

**Testimony of Mary Cushing Doherty, Esquire
of High Swartz LLP
on behalf of the Pennsylvania Chapter of the American Academy of
Matrimonial Lawyers**

December 9, 2019

Thank you Representatives Delozier and Davis for the opportunity to present my observation about House Bill 1397 to you and the sub-committee on Family Law. I join Maria Cognetti as members of the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers (we have been Fellows for over 30 years) and of the Joint State Government Advisory Commission Committee on Domestic Relations Law (on which we have each served since its formation in 1993). I am the presenter for the Pennsylvania Chapter of the American Academy of Matrimonial Lawyers.

There is one central custody principle for our Pennsylvania statutes, procedures and judicial decisions in response to the dilemma of parents separating: What is in the best interests of each child? When a change to our custody statutes is considered, our legislators should ask themselves: Is this legislation helping to serve the best interests of the children involved? Thank you for the chance to let me explain the position of the Academy of Matrimonial Lawyers, Pennsylvania Chapter. The Fellows of the American Academy of Matrimonial Lawyers adamantly disagree with legislation such as House Bill 1397 because it will unquestionably adversely affect the children of Pennsylvania.

This Committee is also hearing from the Pennsylvania Psychological Association. Experienced family lawyers who have represented families in custody litigation can provide first hand knowledge to support the findings of the Pennsylvania Psychological Association which argue against any presumption for physical custody. “Because of the unique characteristics of each family, a parenting arrangement needs to be made that matches the abilities of the parents with the developmental needs of the children to assure the healthy growth and adjustment of children”.¹ While many children do well in shared custody arrangements, the psychologists note the adjustment of children “is most effective when parents communicate respectfully with each other for the welfare of their children, and when they do not expose the children to ongoing hostility, conflict or violence”.¹ Therefore, it is not the shared custody schedule that helps parents be better parents, but rather the parents’ shared goal to shield children from parental conflict.

¹ Testimony of Pennsylvania Psychological Association for House Judiciary Committee Hearing on December 17, 2009.

This is what the lawyers see – that high conflict couples are the ones most often involved in difficult custody litigation. Too many of those parents, who fail to recognize how their conflict hurts their children, claim that if they have physical custody 50%, or close to 50% of the time, it will be best for their children. A law mandating presumed 50% or close to 50% custody time for each parent puts the schedule first and foremost. That puts the concern for the children second. This law would mandate significant shared time instead of the first inquiry: Will the proposed physical custody schedule serve the children's best interests?

I've practiced family law for over 40 years. I began in the late 1970s when our caselaw embraced the tender years presumption favoring mothers of young children. In my parents' era, that presumption may have made sense, but it became unfair for many fathers, particularly as traditional parenting roles changed. In the early 1980s, the courts questioned racial bias. In the 1982 opinion written by the eminent Superior Court Judge Edmund Spaeth in Custody of Temos v. Temos, the Pennsylvania Superior Court overruled the implicit presumption of a trial judge in favor of a white father over a white mother who was spending weekends with a black man.

Judge Spaeth wrote in 1982:

In terms of legal reasoning, the lower court's error was to think in terms of presumptions...This sort of reasoning used to be typical in child custody cases...But courts may no longer reason by presumption in child custody cases. In a custody dispute between parents, no one has the burden of proof; **no presumption may be resorted to instead, the court must determine** according to the evidence in the particular case before it **what will serve their child's best interests**. Ellerbe v. Hooks, 490 Pa 363, 416 A2d 512 (1980) cited in Custody of Temos v. Temos, 304 Pa. Super. 82, 450 A2d 111, at 121 (1982), **emphasis added**.

Each of you who is a parent, or who loves children, knows that each child is unique. Raising a child and addressing the singular needs of a child is each parent's great challenge. Our legislature should not contemplate a return to generalization by employing a blanket presumption. Does this legislation put our children first when it presumes a schedule called "equal parenting time"? You surely have constituents who wanted individual judges to issue a custody order and give him or her close to or exactly equal physical custody time. But how can we set that presumptive 50% custody time as the starting point? And how can we force children of separated parents who may be distraught over the separation, to adjust to their parent's separation by immediately facing an equal or nearly equal physical custody schedule?

I can share many real life examples of cases in which I've been involved to demonstrate that presumptive 50-50 physical custody would have been an emotional disaster for the children involved:

- A father left his wife and girls, ages 1 and 3, because he couldn't handle the responsibility of raising his girls, only to move in with his pregnant girlfriend;
- A parent of a teenager announced plans to move in with the parent of the child's classmate;
- A parent of a child diagnosed with Asperger Syndrome served as the primary caretaker who attended to the child's routines for years;
- The child's fights with one parent drove a wedge between the couple and the parents separated to stop the escalating drama in the home; and
- A hard-drinking, hard-living couple split up after the father went to rehab and assumed sole responsibility for care of their children.
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In any of these scenarios should any of those children be faced with a presumption to spend half their time with each parent until the court sorts out the best interests of children? As others will explain, this bill creates a heavy burden to overcome the initial "out of the gate" order for substantially equal physical custody.

Interestingly this bill labels a shared physical custody schedule as "shared parenting time". Shared parenting starts when the couple first have children. I'm encouraged to see most of my custody clients who are in their early 40s or younger have been raising their children cooperatively. If they live near each other after separating, many parents come to their lawyers assuming they will share physical custody equally or close to 50-50.

The new judges routinely ask every parent in custody court: "During your testimony, I want to know your view on each of the factors". As the case proceeds the judge considers the factors, not presumptions, and after thoughtful analysis awards physical custody based on what is best for the children.

As being reported by Maria Cognetti, the Joint State Government Commission Domestic Relations Advisory Committee has resumed the review of our custody statute and other family laws. Changes will be helpful which put the best interests of our children first. The lawyers active in the Advisory committee, Pennsylvania Bar Association Family Law Section leadership and the AAML Fellows, along with psychologists with the Pennsylvania Psychological Association, are ready to work with concerned legislators like you to foster progress. Focus on helping parents co-parent once they are separated or divorced will lead to putting children first to reach an appropriate shared physical custody schedule. We need to do this as the facts and circumstances allow but reject the mandated presumptions in House Bill 1397.

Respectfully submitted,

Mary Cushing Doherty

on behalf of the Pennsylvania Chapter, American Academy of Matrimonial Lawyers