House Judiciary Committee
Subcommittee on Family Law
PA House of Representatives
Harrisburg, PA

Public Hearing on House Bill 1397 - Equality in Parenting Time
House Judiciary Subcommittee on Family Law
Room 60 East Wing
Harrisburg, PA 17120
Monday, December 9, 2019
10:00 ~11:30

Agenda

10:00 am — Welcoming remarks:
Subcommittee on Family Law - Majority Chairman Sheryl Delozier
Subcommittee on Family Law - Minority Chairman Tina Davis

Honorable Susan C. Helm
Prime Sponsor of HB 1397
House District #104 - Dauphin County (Part), Lebanon County (Part)

10:05 am — **Stephen Meehan**, Volunteer Chairman for the Pennsylvania Affiliate
National Parents Org

Matt Hale, Chairman for the Kentucky Affiliate
National Parents Org

10:15 am — **Gail C. Calderwood, Esq.,** Immediate Past Chair of Family Law Section
Pennsylvania Bar Association

Michael E. Bertin, Esq., Chair of the Family Law Section
Pennsylvania Bar Association

10:30am — **Justin Poe**

Mark Ludwig, Executive Director
Americans for Equal Shared Parenting

10:45 am **Suzanne Estrella, Esq.**, Legal Director
Pennsylvania Coalition Against Rape

Danni Petyo, Esq., Civil Legal Representation Attorney
Pennsylvania Coalition Against Domestic Violence

11:00 am **Honorable Kim D. Eaton,** Administrative Judge – Family Division
Court of Common Pleas of Allegheny County

Honorable Daniel J. Clifford III, Judge,
Court of Common Pleas of Montgomery County
Vice Chairman, Domestic Relations Procedural Rules Committee

11:15 am **Maria P. Cognetti, Esq.**, Cognetti & Associates
Joint State Government Commission Domestic Relations Advisory Committee

Mary Cushing Doherty, Esq., High Swartz LLP
American Academy of Matrimonial Lawyers

Submitted Written Testimony:

Pennsylvania Psychological Association
Christian Stahl
CHILD USAdvocacy
Barbara J. Hart, Justice Center
Laurie Nicholson, Founder of Parental Alienation Awareness, PA
Richard Ducote, Attorney & Counselor at Law, APLC
Melody Sebeck
Dr. Matt Lane, Principle of Fairview High School
Timothy M Shilling, President of Families Civil Liberty Union (FCLU) in Pennsylvania
Joan Kloth-Zanard, Founder and Executive Director of PAS Intervention
Bill Ayers, Pennsylvania Bikers for Justice
Pamela Lewis
Dr. Mark D. Roseman, CEO of the Toby Center
William P. Eckenroth III
Gemma Bryant
Tamara Sweeney
Steven Burda
Shelley Thompson-Ochterski
Tricia M. Fisher
Lucille DePhillips
Kathryn Sherlock

Good Morning

My name is Stephen Meehan, I am a former House Judiciary Legislative Analyst, and an "erased Non-Custodial" parent of four daughters, and a Volunteer Chairman for the Pennsylvania Affiliate of the National Parents Organization. I am not here to discuss my personal case, but am here to speak on behalf of families seeking Child Custody Reforms, on "the other side of the Podiums" on an issue I consider one of the most important legislative initiatives I have ever seen in our Capitol...regarding our sacred ability to parent our children.

Not so long ago, here in America, the LAW established "slaves", and this was "normal", and their children could be sold like chattel. They were sold, and managed at County Court Houses.

Not too long ago, the LAW established a class of citizens who could not vote, known as women, and they were legally disabled in domestic laws regarding child custody and property, and this was "normal", and they were managed by County Court Houses.

Today, our Court Houses establish "non-custodial" parents, who have committed no crime, and they don't receive the same legal protections that we afford to those who are accused of common theft, simply because they are not domestically compatible adults. They are in fact, ordered not to be present and parent their children for a majority of a year, and assigned a debt for that absence. That is the standard result we have been conditioned to accept as "normal". "Parent Custody Competitions" have become the "best practices" to help families of Divorce?!

Today, Pennsylvania has more than 48,000 new child custody cases filed, into a pipeline of cases, that average 2 years in that pipeline, managed on a "case by case" basis, with a nebulous concept of "children's best interests". This "interest" is interpreted in as many different ways as there are Judges. The average cost is $250 per hour for lawyers, not including other assigned industry "experts" that advise these very busy Courts.

Today, the result of our County Non-Custodial Court "factories" produce 48,000 in 2016, as last reported by our Courts. Legally Disabled Parents, with 200,000 immediately impacted family members including the children, grandparents, next spouses, and siblings of each of these parents. That is at least 250,000 disgruntled citizens each year. We are a very large constituency.

We, the Non-Married Parents and their grown children, grandparents, next spouses, siblings, and extended families and industry professionals, who have been through this process, have educated ourselves and organized for Family Law Reform. We are a patchwork of thousands of Reform groups on-line, producing films like "Divorce Corp" and "Erased", "Ms. Doubtfire", and the current media attention to separations of children from parents at the border. But our local County Court houses Order these separations in the thousands by the day across the country of its own law abiding citizens.

We believe that parents need help in "de-coupling" and transitioning to two equal homes, as opposed to a legal contest for dominance in legal status.

We believe, that when the LAW treats parenting status, the same as it treats all other marital assets to be split equally, conflict will be reduced, litigation costs will be reduced, violence would be reduced, but the children would gain children by receiving the correct message that both parents matter.

We believe the following 'top ten", most common problems with Family Law would be reduced or eliminated if "Equality" was the norm, and "primary custody" was the exception.

Problems:

1. Ordered Parental Absence of law-abiding parents

2. Legal implications of being labeled a "non-custodial parent" being assigned debt, suffering financial penalties in tax status, credit status, professional licensure, and risk of loss of liberty upon default.

3. A system that provides a ruthless collection service free of charge to the other parent, but continued litigation for physical custody enforcement for the other assigned by the same document.

4. A logical result of parental marginalization and alienation from the child, enabling one parent to "erase" the other, and their entire extended family.

5. Court validation that ONE "primary parent" matters more, thus creating and perpetuating a myth that citizens must adapt to, that is clearly contrary to our basic Constitutional concepts of "equality" and "liberty" to raise one's child.

6. Encourages competition where there should be none, rather than require and reward sharing.

7. Provides financial incentive to Order the absence/restrict one parents' presence in the form of support, tax status, and federal matching funds to the Courts and local/State governments via Title IV, and a $50 Billion industry of dependent lawyers and court advisors.

8. Causes unnecessary childhood trauma, and all its vast and long term effects on the children, families, and society.

9. Provides a lower standard of evidence than is provided to common accused criminals, reverses burdens of proof.

10. Gives Judiciary too broad discretion without sufficient findings and rationale upon which to challenge, and results in lack of "certainty" that has recently been afforded to Grand Parents in Pennsylvania.

We know, that we are opposed by a $50 Billion-Dollar Industry, dependent on conflict resolution and the money from parents, families, and Federal Matching Funds from Title IV. They are very happy with their performance, and will tell you so today, although they have paid lobbyists who walk the halls year round, and whose opinions and money are received daily in the Capitol. Meanwhile, we continue to hear reports of horrific violence resulting during child custody conflicts in our local news, where formerly law-abiding parents become homicidal because of laws that routinely marginalize one parent. We continue to watch the results of Child Hood Trauma caused by the loss of a "non-custodial parent and their family", in the ripple effects of teen pregnancy, poor academic and professional performance, addiction, incarceration, depression, etc. We continue to see law-abiding parents liquidate their assets to defend a legal status that is already theirs, created by the parties consent in procreation. We continue to amass cases of "parent-child alienation", "move-aways", "abuse and neglect allegations".

This bill is a compromise, and is not the total solution. But it is a much needed step forward to reduce conflict, to reset the compass towards a more ethical true north, reduce litigation and false allegations, and require Courts to justify what should be an abnormal result in legally creating a "non-custodial" parent.

This Bill does nothing to prevent parents pursuing existing Domestic Violence Claims, nor does it provide penalties for false accusations in child custody cases, and has no effect on cases of "rape".

This Bill does not address penalties for violations of Ordered parenting time known as physical custody interference or contempt.

This Bill does not reduce current child support calculations or enforcement thereof.

This Bill does not encumber Lawyers from profiting by the drafting of Marital Contracts, which would better serve young people than the imputed terms of Title 23, of which most lawyers haven't read in entirety. So they would be more informed and involved in establishing an actual marital agreement, and reduce divorce litigation.

We ask this committee to be on the right side of history, defending our most sacred relationships and bonds, between children, parents, and extended families. We believe this Bill should be addressed by the Full Judiciary Committee, in both the House and Senate, and not be pulled into a special interest spider hole. We should hear from retired Judges, Psych Professionals who are not incentivized, retired lawyers who are not incentivized, grown children of divorce.

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2019 NPO Shared Parenting Report Card

National Parents Organization conducted a review of the child custody laws of all 50 states and graded them on the degree to which these laws promote shared parenting, the arrangement for separated parenting that research shows is in children's best interest. Pennsylvania received a 'D' for its child custody statutes.
(Visit sharedparenting.org.)

State Details

State	Grade	Positives	Negatives
Pennsylvania 23 PA. C. S. A. §5327	D	• Pennsylvania statutes list a "friendly parent" factor as the first factor in determining the best interest of a child with respect to a custody determination. Pennsylvania courts are required to consider "Which party is more likely to encourage and permit frequent and continuing contact between the child and another party." 23 PA. C. S. A. §5327	• Pennsylvania has no statutory preference for, or presumption of, shared parenting (joint legal custody and shared physical custody) for temporary or final orders. • Pennsylvania statutes do not explicitly provide for shared parenting during temporary orders. • Pennsylvania statute does not contain any policy statement or other language encouraging shared parenting.

How Does Pennsylvania Compare to Other States?

Eleven states received shared parenting grades worse than Pennsylvania's 'D', 36 states and the District of Columbia received higher grades, and 3 states tied with Pennsylvania. Since the publication of the 2014 NPO Shared Parenting Report Card, Pennsylvania has enacted no new legislation promoting shared parenting.

Summary: State Grades	
Grade	2019
A	2
B	7
C	26
D	14
F	2
Average	C-

How Can Pennsylvania Improve?

Recommendation #1 - Temporary Orders: Pennsylvania should enact a statute creating a rebuttable presumption of equal shared parenting during temporary orders. This is a period when the court typically does not have sufficient evidence to warrant sidelining one parent. Furthermore, the temporary orders period can extend for a significant period of time—a period in which patterns of post-separation parenting are set. Finally, equal parenting during temporary orders allows the court to determine the desirability of equal shared parenting in final orders. Kentucky's 2017 House Bill 492 is a model for such legislation.

Recommendation #2 - Final Orders: Pennsylvania should enact a statute creating a rebuttable presumption of equal shared parenting in final orders. While courts should be deferential to parenting plans freely agreed to by both parents, equal shared parenting should be the starting point for post-separation parenting when parents do not agree. Equal shared parenting is clearly not appropriate in all cases. The presumption must be rebutted by a showing of a pattern of abuse or that such an arrangement would be harmful to the child.

About NPO

National Parents Organization seeks to promote children's wellbeing by making equal shared parenting the norm when parents are living apart. This is the separated parenting arrangement that research shows is typically in children's best interest.

Join National Parents Organization to help achieve its goals.

For more information, visit nationalparentsorganization.org
Email: joinus@nationalparentsorganization.org

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HB 528

House vote 81-2

Senate vote 38-0

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Kentucky Shared Parenting Poll 2018

Support law: 58%

Oppose law: 10%

Undecided: 32%

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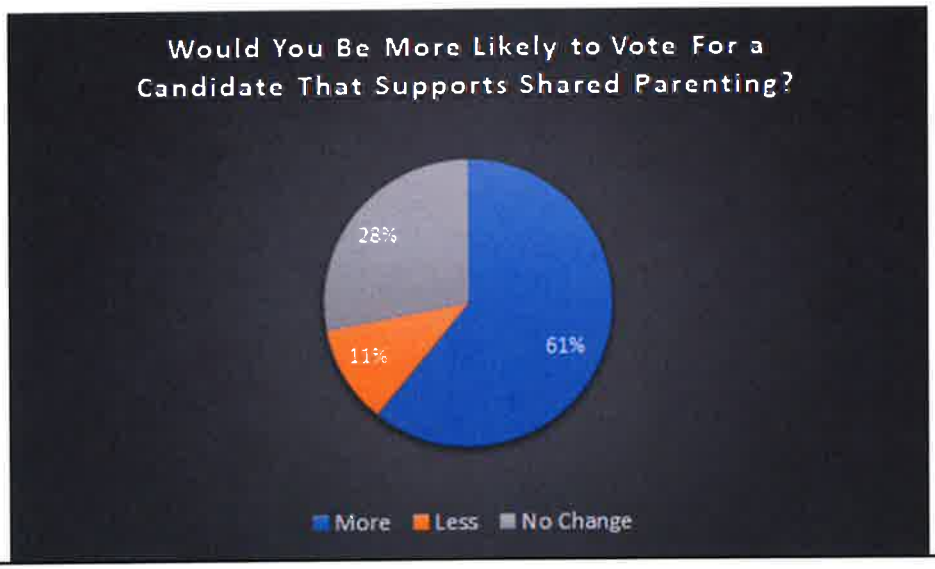

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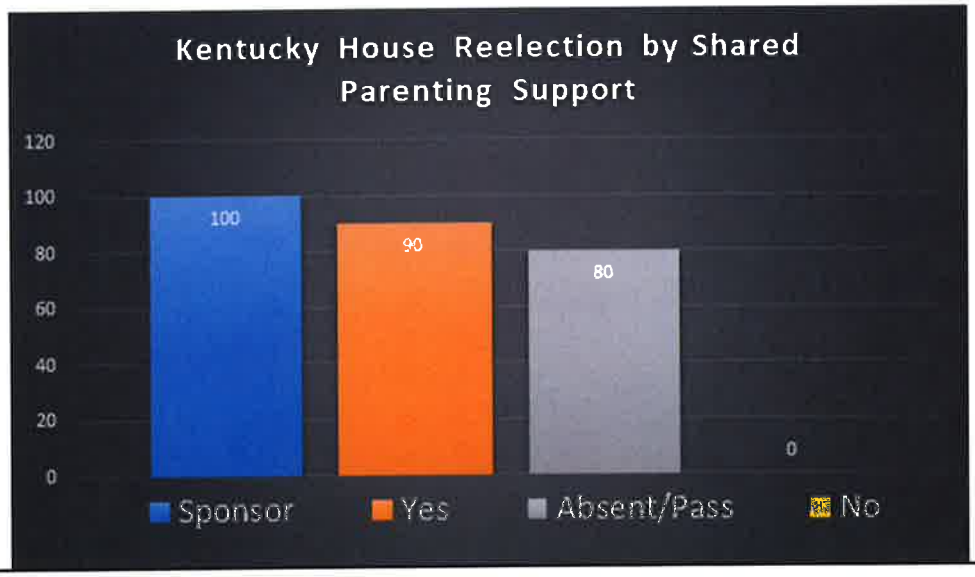

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by
Matthew G. Bevin
Governor
of the
Commonwealth of Kentucky

To All To Whom These Presents Shall Come:

WHEREAS, Kentucky's children are the Commonwealth's most important asset; and

WHEREAS, Federal statistics reflect that children raised by single parents account for more than half of teen suicides, juveniles in state-operated institutions, high school drop-outs, children in chemical abuse centers, those in prison, children who exhibit behavioral disorders, and homeless and runaway children; and

WHEREAS, Shared parenting is an arrangement whereby parents who are separated or divorced are given equal decision-making abilities and equal parenting time; and

WHEREAS, Research indicates that children benefit greatly when they have a relationship with both parents if the parents are fit caregivers; and

WHEREAS, On April 26, 2018, Kentucky became the first true shared parenting state in the United States upon the signing of House Bill 528; and

WHEREAS, Declaring a statewide day honoring shared parenting will encourage children's access to both parents.

NOW, THEREFORE, I, MATTHEW G. BEVIN, Governor of the Commonwealth of Kentucky, do hereby proclaim April 26th, 2019 as

SHARED PARENTING DAY

in Kentucky.

GIVEN AT THE CAPITOL, in the City of Frankfort this 22nd day of April, in the year of Our Lord Two Thousand Nineteen and in the 227th year of the Commonwealth.

MATTHEW G. BEVIN
GOVERNOR

ALISON LUNDERGAN GRIMES
SECRETARY OF STATE

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ADMINISTRATIVE OFFICE OF THE COURTS
Research and Statistics

Family Court Cases Filed by Case Category
01/14/2016 - 07/14/2019 Statewide

	7/14/2016 - 7/14/2017	7/14/2017 - 7/14/2018	7/14/2018 - 7/14/2019
Domestic Violence	16,317	16,069	15,624
Grand Total	**16,317**	**16,069**	**15,624**

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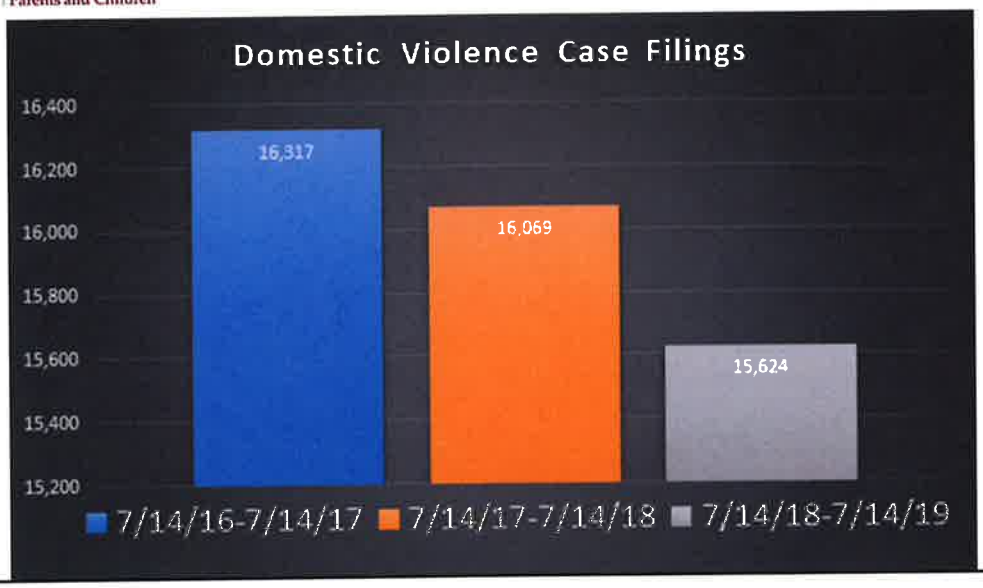

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Public Hearing on House Bill 1937
House Judiciary Subcommittee on Family Law

Testimony of Gail C. Calderwood, Esquire
Immediate Past Chair-Family Law Section
Pennsylvania Bar Association

Good Morning Chairwomen Delozier and Davis, and members of the House Judiciary Subcommittee on Family Law. I am Gail C. Calderwood, Immediate Past Chair of the Family Law Section of the Pennsylvania Bar Association. As an officer of the Section, I represent approximately 1,000 attorneys who are members of the Family law Section and will be impacted by H.B. 1397.

Family lawyers are somewhat unique among the ranks of attorneys, as we represent parties on both sides of cases, on occasion handling a case before one Judge while simultaneously arguing an opposite argument before a different Judge. We represent parties regardless of gender or family connection, and in the course of over twenty years of practice, in custody cases I have represented fathers, mothers, grandparents, aunts, uncles, great-grandparents, and third parties with no familial connection to the child or children in question. All family law attorneys can tell a similar tale, and the basis for our ability to argue seemingly opposite points within the same week or day is that each case is driven by unique facts and factors that impact the involved parties and children. No family or family structure is exactly alike, and a custody case involves arguably the most intimate and detailed analysis of all involved that will ever be endured by those who proceed through litigation. Yet, for every case that is litigated, countless others are resolved amicably with the assistance of attorneys and sometimes by the parties themselves.

Under current law, in every custody case the primary concern of the law is the best interests of the child or children. H.B. 1397 seeks to substantially amend the existing custody statutes in Pennsylvania. The primary purpose of the bill is to impose a presumption of shared physical and legal custody upon every family. The Pennsylvania Bar Association has formally opposed such a presumption in the past and remains steadfast in the same opposition today, as the child deserves to be the focus of the court system, the trier of fact and all involved, and that means a careful, thoughtful analysis of the issues that will impact that particular child, and a decision intended to serve the child's best interests.

Presumptions are dangerous in family law, and the law has moved away from the imposition of such presumptions over the decades. They create a situation that is parent centric rather than focusing on the needs of the child. Our system is a gender neutral one, and this allows fathers to seek primary custody and often to achieve shared custody. While there is certainly reason to believe that children in shared custody arrangements can thrive, and sometimes do better that children living in a partial or sole custody arrangement, that does not mean all children will thrive or do better in a shared custody situation.

Fathers are on equal footing in family law cases, contrary to the myth that the courts favor mothers. Where the mother does establish primary

physical custody, and the father has partial physical custody, it is often due to the dynamic the family established long before they entered a lawyer's office or a courtroom. However, even in cases where a father has not been as involved as the mother, perhaps was not making an effort to spend as much time with the children or was struggling to do so for various reasons, the court will consider shared custody as an option. In fact, arguably the trend is for more parents who enter the court system to be awarded shared custody. Nonetheless, statistics often are skewed, as many families never enter the court system. Many single family homes are created by choices or circumstances of the parties, and one parent is either uninvolved by choice or has simply disappeared from the child's life for various reasons.

Our laws provide the trier of fact, a Judge or appointed Master in certain cases, to make decisions that could result in parents enjoying shared custody, a parent enjoying partial custody while the other parent exercises primary custody, and in some cases a parent having sole custody of a child; and this allows our courts to craft a custody schedule meant to support the child or children and meet their individual needs, such as mental, emotional, health, educational and safety. Physical custody refers to the time a parent spends enjoying time with the child, while legal custody refers to the right to participate in major decisions that impact the child, including but not limited to education, medical, extracurricular, and religious decisions.

HB 1397, as drafted, eliminates most of these terms, in an effort to narrow the focus of the court to shared custody. Presently, shared physical custody is typically viewed by the courts and attorneys in Pennsylvania as equal (50/50) physical time, but it not required to be equal time. In light of our child support laws, it is often viewed as a physical schedule that allows a party to have somewhere between 40% to 50% of the overnight time available each month, outside of vacation and holidays. Eliminating the court's ability to be flexible in creating a schedule is counterproductive to the needs of a child(ren). Moreover, HB 1397 creates a presumption that shared physical and legal custody is in the best interests of every child, rebuttable only by clear and convincing evidence, and this presumption is problematic in many ways. It creates a high evidentiary bar to hurdle for the party seeking a different schedule due to the needs of the child. Judges shall likely interpret that standard to preclude most cases arguing for any deviation from equal, shared physical custody; and that outcome could harm children.

In many instances, a child's best interests will not be served by his or her parents exercising shared physical custody. This includes situations in which parties cannot communicate or agree upon even the smallest of decisions, exposing the child to high levels of conflict and distress, which is detrimental to the child. Other families have struggled with physical and/or mental abuse which create a barrier to shared physical custody, and some face a significant distance or travel time between households. The impact of a party's job that

requires frequent or extended travel, a child's special needs, and many other factors could weigh in favor of a partial/primary schedule for some families. Even in cases where one party has been shown to be interfering with the parent-child relationship, causing the child to oppose spending time with one parent, a sudden imposition of shared custody is not a cure all. In fact, counseling and a schedule that increases over time tends to be more effective in such cases. The courts should not be deprived of their ability to carefully craft a schedule that is meant to serve the child's needs.

In my long career as a family law attorney, I personally have represented fathers who were the primary caretaker and custodian of the children for various reasons, fathers who have been awarded primary physical custody while the mother enjoys partial physical custody, and fathers who have been awarded sole physical and legal custody of a child or children. In the same vein, I have participated in cases where a grandparent or aunt or uncle have primary custody, often due to the parents suffering from drug abuse, mental health issues or other incapacities.

In the case of a father raising his children for years due to mother suffering from mental incapacity or a severe personality disorder, HB 1397 would effectively force the children to spend half of their time with mother, even if she lacks parenting skills or lacks the ability to ensure the children's safety, and overcoming the evidentiary standard would be difficult to impossible in most cases. A parent could have zero contact with a child for the majority of that child's life but suddenly be facing shared custody time with a virtual stranger. The parent seeking to protect the child would have to partake in expensive and time consuming litigation to prove by "clear and convincing evidence" that the other parent should not benefit from the presumption.

HB 1397 creates the highest barrier possible to overcome the presumption, effectively introducing into the general custody arena the "clear and convincing evidence" which is the highest standard in a civil court case. Courts have defined it as evidence "that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitation, of the truth of the precise facts in issue." *M.J.S. v. B.B. v. B.B., 172 A.3d 651, 660 (Pa. Super. 2017)*; and *In the Interest of: B.W., a minor appeal of: B.W. in re: M.M.-W., a minor appeal of: B.W. in the interest of: C.M.-W., a minor appeal of: B.W., no. 1634 WDA 2018, 2019 WL 2526161, at *5 (Pa. Super. Ct. June 19, 2019)* (nonprecedential). This burden of proof requires the plaintiff to prove that a particular fact is substantially more likely than not to be true. Some courts have described this standard as requiring the plaintiff to prove that there is a high probability that a particular fact is true.

It has also been described that, in order to meet the standard, witnesses must be found to be credible, the facts to which they have testified must be remembered distinctly, and their testimony be so clear, direct, weighty, and

convincing as to enable a judge to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. In family law, much of the testimony is "he said, she said" testimony with little to no underlying outside evidence, and meeting the civil law standard of clear and convincing evidence in most cases will be difficult to impossible as a result.

For good reason, this standard is applied sparingly in family law, such as in limited cases in which a third party, unrelated to the child, seeks custody time. For a parent with limited resources, who may have fled an abusive, controlling partner/spouse, or who has restricted time due to caring for a child with special needs, they may lack the means to build and present a case that could meet such a high standard. Moreover, this does not meet the needs of the children caught in these cases, as the court will be barred from weighing anything but overwhelming evidence.

While some members of the public believe that lawyers seek out or encourage litigation; the Family Law Section of the Pennsylvania Bar has taken positions in the past with respect to legislation that arguably negatively impact our potential income, but we do so in the interests of promoting better results and a fair judiciary system to all who enter. Family lawyers are concerned with helping families avoid costly and protracted litigation. Our Section also strives to assist in protecting the rights of all parties, including those who cannot afford an attorney.

HB 1397 will increase litigation, in several respects, as it creates a rigid basic structure for custody, eliminating the room for creative settlements and solutions. Parties shall become either fixated in achieving "shared" physical custody, leaving the parent with serious and/or valid concerns that such a schedule will negatively impact the child will have to pursue full litigation to overcome the presumption. The extremely high evidentiary standard will also lead to more litigation, discovery and contentious court cases. There is a strong likelihood that litigation will be more protracted and far more expensive for parties. Those parents who cannot afford counsel will be at a severe disadvantage given both the presumption and evidentiary standard, which they shall struggle to meet without any legal background. The Bill also invites an increase in grandparent or great-grandparent litigation for custody.

When referring to grandparent or great-grandparent custody I shall sometimes use the term grandparent which shall also encompass great-grandparents, as both have the potential for standing to pursue a custody claim under our custody laws. Grandparent custody is provided for in two sections of our current custody laws, HB 1397 seeks to alter the second section, §5325, which presently allows for grandparents to seek partial physical custody of a child under carefully defined circumstances. This portion of the law stands in contrast to §5324 which allows the same third party relations to seek primary or shared physical and/or legal custody of a child. The grounds

to seek "any form of physical or legal custody" as stated in §5324 are limited to a child that:

(A) Has been declared dependent under Juvenile Law;

(B) Is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity; or

(C) Has, for a period of at least 12 consecutive months, resided with the grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, in which case the action must be filed within six months after the removal of the child from the home

Such a grandparent seeking primary or shared custody must also establish that the relationship between the child and the moving party started with the consent of at least one parent or a prior court order, and that the grandparents is assuming or is willing to assume responsibility for the child.

By contrast, a grandparent seeking partial physical or supervised physical custody of a child has a lower hurdle to clear, but still subject to limited circumstances, and must establish one of the following three circumstances in order to pursue a claim:

(1) The parent of the child is deceased;

(2) The relationship with the child began either with the consent of a parent of the child or under a court order

and where the parents of the child:

(i) have commenced a proceeding for custody; and

(ii) do not agree as to whether the grandparents or great-grandparents should have custody under this section;

OR

(3) When the child has, for at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action must be filed within six months after the removal of the child from the home

HB 1397 would open the door to grandparents seeking shared physical custody, 40% to 50% of the overnights each month with the child, and this could be triggered by the death of one parent. The parent left defending against such a request would have to meet the extremely high evidentiary burden of "clear and convincing" evidence, and this could occur even if the child has no relationship with the grandparent in question. In the situation in which the parents have filed a custody action, the door is also opened potentially to an award for shared physical custody to a grandparent if the other parameters of subsection (2) are met. This leaves the two actual parents with only 50% to 60% of the physical custody time, unless they can overcome the presumption by surmounting the clear and convincing evidence standard.

Other matters impacted negatively by HB 1397 include the elimination of definitions for types of custody that the court shall impose in some cases, such as partial custody or supervised custody, even if HB 1397 were to be implemented. By eliminating the definitions, the proposed law would create ambiguity and confusion in custody matters.

The correction of reference to the Department of Public Welfare, the agency's former name, to the Department of Human Services in §5329.1(b) is a valid change to the law, but the alterations to the custody factors listed in §5328 are unnecessary and in some instances potentially harmful.

§5328(4) currently refers to "the need for stability and continuity in the child's education, family life and community life," but HB 1397 would strike the word "continuity." This is not only a paramount concern for some children, particularly some children with special needs, but this is an established concern for a child's well-being, reflected both in caselaw and as expressed by expert psychologists. It is one factor of many and can be outweighed by other considerations in cases, but it should not be eliminated from the custody factors.

While there has been a shift over time in custody cases toward more shared physical custody cases and most cases enjoying shared legal custody, it would be an error to assume that imposing shared custody as a presumption will lead all parents to be better parents or lead to improved conditions for all children.

For these reasons, the Pennsylvania Bar Association opposes HB 1397. Thank you for affording the PBA the opportunity to address HB 1397, and for your time and attention today.

Public Hearing on House Bill 1397
House Judiciary Subcommittee on Family Law

Testimony of Michael E. Bertin, Esquire
Chair-Family Law Section
Pennsylvania Bar Association

Good morning, Chairwomen Delozier and Davis, and members of the Subcommittee on Family Law. Thank you for the opportunity to speak to you today on one of the most serious and precious issues: Children. My name is Michael Bertin, and I am the Chair of the Family Law Section of the Pennsylvania Bar Association. I have also served as the Chair of the Family Law Section of the Philadelphia Bar Association, am a fellow of the American Academy of Matrimonial Lawyers (AAML), and am a member of the Joint State Government's Advisory Committee on Domestic Relations.

But what I am most proud of and what is most relevant to our discussion today is that I am the author of the text book on child custody in Pennsylvania that is relied upon by the judges and lawyers in our state. This book is the authoritative book on child custody in Pennsylvania. I have reproduced relevant portions thereof in my written testimony to provide you with background, history and guidance about this most important topic.

I stand before you today on behalf of the Pennsylvania Bar Association as the voice of its 24,000 members across the Commonwealth. To be clear, the Pennsylvania Bar Association opposes House Bill 1397. I am a family law attorney who handles child custody cases every day. I am in the trenches working with our current custody law.

I want to walk you through important pieces of information, so that you will fully understand why I am putting forth this position and why it is so important.

I want to read to you the opening lines of my 900 page book:

> The polestar followed by Pennsylvania in deciding child custody cases is, as it is in most jurisdictions, the best interests and permanent welfare of the child. The best interest includes consideration of the **child's physical, intellectual, moral, and** spiritual wellbeing, as well as the factors enumerated in 23 Pa.C.S. **§ 5328. So singular is the state's interest in assuring that the child's** welfare be the paramount concern, that all other interests, including the rights of the contending parties or principles of justice as between them, are invariably deemed subordinate.

Bertin & Bertin, Pennsylvania Child Custody Law, Practice, Procedure (2019 ed., Bisel) §1.1. (citations omitted).

With regard to shared physical custody:

> Historically, the seminal cases regarding shared physical and/or legal custody are *In re Wesley J. K.*, 445 A.2d 1243 (Pa. Super. 1982) and *Wiseman v. Wall*, 718 A.2d 844 (Pa. Super. 1998). In *Wesley* and *Wiseman*, four factors are enumerated which must be considered when awarding shared custody. The four factors are as follows: (1) Both parents must be fit, capable of making reasonable childrearing decisions and willing and able to provide

> love and care for their children; (2) Both parents must evidence a continuing desire for active involvement in the child's life; (3) Both parents must be recognized by the child as a source of security and love; and (4) A minimal degree of cooperation between the parents must be possible. In *Wesley*, the Superior Court stressed that the minimal degree of cooperation "does not translate into a requirement that the parents have an amicable relationship." In that regard, an award of shared custody has been upheld even though an amicable relationship did not exist between the parents. Also, divorced parents who had the ability to cooperate and isolate their personal conflicts from their roles as parents were awarded shared legal and physical custody. However, in the case of *P.J.P. v. M.M.*, 185 A.3d 413 (Pa. Super. 2018), the Superior Court held that trial courts "need no longer engage in the Wiseman analysis when determining whether shared custody is appropriate . . . ." The Superior Court found that the four Wiseman factors are assimilated into the 16 enumerated custody factors of 23 Pa. C.S. § 5328(a). According to the Superior Court: "Section 5328(a), unlike Wiseman, does not require certain findings before a court may award shared custody. Under the current statute, courts must now consider all relevant factors, including the 'the ability of the parties to cooperate,' when making an award of any form of custody, and poor cooperation need not be dispositive."
>
> It has been found that a weekly-rotating shared custody arrangement is not inherently damaging to an infant child, and a shared physical custody schedule was appropriate despite mother having been the primary caretaker. Shared physical custody has been ordered even though the parties lived 120 miles apart. However, the Pennsylvania Superior Court vacated a trial court's order awarding shared physical custody on an alternating week basis where mother resides in North Carolina and father resides in Pennsylvania. Further, where father lived in Philadelphia and mother in St. Louis, annual shifts in physical custody was disapproved by the Pennsylvania Superior Court, though the parties could retain shared legal custody.

Id at §3.2. (citations omitted)

With respect to presumptions, the following is clear:

> The history of child custody decisions is replete with reliance on a variety of presumptions, doctrines, and policies utilized by courts to decide the situs of the best interests of the child, such as the Tender Years Doctrine, separation of siblings, and roots of the tree policy. A growing number of decisions have, however, turned their

backs on these simplistic devices and directed the lower court to eschew the use of presumptions, doctrines, and policies in favor of a considered analysis of the particular facts of each case. As one decision noted,

> "a presumption itself contributes no evidence and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption–being a legal rule or legal conclusion–is not evidence . . . In deciding a child custody case, one should avoid the use of a 'presumption,' which tends to focus the analysis on the respective rights of the parties rather than on close scrutiny of all the particular facts relevant to determine what will serve the child's best interest."

Id. at §3.4.15. (citations omitted).

To give you some quick insight, the Tender Years Doctrine was a presumption that is traced back to an 1813 Pennsylvania Supreme Court case called Commonwealth v. Addicks, 5 Binney 519 (Pa. 1813). In that case, the Pennsylvania Supreme Court rejected the English common law paternal right to custody in favor of a rule which found that children in their tender minority "stand in need of that kind of assistance that can be afforded by none so well as the mother." It took over 100 years for that to go away with the Pennsylvania Supreme Court case of Commonwealth ex rel. Spriggs v. Carson, 368 A.2d 635 (Pa. 1977).

Today, I am proud to say that Pennsylvania is a presumption free state when it comes to child custody, with the exception of the presumption of a parent over a non-parent.

Here is why it is vital that practitioners such as I who are handling custody cases every day stand before you. There are many misconceptions about child custody cases in the outside world. The following are 4 misconceptions:

1. Fathers are regularly being awarded custody with a mid-week night and every other weekend.

2. Fathers are not being awarded equal custody or primary custody.

3. Fathers have not historically been the primary caretaker in a case.

4. The family was an intact family unit before the case started.

Misconceptions 1 & 2 – In my experience, as well as the other practitioners here, fathers are being awarded substantial custody and in many instances 50/50. It is very common to have a custody order entered with a schedule of what is called a 2/2/5/5 schedule or a 2/2/3 schedule or a week-on / week-off schedule. Those are all equal physical custody schedules.

Misconception 3—In many cases, fathers have been the primary caretaker. If HB 1397 were to become law, with the snap of the finger, that father is stripped of that custody **arrangement, regardless of the mother's prior involvement because** of a presumption.

Misconception 4 is one that many do not realize. In most custody cases that reach the courts, the parents were never married, and mostly never lived together. The custody issues related to divorce are settled more than the others. When the parents never lived together, in many situations one parent has been very absent or has no relationship with the child. If HB 1397 were to become the law, none of that would matter, because the presumption would take over. The relevance of the prior custodial reality would fall to the presumption.

Through the hard work of the Joint State Government Commission, our current custody Act, which became law in 2012, is very detailed and child focused. Presumptions, unfortunately, are parent focused. The current custody law combats against inexperienced judges and lazy judges from taking the quick out, and not giving the extreme detailed analysis and attention that is needed when having control over where a child will live with the stroke of a pen. Our appellate courts have mandated that all 16 factors under the current custody law be analyzed and addressed by the trial courts when making child custody decisions. The appellate court is so strict with this important analysis, that if a judge skips a factor, it is reversible error and the case will get sent back to the judge to do it again. HB 1397 undoes that. It is a green light for quick swift action without in-**depth analysis. It is an automatic "pass Go and collect $200" (as was the** case in the game of Monopoly) for the lazy or inexperienced judge.

Also, and importantly, our current custody law provides, under 23 Pa.C.S. § 5328(b), titled Gender Neutral: **"In making a determination under subsection (a) [the 16 factors],** no party shall receive preference based upon gender in any award granted under this chapter**." (emphasis** added).

That language is serious. That is why we are seeing fathers with primary custody. We have 16 factors that the court must consider (and one is a catch-all), and by analyzing them, you arrive at a custody order that is personally tailored for that child or children. To have a presumption, especially with a heightened burden, as in HB 1397, it is all ignored, and focus is removed from the child or children.

We have made great strides in Pennsylvania to eradicate the presumptions that shifted the focus off of the children, such as the Tender Years Doctrine. If we create presumptions again, we will be inviting additional ones which would open up the flood gates and undo what we have accomplished and from where we have come.

There is no shortcut by a presumption to a child's best interest.

Again, I would like to thank you all for having me come to speak with you today, and hope that I have provided you with helpful insight and information.

Thank you.

Official Written Testimony
In Support of
House Bill 1397 - Equality in Parenting Time

House Judiciary Subcommittee on Family Law
December 9, 2019, Room 60 East Wing
Justin T. Poe
Chambersburg, Pennsylvania

Thank you, Chairman and Members of the Committee, for the opportunity to provide testimony in support of House Bill 1397. My name is Justin Poe. I'm a Leasing and Rental Assistant from Chambersburg, Pennsylvania. I'm also a Rotarian, member of the Greater Chambersburg Chamber of Commerce, admin of PAFamilyLawReform, a non-organizational Shared Parenting advocacy group and most important, father of three children.

February 2020 marks the 10-year anniversary of the worst experience of my life. A failed relationship turned into a high-conflict separation that yielded a severe case of Parental Alienation. My daughter was taken and turned against me for four years. I spent more than $40,000.00 in legal fees defending my right to have equal time and equal access with my daughter. After four years in family court, my case took a bazaar and unexpected turn when the mother of my child unexpectedly passed away. Franklin County withdrew from my case. I went from court ordered supervised visits to full custody as if none of this ever happened.

I later married. Together my wife and I terminated the parental rights of her ex-partner, an abusive dead-beat dad who didn't want any part in raising his daughter. We petitioned the court so that I could adopt. The entire process went uncontested by the biological father. Franklin County granted me the adoption and a decree that reads: "the best interests and welfare of the person proposed to be adopted will be promoted by such adoption".

Within two years, my marriage dissolved, and we divorced peacefully. My ex-wife and I shared custody of my youngest child Equally until an unexpected financial situation arose. Time with my daughter diminished and I ended up in family court once again. I submitted Rule 1915.3-2, Criminal Record / Abuse History Verification, proving that I have no criminal record and that I am fit, willing and able to be a parent. After adopting my child, asking the court for equal time and equal access, waiting eleven months and spending more than $11,000.00 in legal fees, I was awarded 43 % custody: one month less per year than an Equally shared 50/50 split. It was just enough of an unfair judgement, for the attorneys, and judges to capitalize on my divorce and the domestic relations section to receive maximum Title IV-D performance, funding and incentives.

This new visitation schedule didn't align with my ex-wife's work schedule, so she asked to switch days. My only option was to return to our shared equal schedule, and that we worked out "child support" between us. It worked! My ex-wife and I share custody of my daughter equally and we have a support agreement outside of the DRS. I'm unaffected.

Since sharing custody equally and returning to the 50/50 schedule, my youngest daughter's grades returned to straight A's. She more engaged in class and at home. She was recognized as student of the week at her elementary school. She's more social, outgoing and joined a gymnastics and cheer team this fall.

When the custody case for my oldest daughter ended, the stress of being alienated ended and we quickly rebuilt a strong, healthy loving relationship. Since I was no longer paying child support and attorney fees, I could afford to get her braces. Her self-esteem and grades skyrocketed. She excelled in High School band, jazz band, marching band and orchestra. She won a scholarship for her achievements in music. She also joined the Shippensburg Community Band and volunteered at NETwork Ministries teaching other children to play the piano. I could afford a professional model saxophone and her skills and talent excelled, motivating her to pursue a career in music. Today, she's attending her second year in college, studying music education and music theory with hopes of teaching High School Band or College level music theory.

My children's success and achievements prove clearly that shared equal custody works and is what's best. I understand there are isolated cases where some parents shouldn't be involved however, the way our current law stands, and the way family court operates, fit, willing and able loving parents are being forced out by the system. In fact, it's incentivized by millions of Title IV-D dollars and corresponding cooperative agreements in every county. There's no safeguard. A parent shouldn't have to wait a year or spend $10,000 to have equal time and equal access with their children. House Bill 1397 would reduce this conflict. It would protect the parent-child and extended family relationships. It would reduce litigation costs and provide needed certainty in law, bettering the lives of our children. Please support House Bill 1397.

Sincerely,
Justin Poe

Dec. 9, 2019
Harrisburg, PA
HB1397

Outline of testimony of Mark Ludwig

- 204 days son was separated from me
- After a year of court battle, ended up with equivalent of an every other weekend visitor
- A couple years later, after having stroke like symptoms, an MRI revealed I had a growth in my brain.
- I realized that if I were to die, my son's mother would immediately receive sole custody with no questions asked.
- However, the reverse was also true. I sincerely wish no ill towards his mother. However, if something happened to his mother, I would have immediately received full sole custody of my son.
- Why would I be a good enough parent to my son to receive 100% custody of my son if his mother were not around. Yet if she is in the picture, my son only gets the benefits of a father in his life to visit on weekends?
- Like many of us in this room, I thought I was the only one in this situation
- TV News station in St Louis ran a story on my ordeal that ended up going viral on the internet.
- Began getting flooded with messages of parents who had been effectively carved out of the actual parenting of their children.
- Has now grown to over 620,000 followers directly or indirectly on various FB pages
- Started study research from books like The Boy Crisis by Dr Warren Farrell talking about the effects on children growing up without a father (although this issue affects both genders)
- Children in this situation are facing a dual trauma. The overwhelming majority don't know how to verbalize the confusion of either:
    - Trauma 1 – Mom & Dad aren't together and I don't know why
    - Trauma 2 – Why do I only get occasional visits with one parent. Don't they love me?
- Confusion of Superior/Inferior Parenting Roles
- The results of this confusion lead to statistics others have spoken about reflecting societal impacts of growing up without a parent: High School Dropout Rates, Incarceration Rates, Teen Pregnancy Rates, Behavioral Problems, Substance Abuse Problems, etc.
- Picture Military Reunion videos – child runs across basketball gym floor and jumps in arms of a parent who had been serving overseas
- Innate love deep inside children for both of their parents
- Why are states telling these children one parent is more important than the other?
- Why are we effectively ripping one of these parents out of a child's life?
- Children need the bonding experience of:
    - Knowing both parents can care for them
    - Doing homework with both of their parents
    - Seeing both of their parents get them ready for school in the morning
    - Seeing both parents in routine daily activity during the week vs Disneyland Dad on weekends
- How effective could an employee be who only showed up for work 4-6 days a month?
- How much could a child learn if they only showed up to school 4-6 days a month?
- Isn't the raising of a child and a child's need to bond with both parents as important as a job or school?

- How can we expect one parent to be effective on 4-6 overnights a month?

- Only 2 groups of people who oppose this bill:
    - Family Law Attorneys
    - Domestic Violence Organizations
- Family Law Attorneys – vested interest in keeping an adversarial relationship in order to rack up billable hours.
    - Try to spin it that parents are only wanting to get out of paying child support
    - Think of this logic
    - If you go from having a child 4 nights a month to having them 15 nights a month, don't your actual expenses increase?
    - Why would a parent voluntarily spend $15-30,000 in legal fees to increase the actual expenses they spend on their child?
    - Fallacy of expenses anyway – there is a bedroom in both homes regardless of how often they are used.
    - Realize, attorneys work for their client, not the child. Their job is to "win" for their client.
    - On daily basis, followers tell me they didn't hate their spouse nearly as much until they met with an attorney who told them "On our state, you're not going to get 50/50. One of you will win, and one of you will lose. So unless you want to lose, you better start coming up with dirt to prove why you are the 'better' parent."
    - Imagine if both parents know they had a high probability of getting 50/50 anyway and all the money from legal fees could be used as a college fund for the child?

- Domestic Violence Groups – Fair concern. None of us would want a child put in a situation where they could be harmed.
    - But from a Due Process standpoint, how do you know until a case starts?
    - You can't presume that all parents of one gender are so bad that they should automatically be rubber-stamped as an every other weekend visitor to their own child.
    - And if they are truly bad parents, why is it okay for they to be every other weekend? Do we think they will be abusive if they are 50/50, but not if they are 20/80? Where is the logic in that?
    - A 50/50 Rebuttable Presumption still gives the Judge full discretion to vary a plan based on individual situations. It merely states that until any facts are known, both parents should be presumed to be fit, willing and able unless proven otherwise rather than siding with one parent over another before the case even starts.
    - How many DWI cases are there? Yet we don't take every person's drivers license who lives on the street when one person gets a DWI as an abundance of caution. If they have a driver's license, they get the benefit of the doubt as a safe driver.
    - When two parents come together in a union, formal or otherwise, to have a child, they should both be presumed to be fit, willing and able unless proven otherwise.
    - And that does not mention the fact that statistically, a child is a more risk of being abused from the boyfriend or girlfriend of a custodial parent than they are by their own biological parents.
- This year, 29 states are introducing legislation addressing the issues of shared parenting.
- We've seen the push toward equality with women in the workforce, equality with regard to racism, gender equality.....its time child have that same right of equality to both of their parents.

HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON FAMILY LAW

TESTIMONY ON H.B. 1397 "EQUALITY IN PARENTING TIME"

HONORABLE KIM D. EATON
HONORABLE DANIEL J. CLIFFORD

December 9, 2019

Thank you for the opportunity to appear before the Committee today to discuss House Bill 1397.

By way of introduction, I am Judge Dan Clifford from Montgomery County. I was elected to the Bench in 2015 following over 30 years as a family lawyer practicing in 12 counties in Pennsylvania. In 2013-2014, I served as Chair of the Family Law Section of the Pennsylvania Bar Association. One of our initiatives commenced that year was to work collaboratively with this Committee on legislation that began as House Bill 380, introduced by Representative Tarah Toohil, which was approved by the House Judiciary Committee by a vote of 26-1 and ultimately signed into law by Governor Wolf as Act 102 in October 2016. I also serve on the Supreme Court Domestic Relations Procedural Rules Committee, currently Vice Chair *via* appointment by the Supreme Court. I also serve on the Joint State Government Commission Domestic Relations Advisory Committee.

My colleague, Judge Eaton, was elected to the Bench in Allegheny County in 1999 following 18 years of practicing family law. She has served as Supervising Judge of Family Court and has been the Administrative Judge, *via* appointment by the Supreme Court, since January 2018. Judge Eaton also serves on the Supreme Court Domestic Relations Procedural Rules Committee, the Joint State Government Commission Domestic Relations Advisory Committee and the Supreme Court Juvenile Procedural Rules Committee.

Our prepared remarks today are made in connection with our unique familiarity on the subject matter, about which we have acquired significant knowledge and expertise through the course of our nearly 75 years of combined family court experience.

The opinions expressed in the prepared remarks, and in response to any of your questions, are our own and do not reflect the views of the Supreme Court, the Court of Common Pleas of Montgomery and Allegheny County, the Supreme Court Rules Committee or the Administrative Office of Pennsylvania Courts.

We appear at the request of Judge Joseph Adams, York County, who is Chair of the Family Court Section of the Pennsylvania Conference of State Trial Judges and who is unable to be here this morning. Our Section meets twice a year and consists of approximately 85 Judges that have assigned family court responsibilities in our 67 Counties.

The contents of House Bill 1397 was discussed at our most recent meeting, in July 2019, and our remarks to you today are consistent with the opinions that were expressed from Judges across Pennsylvania who were present at that meeting.

We share the concerns that have been expressed by the Pennsylvania Bar Association, the Academy of Matrimonial Lawyers and the Joint State Government Commission, that there should not be a presumption of 50/50, equal parenting time, in every child custody matter.

To require these initial proceedings in every custody case would essentially mandate a full blown custody trial, because of the clear and convincing burden, as soon as the parties walk in the Courthouse door. Even now, most jurisdictions struggle with the current 180 day time requirement for a final custody hearing. In addition, the type of evidence necessary to meet the clear and convincing mandate may require more time to accurately develop, especially for self-represented litigants, leaving children with no Order or with an early Order which may not be in their best interests, but would likely continue for some time while the parties await the final custody trial date.

As noted by prior speakers, the issue of presumptions in child custody cases has been a subject of extensive discussion throughout the years. We firmly believe that the current language in the Statute, "*there shall be no presumption that custody should be awarded to a particular parent*" is worded precisely the way it should be worded and, in practice, has served families involved in the family court system well.[1]

As any seasoned colleague on the Family Bench will tell you, "no two families are exactly alike". The "one size fits all" approach does not work for every child. Consistent movement between two households, sleeping in a different bed every two days or every other day to satisfy equality in parenting time, is not something every adult could readily adapt to; let alone every young child.

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1 "A presumption itself contributes no evidence and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption - being a legal rule or legal conclusion - is not evidence. . . In deciding a child custody case, one should avoid the use of a 'presumption', which tends to focus the analysis on the respective rights of the parties rather than on close scrutiny of all the particular facts relevant to determine what will serve the child's best interest." *In re Custody of Hernandez*, 249 Pa. Super. 274; 376 A.2d 648 (1977).

There is also the prospect that children could end up spending up to an hour or more "commuting" to school fifty percent of each week, based on the residences of the parents, just to satisfy the equality of parenting time presumption.

In addition, a relocation, possibly necessitated due to company reassignments or fluctuations of the economy (both of which are outside the control of a parent), would be nearly impossible with a 50/50 presumption in place coupled with the clear and convincing threshold.

While there may be instances, here and there, where a particular litigant may have been dissatisfied with the result in their case, we know that our Family Court colleagues approach the responsibility of determining custody thoughtfully and, by the way, thoroughly by virtue of the 16 Factors that are already set forth in the Statute.

Most of us involved in family court remember the days when a judge might issue a three line Order: "*primary to mother and every other weekend to father*", and, that was it. The Factors, instituted *via* collaboration with the Joint State Government Commission and legislation from this Committee, now require every judge, in every case, to stop, think and fully explain every aspect of their custody decision. As a result, the Factors act to protect every family against both a one or two sentence order, *and* any pre-conceived presumption that a litigant may feel exists in their individual case.

It is important to note that many of the custody cases that arrive before us do not involve an "intact family", where both parents have resided together with the children for many years and have essentially had *de facto* equal time, or at least equal access, to the child. A large percentage of our custody cases involve a parent who may not have seen the child for a considerable time period, issues of drug and alcohol abuse by one or both parents, parents who may have never lived together, let alone parented together, issues of neglect (where grandparents and other third parties have assumed care out of necessity) and, as noted by other speakers this morning, domestic violence. These cases would **not,** and should not, lend themselves to the presumption of equal parenting time.

The concerns over the imposition of a 50/50 presumption, also lead us to what we, as Judges, anticipate will be the eventual impact, if this legislation is enacted, not only on the custody docket, but the entire Family Court docket.

As proposed, the revision to Section 5322 (d) would require the Court to "delineate the reasons for its decision in an award of custody, *including an interim award* in a written opinion or order." Further, the proposed langue requires the Court to "include, with specificity, the reasons for any deviation from equal parenting time".

The insertion of the requirement "*in an interim award*", implies that there is an expectation that there would need to be an initial proceeding upon the filing of every new custody case. If so, this would require a Judge to not just make an initial determination in every custody case that is filed, but would also require that it be supported by a written opinion or order. With the language in the Statue that is already present, regarding the 16 Factors, the Court would also be required to do the 16 Factor analysis, not just at the conclusion of a custody case (after hearing all the witnesses and evidence at an evidentiary hearing) but also at the beginning of every custody case.

Attached to these Remarks is a Summary of the total number of new custody cases filed in 2018, both statewide overall, and in each individual county. The number of new case filings is staggering. Many of these cases involve an ever-growing volume of self-represented litigants which adds significant additional time management elements to the administration of cases.

It is important to remain mindful that, in addition to all of these new custody cases being filed, Judges in highly populated Counties sitting in a designated "family court division" already have an existing docket of pending custody cases in addition to other responsibilities in Family Court *via* child support, divorce, equitable distribution and protection from abuse matters. In less populated counties, in addition to existing custody cases, a Judge may have responsibilities in criminal, civil, orphans and juvenile court matters.

Systematic of family court, many custody cases involve modifications of existing custody Orders. While the presumption of equal custody time would presumably not apply to those cases, we cannot ignore the fact that these cases also represent a significant portion of our existing case load, some requiring an urgent need of our attention, and Court time, due to issues of substance abuse, neglect or domestic violence.

We also have concerns that the proposed legislation would require that the presumption of equal parenting time be rebuttable by "*clear and convincing evidence*". This requirement is a higher level of persuasion, requiring a greater degree of believability than the common standard of proof in a custody case. We believe that requiring a Court to apply this high a threshold, on a child's custodial schedule, in every child custody case is not appropriate and will run contrary to the long established criteria in a custody case for the Court to act in what is "in the best interest of a child". In essence, it will serve to elevate the Court's analysis to what is "best for a parent" as opposed to what may, in the Judge's time tested opinion, be "best for a child".

Lastly, we note that other aspects of the proposed legislation seek to provide some modifications to the 16 Factors. In fact, this is a subject that we, too, have great interest in now that we have been working within the framework of the custody Factors for many years. At the present time, the Joint State Government Commission has a Sub-Committee, consisting of Family Court Judges and lawyers, that are in the process right now of a comprehensive review of the factors in place in

all of our sister states, identifying ones that may be unique to ours, and contemplating tweaking the language of some of our current Factors; some of which can be somewhat overlapping with each other and some that could benefit from more clarity.

We would appreciate the opportunity to be able to complete our work in this regard and, in turn, welcome the ability to make recommendations and work collaboratively with this Committee on proposed changes.

Thank you for receiving our Remarks on this proposed legislation. We look forward to responding to any questions that may be prompted by what we have presented for your consideration this morning.

Respectfully submitted,

/s/Honorable Kim D. Eaton

Honorable Kim D. Eaton

/s/Honorable Daniel J. Clifford

Honorable Daniel J. Clifford

Exhibit "A"

Testimony of Judges Eaton and Clifford

New Custody Cases Filed in Pennsylvania by County 2018

County	New Cases Filed	County	New Cases Filed
Adams	486	Lackawana	470
Allegheny	3,701	Lancaster	1,191
Armstrong	186	Lawrence	318
Beaver	719	Lebanon	435
Bedford	129	Lehigh	1,650
Berks	1,019	Luzerene	1,751
Blair	666	Lycoming	486
Bradford	311	McKean	323
Bucks	1,652	Mercer	201
Butler	392	Mifflin	305
Cambria	264	Monroe	935
Cameron	18	Montgomery	3,805
Carbon	390	Montour	76
Centre	318	Northampton	964
Chester	957	Northumberland	667
Clarion	121	Perry	229
Clearfield	215	Philadelphia	9,928
Clinton	99	Pike	141
Columbia	216	Potter	43
Crawford	482	Schuykill	556
Cumberland	666	Snyder	152
Dauphin	987	Somerset	181
Delaware	1,140	Sullivan	15
Elk	84	Susquehanna	77
Erie	1,005	Tioga	161
Fayette	250	Union	121
Forest	6	Venango	72
Franklin	268	Warren	186
Fulton	21	Washington	459
Greene	73	Wayne	245
Huntington	120	Westmoreland	813
Indiana	154	Wyoming	74
Jefferson	255	York	1,634
Juniata	57		

STATE TOTAL	46,091

Source: Child Custody Caseload 2018, Administrative Office of Pennsylvania Courts, December 2, 2019, http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/custody-and-divorce-caseload.

PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE

COMMENTS ON HB1397
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON FAMILY LAW
DANNI PETYO
CIVIL LEGAL REPRESENTATION ATTORNEY
PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE
December 9, 2019

Thank you for the opportunity to testify about HB 1397. I am Danni Petyo, Civil Legal Representation (CLR) Attorney for the Pennsylvania Coalition Against Domestic Violence (PCADV), the umbrella organization for domestic violence programs in Pennsylvania. Our fifty-nine member programs provide a variety of services, including counseling, emergency shelter, and legal advocacy to domestic violence survivors in all sixty-seven counties. My role at PCADV consists of overseeing PCADV's seventeen Civil Legal Representation (CLR) programs that provide free, expert legal representation in civil legal matters to survivors of domestic violence. We recognize that leaving an abusive relationship is just the first step and that litigation can play an important role in helping a survivor achieve safety, self-sufficiency, and autonomy, whether that takes the form of a divorce, an award for financial support, custody of your children and their protection from an abusive parent, secure immigration status, or any combination thereof. Also, before coming to work at PCADV, I helped start the Civil Legal Representation Project serving Luzerne, Carbon, and Wyoming Counties in 2014. As a CLR Attorney, I have represented many survivors of domestic violence in contested custody matters.

PCADV has significant concerns with HB 1397, particularly the presumption in favor of 50/50 custody, the modification of several of §5328 custody factors, and the expansion of grandparents' rights. These proposed changes would create significant issues for the child custody process, making an already difficult process even harder, dividing families, and putting children at greater risk of harm.

I. The Presumption in Favor of 50/50 Custody

A presumption in favor of 50/50 custody would put the cart before the horse, putting the wants of the parent ahead of the needs of the child. While we recognize that the relationship between a parent and child is fundamental, like no other, we cannot forget that the child is an autonomous individual, as deserving of life, liberty, and pursuit of happiness. They are not a piece of furniture, or a pet, subject to equitable distribution as part of a divorce.

The current statute gets it right. It puts the child first, requiring that a court's custody determination be based on the best interest of the child. HB 1397, and its presumption in favor of 50/50 custody is fatally flawed because it puts the parents and their interest first. Every parent wants to spend as much time with their child as possible. However, contrary to what the proponents of HB 1397 would have you believe, it is not necessarily in the best interest of a child to spend an equal amount of time with both parents:

- **The physical distance between the parents** may make a 50/50 schedule highly impractical though not impossible. For example, the parents live 45 minutes away from each other. The child goes to school in mother's district, so during father's custodial time, the child has to get up an hour earlier and spend almost an hour in the car on the way to and from school.

- One parent's **work schedule** puts them in a superior position to care for the child daily. For example, one parent's work schedule has them starting work before the child needs to be in school with their workday ending after the child is out of school.
- All other things being equal, the child needs **a home base.**
- **A parent is abusive.** This is true even if the abusive parent never directly harmed the child. Abuse that a child can hear and/or see has been shown have significant negative effects on that child's mental, emotional, and physical development. It is our position and the position of common sense that a parent who batterers another parent is a bad parent. Indeed, this statute will be a boon to abusers who will now have significant access to and control over their victims by default.

Compounding the problem is that this presumption can only be overcome by "clear and convincing evidence." The clear and convincing standard is the highest burden of proof in civil law, generally reserved for matters where the state is the party and attempting to limit some significant individual rights or interest, such as termination of parental rights. A high legal standard makes little sense in custody actions as families are unique and different and they commonly require a custody award tailored to their specific situation and the specific needs of the child. The clear and convincing standard effectively makes it impossible to overcome the presumption and for families to seek creative custody solutions from the Courts.

As a result, if HB 1379 passes, the courts will be maintaining and/or establishing, custodial relationships/schedules at the expense of the child's physical, mental, or emotional well-being. There may be situations where a 50/50 custody schedule is in the best interest of the child, but that isn't

always the case and therefore it should certainly not be the starting point. The Child's best interest needs to be that lodestar.

II. Modification of the Sixteenth Custody Factor Under §5328

In turn, the proposed modification of the sixteenth custody factor at §5328 is improper as it does not concern the best interest of the child standard and it would create a retributive aspect to custody determinations. Currently, §5328(a)(16) is "any other relevant factor." HB 1397 would replace it with "the existence of a prior custody order or parenting plan that granted unequal parenting time for reasons not related to the fitness or interest of either parent." First, the factor does not address the child or their interest regarding a prior order that granted unequal parenting time. This is odd considering the factors are to help Courts determine what custody situation is in the best interests of the child. Second, there are a plethora of reasons the parties may have entered into an order that provided for unequal parenting time that has nothing to do with the fitness or interest of the parents, for example, work/school schedules, special needs, child preference, family structure, etc. A lot of these reasons have to do more with the child then the parents and thus may have been in the child's best interests at that time.

Proponents of this legislation may feel that "inequitable" custody orders should receive more scrutiny and that redress is owed to the "victims" of such orders. However, all that this factor modification serves to accomplish is make the adversarial process of custody even more so in allowing Courts to consider this evidence in determining a custody award. Such a factor would give custody a retributive angle that appeals to abusers seeking to have the Courts punish the victim for having custody. Finally, avenues already exist for individuals to challenge unjust or unfair orders, and such issues should not be a factor in considering what is in the best interest of the child.

III. Expansion of Grandparents' Custody Rights Under §5325

Finally, the proposed expansion of grandparents' custody rights under §5325 appears to be a solution in search of a problem. While there are issues with §5325 in its current form, HB 1397 is not the way to fix them. Indeed, it would make the current issues even worse and create significant new problems as well.

The purpose of §5325 is to help maintain relationships between grandparents and grandchildren that might otherwise be destroyed by death, divorce, or family estrangement. However, while well-intentioned, §5325 is not perfect. The requirements for standing, i.e. the right to bring a lawsuit, under §5325 are astonishingly low. Something as minor as an acrimonious divorce and custody case, where the parties disagree as to the extent the child should visit with the in-laws, is sufficient to give a grandparent standing to sue for custody under §5325(2). As such, §5325 seems to fly in the face of the nearly universal belief that a parent's right to the care and control of their child should be free of interference except for the other parent and/or in the event of abuse or neglect. §5325 is already regularly taken advantage of by abusers who go through their parents to gain access to a child they have been separated from due to their harmful behavior. That being said, this low burden for standing is tempered, and made acceptable, by the fact that an award of custody under §5328 is currently limited to partial or supervised physical custody. As such, the potential level of access/interference is also rather low.

Accordingly, HB 1397, which would give grandparents the right to seek the same level of custody over a child as a parent, even when the parents are taking adequate care of the child, would be a major and unwelcome change to the status quo. Indeed, given their stated position as to the importance of the parent/child relationship, I am struggling to see why the proponents of HB 1397

would support a provision that would result in a dramatic increase in third-party interference between parents and children. I can only hope that it has nothing to do with the fact that the proposed change will also make §5325 an even more popular tool for abusers and their enabling parents.

IV. Conclusion

Child custody is always a challenging issue, especially when the courts are involved. Judges and legislators are human. As such, no law, or decision is perfect. However, with luck and the cooperation of people of goodwill, improvements can be made. Unfortunately, HB 1397 is not an example of an improvement. Indeed, it would be a significant step back. It would disregard the central focus of a child custody statute, the child, make the best interest analysis even more difficult, and permit abusers and their enablers to manipulate the system and control their victims to an even greater extent. I urge the honorable members of this committee to vote against this bill.

PCAR
PENNSYLVANIA COALITION AGAINST RAPE

Help • Hope • Healing

Testimony before the Pennsylvania House Judiciary Subcommittee on Family Law
Public Hearing on House Bill 1397, Equality in Parenting Time
December 9, 2019
Presented by Suzanne Estrella, Esq., Legal Director, Pennsylvania Coalition Against Rape

Thank you, Subcommittee Chairwoman Delozier for your advocacy and for inviting the Pennsylvania Coalition Against Rape (PCAR) to testify at today's hearing on House Bill 1397. Thank you, Chairmen Kauffman and Briggs, and members of the House Judiciary Committee, for your leadership in prioritizing legislation that helps victims of sexual harassment, abuse, and assault.

My name is Suzanne Estrella. I am the Legal Director at PCAR. Today, my remarks will focus primarily on the needs of victims and survivors of sexual abuse, assault and harassment, intimate partner violence, family violence and how the proposed change in our custody law could inadvertently cause tremendous hardship to those individuals. I will discuss the courts current position on custody presumptions and I will conclude with recommendations for this Committee to consider in the context of HB 1397 and other legislation going forward.

PCAR has worked to eliminate sexual violence and advocate for the rights and needs of sexual assault victims since 1975. Our Coalition represents the legislative priorities and positions of the Pennsylvania network of rape crisis centers. PCAR's legislative work is rooted in this network's local experiences with victims, families, and community partners throughout Pennsylvania. PCAR and its network share many of the same values of members of this Committee and the larger General Assembly—values reflected in Safe Harbor laws, Child Protective Services Legislative reforms and many other laws that protect children—our most vulnerable Pennsylvanians.

Protection of children, healthy and stable families, and a fair judicial process are values that we share. We want children to be happy and safe so that they grow up to be happy and safe adults. We want to ensure that the judicial process is fair and equitable so all citizens of the Commonwealth have equal access to justice.

For the victims and survivors of sexual abuse, sexual harassment and sexual assault that I serve, a presumption that equal custody is in the best interests of every child creates another barrier to justice that

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survivors will be forced to overcome. Sexual abuse, assault and harassment are serious and widespread problems, and what we do and say matters. Child sexual abuse is unfortunately more prevalent than the rates of child abuse substantiation convey. Studies show that one in four girls and one in six boys will be sexually abused before their 18th birthday.[1] The National Intimate Partner and Sexual Violence (NISVS) study shows that sexual abuse starts early in life, with the majority (81%) of female victims reporting sexual victimization before the age of 25, 43% before the age of 18, 30% between ages 11 and 17, and 12% age 10 or younger.[2] NISVS found that 70% of male victims were abused before the age of 25; 51% before age 18; 25% between ages 11 and 17; and 26% were 10 years old or younger. From what we know, children are most often abused by people they know, and that includes their parents.

We recognize it can be difficult to hear instances of children being harmed, but we also know it helps to illuminate for us the urgency surrounding us legislatively and in practice. I'd like to share with the Committee, a case from Armstrong County, which was provided to me by the director of that county's rape crisis center—a center that also houses a Child Advocacy Center. It was a case where a mother was being accused by the father and the judge of parental alienation. The judge told the mother that if she filed for a protection order or custody modification, he would hold her in contempt and award the father custody. The child was four years old and disclosed the abuse only to his mother. The child eventually disclosed to the Center that "dad puts his big ugly tail in my mouth." This resulted in a report to ChildLine and a founded case of child sexual abuse perpetrated by the father. Had the Center not been involved, the child could have been placed in partial or full custody with an abusive father, because the mother's word was not enough.

The current structure of the law allows for an impartial determination based upon what is in the best interests of each particular child before the court. In fact, Pennsylvania's Superior Court has described the benefits of a presumption free law. The Court stated, "The presumption-free law permits the lower court to engage in a full, fair and comprehensive examination of the best interests of the child. It does not place an unreasonable burden on a long-time custodial parent to defend the status quo. In re Wesley K., 299 Pa. Super. 504, 515, 445 A.2d 1243, 1248 (1982). In that same case, the Superior Court also states that a voluntary shared custody agreement is favored over a shared custody agreement imposed by the court. The Court concluded that an imposition of shared custody must be supported by evidence that both parents will put the needs of the child above their own.

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[1] Finkelhor, 1990. *Sexual abuse in a national survey of adult men and women*.

[2] National Intimate Partner and Sexual Violence Study, 2015: https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf

In an ideal circumstance, PCAR does not disagree that children should have access to loving, healthy, safe, and cooperative family members and caregivers. However, our concern is that given the prevalence of child sexual abuse and the underreported nature of such abuse, a presumption of 50/50 time could tie the hands of judges to fully assess and understand what truly is best for children. The factors enumerated in the statute for determining the best interests of the child allow the courts to conduct a comprehensive review of all relevant factors to determine what is best for the child. If the courts determine that shared custody is best, the law as it stands currently provides for shared custody agreements. Creating a legal presumption that must be overcome by clear and convincing evidence is an unnecessary and unduly harsh burden for the citizens of the Commonwealth that find themselves in situations that are less than ideal.

Unfortunately, sometimes a parent's word or the words of a child are all we have to go on when determining decisions. As this Committee is well-aware, sexual abuse is the most underreported violent crime in the United States. Barriers to reporting are compounded for children who are often developmentally not able to fully understand, describe, or report the abuse that is being perpetrated against them—most often by people they love and trust. Recent studies show medical evidence being available in less than 5% of reported cases of child sexual abuse (Block & Williams, 2019). In fact, of the 500 reported child sexual abuse cases reviewed by Block and Williams (2019), less than one in five went forward to prosecution. Only half of those prosecuted cases resulted in a conviction or guilty plea. However, a lack of evidence and a lack of conviction do not mean the abuse has not occurred. Disclosures of any form of abuse should not be dismissed in the context of divorce, custody, or other legal proceedings. They should always be taken seriously.

HB 1397 aims to also address the problem of "parental alienation," according to its co-sponsorship memo. Protecting individuals against deliberate and unwarranted attempts to separate a parent from a child is a value we share. However, PCAR respectfully puts forth that the theory of parental alienation as a "syndrome" or "disease" has been met with much opposition from national psychological, social work, family and juvenile court, district attorney, bar association, child advocacy, and victim service organizations. The American Psychiatric Association has repeatedly rejected parental alienation as a scientific disorder due to a lack of evidence and therefore, has refused to add it to the Diagnostic and Statistical Manual (DSM) of Mental Disorders—a manual used by trained and licensed professionals to diagnose mental disorders (Meier, 2013). Parental alienation has not stood up as a scientific "syndrome" to peer review, quantitative analysis, or empirical research (Allen, et al., 2012). Its theories have not undergone significant scientific testing to qualify it as a syndrome (O'Dononhue, Benuto, & Bennett, 2016).

Parental alienation has been documented as being used by abusive parents to discredit and harm victims of domestic and sexual abuse. The National Council of Juvenile and Family Court Judges rejects parental alienation as a syndrome. They caution that it is often used to "divert attention away from the behaviors of the abusive parent, who may have directly influenced the children's responses by acting in violent, disrespectful, intimidating, humiliating and/or discrediting ways toward the children themselves or the children's other parent" (Dalton, Drozd, & Wong, 2006).

Risk factors for child sexual abuse and other forms of harm are often missed in family courts and other systems. When reports of sexual abuse are made in the context of family courts and custody decisions—whether by a child or adult, whether in the context of a divorce proceeding or custody determination—these reports must be taken seriously and addressed through valid and reliable assessment protocols and instruments that are rooted in science and that maximize the safety of children and their families.

We want to express thanks to Chairman Kauffman for sponsoring Act 12 of 2017-2018 that strengthened penalties for child endangerment. We are grateful for the leadership of Subcommittee Chairwoman Delozier for her advocacy and leadership on victim rights legislation, including Marsy's Law, and to members of this Committee in passing legislation that further protects victims, most recently through statute of limitations reform. We do not feel HB 1397 would accomplish the shared goals of protecting victims and supporting healthy, stable families. In fact, this bill, in imposing a court-ordered schedule on families, could undermine safety and stability for all. In its current form, PCAR opposes the bill.

PCAR respectfully urges the Committee to consider these recommendations as we go forward in our efforts to protect and support children:

1. Judicial education and training for family court judges, hearing officers, custody evaluators, and others involved in custody determinations about child abuse and safety in custody determinations and power and control dynamics within abusive relationships;
2. Consistent, reliable, and affordable abuse assessments and custody evaluations to inform custody decisions that protect and elevate the needs of children;
3. Establishing greater consistencies in family courts and other settings to identify existing abuse or risk factors for future abuse in the context of custody decisions.
4. Policy and resources that respond to the current status of child sexual abuse reports, low rates of substantiation in Pennsylvania, and what seems to be an overwhelmed and under-resourced child welfare system.

Thank you for your time and consideration.

Testimony of Maria P. Cognetti Esq., Founder of Cognetti & Associates, and chair of the Subcommittee on Custody of Joint State Government Commission's Advisory Committee on Domestic Relations Law

December 6, 2019

Harrisburg, PA

Good morning, Representatives Delozier and Davis, and members of the Subcommittee on Family Law. My name is Maria Cognetti, and I chair the Subcommittee on Custody for the Joint State Government's Advisory Committee on Domestic Relations. My law firm is in Camp Hill. I've practiced family law for over 42 years and 100% of my practice is in family law, including child custody. Through my past and continuing participation in professional organizations and the Joint State Government Commission's Advisory Committee on Domestic Relations Law, I've contributed to major statutory revisions of the Commonwealth's custody law. The last major revision to our custody statute was initially drafted by the Joint State Government Commission's Custody Subcommittee which I chaired then as well. I am also a past Chair of the Pennsylvania Bar Association Family Law Section as well as a Past President of both the Pa Chapter of the American Academy of Matrimonial Lawyers and a Past President of the national Academy.

I want to thank you for the opportunity to speak with you regarding the amendments proposed in House Bill No. 1397 and to inform you about the Advisory Committee on Domestic Relations Law.

The Joint State Government Commission's Advisory Committee on Domestic Relations Law was created under Senate Resolution No. 43[1] "to undertake an ongoing limited study of certain areas relating to domestic relations law" so that findings and recommended legislation could be presented from time to time to the General Assembly. From 1999-2013, Joint State Government Commission published four reports from this advisory committee. Next year, a fifth report from this advisory committee may be ready and will be presented to a legislative task force created by the same resolution. The advisory committee totals two dozen judges and lawyers. A key benefit of the advisory committee is that it is able to coordinate a review of certain proposed amendments to maintain the Domestic Relations Code's systemic integrity.

[1] Sess. of 1993.

At the outset, the advisory committee is pleased that your subcommittee views child custody as an important topic and is considering legislation on it. Coincidentally, the advisory committee's subcommittee on custody, my committee, expects to completely review the statutory chapter relating to child custody for uniformity and any desirable updates.

While well-intentioned, House Bill No. 1397, as drafted, causes the advisory committee two key concerns, both of which appear in amendments proposed for section 5327 (relating to presumption in cases concerning primary physical custody). The first concern is that the proposed amendment would create a presumption for equal parenting time. In removing the best interest standard this section would place the "rights" of the parents above the rights and concerns of the children. The second key concern is that this proposed amendment would require clear and convincing evidence to rebut it.

It might be useful to the subcommittee if I briefly summarize current law, share a little background on it and tell you how this amendment would affect it. For decades, the sole issue to be decided in a custody proceeding between contending parents has been the best interests (and welfare) of the child. We should be wary of deciding matters as sensitive as questions of custody by the invocation of presumptions. The only statutory presumption in current law is between a parent and a third party, with the presumption favoring the parent for custody. That presumption was proposed in our advisory committee's report published in 1999 because some cases were emerging wherein parentage was weighed as a strong factor for consideration instead of as a *per se* presumption *vis-à-vis* third parties. Act no. 112 of 2010 then enacted that presumption.

Clear and convincing evidence means the evidence is so clear, direct, and substantial that you are convinced, without hesitation, that a fact is true. Although this is a significant burden of proof, it does not mean the plaintiff must prove the facts at issue beyond all doubt or beyond a reasonable doubt. Beyond a reasonable doubt is applied to criminal evidence. A more common evidentiary burden is by a preponderance of the evidence rather than the elevated one of clear and convincing. A preponderance standard more evenly balances the burden of proof because that means more likely than not.

Similarly, the clear and convincing evidentiary burden in current law was proposed in the advisory committee's 1999 report and then enacted in 2010 to rebut the presumption favoring a parent instead of a nonparent because statutory standing provisions expanded the class of parties who may file a custody action by sections 5324 (relating to standing for any form of physical custody or legal custody) and 5325 (relating to standing for partial physical custody and supervised physical custody). In other words, the non-parent bears a heavy burden of producing persuasive evidence to overcome the parent's statutory presumption of custody. We felt that **this** circumstance was an appropriate place in which to set the bar high.

There can be no doubt that in every custody dispute the fundamental issue is the best interest of the child. Yet there can also be no doubt that the parent-child relationship should be considered of importance in determining which custodial arrangement is in the child's best interest. Between contesting parents, the burden of proof should be shared equally with the child's well-being as the focus of consideration. Under current law, in a custody dispute between parents, no one has the burden of proof; no presumption may be resorted to; instead,

the court must determine, according to the evidence in the particular case before it, what will serve the child's best interests.

The amendment proposed for section 5327 by House Bill No. 1397 is a presumption favoring a particular custodial arrangement and parenting time over the actual best interest of the child. This puts the "rights" of the parents ahead of the "rights" and, more importantly, the best interest of the child. We suggest to you that custody law should not be "about" what is good for the parents, or what the parents want. The children are not chattels. The Commonwealth and the courts have an obligation to protect the children that come before them.

To more fully understand the effect of the proposed "presumption" one only has to look at the other 49 states' statutes on custody. It is telling to note that only one state, Kentucky, has a presumption similar to that being proposed. The vast majority of states have some form of best interest; many including a list of factors to be considered (such as our present statute).

We know the motivation behind this legislation is simply to try to do the right thing. However, we believe there are other ways to ensure that all parents receive fair and just consideration in court without ignoring the best interest of the child. A review of the 50 state statutes offers some other types of language along those lines. Those of us, both lawyers and judges, who have practiced in the custody trenches for years, are more than happy to offer our assistance in wordsmithing this section to achieve the desired goal in a way which does not harm children.

In addition to the issues with Section 5327 we believe that there are several other areas of this bill which might benefit from further study and refinement to ensure that they are workable. For instance, under "Types of award" it appears that primary physical and partial physical custody have been removed. This would seem to imply that in imposing a presumption of equal time, there would then never be a case where one parent would get primary custody. That is unrealistic; even with a presumption.

In Section 5328 (c) it appears that this bill is taking away the court's ability to grant grandparents partial custody but leaves the options as shared or supervised. Those two forms of custody are at opposite ends of the spectrum and would likely exclude the vast majority of grandparent cases.

In closing, the Joint State Government Commission Domestic Relations Advisory Committee advises against adopting any presumption which grants an equal physical custody arrangement to the parents and ignores the best interest of the child. A 50/50 presumption as a blanket provision elevates parental rights above the best interests of each child. I believe you will hear today from various groups and from esteemed Family Court judges that this approach is not the way to go. Good judges want to do their job. Good judges do not simply want the easy way out. We are united in our opposition to HB 1397 as it is currently drafted.

Representatives Delozier and Davis, thank you for the opportunity to testify here today.

Testimony of Mary Cushing Doherty, Esquire of High Swartz LLP on behalf of the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers

December 9, 2019

Thank you Representatives Delozier and Davis for the opportunity to present my observation about House Bill 1397 to you and the sub-committee on Family Law. I join Maria Cognetti as members of the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers (we have been Fellows for over 30 years) and of the Joint State Government Advisory Commission Committee on Domestic Relations Law (on which we have each served since its formation in 1993). I am the presenter for the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers.

There is one central custody principle for our Pennsylvania statutes, procedures and judicial decisions in response to the dilemma of parents separating: What is in the best interests of each child? When a change to our custody statutes is considered, our legislators should ask themselves: Is this legislation helping to serve the best interests of the children involved? Thank you for the chance to let me explain the position of the Academy of Matrimonial Lawyers, Pennsylvania Chapter. The Fellows of the American Academy of Matrimonial Lawyers adamantly disagree with legislation such as House Bill 1397 because it will unquestionably adversely affect the children of Pennsylvania.

This Committee is also hearing from the Pennsylvania Psychological Association. Experienced family lawyers who have represented families in custody litigation can provide first hand knowledge to support the findings of the Pennsylvania Psychological Association which argue against any presumption for physical custody. "Because of the unique characteristics of each family, a parenting arrangement needs to be made that matches the abilities of the parents with the developmental needs of the children to assure the healthy growth and adjustment of children".[1] While many children do well in shared custody arrangements, the psychologists note the adjustment of children "is most effective when parents communicate respectfully with each other for the welfare of their children, and when they do not expose the children to ongoing hostility, conflict or violence".[1] Therefore, it is not the shared custody schedule that helps parents be better parents, but rather the parents' shared goal to shield children from parental conflict.

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[1] Testimony of Pennsylvania Psychological Association for House Judiciary Committee Hearing on December 17, 2009.

This is what the lawyers see – that high conflict couples are the ones most often involved in difficult custody litigation. Too many of those parents, who fail to recognize how their conflict hurts their children, claim that if they have physical custody 50%, or close to 50% of the time, it will be best for their children. A law mandating presumed 50% or close to 50% custody time for each parents puts the schedule first and foremost. That puts the concern for the children second. This law would mandate significant shared time instead of the first inquiry: Will the proposed physical custody schedule serve the children's best interests?

I've practiced family law for over 40 years. I began in the late 1970s when our caselaw embraced the tender years presumption favoring mothers of young children. In my parents' era, that presumption may have made sense, but it became unfair for many fathers, particularly as traditional parenting roles changed. In the early 1980s, the courts questioned racial bias. In the 1982 opinion written by the eminent Superior Court Judge Edmund Spaeth in Custody of Temos v. Temos, the Pennsylvania Superior Court overruled the implicit presumption of a trial judge in favor of a white father over a white mother who was spending weekends with a black man.

Judge Spaeth wrote in 1982:

> In terms of legal reasoning, the lower court's error was to think in terms of presumptions…This sort of reasoning used to be typical in child custody cases…But courts may no longer reason by presumption in child custody cases. In a custody dispute between parents, no one has the burden of proof; **no presumption may be resorted to instead, the court must determine** according to the evidence in the particular case before it **what will serve their child's best interests**. Ellerbe v. Hooks, 490 Pa 363, 416 A2d 512 (1980) cited in Custody of Temos v. Temos, 304 Pa. Super. 82, 450 A2d 111, at 121 (1982), **emphasis added**.

Each of you who is a parent, or who loves children, knows that each child is unique. Raising a child and addressing the singular needs of a child is each parent's great challenge. Our legislature should not contemplate a return to generalization by employing a blanket presumption. Does this legislation put our children first when it presumes a schedule called "equal parenting time"? You surely have constituents who wanted individual judges to issue a custody order and give him or her close to or exactly equal physical custody time. But how can we set that presumptive 50% custody time as the starting point? And how can we force children of separated parents who may be distraught over the separation, to adjust to their parent's separation by immediately facing an equal or nearly equal physical custody schedule?

I can share many real life examples of cases in which I've been involved to demonstrate that presumptive 50-50 physical custody would have been an emotional disaster for the children involved:

- A father left his wife and girls, ages 1 and 3, because he couldn't handle the responsibility of raising his girls, only to move in with his pregnant girlfriend;
- A parent of a teenager announced plans to move in with the parent of the child's classmate;
- A parent of a child diagnosed with Asperger Syndrome served as the primary caretaker who attended to the child's routines for years;
- The child's fights with one parent drove a wedge between the couple and the parents separated to stop the escalating drama in the home; and
- A hard-drinking, hard-living couple split up after the father went to rehab and assumed sole responsibility for care of their children.
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In any of these scenarios should any of those children be faced with a presumption to spend half their time with each parent until the court sorts out the best interests of children? As others will explain, this bill creates a heavy burden to overcome the initial "out of the gate" order for substantially equal physical custody.

Interestingly this bill labels a shared physical custody schedule as "shared parenting time". Shared parenting starts when the couple first have children. I'm encouraged to see most of my custody clients who are in their early 40s or younger have been raising their children cooperatively. If they live near each other after separating, many parents come to their lawyers assuming they will share physical custody equally or close to 50-50.

The new judges routinely ask every parent in custody court: "During your testimony, I want to know your view on each of the factors". As the case proceeds the judge considers the factors, not presumptions, and after thoughtful analysis awards physical custody based on what is best for the children.

As being reported by Maria Cognetti, the Joint State Government Commission Domestic Relations Advisory Committee has resumed the review of our custody statute and other family laws. Changes will be helpful which put the best interests of our children first. The lawyers active in the Advisory committee, Pennsylvania Bar Association Family Law Section leadership and the AAML Fellows, along with psychologists with the Pennsylvanian Psychological Association, are ready to work with concerned legislators like you to foster progress. Focus on helping parents co-parent once they are separated or divorced will lead to putting children first to reach an appropriate shared physical custody schedule. We need to do this as the facts and circumstances allow but reject the mandated presumptions in House Bill 1397.

Respectfully submitted,
Mary Cushing Doherty
on behalf of the Pennsylvania Chapter, American Academy of Matrimonial Lawyers