Oregon State Bar

Testimony before the Senate Judiciary Committee
In Opposition to SB 318
On behalf of the OSB Family Law Section

March 6, 2019

Dear Chair Prozanski, Vice-Chair Thatcher, 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 am currently serving 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 of up of over 1,000 attorneys who practice family law throughout Oregon. We have members from 30 different Oregon counties, representing a wide variety of clients each with their own unique problems and concerns. Our Executive Committee is comprised of 12 members from 7 different counties, spanning from the lively streets of Pendleton, through the fertile fields of the Willamette Valley, and down to the heart of the Rogue River in Grants Pass.

We come from very different backgrounds and represent a wide variety of viewpoints on family law issues, but are in agreement that Senate Bill 318 is a step in the wrong direction.

What the Bill Does

The proposed legislation would create a rebuttable presumption that equal parenting time is in a child's best interest. The presumption would be rebuttable only by clear and convincing evidence that (1) equal parenting time is not in a child's best interest, and (2) the other parent's lack or inability with respect to the child will cause substantial risk of harm to the child's health or safety.

Parenting Time as a Policy Matter

ORS 107.101 sets forth the State's policy regarding parenting time and makes clear that minor children should be assured of "frequent and continuing contact with parents who have shown the ability to act in the best interests of the child." The statute goes on to encourage parents to share parental rights and responsibilities, and to develop a parenting plan on their own (with the assistance of legal and mediation professionals, if necessary). But the policy is equally clear that both parents and courts should have the "widest discretion" in developing a parenting plan that is in a child's best interests.

A presumption that equal parenting time is in the best interests of a child works against those policy considerations. The presumption would discourage parents from developing their own parenting plans and would frustrate efforts by both parents and courts to craft parenting plans that serve the child's best interests instead of either parent's.

How does one go about sharing equal parenting time with a nursing infants? What about cases where one parent's work schedule is not conducive to parenting exactly one-half of the time? How does one address those instances where the children have historically (often over the course of many years) spent a significantly larger period of time with one parent? How should parents and the courts address situations where parties live geographically distant from each other (or at least far enough to make equal time-sharing disruptive for the child)?

Should a breakdown of the parents' relationship trigger an automatic change to a child's daily schedule? Or should parents and courts take a critical look at the individual family dynamics in play to craft a schedule that will meet ***this child's*** needs?

To be sure, equal parenting time is a laudable goal. The notion that equal parenting time is in a child's best interest is factual ***but only if*** (and decades of research has backed this caveat) there are protective factors in place such as the agreement of the parents, parental communication and effective problem solving skills, an absence of parental conflict and controversy, the quality of the parents' relationship with their child, and close geographic proximity between each parent's home.

In the absence of such protective factors, compelled equal parenting time can lead to increased conflict. Exposure to conflict is detrimental to a child's well-being. Mandating equal parenting time in situations involving high interparental conflict subjects the child to more conflict. Thus, forcing parents into sharing equal parenting time in these situations does not promote a child's best interests and may well do harm, particularly in areas of psychological functioning.[1]

Even in states that have presumptions of joint parenting time, joint does not always mean equal. Idaho's statutory framework contains a "presumption that joint [physical] custody is in the best interests of a minor child."[2] But the statute specifically defines "joint physical custody" as an order "awarding each of the parents significant periods of time in which a child resides with or is under the care and supervision of each of the parents or parties." The statute goes on to state that the parenting time shall be shared in such a way to assure the child frequent and continuing contact with both parents "but does not necessarily mean the child's time with each

[1] Christy M. Buchanan & Parissa L. Jahromi, A Psychological Perspective on Shared Custody Arrangements, 43 Wake Forest L. Rev. 419, 427-28 (2008).
[2] Idaho Code § 32-717B.

parent should be exactly the same in length nor does it necessarily mean the child should be alternating back and forth over certain periods of time between each parent."

Idaho's parenting time statute closes by stating that the actual amount of parenting time with each parent "shall be determined by the court."

Practical Concerns with SB 318

In family and civil law litigation, generally, matters must be proven by a preponderance of the evidence. SB 318, Section 4, states that a presumption of equal parenting time can only be rebutted by "clear and convincing evidence." This upward departure from a typical evidentiary standard is not supported by any logical basis and creates a significant barrier to rebut the presumption.

In addition, the presumption must be rebutted not only by demonstrating that equal parenting time is not in a child's best interest, but by a secondary showing that "the other parent's lack or inability with respect to the child will cause substantial risk of harm to the child's health or safety." This caveat turns the focus from what is in the child's best interest to the deficiencies (or lack thereof) of one of the parents. Equal parenting time might not be in a child's best interest irrespective of whether the other parent has some perceived (or actual) deficiency when it comes to parenting. To say that equal parenting time is appropriate unless a parent has some associated fault is to ignore decades of research in this area.

Conclusion

The Family Law Section of the Oregon State Bar represents both mothers and fathers and is neither pro-mom or 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. SB 318 does not support any of those goals.

On behalf of the Family Law Section of the Oregon State Bar, I thank the Committee for its consideration and urge the Committee to not move the Bill forward.

Sincerely,

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