

STATEMENT OF THE OHIO STATE BAR ASSOCIATION IN OPPOSITION TO HOUSE BILL 14

Before the House Families and Aging Committee
Representative Jean Schmidt, Chair

Chairwoman Schmidt, Vice Chair Miller, Ranking Member Denson, and members of the House Families and Aging Committee: Thank you for the opportunity to present opponent testimony on behalf of the Ohio State Bar Association.

My name is Nicole Rutter-Hirth. I am here to lend my voice and speak on behalf of the Ohio State Bar Association and the family law attorneys in the state of Ohio against House Bill 14. I have been a family law attorney for 17 years and worked in family law courts for five years prior to that. My practice is almost exclusively family law and I regularly practice in six counties.

In my practice, I've never had two identical cases. I've represented victims of domestic violence, parents with mental health issues, parents who are heroin addicts, stay-at-home moms, and third-shift working dads. I've seen it all, but rarely twice. No two identical cases exist.

House Bill 14 proponents will tell you its purpose is to grant equal custody rights to separating parents, promoting fairness and equity for them. This bill sounds well-intentioned but could have destructive consequences. Proponents of the bill will tell you it will cut down on litigation. That sounds great, any family law lawyer will tell you they love the idea of cutting down on litigation, me included. This bill will not accomplish that.

One Size Does Not Fit All

First, this bill requires the courts to treat cases in a one-size-fits-all approach. Creating a one-size-fits-all standard is problematic. No two relationships or family circumstances are identical. This bill overlooks the nuances of each case. Worse than that, it overshadows the best interest of the child standard used by courts for decades.

Mandating equal time and equal rights may place a child in the equal care of a parent with a drug or alcohol addiction or mental health issues. It may force a victim of domestic violence to co-parent with their abuser. It may force parents who live dozens or hundreds of miles apart to share equal time with the kids, forcing the kids to travel up and down highways on a weekly basis. It may grant parents who work third-shift equal time to stay-at-home parents. It ignores harmful circumstances and practical considerations.

Predetermines Outcomes and Undermines Judiciary

Second, this bill undermines the judiciary. Mandating judicial action removes discretion from the elected officials. It tells voters that judges cannot be trusted to apply the law to make an appropriate decision. It also ignores the current system which already encourages shared custody.

Courts currently utilize the best interest of the child standard when addressing custody and parentage disputes. There are additional statutes that specifically address shared parenting and require courts to consider it if a proposed plan for shared parenting is filed. Every court has a mandated parenting seminar that must be completed before a final divorce hearing is held. All of the courts I regularly practice in encourage, and some even mandate, use of co-parenting apps.

Further, every family court, both domestic and juvenile, have what is called a standard or model parenting order included in their local rules. This is a default schedule they suggest if the parties are unable to reach an agreement. In the past five years, many of those courts have expanded their standard orders and now have multiple default parenting schedules available, several of which include schedules of equal time. I have seen more equal parenting time cases ordered in the last three years than I did in the first 14 years of practice. With the addition of all of the parenting tools now available, courts do encourage equal time and shared parenting when it's appropriate. While no system is perfect, this bill upends a process that already encourages collaboration, while ensuring that children remain the first priority. The current system encourages shared parenting and provides tools to help it succeed.

By removing judicial discretion and mandating particular outcomes for both custody and parenting time, the bill ignores the facts at hand and removes the application of the best interest of the child standard. This bill promotes the best interest of the parent.

Increase in Litigation and Litigation Costs

Third, proponents of the bill suggest it will reduce litigation. The bill establishes a rebuttable presumption of equal time and equal parenting rights, which can be rebutted by clear and convincing evidence. I believe this may actually increase litigation.

It raises the legal standard. The current standard of proof is a preponderance of the evidence, meaning something is more likely than not. Clear and convincing evidence is elevated and requires proof of a fact to the extent that it leaves little doubt. If we force parents to prove their concerns about the other to this level, it will undoubtedly require increase costs.

For example, if a parent has concerns about the other parent's mental health, in order to provide clear and convincing evidence of it, they may have to hire a parenting psychological evaluator. In my experience, these evaluations can take 6-12 months and cost upwards of \$5-10K.

If a parent has concerns about the other parent's substance abuse concerns, drug tests can cost anywhere from \$200-800. Alcohol testing is more problematic. Consumption of alcohol is not in and of itself illegal. To establish a harmful pattern of alcohol use by clear and convincing evidence will require use a daily alcohol monitoring device. These devices cost a few hundred to a few thousand dollars and require monthly service fees that are several hundred dollars. The average litigant cannot afford this, but requiring them to prove their child's other parent has an alcohol addiction by clear and convincing evidence, leaves them no choice.

Of course, the court can appoint a Guardian Ad Litem (GAL) in any case. This person acts as an investigator as to what is in the best interest of the children. Every court has a different cost for a GAL, but the average cost in my area of practice is \$1,500-2,000. This person can investigate concerns of either parent, and often recommends further assessments if they have concerns. A GAL is often, but not always used due to cost. If the standard of proof is elevated, they will all but be mandated. In one court I practice in, there are only three GALs on the court's appointment list, but one of which is my associate, so I cannot use her. These GALs are overly burdened now, getting flooded with cases. And the amount of time they put into these cases forces them to work at a significantly discounted rate. If we all but mandate their involvement, increasing appointments, they will refuse to be appointed or insist on higher fees. Again, these are costs passed on to the litigants that many cannot afford.

This higher burden heightens tensions. Forcing parents into equal parenting orders regardless of facts of the case heighten tensions. Custody battles and divorces are already highly emotional and contentious. It will certainly increase legal fees to mandate lawyers satisfy a higher burden of proof. And because the burden of proof will be so high, nearly unachievable, there is little risk to litigating on the hopes the opposing party cannot satisfy their burden.

Further, vulnerable litigants will actually be put at a disadvantage. Lower income families cannot afford to meet the burden of proof they're forced to meet. Stay-at-home parents already struggle to hire attorneys. If the standard of proof is elevated, I will have to calculate higher estimated costs to be retained. Having to turn clients away who cannot afford counsel because they are not the income earning spouse is difficult already. This new standard will force victims of domestic violence to prove they were abused by clear and convincing evidence. We are further disenfranchising vulnerable litigants.

Finally, setting the standard that all cases are appropriate for shared custody and equal time will certainly open a floodgate for all previously litigated custody cases. It will encourage all parents with existing custody orders that are not equal to come back to court and request equal time and equal rights. Let's not forget that the current child support system reduces support based on the number of overnights the obligor has with the children. There will be a financial incentive to litigate. Be prepared to open a floodgate of litigation and bombard the courts.

Conclusion

In conclusion, proponents of this bill have likely presented you with statistics about children who grow up in primarily one-parent homes and how that affects their success. I implore you to pull statistics on children who have 50% of their time spent with a parent with mental health issues or alcohol issues. To be clear, I am not opposed to equal rights when appropriate. I have filed more shared parenting plans in the last three years than I did in my first 14 years of practice. To be clear, I am not opposed to equal parenting schedules. I'm proud to practice in several counties that offer week on/off parenting time as one of their default schedules.

Proponents have said this bill "incentivizes coparenting." This is false. Coparenting already exists and judges implement it when appropriate.

Proponents have said this bill will “cut down on litigation.” This is false. This bill is likely to increase litigation. It welcomes old custody cases to be reopened by setting an equal standard. It increases the burden of proof, which mandates attorneys to hire experts and use alcohol or drug testing. This bill encourages litigation because the bill raises the stakes in EVERY case.

Proponents have said “Ohioans don’t trust courts. We need to hold courts accountable.” This too is false. Mandating judicial action tells Ohioans they can’t trust the judiciary.

The Equal Parenting bills shifts the focus. It requires proof that shared parenting is detrimental to the child instead of proof that the arrangement is in the best interest of the child.

The Equal Parenting bill ultimately focuses on the interests of the parents, NOT the children. The legal standard has never been what is in the best interest of the parents and I’m here today asking you to ensure it never is.

Thank you for the opportunity to appear before you today. I am happy to answer any questions you may have.