My name is David Becker. I am a solo practitioner in Portland, and a litigator who practices federal environmental law, not family law. I am Treasurer of the State Bar's Environmental and Natural Resources Section and sit on that Section's Executive Committee, but offer this testimony in my capacity as a private citizen.

I am testifying in opposition to SB 318 because it would enact an evidentiary presumption that has no empirical support and that would, paradoxically, make divorce and custody proceedings less fair than they currently are under the multi-factor balancing scheme in the current law.

I want to echo the written testimony of attorney Andrew McLain to point out that when the legislature includes an evidentiary presumption in the law, it is critical that it be based on overwhelming empirical evidence that the presumption is factually accurate in the vast majority of cases. I have read most of the written submissions that have been posted on the Committee's website and listened carefully to the oral testimony offered at the hearing on Wednesday, March 6, 2019. Although there are many heartbreaking anecdotes describing apparently unfair outcomes under the current system, and suggesting that there is ample basis for reforms of the current system, there are no empirical studies that would begin to justify a legislative presumption that parenting time should be equal in all instances, rather than judged on a case-by-case basis as under the current law.

What is problematic about an unsupported evidentiary presumption is that it imposes a one-size-fits-all standard on a legal issue that is inherently different for every different couple and every different child. Further complicating this is the "clear and convincing" evidentiary burden for overcoming the presumption – in practice, in my experience as a litigator, this is an evidentiary burden that is much harder to overcome that a "preponderance of the evidence" or "more likely than not" standard of proof. This is confirmed by Oregon case law, which demonstrates that "clear and convincing evidence is a far higher standard to meet. *Riley Hill Gen'l Contractor Inv. v. Tandy Corp.*, 303 Or. 390, 402 (1987) ("To be 'clear and convincing,' evidence must establish that the truth of the facts asserted is 'highly probable.'"). In the involuntary commitment statute, the Oregon Court of Appeals has held that "clear and convincing" evidence must be "evidence of 'extraordinary persuasiveness.'" *State v. M.S.*, 180 Or. App. 255, 263 (2002); *see also Pantano v. Obbiso*, 283 Or. 83, 87 (1978) (equating the "clear and convincing evidence" standard with "evidence that is of extraordinary persuasiveness" in another civil context). It is unlikely that few litigants, and even fewer people of modest means, could overcome the statutory presumption against the "clear and convincing" burden of proof.

This has the potential, as Mr. McLain mentions in his written testimony, to lead to more litigation and tragic and undesirable outcomes where one partner with more resources gets an additional thumb on the scale in custody proceedings. To the extent that you have heard about problems with the current custody system, the judiciary should be seeking other reforms, such as the other bills here giving children a voice, but not imposing an unfounded presumption.

The legislature should not be in the business of casually enshrining evidentiary presumptions and taking away from the courts their ability to weigh evidence in the best interest of children and make it much more difficult or even impossible for a parent without financial resources to

overcome the evidentiary presumption – which in many cases will be detrimental to children. I urge the Committee not to advance this bill. Thank you.