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 736*

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 736 appears to be a "housekeeping" bill, aimed at modernizing the language in Oregon Revised Statutes ("ORS") Chapter 107 regarding custody and parenting time. By and large I believe that will be its impact on the State. With that said, there are benefits and detriments I wish to underline.

Where **Section 2** of this bill is concerned, I am pleased to see the legislature considering a definition of child custody. I frequently observe to clients, how strange it is for Oregon to have a concept so fundamental to its families as "custody," but to have no legal definition! In one of my cases, a lawyer and I undertook to list the decision making capacities that are affected. I believe Section 2 (1)(a)'s definition could be improved by including "consent to inherently dangerous activities" and "consent to legally binding transactions" to encompass skydiving, in the first example, and marriage or military enlistment, in the second.

Throughout the bill, though, **substituting "agreement" for "order" is unwise**, because it blurs an important legal distinction. Agreements, if they are not also orders, need not continue indefinitely, and often are not binding after one party ceases to agree. The term "order" needs to remain, throughout. An "agreement" can be converted to an "order" through the judiciary only. This distinction is legally necessary.

In **Section 11**, the effort to change nomenclature has an unintended effect. The little-used ORS 107.135(7)(a) authorizes the court to offer credit against arrears for a child support obligor who "has physical custody of the child" with the knowledge of the oblige, or by court order. My perception, after 12 years of practice, is that courts are willing to do this when a primary parent has ceased to act as a primary parent. The revised language creates an incentive for an obligor to withhold the child from a regular parenting time arrangement, to create a scenario where that parent has even one more overnight than what was ordered by the court!

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I believe the intent is to make it easier for courts to right wrongs, when a primary parent stops being reliable and a non-primary parent steps up. A way to amend the bill would be to have the phrase "*[has physical custody of the child]*" replaced by "**cares for a child substantially in excess of the amount of parenting time contemplated by the support order;**" so that the court has discretion but is encouraged to exercise that authority only when the shift of parenting responsibility is great. **Sections 34** and **41** must be amended in accordance.

Section 12 of the bill has positive and negative provisions. It is a great idea to explicitly add "allocating parenting time with" a child, to the situations in which the court looks to ORS 107.137 for guidance about the children's best interests—and as a practical matter that already happens, because the Courts of Appeals have blessed that approach. However, when Section 2 of that statute is considered, the change is detrimental. Subsection 2 presently provides a presumption that a parent who has committed abuse shall not be the custodial parent nor even a joint custodial parent. To also presume that an abuser (of whom, the statute does not specify) should also not have any parenting time with a minor child is a vast step further, and in my opinion is not good policy.

Commission of abuse (harm, or threat of harm, per ORS 107.705) can be a serious matter—but it also encompasses the same activities that constitute misdemeanor harassment under ORS 166.065, which the legislature currently classifies as a B Misdemeanor. One comment that a judge interprets as a violent threat, and that person is presumptively disabled from exercising parenting time? I am an advocate for tough laws protecting domestic violence victims, but this is too much.

The bill should be amended to remove all proposed changes to ORS 107.137(2). If not, these changes would set up a paradox with ORS 107.105(1)(b), the legislature's direction to courts considering removing parenting time for a party. If the parent who committed abuse is not "are endangering or will likely endanger the health, safety, or welfare of the child" *Id.* then the court cannot, under the cited statute, discontinue parenting time.

As a practical matter, courts see these cases both at the acute stage (soon after abuse has occurred) and thereafter. Courts want parties to become more tolerant of supporting the relationship between a child and a former abuser. That's because Oregon's custody and parenting time laws protect the rights of the children, rather than—and distinct from—the rights of parents.

Section 21 of this bill should be deleted. An "Order of Assistance" is an extraordinary remedy, and should not be authorized unless a child is diverted from his or her primary residence. The concept of child custody includes parenting time, but the two are not synonymous! Only if a custodial or residential parent is the one applying, should an Order of Assistance be allowed. Otherwise there is ORS 107.434, to provide a remedy. It is noteworthy that this statute was not included in the proposed bill.

The amendments proposed in **Section 22** require that ORS 109.767 should also be amended. You can't have one without the other.

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Section 23 should be deleted as well. Requiring a Family Abuse Prevention Act hearing within 5 days whenever parenting time is at issue, will create a terrible situation at the Circuit Courts, as courts struggle to find space on the docket for these 5 day hearings to become the default. The result would be "docketing only" appearances, with swift continuances to comply with the letter of the statute, while the intention of the statute—providing timely hearings—would be sacrificed.

Section 42, dealing with the little-used ORS 109.175, oversteps when watering down the phrase "physical custody," replacing it with "exercising parenting time." A better way to express the intent is to say that the parent who provides the child with his or her primary residence shall be considered the custodial parent until further order of the court—as used in other sections, "primary responsibility or the supervision and physical care" of a child is a good replacement.

Thank you for reviewing this testimony.

Sincerely,

Andrew McLain
Principal Attorney
McLain Legal Services PC