Michigan Judges Association
Founded 1927

June 13, 2017

House Judiciary Committee
Attention: Chairman Jim Runestad

Chairman Runestad, members of the House Judiciary Committee, thank you for the opportunity to provide comments and concerns regarding HB 4691. On behalf of the Michigan Judges Association's Family Law Committee, we offer the following comments with the hope of improving HB 4691 and eliminating challenges in the court.

HB 4691 creates a presumption of equal custody with both parents. This presumption is perpetuated by the *presumption* of an Established Custodial Environment (ECE) contained in section 6a.

Michigan Rule of Evidence 301 addresses presumptions in civil actions; it provides that a presumption shifts the burden of production to the other side who must adduce evidence contrary to the presumed facts. This rule was addressed in *Reed v Breton*, 475 Mich 531 (2006), wherein the court stated that to rebut a presumption in a civil matter, the opposing party must present competent and credible evidence.

Section 6a(4) is contrary to MCR 301 and established case law because it provides that the presumption of the ECE may only be rebutted by "clear and convincing evidence". This departure from all established case law and precedent will dramatically impact the law in general. This impact will be most pronounced on those cases in which domestic violence is a factor because the impact of domestic violence on children can have devastating and lifelong physical, mental and psychological consequences.

Clear and convincing evidence is that evidence which "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Kefgen v Davidson*, 241 Mich App 611, 625 (2000). The "clear and convincing evidence" standard is very difficult to meet and will put judges in the position of having to place a child in a home where domestic violence is found to exist by a preponderance of the evidence but *not* by clear and convincing evidence. This will sacrifice the best interests of the child to the presumption of equal parenting time.

This high burden of proof will have the effect of increasing the number of high-conflict cases in Michigan courts as the stakes involved in protecting children from domestic violence will set up an "all-or-nothing" battle between parents. A parent with some domestic violence history, who can be awarded parenting time with appropriate conditions or restrictions under current law, will have to be branded "unfit" in order to avoid the presumption of equal time. The court will be incentivized by child protection concerns (under this proposal) to find clear and convincing evidence that a child has been "exposed to domestic violence" (subsection (11)(a)) where only a preponderance might otherwise have been found.

Of substantial concern to the Family Law Committee is the elimination of domestic violence from the factors used to consider and determine custody. Domestic violence may be included in subsection 3(B)(ix)'s consideration of criminal activity; however, domestic violence encompasses emotional and mental abuse that are not actionable "criminal activity".

Custody determinations are now made pursuant to the Child Custody Act of 1970, MCL 722.21 et. seq. The Child Custody Act focuses on the Best Interest of the Child test that involve twelve factors the court must consider to resolve custody and parenting time disputes. HB 4691 focuses on the rights of parents to custody, totally disregarding the child's best interest. Subsection (11) of section 6a does set forth considerations to rebut the ECE by clear and convincing evidence; the listed factors for consideration have little to do with the child's best interests, however.

The disregard of the rights of the child is evident in section 3 which rewrites the Best Interest of the Child test instead focusing on "the capacity and a history of the parents".

Section 6a creates a presumption of an ECE with both parents if they reside together. This presumption disregards the actual facts as to which parent provides day to day support, maintenance and nurturing of the child and instead substitutes mere presence of a parent.

Further, subsections 6a(2) and (3) allows a parent to file an intention to preserve the ECE irrespective of the actions of the parent during the marriage and during separation and irrespective of whether an ECE actually existed with the child.

Section 6a(11)(E) provides that "[p]redominant weight shall be given to a child's preference after he or she turns 16 years of age". Currently the court is only required to consider the child's preference as one of twelve factors. Giving the preference predominant weight will require disclosure of the child's preference and thrust the child into the middle of a contentious battle between their parents. The ensuing animosity and hurt feelings will linger well after the custody battle is over. Giving "predominant weight" to a child's preference also increases the ability of a minor child to manipulate the parents and "play" one against the other or for the parents to inappropriately cajole children into choosing one parent over the other.

Section 7(4) allows a deployed military parent to designate a third party to exercise a deployed parent's parenting time. There is no legal basis for a third party designee to exercise parenting time. The designee could be anyone and someone the child has no familiarity or relationship with. This provision could mandate a result which is completely contrary to the best interests of the child.

A voluminous number of hearings are required under the bill. The court will be required to conduct a hearing in up to twelve instances. Courts would be required to conduct a hearing every time a parent seeks to rebut the presumption by "clear and convincing" evidence. Subsections 6a (4), (5), (6),(7),(10),(11),(12). Hearings would also be required under subsections 6a (10)(B), (15), (16) and subsections 7(E) and 7a (11).

Section 7a(16) requires the court schedule a hearing to resolve custody disputes within 21 days after a motion is filed contesting an ex

parte order. Courts have time deadlines for most matters before the court. Many cases are routinely scheduled at the earliest date available which may be months out. Requiring that these matters be heard within 21 days will guarantee that either these cases or others will not be heard timely.

It is the Michigan Judges Association Family Law Committee's desire that we work together to resolve these problems and potential pitfalls that exist in the current bill. We look forward to discussing this bill further and reaching a consensus as to how we can improve the bill. We also express our strong support for the issues raised in the Michigan Probate Judges Association June 12, 2017 letter.

Very truly yours,

Hon. Kathleen A. Feeney
Chairperson
MJA Family Law Committee

Brian Kirkham with permission

Hon. Brian K. Kirkham
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