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

(CONTINUED NEXT PAGE)

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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.

Abusive partners use modification most commonly to abuse. They will abuse more under current laws as shown w/ decreases in litigation for 50/50 parents

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 formula for overnights under determines overnights attached is a calculation

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.

If they have the same income ? time how is this unfair?

Injustices of monetary value have to go to small claims or higher court. Why is family law special?

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.

more cases would settle as no one would have a gender imbalance.

(CONTINUED PAGE 3)

Lie/Fraud. Cases would decrease. As mediation decreased cases ↑ & increased equitable parenting, this would decrease family law cases going to trial as well.

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,

Andrew McLain
Principal Attorney
McLain Legal Services PC

Empirical finds of 55 studies show 54/55 academic research supports Shared Parenting. Research before you write

Bingo! Emperical Social Science evidence supports Shared Parenting as 40/60 Percent at near 100%, the same science Percentage as supports climate change-- What does that tell you???

Other states and other countries have already tried 50/50 custody with devastating effects.

Economically

Parents generally already have a portfolio of responsibilities.

Career parents will have to suddenly work part time.

Primary caregivers find themselves seeking employment, which is usually unsustainable for parents who have been out of the work force or ill prepared for the work force after child rearing.

More single parents who can only work part time will apply for public assistance.

The cost of day care will skyrocket.

Socially

Children have more difficulty in school, especially if parents live in different school districts. Wrong. see research attached

Children do not have a "permanent" place of residence as they are ping ponged between locations. This is from the 70s → 90s all 2000+ data refutes this myth

50/50 doesn't account for parents' religion or culture in family dynamics.
For example, The Church of Jesus Christ of Latter-Day Saints has published *The Family: A Proclamation to the World*, which outlines parental duties. Parents can still decide their own orders

Safety

75% to 95% of all divorces are handled OUTSIDE of court without custody dispute. These are the parents who can work together, and who this bill does not apply to. Wrong the Parents can't afford court

HOWEVER, 90% of the remaining involve Family Violence and is the abusive parent's attempt to maintain power and control. This is a lie

What this bill purposes is to grant 50/50 custody to the parents in that remaining percent in which family violence is prevalent and who cannot co-parent together in a 50/50 arrangement.

Empirical Evidence is not a blog

Below is research about death toll rising in women and children when 50/50 was court ordered:
https://stopabusecampaign.org/2019/02/12/custody-court-crisis-how-many-deaths-are-caused-by-shared-parenting-versus-safe-parenting/?fbclid=IwAR2yCUJe-hnOaNbBlZtE0ZIgUQaCctC1rfuEv_2HN5eDywmjn0HdaQQ70Qo

Research stats here: http://www.domesticviolenceabuseandchildcustody.com/Talkingpoints.pdf

Unrelated to Shared Parenting.

Oregon is one of the most dangerous places in America for women. A ten year study by the Women's Foundation of Oregon found that over one MILLION Oregon women and girls have been victims of domestic violence and sexual assault. That is double the national average. This cannot be ignored. Oregon is now the second most dangerous state for women.

We also know from many studies by legal institutions and universities that 90% of divorces can be handled outside of court. We also know that of that 10% that do appear in court, 90% of those so called "high conflict" cases are actually domestic violence cases. 9 out of 10 times judges are making rulings on domestic violence cases, yet they are ignoring children and disregarding and humiliating men and women when they come forward with allegations of abuse.

33% of Domestic cases are men being abused but they are still deemed unfit Parent

And the women take custody

We know that the Family Court System is being used by abusers and those with narcissistic tendencies to perpetuate abuse. We also know the statistics that abusers are twice as likely to sue for custody. We know that approximately 58,000 children are taken from safe parents every year and given to their abusers. We know that in Oregon, safe parents are being killed, and so are their children.

Having NPD & BPD increases mobbing & ability to fabricate believeable tales. PBD is Predominately found in females

which includes females

50/50 custody will perpetuate conflict, encourage more allegations of abuse and keep those who are actually being abused in abusive situations. — Then have DHS do their jobs

50/50 custody rulings by lazy judges who do not actually consider the child's best interest are resulting in casualties and perpetuation of violence and abuse by the next generation. — actually, evidence shows custody evals are failing the kids

SB318 contradicts all the other legislative bills' terms of "best interest" for a child in court related proceedings. Courts need to look at every child's individual needs and recognizing that these needs and families are unique and that they will change as the child ages. Not according to empirical research

I can guarantee you that the needs for a nursing infant are different from those of a 17-year-old young man or woman. All Parents know this, not just women

We need to start listening to the children and their therapists if we are going to determine their "best interest" instead of listening to parents who want to turn divorce into a competition where everyone should get a trophy and no one losses or has to pay child support. The children in ~~KEEP~~ empirical studies cry out for shared Parenting.

This is what is really happening in courts:
http://www.domesticviolenceabuseandchildcustody.com/Talkingpoints.pdf

https://securitybaron.com/blog/most-dangerous-states-for-womens-sexual-safety/

The Women's Coalition, 2017, Estranged Wife Murdered Xmas Night; Baby Survives. Ex-Wife's motion for Sole Custody to Protect 5 Year-Old Denied in Oregon. https://www.facebook.com/TheWomensCoalition/posts/1846588232282161:0

The Women's Foundation of Oregon, Count Her In Report, https://womensfoundationoforegon.org/count-her-in 2016.

Then make it easier to get abused individuals help

Exposure to abusive behavior can be as damaging as being directly abused, as published by the Childhood Domestic Violence Association here:

https://cdv.org/2014/02/10-startling-domestic-violence-statistics-for-children/

Multnomah County Family Court Services' mediation staff report they are able to identify domestic abuse in about 50% of cases. But do they look @ it from both sides?

Due to this prevalence and the important implications for custody and parenting time decisions. Oregon law (ORS 107.137; (1) (d)) **specifically requires the consideration of "the abuse of one parent by the other" as a factor in deciding the custody of minor children.**

By not considering "abuse of one parent by the other" in determining best interest is a form of victim blaming. It is essentially saying that the abuse happened because of the victim and not because the abuser is abusive. wrong. This is an issue of childs best interest not spouses best interest. Not all abusive husbands/wives are abusive parents

However, even with protections in place by law, 58,000 children are taken from safe parents every year and given to their abusers full time or 50/50 custody, not because their protective parents were unfit, but because they were outlawyered and outmaneuvered in a court system that is not trained to understand family violence dynamics. Therefore, these 58,000 would have a better chance of not losing 20/80

SB318 will not solve our court crisis. It will only make it worse and doom protective parents and their children.

Custody battles are a way for abusers to maintain power and control over their victims even after the victim has fled with the children. This is a line fed by activists. Data shows conflict is resolved even in high conflict cases

If there is a "custody battle", that is the first indicator there is a power and control dynamic. Yet, the mom is often the one initiating & winning... w/ 50/50 Plans

SB318 will not end the power and control dynamic nor keep parents and kids safe.

But will assist in psychologically & physically maintaining strong contact for kids & their parents

Safe parenting works. Especially if victims are **exempt** from court and custody battles upon determination of family violence by state certified domestic violence advocates and family and child therapists. Yes! After rebutting the law w/ Perponderance of the evidence - a 50.000/1% Chance the abuse happened. That shouldnt be hard to do

As an investigative reporter I have interviewed many of the father's rights groups who are pushing this bill. This is not investigative journalism this is cognitive dissonance of your opinion
These father's rights groups are also known as the "Angry Dad Brigade".

What I have found is that many of them do NOT actually want 50/50 custody.

From my interviews with these men I poled the top seven reasons why a 50/50 custody bill is being pushed by father's rights groups.

1. To do away with gender bias in court. Gender bias goes both ways.
   Not in custody, but yes we live in Patriarchy
2. Have equal 50/50 child support. They said they know statistically how much it cost to raise a child in any particular state. Father rights groups would like this cost of raising a child shared equally so that they don't feel like "she gets the kids and I get the bill".
   When dads get 4/31 days and her pay increases 20%...
3. Some fathers do not feel they should have to pay child support, especially if they didn't choose to get a divorce. Thats false.
4. Some want to keep in control or in contact with the other parent for unhealthy reasons. Nope.
5. They do not like that they as parents are put on trial like criminals in a family court.
   They are... but youre way left field
6. They do not agree with how the child support is spent.
   If incomes arent equal, even @ 50/50 support is paid
7. They do not want to feel like anyone "wins" or "looses" in a divorce trial. Part of this feeling comes from lawyers perpetuating conflict and making divorce a competition rather than looking for solutions for the children.
   Exactly. If the law forms fair rules, it will lessen the conflict in the games

* They have also informed me that they have someone working for them in the capitol, who also works for the senator sponsoring the bill. *
Are you serious?

This person clearly lacks the ability to research scientific data. She uses scare tactics and conspiracy theory!

List your sources!!!

Name those FR guys - A real reporter blows a real whistle

Grandma doesn't want ex-son-in-law to have time

SB 318 – Senate Bill 318

Sponsored by Senator Thatcher – Senator Manning Jr.

Creates rebuttable presumption that equal parenting time is in the best interests of child. Requires rebuttal of presumption by clear and convincing evidence.

As a mother and grandmother, I request that the proposed changes to SBO 318 be stopped.

One of my daughters is **currently in a Parenting Plan crisis. It has been 3 ½ years of court proceedings** costing over $30,000.00 with no end in sight. **I speak from the experience of the "minority". It is** understood **by** attorneys and Judges that a large percentage of divorced **parents devise a Parenting Plan,** which when submitted to the Court, is found to be in the best interests of the children.

A small percentage, (like my daughter's case) are found to be high conflict cases which require the court to order a Parenting Plan.

Oregon Law presently is written in the "best interest of the child" by advocating "equal" parenting time as referenced in **SECTION 1. ORS 107.101 (1), (2), (3), (4) and (5).** Let there be no mistake - Shared **Parenting ,although not specifically referenced as such,** is outlined in detail in the current Statutes.

Shared parenting means that two parents share parenting rights, responsibilities and time with their kids in some proportion Shared parenting time can be anything from 25 – 50% of the time. Equal Parenting time IS NOT the Same as Shared Parenting.

Father's Rights Movements across the nation are actively promoting and determined to achieve "equal" **Parenting to protect their rights.** Their FaceBook pages daily posts vile and dehumanizing posts **undermining the mothers' of their children while claiming to be the** "victim" of being denied parenting **rights. Under the current Law their rights are** protected – gender IS NOT a factor when determining the **shared parenting of the children.**

Each family situation is unique and at present, the current Law encourages parents to create a Plan that **is best not only** for the child (or children) but also for the specific needs of both parents. **(Holiday Schedules,** Vacations, etc.)

Amicable divorcing parents do not need this order. I, personally have been married for 36 years and with **3 children, I can** assure you my husband and my parenting time was SHARED! (If I ever said it was equal **– it was like saying he wasn't picking up the slack)** Nothing, not even our marriage, was EQUAL! **However, we did co-parent and have shared** time with our children. As a result, we are the proud **parents of 3 grown women who now hold leadership** positions in their career and are raising children of **their own. I know about divorce and parental plans** – My first marriage ended in divorce and together **we co-parented our daughter!**

Unfortunately, there are those divorcing parents that are unable "for a variety of reasons" to **collaboratively work** out a parenting plan. The Law currently encourages these parents to work with **either their** respective attorneys or through mediation to achieve a plan for the best interest of their **children.** In my daughter's case, a Temporary Order is currently in place until a permanent Parenting

Good afternoon, Senator Hansell and others.

I have been made aware that SB 318 would change the current law regarding parenting plans for Oregon parents. As a retired custody and divorce mediator, I would like to state the following:

Research in the field of child development strongly and unequivocally states that parenting plans should be customized to fit the unique needs of each child; also, abundant evidence shows that the first three years of life are critical for child development and decisions should be carefully considered for this age group. I was told that the change to current law would provide a legal presumption that parenting time should be equal between parents. My years of experience working with parents have shown me that each situation is unique and deserves to be managed by the parents themselves, if at all possible, without statutory suggestion of something that perhaps both parents would agree does not work best in that family's particular circumstances.

I found over and over during my career as a custody mediator that parents who are given the opportunity to work together - sometimes, but not always - with the help of child development specialists and mediators - will always choose what works best for THEIR OWN CHILDREN. I do know that currently the 'best interest of the child' ALONE, NOT a legal presumption, is what judges and other Oregon professionals recognize as the way to make decisions regarding parenting time.

Please consider carefully before changing a law that, right now, works for each individual family and gives parents the opportunity to CHOOSE THEMSELVES what will be best for THEIR children, rather than having statutes presuming that one-size-fits-all thrust upon them. The best interests of each individual child, rather than any kind of cookie-cutter legalese, should be what parents, themselves, use to make decisions for their families. I strongly encourage leaving the current statute as it is and allowing PARENTS, THEMSELVES, the opportunity to make decisions for their precious children!

Thank you for your time.

Respectfully,
Joan Howard
Milton-Freewater, Oregon

Between 1970- 1999, it was widely assumed that moms were better @ parenting. Empirical findings conducted between 2005 → 2018 all found shared parenting was best. Thats 40/60 time. not 20/80, nor only 50/50

My co-parent wanted as much parenting time as possible to take parenting time away from me. He often sends other people for his supervised parenting time. It's awful.

He didn't call or check on us in over a year, then wanted parenting time and this is what the courts decided for us. It's not great but, 50/50 would be horrifying for my toddler.

If the child services is looking for a way to streamline their caseload, please don't let cases like mine fall under a default 50/50 plan. That is not right for the children.

-Cecily Decker

Documented, this would Qualify under Rebuttable Presumption

CIRCUIT COURT OF THE STATE OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
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TESTIMONY REGARDING SB 318—EQUAL PARENTING TIME

Before the Senate Judiciary Committee of the Oregon Legislature
March 6, 2019

Submitted by:
Maureen McKnight, **Circuit Court Judge**
Multnomah County

Chair Prozanski, Vice-Chair Thatcher, and Members of the Committee:

My name is Maureen McKnight and I am a Circuit Court Judge in Multnomah County. I have served in the Family Law Department there the last 17 years after practicing family law exclusively as an attorney for 22 years. I am the immediate past Chief Judge of that department and speak today for myself and those 13 colleagues rather than the Oregon Judicial Department.

We oppose codifying the presumption for equal parenting time proposed in SB 318.

Maximum contact with both parents is a laudable goal but:

- **any ideal has to be applied <u>in the reality</u>, and here that means separate households.** A child is not a prized painting whose possession can easily be alternated in opposing weeks, months, or years. The current time gives one Parent ownership over education, school, religion making the child ~~opposition~~ possession.
- **50-50 parenting time between two households is simply not possible – or appropriate -- for many, many children. Individualized plans are needed.** Each child and family situation present a different constellation of factors and require a parenting plan designed for specific, unique needs rather than a "one size fits all" focus. Many, many factors affect a parenting schedule, including a child's age and school schedule, if any; developmental stage or any special needs; the existence of siblings (half of full); how close the parents live to each other; whether the parents are able to put aside their personal conflict to communicate effectively with each other about their children; and the existence of any risk factors including domestic violence, cognitive impairments, mental health issues, ongoing substance abuse, or other barriers to safe and healthy co-parenting. The list goes on and on. Accommodation of all these variables is an individualized balancing, best done by the parents but when they aren't in agreement, by a trier charged with a "best interests" imperative. The focus must be on what's best for the child, not what is "fair" for the parents. All of my colleagues and I have seen parental proposals for 50-50 parenting time that include steps such as exchanging the child at 2

All of this would fall under rebuttable presumption

You, as Judges could adjust drop off times. Not all families are 8-5ers

a.m. at one parent's work place parking lot, as that was the only way to make the plan come out 50-50 and be "fair" to that parent. Policy presumptions that assume untruths, even rebuttably so, would encourage this type of proposal instead of a *child*-focused plan. Why is a plan different than what you want more Parent than child focused?

- **The Oregon Legislature has already codified the appropriate directive, one that requires judges to:**

  "assure minor children of frequent and continuing contact with parents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their children after the parents have separated or dissolved their marriage." ORS 107.149.

Yet the Friday - Sunday every other week is for the losing parent

Since 1987, this directive has driven family law practice and allows judges to develop, when parents cannot agree (which we always prefer) an individualized plan that takes into account all of those variables I mentioned in maximizing contact in the children's best interests.

We do endorse an additional element in the statutes. We support and try to practice procedural fairness in our courtrooms. A key component of this evidence-based principle regarding trust and legitimacy for an institution is for participants, here parents, to understand the *basis* for decisions. We believe it would be appropriate to **require judges to state the reason why a 50-50 parenting plan is not in the best interest of a child or sibling group, when we deny such a request from a parent. This** is not currently the law but we believe strongly that parents are entitled to know the reasons behind the judges' decision.

But they use affairs, their religion, morality Knowing the loser has little to no chance of being heard in the court of appeals

Thank you for considering my comments.

Respectfully submitted,

Maureen McKnight

MAUREEN McKNIGHT, Circuit Court Judge

cc: Members of the Senate Judiciary Committee
Kingsley Click and Phil Lemman, State Court Administrator's Office
Addie Smith, Senate Judiciary Counsel

Linda Scher
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— Profits from conflicting parents will lose business

BEFORE THE SENATE COMMITTEE ON JUDICIARY
WRITTEN TESTIMONY ON SB 318

Dear Chair Prozanski and Committee members,

I appear today on my own behalf and not as a representative of any other body or organization. **I oppose SB 318.**

I am a family mediator in private practice in Portland, providing mediation, facilitation and training for families in Oregon for over 25 years. I am a former president and current member of the Oregon Mediation Association and a current Practitioner Member of the Family Law Section of the Association for Conflict Resolution.

I was a member of the Statewide Family Law Advisory Committee (SFLAC) for 15 years and served as chair of the SFLAC's Parenting Plan Workgroup (now called the Parental Involvement Outreach Workgroup). When I was chair of the Parenting Plan workgroup, I led a highly qualified, thoughtful, collaborative multidisciplinary team of family professionals to create and revise the Basic Parenting Plan and Safety Focused Parenting Plan Guides that are currently used throughout the state to assist parents in creating their custom parenting plans. When I was co-chair of the Parental Involvement Outreach Workgroup, I worked with a similar diverse group of family professionals to create the Custody and Parenting Time report. I call the committee's attention to these materials and urge you to review them thoroughly.

For the past few decades, a significant amount of resources of the state have been focused on supporting parents to create the parenting plan for their child that best supports the unique needs of the children and the family. This policy is codified in existing ORS 107.101 (3) and (4):

107.101 Policy regarding parenting. It is the policy of this state to:

... (3) Encourage parents to develop their own parenting plan with the assistance of legal and mediation professionals, if necessary;

(4) Grant parents and courts the widest discretion in developing a parenting plan; ...

The Basic Parenting Plan Guide and the Safety Focused Parenting Plan Guide have provided parents, mediators, counselors and attorneys with important tools in crafting the ideal parenting plan for each unique family.

The guides offer an example of the variety of parenting time schedules that might serve the needs of children. These sample schedules were crafted after extensive national research on child development, bonding and adjustment to parental separation. You will note that the schedules change with the child's age, a critical adjustment not reflected in a single standard presumption as is offered by SB 318.

These Plans aren't used & are ignored by Judges

The Custody and Parenting Time Report lays out protective factors and favorable conditions that support shared (or equal) parenting time and risk factors and contra-indications that caution against shared (or equal) parenting time. While each particular factor may be argued or disputed, the overall complexity of the decision for each family is clear – a single model does not serve children well. This is the conclusion of the report (see section VI). Using research from 20 or more years ago

Although I feel that the bill as a whole does not support the needs of Oregon's children and families, there is one provision in the bill that is particularly concerning:

Section 4 (1) (b) (A) provides that rebuttal of the presumption of equal parenting time requires a finding "by clear and convincing evidence that equal parenting time is not in the best interest of the child and the other parent's lack or inability with respect to the child will cause substantial risk of harm to child's health or safety" (emphasis added). In other words, the fact that equal parenting time is not in a child's best interest does not by itself satisfy the criteria for ordering a different parenting time schedule. A substantial risk of harm must be proven. This goes against the fundamental policy of Oregon's Family Law that the child's best interest is primary in making court orders.

Why are married parents allowed to make best interest

I urge you not to move this bill along any further. Thank you for your consideration of my testimony.

Linda Scher
March 5, 2019

Judgement calls, yet, ~~suddenly~~ lose that ability when they become single?

Single ≠ unfit.

Fit parents have the right under the federal law to form their family their ways.

What one believes is best for a child based on their experiences may not actually be what's best -- which is why Fedral Law ~~it~~ gives the right of parents to dictate

Benefits from funds

Oregon Law Center
WORKING TOGETHER TO ACHIEVE JUSTICE FOR LOW INCOME OREGONIANS

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Testimony in Opposition to Senate Bills 318
Before the Senate Judiciary Committee

March 6th, 2019

Chair Prozanksi, Vice Chair Thatcher, and members of the Committee:

On behalf of the Oregon Law Center (OLC), I submit this testimony regarding Senate Bills 318. I thank you for the opportunity to submit comments.

OLC is a statewide non-profit law firm whose mission is to provide access to justice for the low-income communities of Oregon by providing a full range of the highest quality civil legal services. Because we are not able to help all who qualify for our services, we prioritize the provision of assistance to the neediest Oregonians – the lowest of income, the most vulnerable. The single most frequent request for help from our offices is in the area of family law. Often, our clients are struggling to escape domestic violence. Rarely are the issues facing our clients more compelling than when parents seek our assistance in establishing safety and stability for themselves and their children in the aftermath of a separation. In all cases, we look for outcomes that, tailored to the needs and circumstances of the individuals involved, will enable the children to thrive. It is through this lens that my testimony is provided regarding the bills before the committee this morning.

SB 318 would negatively impact families by presuming a one-size fits all standard for making determinations of parenting time. The bill proposes codification of a legal presumption that equal (50/50) parenting time is in the best interests of children. The bill provides that this presumption could only be rebutted by one parent's showing, by clear and convincing evidence, 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." Despite good intentions, this standard would exacerbate parent conflict and would have significant negative impact on children and families.

So what is ample time? 4 days a month? 13 percent?

It is absolutely the case that children benefit with ample and regular access to loving parents. Oregon statutes establish several principles regarding the importance of both parents in the establishment of parenting time orders, against the foundation of a consideration of the best interests of the children and the safety of the parents:

Policy Regarding Parenting:[1]

- Assure frequent/continuing **contact with parents who have shown the ability to act in the** child's best interest;
- Encourage fit parents to share in rights/responsibilities of raising children;
- Terms of parenting plan for benefit of child, not parents;
- Encourage parents to develop own parenting plans - wide discretion;
- Best interests of the child and safety of the parents must be considered.

When parents cannot agree about the terms of custody and parenting time, and need a judge's decision on the matter, Oregon's law provides a nationally recognized standard for determining the appropriate

order. The judge must consider the facts and circumstances of the individual family, and make a determination about what would be in the child's best interests:

Best Interests of the Child Standard:[2]

Consider all of these factors:

- Emotional ties between child and family members;
- Interest of parties in child and attitude towards child;
- Desirability of continuing existing relationships;
- Abuse of one parent by the other;
- Preference for primary caregiver of the child, if the caregiver is fit;
- Willingness and ability of parent to facilitate relationship between child and other parent;
    - May not consider this factor in cases of sexual assault or pattern of abuse, if continuing relationship would endanger health/safety
- Rebuttable presumption that it is not in the best interests of the child to be in sole or joint custody of parent who has committed domestic violence;
- Marital status, income, social environment, conduct, or lifestyle not considered unless causing or may cause damage to child;
- No preference to mother over father or father over mother.

And when the child is young, the judge decides

Our current statutes recognize that all families are different, and have myriad factors that are relevant to the best interests of children. For example, factors such as the parents' employment schedules, the children's ages and developmental stages, where the parents live, physical or mental health issues, development stages, school and sports schedules, and more can more often than not mean that 50/50 splitting of time is not in the child's best interests. Low-income families in particular may have financial burdens, transportation issues, job schedules, and other challenges that would make a 50/50 parenting time schedule extremely difficult for children.

The bill would impose barriers to a court's ability to fashion a parenting time schedule that works best for the child. The requirement that a parent must show by clear and convincing evidence that the other parent poses a significant risk to the child, before any deviation from the presumed 50/50 split could be allowed, would increase rancor and litigation costs in family law proceedings. In low-income families, or in families where one party's resources outweighed the other's, the bill's standard would significantly disadvantage the lesser-resourced parents. In all cases, the bill's proposed standard would decrease the court's ability to get to the issue of the best interests of the child.

All families are different, and have different challenges, strengths, and needs. The consequences of having an inappropriate order regarding parenting time are severe. Oregon's current law strikes a balance that facilitates a court's ability to consider relevant factors designed to encourage the crafting of an order that works best for children. This is the appropriate focus for our family law statutes. For these reasons, we oppose Senate Bill 318.

Thank you for the opportunity to testify.

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[2] ORS 107.137

$75 Billion industry set to lose money if passed

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. What one parent deems correct doesn't mean the other is wrong. STOP assuming there is only one care giver

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. Yet, 20/80 or 13.5% → 25% time is the most common granted

How? If one parent says academics are best the other says sports & 1 child says music ... Who's right?

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)?

New research suggests rigid schedules are bad flexible good

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.

Refuted 2005 thru 2018 using Empirical methods

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]

All research showed the opposite

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

STATE 35 → 50% is shared, and solve Your issue =

[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.

No one said exact

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. The child may have a financial dynamite parent and ~~[illegible]~~ a parent on welfare – the child will learn

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. Then why are you using data claims refuted by Soc. Scien & ?

both sides

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

Mother W/ a degree using to benefit and complain about father

Suzanne Zane, DVM, MPH

Resident of Portland, Oregon

Testimony for public hearing on SB-318

8:00 am Wednesday March 6, 2019

I. Credentials / Private citizen statement

My name is Dr. Suzanne Zane. I am the senior maternal and child health epidemiologist for the **Oregon Health Authority, and a have** been a public health scientist in that field for 2 decades within **a major federal agency. My work focuses** on how to support the health and wellbeing of children **and families** throughout Oregon. However, today I am here to testify against this bill as a private **citizen.**

II. Ideal world vs. actuality of families' lives

I do recognize that the proponents of this bill are putting it forward out of best intentions. And I would like to live in a world in which all parents could share parenting 50/50 and maintain a conflict-free, stable, nurturing environment for their children after divorce, communicating well and collaborating effectively for the sake of the child. Unfortunately, this is not the typical reality, and children can be deeply harmed, both short-term and long-term, by the common real-life situations they face.

III. ACEs—divorce is one of them

Many of you have heard of "ACEs"—adverse childhood experiences, forms of trauma which are shown to influence psychological and health effects through childhood and long term into adulthood. Divorce is one of the ACEs. But damage to a child from the effects of divorce is deeply variable. A good outcome for the child depends upon:

Lack of conflict
Consistency for child
Good inter-parent communication
Ability of parents to collaborate on child's behalf and create a nurturing, emotionally **stable environment**

Attachment theory has been refuted → These statements have been refuted by empirical Data attached herein

Any age child is affected if these requirements are not met. If there is conflict and inconsistency, the effects on children of all ages are profound.

I need to also highlight the specific situation of the infant and very young child—the key developmental time period to develop stable attachments with their parents and caregivers, forming patterns of secure—or insecure—attachment that affect their ability to form healthy relationships their entire lives. For infants, spending time entirely split between 2 households breaks what ob/gyns and pediatricians refer to as the mother/child dyad—one in which breastfeeding, a key component of health from childhood through adulthood, takes place. However, regardless of whether an infant is cared for by a mother, father, or other caregiver, there must be a primary

caregiver or caregivers who are consistently in place most of the time and know the child's 24-hour needs around food, sleep, and comforting and have the level of constant familiarity to recognize when there is a physical or emotional problem. Consistency and stability—rootedness within a primary home within which they feel secure--are key to the ability to form secure attachments to all those who care for and love them—including the parent who does not have the majority of the time with them. Changing households and not having a stable primary way of living and person who cares for them puts the psychological and emotional development of the child at risk. Being in a different environment half the time is not something that young children can conceptualize or truly understand. Scientific understanding of infant and child developmental needs says this is the wrong approach for infants and younger children.

IV. Damage to Oregon's children via the presumption in this bill

We cannot have a one-size-fits-all presumption and legislate what must be individualized. This bill states that a 50/50 parenting time split is subject to rebuttal—however, the burden of proof, stated as "clear and convincing evidence...", is far too high. It is untenable for most parents for some key reasons including lack of knowledge of the legal process, resultant fears, and especially cost—for lawyers, for parenting evaluations, and in the need to miss work.

Judges must be able to apply the statutory factors to determine what parenting time split really is in "the best interests of the child." How can the legislature presume to make a choice for all children that will take an extraordinary amount of evidence and cost for a parent to rebut? The current system is imperfect, but it relies on a number of factors that allow each individual case to be adjudicated individually, rather than making a crude and heavy-handed presumption that, in practice, will be almost impossible for many primary caregivers to rebut.

V. Personal story

This would be rebuttable

Had this proposed presumption been in place a few years ago, my now 15-year-old son would likely not be functional or potentially even alive today. He had severe mental health issues for a period of years. Although I had legal custody and could make decisions about his needed psychiatric care and special education needs, his father would not allow him to attend any therapy appointments during his parenting time and would not communicate with his psychiatrist, therapists, teachers or schools about his condition and needs, and transfers each week between households stirred conflict and aggression on his father's part. It took all of my resources, financially and emotionally, and 2 years of legal action to ensure that this child is with me as his primary parent Monday through Friday so that he could get the treatment and environment he needed to recover. I am using this personal example to illustrate that even I-- a highly-educated middle class professional in the health field, with access to financial credit, a job with banked paid leave time, a supportive and understanding work environment that tolerated frequent absences, and a diagnosed major illness in a child --only *barely* managed to get this child what he needed even without the increased standard of evidence for rebuttal that would be the law if this bill passed. My son would likely have had a life-altering long-term psychiatric disability or even have ended his own life had I not been able to obtain this change in parenting time. The legislature risks creating many unintended tragedies if it passes this bill.

VI. Closing

The presumption stated in this bill regarding the wellbeing of children is not factually accurate. I urge this Committee to leave the family courts of this state the autonomy and judgement to work with individual case situations to determine parenting time as currently stipulated by law. We must strive to serve the needs of children as best we can based upon scientific evidence, and not mandate a boilerplate standard that is near-impossible to refute and which may result in damage to child health and wellbeing statewide.

Shareholder if you received funds from my company...

TESTIMONY REGARDING SB 318—EQUAL PARENTING TIME

Before the Senate Judiciary Committee of the Oregon Legislature
March 6, 2019

Submitted by:
Sean Armstrong, Circuit Court Judge
Marion County

Chair Prozanski, Vice-Chair Thatcher, and Members of the Committee:

My name is Sean Armstrong. I am a Circuit Court Judge in Marion County. I serve as the chair of the Marion County Family Law Executive Committee. I am the Judge member of the Marion County Domestic Violence Council. I am a current member of the Parental Involvement & Outreach Subcommittee of the Oregon State Family Law Advisory Committee, and a past Member of the Oregon State Bar Family Law Executive Committee.

In addition to my regular caseload, I also presently run the entire self-represented family law litigant docket in Marion County. I also routinely serve as a settlement conference judge, handling as many as three settlement conferences each week for family law litigants who seek alternative dispute resolution in lieu of trial. Prior to taking the bench, I was a shareholder at Garrett Hemann Robertson PC in Salem, where I practiced family law for 14 years.

These thoughts are my own. I offer this testimony based upon my experience as both a Circuit Court Judge and family law practitioner. I am not representing the Oregon Judicial Department today.

I oppose SB 318 for three reasons.

The best interest in Empirical evidence is 35=50/50 65 time.

1. **Families, and their needs, are unique.** When families are in crisis (as if often the case at the end of a relationship) they need courts to have wide latitude to craft a child-focused parenting plan. A bill that mandates an equal parenting plan in all cases ignores the wide variety of family and parent/child dynamics at play. Even in cases where no actual physical or emotional abuse occurs, families have varying power structures. Parents have differing skill sets. Children have a variety of needs based upon their ages, emotional maturity, and level of attachment to each parent. The current state of the law appropriately requires the court to focus solely upon the best interests of the children without regard to what their parents perceive as "fair." There is no evidence that perceived "fairness" is a reliable mechanism for predicting appropriate outcomes for children.

Studies Show 45% of Mill. males are 50/50 dads

2. **Equal parenting time, as conceived of here, rarely exists in intact families.** The presumption of equal parenting time is not the reality for most families, who have long ago figured out who will serve as the primary parent—who will handle medical appointments and school counseling, who will prepare meals for the children, bathe them, dress them, and take them to school. In my experience, these tasks are rarely equally shared. While children are undergoing the difficult transition from intact to separated family, they need above all else a stable and effective transition that relies upon education and skill-building for the parents, rather than an artificial plan that would rarely reflect the reality of their intact family childhood experience.

If we don't have children choose to go to school or takes meds — why would we choose to determine what is best based on their beliefs or the beliefs of the court who doesn't know them

3. **This bill would shift the focus of litigation from a child-based model to a parent-based model.** I spend hours educating parents about the value of working together in mediation to agree on a plan that actually benefits their children, with the objective of recognizing that their individual strengths and weaknesses should be respected rather than attacked. Most litigants, whether self-represented or represented by attorneys, start with the presumption that custody and parenting time decisions depend upon maligning the other parent's skills or life choices in an effort to "prove" they are the superior parent. While that is not the case under current law, this bill makes attacking the other parent mandatory because it is the only mechanism for adjusting a parenting plan—even when, for example, the plan should really be changed to accommodate relocation of a parent, a change in work schedules, changes to a child's school or daycare arrangements, or scheduling around extracurricular activities. Forcing a parent to attack the other based upon perceived inability to parent can only serve to increase the emotion associated with litigation at time when children are particularly vulnerable.

Thank you for considering my comments.

Respectfully submitted,

Sean Armstrong, Circuit Court Judge

Parents determine the best interest of their children based on their children

This is shameful. A law professor taught teaching "use the most current research"? using decade old papers because new science refutes him!

UNIVERSITY OF OREGON | School of Law

March 6, 2019

Senate Committee on Judiciary (by email to its members)

Senator Floyd Prozanski, Chair
Senator Kim Thatcher, Vice-Chair
Senator Cliff Bentz, Member
Senator Shemia Fagan, Member
Senator Sara Gelser, Member
Senator Dennis Linthicum, Member
Senator James Manning, Jr., Member

All research is Pre-2005 - there is 1 from 2000! nearly 20 years Old

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.

a Supra case

The 2014, 2016, 2013 cases and Laws are not empirical research !!

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.

FACULTY OFFICES

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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*

Not research - however researchers who concluded more time needs to be given @ at least 35-50%. both parents ... ouch

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 by rebutted by **a** preponderance of the evidence, the scales seemed tilted in favor of the domestic violence perpetrator.

see Summary of Summit

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.

his own opinion as research is beyond pompus

> 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]

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[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).

Then include it in Lawyer brief

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

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[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

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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

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[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,

Merle H. Weiner

Merle H. Weiner
Philip H. Knight Professor of Law

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March 5, 2019
Testimony in Opposition to SB 318

Chair Prozanski, Vice Chair Thatcher and members of the Committee:

I am the executive director of Clackamas Women's Services (CWS), a community-based non-profit agency that has supported survivors of domestic and sexual violence, stalking, trafficking and elder abuse on their path to safety and stability for over 30 years.

54/55 empirical studies so don't want to call this fraud but...

I am writing to express our agency's concerns with SB 318 which proposes codification of a legal presumption that equal (50/50) parenting time is in the best interest of children. Our first concern is that we are unable to find research that supports this presumption. We agree that children benefit most when they have regular access to loving and safe parents and we believe this is currently reflected in Oregon statutes that establish principles and standards that highlight the importance of both parents in the establishment of parenting time orders. The presumption that equal parenting time is in the best interest of all children does not take into account a multitude of factors. Factors such as parent's employment schedules, protective factors, children's developmental stages, exposure to past trauma or adverse childhood experiences, school location and so forth. We believe that parenting time plans should affirm what is in the best interest of the child and there is currently a process in place to assessing this on an individual basis- which supports the formula that each child has unique needs and a unique set of factors. What is "fair" to the adults involved should not be imposed as the standard for what is in the best interest of the child.

Second, the bill provides that this presumption could only be rebutted by one parent's showing, by clear and convincing evidence, 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 shifts away from a framework of decision making that is guided by the "best interest of the child" and only considers substantial risk of harm. This impedes the courts ability to craft a child-focused parenting plan. It makes attacking the other parent a requirement if there is disagreement about the structure of the parenting plan.

Furthermore, the high standard for rebuttal moves closer to the standard in the criminal system and away from the current standard that is aligned with civil proceedings. In the criminal system there is a prosecutor and a defense attorney there to navigate this standard of proof. This high standard will create significant barriers for parents who do not have access to legal counsel or the ability to navigate the legal system. For victims of domestic violence this standard can be untenable as they often face further harm from the abuser as a result. The law currently takes into account the dynamics of domestic violence, and this statute stands to unravel that- putting untenable responsibility on the victim.

We hope that you will consider these concerns.

Sincerely,

Melissa Erlbaum, MPA