McLAIN LEGAL SERVICES PC

Family Law, Criminal Defense, Child Welfare

March 4, 2019

Oregon Senate Judiciary Committee
BY EMAIL TO: sjud.exhibits@oregonlegislature.gov BY EMAIL ONLY

RE: Testimony re: *Senate Bill 318*

Dear Members of this Committee,

I am a life-long Oregonian, and a Domestic Relations Attorney. I live in Senate District 18 and House District 36. My law office is in these districts as well. I have been practicing Domestic Relations—also known as "Family Law," and encompassing divorce, dissolution, child custody and child support, among other topics—for more than 12 years. I have appeared before the courts of 13 Oregon judicial districts.

SB 318 would create a rebuttable presumption that equal parenting time is best for the child. I believe this effort to be well-intended, but ultimately, impractical and fraught with unintended consequences. I urge the committee not to pass this bill.

There are two main problems with this bill, as I see it. The first is that, whenever an evidentiary presumption is created, it changes the landscape for all litigants. Presently, parents are required to put on evidence of their parenting capacity and their connection with their children, in order to support a position. This requirement is true for self-represented litigants (who make up more than 80% of those who bring Domestic Relations cases before the court) as well as for those who have attorneys. Every parent would attest that they are "above average," in my opinion, but the current law requires that they do more than simply assert their prowess, to achieve 50% parenting time. It is very likely that this presumption would disproportionately and negatively impact families in which the primary caregiver does not have equal access to resources, providing an unfair advantage to a high-earning or well-supported secondary caregiver.

The second problem with this bill is that it overstates the State's parenting policy. There is already a very strong statement of legislative policy that is directly related to this bill. Oregon Revised Statutes ("ORS") 107.101 states that "It is the policy of this state to: (1) Assure minor children of frequent and continuing contact with parents who have shown the ability to act in the best interests of the child[.]" I quote this language in many of my case briefings.

There is no need to further strengthen this statement, and many good reasons not to add more words to this policy statement. The assertion that equal parenting time is best for children is not well founded in science and should not be included in our state's laws. The operation of the present legislative policy is to give courts an incentive to continue a child's pre-existing stable

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condition, and to provide opportunities for parents who have, prior to litigation, de-prioritized their involvement in their children's lives. Adopting this policy would leave children with a parenting time plan that has a high likelihood to disrupt their performance in school (when an unpracticed parent does not help with homework) and activities (those scheduled on the other parent's time still take place, but children often miss).

Many children have the benefit of two loving parents who are capable of caring for them full time. This is not the majority, in my opinion, nor would an aspirational policy statement lead to a big increase in the effectiveness of parenting teams statewide.

Legal presumptions should not be taken lightly. They should be of the same quality as those we already recognize—for instance, that drivers with a blood alcohol level of .08 or higher can be presumed to be impaired. This may not be true for 100% of drivers, but the vast majority will fall into this category. ORS 107.105(1)(f)(C) embodies a "presumption of equal contribution," that both spouses contributed equally to the acquisition of a marital asset, whether by economic contribution or by non-economic contribution such as the "home-maker contribution" also recognized by the same statute.

Not to be alarmist, but SB318 would be another avenue for an abusive partner to continue abusing a victim after the partnership has ended. I am sure the committee understands that abuse includes physical threat or harm (ORS 107.705), but often entails financial abuse as well. An abuser who has the wherewithal to hire a custody attorney would be able to take advantage of a less privileged partner who would come to court without an attorney. The abuser, with counsel, would leave the court little choice but to award 50% parenting time, because an unrepresented party is unlikely to overcome a statutory evidentiary presumption. I see this fact pattern in many cases now, and it would only get worse if SB318 were to become law.

The number of overnights awarded to a parent is a significant fact used to determine child support. In the present circumstance, that dependency often over-determines the number of overnights awarded in parenting time, but under SB318, child support would be a mess. 50% parenting time is a "magic number" in the Child Support Guideline formula, in that parents with nearly the same income and the same number of court-ordered overnights, can be ordered $0 child support (avoiding even the "minimum order" of $100 per month). A parent who is ordered to have 182.5 overnights per year cannot be held in contempt for failing to exercise them. This means there are, already, support-free parenting time cases in which a parent who exercises little or no parenting time, also pays little or no child support. Fixing that problem requires the disadvantaged parent to litigate in order to correct the problem, since the Dept. of Justice, Child Support Division must respect the court order and cannot change parenting time.

Another loser, under SB 318, is the court system. We do not need more cases going to trial, in our under-funded court system. This presumption would definitely increase litigation. Presently, an unremarkable parent has little incentive to go to trial in order to get more parenting time than he or she will actually exercise. After SB318, however, even a bad parent would have a huge incentive to take the case to trial in the hope that the primary parent would not produce sufficient evidence to overcome the presumption for equal parenting time.

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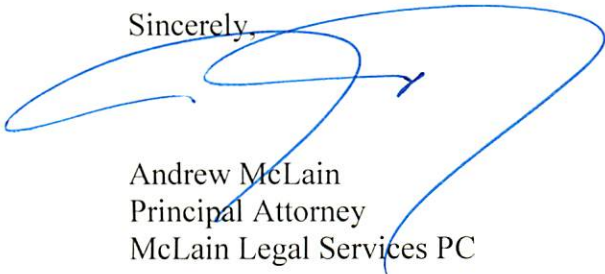
Don't get me wrong, this bill would be great for my business! I am sure to benefit personally, since I am a trial-oriented family law lawyer. The rest of the State would not be so lucky. Oregon Courts already have more family law litigants than they can handle. The Oregon Bar, the State Family Law Advisory Committee, and numerous other organizations, are trying to find ways to assist self-represented litigants in Domestic Relations, to decrease the negative impact on our trial dockets and clerical budgets. This bill would make more work for the courts, even as it makes more work for Domestic Relations lawyers like me.

Evidentiary presumptions need to be based on empirical findings, showing that the presumption is actually true the vast majority of the time. I have not undertaken such a study, but after 12 years representing parties in Oregon's family law courts, my own anecdotal data suggests the opposite is true. Most families develop a routine around the dedication of one parent who works fewer hours or days or has a more flexible schedule, to be available for a child who must come home from school sick or who must stay home on a snow day. Pretending otherwise, will prove a disadvantage to children, and to that primary parent, who has often foregone advancement in the workplace to purchase that necessary flexibility.

I am willing to believe this bill is well-intended, but it should not be adopted. The presumption it proposes is not factually accurate in my opinion. The law, were it adopted, would disadvantage those without the resources to hire attorneys, as well as abuse victims. The courts would suffer mightily, with litigants—both represented and not—insisting on trial in order to secure that presumption in their favor. Worst of all would be the detriment to children, whose needs would not be met by a parent who benefits from a presumption that is not factually accurate.

Please do not pass this bill!

Sincerely,



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