PROPONENT TESTIMONY - HB14

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FAMILIES AND AGING COMMITTEE

OHIO HOUSE OF REPRESENTATIVES, 135TH GENERAL ASSEMBLY

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Chairwoman Schmidt, Vice Chair Miller, Ranking Member Humphrey and members of the House Families and Aging Committee, thank you for the opportunity to provide proponent testimony on HB14.

My name is Elizabeth McNeese. I'm a very proud mother of three children, two of whom are now grown and off to college. I have three beautiful step-children. I'm also mother to a child with developmental disabilities and a successful 50/50 parenting arrangement. And finally, I'm an advocate and co-author for House Bill 14.

It's been very encouraging to see this committee so engaged. Last GA there wasn't nearly the same level of engagement. Your questions have been thoughtful and thorough so far - thank you for listening and really digging into the bill. I hope that you'll keep asking the hard questions.

First, there are <u>two</u> separate issues at play when discussing parental rights and responsibilities: Custody (decision-making) and Parenting Time.

Current Law on "Custody"

Current law technically allows for two possible outcomes in the assignment of Custody: Shared Parenting or Sole Custody. Our current custody laws effectively sets Sole Custody as the *presumed outcome*, unless one of the parents takes affirmative steps to request and demonstrate otherwise to the court. **So, there is a presumption already in the law: it's sole custody.** That means in divorce, two parents walk into court with custody but only one parent will walk out of court with custody. In order to get shared parenting, parents must jump through hoops and hope the court agrees.[1]

[1] O.R.C. 3109.04(A)(1) "*If neither parent files a pleading or motion in accordance with division (G) of this section, if at least one parent files a pleading or motion under that division but no parent who filed a pleading or motion under that division also files a plan for shared parenting, or if at least one parent files both a pleading or motion and a shared parenting plan under that division but no plan for shared parenting is in the best interest of the children, the court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child..*"; O.R.C. 3109.04(A)(2) *"If at least one parent files a pleading or motion in accordance with division (G) of this section and a plan for shared parenting pursuant to that division and if a plan for shared parenting is in the best interest of the children and is approved by the court in accordance with division (D)(1) of this section, the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children in accordance with the approved plan for shared parenting."*

Please also note that “Shared Parenting” in the O.R.C. is not defined as “equal.”[2] In fact, it’s very common for “Shared Parenting Orders” to specify that one parent has final decision making authority over the other parent. So basically, “shared parenting” under current law doesn’t really mean much of anything.

Current Law on “Parenting Time”

There is little to no guidance for courts on how to handle parenting time. The O.R.C. is mostly silent with the exception of a vague statement of “frequent and continued contact” for a non-custodial parent.[3]

Courts are required by statute to have their own standard parenting time order,[4] and some counties even explicitly state in their local rules that “it is rebuttably presumed” that the local rule “is in the best interest of children.” And that their local rule “will be applied in *all* cases unless otherwise ordered” and “shall be used in *all* contested visitation cases.” So when judges and attorneys claim that the local rules are rarely used, the facts show otherwise.

Furthermore, how is *equal* time “rebuttably presumed to be in the best interest of children” in one county,[5] but in another county 4 days per month is also “in the best interest of children?”[6]

How HB14 will change things

HB14 makes custody law much more straightforward and fair. Parents are first encouraged to work together, and only if parents cannot come to an agreement will the equal presumptions come into play.

We also build upon the long-standing “best interest of the child” standard - we do not eliminate it or replace it as some opponents claim.

Specifically, HB14 takes the currently *undefined* and subjective "best interest" standard and provides a baseline for courts to start with, guided by real data and research about the well-being of children–*not* just opinions or anecdotes.

HB14 establishes a clear policy about what *is* in the best interest of children. But, if it’s found that an equal arrangement would be detrimental to the child, the court must use their discretion to create an alternate arrangement, using largely the *same* factors they are already using in current law, to determine what is in the best interest of the child… again, *refining* the “best interest” standard, not replacing it.

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[2] O.R.C. 3109.04(K) *“As used in the Revised Code, "shared parenting" means that the parents share, in the manner set forth in the plan for shared parenting that is approved by the court under division (D)(1) and described in division (L)(6) of this section, all or some of the aspects of physical and legal care of their children.”*

[3] O.R.C. 31093.04; O.R.C. 3109.051

[4] O.R.C. 3109.051(F)(2)

[5] Ashtabula County, Court of Common Pleas, Local Rule 19: “*The following standard parenting guidelines will be applied in all cases unless otherwise ordered: 1. Presumptions: a. Shared parenting is in the best interests of the child(ren); b. Equal division of the available parenting time is in the best interests of the children*.”

[6] Hocking County, Court of Common Pleas, Local Rule 28: *“There is hereby established and adopted as court rule Exhibit “A” and Exhibit “B”, a companionship schedule for visitation, which shall be used in all contested visitation cases. The schedule shall be rebuttably presumed to be fair and in the best interests of the children involved.” Exhibit “A”: “This Will Not Be Normally Less Than: Weekends: Alternate weekends from Friday at 6:00 P.M. until Sunday at 6:00 P.M*.”

Accountability for Courts and Family Law Practitioners

The bill also creates accountability for courts and attorneys, which is a likely reason the Ohio Judicial Conference and Bar Association isn't inclined to support it.

- *"The courts will generally expend more time and effort to administer such cases"*[7] - it's important to note KY has seen a decline in contested cases, but courts do have to pay closer attention to the facts of the case
- By creating a "starting point" for the courts, we've installed guardrails and require their discretion to originate from a position of equality.
- The bill will require courts to track the outcomes of these cases, which they do not currently do and have resisted proposals to do so.
- It will also require courts to "show their work" by including Findings & Facts with their decisions, giving parents a fair shot in appeal should the court get it wrong.
- Courts will not be able to rubber stamp a GAL's recommendation, and must actually review the facts in the case in addition to a GAL's recommendation
- And by raising the evidentiary standard, they will need to actually weigh the evidence
- Unfounded and frivolous motions will be kept in check

The Evidentiary Standards

One of the most discussed aspects of this bill is the evidentiary standard. HB14 replaces the preponderance of the evidence standard currently used with a clear and convincing standard.

Why are we doing that? There are many reasons.

- Law abiding parents have **fewer** protections and rights in family courts than criminals do in Criminal Courts, there is no such thing as "innocent until proven guilty," and no "right to an attorney" in family courts.
- Parents do have a Constitutional fundamental right to the care and custody of their children. The U.S. Supreme Court has reinforced that time and again.[8]
- Fundamental rights require appropriate due process and strict scrutiny before they are infringed upon.[9]
- The U.S. Supreme Court has held that because parents' interest in retaining custody of their children is fundamental, the state may not terminate parental rights by a preponderance of the evidence—the burden of proof to award money damages in an ordinary civil action—but must prove that parents are unfit by clear and convincing evidence.[10]

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[7]Ohio Legislative Service Commission, Fiscal Note & Local Impact Statement, HB508, p1 (2022)
[8] See, e.g., *Wisconsin v. Yoder*, 406 U. S. 205, 406 U. S. 231-233 (1972); *Stanley v. Illinois*, supra; *Meyer v. Nebraska*, 262 U. S. 390, 262 U. S. 399-401 (1923).*Troxel v. Granville* 530 U.S. 57 (2000)
[9]The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," *Washington v. Glucksberg*, 521 U. S. 702, 720, including parents' fundamental right to make decisions concerning the care, custody, and control of their children, see, e. g., *Stanley v. Illinois*, 405 U. S. 645, 651. Pp.63-66.,*Troxel v. Granville* 530 U.S. 57 (2000), *Schneiderman v. United States*, 320 U. S. 118, 125 (1943).
[10]See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982), *Rivera v. Minnich*, 483 U.S. 574 (1987)

- Courts cannot assume a parent to be unfit and "unfitness" must be established affirmatively.[11]
- Clear and Convincing is the appropriate standard to uphold due process. Anything ***less*** than that allows for unfounded allegations to restrict or terminate a parent-child relationship.
- It is not an "insurmountable" burden. In fact, Ohio already uses C&C in custody law and various other Civil Court proceedings.
- Most all states use C&C in juvenile court cases when the state is terminating a parent's rights– *even Ohio*.[12] What's wrong with this same standard being applied during divorce and separation?
- Interestingly, Ohio also uses this standard to protect the parental rights of marijuana card holders. The state must show "*by clear and convincing evidence that a child is unsafe*"[13] before the state can use it against the parent in custody.
- And Ohio parents already must have C&C evidence to convince the court that the other parent is in contempt of court- and violating the existing court order.[14]
- Other states and territories that apply a C&C standard in custody disputes: Arkansas, Iowa, Louisiana, Washington D.C. Additionally, preliminary data from Arkansas, which has an explicit equal presumption with C&C, has seen a decrease in DV cases and overall caseload.[15]

State legislatures have the authority to establish legal presumptions and rules respecting the burden of proof in litigation[16] and shouldn't be afraid to do so. My hope is that you will agree that the current standard of preponderance is not working for Ohio's families nor ensuring adequate due process, and is in fact sidelining otherwise fit and loving parents.

To conclude, perhaps the largest practical effect of HB14, if passed, would be to encourage collaboration instead of conflict, to level the playing field and remove the legal hurdles preventing good parents from being involved, and to require Ohio courts to promulgate new standards that equally divides responsibilities and time with the children between the parents.

Thank you for considering House Bill 14 and I hope you will support this bill. I'm more than happy to address any further questions or concerns you have.

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[11] See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972)

[12] O.R.C. 2151.415(C)(1), *"A court shall not place a child in a planned permanent living arrangement, unless it finds, by clear and convincing evidence, that a planned permanent living arrangement is in the best interest of the child…*"; O.R.C. 2151.415(D)(1), *"The court may extend the temporary custody order of the child for a period of up to six months, if it determines at the hearing, by clear and convincing evidence, that the extension is in the best interest of the child…"*

[13] O.R.C. 3796.24(B) *"Unless there is clear and convincing evidence that a child is unsafe, the use, possession, or administration of medical marijuana in accordance with this chapter shall not be the sole or primary basis for any of the following: (1) An adjudication under section 2151.28 of the Revised Code determining that a child is an abused, neglected, or dependent child; (2) An allocation of parental rights and responsibilities under section 3109.04 of the Revised Code; (3) A parenting time order under section 3109.051 or 3109.12 of the Revised Code.*

[14] See, e.g., *Patino v. Foust,* 8th Dist. No. 90475, 2008-Ohio-6280

[15] State of Arkansas, Domestic Relations Cases by Type and Filing Year, 2018 – 2022

[16] See *Hawkins v. Bleakly*, 243 U.S. 210, 214 (1917); *James-Dickinson Co. v. Harry*, 273 U.S. 119, 124 (1927). Congress's power to provide rules of evidence and standards of proof in the federal courts stems from its power to create such courts. Vance v. Terrazas, 444 U.S. 252, 264–67 (1980); *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 31 (1976). In the absence of congressional guidance, the Court has determined the evidentiary standard in certain statutory actions. *Nishikawa v. Dulles*, 356 U.S. 129 (1958); *Woodby v. INS*, 385 U.S. 276 (1966).