

Chairman Hillyer, Vice Chair Grendell, Ranking Member Galonski and Members of the Committee, thank you for the opportunity to meet with you today.

My name is Karen Zajkowski. As is stated on today's agenda, I recently retired from the Tuscarawas County Court of Common Pleas where I was a Magistrate for 21 years. For those 21 years, I heard domestic relations matters. I was involved in the creation of Tuscarawas County's current standard parenting time schedule. I am aware that proponents of an equal parenting presumption have cited Tuscarawas County's parenting plan as a model. However, HB 508 is not a codification of Tuscarawas County's parenting plan. The Tuscarawas County plan was based on child development research, and recognizes that children's needs change as they mature. At some ages, there is equal parenting time which is customized, as necessary, to meet the needs of the family and, more importantly, the best interest of the child. HB 508 proposes to equalize the rights of both parents and to create a rebuttable presumption in favor of equal parenting time and equal decision-making. Creating a presumption wherein both parents are initially treated equally promotes a sense of fairness and trust in the legal system, but it is only a starting point

Some of the proponents of HB 508 have testified regarding the emotional trauma they have experienced and have shared with you their feeling that they were treated unfairly by the court system. Some have shared their hopes that HB 508 will help to remedy their personal predicament. While their hardships must be acknowledged, in the words of Supreme Court Justice Oliver Wendell Holmes, "Hard cases make bad law." When a case presents a special hardship, there is a temptation to create a law that may be fine for the case at hand but unsound as a general rule. HB 508, as it is currently written, is unsound as a general rule.

Equal parenting time should be the standard only when it is in the best interest of the child. The age and development of the child must be considered; the family circumstances must be considered. The parenting plan that is best for a newborn is not likely to be the best for a middle-school aged child. Likewise, the parenting plan that's best for a child whose parents work while the child is in school isn't likely to be best for a child whose parents both work rotating shifts. There is no one-size-fits-all solution.

HB 508, as currently written, puts parents' rights above the best interest of the child. I think there's consensus that good, appropriate, nurturing parents should have substantially equal time with their child when appropriate and in the best interest of the child. However, the reality is that there are some parents who are not good, appropriate, nurturing parents yet. HB 508 permits these inappropriate or potentially harmful parents to have equal access to their children and places an unreasonable burden on the other parent.

CLEAR AND CONVINCING EVIDENCE

HB 508 requires that the presumption of equal time and equal decision-making be rebutted by clear and convincing evidence. Clear and convincing evidence is defined as evidence that creates a firm belief or conviction. Meeting the standard of proof of clear and

convincing evidence requires substantial credible evidence. My experience has been that clear and convincing evidence is rare in domestic cases. Civil cases, with few exceptions, have the standard of proof of preponderance of the evidence. A preponderance of the evidence is evidence that creates a belief that something is more likely than not. What if there is only a preponderance of evidence of potential harm to a child with one parent? The preponderance of evidence may show that a parent committed domestic violence and HB 508 requires that, since the presumption wasn't rebutted, the child will have equal time with that potentially harmful parent. This cannot be the outcome the proponents of this bill want. However, in some situations, this will be the result. The safety of a child cannot be made secondary.

The clear and convincing evidence standard may be unfairly burdensome in many cases, unfairly insurmountable in others, and potentially harmful to children in a devastating few. Self-represented litigants may be severely prejudiced by the clear and convincing evidence requirement, since they are less aware of what evidence they need to present, the quality and quantity of evidence is often lacking. Despite this, the evidence presented may still reach the preponderance of the evidence standard but may not meet the clear and convincing standard. HB 508 should not allow a parent's lack of courtroom skills to put a child in a potentially harmful situation with the other parent.

DETRIMENT TO THE CHILD

HB 508 requires equal parenting time or equal decision-making unless the presumption is rebutted by clear and convincing evidence of a "detriment" to the child. Detriment is defined as damage, hurt, harm or affliction. The current standard requires a court to determine what is in the best interest of a child. The best interest of a child is what's best for the child's growth and development. HB 508 as currently written no longer requires courts to order a parenting plan that will be most likely to promote the growth and development of the child, but instead only requires the court to order a parenting plan that won't damage the child. Using the "detriment" standard rather than the "best interest" standard lowers the quality of parenting that's required. Instead of doing what's best for a child, the standard is lowered to what's barely good enough so that it doesn't harm the child. This is clearly the opposite of the effect desired but I believe it could be the effect that occurs since HB 508 removes the child-centered approach to allocating parenting time.

EQUAL DECISION-MAKING

Equal decision-making is challenging at times in intact families. Requiring it in domestic and juvenile court cases is aspirational but often unrealistic. Equal decision-making requires good communication between the parents, respect between the parents, and a willingness to compromise. Often, none of those characteristics are present. Communication of any type presumes there is an on-going relationship between the parents. That presumption may be misplaced, especially in juvenile court cases where a relationship may be non-existent. Parents who have an order of equal decision-making but are unable to agree will have to return to court for a resolution. The very order that

was supposed to reduce litigation will instead increase litigation as parents return to court for an order deciding, for example, whether their child will spend 2 evenings a week at baseball practice or the same two evenings a week at swimming lessons.

When parents reach an impasse, there is the distinct possibility that the more strong-willed parent, the more abrasive or insistent parent, or the more bullying parent will “win” whether or not the decision is in the best interest of the child.

TEMPORARY ORDERS (Sec. 3109.0436)

Temporary orders are issued early in a case, before either party has had the opportunity to conduct significant discovery or investigation. Courts issue temporary orders after the presentation of minimal, if any, evidence and orders may be based on the affidavits of the parties. Early in the case, the parties may not have the volume of evidence needed to rebut the presumptions of HB 508. Often, parties have been living separately for an extended period of time and may not yet be aware of potential safety concerns in the other parent’s home. Courts will need to have a higher number of and more extensive hearings before issuing temporary orders. To require equal parenting time and equal decision-making in situations where there is a paucity of evidence potentially poses an unreasonable risk to children.

RECORD-KEEPING (Sec. 3109.0485)

This requires courts to track the number of overnights allocated to each parent, the type of case, and whether the parenting time order was agreed or contested. This requirement takes resources and staff away from a court’s core mission of resolving disputes and serving families, without providing any useful public benefit. Some courts will need to add staff in order to comply with this requirement as courts don’t currently keep such aggregate data. Such a requirement flies in the face of a court’s mission to “do individual justice in individual cases.” (Ernest Friesen, author *Managing the Courts*)

CONCLUSION

Children need regular, safe, frequent contact with good parents. HB 508 has this right. However, children need to be protected from parents who don’t act in the best interest of their children. HB 508, as currently written, doesn’t provide this protection.

The corollary to “Hard cases make bad law” is that “Hard cases can make good law.” Revising HB 508 to make it child-centered, to protect children by using a preponderance of the evidence standard, and to use the “best interest” standard rather than the “detriment” standard will make HB 508 sound as a general rule and make it “good law.”

Thank you for your time.

