



March 6, 2019

Senate Committee on Judiciary (by email to its members)

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Dear Members of the Senate Judiciary Committee:

I write to present my views on SB 318. This bill would change Oregon family law by adding a rebuttable presumption that “equal parenting time is in the best interest of the child.” *See* proposed O.R.S. §107.105(1)(b)(A). In particular, it would amend the law so that when a court is developing a parenting plan, because the parents cannot, “It is presumed, unless rebutted by clear and convincing evidence by the parent challenging the presumption, that equal parenting time is in the best interest of the child.” *See* proposed O.R.S. §107.102(4)(b)(B).

I have been teaching family law at the University of Oregon for approximately 22 years. I have written extensively about child custody topics, including the relocation and abduction of children by their parents. In 2016, I authored an article directly relevant to SB 318 entitled, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody* (2016) ILL. L. REV. 1535. I am also the faculty director of the Domestic Violence Clinic at the University of Oregon.

In my opinion, SB 318 is misguided for many reasons. It would be a major setback for Oregon children whose parents are litigating their custody and it would threaten the physical safety of domestic violence victims and their children.

Oregon Law Allows Courts to Award Equal Parenting Time and is Gender Neutral

Before setting forth the disadvantages of SB 318, it is important to describe Oregon custody law because there is considerable misinformation about it.

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First, courts already have the authority to order parents to have equal parenting time with a child. For example, in the case of *In re Marriage of Deffenbacher*, 5 P.3d 1190 (Or. Ct. App. 2000), the Court of Appeals modified a parenting time schedule to provide the father with 50 percent parenting time. Judges all over the state, in fact, make such orders. *See, e.g.*, *In re Marriage of McGuire*, 2014 WL 8623572 (Or. App.) (Appellate Brief, Case No. A155965. Sept. 19, 2014) (“The parties' General Judgment of Dissolution awarded them joint legal custody of and equal parenting time with their three children.”).

Courts often order this arrangement when the parents agree to it, but they can also order it when the parents do not agree. The only restriction on the ability to award equal parenting time is found in O.R.S. § 107.137(6). It prohibits an award of “sole or joint custody” to a parent if the parent “has been convicted of rape” and the rape resulted in the conception of the child.

While courts can order equal parenting time regardless of the parents' agreement and desire for it, Oregon courts cannot order “joint [legal] custody, unless both parents agree to the terms and conditions of the order.” *See* O.R.S. §107.169(3). The term “joint custody” in O.R.S. §107.169(3) refers to joint legal custody, not joint physical custody, because O.R.S. §107.169 defines joint custody as the sharing of “rights and responsibilities for major decisions concerning the child, including, but not limited to, the child's residence, education, health care and religious training.” O.R.S. §107.169(4). Wisely, the statute also requires a court to order “joint custody” when the parties agree to it.

SB 318 does not address joint legal custody, but joint physical custody. Oregon's law on joint legal custody is sensible. As a general matter, it is sound policy for a court not to order joint legal custody when parties cannot agree to it. Their disagreement suggests they will likely disagree about the major life decisions that are the subject of joint legal custody. This will cause more hostility, strife, and ultimately relitigation.

Second, Oregon law is gender neutral with respect to custody awards. O.R.S. §107.137(5) specifically says, “No preference in custody shall be given to the mother over the father for the sole reason that she is the mother, nor shall any preference be given to the father over the mother for the sole reason that he is the father.” That provision means that both parents have the opportunity to be the primary custodian regardless of gender and the court will make the custody decision that is in the best interest of the child. The proponents of bills like SB 318 often claim that custody law discriminates against fathers. However, Oregon law is clear that gender is irrelevant to a court's determination of what is in the best interest of a child.

The Bill Would Harm Children By Taking the Focus Away from their Best Interests

SB 318, apart from being unnecessary, would have several deleterious effects. The negative effects will be felt by two classes of people: children and domestic violence victims.

First, custody adjudications should always be focused on what is best for the child. However, SB 318 *removes* the court's focus from the best interest of the child by its formulation of what rebuts the presumption of equal parenting time. The bill says that to rebut the presumption of equal parenting time, a parent must prove *both* the child's best interest lie elsewhere *and* the other parent "will cause substantial risk of harm to the child's health or safety." See proposed O.R.S. § 107.105(1)(b)(A). This test means that a parent might, in fact, prove by clear and convincing evidence that a child's best interest is not served by equal parenting time, but a court would still favor an award of equal parenting time unless the parent could also prove the award "will cause substantial risk of harm to the child's health or safety." This test shifts the focus away from the best interest of the child. It also imposes a high standard for rebutting the second requirement. Overall, this provision means that a child might be ordered to spend equal time with a parent even though it is *not* in the child's best interest *and* that parent poses *a risk of harm* to the child's health or safety. So long as it is not a substantial risk, the presumption for equal parenting time remains, even when it is not in the child's best interest. That legal formulation puts a parent's interest above the child's interest and wellbeing.

Second, in assessing the child's best interest, the bill elevates the importance of equal parenting time above other relevant facts. Currently, Oregon law uses a best interest of the child test. O.R.S. §107.137. The law is clear that a child's best interests "shall not be determined by isolating any one of the relevant factors ... and relying on it to the exclusion of other factors." That approach is good policy because it provides a holistic approach to determining the child's wellbeing. In contrast, SB 318 requires a parent to rebut the presumption of equal parenting time by clear and convincing evidence. That formulation gives equal parenting time a thumb on the scale that no other factor (other than domestic violence) receives. The weight accorded this factor is especially inappropriate because a 2013 interdisciplinary think tank on shared custody, sponsored by the Association of Family and Conciliation Courts, and consisting of thirty-two family law experts from a wide range of disciplines, thought that the "nuances" in the literature required custody matters to be resolved either by "parental agreement or individualized judicial assessments rather than decisions premised on legal presumptions." See Marshal Kline Pruett and J. Herbie DiFonzo, *AFCC*

Think Tank Final Report: Closing the Gap: Research, Policy, Practice, and Shared Parenting, 52 FAM. CT. REV. 152, 162 (2014).

Third, by giving equal parenting time more weight than most other factors do not receive, the bill waters down the presumption in Oregon law that a domestic violence perpetrator should not have custody. Current law states, “[I]f a parent has committed abuse as defined in ORS 107.705 (Definitions for ORS 107.700 to 107.735), other than as described in subsection (6) of this section, there is a rebuttable presumption that it is not in the best interests and welfare of the child to award sole or joint custody of the child to the parent who committed the abuse.” SB 318 gives no attention to how these two presumptions would interact. When a domestic violence perpetrator seeks equal parenting time, would the new presumption cancel out the presumption that the perpetrator should not have custody? Since the “equal parenting time” presumption can only be rebutted by clear and convincing evidence, and the “domestic violence presumption” can be rebutted by a preponderance of the evidence, the scales seemed tilted in favor of the domestic violence perpetrator.

In my Illinois Law Review article (mentioned in the introductory paragraphs to this letter), I discussed the harm that can come from a proposal like SB 318. I include here an excerpt from the article.

There are real risks associated with imposing equal shared custody, or having strong preferences for equal shared custody when the parents do not agree to it. ...If domestic violence exists in a relationship, a shared-custody arrangement can be extremely problematic. Peter Jaffe discussed the disadvantages.¹ Not only does shared custody cause stress and strain, but increased access to the child, and often to the other parent, makes domestic violence more probable.² As one commentator stated, we know that “children in shared-time arrangements tend to not fare well when mothers have safety concerns [or] when children are stuck in the middle of high ongoing parental conflict.”³

¹ Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants*, 52 Fam. Ct. Rev. 187, 189 (2014); see also Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576 (1989) (discussing harms to children from joint physical custody when parents disagree).

² Jaffe, *supra* note 2, at 189; see generally Gabrielle Davis et al., *The Dangers of Presumptive Joint Physical Custody* (2010), available at <http://www.bwjp.org/resource-center/resource-results/the-dangers-of-presumptive-joint-physical-custody.html>.

³ Bruce Smyth et al., *Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?*, LAW AND CONTEMPORARY PROBLEMS. 109, 141 (2014).

Courts do not always effectively screen cases for domestic violence, even though these cases are clearly inappropriate for shared custody. Margaret Brinig looked at outcomes in Arizona, where courts must adopt a parenting plan that allows parents “to share legal decision-making ... and ... that maximizes their respective parenting time” so long as that outcome is consistent with the best interest of the child.⁴ In that state, divorcing parents are “substantially sharing custody and ... the largest single group ... share[s] time equally.”⁵ Brinig looked at the decided cases and observed that more post-divorce allegations of domestic violence existed (as reflected in the number of arrests and protective orders) in cases in which the parents had arrangements approximating equal shared custody.⁶ Brinig posited that judges were either inadequately screening out cases that were inappropriate for shared custody or were preferring joint custody even when it was inappropriate.⁷

The fact that judges award shared custody in cases where it is inappropriate cautions against using a presumption for shared custody to nudge judges toward it, or allowing judges to award it over a party's refusal. Judges are already predisposed to award joint custody when it is an option. David Chambers explained that judges do not like to choose between parents because it implies that one parent is better than the other. When confronted with the task of selecting the custodian, judges can “blind themselves to signs that the parents are unlikely to cooperate.”⁸ Brinig's data

⁴ See Ariz. Rev. Stat. Ann. § 25-403.02(B) (2016).

⁵ Margaret F. Brinig, *Substantive Parenting Arrangements in the USA: Unpacking the Policy Choices*, in 1515 NOTRE DAME LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES 14 (2015) (“The experts agree that two-parent married or unmarried families with loving parents are theoretically best for children and that continuing relationships with two nurturing parents (biological or adoptive) who no longer live together is typically the second-best solution.”).

⁶ The same was not true in Indiana, and that could be because judges were better at denying shared custody in these cases or screening for it. *Margaret F. Brinig, Result Inequality in Family Law*, 48 AKRON L. REV. *1 (2015).

⁷ *Id.* at 21, 28.

⁸ David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477. He recommended that judges not have the power to impose joint custody. *Id.* at 567-68. He continued,

For judges who believe that they must make case-by-case decisions on requests for joint custody, I would suggest that they impose joint custody only when they find that several conditions are met: (1) the child in question is not three years of age or younger; (2) both parents seem reasonably capable of meeting the child's needs for care and guidance; (3) both parents wish to continue their active involvement in raising the child; (4) the parents seem capable of making reasoned decisions together for the benefit of the child and seem

suggests that judges can also blind themselves to signs that domestic violence exists. Carbone too thought judges used joint custody “to resolve otherwise intractable parental disputes,”⁹ including in cases with domestic violence or extreme distrust. Carbone cited Maccoby and Mnookin's research, which found that “40% of these high conflict cases resulted in joint custody awards, typically with mother residence, compared to less than 25% of the cases resolved earlier.”¹⁰ Carbone also cited Melli, Brown and Cancian's research, which suggested that “parents with equal shared time are very different from those who negotiate or are given an unequal shared custody award.”¹¹ The couples with equal shared time awards were more likely to have disputed custody, disputed it for a longer period of time, and have an attorney.¹² After reviewing the research about California and Wisconsin, Carbone concluded, “high conflict cases were *more*, not less, likely to result in joint physical custody awards”¹³

Apart from the fact that joint custody statutes facilitate adjudicated joint custody awards to couples with high conflict (or inappropriately penalize domestic violence victims when they resist joint custody),¹⁴ such statutes also present problems during negotiations for parties opposed to joint custody. Joint-custody statutes send a message that joint custody is expected, and that

reasonably likely to be able to do so even under the coerced circumstances; (5) joint custody would not impose substantial economic hardship on the parent who opposes it; and (6) joint custody would probably disrupt the parent-child relationships less than other custodial alternatives.

Id. (footnote omitted).

⁹ June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1116 (1999).

¹⁰ *Id.* at 1119 (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 58 (1992)).

¹¹ *Id.* (internal quotations omitted).

¹² *Id.* at 1119 n.136 (citing Marygold S. Melli et al., *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 1997 ILL. L. REV. 773, 799 (1997)).

¹³ *Id.* at 1120. She also noted that “unlike the more amicably settled joint custody cases, the high conflict type was more likely to result in primary mother residence.” *Id.*

¹⁴ Since the arrival of the “friendly-parent” factor, a domestic violence victim's attempt to resist joint custody can unfortunately be seen as unfriendly behavior and cause her to lose custody altogether. See GABRIELLE DAVIS ET AL., *THE DANGERS OF PRESUMPTIVE JOINT PHYSICAL CUSTODY* (2010), available at <http://www.bwjp.org/resource-center/resource-results/the-dangers-of-presumptive-joint-physical-custody.html>, at 10. Although friendly-parent statutes often have exceptions for victims of domestic violence, see O.R.S. §107.137(1)(f) (2016), it is unclear whether judges applying those exceptions adequately identify cases for which the factor would be inappropriate.

message may subtly coerce reluctant parents into the arrangement. The resistant parent may think, “[e]veryone does it so I should agree to it too, even though this will not be good for me or my child.”¹⁵ The message may be particularly problematic for domestic-violence victims, who may already have a reduced capacity to resist such an arrangement.¹⁶ Statutory preferences for joint custody can also lead to unsavory bargaining tactics, even among couples without violence. As David Chambers explained, “[a] parent who is not really interested in having joint custody may use the threat of demanding it as a tool to induce the other parent to make concessions on issues of property division and child support.”¹⁷ While this type of behavior does not appear to be widespread, it sometimes occurs.¹⁸

Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody* (2016) ILL. L. REV. 1535, 1569-71.

The Bill is The Wrong Way to Get Parents to Achieve Shared Parenting and Shared Custody

In the 2016 Illinois Law Review article, I explained that supportive coparenting is more important for children’s wellbeing than their parents’ particular custody arrangement. Presumptions and preferences for shared custody foster the illusion that custody law can achieve supportive coparenting, but it cannot. I proposed changes to the law that would actually encourage supportive coparenting from the time of a child’s birth and strengthen the parents’ overall relationship. As I argued, “If the law were so structured, then shared custody should become a reality for more couples even without a legal mandate for it; simply, most parents should then agree to it. This approach would achieve the

¹⁵ See, e.g., Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 Fam. L. Q. 201, 217-18 (1998) (“However, the greatest impact of joint custody legislation on the judicial process concerns pretrial negotiations between the parties. Joint custody legislation places pressure on litigants to negotiate a joint custody agreement The likelihood is that parents will enter into more agreements for joint custody, regardless of whether it is best for their children ... simply because the parents are unable to agree on anything else.”).

¹⁶ Davis, *supra* note 14, at 14.

¹⁷ Chambers, *supra* note 8, at 567 (concluding that “[i]f there were good reasons to believe that imposed joint custody would work well for children, this impact on the negotiating process would be worth the risk. Because there are not, the risk is worth avoiding.”).

¹⁸ See, e.g., Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. ORTHOPSYCHIATRY 233, 240 (1990) (finding 20% of mothers with joint legal and sole physical custody reported financial pressure to trade money for time).

outcomes desired by those advocating for shared custody presumptions or preferences, but it would be a better approach. In fact, without first reforming the law to produce these outcomes, shared custody will always be ineffective for some parents, only half as good as it could be for others, and harmful for yet others.”

The recommended legal reform is detailed at length in my book, *A Parent-Partner Status for American Family Law* (Cambridge Univ. Press 2015). It argues that legislators should create a new legal status for parents with a child in common that would encourage supportive relationships between parents from the get-go. It recommends creation of a status that would arise automatically between parents upon the birth or adoption of their child (*i.e.*, as soon as legal parenthood is established). The legal obligations together would create a status, which in turn would help create a social role with certain normative expectations. A status defines who one is. As I explain in the Illinois Law Review article and the book, “Like all social roles, the parent-partner social role would have certain social expectations attached to it, *i.e.*, that the parent-partnership is a supportive relationship and that parent-partners should exhibit fondness, flexibility, acceptance, togetherness, and empathy toward each other. Social roles guide people's behavior, as identity theory in sociology explains.” Weiner, *Thinking Outside the Custody Box*, *supra*, at 1575.

I am happy to talk to members of the Committee more about the legal changes I recommend. Those changes would be a much better approach to achieving equal parenting time than SB 318. SB 318 is a very bad proposal.

Sincerely,

A handwritten signature in cursive script that reads "Merle H. Weiner". The signature is written in black ink on a white background.

Merle H. Weiner
Philip H. Knight Professor of Law