HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON FAMILY LAW

TESTIMONY ON H.B. 1397 "EQUALITY IN PARENTING TIME"

HONORABLE KIM D. EATON
HONORABLE DANIEL J. CLIFFORD

December 9, 2019

Thank you for the opportunity to appear before the Committee today to discuss House Bill 1397.

By way of introduction, I am Judge Dan Clifford from Montgomery County. I was elected to the Bench in 2015 following over 30 years as a family lawyer practicing in 12 counties in Pennsylvania. In 2013-2014, I served as Chair of the Family Law Section of the Pennsylvania Bar Association. One of our initiatives commenced that year was to work collaboratively with this Committee on legislation that began as House Bill 380, introduced by Representative Tarah Toohil, which was approved by the House Judiciary Committee by a vote of 26-1 and ultimately signed into law by Governor Wolf as Act 102 in October 2016. I also serve on the Supreme Court Domestic Relations Procedural Rules Committee, currently Vice Chair *via* appointment by the Supreme Court. I also serve on the Joint State Government Commission Domestic Relations Advisory Committee.

My colleague, Judge Eaton, was elected to the Bench in Allegheny County in 1999 following 18 years of practicing family law. She has served as Supervising Judge of Family Court and has been the Administrative Judge, *via* appointment by the Supreme Court, since January 2018. Judge Eaton also serves on the Supreme Court Domestic Relations Procedural Rules Committee, the Joint State Government Commission Domestic Relations Advisory Committee and the Supreme Court Juvenile Procedural Rules Committee.

Our prepared remarks today are made in connection with our unique familiarity on the subject matter, about which we have acquired significant knowledge and expertise through the course of our nearly 75 years of combined family court experience.

The opinions expressed in the prepared remarks, and in response to any of your questions, are our own and do not reflect the views of the Supreme Court, the Court of Common Pleas of Montgomery and Allegheny County, the Supreme Court Rules Committee or the Administrative Office of Pennsylvania Courts.

We appear at the request of Judge Joseph Adams, York County, who is Chair of the Family Court Section of the Pennsylvania Conference of State Trial Judges and who is unable to be here this morning. Our Section meets twice a year and consists of approximately 85 Judges that have assigned family court responsibilities in our 67 Counties.

The contents of House Bill 1397 was discussed at our most recent meeting, in July 2019, and our remarks to you today are consistent with the opinions that were expressed from Judges across Pennsylvania who were present at that meeting.

We share the concerns that have been expressed by the Pennsylvania Bar Association, the Academy of Matrimonial Lawyers and the Joint State Government Commission, that there should not be a presumption of 50/50, equal parenting time, in every child custody matter.

To require these initial proceedings in every custody case would essentially mandate a full blown custody trial, because of the clear and convincing burden, as soon as the parties walk in the Courthouse door. Even now, most jurisdictions struggle with the current 180 day time requirement for a final custody hearing. In addition, the type of evidence necessary to meet the clear and convincing mandate may require more time to accurately develop, especially for self-represented litigants, leaving children with no Order or with an early Order which may not be in their best interests, but would likely continue for some time while the parties await the final custody trial date.

As noted by prior speakers, the issue of presumptions in child custody cases has been a subject of extensive discussion throughout the years. We firmly believe that the current language in the Statute, "*there shall be no presumption that custody should be awarded to a particular parent*" is worded precisely the way it should be worded and, in practice, has served families involved in the family court system well.[1]

As any seasoned colleague on the Family Bench will tell you, "no two families are exactly alike". The "one size fits all" approach does not work for every child. Consistent movement between two households, sleeping in a different bed every two days or every other day to satisfy equality in parenting time, is not something every adult could readily adapt to; let alone every young child.

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1 "A presumption itself contributes no evidence and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption - being a legal rule or legal conclusion - is not evidence. . . In deciding a child custody case, one should avoid the use of a 'presumption', which tends to focus the analysis on the respective rights of the parties rather than on close scrutiny of all the particular facts relevant to determine what will serve the child's best interest." *In re Custody of Hernandez*, 249 Pa. Super. 274; 376 A.2d 648 (1977).

There is also the prospect that children could end up spending up to an hour or more "commuting" to school fifty percent of each week, based on the residences of the parents, just to satisfy the equality of parenting time presumption.

In addition, a relocation, possibly necessitated due to company reassignments or fluctuations of the economy (both of which are outside the control of a parent), would be nearly impossible with a 50/50 presumption in place coupled with the clear and convincing threshold.

While there may be instances, here and there, where a particular litigant may have been dissatisfied with the result in their case, we know that our Family Court colleagues approach the responsibility of determining custody thoughtfully and, by the way, thoroughly by virtue of the 16 Factors that are already set forth in the Statute.

Most of us involved in family court remember the days when a judge might issue a three line Order: "*primary to mother and every other weekend to father*", and, that was it. The Factors, instituted *via* collaboration with the Joint State Government Commission and legislation from this Committee, now require every judge, in every case, to stop, think and fully explain every aspect of their custody decision. As a result, the Factors act to protect every family against both a one or two sentence order, *and* any pre-conceived presumption that a litigant may feel exists in their individual case.

It is important to note that many of the custody cases that arrive before us do not involve an "intact family", where both parents have resided together with the children for many years and have essentially had *de facto* equal time, or at least equal access, to the child. A large percentage of our custody cases involve a parent who may not have seen the child for a considerable time period, issues of drug and alcohol abuse by one or both parents, parents who may have never lived together, let alone parented together, issues of neglect (where grandparents and other third parties have assumed care out of necessity) and, as noted by other speakers this morning, domestic violence. These cases would **not,** and should not, lend themselves to the presumption of equal parenting time.

The concerns over the imposition of a 50/50 presumption, also lead us to what we, as Judges, anticipate will be the eventual impact, if this legislation is enacted, not only on the custody docket, but the entire Family Court docket.

As proposed, the revision to Section 5322 (d) would require the Court to "delineate the reasons for its decision in an award of custody, *including an interim award* in a written opinion or order." Further, the proposed langue requires the Court to "include, with specificity, the reasons for any deviation from equal parenting time".

The insertion of the requirement "*in an interim award*", implies that there is an expectation that there would need to be an initial proceeding upon the filing of every new custody case. If so, this would require a Judge to not just make an initial determination in every custody case that is filed, but would also require that it be supported by a written opinion or order. With the language in the Statue that is already present, regarding the 16 Factors, the Court would also be required to do the 16 Factor analysis, not just at the conclusion of a custody case (after hearing all the witnesses and evidence at an evidentiary hearing) but also at the beginning of every custody case.

Attached to these Remarks is a Summary of the total number of new custody cases filed in 2018, both statewide overall, and in each individual county. The number of new case filings is staggering. Many of these cases involve an ever-growing volume of self-represented litigants which adds significant additional time management elements to the administration of cases.

It is important to remain mindful that, in addition to all of these new custody cases being filed, Judges in highly populated Counties sitting in a designated "family court division" already have an existing docket of pending custody cases in addition to other responsibilities in Family Court *via* child support, divorce, equitable distribution and protection from abuse matters. In less populated counties, in addition to existing custody cases, a Judge may have responsibilities in criminal, civil, orphans and juvenile court matters.

Systematic of family court, many custody cases involve modifications of existing custody Orders. While the presumption of equal custody time would presumably not apply to those cases, we cannot ignore the fact that these cases also represent a significant portion of our existing case load, some requiring an urgent need of our attention, and Court time, due to issues of substance abuse, neglect or domestic violence.

We also have concerns that the proposed legislation would require that the presumption of equal parenting time be rebuttable by "*clear and convincing evidence*". This requirement is a higher level of persuasion, requiring a greater degree of believability than the common standard of proof in a custody case. We believe that requiring a Court to apply this high a threshold, on a child's custodial schedule, in every child custody case is not appropriate and will run contrary to the long established criteria in a custody case for the Court to act in what is "in the best interest of a child". In essence, it will serve to elevate the Court's analysis to what is "best for a parent" as opposed to what may, in the Judge's time tested opinion, be "best for a child".

Lastly, we note that other aspects of the proposed legislation seek to provide some modifications to the 16 Factors. In fact, this is a subject that we, too, have great interest in now that we have been working within the framework of the custody Factors for many years. At the present time, the Joint State Government Commission has a Sub-Committee, consisting of Family Court Judges and lawyers, that are in the process right now of a comprehensive review of the factors in place in

all of our sister states, identifying ones that may be unique to ours, and contemplating tweaking the language of some of our current Factors; some of which can be somewhat overlapping with each other and some that could benefit from more clarity.

We would appreciate the opportunity to be able to complete our work in this regard and, in turn, welcome the ability to make recommendations and work collaboratively with this Committee on proposed changes.

Thank you for receiving our Remarks on this proposed legislation. We look forward to responding to any questions that may be prompted by what we have presented for your consideration this morning.

Respectfully submitted,

/s/Honorable Kim D. Eaton

Honorable Kim D. Eaton

/s/Honorable Daniel J. Clifford

Honorable Daniel J. Clifford

Exhibit "A"

Testimony of Judges Eaton and Clifford

New Custody Cases Filed in Pennsylvania by County 2018

County	New Cases Filed	County	New Cases Filed
Adams	486	Lackawana	470
Allegheny	3,701	Lancaster	1,191
Armstrong	186	Lawrence	318
Beaver	719	Lebanon	435
Bedford	129	Lehigh	1,650
Berks	1,019	Luzerene	1,751
Blair	666	Lycoming	486
Bradford	311	McKean	323
Bucks	1,652	Mercer	201
Butler	392	Mifflin	305
Cambria	264	Monroe	935
Cameron	18	Montgomery	3,805
Carbon	390	Montour	76
Centre	318	Northampton	964
Chester	957	Northumberland	667
Clarion	121	Perry	229
Clearfield	215	Philadelphia	9,928
Clinton	99	Pike	141
Columbia	216	Potter	43
Crawford	482	Schuykill	556
Cumberland	666	Snyder	152
Dauphin	987	Somerset	181
Delaware	1,140	Sullivan	15
Elk	84	Susquehanna	77
Erie	1,005	Tioga	161
Fayette	250	Union	121
Forest	6	Venango	72
Franklin	268	Warren	186
Fulton	21	Washington	459
Greene	73	Wayne	245
Huntington	120	Westmoreland	813
Indiana	154	Wyoming	74
Jefferson	255	York	1,634
Juniata	57		

STATE TOTAL	46,091

Source: Child Custody Caseload 2018, Administrative Office of Pennsylvania Courts, December 2, 2019, http://www.pacourts.us/news-and-statistics/research-and-statistics/dashboard-table-of-contents/custody-and-divorce-caseload.