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OPPONENT TESTIMONY - SB174
TESTIMONY OF DONALD C. HUBIN, Ph.D.
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JUDICIARY COMMITTEE
OHIO SENATE, 1365TH GENERAL ASSEMBLY

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Chairperson Manning, Vice Chair Reynolds, Ranking Member Hicks-Hudson and members of the Senate Judiciary Committee, thank you for the opportunity to provide opponent testimony on SB174.

My name is Don Hubin, I'm an Emeritus Professor of Philosophy at the Ohio State University and the Founding Director Emeritus of the OSU Center for Ethics and Human Values. I'm also the Chair of the National Board of National Parents Organization. NPO is the nation's largest and most effective shared parenting organization, with chapters in 36 states. We work to promote children's best interest by strengthening the bonds between children and their fit and loving parents when those parents live apart.

According to proponents of SB174, the bill seeks to enact into law the recommendations of the 2001 Ohio Task Force on Family Law and Children, a body to which I was invited to testify these many years ago, and the 2005 recommendations of the Supreme Court of Ohio's Advisory Committee on Children, Families & the Courts. Proponents point to the objective of reducing the adversarial nature of decisions about parental responsibilities and encouraging parents to share in the responsibilities of raising their children and courts to maximize the time the children have with each parent.

These are fine objectives; NPO fully endorses the *goals* of SB174. But we believe that the methods SB174 seeks to employ to achieve these goals are inadequate and, in some cases, counterproductive.

The (Sort of) Good

While I will focus on the problems with SB174, I would be remiss if I didn't note some of the positive changes it proposes. First, the rhetoric about maximizing the child's time with each parent and sharing in parental responsibilities is welcome. But, of course, rhetoric alone won't change the ingrained practices of many Ohio courts. And what SB174 actually says about

maximizing time is that parenting plans “shall seek to ... maximize parenting time with each parent when it is in the best interest of the child” (§3109.044). This will result in a substantive change in family court decisions *only if* currently Ohio courts are not maximizing parenting time with each parent *even when doing so would be in the best interest of the child*. Is it the position of the proponents of SB174 that courts are declining to maximize parenting time with each parent when doing so is in children’s best interest?

One good substantive change that SB174 proposes is adding to the factors for determining child well-being “[w]hether a parent or legal custodian intentionally misled the court to cause an unnecessary delay, increase the cost of litigation, or induce the court to give preference to that parent or legal custodian regarding decision-making powers or parenting time or companionship or visitation” (§3109.0430(A)(24).

Another issue concerns mechanisms for handling interference with court ordered parenting time. In current law, the only remedy for this is a contempt of court action which is expensive, time consuming, and often results in nothing more than a scolding from the bench. Finally, 20 years after the family law reform reports mentioned and decades of parents urging the legislature and courts to address this problem, the Ohio Judicial Conference and the Ohio State Bar Association have proposed a new tool for handling parenting time interference.

SB174 provides for an expedited hearing of complaints of interference with parenting time and permits the court to impose a number of sanctions if it finds that there was unjustified interference. But what SB174 does not do is follow Minnesota’s lead to make some of these remedies—such as compensating parenting time and the payment of court fees—presumptive. Instead, the court is merely empowered to employ these remedies *if it so chooses*. And SB174 does not make this process easy for parents acting *pro se* to initiate, as Missouri does with its Family Access Motions (RSMo §452.400). This provides a barrier to the employment of this tool in the form of a cost to the families and, as a result, decreases its effectiveness.

The proponents note that SB174 clarifies that “the court is not to draw any presumption based on temporary orders in allocating parenting responsibilities or approving a parenting plan.” But this is not a substantive change in Ohio law. Under current law, temporary orders do not establish a presumption concerning final orders. In effect, the change proposed by SB174 just say, “no, really, we mean it: temporary orders don’t create a presumption for final orders.” Is it the position of the advocates of SB174 that Ohio courts are currently treating temporary orders as establishing a presumption for final orders?

What temporary orders do create is a *de facto status quo* that can be difficult for a parent who wants to care for the child more than is provided under temporary orders to overcome if the other parent objects to the change. In oral testimony Judge Fuller claimed that “Senate bill 174 says that you can't have anchor bias or you can't have the temporary orders dictate or affect what your ultimate outcome in the case is.” It would be terrific if it were this easy to

overcome anchor bias (and also *status quo* bias). It is not! You cannot legislate human psychology. We are all subject to anchor bias and *status quo* bias. A parent who is marginalized in temporary orders and wants equal parenting time is asking the court to take a bet in final orders on a parenting arrangement that it hasn't seen working. And if the other parent objects to equal parenting time, that parent has every incentive to make it appear to the court that equally shared parenting time can't work.

But there is also a substantive change regarding temporary orders. SB174 would permit a parent who was subjected to temporary orders without an oral hearing to request such a hearing and it would require the court to conduct that hearing, ordinarily within 28 days (§3109.0423) and it permits a court to issue new temporary orders "necessary to protect the relationship between parent or legal custodian and child" (§3109.0493). But, again, the language is permissive, simply restating a power that Ohio courts already have.

The Bad (But Not the Worst)

Despite lovely rhetoric about diminishing parental conflict and keeping both parents in children's lives, SB174 actually does very little to ensure that these goals will be achieved.

Substituting 'designated parent' for 'residential parent' and 'custodial parent' is a cosmetic change. Some courts may choose to designate both parents for some responsibilities and/or to divide responsibilities, designating one parent for some and the other parent for others. But there is absolutely nothing in SB174 that requires this or even makes it presumptive. Courts are free to designate one parent for all significant responsibilities. And, when parents (or their attorneys) realize what turns on a specific designation—perhaps to make medical, educational, or religious decisions about their children—they will fight as hard over who is the "designated parent" for a given function as they currently do over who is a custodial or residential parent.

In short, SB174 engages in a rhetorical sleight of hand when what is needed is a substantive change. Kentucky saw contested divorce cases drop after it enacted a rebuttable presumption of equal shared parenting. The same thing happened in the regions of Spain that adopted such presumptions. The evidence is clear: if you want to reduce parental conflict and the violence that sometimes (unfortunately) arises out of it, you need to reassure both parents that they will remain equally involved in raising their children unless there is some good reason for that not to happen. This is not what SB174 does.

The (So Bad It's) Ugly

SB174 strikes from the Ohio Revised Code over 150 instances of the term 'parental rights'. Proponents testify that "[t]his change more accurately reflects that children should be treated as persons, not property (or assets) to be divided when the parents are no longer together." And in oral testimony proponents have said, "[t]his is done to again show we're focusing on the

child and what is in the best interest of the child and not to make it sound like we're dividing property or assets.”

As someone who has taught philosophy of law and political philosophy to undergraduate and graduate students for over 40 years, I find these attempts at justification appalling! Rights do not concern merely property. We have rights protecting our freedom of speech, religion, association, etc. And as someone who has published several articles on parental rights, I can assure you that practically no one since the 18th Century has believed that parental rights are property rights. (And most 18th Century people didn't believe this, either!)

Parental rights protect parents from undue interference from the state in how they raise their children. Of course the government has the right, and the responsibility, to protect children from harm, even from their parents. But absent a showing of harm to the children, the state has a limited role in mandating how children are raised.

This is not a radical idea. We have over 100 years of U.S. Supreme Court decisions, often written with great eloquence, asserting clearly not only that parents have rights to raise their children as they see fit, absent a showing of harm, but that these rights are fundamental constitutional rights, meaning that the state can infringe on them only to achieve a “compelling state interest” and when there is no less constitutionally-offensive way to achieve that interest.

One might protest that this, like much else in SB174, is just a rhetorical move—that the bill is not denying parental rights, just choosing not to highlight them. But this defense is belied by several facts.

First, there is no requirement that a court must find potential harm to a child before choosing to name the other parent as the sole “designated parent” for a responsibility. One must be clear about this. The naming one parent as the sole designated parent for a parental responsibility *is not granting anything to either parent. It is depriving the other parent of a right that parent had until the court made that decision.* At least in cases of divorce, *both parents* had all of the parental rights in question; in “SB174 speak”, both parents were “designated parents for *all* parental functions”. The court's action of picking a designated parent is not the creation of a right and responsibility for that parent; it is the termination of that right and responsibility for the other parent.

The typical justification for courts depriving a parent of certain parental rights in divorce is that there is a dispute between two parents, both of whom have these rights. The court has to step in and resolve that conflict. Even in that case, though, because parental rights are fundamental constitutional rights, the state should be required to show that it is necessary to deprive one parent of a right in order to protect the children from harm.

But SB174 goes way beyond this. It specifically says that, *even if the parents file a joint parenting plan*, the court can substitute its judgment about what's in children's best interest for that of the parents who are in agreement, without a finding that the parents plan would be harmful to the children (§3109.046). The court is allowed, but not required, to ask the parents to revise their plan. Or, if the court wishes, it can decline to ask for such revisions and simply order its own parenting plan. Would courts do this? Probably not often. But SB174 empower them to if they wish.

Conclusion

SB174 offers rhetorical improvements but little substantive change—at least, little substantial change in the right direction.

Under this bill, Ohio courts are not required to change their local rules to promote the sharing of parental responsibilities and parenting time. Sponsors express *hope* that they will. But this hope is a thin gruel when 45 of Ohio's family courts still have local parenting time rules—rules they presumably put in place because they believed these were in children's best interest—that allow the children only every other weekend and a few hours a weekday evening with one of their parents. Are we to believe that these courts will suddenly be moved *by the power of the positive rhetoric in SB174* to modernize their rules in light of the more than four decades of social science research showing that children do best when separated parents share parenting responsibilities in a substantially equal way?

Given the relative paucity of actually substantive legal changes in SB174, there's reason, too, to be skeptical about the motives of proponent organizations in putting it forward now. As these proponents point out, the recommendations on which they base their bill were made 20 years ago, or more. If promoting the significant involvement of both parents in raising their children when living apart were a priority for the Ohio Judicial Council or the Ohio State Bar Association, steps could, and should, have been taken years ago.

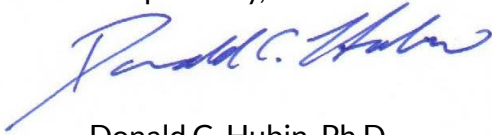
There's another possible motivation for a bill like this—a bill written by, and seemingly for, divorce professionals—being introduced at this time. The movement for presumptions of equal shared parenting is gaining steam. Arizona (2012), Kentucky (2017 & 2018), Arkansas (2021), West Virginia (2022), and Missouri and Florida (2023) have all enacted such presumptions. In recent years, equal shared parenting bills have been introduced in dozens of states, including, of course, Ohio. Some states that failed to pass such bills have come very close to passing them, sometimes missing by a single vote.

Those states that have enacted presumptions of equal shared parenting and for which we have data, have seen a reduction in contested divorce proceedings, in intimate partner violence, and in child maltreatment.

Instead of embracing a true modernization of Ohio's family laws, SB174 appears to be designed to head off serious reform by making very small positive steps wrapped in flowery language. Instead of a tested approach to improving the lives of children of separated parents, SB174 proposes an untested approach that shows little promise of actually improving Ohio family law.

Chairperson Manning and members of the committee, thank you again for allowing me to provide testimony in opposition to SB174.

Respectfully,

A handwritten signature in blue ink that reads "Donald C. Hubin". The signature is written in a cursive style with a long, sweeping underline.

Donald C. Hubin, Ph.D.