

**OPPONENT TESTIMONY ON HB 14 BY MICHAEL SMALZ
ON BEHALF OF THE ACTION OHIO COALITION FOR BATTERED WOMEN AND OHIO NOW
HOUSE FAMILIES AND AGING COMMITTEE, MARCH 21, 2023**

CHAIRWOMAN SCHMIDT, VICE CHAIR MILLER, RANKING MEMBER DENSON AND COMMITTEE MEMBERS:

My name is Michael Smalz. I am testifying in opposition to HB 14 on behalf of the ACTION OHIO Coalition for Battered Women and Ohio NOW. I am a Board member with ACTION OHIO and Ohio NOW, and I am a retired lawyer, having previously worked as an attorney with the Ohio Poverty Law Center and as a legal aid attorney.¹ We oppose HB 14 because it undermines the focus on the best interests of the children and fails to adequately protect the safety of abused children and parents by replacing the “best interest of the child” test with statutory presumptions of shared parenting and 50-50 parenting time.

Most child custody cases are settled. HB 14 primarily targets contested child custody cases. The majority of litigated cases involve reports or allegations of domestic violence.² In Ohio, 25% of all children are exposed to domestic violence before they turn 18 years of age.³ Children who witness domestic violence have significantly worse social, psychological, and academic outcomes than children in nonviolent homes.⁴ Moreover, there is a high correlation between adult partner domestic violence and child abuse, and children who witness intimate partner violence are approximately four times more likely to experience direct child abuse than children who have not witnessed intimate partner violence.⁵

Presumptions of shared parenting and 50-50 parenting time are especially harmful in cases involving a history of domestic violence and a risk of further abuse. Research clearly shows that “physical abuse, stalking, and harassment continue at significant rates post-separation and may even become worse.”⁶ Abusers deploy children as pawns, continuing to abuse their victims through their shared children.⁷ Children are not only likely to be exposed to violence between the abuser and the mother post-separation, but there is a higher risk of domestic violence directed toward both the child and the abused parent.⁸

Presumptions of shared parenting or equal parenting time shift the focus from the individual child’s needs and interests to the conflicting rights and desires of the parents.⁹ HB 14 is more extreme than the Kentucky, Arkansas, and West Virginia presumptive joint custody laws. Unlike Kentucky and West Virginia, HB 14 requires proof by the unusual and often insurmountable standard of “clear and convincing evidence” to rebut the presumptions of shared parenting and 50-50 parenting time. The rebuttable presumptions in HB 14 are also unusual because, instead of applying the “best interest of the child” test, HB 14 requires proof that shared parenting time and equal parenting time are “detrimental to the child.” The “detrimental to the child”

standard is a more stringent test required by the Ohio Supreme Court¹⁰ to determine whether custody should be awarded to a non-parent in custody cases between a parent and a nonparent.

Unlike any other state, if the presumptions of shared parenting and equal parenting time are rebutted under HB 14, 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 and parenting time. It is likely that the abuser will be found to be “more cooperative” with the other parent because the abused parent fears for her and her child’s safety. In fact, the Ohio Supreme Court’s Court Guide on Domestic Violence & The Allocation of Parental Rights and Responsibilities cautions against giving undue weight to parental cooperation in custody 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.¹¹ Under HB 14, if the presumptions are rebutted because of domestic violence, the abused parent may then be punished by losing custody to the abuser. Such an outcome is unfair, illogical, and inconsistent with the best interests of the children.

Furthermore, HB 14 is less protective of domestic violence victims than the Kentucky, Arkansas, and West Virginia statutes. In Kentucky, there is no presumption of joint custody if a domestic violence protection order has been issued against the abusive parent. Arkansas has 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.¹² And in West Virginia, if a parent is found to have engaged in domestic violence or child abuse, the court may not allocate legal or physical custody to that parent without making special written findings that the child and other parent can be adequately protected from harm by such limits as it may impose, and the abusive parent has the burden of proving that allocating custody to that parent will not endanger the child or the other parent.¹³ HB 14 does not provide any of these protections.

There have also been two significant recent developments. First, In March 2022, Congress passed and President Biden signed the Violence Against Women Act Reauthorization, which incorporated Kayden’s Law.¹⁴ (Kayden was a 7-year-old child who was brutally murdered by her father after he was granted unsupervised parenting time by a Pennsylvania family court.) Kayden’s Law provides financial incentives to states that change their child custody laws by prioritizing child safety, mandating judicial education on domestic violence and child abuse, and limiting expert testimony regarding domestic violence and child abuse to professionals with demonstrated expertise and clinical experience. Two Congressional findings in Kayden’s Law are especially noteworthy: (1) empirical research demonstrates that abusive parents are often granted custody or unprotected parenting time, placing the children at ongoing risk; and (2) researchers have documented nearly 800 children murdered by a divorcing or separating parent since 2008, with more than 100 of those murders known to have occurred after a court

ordered the child into contact with the dangerous parent over the objection of a safe parent or caregiver.¹⁵ Contrary to Kayden’s Law, HB 14 would increase the likelihood that abusive parents will be awarded shared parenting and equal parenting time.

More recently, in December 2022, the National Council of Juvenile and Family Court Judges approved a revised Chapter Four of the Model Code on Family and Domestic Violence.¹⁶ They found that many children and survivor parents continue to face abuse, harassment, threats, or danger because of unsafe and unworkable court-ordered parenting arrangements. Chapter Four addresses the intersection of child custody/parenting time cases and domestic abuse. It recommends various statutory changes designed to make it either less likely that courts will award joint custody to parents who are abusers or ensure that that necessary restrictions and services are in place when joint custody is awarded to an abusive parent. The Model Code provisions, unlike HB 14, prioritize child safety.

In conclusion, we oppose HB 14 because it prevents judges from issuing a custody order tailored to the best interests of the children and threatens the safety and welfare of domestic violence survivors and their children. In addition, we recommend that the legislature consider the statutory recommendations in Kayden’s law and the Model Code on Family and Domestic Violence.

¹Michael Smalz has also served as a member of the Ohio Supreme Court’s Advisory Committee on Domestic Violence and its Advisory Committee on Children and Families. He was awarded the Ohio Domestic Violence Network’s Croucher Family Advocacy Award in 2014, and awarded the American Bar Association’s 20-20 Vision Award in 2015, for his leadership and advocacy on domestic violence.

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 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>.

⁴ 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/>.

⁵ 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).

⁶ 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).

⁷ 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).

⁸ 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); 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); 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); 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).

⁹ Mildred 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).

¹⁰ *In re Perales*, 52 Ohio St.2d 89 (1977).

¹¹ The Supreme Court of Ohio, *Domestic Violence & Allocation of Parental Rights and Responsibilities: Court Guide* 5, 6 (May 2016), available at

<https://www.supremecourt.ohio.gov/JCS/domesticViolence/publications/DVAllocationParentalRights.pdf>.

¹² A.C.A. 9-13-101.

¹³ WV Code 48-9-209(c)

¹⁴ Public Law No. 117-103, 136 Stat. 951-962; <https://www.congress.gov/bill/117th-congress/senate-bill/3623>

¹⁵ *Id.* At 903-904.

¹⁶ <https://www.ncjfcj.org/publications/revise-chapter-four-families-and-children-model-code-on-domestic-and-family-violence/>