UNIVERSITY OF OREGON | School of Law

February 25, 2025

Dear Members of the House Judiciary Committee:

I write to share my views about HB 3095. This bill would change Oregon family law by adding a rebuttable presumption that says "equal parenting time is in the best interests of the child." *See* proposed O.R.S. §107.101(6). Consequently, when a judge crafts a parenting plan because the parents could not agree themselves, the judge's discretion would be limited by "a rebuttable presumption that equal or approximately equal parenting time is in the best interests of the child." *See* proposed O.R.S. §107.102)(5)(c). In addition, "If the court rebuts the presumption, the court shall develop a parenting time schedule that maximizes the practicable parenting time with each parent." *Id.*

I am qualified to comment on this proposed legislation. I have been teaching family law at the University of Oregon for approximately 27 years. I have written extensively about child custody topics, including relocation, child abduction by parents, and the way in which the law could usefully encourage shared parenting. For twenty years, I was also the faculty director of the Domestic Violence Clinic at the University of Oregon.

In short, while HB 3095 is a better drafted provision than a similar proposal considered in 2019 (SB 318), it is still misguided. Not only is it unnecessary (because Oregon law already allows judges to award equal parenting time when it is in the best interest of a child), but the adoption of a presumption would undermine the individualized best interests test that is the hallmark of Oregon's custody law and it would adversely affect the wellbeing of domestic violence victims and their children.

Oregon Law Allows Judges to Award Equal Parenting Time and is Gender Neutral

Before elaborating on the disadvantages of HB 3095, it is useful to quickly describe the relevant provisions of Oregon family law. This description suggests that the proposed legislation is unnecessary because judges can already award equal parenting time. The law is gender neutral and does not discriminate against the noncustodial parent.

First, judges currently are authorized to order equal parenting time, even when the custodial parent disagrees with the award. 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. In fact, appellate cases often mention such awards incidentally. *See, e.g.,* Matter of the Marriage of Banerjee and Fiorillo, 485 P.3d 920 (Or. Ct. App. 2021)(affirming a parenting-time plan that gave the father custody and each parent roughly equal time with an 8-month-old child); In re Marriage of McGuire, 2014 WL 8623572 (Or. Ct. 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.").

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Second, currently, judges are guided in their determinations of parenting time solely by the best interest of the child, with no presumption for or against any specific amount of parenting time, and the safety of the parties. Oregon law tells judges to "develop the parenting plan in the best interest of the child, ensuring the noncustodial parent sufficient access to the child to provide for appropriate quality parenting time and ensuring the safety of the parties, if implicated." ORS §107.105(b). *See also* ORS §107.102(5)(b). Oregon also has a strong "policy" in favor 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." ORS §107.149; ORS §107.101(1).

Third, Oregon's parenting time and custody law is gender neutral. In fact, the law 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." O.R.S. §107.137(5). Both parents have the same opportunity to become the primary custodian regardless of gender. Nor is gender relevant to a judge's determination of whether parenting time is in the best interest of a child or in what amount.

In short, if a judge determines is in the best interest of a child to spend 50% of the child's time with each parent, the judge can order that result. A judge *must* give the noncustodial parent sufficient access to the child to provide for appropriate quality parenting time. The only consideration other than the best interest of the child is the safety of the parties.

The Bill Would Harm Children by Taking the Focus Away from an Individualized Best Interests Inquiry

HB 3095, apart from being unnecessary, would harm children subject to litigated parenting-time disputes. A presumption of equal parenting time generalizes about what is good for children and applies it to a particular child. However, research does not support applying the generalization to children whose parents cannot agree on parenting time. The presumption then requires the custodial parent to prove the child's situation differs, even though the mere fact that the parents are litigating suggests the presumption is not appropriate. A custodial parent can have difficulty refuting the presumption for reasons unrelated to the merits. Among other things, that parent may lack legal counsel and/or may be unable to afford an expert to establish the safety issues or why equal parenting time is not in the child's best interest. In short, the presumption is ill advised when parents are litigating. Rather, judges should be utilizing the individualized best interest inquiry and placing the burden of proof and persuasion on the person seeking the allocation of equal parenting time.

In 2022, Mr. Milfred Dale, an attorney and a psychologist, published an important article on this topic in the *Journal of the American Academy of Matrimonial Law*. I am providing the entire article to the committee, but I will summarize some of Mr. Dale's main points for purposes of convenience.[1] Mr. Dale, like myself, supports "shared parenting, even equal time parenting plans, when these can be achieved by parental agreement or through court findings using *the individualized best interests of the child* standard that such an arrangement benefits the child."[2] The propriety of the individualized assessment was also affirmed by a 2013 interdisciplinary think tank on shared custody, sponsored by

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the Association of Family and Conciliation Courts, and consisting of thirty-two family law experts from a wide range of disciplines. The participants 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 Think Tank Final Report: Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 162 (2014).

A presumption about equal parenting time is problematic because it undermines the judge's discretion in cases that do not settle. As Mr. Dale says, "For cases that do not settle, 'discretion' by a family law judge is a necessity, not a bad idea or a 'dirty word.' Best interests of the child determinations involve a fact-intensive inquiry seeking an individualized answer."[3]

Parents who cannot agree to parenting-time arrangements for their children are different than most parents and should be treated differently by judges. Oregon law already recognizes this fact in the context of joint custody. 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 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). The reason for the rule is that if parties cannot agree to joint legal custody, they are unlikely to agree about the major life decisions that are the subject of joint legal custody, leading to hostility, strife and relitigation. Similarly, parents who do not agree to their parenting time arrangement are unlikely to have a successful equal parenting-time arrangement in practice. Mr. Dale notes, correctly, that conflict between parents is the most problematic variable for children when the parents split.[4] Equal parenting time provides the parties increased opportunities and reason for conflict.

Moreover, research does not support the benefits of 50:50 parenting-time arrangement in cases in which the parents don't agree to it. Mr. Dale exhaustively details the problem with the existing research, including the studies cited by proponents of a 50:50 parenting-time presumption. Researchers' positive claims about child adjustment are attributable to self selection and misguided views of causality. As he notes, "the research is far from 'sufficient and consistent' enough to demonstrate that shared parenting should be presumptively considered as in the best interests of children."[5] Nor does the research support a legal presumption. He calls the research for a presumptioin of equal parenting time "untenable and scientifically indefensible."[6] Rather, the research instead shows that "it is the quality of the relationships between children and their separated or divorced parents that matters more than the amount of contact or time."[7] Oregon law already recognizes that fact and assures the noncustodial parent sufficient access to maintain a quality relationship.

A 50:50 parenting time presumption is inappropriate because the correct amount of parenting time rests on a complex array of child-specific variables, including the following:

> geographical proximity; the ability of parents to get along and, at minimum, to maintain a "business-like" working relationship as parents with children being kept "out of the middle"; child-focused arrangements, with children's activities forming an integral part of the way in which the parenting schedule is developed; a commitment by everyone to make shared care work; family-friendly work practices; a degree of financial independence, especially for mothers; and a degree of paternal competence.[8]

In addition, a judge must consider "practical issues," and there is "little to no research data" on how a judge should view these important considerations. They include the following:

> (1) whether more transitions adversely affect children (e.g., alternating homes every day, every few days, or every week); (2) whether joint physical custody is more beneficial, harmful, or desirable to children of different ages; (3) whether longer separations from each parent harm younger children (e.g., babies may benefit from more transitions and shorter separations from either parent, while school-age children benefit from fewer transitions and longer separations); and (4) whether flexible, evolving parenting plans work better for both children and parents.[64]"[9]

The judge must also consider things like whether this is a case of "establishing, reestablishing, maintaining, or improving the parent-child relationship," whether "the history of the parent-child relationship positive or negative," and "case-specific facts (e.g., adverse events) or factors (e.g., age or special needs of the child)" that might influence a schedule."[10]

A judge should have maximum flexibility to consider these various factors, unconstrained by a "presumption" that often truncates the inquiry, especially when a party may lack an attorney or expert to rebut the presumption, as is the case for so many family court litigants.

The Bill Will Harm Domestic Violence Survivors and their Children

HB 3095 commendably allows the presumption of equal parenting time to be rebutted if there are safety concerns. However, that provision is not sufficient to further the safety of survivors and their children for several reasons. First, recall that the burden is on the one trying to rebut the presumption —i.e., the domestic violence victim. That allocation seems unfair, ill advised, and contrary to the spirit of ORS §107.137, which creates a presumption that it is not in the best interest of a child to award custody to a perpetrator of violence. HB 3095 gives no attention to how its presumption works with the presumption found in 107.137. Presumably, a domestic violence victim may have a restraining order against the perpetrator, obtain sole custody, and then have to prove to the judge that equal parenting time is not in the best interest of the child because of safety concerns. The presumption in 107.137 was added, in part, because it is very difficult for survivors to prove that awarding custody to the perpetrator is not in the best interest of a child -- the survivor might lack counsel or expert testimony about the harms to children from domestic violence. The same obstacles are going to make it difficult for a survivor to rebut the presumption of 50:50 parenting time.

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Second, rebutting the presumption of equal parenting time might not be easy for a domestic violence survivor because, as research demonstrates, their concerns are frequently discounted in favor of the ideal of two parents sharing parenting. Professor Joan Meier explains, "Numerous scholars have described how domestic violence provisions--whether embodied in best interest factors, exceptions to joint custody, or presumptions against custody to a batterer--are routinely superseded by the shared parenting ideal. In fact, a Wisconsin study found that even where one parent had been criminally convicted of domestic violence, neither settlement agreements nor court decisions gave much weight to that violence."[11] As she states, " the data objectively indicate a high level of judicial skepticism toward mothers' claims of domestic violence and child abuse."[12]

I have also written about the harm that can come to domestic violence survivors and their children from a proposal like HB 3095. I include here an excerpt from my article, as it provides additional authority for my points above and it raises a few new concerns.

> 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.[13] 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.[14] 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."[15]
>
> 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.[16] In that state, divorcing parents are "substantially sharing custody and ... the largest single group ... share[s] time equally."[17] 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.[618] 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.[719]
>
> 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."[820] Brinig's data 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,"[21] 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."[22] 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."[23] 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.[24] 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"[25]

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),[1426] 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 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."[27] The message may be particularly problematic for domestic-violence victims, who may already have a reduced capacity to resist such an arrangement.[28] 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."[29] While this type of behavior does not appear to be widespread, it sometimes occurs.[30]

Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody,* ILL. L. REV. 1535, 1569-71 (2016).

Shared Parenting Can Be Addressed in Other, Preferrable Ways

In my 2016 *Illinois Law Review* article, cited immediately above, I explained that supportive coparenting is more important for children's wellbeing than their parents' particular custody arrangement. Presumptions and preferences for shared custody or equal parenting time 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

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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 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."[31] Unfortunately, no such social role of "parent-partner" currently exists. Until it does, a presumption of equal parenting time will be more problematic than helpful.

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 HB 3095. I strongly recommend you vote against advancing HB 3095.

Sincerely,

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Notes

[1] Milfred Dale, *"Still the One": Defending the Indivudlaized Best Interests of the Child standard Against Equal Parenting Time Presumptions*, 34 J. Am. Acad. Matrim. Law. 307 (2022).

[2] *Id.* at 308.

[3] Id. at 317.

[4] *Id.* at 340-343.

[5] *Id.* at 335.

[6] *Id.* at 351.

[7] *Id.* at 335.

[8] *Id.* at 319-20 (citing Stephen Gilmore, *Contact/Shared Residence and Child Well-Being: Research Evidence and Its Implications for Legal Decision-Making*, 20(3) INT'L J. LAW, POL'Y, & FAM. 344, 358 (2006)).

[9] *Id.* at 320.

[10] *Id.* at 353.

[11] *See* Joan S. Meier, *Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law*, 110 GEO. L.J. 835, 864 (2022).

[12] *Id*. at 848.

[13] 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).

[14] Jaffe, *supra* note 13*,* at 189; s*ee 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.

[15] Bruce Smyth et al., *Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?*, LAW AND CONTEMPORARY PROBLEMS 109, 141 (2014).

[16] *See* ARIZ. REV. STAT. ANN. § 25-403.02(B) (2016).

[17] Margaret F. Brinig, *Substantive Parenting Arrangements in the USA: Unpacking the Policy Choices*, in 15 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.").

[18] 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).

[19] *Id.* at 21, 28.

[20] 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 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.

[21] June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1116 (1999).

[22] *Id.* at 1119 (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 58 (1992)).

[23] *Id.* (internal quotations omitted).

[24] *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).

[25] *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.*

[26] 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.

[27] *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.").

[28] Davis, *supra* note 26, at 14.

[29] Chambers, *supra* note 20, 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.").

[30] *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).

[31] Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody* (2016) ILL. L. REV. 1535, 1575.