

OPPONENT TESTIMONY ON HB 508
BY MICHAEL SMALZ, ON BEHALF OF THE ACTION OHIO COALITION FOR BATTERED WOMEN
HOUSE CIVIL JUSTICE COMMITTEE, MAY 24, 2022

CHAIRMAN HILLYER, VICE CHAIR GRENDALL, RANKING MEMBER GALONSKI AND COMMITTEE MEMBERS:

My name is Michael Smalz. I am testifying on behalf of the ACTION OHIO Coalition for Battered Women in opposition to HB 508. I serve as a volunteer and Board member (Vice President) with ACTION OHIO, and I am a retired lawyer, having previously worked as an attorney with the Ohio Poverty Law Center and as a legal aid attorney representing victims of domestic violence in protection order, divorce, and child custody cases.

Under current Ohio law, courts grant shared parenting and/or equal parenting time when the parents agree to such an arrangement or when, over the objections of one parent, the court determines that such orders serve the best interests of the children. By statute, the mother and father stand on an equal footing. Judges must consider the totality of the facts and each child's unique situation to create a custody order tailored to the child's best interests. HB 508 undermines judicial discretion and the focus on the best interests of the children by creating presumptions of shared parenting and equal parenting time, replacing the "best interest of the child" standard with the "detrimental to the child" test, and automatically awarding most decision-making rights and responsibilities to the "more cooperative" parent when the shared parenting presumption is rebutted.

The vast majority of child custody cases are settled.¹ This bill primarily targets contested cases. National research suggests that approximately 75% of contested cases involve reports of domestic violence.² Research has shown that children's post-divorce well-being is not dependent on the frequency with which they see both parents, but upon the extent to which the parents' agreement or court order reflects pre-divorce caretaking and parenting.³ Adults who experience divorce as children report better outcomes when exposed to high-quality parenting regardless of the custody arrangement; they report worse outcomes when custody is shared and one parent provides low-quality parenting.⁴ Therefore, the courts' focus should be on ensuring that the children have high-quality parenting.

A presumption of shared parenting and 50-50 parenting time is especially harmful to children in cases involving a history of domestic violence and a risk of further abuse. In Ohio, 25% of all children are exposed to domestic violence before they turn 18 years of age.⁵ Children who witness domestic violence are harmed by the abuse, even if they are not themselves physically abused. They have significantly worse social, psychological and academic outcomes than children in nonviolent homes.⁶ Moreover, there is a high correlation between adult partner domestic violence and child abuse, with studies showing that children who have witnessed intimate partner violence are approximately four times more likely to experience direct child abuse than children who have not witnessed intimate partner violence.⁷

Joint custody prolongs the abused parent's and the children's exposure to violence. Contemporary social science research clearly shows that "physical abuse, stalking, and harassment continue at significant rates post-separation and may even become worse."⁸ Abusers deploy children as pawns, continuing to abuse their victims through their shared children.⁹ Children are not only likely to be exposed to violence between the abuser and the mother post-separation, but threats of violence may be directed at the

child,¹⁰ and there is an elevated risk of domestic violence directed toward both the child and the battered parent.¹¹ Batterers are poor candidates for physical custody of children¹² and serve as negative role models for their children.¹³ Research shows that in families with domestic violence the best parenting arrangement is to grant sole legal and physical custody to the parent capable of providing a nonviolent home.¹⁴

HB 508 is more extreme than the preemptive joint custody laws that have been enacted in other states, notably Kentucky and Arkansas. While preemptive joint custody or equal parenting time statutes in those states require proof that joint custody or equal parenting time “is not in the best interest of the child,” HB 508 requires proof that shared parenting and equal parenting time are “detrimental to the child.” The “detrimental to the child” standard is the standard required by the Supreme Court of Ohio (*In re Perales*) to determine whether custody should be taken from parents and given to a non-parent. It is a much higher bar than the “best interest of the child” test applied in contested custody cases between parents. Also, HB 508 apparently applies these presumptions to putative fathers who have not established paternity and may not be the biological father of the children.

Unlike any other state, if the presumptions of shared parenting and equal parenting time are rebutted under HB 508, the parent who has “demonstrated a greater and more consistent willingness to cooperate with the other parent” must be awarded the majority of decision-making rights and responsibilities without consideration of any other “best interest” factors. It is likely the abuser will be found to be “more cooperative” than a battered parent who fears for the safety of herself and her children and is more afraid of contact with the other parent. In fact, the Supreme Court of Ohio’s Court Guide on Domestic Violence & The Allocation of Parental Rights and Responsibilities cautions against giving undue weight to parental cooperation in cases involving domestic violence because concerns for a child’s safety or the impact of trauma on a child may inhibit a parent’s ability to facilitate parenting time or encourage love and affection for the other parent.¹⁵ Under HB 508, if the presumption of shared parenting is rebutted, the abused parent may be punished by losing legal custody to the abuser. Such an outcome is unfair and inconsistent with the best interests of the children.

Furthermore, HB 508 is less protective of domestic violence victims than the Kentucky and Arkansas statutes touted by the proponents of HB 508. Under the Kentucky statute, and there is no presumption of joint custody if a domestic violence protection order has been issued against the abusive parent because of domestic violence against the other parent. Also, unlike HB 508, the Arkansas statute provides that if a parent proves by a preponderance of the evidence that the other parent “committed an act of domestic violence” against the abused parent, the presumption of joint custody does not apply. A.C.A. 9-13-101. In fact, Arkansas law applies the opposite presumption – a rebuttable presumption that it is not in the best interest of the child to be placed in joint custody – where there is proof by a preponderance of the evidence that the parent has engaged in a pattern of domestic abuse. *Ibid.* HB 508 does not provide those protections.

In conclusion, ACTION OHIO opposes HB 508 because it prevents judges from exercising their discretion to issue a custody order tailored to the best interests of the children and threatens the safety and welfare of domestic violence survivors and their children. If the legislature wants to further explore the expansion of shared parenting or equal custody, we recommend the legislature establish a task force or commission to study the impact of such laws and make legislative recommendations, as was done in the state of Washington.

¹ Ollendick, White & White, *THE OXFORD HANDBOOK OF CLINICAL AND CHILD AND ADOLESCENT PSYCHOLOGY*, 499 (2018)

² See generally, Jaffe, Zerwer & Poisson, *ACCESS DENIED: THE BARRIERS OF VIOLENCE & POVERTY FOR ABUSED WOMEN AND THEIR CHILDREN 1* (citing four studies); Janet Johnston et al., *Allegations and Substantiations of Abuse in Custody-Disputing Families* 43, *Fam CT. REV.* 283, 288 (2005).

³ Anne-Rigt-Poortman, *Postdivorce Parent-Child Contact and Child Well-Being: The Importance of Pre-Divorce Parental Involvement*, 80 *JOURNAL OF FAMILY AND MARRIAGE* 671-683 (2018).

⁴ Anja Steinbach, *Children's and Parents' Well-Being in Joint Physical Custody: A Literature Review*, *FAMILY PROCESS*, 2018, at 8.

⁵ The Health Path Foundation of Ohio, (2017), *Impact of Domestic Violence Exposure: Recommendations to Better Serve Ohio's Children*, Cincinnati, Ohio. Available from <http://www.healthpathohio.org/dvimpact>.

⁶ E.g., Kitzmann, Gaylord, Holt & Kenny, *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 *JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY* 339-352 (x); <https://acestoohigh.com/got-your-ace-score/>.

⁷ VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2022, Section 1602. Findings. (signed into law by President Biden on March 16, 2022); see, also, Jeffrey E. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 *VIOLENCE AGAINST WOMEN* 134 (1998) (studies show that children are direct victims of violence in 30 to 60% of cases where a male partner is violent toward a his spouse).

⁸ Peter G. Jaffe et al., *Parenting Arrangements After Domestic Violence*, *J. OF THE CENTER FOR FAMILIES, CHILDREN AND THE COURTS* 81,82 (2005) (internal citations omitted). See also K.M. Kitzmann et al., *Child Witnesses to Domestic Violence: A Meta-Analytic Review*, 71 *JOURNAL OF CONSULTING AND CLINICAL PSYCHOLOGY* 339 (2003); D.A. Wolfe, *The Effects of Children's Exposure to Domestic Violence: A Meta-Analysis and Critique*, *CLINICAL CHILD & FAMILY PSYCHOLOGY REVIEW* 171 (2003); American Psychological Association, *VIOLENCE AND THE FAMILY, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY* 40 (1996); Michelle L. Toews & Autumn M. Bermea, *"I Was Naïve in Thinking "I Divorced this Man; he is Out of My Life" ": A Qualitative analysis of Post-Separation Power and Control Tactics Experienced by Women*, *J. OF INTERPERSONAL VIOLENCE* 1, 18 (2015); and Shalansky et al., *Abused Women and Child Custody: The Ongoing Exposure to Abusive Ex-Partners*, 29 *J. OF ADVANCED NURSING* 416, 417 (1999).

⁹ Brittany E. Hayes, PhD., *Indirect Abuse Involving Children During the Separation Process*, *J. OF INTERPERSONAL VIOLENCE* 4 (2015). See also Daniel G. Saunders & Karen Oehme, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns*, *CHILD CUSTODY AND VISITATION DECISIONS IN DOMESTIC VIOLENCE CASES* 4 (2007); ABA Child Custody and Adoption Pro Bono Project, *A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES* 87 (2nd ed. 2008) *Custody and Visitation Decisions in Domestic Violence Cases* 4 (2007).

¹⁰ Zeoli et al, *Post-Separation Abuse of Women and Their Children: Boundary Setting and Family Court Utilization Among Victimized Mothers*, *J. FAM. VIOLENCE* 547 (2013), Brittany E. Hayes, PhD., *Indirect Abuse Involving children During the Separation Process*, *J. OF INTERPERSONAL VIOLENCE* 4 (2015). See also Daniel G. Saunders & Karen Oehme, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns*, *CHILD CUSTODY AND VISITATION DECISIONS IN DOMESTIC VIOLENCE CASES* 4 (2007); ABA Child Custody and Adoption Pro Bono Project, *A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES* 87 (2nd ed. 2008).

¹¹ National Council of Juvenile and Family Court Judges, *Model Code on Domestic and Family Violence*, Sec. 405 Commentary, in *A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES* (2nd Ed. 2008); see also ABA Child Custody and Adoption Pro Bono Project, *A JUDGE'S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES* 87 (2nd ed. 2008). *Custody and Visitation Decisions in Domestic Violence Cases* 4 (2007).

¹² Peter J. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 *FAM. CT. REVIEW* 500, 515 (2008).

¹³ Peter G. Jaffe et al., *Parenting After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, 8 *J. CTR. FAM. CHILDREN & COURTS* 81, 82 (2005)

¹⁴ Peter G. Jaffe et al., *Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, 515 (2008).

¹⁵ The Supreme Court of Ohio, *Domestic Violence & Allocation of Parental Rights and Responsibilities: Court Guide* 5, 6 (May 2016), available from <https://www.supremecourt.ohio.gov/JCS/domesticViolence/publications/DVAllocationParentalRights.pdf>.