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HB 1397: Is a 50/50 Custody Presumption on Its Way to Pennsylvania?

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On May 6, HB 1397 was introduced in the Pennsylvania General Assembly. The primary sponsor is Rep. Susan C. Helm who represents parts of Dauphin and Lebanon counties. The bill seeks to amend various sections of Title 23 of the Pennsylvania Consolidated Statutes that relate to child custody. The most significant of those changes are to 23 Pa. C.S.A. Section 5322 and Section 5327, such that the concepts of "primary" and "partial" physical custody would be eliminated in favor of "equal parenting time." Equal parenting time is defined as, "As close as practicable to 50% of time spent with each parent, but in no case exceed 60% of time with either parent."

Under HB 1397, the current language of 23 Pa. C.S.A. Section 5327(a), stating that there is no presumption that custody should be awarded to a particular parent is replaced by, "A presumption, rebuttable by clear and convincing evidence, that shared physical and legal custody and equal parenting time is in the best interest of the child." The bill goes on to state that, "If a deviation from equal parenting time is warranted, the court shall order a parenting time schedule that maximizes the time each parent has with the child, to the extent consistent with the child's best interest."

As with all proposed legislation, Helm circulated a co-sponsorship memorandum to her colleagues setting out the purpose of the bill. She states that this legislation will, "Promote true gender equality in custody determinations and protect the right of children to continue to have both loving and fit parents meaningfully involved in their lives following a separation or divorce."

The co-sponsorship memorandum goes on to state that:

"Custody plans that allow children to see one of their parents—typically their father—only one day a week or every other weekend undermines this fundamental relationship during the child's crucial development years. Research shows that, except in rare cases, that children do best if both parents share in the day-to-day responsibilities of raising children. Children with two actively involved parents do better in school, are less likely to suffer abuse or neglect, and are less likely to become involved with drugs and other high-risk behaviors. Equally shared parenting is also linked to higher rates of voluntary child support compliance and lower rates of parental alienation."

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No studies or other research are cited to support these claims.

If all of this sounds familiar, that is because it is. The current versions of the statutes that comprise the child custody provisions of Title 23 were enacted in 2011 after consideration in the legislature in 2010. Simply put, HB 1397 seeks to modify significant provisions of the statutory framework on child custody that the legislature considered, took testimony on and debated less than 10 years ago. The most significant difference this time is that while the prior bill, HB 1369, Act 2010-112, was a "clean up, clarification and codification" of 50 years of case law on custody and clarified procedures in custody litigation, HB 1397, is specific to the issue of equal parenting time.

Since the idea of a presumption in custody cases is not new, the arguments for and against are not new either. Helm's cosponsorship memorandum cites to true gender equality in custody cases, the right of children to have both parents involved in their lives, and that children do better when both parents have day-to-day responsibilities for the children. She also cites higher rates of voluntary child support compliance and lower rates of alienation as pros of a 50/50 custody presumption.

In addition to that, such a statute would certainly cut down on custody litigation. If the probable result is almost a foregone conclusion, what is there to litigate? Under the proposal, equal means equal, or at least very close to it. Judges with a crowded docket and distaste for protracted custody litigation will obviously welcome such a change.

On the other hand, are the problems that HB 1397 seeks to address really problems? As to the issue of gender equality in custody litigation, obviously there are constituencies that see inequality but the courts do not see any problem. See *D.K.D. v. A.L.C.*, 141 A.3d 566 (Pa.Super. 2016). As to the issues with child support collection tied to disgruntled parents, the Pennsylvania Department of Human Services' website boasts that the Bureau of Child Support Enforcement "continually exceeds the national average for the collection of monthly child support payments," and that, "Pennsylvania is the only state in the nation to meet or exceed all five performance standards that the federal government sets in determining effectiveness of state child support enforcement programs." See www.dhs.pa.gov/. Collection of child support does not appear to be a major problem in Pennsylvania.

Additionally, in the geographic area where I practice, the "every other weekend dad" is more the exception than the rule. A weeknight overnight in addition to weekends is more the norm and arrangements close to 50/50 are becoming more common.

Obviously, children do better when both parents are actively involved in their lives, but does that imply a 50/50 custody schedule for all children of separated parents? Not necessarily. Most psychologists will tell you that children need involved parents and continuity from their parental situation before their parents' separation to the post-separation situation. Just as there is no uniform parenting arrangement or situation before separation, there should not be a uniform arrangement after separation.

Psychologists will tell you that no two families are alike so a one-size-fits-all approach to child custody is not in a child's best interest. Similarly, it is overly presumptuous to assume that a 50/50 custody arrangement is in the best interest of all children.

A final point made in Helm's memo is that a presumption of 50/50 custody will lower rates of parental alienation. In my experience, accusations of parental alienation arise in high-conflict custody cases. Query whether the allegations of alienation cause the conflict or the conflict causes the alienation; however, either way, the perspective must be from that of

the child, not the parent. Is moving a child every week or every few days between two households that, for lack a better term, are at war with each other, the best thing for the child?

Again, in my experience, for a 50/50 custody arrangement to work, parents need to cooperate and communicate more after separation than they did before. Otherwise, homework does not get done and kids do not get to activities and doctor appointments. While the existing 23 Pa. C.S.A. Section 5328 factors would remain under the proposed legislation, to defeat the 50/50 custody presumption will require clear and convincing evidence, the highest civil standard under the law. So, the weighting of these various factors leading to a 50/50 arrangement would now be significantly deluded.

Helm's co-sponsored memo cites to the right of children to equal access to parents but another argument is that this bill is not about children, it is about parents or better, one parent, and changes the focus of custody litigation from what is best for the child, to what is best for one of the parents.

Previously, domestic violence prevention groups have put forth the argument that a 50/50 custody presumption trivializes domestic violence in the custody context. Given that the burden of proof in a protection from abuse case is a preponderance of the evidence and the standard to deviate from a 50/50 custody arrangement under HB 1397 is clear and convincing evidence, not only does prior domestic violence diminish in importance, but the real possibility exists of retrying a protection from abuse case as part of a custody proceeding.

Also, with a 50/50 custody presumption, the concept of relocation virtually disappears. Should a parent be offered an employment opportunity in another state or even in another county, that individual will be forced to choose between foregoing the opportunity or foregoing custody. At least for the parent seeking to relocate, the corporate mobility of the 21st century is put on hold until the parties' youngest child is 18 years old, impeding that parent's and the child's financial horizons for the future.

In conclusion, HB 1397 represents a radical change from the courts' current approach to child custody. Whether it is a change that promotes fairness and reduces tensions between parents and, therefore, for children, or has the complete opposite effect, remains to be seen. There are arguments on both sides of the issue. If you feel strongly one way or the other, contact your state legislators and let your opinion be known.

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