TESTIMONY TO OHIO HOUSE OF REPRESENTATIVES
CIVIL JUSTIC COMMITTEE

OPPOSING HOUSE BILL 508

Testimony Given: May 17, 2022

RE: Opposing House Bill 508: An act creating a presumption of equal parenting time.

Please consider this written testimony as opposition to House Bill 508 as amended. because I view the proposal of a presumption of equal parenting time as inconsistent with and in many cases contrary to doing what is in the best interests of children.

My name is Milfred "Bud" Dale, Ph.D. (ABPP), J.D. I am from Topeka, Kansas. I have been asked to come to testify by a number of opponents of this bill because of my experience in child custody in numerous roles and my knowledge of the empirical scientific research on shared parenting.

I am both a psychologist and an attorney. I earned my Ph.D. at The Ohio State University in 1987 and have been a licensed psychologist since 1989. Since 1995, a large part of my psychology practice has related to helping children, parents, and families deal with parental divorce and separation. As a psychologist, I have treated: children of divorce – both boys and girls; as well as mothers, fathers, and step-parents in divorce situations. I have performed couples therapy, cooperative parenting therapy, and family therapy in divorce cases. For eleven years, I co-taught an 18 hour psycho-educational class for families in high conflict parents and their children in Shawnee County, Kansas. We served more than 550 families in this class. For more than twenty-five years, I have also conducted court-ordered custody evaluations in contested custody matters – many of which have involved allegations of child abuse, domestic violence, and/or parental alienation. For this same period, I have practiced as a certified mediator and performed domestic case management.

In 2009, at age 49, I graduated from Washburn University Law School. Since 2009, I have also been a licensed and practicing family law attorney. My practice focuses on parental divorce and separation, modifications of parenting plans, child support, adoptions, and guardianships. As an attorney I have mediated and litigated custody disputes.

In addition, I have presented in numerous forums across the United States and in Canada on topics ranging from the best interests of children and custody evaluations to ethical and professional issues for mental health providers, experts, and attorneys. I have written extensively about children and families of divorce and parental separation and served on multiple editorial boards of professional and scientific journals in this field. I served six years on the National Board of Directors for the Association of Family and Conciliation Courts (AFCC), the world's largest interdisciplinary professional organization studying parental divorce and separation and the world's recognized leader in education and training in this area. In 2012, I started www.bestinterests-talk.com, an interdisciplinary listserv with more than 600 members across the United States, Canada, and three additional continents

(Europe, Asia, and Australia). This listserv involves a rich dialogue about the scientific research and the development of methods to evaluate and help children and families of divorce and parental separation.

My message is the same as that of Dr. Karl Menninger when he, his father, and brother formed the Menninger Clinic in Topeka, Kansas: "Don't Forget the Children." The best interests of the child standard in child custody and the requirement for individualized decision making is the most powerful protection children have during periods when the conflicts and decisions of their parents place them at risk.[1] We should pay close attention to the notion that we should not forget that children are especially vulnerable when parents separate and divorce. This is a period of heightened conflict and risk. The period when separations are occurring is an emotional one often fraught with a myriad of emotions for all involved. Anger, a sense of betrayal, or a lack of trust are a few of the many emotions often making this period especially difficult for the parties. In instances of abuse or domestic violence, this period is more dangerous and carries heightened risks for increases rather than decreases in violence. Bullying, coercive control, and power dynamics are often part of the disagreements that led to the divorce and make finding solutions more difficult.

Imposing an equal time parenting plan on children during one of the most vulnerable times of their lives is not in the best interests of children. It instead places them at heightened risk for behavioral, emotional, and psychological problems and stresses, particularly when the dispute of the parents involves conflict, disagreement, and abuse or violence.

The available social science research does not support equal parenting time as best for all or even a majority of children. Just this month I completed a paper that reviews the rationale of the best interests standard and the claims by the scholars referenced on the National Parents Organization website. When viewed through the lens of science and the requirements of the scientific process, these claims just simply do not hold up.

The title of my article is, "Still the One: Defending the *Individualized Best Interests of the Child* Standard Against Equal Parenting Time Presumptions,"[2] and will appear this month in the Journal of the American Academy of Matrimonial Lawyers. It should not be necessary to explain to researchers and mental health professionals that methodology matters, that "correlation does not prove causality," and that significance testing and vote counting are limited methods – but, in this instance, it has become necessary. In my article I attempt "to walk a fine line of supporting shared parenting, even equal time parenting plans, when these can be achieved by parental agreement or through court findings using the individualized best interests of the child standard that such an arrangement benefits the child."[3] Throughout my career, I have remained current on the literature about child development and the experiences of children and parents when divorce happens. In addition,

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[1] Milfred D. Dale, *Don't Forget the Children: Court Protection from Parental Conflict is in the Best Interests of Children*, 52(4) FAM. CT. REV. 648 (2014).
[2] Milfred D. Dale, *"Still the One": Defending the Individualized Best Interests of the Child Standard Against Equal Parenting Time Presumptions*, 34 J. AM. ACAD. MATRIMONIAL LAWYERS 307 (2022).
[3] *Id.* at 308.

during 2018 and 2019, I systematically and comprehensively reviewed the shared parenting research by conducting multiple meta analyses because I perceived a number of inaccurate portrayals were occurring in the literature. I did not simply accept the conclusions from summaries of the literature, but instead collected every original article cited by the reviews. I hired two graduate students who helped me replicated the meta analyses by Bauserman and Baude et al., and we conducted a separate meta analysis of the 60 studies from the Nielsen article.

The research generally does show that children of divorce or parental separation usually do slightly better when both parents are involved. The research also generally does show that ***quality*** of parenting is more strongly associated with positive child adjustment than ***quantity*** of parenting; that is, the way children are treated by their parents matters and authoritative parenting, where parents are involved in their children's lives and have positive relationships, is good for children. But the research also shows that not all parents are good parents, not all of them have been involved with their children in positive ways, and not all parents can relate to their children in ways that benefit the children. Social science research continues to show that children of divorce and separated parents often score lower (as a group) than children of married parents or intact families. In short, parents can positively influence their children, but whether they do is a fact-specific issue.[4] I have presented this data at two international conferences and numerous bar associations meetings.[5]

Most child custody experts believe shared or equal parenting time approaches have their place and should be considered under the right circumstances. In 2013, I participated with more than thirty other child custody experts in a national Think Tank About Shared Parenting sponsored by the Association of Family and Conciliation Courts (AFCC). This group spent three days extensively reviewing the scientific literature, the social policy debates, and the needs of children and families in relation to shared parenting. It issued two papers about shared parenting. Please note, the term "shared parenting" in the professional literature references parenting plans where the nonresidential parent has the child at least 35% of the time. HB 507 is talking about "equal time." In summarizing the literature on shared parenting time, this Think Tank provided five conclusions:[6]

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[4] Milfred D. Dale, *Of course, quantity AND quality of nonresidential father involvement matters … as part of every individualized best interests of the child determination: Commentary on Adamsons 2018 article*, J. CHILD CUSTODY (2019).

[5] Milfred Dale, *A Meta-Analysis of Child Adjustment in Different Custodial Arrangements*, AFCC Webinar Series, July 17, 2019; Milfred Dale & Austen McGuire, *More Data, Less Woozle: Defending Individualized Best Interests in the Shared Parenting Debate*, 56th Annual AFCC Conference, Toronto, CA; Milfred Dale, *The Woozling for 50/50 Parenting Time & the Actual Research Data: Implications for Best Interests Determinations & Family Lawyers*, Sedgwick County Bar Association Meeting, Wichita, KS, May 3, 2019; Milfred D. Dale, Stephanie Gusler, & Austen McGuire, *To Stop a Woozle: A Meta-Analysis of Shared Versus Primary Parenting*, AFCC 13th Symposium on Child Custody, Denver, CO., November 9, 2018; Milfred D. Dale, Stephanie Gusler, & Austen McGuire, *The Woozling of 50/50 Parenting Time and the Actual Research Data: Implications for Family Law*. Wyandotte County Bar Association Meeting, Kansas City, Kansas, October 17, 2018.

[6] Marsha Kline Pruett & Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52(2) FAM. CT. REV. 152 (2014); Volume 52, Issue 2 of the 2014 Family Court Review is devoted to the debate about the drawbacks, effects, and impacts of shared parenting.

1. The most effective decision making about parenting time after separation is inescapably case specific.
2. Statutory presumptions prescribing specific allocations of shared parenting time are unsupportable because no prescription will fit all, or even the majority of, families' particular circumstances.
3. Social science research strongly supports shared parenting (i.e., frequent, continuing, and meaningful contact) when both parents agree to it. There is also empirical support for shared parenting under broader conditions (e.g., some forms of parental conflict or disagreement) for children of school age or older.
4. There is no "one-size-fits-all" shared parenting time even for the most vulnerable of families. [There is no conclusive research evidence about the impact of overnights on long term parent-child relationships and child well-being. Shared parenting in the midst of high conflict is generally not in the children's best interests. And family violence usually precludes shared parenting.].
5. A majority of the Think Tank participants supported a presumption of joint decision making, while a substantial minority espoused a case-by-case approach.

One expert commenter wrote against shared custody presumptions, particularly when parents could not resolve things themselves, noting:

> Entering a courthouse to ask a judge to decide a parenting plan for children communicates an inability for one or both parents to work together in the best interests of children. . . . [B]y the time most parents face a judge, one can safely assume that they have had access to many friends, family members, counselors, lawyers, parent education programs, or mediators who have told them to work out their differences. Countless people would have told them that, while they are separating as intimate partners, they will be parents forever. Many people have told them that conflict hurts children. By this stage of appearing in court, the average parent should be starting to appreciate the emotional and financial costs of litigation.[7]

There is research that parents who choose to do shared parenting are healthier (and so are their children)[8] and wealthier,[9] but this data does not demonstrate shared parenting "causes" or "produces" healthier children. The research does reflect that children do better in shared parenting plans when the parents are more child-centered, when both parents have established relationships with the children, and when the parents are capable and willing to make the extra effort the arrangement requires.[10] Unfortunately, shared parenting is a much more difficult fit when the parents have never been married, never lived together

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[7] Peter Jaffe, *A Presumption Against Shared Parenting for Family Court Litigants,* 52 FAM. CT. REV. 187 (2014).

[8] Linda Nielson, *Joint Versus Sole Physical Custody: Outcomes for Children Independent of Family Income and Parental Conflict,* J. CHILD CUSTODY 1 (2018); Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review,* 16(1) J. FAM. PSYCHOL. 91 (2002).

[9] Marygold S. Melli & Patricia R. Brown, *Exploring a New Family Form – The Shared Time Family*, 22 INT'L J.L. POL'Y 231 (2008).

[10] CHRISTY M. BUCHANAN, ELEANOR E. MACCOBY & SANFORD M. DORNBUSH, ADOLESCENTS AFTER DIVORCE (1996).

to co-parent, or when one parent has a marginal, tenuous, or unrealized relationship with the child or children. More than 40% of the children born each year in the United States are born to unmarried parents. The needs of this group of people are enormous. Unfortunately, for a significant percentage of unmarried parents, equal parenting time is not financially or practically possible or feasible.

Shared and equal time parenting schedules create high demands for high levels of parental engagement, when the research shows that as many as 40 percent of divorced families eventually settle into parallel parenting arrangements where parents have little interaction with each other.[11] Most estimate that between 25 and 30 percent of families accomplish truly engaged and shared parenting. The remaining 20 to 25 percent have difficulties with varying levels of parental conflict, abuse, alienation, mental illness, and substance abuse. There is also the unfortunate reality that many fathers have no contact with their children.[12]

In my paper, I also report on the connections between child support and parenting time and concerns about the risk of "drift." Drift refers to informal changes of the parenting plan by parents themselves. Parenting plans evolve and shift. We should be ever vigilant and protect children by evaluating when requests for additional parenting time are child centered and when they are motivated by efforts to decrease or eliminate child support.

> Another dimension of the parenting time / child support connection concerns the stability of different parenting time arrangements and how drift (e.g., informal changes of the arrangement made by parents) might create inequities. The presence of drift is not a new or rare phenomena. As a group, shared parenting arrangements are not as stable as primary care arrangements and the risk for drift out of shared parenting into primary parenting is an important consideration. A California study found a significant "drift" toward de facto mother custody, both in cases where the father was awarded physical custody (drift of nearly 23%) and in joint physical custody (nearly 40%).[13] A longitudinal Australian study tracking parenting arrangements in two samples over three years found that 40% of shared care arrangements in one sample and 50% in a second sample changed, with almost all of the changes reverting to mother-custody.[14] A qualitative study of fifty divorced parents in Alberta who had a shared custody order or agreement found that in about 25% of the cases it became a situation where one parent was clearly the primary residential caregiver.[15] Children may be placed at risk when a parent's financial

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[11] Matthew J. Sullivan, *Coparenting and the Parenting Coordination Process*, 5(1) J. CHILD CUSTODY 4 (2008).
[12] For a review of living arrangements and father involvement, *see* Pew Research Center website: http://www.pewsocialtrends.org/2011/06/15/chapter-1-living-arrangements-and-father-involvement/.
[13] Robert H. Mnookin et al., *Private Ordering Revisited: What Custodial Arrangements Are Parents Negotiating?*, in DIVORCE REFORM AT THE CROSSROADS 37 (Stephen D. Sugarman & Herma Hill Kay eds. 1990).
[14] Bruce Smyth, R. Weston, et al., *Changes in Patterns of Parenting over Time: Recent Australian Data*, 14(1) J. FAM. STUD. 23 (2008).
[15] Rick Gill & Cherami Wichmann, *Shared Custody Arrangements: Pilot Interviews with Parents*, 2004-FCY-5, FAM., CHILD. AND YOUTH, DEP'T OF JUSTICE,. CAN., http://www.justice.gc.ca/eng/rp-pr/fl-lf/parent/2004_5/index.html.

motives inappropriately impact parenting plans, then parenting plans change without the requisite financial considerations.[16]

But the most important rationale against a shared or 50/50 shared parenting presumption is that it shifts the focus from meeting the children's needs to the desires and rights of the parents. The strongest argument for individualized parenting plans for every child is that

> . . . each recommendation, each decision made, considers the individual child's developmental and psychological needs. Rather than focusing on parental demands, societal stereotypes, cultural tradition, or legal precedent, the best interest standard asks the decision makers to consider what this child needs at this point in time, given this family and its changed family structure. There is no other way to address a child's best interest. The best interest standard represents a willingness on the part of the court and the law to consider children on a case-by-case basis rather than adjudicating children as a class or a homogeneous grouping with identical needs and situations. Even though time-consuming, it is society's way of acknowledging that children's needs are important and unique.[17]

In 2018, I wrote about the importance of quantity and quality of nonresidential father involvement in response to an article that proposed shared or equal parenting time. The title of this article is: "Of course, quantity AND quality of nonresidential father involvement matters … as part of every individualized best interests of the child determination: Commentary on Adamsons 2018 Article." I noted that Justice Sandra Day O'Connor famously noted in Troxel v. Granville, a famous case about parental rights to the care, custody and control of children, that:

> "The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."[18]

My response is that, "If there are no 'average' fathers and no 'average' families, we should remain committed to the idea that there are no 'average' children. As the standard for child custody issues, the best interests of the child embraces the notion that there is no average child(.)"[19]

I support the individualized decision-making found in the best interests of the child standard as what is best for children. This should be the standard throughout the process. It is the social policy that will best serve children and families. I cringe when I hear testimony

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[16] Dale, *supra* note 2, at 353.

[17] Joan B. Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35(4) ASS'N FAM. CONCIL. CTS. 377, 385 (1997).

[18] Troxel v. Granville, 530 U.S. 57, 63 (2000).

[19] Milfred D. Dale, *Of course, quantity AND quality of nonresidential father involvement matters … as part of every individualized best interests of the child determination: Commentary on Adamsons 2018 article*, J. CHILD CUSTODY (2019).

of "making the presumption" more and more difficult to overcome – especially when overcoming the presumption will require proof of domestic or intimate partner violence or "detriment." The focus on "detriment," a term the proponents do not appear to define, implies looking for damage or harm done to the child rather than encouraging the parents to facilitate the child's development and designing the parenting plan to promote the child's emotional, physical, and moral growth. Doing what is best for children requires looking out for the child's interests first and foremost, not maximizing one's own interests.

Even the change in the bill from requiring clear and convincing evidence to a preponderance of the evidence does not change the shift away from the focus on the rights of the parents rather than the needs and interests of children. Regardless of this proposed change to the burden of proof, this is likely to focus the process on allegations and accusations that can have adverse consequences far beyond the initial decisions and, because of their impact on coparenting relationships, throughout the child's minority and into their adult years. Shifting the focus away from the needs of children places them at additional risks. For the reasons above, I oppose the equal parenting premise of House Bill 508.

Respectfully submitted,

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