

MINUTES OF THE MEETING OF THE JUDICIARY COMMITTEE
February 16, 1981

The meeting of the House Judiciary Committee was called to order by Chairman Kerry Keyser at 8:00 a.m. in Room 437 of the Capitol. All members were present except Rep. Conn and Rep. Daily, who were excused. Rep. Teague was absent. Jim Lear, Legislative Council, was present.

HOUSE BILL 703 REP. DUSSAULT, chief sponsor, stated this bill is to establish a preference for joint custody awards upon dissolution of marriage. This would insure the minor child flexibility and constant contact with both parents.

JOAN UDA stated about 100 years ago when a marriage was dissolved the child went with the father. That changed and the child went with the mother particularly if the child was young in years. We have reached an age where the dissolution of a marriage is quite common. Joint custody is something that will happen only if both parents ask for it. It severs all rights and obligations except to see the child is supported. The only other way is when abuse and neglect are involved.

The bill makes clear that once you are a parent you are always a parent.

VINCE MATULA supports this bill. EXHIBIT 1.

MARGARET STEWART has worked with child welfare in the SRS. One of the most damaging things is to separate a child from the parent. The child loses out in life. It has been established in a study in California that joint custody in which each parent has important decisions in the life of the child, the child is better off.

B. MOLONEUX stated about 40% of all marriages end in divorce. That statistic will increase to 55-60% in Montana. The impact of divorce places the child in a high risk area. It is not the divorce that hurts the children, it is the conditions surrounding the divorce that hurts the child. If the situation is absent of complications, anger and financial matters the child usually is not hurt drastically.

ALAN D. NICHOLSON read from EXHIBIT 2.

CAROL MITCHELL gave out EXHIBITS 3 and 4. MITCHELL stated in representing a client seeking a divorce the most traumatic thing is the decision of custody of the children. There have been over 100,000 kidnappings of children by the parent who does not have custody. Many times a parent won't visit the child because it is too painful, not because it is a financial burden.

There were no further proponents.

There were no opponents.

In closing, REP. DUSSAULT stated the data is clear that joint custody benefits the children as it provides security. It is in the best interest of the parents as it protects them both. It makes presumptions in the courts.

REP. HANNAH asked if this bill would make it easier to obtain a divorce. MITCHELL said no. Usually the wife comes in and files for the divorce knowing she will get to keep the children. If the dad becomes serious and feels it is not fair then the contest of custody begins. Many times the father does not contest because his friends tell him he probably will not get the kids. MITCHELL stated she has to prove to the court that this is an exceptional father.

REP. KEEDY asked what makes MITCHELL think the judges will follow this law. MITCHELL replied it draws it to their attention. This way they will not have to make a choice between which parent is best.

REP. EUDAILY asked if the schools should be notified of joint custody. Many times a parent who does not have custody will come to the school to take the child with them or to look at school records. The sponsor replied section 4 allows those parents access to the records. UDA stated often times there is a question to who has rights to the records. This would open it up.

REP. HANNAH questioned remarriage. REP. DUSSAULT stated custody would remain with the original set of parents. Only by a court order would that change. UDA stated usually when she represents the interest of the youth tests are performed on him. He is evaluated. She calls the attorneys of both parents and makes suggestions concerning the welfare of the child. Usually they agree with her decision.

REP. BENNETT asked if a parent can be forced to attend a meeting with counselors, ministers, etc. UDA stated the law allows that now to determine various things.

HOUSE BILL 698 REP. MEYER stated this bill is to provide that a defendant who is provided with court-appointed counsel may be required upon conviction to repay the costs of counsel. A person must submit under oath a financial statement to obtain a lawyer appointed by the court. Section 3 states if the person makes a false statement he may be charged with false swearing.

REP. MEYER felt section 4 was the most important part of the bill. It states the court may sentence a defendant to pay the costs.

Section 6 states in the case of default the court may find the person in contempt. REP. MEYER told the committee members this bill has all the necessary safeguards.

This will help the budgets of cities and counties. In 1978-79 the total cost of the Public Defender's work in Great Falls in cases where the defendant did not pay was \$37,000. This past year the figure was \$118,000. With this bill some people who are able to pay for public defense will be so ordered.

DON PEOPLES, Butte Silver Bow, supports this bill. This is an overburden for the counties. PEOPLES felt this bill is well written. It does not interfere with the equal opportunity of the law. He would like the bill to read if partial payment could be made the person pay it.

There were no further proponents.

There were no opponents.

In closing, REP. MEYER stated he agrees with the partial payment. There is a monthly installment plan.

REP. KEEDY asked how and why were some people getting court-appointed attorneys when they could afford the costs. REP. MEYER stated some people quit their job and sell or lend out their property so when they file the financial statement they look as though they do not have many assets. Recently in Montana a judge did require an individual to pay. It was brought before the Supreme Court which did not uphold the decision. Most judges ask the person to file a financial statement but payment cannot be required.

HOUSE BILL 711 REP. HARPER stated this bill is to revise the laws regulating notary publics. There is an 1895 law in the books that requires a notary public to handle foreign and domestic bills. The requirement is unused. Fees have been adjusted from 20 cents to \$3.50 a page.

DON COBURN became a notary public in 1977. When he became a notary the Secretary of State sent him a notice that listed the law on it. Most notaries have no knowledge of this law and it does not apply. He has checked with attorneys and received no response. The rules regulating notaries should be updated. The fee of \$3.50 per page compares with that of a court reporter.

There were no further proponents.

There were no opponents.

REP. HARPER closed the bill.

REP. HANNAH asked if the fee schedule should be eliminated. REP. HARPER stated if it is in the law there will be a basis for charges. REP. HANNAH stated most notary publics charge different fees, some things free and some things \$5.00. Would there be an objection to eliminating the fee schedule? REP. HARPER would not suggest that to the committee.

REP. EUDAILY asked about promissary notes in reference to foreign bills. COLBURN replied it was just for bills and exchanges. COLBURN stated the most work he has done is to verify signatures, and give an oath of office.

REP. MATSKO asked if this was cutting out payment of promissory notes. REP. HARPER said in 1907 this was probably a catch-all provision.

EXECUTIVE SESSION

HOUSE BILL 535 REP. HUENNEKENS moved do pass. This would include the Department of Revenue as an agency that payment be made in cases where a spouse has not made child support. The request at local level will be made by the SRS. The Department of Revenue takes over cases from the SRS.

REP. CURTISS asked if the Department has access to the individual's ability to pay records. REP. HUENNEKENS replied they are not a collection agency. The process involves a nonexistent court order. He stated there is an office in Billings.

The motion of do pass carried. (Representatives CONN, IVERSON, ANDERSON, TEAGUE and DAILY absent during vote).

REP. HANNAH moved to place House Bill 535 on the consent calendar. REP. KEEDY objected. The bill will not go on the consent calendar.

HOUSE BILL 536 REP. HUENNEKENS moved do pass. This bill would strike the statute of limitations of three years. The child would be able to bring action after the three year period. It does not take away the father's defense.

The motion of do pass carried. (Representatives CONN, IVERSON, and DAILY absent during vote).

HOUSE BILL 537 REP. HUENNEKENS moved do pass.

REP. KEEDY had no objection to the intent of the bill but feels it is a bad way to draft legislation. It will make a mess out of the codes. REP. KEEDY moved to strike lines 2-11 and to put the change of statute of limitations on lines 10-14, page 2 into 53-4-248 and 40-5-221.

A roll call vote resulted. Those representatives voting yes were: CURTISS, HANNAH, MCLANE, ANDERSON, KEEDY and YARDLEY. Those representatives voting no were: KEYSER, SEIFERT, BEENETT, EUDAILY, MATSKO, ABRAMS, HUENNEKENS, SHELDEN and BROWN. The motion failed 9 to 6.

REP. HUENNEKENS moved do pass. The motion carried. (Those Representatives absent were CONN, IVERSON, TEAGUE and DAILY).

HOUSE BILL 538 REP. HUENNEKENS moved do pass. This would allow the state to collect taxes from companies out of the state who are doing business in the state. It would be worthwhile to be able to go back five years.

REP. BROWN moved to strike the remainder of line 9 following "PERIODS" through "APPLICATION" on line 10 and the title to be so amended. Following "1980" on page 4, lines 3 through 5, strike the remainder of line 3 through "statute" on line 5.

REP. KEEDY stated that would include only taxpayers who have not completed a return. On that basis, REP. KEEDY objects to the amendment. REP. HUENNEKENS replied without reference to the five years the department will not be able to obtain the money due.

The amendment passed with the following representatives voting no: YARDLEY, SHELDEN, KEEDY, HUENNEKENS and EUDAILY.

REP. HUENNEKENS moved do pass as amended.

REP. HANNAH was against the motion. It is more government regulations and control. REP. CURTISS agreed. It will require each individual to keep records for everything forever.

REP. HUENNEKENS stated if we do not have involvement on this matter the individual income tax and corporate income tax are not producing equity for taxpayers. If there is no equity there is no justice.

A roll call vote resulted on the motion of do pass. Those voting yes were: ANDERSON, HUENNEKENS, SHELDEN, KEEDY, YARDLEY and BROWN.

Those voting no were: KEYSER, SEIFERT, BENNETT, CURTISS, EUDAILY, HANNAH, IVERSON, MATSKO, MCLANE and ABRAMS. The motion failed 10 to 6.

REP. MCLANE moved to reverse the vote to do not pass as amended. The motion passed.

HOUSE BILL 545 REP. SEIFERT moved do pass.

REP. SEIFERT moved to strike subsections 2, 3, and 4 on page 1.

REP. KEEDY made a substitute amendment to strike in the title and on line 5 "GUARANTEEING" and to insert "TO ALLOW". Line 5 strike "POLICEMAN'S" and insert "POLICE FORCE", line 6 strike "FAMILY THE RIGHT". Line 11 following "policemen" strike through "members".

REP. BROWN thought a committee bill to repeal this section would be good. As amended it would make it clear the policeman and his family could participate in political campaigns.

The amendment passed with REP. HUENNEKENS and REP. EUDAILY voting no. (Representatives CONN, ANDERSON, and DAILY absent during the vote).

REP. CURTISS moved to reinsert line 25 on page 1 and lines 1-3 on page 2. REP. YARDLEY stated that amendment would imply policemen could not participate. REP. CURTISS withdrew her motion.

REP. SEIFERT moved do pass as amended. The motion carried with REP. HUENNEKENS and REP. EUDAILY voting no. (Representatives CONN, ANDERSON and DAILY absent during the vote).

HOUSE BILL 668 REP. CURTISS moved do pass. She stated she introduced the bill on behalf of citizens who signed a petition. Most of the signatures were people related to AFL-CIO. REP. CURTISS stated an objection to the bill was it is illegal to post bonds. Many companies, however, do that now.

REP. HUENNEKENS moved to amend page 2, line 24 striking "each a part" and inserting "all". Strike the remaining language on page 2, line 25 and on page 3. REP. HUENNEKENS withdrew his motion.

REP. HANNAH stated he liked the intent of the bill. A person who takes a frivolous action should have to pay. REP. CURTISS stated most of these nuisances are delaying tactics. It involves costly delays.

REP. BROWN thought this was a bad bill.

REP. SEIFERT supports the bill. It is relative to the human right law. It should be placed in the books to see if it is constitutional.

REP. HUENNEKENS was concerned about delays stating it will be appealed and appealed.

REP. BENNETT stated in condemnation procedures the person has the right to contest the necessity. That would be addressed in court. REP. MATSKO stated eminent domain might be overridden by this.

REP. BROWN made a substitute motion of do not pass. REP. BROWN stated he was in support of the bill but the intent is not right.

REP. CURTISS stated the bill will make the state agencies more responsible.

A roll call vote resulted on the motion of do not pass. Those representatives voting yes were: EUDAILY, HANNAH, IVERSON, ANDERSON, ABRAMS, HUENNEKENS, SHELDEN, KEEDY, YARDLEY and BROWN. Those voting no were: KEYSER, SEIFERT, BENNETT, CURTISS, MATSKO and MCLANE. The motion carried 10 to 6. (Representatives CONN, DAILY and TEAGUE were absent during the voting).

The meeting adjourned at 11:30 a.m.


KERRY KEYSER, CHAIRMAN

mr

Vincent P. Matule
429 Raymond Street
Helena, Montana 59601

Mr. Chairman and Members of this Committee:

My name is Vince Matule and I am speaking in support of House Bill #703. Fortunately my wife and I share the joint custody of our children at this time by virtue of a successful marriage. I believe if any differences occur in the future which may make it impossible for us to live together, that these differences should not interfere with our ability to parent our children. I believe that my wife and I share this right and I believe that we also share this responsibility. I also believe it is the right of our children.

This legislature has repeatedly addressed itself to a changing mood in our country which more firmly affixes responsibility to parents. The most recent example of such legislation is the tentative approval given to the bill calling for the publication of the names of juvenile offenders. The Department of Revenue has increased a hundredfold its efforts to see that the absent parent of children are held financially responsible for their children. Such added responsibility must carry with it an increase in the rights of these parents for in a democracy such as ours, rights and responsibilities go hand in hand.

It is inevitable that our legislature begin to deal with the problems surrounding the growing number of divorces. Laws pertaining to divorce must be re-examined and kept abreast of changing mores in our society. This bill addressed one of the more complex and painful results of marriage breakdown. Essentially it gives to the court one more option to be included in the decision making process affecting the children of divorce. It attempts to maintain the involvement of both parents in the rearing of the children. Such involvement has been clearly demonstrated to be in the best interests of the children.

For too long, this responsibility has rested unfairly on the mother. Due to her nurturing capability, she was expected by the court to always be the primary caretaker of the children. She was given the full parenting responsibility while the father was merely regarded as a financial resource who might occasionally drop by for a visit. He paid his support and went on his way.

However, our society has changed rapidly in this area. Women have assumed more than just a nurturing role in our society and men in fact have frequently insisted on increased responsibility in the rearing of the children. We as a nation have become increasingly sophisticated in understanding both the needs of our children and the different parenting skills which fathers and mothers provide their children. We are much more aware of our children's needs for both parents to be actively involved in their lives. Each parent has something unique to offer. Just as it takes two parents to produce a child, so also does it take two parents to rear the child. This bill encourages the involvement of both parents in this increasingly complicated task. I ask your support for House Bill # 703.

JOINT CUSTODY

House Bill No. 703

Testimony 2/16/81, House Judiciary Committee

Alan D. Nicholson, Joint-Custody Parent

I am a joint-custody parent. My little boy, Aaron, will be 3 years old in two weeks. For about 18 months now, his mother and I have been sharing the warmth, the joy, the sorrow, the frustration, the responsibility and the privilege which is this little person. And he has been sharing us. He is bright, mischevious, loving, well behaved, spoiled, potty-trained and, thank God, on the other side of the terrible two's. He has a mother. He has a father. We both love him very much. It is not easy or painless or perfect, but I'm absolutely convinced it's the very best for him.

It was very hard. Tens of thousands of dollars were spent on legal fees and counselors fees. Hours were spent in lawyers offices and in the awesome presence of the court. Emotions and passions became exaggerated as each parent, tormented by the spectre of losing a child, fought to convince everyone that the other was unfit. Work went undone. Play was impossible. No living thing which touched either parent escaped the anguish, especially the object of it all, little Aaron.

Somehow it worked out. Threats, promises, counselors, jurists, lawyers, psychologists, psychiatrists, mental breaks, emotional fatigue, spirit, purpose, love, hate, growing and learning---somehow it worked out. We agreed to jointly petition the court to make permanent the temporary joint-custody order it had previously given with certain procedures, peculiar to one situation, for making it work.

Aaron's mother and I do not love each other. We do not even like each other. We do not agree on many fundamental things. We do, however, agree that our son and his welfare is of paramount concern to each of us. So, with the frequent exchanges of Aaron's physical presence, we are also exchanging anecdotes and observations about our son, about his doctors and babysitter, about his sickness

and his health, about his appropriate and inappropriate behaviors. And because we are equal, because we have joint responsibility, the hidden agenda is not about personal triumph, not about obliterating the other. (We have what Kissinger could only dream about for nations--we have detente'.) However disguised or open, our agenda is the same...to make Aaron's world the very best it can be and to do that within the context of joint parenting. As one of two very proud parents, I can report that Aaron is thriving and growing in this joint-parenting family with love of both of his parents shining fully on him.

This Bill, had it been around a year ago, would have given much guidance to us and would have saved much pain and expense. In this rapidly changing and increasingly perilous world it seems inappropriate to assume that the "best interests" of a child are always served by subjecting the child to sameness and routine, by avoiding conflict and change or by favoring the continuity of the physical surroundings and the appearances of a conventional family over the continuity of the love and responsibility of both parents and a shared family existence with each parent. What among humankind's oddesys sustains us more, gives us more hope, enriches us more, or gives us more faith in some kind of immortality than our relationships with our own children and our own parents? I urge passage of this timely Bill.

JOINT CUSTODY

HOUSE BILL NO. 703

Testimony 2/16/81, House Judiciary Committee

Excerpt From A Legal Journal

Regarding a California Statute Similar
To The One Now Before The Montana Legislature

JOINT CUSTODY, SOLE CUSTODY: A NEW STATUTE REFLECTS A NEW PERSPECTIVE

James A. Cook*

The greatest impact of California's new child custody Statute is the effect it will have upon the expectations and conduct of parents prior to a court hearing. Secondly, the new law modifies the options available to the court and the considerations which must be weighed in disposing of custody cases. Transition into the new concept may initially be difficult for the courts. However the burden of change will be lessened as the divorcing public becomes aware, in advance of custody proceedings, of the Statute's intent. The new Statute facilitates preservation of the child's needs for contact with both parents; it reduces use of the courtroom by one parent to destroy the other parent, to the detriment of the child's best interests. This new Statute's emphasis on joint custody is intended to alleviate other problems frequently generated under the former law:

1. Defusing child-stealing and support-avoidance

This legislative recognition of joint custody and its implementation by the courts may defuse and reverse the increasingly menacing recourse by excluded parents to "child stealing" and/or abandonment of financial support for lack of meaningful, frequent and extensive contact with their children. Legal practitioners have been reluctant to apply punitive or confiscatory sanctions in cases of child-stealing or abandonment of support. Observers have been uneasy about a legal solution that focused solely on punishment and support-collection on behalf of custodial parents, when many custodial parents share the responsibility for the provocation. Instead, joint custody provides an opportunity to demonstrate and increase respect for equality under the law while effecting a possible reduction of child-stealing and support-avoidance.

*James A. Cook has been a long time advocate of joint custody and was instrumental in the introduction and passage of A.B. 1480 by Assemblyman Charles Imbrecht (Ventura, California).

Assembly Bill 1480 appears at the end of this article as Exhibit A.

2. Redressing the imbalance between mother vs. father custody fights.

Additionally, it is intended that this new emphasis upon joint custody will result in tempering a recent trend of fathers to strive for sole custody. While the opportunity for fathers to compete for sole custody tests the equality of the sexes insofar as sole-custody decrees are concerned, the result is increasingly hostile custody battles because of a heightened expectation of unilateral victory by both parents. The new law will shift the view of equality—from a statistical determination of how frequently fathers rather than mothers achieve sole custody—to a decision based on protecting a child's access to both parents and on encouraging parental sharing of responsibility for the child.

3. Discouraging the use of child custody for intimidation.

The most immediately apparent feature of California's new child custody law is "the message it sends in advance to divorcing parents": a powerplay for exclusive child custody, either for purposes of intimidation or to force subservience in negotiation, is less likely to be tolerated by the court. Therein, the new Civil Code Section 4600 and 4600.5 is regarded as one of the most significant evolutions of California's family law since the advent of "no fault" divorce in 1970, which eliminated the airing of "faults" as justification for divorce. Henceforth, the new child custody Statute will largely dissolve the recourse to winner-take-all custody litigation that has heretofore been substituted for the catharsis of airing "faults."

Preference is likely to favor joint custody, or sole custodianship for that parent who demonstrates the most cooperation and tolerance for the child's frequent and continuing contact with the alternate parent. Consequently, an antagonistic and covetous parent is likely to be denied sole custody and may jeopardize the opportunity to participate equally in joint custody.

TESTIMONY OF CAROL A. MITCHELL
BEFORE THE JUDICIARY COMMITTEE,
of the HOUSE OF REPRESENTATIVES
February 16, 1981
RE: HOUSE BILL 703, Joint Custody of Children

HISTORICALLY: THE PARENT-CHILD RELATIONSHIP

Historically, children were viewed as chattel-property to be awarded. A hold-over of the Roman Law, the English and American Common Law viewed the natural parent, particularly the father, as having the presumptive right to care for his offspring without interference of the state.

In the late 19th and early 20th Centuries, the "paternal superiority" standard gradually gave way to one of "fault" of the spouse in determining which parent should have custody. This concept arose from the legal maxim that a person ought not to be allowed to profit from his own wrong-doing. And that the "innocent" parent could best provide for the child's future welfare. This, plus other social changes occurring at the time, most often resulted in a maternal preference.

In the early 20th Century, there developed a "tender years" doctrine, which held that, all things being equal, the mother was the natural, nurturing parent of the younger child.

These three standards: "paternal preference", "spousal fault", and "tender years" focused on the parent and not on the child, with the later two resulting in clear preference for the mother. As we began to accumulate formalized knowledge of child development, the law moved toward the "best interest of the child" standard. This is the status of the law currently in Montana today.

MONTANA'S LAW TODAY

The "best interest" standard is too often, even today, given only lip service by judges, lawyers and counselors bringing old biases and habits with them to the custody determination. They fail to incorporate into their thinking, the recent research of such people as Judith Wallerstein (whose 5 year study of children of divorces documents the conclusion that the principal factor in a child's adjustment to divorce is the continued, quality involvement of both parents.) Our common sense supports this conclusion!

The research indicates that too often a child fantasizes the image of the absent parent. "If only Dad were here, I would be happy." "Mom, would solve my problems." This, and many other adverse reactions, impacts the child's development and too often negatively affects the child's future relationships.

And, what about the parent and his or her rights and well-being? The story of the non-custodial parent who fails to visit or to support his or her children is a commonplace tale. That parent has been cut off, feels cut off and acts that way. And it is ironically often the parent who is a good parent during the marriage who reacts by withdrawing the most.

While not a cure-all, joint custody hopefully mitigates that separation and encourages continued involvement as a parent.

On a strictly legal basis, has the state the right to terminate a parent's custody without a showing of harm to the child? If we view the child simply as property, how can the custody of the child be severed without due process and a showing of substantial interest on the part of the state? Is it justice to have a parent face a divorce (from his/her spouse) with a presumption that one parental rights will be severed—just because that's the way these things are done?

WHY H.B. 703

Montana law today offers the courts the option of granting joint custody—and they are in those districts where particular lawyers or judges or counselors have taken an interest. But, we need to take the next step to standardize the law throughout the state. We need to pass H.B. 703 in order to incorporate the new research (and our own common sense) and to remediate the inaccurate biases of the judges, lawyers and counselors which do not serve the best interests of Montana's children and trample on one of the most precious and primary rights of their parents.

H.B. 703 does this. It would require the courts to look first at preserving the custodial rights of parents to their children and children to both of their parents. If there is a reason why both parents ought not to continue to have custody of their children, that one parent ought to be awarded sole custody, the court need only state the reason.

Additionally, H.B. 703 allows parents already divorced to seek to regain joint custody of their children if they can show that it would be in the best interests of their children.

Given the epidemic of child-knapping by parents and the plague of parents who do not financially (much less emotionally) support their children following a divorce, legislation which is aimed at ensuring the continued lawful involvement of parents with their children merits serious consideration and passage.

As an attorney and as a parent, I ask your support. Thank you.

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

BILL 698

Date 2/16/81

SPONSOR MEYER

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEEBILL 703Date 2/16/81SPONSOR DUSSAULT

NAME	RESIDENCE	REPRESENTING	SUP- PORT	OP- POSE
B. Molinaro	Helena	self	✓	
M. Stuart	Helena	self	✓	
Carol Mitchell	Missoula	self	✓	
Vince Matule	Helena	self	✓	
Alan D. Nicholson	Helena	self	✓	
Jean Uda	Helena	self	✓	

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PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

BILL 711

Date 2/16/81

SPONSOR HARPER

[illegible]

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.