairment of emotional ties between the parent and the child;
e. The abusive use of conflict by the parent which creates a danger of serious damage to the child's psychological development;
f. A parent has withheld from the other parent access to the child for a protracted period without good cause;
g. Other factors or conduct the court expressly finds adverse to the best interests of the child; or
h. A parent or a parent's housemate has engaged in the following:
   Act(s) of domestic abuse, physical harm, bodily injury, infliction of fear of physical harm, assault, terroristic threats, or criminal sexual conduct, whether against the other parent, or another household member.

In the event that the parents consider other responsibilities in the parenting plan, the financial responsibility for these expenses should be detailed in the parenting plan. These financial obligations would be in the nature of child support and should not be dischargeable in bankruptcy. The public child support agency would not be responsible for collection.

The Court needs to carefully scrutinize parenting plans in which there is any kind of public assistance benefits going to any member of the family. If the parents are unrepresented by counsel, the court should seek input from a knowledgeable and neutral person or entity with regard to whether the adoption of the parenting plan would adversely impact the child. The input from the neutral person or entity must be served on all parties and would not be considered to be ex parte communication. The Task Force acknowledges that "this neutral and knowledgeable person or entity" may

not currently exist as a funded position, and believes that it is important to advocate for its existence. The Task Force envisions that this position would be at the state level and provide resources to all counties.

The Task Force recognizes that new services will need to be offered and current services will need to be modified to assist parents with completing parenting plans. Some changes with fiscal impact may necessitate classes to assist in preparing the form, an informational brochure, and easy access to forms.

The proposed changes with fiscal impact should not be implemented without funding for the new, increased, and current services identified as needed in association with parenting plans, including at least these services:

a. reasonable access to "child-safe" visitation centers for residents of each county;
b. new curriculum on parenting plans for parenting education classes;
c. assistance to pro se parents in the form of explanation and advice about parenting plans and clerical assistance in completing forms;
d. additional publicly funded family law attorneys;
e. a knowledgeable and neutral party to advise the court on public assistance benefits and the best interests of the child;
f. educational opportunities for family law stakeholders; and
g. a reliable and expeditious means for the court to evaluate proposed parenting plans from pro se parties to determine whether the plan is in the best interests of the child.

12. The Court may not require that parenting plans provide for joint legal custody or use of dispute resolution processes, other than court action, if the Court finds that either parent has engaged in the following:

a. Act(s) of domestic abuse; physical harm, bodily injury, infliction of fear of physical harm, assault, terroristic threats, or criminal sexual conduct;
b. Physical, sexual or a pattern of emotional abuse of a child;
c. Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions;
d. Conviction of one of the following crimes if the conviction occurred within the preceding five years; the person is currently incarcerated, on probation, or under supervised release for the offense; or the victim of the crime was a family or household member as defined in M. S. § 518B.01, subdivision 2:
    i. murder in the first, second, or third degree under section 609.185, 609.19, or 609.195;
    ii. manslaughter in the first degree under section 609.20;
    iii. assault in the first, second, or third degree under section 609.221, 609.222 or 609.223;
    iv. kidnapping under section 609.25;
    v. depriving another of custodial or parental rights under section 609.26;
    vi. soliciting, inducing, promoting, or receiving profit derived from prostitution involving a minor under section 609.322;

vii. criminal sexual conduct in the first degree under section 609.342;
viii. criminal sexual conduct in the second degree under section 609.343;
ix. criminal sexual conduct in the third degree under section 609.344, subdivision 1, paragraph (c), (f), or (g);
x. solicitation of a child to engage in sexual conduct under section 609.352;
xi. incest under section 609.365;
xii. malicious punishment of a child under section 609.377;
xiii. neglect of a child under section 609.378;
xiv. terroristic threats under section 609.713; or
xv. felony harassment or stalking under section 609.749, subdivision 4.

Comment:

If either parent has been found to have committed act(s) of domestic abuse or child abuse, or if a parent has abandoned a child and/or parenting responsibilities, joint legal custody and the use of dispute resolution processes will not be required in preparation of a parenting plan

13. When allegations of domestic violence exist, the parents shall not be required to participate in mediation to develop a parenting plan. Each parent may still submit his or her proposed parenting plan. In these matters, the Court should consider the appointment of a guardian ad litem, and/or a custody evaluator.

14. A determination by the Court that domestic abuse has occurred raises a rebuttable presumption that it is detrimental to the child and not in the child's best interests to be placed (a) in sole legal custody or in sole physical custody with the perpetrator of family violence; or (b) in joint legal custody or joint physical custody with the perpetrator of family violence.

15. In addition to other factors that a Court must consider in a proceeding in which the custody of a child or visitation is at issue and in which the Court has made a finding of domestic abuse:
    a. The Court shall consider as primary the safety and well being of the child and of the parent who is the victim of domestic abuse. The Court shall make specific findings of fact to show that the custody or visitation arrangement best protects the child and the parent or other family member who is the victim of domestic violence.

    b. The Court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person. In determining the existence of domestic abuse, the Court's consideration shall include, but is not limited to testimony of witnesses, the issuance of a final or temporary order for protection under section 518B.01, subd. 6 or subd. 7, violations of an order for protection, the response of a peace

officer to the scene of alleged domestic abuse, the arrest of a parent following response to a report of alleged domestic abuse, or a conviction of a crime against a family or household member.

c. If the Court finds that both parties have perpetrated domestic abuse, the Court shall consider which of the parties was the primary aggressor and shall consider the primary aggressor to have acted contrary to the child's best interests. Perpetration of domestic abuse by a non-primary aggressor does not rebut the presumption in recommendation 14 above. In determining whether a person is the primary aggressor the Court shall consider:
   i. The considerations listed in paragraph (b) above;
   ii. Who has made prior reports to law enforcement of domestic violence;
   iii. The relative severity of the injuries inflicted on each person;
   iv. The likelihood of future injury to each person;
   v. Whether one of the persons acted in self-defense; and
   vi. Whether one of the persons has used methods of power and control over the other person.

Comment:

Current law has a rebuttable presumption against joint legal and joint physical custody where one parent has perpetrated domestic abuse against the other. This language would plug a gap and extend the presumption to sole physical custody and sole legal custody. This presumption is designed to reduce conflict between parents where one or both have perpetrated domestic violence, by limiting the likelihood that a perpetrator's quest for sole physical custody or sole legal custody will succeed.

An Order for Protection must automatically supercede any inconsistent provisions of a prior parenting plan.[12]

16. If a parent is absent or relocates because of an act of domestic abuse by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or visitation.

C. CHILD SUPPORT AND PARENTING PLANS

1. Child support should be separated from the parenting plan and should be determined in accordance with the child support guidelines.

[12] See M.S. § 518B.01, subd. 6 for a full explanation of the relationship between an order for protection and proceedings for dissolution or legal separation.

Comment:

The child support determination and the parenting plan should be part of the same final document for dissolutions (Minn. Stat. §518) and Parentage Act cases (Minn. Stat. §257.66). The connection between child support and parenting plans exists only so far as they are both attached to the same judgment and decree documents. Child support determinations in a modification (Minn. Stat. §518.64) and establishment (Minn. Stat. §256.87) action should proceed with no incorporation of a parenting plan. Parenting plans should not be incorporated in domestic abuse (Minn. Stat. §518B) actions although child support may be addressed.

By making this recommendation the Task Force is not specifically endorsing the current child support guidelines and the manner in which they determine support. Rather, the Task Force believes that separating the amount of child support from parenting plan issues will prevent parties from using a parenting plan to manipulate the amount of child support. This is consistent with other states' handling of these issues and is the least complicated approach.

2. The issue of child support should be detached from time and residence issues.

Comment:

Detaching child support from time and residential issues is consistent with recommendations from an earlier Supreme Court Task Force that looked at child support and visitation issues. It is likely to prevent disingenuous litigation, i.e., situations in which parents argue for more time with the children in order to pay less support. The Task Force is concerned that if child support and time and residential issues are linked together, child support will go down. The Task Force recognizes that there is current case law that does allow parents some avenues for adjusting child support based upon time and residential issues. The Task Force believes that the Department of Human Services' Child Support Guidelines Review Project should propose a guideline that appropriately and comprehensively deals with Valento[13] type issues and also ensures that the basic needs of children are met.

The Task Force's preferred or ideal policy implementation plan would have any parenting plan changes implemented at the same time as any change in the child support guidelines.

[13] Valento v. Valento provides that when determining support where joint physical custody is provided, the party's obligation is based on his or her guidelines amount for the period the other parent has custody. Payments may be made strictly during that time period or may be spread out over the entire year. The case also reiterates that one cannot deviate from child support guidelines by simply subtracting a parent's income from his or her needs. Instead, the court must consider the five statutory factors in conjunction with each other and supply written findings. Valento v. Valento, 385 N.W.2d 860 (Minn. Ct. App. 1986).

3. The development of parenting plans shall not preclude the ordering of temporary child support.

Comment:

The Task Force was concerned that child support payment not be delayed if parents are developing a parenting plan. The Court should follow existing protocols to immediately establish temporary child support obligations and payments.

D. SERVICES TO CHILDREN AND FAMILIES

1. The Minnesota Legislature should continue funding for the Cooperation of the Children Program, provided that the pilot programs continue to screen for domestic violence, mental health issues, and chemical dependency issues. The State Court Administrator's Office should require program staff to contact the non-applying party as part of the screening process. Recognizing that an evaluation of the pilot programs is being done, if the program reduces parental conflict and litigation, the program should be expanded to provide services on a statewide basis.

Comment:

The Supreme Court Task Force on Visitation and Child Custody recommended that the Legislature fund and the Supreme Court establish a pilot project, Cooperation for the Children, with the purpose of providing parents and extended family members with an easily accessible, expedited process emphasizing nonadversarial methods to resolve visitation disputes. Currently Cooperation for the Children Pilot Programs are operating in Ramsey (St. Paul) and Stearns (St. Cloud) counties. The programs offer assistance regarding the following types of requests:

- Enforcement of existing visitation orders, including temporary orders and post-decree matters;
- Modification of existing visitation orders, including temporary orders, post-decree matters, cases where paternity has been adjudicated, cases where the issue of visitation is reserved, and cases where the child is moving or has moved out of state; and
- Establishment of visitation rights in Recognition of Parentage cases.

Program staff is responsible for screening applications for assistance and for rejecting cases that are not visitation related or are the current subject of a custody evaluation, and cases involving domestic violence, mental health issues, and chemical dependency issues.

The current programs are funded by a combination of state and federal funds. An evaluation of the programs will take place in 2000. The results of this evaluation will be instrumental in determining whether to continue the existing pilot programs, expand the programs on a statewide basis or phase out the project.

2. The Minnesota Legislature should increase visitation center funding for (a) the development of additional visitation centers; (b) increased access by low-income families; (c) expanded service hours; and (d) adequate security.

Comment:

Visitation centers provide two types of services: (a) supervised visits; and (b) facilities for visitation exchanges. It has been demonstrated that visitation centers reduce conflict between parents by preventing contact at visitation exchanges. The centers protect children from witnessing conflict between their parents by eliminating a frequent opportunity for that conflict. Because the parents have no contact with each other at exchanges, the risk of assault or other harm inflicted by parents is reduced. Supervised visitation allows children to spend time with parents who otherwise would not see the children due to the risk of harm during visits. Use of the centers reduces litigation between some parents, according to surveys of parents.

Minnesota currently has approximately 28 visitation centers. Only eight of these centers receive state funding. Some of the centers serve only limited populations, and are not fully available to all parents who need supervised visits or exchanges. Most counties in Minnesota do not have any visitation centers. Most centers operate for limited hours on evenings and weekends when parents are most available for visits. Some centers charge up to $30 per visit, which limits the number of visits some families can afford. Some families cannot afford any visits at that price.

3. The Minnesota Legislature should review ways to improve the visitation expeditor statute to increase its utilization.

Comment:

The visitation expeditor was created to assist parties in resolving visitation disputes in an efficient, non-adversarial manner. Since its inception, the position has been under utilized, primarily because of a lack of resources in many counties, the expense of using the system, and the overly complex procedures to be followed. A visitation expeditor can offer much needed services to parties with visitation disputes. An analysis of the enabling legislation is necessary to improve the process.

E. EDUCATION

1. All law schools in Minnesota should offer alternative dispute resolution (ADR) as a part of its curriculum.

2. Family Law should be a required course in all law schools. The curriculum should include, but not be limited to dissolution of marriage, paternity, custody, visitation, parenting plans, child support, alternative dispute resolution options, child

development, family dynamics, domestic abuse and the impact of domestic violence on children.

Comment:

The Task Force acknowledges that it does not have authority to mandate law school curriculum. The Task Force believes, however, that since the issues addressed in family law education encompass subject matter that is applicable for many other areas of the law, it would be desirable for law students to be exposed to family law education. In addition, since family law is a mandatory subject on the Minnesota State Bar Examination, students would benefit from exposure to family law during their education.

3. Minimum levels of education regarding family law should be established for judges, lawyers, ADR providers, guardians ad litem, custody evaluators, court personnel, family therapists, social workers, and other licensed professionals involved with children. Each professional board should develop education requirements for their respective professions. This education should include but not be limited to the developmental stages of children, domestic abuse, custody, visitation, parenting plans, mental illness, chemical dependency, and the impact of domestic violence on children.

Comment:

The Task Force recognizes the benefits of providing professionals involved with children with a broad based education aimed at assisting the professional to carry out the duties of the position in a manner that best takes the best interests of the child into account. The Task Force recognizes that each profession has its own minimum education standards and that it is most appropriate for each profession to set such standards.

The Task Force extensively debated the issue of education for the various stakeholders in the system, particularly the limitations and parameters of what could be accomplished, within the existing structures, to educate attorneys to reduce conflict in family law litigation involving children.

The group acknowledged that the basic emotional makeup of some litigators was beyond the influence of the Legislature and this Task Force. However, education regarding ADR, family psychological dynamics, domestic violence, and child development is seen as a method of reducing conflict in the majority of situations.

Deliberations centered around practical methods of enforcing educational requirements (i.e., making it mandatory). Consensus among the practitioners was that a great majority of attorneys do not practice in the contested family law areas, and would be resistant to a global CLE requirement.

The Task Force discussed the issue of Certification as a Family Law Specialist. The practitioners opposed the trial component of the current proposal by the American Trial Lawyers Association (ATLA). The group felt that the trial requirements encouraged litigation rather than alternative resolution.

F. RESEARCH AND EVALUATION

1. The Supreme Court should commission a study on the use of alternative dispute resolution (ADR) in family matters: specifically, Rule 114 as it relates to family law and Rule 310 (ADR in Family Law Cases) of the Minnesota Rules of General Practice. The study should include an analysis of whether ADR is used, the types of ADR employed, the outcome of ADR, access to ADR by low income families, and the existence of screening for chemical dependency, mental illness, and domestic violence.

2. The Supreme Court should develop a periodic review or assessment regarding the effectiveness of the various programs addressing parental conflicts in paternity and dissolution matters.

3. The Supreme Court should develop a methodology to allow compilation of data from court files to facilitate the study and review of family conflicts and methods of reducing that conflict.

4. The Supreme Court, in conjunction with the Department of Human Services or other appropriate entities, should conduct an evaluation of the use of voluntary parenting plans. Such an evaluation should include, but not be limited to, the impact of parenting plans on financial support, the well being of parents, and indicators of child well being.

5. The Legislature should provide funding for the research and evaluation efforts recommended in this section.

Comment:

The Task Force spent considerable time discussing the need for research on the effectiveness of current conflict resolution techniques in place in the judicial system, including mandatory parent education, the use of ADR and the Cooperation for the Children Pilot Project. In addition, the use of parenting plans should be monitored and evaluated to assist policy makers in future deliberations about the efficacy of parenting plans.

The Task Force recognized that the time and appropriation allotted to the initial analysis did not afford enough time or sufficient funding to conduct a meaningful evaluation of existing programs. The Task Force spent time in committee as well as in subcommittee identifying specific data needs, and went so far as to discuss the

parameters of a case file review. The Task Force was unable to undertake such a review due to budgetary constraints. The budget also did not permit additional surveys of family law system stakeholders.

The Task Force recommends that the Supreme Court and Legislature recognize the need for sound empirical research on these issues and that sufficient funds be appropriated to accomplish these research endeavors.

G. OTHER RECOMMENDATIONS

1. Minnesota statutes should be amended to permit parties, who have in the past or may in the future, to stipulate to a best interests modification standard in cases involving sole physical custody.

Comment:

Minnesota Statute § 518.18 (d) sets out the standards to be applied when modifying an existing custody order. The statute also provides that in deciding whether to modify a prior *joint* custody order, the court may apply a different standard if the parties agree in writing to the different standard. The statute does not contain a comparable provision for parties to agree to a different modification standard in cases involving *sole* physical custody.

The Minnesota Supreme Court recently upheld this distinction in *Frauenshuh vs. Giese*, 599 N.W.2d 153 (Minn. 1999), which provides that the modification requirements of Minn. Stat. § 518.18 apply to sole physical custody even when the parties have stipulated to a different standard in their dissolution decree.

MINORITY REPORTS

MINORITY REPORT A

EVALUATE EXISTING MINNESOTA PROGRAMS DESIGNED TO REDUCE PARENTAL CONFLICT BEFORE ENCOURAGING USE OF PARENTING PLANS

The undersigned members of the Parental Cooperation Task Force disagree with the recommendation to permit parenting plans by agreement of both parents or by court order. That recommendation is premature. Recently created programs intended to reduce conflict between Minnesota parents should be evaluated before experimenting with parenting plans. Divorce and parenting education have expanded statewide in recent years. In addition, parents have been required to attend such programs since 1998.[14] Consideration of alternative dispute resolution (primarily mediation) has been mandated in most family law cases since 1997.[15]

It may be that existing programs do more to reduce conflict than use of parenting plans. The Task Force heard that many divorce education programs in rural areas are struggling for survival with little money and overtaxed volunteers. These programs should be studied to find out whether they reduce conflict. Directing resources to the struggling education programs may reduce far more conflict than use of parenting plans.

Respectfully submitted,

Maria Pastoor
Alice Lynch

[14] Minn. Stat. § 518.157 (1998).
[15] Rule 310.01 of the Minnesota Rules of General Practice.

MINORITY REPORT B

JOINT PHYSICAL CUSTODY IS HARMFUL TO CHILDREN OF HIGH-CONFLICT PARENTS.

The undersigned members of the Parental Cooperation Task Force believe it important to warn that the co-parenting encouraged by parenting plans is harmful to children of high-conflict parents.

A report commissioned by the Washington State Gender and Justice Commission and Domestic Relations Commission reviewed all scientific studies of joint physical custody and child well-being following divorce. While some studies drew different conclusions, the high quality studies warned against co-parenting in some situations:

> Evidence from two high-quality studies suggests that **high levels of child-nonresidential father contact are** beneficial to children in low conflict families but **harmful to children in high conflict families.**[16]

The harm may arise from the high level of contact between parents required to co-parent, which increases opportunities for arguments. Extensive contact also endangers parents and children who have survived domestic abuse by increasing opportunities for contact, harassment, intimidation, and assault. The low conflict families will and do co-parent, whether it is called a parenting plan, or custody and visitation.

A recent evaluation of high-quality studies found no decrease in parental conflict from co-parenting:

> Shared or 50/50 residential schedules and frequent child non-residential parent contact do not promote parental cooperation.[17]

Thus, co-parenting risks harm to children of high conflict parents, with no evidence that it affects the cooperative behavior of low-conflict parents.

Respectfully submitted,

Maria Pastoor
Steve King
Alice Lynch
Nancy Mischel
Charles Thomas

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[16] Diane L. Lye, Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission, June 1995, Chapter 4 (*What the Experts Say*), page 15 (refers to studies by Amato and Rezac 1994, Buchanan et al. 1991, 1996)(emphasis added).

[17] *Id.*, page 3.

MINORITY REPORT C

THE LEGISLATURE SHOULD FUND AND REQUEST DEVELOPMENT BY THE SUPREME COURT OF A METHOD TO SCREEN ALL FAMILY COURT CASES FOR DOMESTIC ABUSE.

The undersigned members of the Parental Cooperation Task Force recommend that the legislature fund and request development by the Supreme Court of a method to screen all family court cases for domestic abuse. Sprinkled through the majority report and current law[18] are exceptions to various laws when one parent has inflicted domestic abuse on the other. The Task Force heard repeatedly that current exceptions for domestic abuse do not work well because judges, guardians ad litem, custody evaluators, and mediators often do not know whether one parent has abused the other. This is because parents are not routinely asked about domestic abuse, many parents and players in the court system do not understand the significance of domestic abuse to custody and visitation arrangements, and many parents are too fearful, intimidated, and/or ashamed to volunteer the information. No one claimed otherwise. The new exceptions promoted by the majority will not work any better. While the majority recommendations may not make the current situation worse, use of parenting plans may create inappropriate pressure on domestic abuse survivors to agree to parenting plans, as happened when mediation was introduced.[19] Low-income abuse survivors may experience pressure to "agree" to imprudent parenting plans because they lack the resources to litigate, mediation is dangerous, and there are no institutionally supported alternatives.

Screening is necessary to avoid inflicting co-parenting (also known as joint physical and legal custody) on those to whom it presents danger. Screening is also necessary to avoid imposing mediation on domestic abuse survivors.

Screeners should have knowledge about the use of power and control as well as experience providing direct service to domestic abuse survivors. Screening should occur at the first possible opportunity, with mediators and custody evaluators also screening at their first and later contacts with a parent.

Respectfully submitted,

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Ron Longtin
Alice Lynch
Judge Leslie Metzen
Nancy Mischel
Charles Thomas

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[18] For example, Minn. Stat. §§ 518.17, subd. 1(12)(effect on children of domestic abuse to be considered in custody decision); 518.17, subd. 1(13)(friendliness of one parent to the other considered except where finding of domestic abuse); 518.17, subd. 2(rebuttable presumption that joint custody not in child's best interests where domestic abuse occurred) 518.619, subd. 2 (exception from court-ordered mediation if probable cause of domestic violence); Rule 310 of the General Rules of Practice (court may not order certain types of alternative dispute resolution where one parent claims domestic abuse).

[19] "Some judges continue to order custody mediation in situations where there has been domestic abuse in spite of state law prohibiting mandatory mediation in these cases." Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Report Summary S10 (1989).

MINORITY REPORT D

THE LEGISLATURE SHOULD ENACT A REBUTTABLE PRESUMPTION THAT DOMESTIC ABUSE SURVIVORS MAY RESIDE WITH THEIR CHILDREN IN A LOCATION OF THEIR CHOICE.

The undersigned members of the Parental Cooperation Task Force disagree with the majority recommendation that if a court determines that domestic abuse has occurred and denies a request by the custodial parent to remove children from Minnesota, it must make detailed findings that the removal is not in the children's best interest. The recommendation does not go far enough to protect children and their custodial parents from domestic abuse by a nearby parent.

We recommend that the legislature add language to Minn. Stat. § 518.18 providing that where there is a dispute as to removal of a child from Minnesota, a determination by a court that domestic abuse has occurred raises a rebuttable presumption that it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic abuse in the location of that parent's choice.

This presumption recognizes that enhanced safety, personal, and social supports may be available to the abused parent in another state, and that these supports are not only in the parent's best interests, but are, likewise, in the best interest of the child. The ability to put distance between a parent and an abuser, coupled with proximity to supportive family and/or friends may engender more safety for survivors than all the legal remedies afforded by the court system. If forced to stay in the same area as the abuser, the abuser may more easily intimidate the other parent, isolate the other parent from friends and family, and prevent continued education and/or better employment. A presumption will deter bad-faith litigation by abusers intent on controlling the whereabouts of their victims far better than the weaker majority recommendation.

This presumption is recommended by the Family Violence Model State Code promulgated by the National Council of Juvenile and Family Court Judges. Professor Janet Bowermaster lauds the Model Code provision and further explains the issues in a recent law review article.[20]

Respectfully submitted,

Rosemary Frazel
Maria Pastoor
Ron Longtin
Alice Lynch
Judge Leslie Metzen
Nancy Mischel
Judge Donald Rysavy
Charles Thomas

[20] Janet M. Bowermaster, *Relocation Disputes Involving Domestic Violence*, 46 U. Kansas L. Rev. 433 (1998).

MINORITY REPORT E

PARENTING PLANS USED IN OTHER STATES SHOULD BE EVALUATED FOR REDUCTION IN PARENTAL CONFLICT BEFORE USING THEM IN MINNESOTA.

The undersigned members of the Parental Cooperation Task Force disagree with the recommendation to permit parenting plans by agreement of both parents or by court order. That recommendation is premature. The states that have implemented parenting plans should be studied to see whether parenting plans actually reduce conflict between parents. None of these states have produced data showing or even suggesting a decrease in conflict.

Washington State enacted parenting plans in 1987. Data from Washington suggests proceeding with caution. The settlement rate for parenting plans is only 51.5 percent,[21] compared to the 93 percent settlement rate in Minnesota for dissolutions.[22] These numbers suggest a considerably higher rate of conflict than experienced currently in Minnesota. Another study in Washington State found no benefits to children resulting from parenting plans, that parents' well-being was *worse*, that parental conflict did not decrease but in fact intensified, and no improvement in child support payments.[23] Although the reliability of the study may be limited by the small response rate, the results underscore that we should not encourage use of parenting plans without data showing that they actually reduce parental conflict. Some Task Force members have suggested that in Washington parenting plans result in fewer post-decree modifications. The data do not support that statement.[24]

Other findings in the 1999 study of parenting plans in Washington State suggest significant problems where one parent has inflicted violence on the other:

> "Domestic violence survivors find the civil justice system especially difficult to access and utilize, and often have [parenting] plans they believe compromise their own and their children's safety."[25]

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[21] Diane N. Lye, *Progress Report to Washington State Gender and Justice Commission*, November 13, 1998, page 3 (describes study commissioned by State Representative Kastama).

[22] Trial Court Caseload Statistics for fiscal year 1998 and 1999, available from State Court Administration, 120 Constitution Avenue, Suite 120, St. Paul, MN 55155 (494 of 7,101 dissolution cases disposed of in 1998 were disposed of by trial; 497 of 7,101 dissolution cases disposed of in 1999 were tried).

[23] John E. Dunne, M.D., *Can Changing the Divorce Law Affect Post-Divorce Adjustment?* 12, 14, 20, 22 (undated) (unpublished longitudinal study, on file with Minnesota State Court Administration).

[24] Data from Washington State shows that modifications of parenting plans "are heavily concentrated in the fourth, fifth, and sixth years after the prior plan." (Diane L. Lye, Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission, June 1995, Chapter 3, page 28.) However, the Washington State Parenting Plan Act Study did not compare modifications before and after Washington enacted parenting plans in 1987. No data shows whether use of parenting plans resulted in a greater length of time until plans were modified. Nor did the Task Force receive any comparison data showing the length of time prior to modifications of custody and visitation modification orders in Minnesota.

[25] Diane L. Lye, Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission, June 1995, Introduction, page 1.

Professional providers such as judges, attorneys, mental health professionals, parenting evaluators, guardians ad litem, and activists believe that "[T]he Parenting Act fails to adequately protect survivors of domestic violence."[26]

Anecdotal evidence from Washington also warrants caution concerning parenting plans. Accounts range from those who believe that parenting plans help parents work cooperatively and focus on children's needs, to those who believe parenting plans have increased attorney's fees needed to divorce and increased conflict between parents by giving them more issues to fight about than before[27].

Further study of parenting plans should be conducted before implementing them in Minnesota.

Respectfully submitted,

Maria Pastoor
Ron Longtin
Alice Lynch
Nancy Mischel
Charles Thomas

[26] *Id.*, page 2.
[27] Honorable Mike Brigner, memorandum to Ohio Association of Domestic Relations Judges dated September 17, 1997 (unpublished memorandum on file with Minnesota State Court Administration, reporting interviews with Washington State attorneys, researchers, a social worker, a guardian ad litem, judges, and a law professor).

MINORITY REPORT F

NO DATA SUGGEST THAT CHANGING THE TERMS "CUSTODY" AND "VISITATION" WILL REDUCE PARENTAL CONFLICT.

The undersigned members of the Parental Cooperation Task Force disagree with the majority recommendation to replace the term "visitation" with "parenting time" and to permit parents to use different terms from "physical custody," "legal custody," and "visitation" in parenting plans.

No data demonstrate any increase in parental cooperation or any other benefit from replacing the existing terms of "custody" and "visitation." In addition, the terms change implies that there is something wrong with having one custodial parent. In fact, having the designation of custodial parent is helpful to children of battered mothers because it limits power and control opportunities for the abusive parent. The use of any number of words instead of "custody" and "visitation" may also confuse law enforcement, court administrators, and child support workers within and outside Minnesota, making parenting plans difficult to enforce.

The majority recommends this change with no evidence that it will reduce conflict.

Respectfully submitted,

Maria Pastoor
Ron Longtin
Alice Lynch
Nancy Mischel
Charles Thomas

MINORITY REPORT G

Frauenshuh v. Giese

At page 30 above, the Parental Cooperation Task Force has taken a positive, although limited, step in recommending that the Legislature overturn *Frauenshuh v. Giese*, 599 N.W.2d 153 (Minn. 1999) and *Geiger v. Geiger*, 470 N.W.2d 704 (Minn. Ct. App. 1991). These decisions carried to extreme Minnesota's current law governing the situation where a parent who has sole physical custody of a child seeks to remove the child from the State of Minnesota. Under our law, the custodial parent may leave with the child unless the move would endanger the child or the move is designed to interfere with the non-custodial parent's visitation rights. Because of the difficulty of proving endangerment or intent to prevent visitation, the custodial parent's right to take the child out of the state is unfettered in nearly all cases. Even without *Frauenshuh v. Giese*, Minnesota is one of the most permissive states in allowing a custodial parent to move the child. *See* Edwin J. (Ted) Terry, et al., *Relocation: Moving Forward, or Moving Backward?*, 15 J. AM. ACAD. MATRIMONIAL LAWS. 1, 167-241 (1998).

In *Frauenshuh* and *Geiger*, Minnesota courts held that our state's already permissive standard applies even if the parties *had agreed*, at the time custody was determined, that the move would be allowed only if it were found to be in the best interest of the child. The Parental Cooperation Task Force recommends that the Legislature overturn these cases by permitting parents to agree that the best interest standard would apply if and when the custodial parent seeks to take the child from our state. The Task Force's recommendation would be an important improvement in the law. It would facilitate the settlement of cases in which one parent is willing to agree that the child may live with the other parent, but is unwilling to grant the other parent an all but limitless right to take the child from the state.

In our view, however, the Parental Cooperation Task Force has not gone far enough. Instead of merely allowing parents to *agree* that the best interests standard will govern in their case, that standard should be adopted in *all* removal cases, agreement or not. The existing law is supposedly based on a policy favoring the stability of the child's life. That policy actually argues against the current law because moving often has a profoundly destabilizing effect on a child. *See* Marion Grindes, PhD., *The Psychological Effects of Relocation for Children of Divorce*, 15 J. AM. ACAD. MATRIMONIAL LAWS. 1, 119-48 (1998).

In many cases, a move robs the child of playmates, schoolmates, teachers, a worship community, grandparents, neighbors – all important aspects of the child's support system. A move can also drastically alter the child's relationship with the non-custodial parent. That relationship may in fact be stronger than that with the custodial parent, regardless of "custodial" and "non-custodial" labels. Experienced professionals in this field know that, in some instances, the parent formally designated as "non-custodial" may be the most important adult in the child's life. For example, the "non-custodial" parent may see the child every day, attend the child's school and sporting events several times a week and the like, and may be a more stable parent than the designated "custodial" parent. In such cases, the move transforms the formerly close non-custodial parent into a distant figure who may see the child only on vacations and holidays, at great expense.

Under our law, the destabilizing effects of the move itself cannot be considered – the assumed stability of the child's relationship with the custodial parent who wants to move, trumps all other factors, except endangerment or bad motives. *See Silbaugh v. Silbaugh*, 543 N.W.2d 639 (Minn. 1996).

Along with many other professionals in the field, we believe that giving the custodial parent the virtually unfettered right to move the child's residence can undermine, rather than promote, stability in the child's life. We suggest that when a custodial parent wants to move the child from his or her home, the non-custodial parent should have the opportunity to stop the move by showing that it is not in the child's best interest. We recommend that the Legislature consider directing the courts, in determining the child's best interest, to weigh the factors set forth in the American Academy of Matrimonial Lawyers' proposed Model Relocation Act.[28] These factors focus on facts, not assumptions, about the effect of the move on the child:

1. The nature, quality, extent of involvement, and duration of the child's relationship with the person proposing to relocate and with the non-relocating person, siblings, and other significant persons in the child's life;
2. the age, developmental stage, needs of the child, and the likely impact the relocation will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child;
3. the feasibility of preserving the relationship between the non-relocating person and the child through suitable [visitation] arrangements, considering the logistics and financial circumstances of the parties;
4. the child's preference, taking into consideration the age and maturity of the child;[29]
5. whether there is an established pattern of conduct of the person seeking the relocation, either to promote or thwart the relationship of the child and the non-relocating person;
6. whether the relocation of the child will enhance the general quality of life for both the custodial party seeking the relocation and the child, including but not limited to, financial or emotional benefit or educational opportunity;
7. the reasons of each person for seeking or opposing the relocation; and
8. any other factor affecting the best interests of the child.[30]

In most cases, the result of the change we propose would be the same as under present law, since the parent opposing the move would not succeed in showing that the change of

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[28] The Model Relocation Act is located at 15 J. AMER. ACAD. MATRIMONIAL LAWS. 1, 1-24 (1998).

[29] Our law does not call for asking the child what he or she wants, and the child is rarely permitted separate representation. See the reforms suggested by Minnesota Attorney Gary A. Debele in *A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard*, 15 J. AM. ACAD. MATRIMONIAL LAWS. 1, 75-118 (1998).

[30] The American Academy of Matrimonial Lawyers' Model Act §406 sets forth the following as factors not to be considered:

a. If the court has issued a temporary order authorizing a party seeking to relocate a child to move before final judgment is issued, the court may not give undue weight to the temporary relocation as a factor in reaching its final decision.
b. The court may not consider whether the person seeking relocation of the child has declared that he or she will not relocate if relocation of the child is denied.

residence is not in the child's best interest. But in those cases where the relationship with the non-custodial parent is woven into the fabric of the child's life, that parent should have a chance to show that if the custodial parent moves, the best interest of the child requires that the child stay behind in the custody of the other parent. One result of this change might be that fewer custodial parents would move. It could be argued that this requires a sacrifice of the custodial parent's freedom of choice, etc., but sacrificing for one's children is what parenting is all about. Another, and beneficial, result would be that even more cases would settle, since a parent would be more likely to agree that a child may live with the other parent if he or she could be assured of being able to assert the child's interests in the case of a future move. Most importantly, the child's interests would be considered, not just those of the parent desiring to move.

Finally, we would add one important exception to the new legislation we propose: Where a custodial parent can establish that he or she is moving to escape abuse or harassment from the non-custodial parent, that should be the end of the inquiry. No child should be required to live with a parent who has abused the child's other parent, and in such a case, getting the child's parent out of an abusive situation is always in the child's best interest.

Respectfully submitted,

William E. Mullin, Esq.
Robert A. Carrillo
Representative Andy Dawkins
Mindy Mitnick

MINORITY REPORT H

Frauenshuh v. Giese

The undersigned members of the Court's Task Force on Parental Cooperation respectfully disagree with and dissent from one of the Recommendations of the Task Force which was drafted in response to the Supreme Court's decision in *Frauenshuh v. Giese*, 599 N.W.2d 153 (Minn. 1999).

The following recommendation for an amendment to current Minnesota Statutes appears as Recommendation #1 under G. Other Recommendations:

> Minnesota statutes should be amended to permit parties, who have in the past or may in the future, to stipulate to a best interests modification standard in cases involving sole physical custody.

This recommendation is to expand the scope of existing Minn. Stat. §518.18(e)(1) which allows only parents who have agreed to "agree in writing to the application of a different standard" regarding future modification of custody.

A majority of the Task Force voted to recommend that the Court request the Minnesota Legislature to amend Minn. Stat. §518.18, in order to obviate the statutory basis for the Court's ruling in *Frauenshuh v. Giese* . In *Frauenshuh v. Giese*, the Supreme Court held that a parent seeking modification of an award of sole physical custody must satisfy the "endangerment" test of §518.18(d)(iii) despite a stipulated marital termination agreement that provided for use of the "best interests of the child" standard if the sole physical custodian parent sought permission to move the child's residence to another state.

We agree with the view that a child who is in the sole physical custody of a parent because of a stipulated agreement by the parents or because of a decision by the court, has a status in which the Legislature intended "to impart a measure of stability to custody determinations in most circumstances". *State ex rel. Gunderson v. Preuss,* 366 N.W.2d 546, 546 (Minn. 1983), quoted in *Frauenshuh v. Giese*, 599 N.W.2d 153, 158 (Minn. 1999). The "settled policy view" in Minnesota is "that stability of custody is usually in the child's best interest." *[Id.]* The stability of a sole physical custody status is based in the modification standard of Minn. Stat. §518.18, which provides that if the parents do not agree at the future time when a modification of sole physical custody is proposed, there will not be modification unless there is endangerment. This is a reasoned statutory scheme that makes sole physical custody a different legal status than joint physical custody.

We express our disagreement with the Task Force majority recommendation and have signed this minority report for these reasons:

- Parents remain free to agree to a modification of custody at the time it is proposed.
- Parents who meet the standards for a joint custody arrangement are presently able to "agree in writing to the application of a different standard". Minn. Stat. § 518.18(e).

- Under current law, absent agreement or endangerment, a child who is placed in sole physical custody, by the parents' agreement or by court decision, stays in sole physical custody. *Frauenshuh* properly reads the current statute to provide that a contract between the parents to waive this protection of the child at a future date is not binding. This prevents a parent from taking away, giving away, or bargaining away, the child's protective, stable, sole physical custody status, which has been previously established by the parents' agreement or by the court's decision to be in the child's best interest.
- This recommendation is not based on any evidence that conflict would be reduced. *Cf.*, Family Law Attorney Survey Results, from the 20th MSBA Family Law Institute, 29-30 March 1999, [only 40% of responding attorneys felt that changing the child removal standard would reduce potential conflict.]

We oppose eliminating the concept and legal status of sole physical custody in Minnesota. The Task Force majority's recommendation would elevate parents' stipulations above the best interests of the child and would "equate decisions regarding child custody to decisions regarding property". *Frauenshuh v. Giese*, *supra,* 599 N.W.2d at 159.

For these reasons, we disagree with the majority recommendation in this regard and dissent from the Report, and request that the Court not accede to the Task Force recommendation for statutory amendment on this matter.

Respectfully submitted,

Charles H. Thomas
Nancy Mischel
Maria Pastoor

MINORITY REPORT I

The Process

Over the past 16 months it has been and continues to be my concern that to a large extent the final outcome of our effort was predictable from the outset, based upon the very construct of task force membership referenced as "stakeholders".

My evaluation of this process is that a meaningful shift from an inherently acrimonious custody-based legal battleground perspective which we embrace presently in Minnesota, to a parenting-based, child and family centered, and public health legal perspective, would have required fewer individuals as task force members with vested interests, directly and indirectly connected with the public sector, and who are paid very well to *manage* this problem and not *address and solve* this problem.

In short, there were too many judges, family court attorneys, family court personnel, DHS personnel, etc. who made it painfully clear throughout this process that they enjoy the manner in which they conduct their *business* presently and that they will resist any change relative to the present system which will impact them personally in terms of their career paths and from the perspectives of their present power, control, and economic well-being.

In spite of the overwhelming evidence to support the absolute need to focus on the tremendous and negative impact of the present system of child custody on our Minnesota children and families, we as a task force have allowed the process to become tainted based upon our petty bias, gender specific excuses, the inclusion of, and to some extent, the deliberate use of misinformation without challenging its sources appropriately *parenting plans* in other states. I would also like to add that I believe that there is a fair amount of evidence to support an argument that information and sources which could have easily refuted much of the misinformation referenced above was intentionally overlooked and/or ignored by way of the "we just didn't have enough time" excuse.

Voluntary vs. Mandatory "Parenting Plans"

The Parental Cooperation Task Force has taken a "who's kidding who" position relating to this issue. Like the "cooperation for the children program" pilot project created several years ago, when the program was *voluntary* no one came to the party. It was not until the program was *made mandatory for all parties* quite some time later that the program acquired teeth and became successful. At that time I testified against the voluntary nature of said program, and DHS personnel and Minnesota Attorney General personnel assured me at that time as well that I was wrong. In short, should the parenting plan approach go forward based upon a voluntary status, as opposed to the 13 year success story and evolutionary process of the *Washington State Parenting Plan Program* as a mandatory procedure, ours will remain as a good idea without teeth, and will **only reach those who need this positive intervention at the outset of a divorce *with children* the least**. For those families who need this positive influence of a mandatory parenting plan program at the outset, the battle over children as property, and therefore the lucrative child custody battles, post dissolution battles, and

destructive fallout for years to come will continue, and it is our community of children and Minnesota families who will continue to suffer.

"No Unfunded Mandates"

The dubious intentions of many of our members aside, *government and related parties* in various forms of its representation on our task force appear to have a great deal of difficulty in terms of self examination, identifying their respective roles in this process, and the related costs involved.

Although raised as an issue many times over the past 16 months, there remains absolutely no willingness whatsoever on the part of controlling membership to identify itself as a part of the **taxpayer cost** of conducting "business as usual" in the area of Minnesota Family Courts and related services today, and the potential waste directly and indirectly related to a system which is clearly not working very well. Therefore, it would appear that when we speak to the issue of *funding* a parenting plan program, these same individuals see this as adding yet but another layer of bureaucratic machinery atop the existing dysfunctional infrastructure, as opposed to seeking out funding mechanisms from the existing waste and inefficiency easily identified within the present system of parental combat.

This of course is a direct result of a culture of indifference, which has developed over time relating to these matters, and collective denial on the part of those who *manage* this problem presently. In short, it would be my contention that a full blown, mandatory, parenting plan program could be funded ten times over should an honest and independent audit of the present system be conducted, and the obvious waste and inefficiency within that system be rooted out and be put to better use. As an illustration of my point, there is absolutely no rational reasons whatsoever why individuals must engage the family court system....10...15....and over 20 times...over the course of several years in order to have relatively simple matters resolved without prejudice, and with efficiency and definitive closure as a result.

In Closing

There are many ways in which children can be abused. Sometimes, they can and are abused by the very system created which purportedly has the responsibility to support them. During the past eight years of my involvement relating to these and similar issues as a volunteer and in various roles relating to Minnesota government, and now as a member of this task force as well, I have engaged some of these people. We can and should have done better here.

Respectfully submitted,

Robert A. Carrillo

APPENDIX A

Family Law Attorney Survey[31] Results

Survey Respondents: Family Law Attorneys and Their Practice

- 361, or 53%, of the nearly 700 attorneys in attendance at the 1999 Family Law Institute completed and returned the Family Law Attorney Survey.
- The attorneys responding to the survey have been practicing Family Law an average of just under 12 years.
- 10% of the respondents were in their first year of practicing Family Law.
- 26% of respondents believe that Family Law should be a certified specialty in Minnesota. However, 54% believe certification depends upon the requirements. Further analysis does not suggest any correlation between the length of time practicing Family Law and preference for certification.
- Respondents report handling an average of 36 dissolutions with children per year. However, the reported number of cases handled is probably somewhat inflated and should be viewed with some caution as the sum of dissolutions with children reported by respondents exceeds the average total dissolutions with children filed per year statewide for as long as that information has been gathered.
- Respondents report that on average they represent the mother 57% of the time, and represent the father an average of 37% of the time. However, further analysis suggests that respondents were equally as likely to represent either party.
- Respondents report that the parties they represent agree to joint legal custody in an average of 70% of the cases they handle, while half of all respondents report the parties agreeing to joint legal custody in 90% or more of their cases.

[31] Family Law Attorney Survey conducted by the Minnesota Supreme Court Parental Cooperation Task Force at the 20th Annual Family Law Institute, presented by the Minnesota State Bar Association Family Law Section and Minnesota Continuing Legal Education, March 29 & 30, 1999.

- On average, respondents report that 38% of the dissolutions with children they handle are characterized as high conflict. However, there appears to be little correlation between a case being characterized as high conflict and whether there is a dispute over either the physical custody or the legal custody label.

Changing the Labels in Dissolutions with Children

- Respondents report that the label "legal custody" is disputed in only 13% the dissolutions with children they handle.

- However, the label "physical custody" is reported to be disputed in 44% of the cases respondents handle.

- Less than 29% of respondents believe that changing the label "legal custody" will lessen the amount of conflict in dissolutions with children, with only 6% stating such a change would result in "much less conflict." 45% believe changing the label "legal custody" would result in no change in the amount of conflict; less than 10% believe the amount of conflict would increase; and 16% didn't know how changing the label would affect the amount of conflict.

- However, 69% believe that changing the label "physical custody" would lessen the amount of conflict in dissolutions with children at least somewhat, with 31% believing that there would be "much less" conflict. Only 7% of respondents believe that changing the label would increase the amount of conflict; and 10% didn't know how changing the label would affect the amount of conflict.

- Respondents were fairly evenly divided on whether they believed the amount of conflict would increase or decrease in dissolutions with children if the standard on removal was the best interest of the child and the burden was on the party advocating removal. 36% believe the amount of conflict would be less and 34% believe the amount of conflict would increase. 20% of respondents believe the amount of conflict would remain the same, and 10% didn't know.

- Similarly, respondents were evenly divided on whether they believed the amount of conflict would increase or decrease in dissolutions with children if the presumption in favor of removal were changed to a presumption against removal. 32% believe the amount of conflict would be less and 34% believe there would be more conflict. 22% believe there would be no change in the amount of conflict if the presumption was changed, and 12% didn't know.

Use of Parenting Plans in Dissolutions with Children

- 57% of respondents said they are familiar with the practice of establishing detailed Parenting Plans in dissolutions with children, and 79% of those respondents familiar with the practice of establishing detailed Parenting Plans have used such a plan in the dissolutions with children they have represented.

- However, 70% of those respondents who have use detailed Parenting Plans do so only rarely or sometimes. 23% of respondents report using detailed Parenting Plans often, and 7% always use a detailed Parenting Plan.

- Respondents were asked whether the Parenting Plans they use addressed five specific issues arising in dissolutions with children, namely: custody, child support, access schedules, maintenance, and parental decision-making responsibilities. Two thirds of all those who have used Parenting Plans addressed four out of the five issues identified.

- 100% of those responding said their Parenting Plans address the issue of access schedules.

- 99% of those responding said their Parenting Plans address the issue of custody.

- 93% of those responding said their Parenting Plans address the issue of parental decision-making responsibilities.

- 84% of those responding said their Parenting Plans address the issue of child support. 74% of those plans that handle the issue of child support do so using the guidelines. The most commonly cited alternative means of addressing the issue of child support was to the model established in Valento v. Valento.

- Only 36% of those responding said their Parenting Plans address the issue of spousal maintenance.

- 92% of respondents' Parenting Plans provided for mediation in the event of conflict.

Issues Prompting Conflict

- Respondents were evenly divided on whether they thought access schedules would be easier to resolve if the labels "custody" and "visitation" were replaced with other language. Of the 50% who believed that access schedules would be easier to resolve, the most common language suggested as a replacement were either some version of "Parental Access", or language similar to "Shared Parenting."

- Child custody and child support were the two issues that most respondents considered sources of conflict prior to decree in dissolutions with children, with 82% citing the former and 77% citing the latter. 71% of respondents said visitation prompted pre-decree conflict.

- Nearly two thirds of respondents said that maintenance and property issues prompted pre-decree conflict in dissolutions with children.

- Visitation and child support were the most commonly cited sources of post-decree conflict in dissolutions with children, with 78% of respondents citing the former and 76% citing that latter. 58% of respondents cited custody as an issue prompting post-decree conflict.

- 42% of respondents said that maintenance prompted post-decree conflict in dissolutions with children, and only 14% said property issues were a source of post-decree conflict.

- 40% of those who responded felt that if the standard for removal of a child from the state were changed it would reduce potential conflict over the initial determination of custody or parental access. The best interest of the child with the burden on the party advocating removal or a presumption against removal, were the most frequently proposed alternatives for the standard for removal of a child from the state.