



Public Hearing on House Bill 1397  
House Judiciary Subcommittee on Family Law

Testimony of Michael E. Bertin, Esquire  
Chair-Family Law Section  
Pennsylvania Bar Association

Good morning, Chairwomen Delozier and Davis, and members of the Subcommittee on Family Law. Thank you for the opportunity to speak to you today on one of the most serious and precious issues: Children. My name is Michael Bertin, and I am the Chair of the Family Law Section of the Pennsylvania Bar Association. I have also served as the Chair of the Family Law Section of the Philadelphia Bar Association, am a fellow of the American Academy of Matrimonial Lawyers (AAML), and am a member of the Joint State Government's Advisory Committee on Domestic Relations.

But what I am most proud of and what is most relevant to our discussion today is that I am the author of the text book on child custody in Pennsylvania that is relied upon by the judges and lawyers in our state. This book is the authoritative book on child custody in Pennsylvania. I have reproduced relevant portions thereof in my written testimony to provide you with background, history and guidance about this most important topic.

I stand before you today on behalf of the Pennsylvania Bar Association as the voice of its 24,000 members across the Commonwealth. To be clear, the Pennsylvania Bar Association opposes House Bill 1397. I am a family law attorney who handles child custody cases every day. I am in the trenches working with our current custody law.

I want to walk you through important pieces of information, so that you will fully understand why I am putting forth this position and why it is so important.

I want to read to you the opening lines of my 900 page book:

The polestar followed by Pennsylvania in deciding child custody cases is, as it is in most jurisdictions, the best interests and permanent welfare of the child. The best interest includes consideration of the child's physical, intellectual, moral, and spiritual wellbeing, as well as the factors enumerated in 23 Pa.C.S. § 5328. So singular is the state's interest in assuring that the child's welfare be the paramount concern, that all other interests, including the rights of the contending parties or principles of justice as between them, are invariably deemed subordinate.

Bertin & Bertin, Pennsylvania Child Custody Law, Practice, Procedure (2019 ed., Bisel) §1.1. (citations omitted).

With regard to shared physical custody:

Historically, the seminal cases regarding shared physical and/or legal custody are *In re Wesley J. K.*, 445 A.2d 1243 (Pa. Super. 1982) and *Wiseman v. Wall*, 718 A.2d 844 (Pa. Super. 1998). In *Wesley* and *Wiseman*, four factors are enumerated which must be considered when awarding shared custody. The four factors are as follows: (1) Both parents must be fit, capable of making reasonable childrearing decisions and willing and able to provide

love and care for their children; (2) Both parents must evidence a continuing desire for active involvement in the child's life; (3) Both parents must be recognized by the child as a source of security and love; and (4) A minimal degree of cooperation between the parents must be possible. In *Wesley*, the Superior Court stressed that the minimal degree of cooperation "does not translate into a requirement that the parents have an amicable relationship." In that regard, an award of shared custody has been upheld even though an amicable relationship did not exist between the parents. Also, divorced parents who had the ability to cooperate and isolate their personal conflicts from their roles as parents were awarded shared legal and physical custody. However, in the case of *P.J.P. v. M.M.*, 185 A.3d 413 (Pa. Super. 2018), the Superior Court held that trial courts "need no longer engage in the Wiseman analysis when determining whether shared custody is appropriate . . ." The Superior Court found that the four Wiseman factors are assimilated into the 16 enumerated custody factors of 23 Pa. C.S. § 5328(a). According to the Superior Court: "Section 5328(a), unlike Wiseman, does not require certain findings before a court may award shared custody. Under the current statute, courts must now consider all relevant factors, including the 'the ability of the parties to cooperate,' when making an award of any form of custody, and poor cooperation need not be dispositive."

It has been found that a weekly-rotating shared custody arrangement is not inherently damaging to an infant child, and a shared physical custody schedule was appropriate despite mother having been the primary caretaker. Shared physical custody has been ordered even though the parties lived 120 miles apart. However, the Pennsylvania Superior Court vacated a trial court's order awarding shared physical custody on an alternating week basis where mother resides in North Carolina and father resides in Pennsylvania. Further, where father lived in Philadelphia and mother in St. Louis, annual shifts in physical custody was disapproved by the Pennsylvania Superior Court, though the parties could retain shared legal custody.

*Id* at §3.2. (citations omitted)

With respect to presumptions, the following is clear:

The history of child custody decisions is replete with reliance on a variety of presumptions, doctrines, and policies utilized by courts to decide the situs of the best interests of the child, such as the Tender Years Doctrine, separation of siblings, and roots of the tree policy. A growing number of decisions have, however, turned their

backs on these simplistic devices and directed the lower court to eschew the use of presumptions, doctrines, and policies in favor of a considered analysis of the particular facts of each case. As one decision noted,

“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.”

*Id.* at §3.4.15. (citations omitted).

To give you some quick insight, the Tender Years Doctrine was a presumption that is traced back to an 1813 Pennsylvania Supreme Court case called Commonwealth v. Addicks, 5 Binney 519 (Pa. 1813). In that case, the Pennsylvania Supreme Court rejected the English common law paternal right to custody in favor of a rule which found that children in their tender minority “stand in need of that kind of assistance that can be afforded by none so well as the mother.” It took over 100 years for that to go away with the Pennsylvania Supreme Court case of Commonwealth ex rel. Spriggs v. Carson, 368 A.2d 635 (Pa. 1977).

Today, I am proud to say that Pennsylvania is a presumption free state when it comes to child custody, with the exception of the presumption of a parent over a non-parent.

Here is why it is vital that practitioners such as I who are handling custody cases every day stand before you. There are many misconceptions about child custody cases in the outside world. The following are 4 misconceptions:

1. Fathers are regularly being awarded custody with a mid-week night and every other weekend.
2. Fathers are not being awarded equal custody or primary custody.
3. Fathers have not historically been the primary caretaker in a case.
4. The family was an intact family unit before the case started.

Misconceptions 1 & 2 – In my experience, as well as the other practitioners here, fathers are being awarded substantial custody and in many instances 50/50. It is very common to have a custody order entered with a schedule of what is called a 2/2/5/5 schedule or a 2/2/3 schedule or a week-on / week-off schedule. Those are all equal physical custody schedules.

Misconception 3—In many cases, fathers have been the primary caretaker. If HB 1397 were to become law, with the snap of the finger, that father is stripped of that custody arrangement, regardless of the mother's prior involvement because of a presumption.

Misconception 4 is one that many do not realize. In most custody cases that reach the courts, the parents were never married, and mostly never lived together. The custody issues related to divorce are settled more than the others. When the parents never lived together, in many situations one parent has been very absent or has no relationship with the child. If HB 1397 were to become the law, none of that would matter, because the presumption would take over. The relevance of the prior custodial reality would fall to the presumption.

Through the hard work of the Joint State Government Commission, our current custody Act, which became law in 2012, is very detailed and child focused. Presumptions, unfortunately, are parent focused. The current custody law combats against inexperienced judges and lazy judges from taking the quick out, and not giving the extreme detailed analysis and attention that is needed when having control over where a child will live with the stroke of a pen. Our appellate courts have mandated that all 16 factors under the current custody law be analyzed and addressed by the trial courts when making child custody decisions. The appellate court is so strict with this important analysis, that if a judge skips a factor, it is reversible error and the case will get sent back to the judge to do it again. HB 1397 undoes that. It is a green light for quick swift action without in-depth analysis. It is an automatic “pass Go and collect \$200” (as was the case in the game of Monopoly) for the lazy or inexperienced judge.

Also, and importantly, our current custody law provides, under 23 Pa.C.S. § 5328(b), titled Gender Neutral: “In making a determination under subsection (a) [the 16 factors], no party shall receive preference based upon gender in any award granted under this chapter.” (emphasis added).

That language is serious. That is why we are seeing fathers with primary custody. We have 16 factors that the court must consider (and one is a catch-all), and by analyzing them, you arrive at a custody order that is personally tailored for that child or children. To have a presumption, especially with a heightened burden, as in HB 1397, it is all ignored, and focus is removed from the child or children.

We have made great strides in Pennsylvania to eradicate the presumptions that shifted the focus off of the children, such as the Tender Years Doctrine. If we create presumptions again, we will be inviting additional ones which would open up the flood gates and undo what we have accomplished and from where we have come.

**There is no shortcut by a presumption to a child's best interest.**

Again, I would like to thank you all for having me come to speak with you today, and hope that I have provided you with helpful insight and information.

Thank you.