

**Testimony before the House Subcommittee on Civil Law  
Comments on House Bill 2948  
On behalf of the OSB Family Law Section**

March 3, 2021

Dear Chair Power, Vice-Chair Wallan, and Members of the Committee:

My name is Ryan Carty. I am an attorney in private practice limited to family law. I am the legislative liaison for the Family Law Section of the Oregon State Bar for the current legislative session and I serve as Chair of the Family Law Section's Legislative Subcommittee. I appear today in that capacity. The Family Law Section was originally formed in 1978, and today is made up of nearly 900 attorneys and judges who handle family law cases throughout Oregon. Our members hail from 30 different Oregon counties, representing a diverse population of clients each with their own unique problems and concerns. Our Executive Committee is comprised of 12 members from 8 different counties, spanning from the lively streets of Pendleton, through the fertile fields of the Willamette Valley, and to the heart of the Rogue River in Grants Pass.

Our membership is split on the merits of HB 2948. Some members strongly support the concept of providing courts with discretionary authority to order joint custody in appropriate cases, while others are adamantly opposed to this approach. As a result of this split in our membership, the Executive Committee of the Family Law Section remains neutral on the substantive impacts of HB 2948.

Despite the split on the substance of the bill, the Executive Committee has a number of concerns with the bill *as drafted*. If this Committee decides the bill should move forward, the Family Law Section of the Oregon State Bar requests an opportunity to work collaboratively with Committee staff to amend the bill in an effort to make it more workable for Oregonians.

**What the Bill Does**

The proposed legislation would provide the court discretionary authority to order joint custody (i.e., joint legal decision-making authority) in cases even when the parents do not agree to such an order, upon a finding that joint custody is in the child's best interests.

**Custody vs. Parenting Time**

Custody is defined as the authority to make legal decisions relating to a minor child. Parenting time, on the other hand, is the amount of time each parent spends with the child. HB 2948 would have no impact or effect on parenting time. Oregon courts have long enjoyed wide discretion in developing parenting plans, guided by the statutory directive to consider only the

best interests of the child and the safety of the parties.<sup>1</sup> The legislature affirmed courts' discretion as recently as the 2019 legislative session with SB 318, which permits the court to order equal parenting time (i.e., a 50/50 schedule) when developing a detailed parenting plan.

### **Practical Concerns with HB 2948**

- The bill does not address how parents and courts will navigate disagreements over major decisions such as school and medical issues. Under current Oregon law there is ***no statutory authority for the court to enter temporary orders in a modification proceeding***. This means that if the joint custodial parents of a 5-year-old disagree about where the child will attend kindergarten, one parent must file a modification proceeding – and the court must fully resolve the modification proceeding before it can enter a new judgment. This process can often take six months or longer.

In jurisdictions where joint custody is ordered more often than sole custody, there is typically some judicial process allowing for either an abbreviated hearing or a decision based on sworn declarations to address disagreements. In Washington, for example, there is a process for hearings on declarations within 14 days to address things like school choice, extracurricular activities, non-emergency medical care, etc. Oregon has no such process.

- The bill requires that the court take into consideration the statutory factors set forth in ORS 107.137 when ordering joint custody. Those factors were developed to guide the court in fashioning an award of sole custody, not joint custody. ORS 107.137(1)(f) addresses the ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child, but does not explicitly address either parent's ability to communicate effectively with the other. Successful joint custody arrangements require a strong level of communication between parents.

In Washington, where there is a presumption in favor of joint decision making (note: the term custody is no longer used in Washington), there is a robust statute identifying limitations on when a court may order joint custody. HB 2948 provides the court very little guidance as to when it may not be appropriate to order joint custody.

- Section 3 of HB 2948 would create a substantial change of circumstances ***as a matter of law*** as to any custody order entered or modified before the effective date of this legislation. Under current Oregon law, a custody order can only be modified upon a showing of a substantial change of circumstances that was not contemplated at the time the order was entered. This is an important limiting factor because it prevents

---

<sup>1</sup> ORS 107.102(5)(b)

serial litigation. Section 3 of the proposed bill would make every Oregon custody order immediately modifiable. Our courts are simply not equipped to handle the influx of modification cases this would create.

### **Conclusion**

The Family Law Section of the Oregon State Bar represents both mothers and fathers and is neither pro-mom nor pro-dad. The Section's focus is on promoting the best interests of the child, achieving consistency and fairness in difficult cases, and in seeing family animosity decreased in the divorce context. The Section is split as to whether courts should have discretion to order joint custody over the objection of a parent, but the Section agrees that if the Committee determines this bill should move forward it should only be moved after making common sense amendments and considering the impact of the legislation on Oregon families and courts.

On behalf of the Family Law Section of the Oregon State Bar, I thank the Committee for its consideration and ongoing hard work on behalf of all Oregonians.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ry-Carty", is written over the typed name.

**Ryan Carty** | Attorney  
*ryan@cartylawpc.com*  
(503) 991-5142