TO: Chairman Rob W. Kauffman, House Judiciary Committee, and Subcommittee Chairs Sheryl M. Delozier and Tina M. Davis, and House Judiciary Subcommittee on Family Law Members

FROM: Kathryn Robb, Esq. Executive Director, CHILD USAdvocacy
Danielle Pollack, MA, Family Court Reform Advocate, CHILD USAdvocacy

RE: HB1397

DATE: December 4, 2019

First, we want to thank you, Chairman Kauffman, Chairwoman Delozier, Chairwoman Davis, and thank you, committee members, for allowing our testimony relative to HB1397 and the serious concerns about this legislation.\(^1\) While at first glance this legislation presents as simply increasing parity between parents litigating custody, it in fact reduces child wellbeing and is overall not in the best interests of children, especially in situations where interpersonal family violence is present (in 75% of litigated custody cases).\(^2\)

By way of introduction, we are writing on behalf of CHILD USAdvocacy, a national organization that advocates for better evidence-based and common-sense child protection laws and policies. We are Kathryn Robb, Esq. the Executive Director of CHILD USAdvocacy and a member of the board at Massachusetts Citizens for Children, and Danielle Pollack, MA, Family Court Reform Advocate, CHILD USAdvocacy.

To frame the problems that HB1397 presents, you must first consider the essential goal of custody decisions – to ensure that the best interests of the child – not parents – are protected. This bill is contrary to common sense child protection policies and not in children’s best interests. Perhaps most alarmingly, it will put countless at-risk Pennsylvania children in the way of grave harm, and possibly death. In 2000, Wisconsin adopted a 50/50 presumption model similar to that proposed in HB1397; the outcome there is that children are regularly placed in 50% custody of a parent who has been criminally convicted of perpetrating family violence.\(^3\) The rights of parents should never outweigh the protection and best interest of children.

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\(^1\) This bill would amend Pennsylvania custody law by creating a rebuttable, by clear and convincing standard, presumption that “equal parenting time is in the best interest of the child.” See proposed Pa.C.S. § 5227(a).
https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=91&Issue=11&ArticleID=26737#
1. Because family violence is present in most contested custody cases (75%), this legislation will negatively impact primarily those it should be designed to protect—children at risk of being subject to ongoing family violence.  

2. Pennsylvania law is already gender neutral and already allows courts to award equal parenting time.  

3. HB1397 will harm the Commonwealth’s children because it is not in their best interests, but rather in adults interest  

4. HB1397 seeks to erase essential distinctions in types and degrees of custody  

5. HB1397 will dramatically increase the burden of proof for protective parents from preponderance to clear and convincing, leading to increased risk of harm for children

Pennsylvania Law Already Allows Courts to Award Equal Parenting Time and is Gender Neutral

It is important to describe existing Pennsylvania custody law because there is considerable misinformation surrounding it. Current Pennsylvania law requires courts to use a gender-neutral model. Proponents of bills like HB1397 often mistakenly claim that custody laws discriminate against fathers. Pennsylvania law is clear that gender is irrelevant to a court’s determination of what is in the best interest of a child.  

Furthermore, research shows that when fathers actively seek custody, they obtain primary or shared custody over 70% of the time. Historically (until the 1980’s), courts commonly defaulted to awarding mothers custody, however, this has not been the case for several decades in family courts. On the contrary, some studies show mothers are held to a much higher standard than fathers when being assessed by courts on their fitness to parent.  

Additionally, Pennsylvania courts already have the authority to order parents to have equal parenting time with a child. Judges all over the Commonwealth, in fact, strive to and already very commonly make such orders after assessing the sixteen “best interests of the child” factors as they apply to each child on an individual basis.  

Presumptions in child custody law, unless they concern child safety, are widely considered to be restrictive and contrary to determining a child’s best interest. The best interest of a nursing infant, for example, is different than that of a teenager who can drive. The best interests of a child who has never known nor lived with one parent are quite different than those of a child who has spent

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4 See generally, Jaffe, Zerwer & Poisson, Access Denied: The Barriers of Violence & Poverty for Abused Women and their Children After Separation 1 (citing four studies, all of which found 70-75% of cases in litigation involved allegations of domestic violence).  
5 § 5328 (b) “Gender neutral.—In making a determination under subsection (a), no party shall receive preference based upon gender in any award granted under this chapter.”  
6 Supra note 5  
7 Gender Bias Study of the Court System in Massachusetts, 24 New Eng. L. Rev. 831-832 (1990).  
8 § 5328. Factors to consider when awarding custody.  
10 Judith G. Greenberg, Domestic Violence and the Danger of Joint Custody Presumptions, 25 N. Ill.U.L.Rev. 403, 411 (Summer 2005);
considerable time with and is bonded with both parents. A child’s best interests are not served by spending 50% of his or her time with a severely drug addicted parent when the other parent is fit and has historically provided nearly all the caretaking, and so on.

Only individual assessments by courts can consider all the factors unique to each child and their circumstance, which is how current law operates. HB1397 would instead impose a one size fits all model. This would be using a cudgel-like approach - asserting a presumption of exactly equal time with each parent as the preeminent determinate of a “child’s best interest.” This position is not empirically supported. Research shows that children’s post-divorce well being is not dependent upon the frequency with which they see both parents, but rather upon: (1) the extent to which the custody agreement reflects pre-divorce caretaking and parenting time and (2) the quality of the parenting.

HB1397 Seeks to Erase Essential Distinctions in Types and Degrees of Custody

This bill seeks to erase essential language used to distinguish among the differing degrees and types of custody in Pennsylvania, including: “partial physical custody, primary physical custody, sole legal custody, sole physical custody, shared physical custody, supervised physical custody” and replace them all with equal parenting as the sole standard. These nuanced distinctions define important aspects of a parent’s rights and a child’s well-being, and apply to everything from making medical decisions to determining residence and implementing safety measures. Not only would such erasure be contrary to a child’s best interest, it would create chaos in a system reliant on such determinants.

This Bill Would Harm Children by Taking the Focus Away from their Best Interests

The essential goal of custody decisions is to ensure that the best interests of the child – not the parent – are protected. The current dilemma in family courts is not that parents’ rights are too limited or not shared equally enough, but rather that the rights of children – especially at-risk children – are too often minimized in the interest of what the litigating parents demand. As it stands, courts err too often on the side of shared, equal or near equal custody arrangements over child safety, often resulting in ongoing child abuse or even fatality.

This was the case in Bucks County in 2018 for 7-year-old Kayden Mancuso, who was brutally murdered by her father after the court ordered unsupervised parenting time in an effort to be “fair” to both parents, despite the mother’s pleas against it and the father’s history of violent erratic behavior. Research shows approximately 58,000 children in the US annually are court-ordered into

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12 Anja Steinbach, Children’s and Parents’ Well-Being in Joint Physical Custody: A Literature Review, Family Process, 2018 (measuring “benefit” by using children’s self-reports of their life satisfaction and by using their feelings of depression as ascertained by responses to questions asking about loneliness, quality and amount of sleep, and frequency of moods such as happiness and sadness.).
the care of an abusing parent by our family courts;\textsuperscript{15} nationally over the past decade over 700 children have been murdered by a divorcing/separating parent amidst a custody battle.\textsuperscript{16} In fact, in Pennsylvania alone, at least 24 children have been murdered by a parent amidst a custody battle, in the last decade.

The rebuttable 50/50 presumption model, proposed by HB1397, would further prioritize the demands of litigating adults, rather than the needs of children. HB1397 is regressive and counter to the best interest of the children of Pennsylvania.

\textbf{HB1397 Increases the Burden of Proof for Family Violence Survivors and Protective Parents}

Studies show that concerns for child safety and claims of child abuse brought by a safe protective parent are often minimized or overlooked in the family courts and the safe parent is sometimes punished - in the form of loss of custody/visitation time with their child - if they persist in bringing child abuse claims and seeking protection for their children. Though there are several reasons for


this, chief among them is that family courts strive to award some form of shared or equal custody to both parents often above all else, even when safety risks are present.  

Child abuse and neglect occurs more frequently within the family than in any other context. We know that “80% of child fatalities due to abuse or neglect occur within the first 3 years of life and almost always at the hands of an adult responsible for their care.” But because of the nature of family violence — often occurring behind closed doors, without outside witnesses to provide corroboration, and the fact that young children who cannot testify are frequently the only witness to crimes perpetrated against themselves (especially regarding child sexual abuse) — it is not easy to reach the necessary burden of proof to establish harm or danger and then protect children.

Safe protective parents already struggle to meet the required burden of proof in family courts, which is preponderance. HB1397 would impose an even higher and nearly impossible to reach standard — clear and convincing — for such parents to rebut the 50/50 presumption and prove their children are indeed at risk or are being harmed.

**Family Violence is Present in the Majority of Contested Custody Cases**

The overwhelming majority of custody agreements (90%) are decided privately between parents with no court intervention or decisionmaking. Most divorcing/separating families do not have a family violence component, however, the majority of those who do litigate custody do involve family violence. Numerous studies show that 75% of contested custody litigants report a history of domestic violence. Only 10% of the total number of divorcing/separating parents litigate custody, and those are the families subject to this proposed law.

Domestic abuse is an “Adverse Childhood Experience” (ACE), and it impacts children even if children are themselves not directly physically or sexually abused by a family violence perpetrator. We know that “children exposed to intimate partner violence (IPV) often experience a sense of terror and dread that they will lose an essential caregiver through permanent injury or death.”

For polyvictims - children exposed to both IPV and also directly physically and/or sexually abused themselves - the outcomes are disastrous in terms of individual health over lifetime and social cost.

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17 Dickson & Meier, *supra* note 13. This national study found that fathers accused of abuse who counter-accused the mother of “alienation” took custody from the protective mother at a greater rate (72%) than fathers who were not accused of abuse (67%). *Being accused of child sexual abuse by the mother increased fathers’ win rate to 81%, despite the fact that fabricated child sex abuse (CSA) allegations are empirically confirmed to be very rare (2%-6%).* 17 (Everson & Boat, *False Allegations of Sexual Abuse by Children and Adolescents*, 28 Journal of the American Academy of Child & Adolescent Psychiatry 230-235 (1989)). Mothers accused of alienation lost custody in approximately half of all cases, regardless of whether or not they had accused the father of abuse.


20 Jaffe et al, *supra* note 4

21 Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 56 American Journal of Preventive Medicine 774-786 (2019) (finding that people abused in childhood are more likely to develop potentially deadly conditions such as heart disease and cancer).

22 Report of the Attorney General *supra* note 18
more broadly. We know this from the ACE studies of over 17,000 individuals, as well as from many other studies and sources now.\footnote{Felitti, \textit{supra} note 20}

"As many as 1 in 10 children in this country are polyvictims, according to the Department of Justice and Centers for Disease Control and Prevention’s groundbreaking National Survey of Children’s Exposure to Violence (NatSCEV). The toxic combination of exposure to intimate partner violence, physical abuse, and sexual abuse...increases the risk and severity of posttraumatic injuries and mental health disorders by at least twofold and up to as much as tenfold. Polyvictimized children are at very high risk for losing the fundamental capacities necessary for normal development, successful learning, and a productive adulthood. The financial costs of children’s exposure to violence are astronomical. The financial burden on other public systems, including child welfare, social services, law enforcement, juvenile justice, and, in particular, education, is staggering when combined with the loss of productivity over children’s lifetimes."\footnote{Supra note 3}

Keeping in mind that approximately three-fourths of litigated custody cases involve a family violence factor, our custody statute should seek to diminish these risks for children, rather than exacerbate them as HB 1397 would.

\textbf{The Empirical Data vs. Ideology}

Several widely accepted views among proponents of 50/50 presumption custody bills like HB1397 do not bear out under scrutiny.

Proponents of 50/50 presumption bills like HB1397 often claim that “parental alienation syndrome” (PAS) is a valid theory, when in fact it has repeatedly flunked admissibility standards and has been discredited by nearly every reputable institution in this field, including the American Bar Association, the National Council of Juvenile and Family Court Judges, the American Psychological Association, the National District Attorney’s Association, and the American Prosecutors’ Research Institute.

The Presidential Task Force of the American Psychological Association on Violence in the Family has stated that “there are no data to support the phenomenon called parental alienation syndrome, in which mothers are blamed for interfering with their children’s attachment to their fathers ... .” The National Council of Juvenile and Family Court Judges (NCJFCJ) likewise finds PAS lacking in scientific merit, advising judges that based on evidentiary standards, “the court should not accept testimony regarding parental alienation syndrome, or ‘PAS.’ The theory positing the existence of PAS had been discredited by the scientific community”; and “the discredited ‘diagnosis’ of ‘PAS’ (or allegation of ‘parental alienation’), quite apart from its scientific invalidity, inappropriately asks the court to assume that the children’s behaviors and attitudes toward the parent who claims to be ‘alienated’ have no grounding in reality.” The American Prosecutors’ Research Institute and the National District Attorney’s Association, legal organizations concerned with the prosecution of child abuse and domestic violence, have also dismissed PAS.\footnote{Rebecca M. Thomas & James T. Richardson, \textit{Parental Alienation Syndrome: 30 Years on and Still Junk Science}, The American Bar Association (July 1, 2015). https://www.americanbar.org/groups/judicial/publications/judges_journal/2015/summer/parental_alienation_sy}
Proponents also claim that children must have both parents equally involved in their lives at all cost and above all other factors (absent a successful clear and convincing rebuttal), in order to serve the “best interest” of the child, when in fact research shows it is the quality of parenting which is determinative of a child’s well being not the amount of time spent. It is widely accepted and empirically supported that if both parents are fit and do not have highly anti-social behaviors, having both parents involved in children’s lives to some degree is beneficial to children. No controlled study, however, shows this to be so for equal parenting time. And importantly it is counter to children’s best interest live with a parent with a high degree of anti-social behavior.

Using data from an epidemiological sample of 1,116 5-year-old twin pairs and their parents, this study found that the less time fathers lived with their children, the more conduct problems their children had, but only if the fathers engaged in low levels of antisocial behavior. In contrast, when fathers engaged in high levels of antisocial behavior, the more time they lived with their children, the more conduct problems their children had. Behavioral genetic analyses showed that children who resided with antisocial fathers received a “double whammy” of genetic and environmental risk for conduct problems.26

For those who contend the rebuttal provision in HB1397 will provide relief in such cases, bear in mind the above cited figures demonstrating how protective parents already struggle in family courts to meet the lower standard of preponderance in order to protect children from harm. Demonstrating to a court that the other parent has a high degree of anti-social behavior is not at all synonymous with having the necessary evidence to reach a clear and convincing standard (even higher than preponderance standard) to overcome the 50/50 presumption.

We have a few questions worth your consideration:

• Shouldn’t the law in Pennsylvania seek foremost to separate children from harm and danger, regardless of the origin of that danger?
• Isn’t the safety of children of paramount importance, and an issue the court should consider based on the best interest of the child?
• Shouldn’t the interests of children come before the interest of the parents in adopting any presumption in custody law?

Child custody and parenting time should not be based on legal presumptions, but rather, what is best for the physical and emotional welfare of children. CHILD USAdvocacy strongly opposes HB 1397.

In contrast, the goal of prioritizing child safety in HB 1587, sponsored by Representatives Tina Davis and Tarah Toohil, is that which CHILD USAdvocacy would fully support. In 2018 Louisiana enacted legislation very similar to what HB 1587 offers. It positions child safety as the first priority which courts must consider before considering any other best interest factors when making custody determinations. It requires an evidentiary hearing be held when credible allegations of child abuse or

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26 Sara R. Jaffee, Terrie E. Moffitt, Avshalom Caspi, and Alan Taylor. Life With (or Without) Father: The Benefits of Living With Two Biological Parents Depend on the Father’s Antisocial Behavior. Child Development, January/February 2003, Volume 74, Number 1, Pages 109–126
family violence are made. Pennsylvania’s HB 1587, which carries the name “Kayden’s Law” in memory of Kayden Mancuso who was murdered by her biological father, puts the needs and safety of children before all other considerations.

It is this simple — in making determinations about custody and parenting time, the court should consider the best interests of the child first, not the best interests of the parents. A presumption of shared 50/50 parenting is contrary to the notion that the needs and safety of children should always come first. A presumption of parents first is a dangerous standard that will ill serve and endanger countless children in Pennsylvania.

It will put the parents first — and children last. Perhaps most alarmingly, it would threaten the health and safety of thousands of at-risk children and domestic violence victims. We urge you and this committee to please put children first and reject House bill 1397 as it will clearly put the children of Pennsylvania in harm’s way and not serve their best interest. Please feel free to contact us should you have any questions.

Respectfully,

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WHY A PRESUMPTION OF 50-50 CUSTODY
IS NOT IN THE BEST INTERESTS OF CHILDREN

FACT SHEET

I. 50-50 Custody Legislation Deprives Courts of Discretion

• The essential goal of custody decisions is to ensure that the best interests of the child are protected.
• Courts do so by considering many factors, including the safety of the child, the child’s relationship with each parent, and many other important factors (16 in Pennsylvania).
• Courts are already able to, and often do, grant 50-50 custody whenever they deem such an order appropriate; equal or near equal placement is already a very frequent outcome of custody disputes.¹
• Only a fact-intensive inquiry can take account of each child’s unique situation and create a custody order tailored to their best interests. 50-50 presumption legislation takes necessary discretion away from courts and will result in outcomes that are harmful to children and survivors of domestic violence, as indicated by a recent Wisconsin study showing that joint custody orders were common despite proven domestic violence.²

II. Requiring 50-50 Custody Would Not be in the Best Interests of Children

• Research has shown that children’s post-divorce well-being is not dependent upon the frequency with which they see both parents, but upon the extent to which the custody agreement reflects pre-divorce caretaking and parenting.³

¹ Meyer, Cancian & Cook, The Growth in Shared Custody in the United States: Patterns and Implications, 55 Family Court Review, 500-512 (2017) (estimating that shared custody is now the most common post-divorce parenting arrangement.)
² Meuer, Gibart & Roach, Domestic Abuse: Little Impact on Child Custody and Placement, 91 Wisconsin Lawyer (2018) (finding that joint custody was granted in 50% of cases where one parent had a criminal conviction for domestic violence), available at https://www.wisbar.org/NewsPublications/InsideTrack/Pages/article.aspx?Volume=91&Issue=11&ArticleID=26737
• One study found that children only benefited from joint physical custody when both parents had previously, prior to the separation, been moderately or highly involved in their daily life.\(^4\)

• Losing access to the support of their primary caretaker is painful and destabilizing for children; children placed in joint custody with both a more-involved and less-involved parent were found to experience more social, behavioral, and psychological problems than those whose post-divorce placement mirrored the pre-divorce caretaking.\(^5\)

• Even when awarded substantial time with their children, less-involved parents tend to maintain their pre-divorce low level of involvement with children.\(^6\)

• Adults who experienced divorce as children report better outcomes when exposed to high quality parenting regardless of the custody arrangement; they report worse outcomes when custody was shared, where one parent provided low-quality parenting.\(^7\)

• One study indicates that frequent overnight visits with both parents has an adverse impact on children under the age of 5; the children studied demonstrated attachment issues and an increase in behaviors such as hitting parents, refusing to eat, and frequently worrying.\(^8\)

• Experiencing high levels of parental conflict has negative outcomes for children.\(^9\) 50-50 custody unavoidably places children in the middle of their parents’ conflicts. The harms to children of highly conflictual parents can be mitigated when a court has discretion to look at the severity and frequency of the conflict, safety factors, and the ability of each parent to provide high quality parenting.\(^10\)

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\(^4\) Anja Steinbach, *Children’s and Parents’ Well-Being in Joint Physical Custody: A Literature Review*, Family Process, 2018, at (measuring “benefit” by using children’s self-reports of their life satisfaction and by using their feelings of depression as ascertained by responses asking about loneliness, quality and amount of sleep, and frequency of moods such as happiness and sadness.)

\(^5\) Poortman, *supra*, Postdivorce Parent-Child Contact and Child Well-being: The Importance of Predivorce Parental Involvement at 672, also citing Westphal, Poortman & van der Lippe, *Non-resident Father-Child Contact across Divorce Cohorts: The Role of Father Involvement during Marriage*, 2014 (finding that fathers who were involved with their children pre-divorce were much more likely to remain involved post-divorce.)

\(^6\) Poortman, *supra*.

\(^7\) Steinbach, *Children’s and Parents’ Well-Being in Joint Physical Custody: A Literature Review*, at 8.

\(^8\) *Id* (concluding from a review of empirical research that there is no “one size fits all” best custody arrangement). and Jennifer McIntosh, Bruch Smyth, Margaret Kelaher, *Overnight care patterns following parental separation: Associations with emotion regulation in infants and young children*, 19 Journal of Family Studies, 224-239 (2013) (finding that joint physical placement was able to predict a higher level of these poorly regulated behaviors in toddlers).

\(^9\) Nicole Maher et al., *Does Shared Parenting Help or Hurt Children in High-Conflict Divorced Families?*, 59 Journal of Divorce and Remarriage, 324-347 (2018) (concluding that high conflict divorces were associated with poor child adjustment which could be somewhat mitigated if at least one parent offered high quality parenting).

\(^10\) *Id* at 339.
III. 50-50 Custody is Particularly Damaging in Families with a History or Risk of Abuse

- The overwhelming majority of custody agreements (90%) are reached in out of court settlements. Only 10% of parents litigate custody. Numerous studies have found that 75% of contested custody litigants report a history of domestic violence. Domestic abuse is an “adverse childhood experience” (ACE), even if they are not themselves directly physically or sexually abused.

- Abusive parents often use custody litigation to extend their abuse into the legal forum. Parents seeking to keep their children safe from a domestic abuser spend, on average, $100,000 attempting to ensure safe conditions of the abuser’s access to the child. These costs and the extreme stress of fighting an abuser in court undermine safe parents’ capacity to parent to their full potential.

- The standard of proof in civil court is preponderance of the evidence. Imposition of a “clear and convincing” proof standard to rebut a 50/50 presumption would create an extremely high burden for domestic abuse victims trying to protect children from an abusive ex-partner.

- Numerous studies indicate that family courts frequently discount or disbelieve victims’ reports of abuse. One study of adjudicated abusers who contested custody found that the vast majority of such abusers were actually granted sole or joint custody of children.

- In an early court-sponsored study, 94% of fathers who petitioned for custody received sole or joint custody regardless of whether they had a history of being abusive. Children living in a home where they are physically or sexually abused suffer...
increased Adverse Childhood Experiences (ACES), which result in costly lifelong negative health impacts for the child victims.\textsuperscript{18}

- A recent study of 240 cases around the country found that fathers accused of abuse who counter-accused the mother of “alienation” took custody from the protective mother at a greater rate (72%) than fathers who were not accused of abuse (67%). **Being accused of child sexual abuse by the mother increased fathers’ win rate to 81%, despite the fact that fabricated CSA allegations are empirically confirmed to be very rare (2%-6%).**\textsuperscript{19} Mothers accused of alienation lost custody in approximately half of all cases, regardless of whether or not they had accused the father of abuse.\textsuperscript{20} Even when courts believed a father had been abusive to a mother or child, they still granted custody to those fathers in 14-38% of cases.\textsuperscript{21} Yet even alienation specialists have acknowledged that there is no current valid scientific support for the core tenets of parental alienation theory.\textsuperscript{22}

- One estimate suggests that 58,000 children annually are ordered by courts to spend visitation or custodial time with an allegedly abusive parent.\textsuperscript{23}

In sum, the growing body of evidence that children are being subjected to unsafe custody/visitation arrangements by family courts indicates that a presumption of 50-50 custody is likely to be harmful to the best interests of many children.

\textsuperscript{18} Felitti et al., \textit{Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study}, 56 American Journal of Preventive Medicine 774-786 (2019) (finding that people abused in childhood are more likely to develop potentially deadly conditions such as heart disease and cancer).


\textsuperscript{20} Dickson & Meier, \textit{supra}.

\textsuperscript{21} Id. at 328.

\textsuperscript{22} Saini et al, in Drozd, Saini & Olesen, \textit{PARENTING PLAN EVALUATIONS: Applied Research for the Family Court}, 2d Ed, 374-430 (Oxford University Press.2016) (“the lack of consensus on the definitions of alienation and the use of varying non-standardized measures and procedures limit the ability of researchers to undertake methodologically sound research in this area”)

\textsuperscript{23} Leadership Council on Child Abuse & Interpersonal Violence, \textit{How Many Children are Court-Ordered into Unsupervised Contact with an Abusive Parent After Divorce?}, (2008).