STATE OF MICHIGAN
Department of Health & Human Services

Michigan Domestic & Sexual Violence Prevention & Treatment Board
235 S. Grand Avenue, Suite 1108
Lansing, MI 48933
www.michigan.gov/domesticviolen
Phone: (517) 335-6388
Fax: (517) 241-8903

TO:	**Members of the House Committee on Judiciary**
FROM:	**Debi Cain, Executive Director, Michigan Domestic & Sexual Violence Prevention & Treatment Board**
DATE:	**June 12, 2017**
RE:	**HB 4691, proposed "Michigan Shared Parenting Act"**
CC:	**Dr. Cris Sullivan, Sgt. Yvonne DeCarla Brantley, Hon. Thomas Cameron, Jeffrie Cape, James A. Fink, Hon. Elizabeth Pollard Hines, Jacqueline Schafer**

The Michigan Domestic & Sexual Violence Prevention & Treatment Board (MDSVPTB) believes that joint custody arrangements make sense in the many cases where divorced or separated parents can cooperate in good faith to promote the well-being of their children. The MDSVPTB further believes that Michigan's current Child Custody Act effectively encourages joint custody arrangements in appropriate cases. The MDSVPTB opposes HB 4691, because it seeks to replace the current provisions of the Child Custody Act with a confusing array of presumptions and standards that would foster litigation as divorcing parents and their attorneys seek judicial interpretation.

The MDSVPTB also believes that passage of HB 4691 would have negative effects on the well-being of Michigan parents and children who are subjected or exposed to domestic violence. The Board's principal concerns in this regard are as follows:

- The bill's presumptions favoring joint legal and physical custody will make it more difficult for abused parents to protect themselves and their children from perpetrators' behavior.
- The bill would allow parents to create artificial "established custodial environments" that are not based on the lived experiences of their children, prioritizing parents' "rights" to access to children over children's stability, safety and well-being. These provisions can be easily manipulated by abusive parents who chose to be uninvolved in their children's lives prior to a divorce, but seek to use contact with their children as a means of maintaining coercive control over their former partners post-separation.
- The bill's reduction of the 100-mile limitation on parental relocation to 40 miles would make it more difficult for abused parents to shield their children from exposure to abuse.
- The bill's provision allowing a deployed military parent to name a third party to exercise his or her parenting time contains no opportunity for the other parent or the court to raise legitimate concerns about a child's safety or well-being during contact with the designee.

1. The Current Child Custody Act Already Favors Joint Custody Arrangements

Michigan's current Child Custody Act already contains a presumption that "it [is] in the best interests of a child for the child to have a strong relationship with both of his or her parents," directing courts to grant parenting time "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time." MCL 722.27a(1). The current Act also recognizes the role that joint custody can play in fostering strong child/parent relationships. Current MCL 722.26a(1)-(2) encourages joint custody by requiring courts to advise parents of its availability, and to consider joint custody at the request

of either parent. The court must make a record for purposes of appeal on its reasoning for granting or denying a request for joint custody. Because a joint custody arrangement cannot effectively promote children's well-being unless each parent cooperates to implement it, the current Act directs courts to consider two critical factors in making joint custody decisions: 1) the best interests of the child; and, 2) "whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child." In this way, the current Act promotes joint custody arrangements in cases where they are workable, allowing parents and courts the flexibility to respond to diverse individual family situations.

HB 4691 does away with the foregoing provisions of current law. It replaces them with a byzantine system of multiple presumptions and standards for creating "established custodial environments" and joint custody arrangements that will foster litigation and reduce courts' flexibility to respond to families for whom cooperative parenting is an unrealistic goal. If a court determines that a child's parents are not likely to cooperate or agree regarding decisions affecting the child's welfare, sec. 6a(10) of the bill contains vague, ill-defined provisions encouraging the court to force cooperation, without regard to whether cooperation is feasible or dangerous because one parent is exercising coercion or control over the other. Some of the provisions for encouraging cooperation in this section would continue or exacerbate the conflict between the parties for an indefinite period of time with no relief for children who are caught in the middle. For example, the bill directs that a court may order that "no changes … be made with regard to the child's schooling or other important decisions until the parents are able to agree on important issues for the benefit of the child or agree to a decision-making process or designee to settle disputes for the benefit of the child."

2. The Rebuttable Presumptions in HB 4691 Will Make It More Difficult for Abused Parents to Protect Their Children from Exposure to Perpetrators' Behavior

The bill's presumptions favoring joint legal and physical custody are of particular concern to the MDSVPTB, because domestic violence perpetrators are not good candidates for these types of custody arrangements. Domestic violence perpetrators are not interested in behaving in the cooperative manner that is needed for joint custody arrangements to succeed. Instead, perpetrators seek to control their former partners and children through physical violence, threats, and manipulation. Perpetrators' tactics often including undermining their partners' authority over or relationships with children, using access to children as a tool to manipulate their partners, and using children as sources of information that can be used against their partners. Many perpetrators use the contacts with their partners that are needed to implement joint custody arrangements as opportunities for physical violence or emotional abuse, often committed in front of the children.

The MDSVPTB has a longstanding position opposing rebuttable presumptions for joint custody in cases involving domestic violence because such presumptions do not adequately protect children and abused parents from the harms that could result from inappropriate orders for joint custody. Rebuttable presumptions tip the scale in favor of abuse perpetrators, by placing the burden to challenge an inappropriate arrangement on the parent who is less able to do so. The imbalance of power that favors abuse perpetrators in these cases arises from several sources:

- In many cases, evidence of abusive tactics is not clear-cut or conclusive because the perpetrator's behavior was not witnessed by others, or did not lead to documented interventions. Such behavior may include non-criminal controlling tactics such as: isolating children or abused parents from family members, health care providers, spiritual leaders, or other supportive individuals; withholding access to vehicles, medicines, food, or other necessities; name-calling, shaming, or belittling an abused parent, often in front of the

children; and, disrespecting rules set by the abused parent, or criticizing decisions made by that parent in front of the children.

- Many abused parents have been prevented from working or denied access to money during the abusive relationship. These parents lack the financial resources to hire counsel to help them overcome the legal hurdles a presumption presents.
- Many abused parents are intimidated by threats of retaliation, or so exhausted by the perpetrator's behavior, that they are afraid or lack the emotional reserves needed to engage with the perpetrator to overcome a presumption.

The "clear and convincing" standards for rebutting the presumptions in HB 4691 are particularly onerous, making it nearly impossible for many abused parents to protect their children from perpetrators' harmful behavior in the context of joint custody arrangements.

- Section 6a(10) of HB 4691 requires a court to order an abused parent to share joint legal custody with a perpetrator, unless the abused parent can establish by clear and convincing evidence that a child's health, safety or well-being would be "materially compromised" by an order for it. The "best interest factors" set forth in section 3 of the Child Custody Act would apparently not be considered in making this determination. "Clear and convincing evidence" is a very high standard of certainty, much higher than the preponderance of evidence standard that generally applies in family law cases. Moreover, the meaning of "materially compromised" is unclear. Section 2(l) of the bill defines this term as "diminished outcomes that exceed minor deviations and that would have a significant and profound impact on the well-being of the child." It is not clear what "outcomes" this definition seeks to measure. It is also uncertain what norms would be the standard against which "minor deviations" would be measured. An abused parent who seeks to meet this rebuttal standard will undoubtedly need the financial and emotional wherewithal to litigate these unanswered questions.
- If an established custodial environment has been created by both parents (see part 2 below), section 6a(11) of HB 4691 requires a court to "order that it is in the best interests of the child to grant the parents substantially equal parenting time," without any assessment of the child's actual circumstances under the best interest factors in section 3 of the Act. This presumption can be overcome if the objecting parent demonstrates clear and convincing evidence of certain circumstances listed in section 6a(11); no consideration of the best interest factors in section 3 is required. Circumstances that would justify overcoming this presumption include the *child's* (but not the other parent's) exposure to domestic violence. This provision overlooks the close connection between the safety of a child and an abused protective parent, offering no protection to children in cases where the abuse is directed at a parent, but the child has not been "exposed" to it. Moreover, the high standard of proof to overcome the presumption will be impossible for many abused parents to meet, particularly if the perpetrator's behavior has not been witnessed by others or documented by police reports, medical records, or other corroborating evidence. Many parents – particularly those who are low-income and/or unrepresented – will not have the resources or knowledge needed to invoke the exception. Additionally, abused parents (particularly those who do not have conclusive evidence corroborating the abuse) will likely be deterred from invoking this exception due to the risk that they will be disbelieved and penalized under other provisions in this subsection directing courts to consider false or misleading allegations about abuse, and attempts to "alienate" a child from an abusive parent.

3. The Bill's Provisions for Establishing a Child's Custodial Environment Prioritize Parental "Rights" Over Child Safety

In addition to its position opposing presumptions favoring joint legal and/or physical custody, the MDSVPTB has adopted the following general principles regarding child custody and parenting

time matters:

> "Courts must be given clear standards governing the allocation of decision-making responsibility and residential care for children after their parents separate. A parent's 'right' to exercise physical or legal responsibility for a child must never be given priority over the physical and emotional safety of each child and parent. Courts must be given clear standards to determine when a parent's behavior makes it unsafe for that parent to have decision-making responsibility or residential care for a child. Once such a determination has been made, courts must also have clear standards to apply to ensure that the parent's non-residential contact with a child does not endanger the child, the other parent, or any other person. Ambiguous laws and court orders create opportunities for domestic violence perpetrators to manipulate the legal system as a weapon against their former intimate partners. The best way to protect children from domestic violence is to protect the abused parent and to hold the abuse perpetrator accountable."

HB 4691 is inconsistent with the foregoing principles in that it prioritizes a parent's "right" to exercise physical and legal custody of a child over the child's physical and emotional safety. This priority is most evident in the presumptions regarding a child's established custodial environment in section 6a(1)-(8). The current Child Custody Act recognizes that children need stability in their home environments after their parents' separation, by requiring a showing of clear and convincing evidence as a prerequisite to changing a child's established custodial environment. HB 4691 eliminates this provision of the Act. Instead, the bill allows parents who are not residing together at the time of filing for divorce or custody to either create a presumed artificial "established custodial environment" that has no basis in the reality experienced by the child, or to seek "reunification" with the child, depending upon whether the parent has met an arbitrary 90-day deadline to give notice of the intent to preserve his/her established custodial environment.

If the parent seeking to establish a presumed "established custodial environment" meets the bill's 90-day notice deadline, the other parent may rebut this presumption only upon a showing of clear and convincing evidence that this is not in the child's best interests, apparently under the redrafted "best interest" factors in section 3. Unlike the current Act's best interest factors, the redrafted factors do not specifically mention domestic violence. Instead, the "domestic violence" factor seems to have been replaced by factors requiring clear and convincing evidence of "criminal activity" or "behavior extending beyond reasonable parenting practices that materially compromises the stability of the home or the health safety, or well-being of the child." The "criminal activity" factor will not be helpful to abused parents who have endured abuse tactics that are highly damaging to them and their children, but are not criminal. The factor requiring the court to consider "behavior extending beyond reasonable parenting practices that materially compromises the stability of the home or the health, safety, or well-being of the child" fails to recognize the close connection between the safety of a child and that of an abused parent. Moreover, as noted above, the bill's standard for behavior that "materially compromises" a child's stability, health, safety, or well-being is at once so vague and so stringent that it will be extremely difficult to meet.

If a parent who has not resided with the other at the time of filing for divorce or custody fails to meet the 90-day deadline for giving notice of the intent to preserve his/her established custodial environment, or if the presumption of an established custodial environment is rebutted because a parent was unaware of parentage or was unable to make routine contact with the child, the bill requires the court to give this parent an opportunity for "reunification" with the child, absent a determination that there is clear and convincing evidence that this is not in the child's best

interests. No guidelines for "reunification" are provided, creating concerns about what this process might entail, how long it would last, who would pay for it, and who would supervise it.[1] Although it is not clear why, a "best interest" determination in this case is made using the factors set forth in section 6a(11) rather than those in section 3. These factors include domestic violence, but are problematic for the reasons mentioned above in the discussion of the presumption in section 6a(11) requiring "substantially equal parenting time."

4. Limits on Relocation

Section 11 of the bill reduces the 100-mile relocation restriction in the current Child Custody Act to 40 miles as measured by a vehicle's odometer, unless the court determines for the benefit of the child that a 40-mile distance would negatively affect the child's access to parenting time, parental involvement in the child's school, or the child's ability to access routing support groups or extracurricular activities. As under current law, parents seeking to relocate to escape the threat of domestic violence may do so under the bill, "until the court makes a determination" whether this is permissible. However, the factors the court must consider in deciding whether to allow relocation do not specifically include domestic violence committed against the relocating parent. In fact, the relocating parent must prove by clear and convincing evidence that "no domestic violence...is likely to exist in the moving parent's new residence." These amendments to the Custody Act's current relocation provisions will unduly limit abused parents in their efforts to build safe environments for themselves and their children, forcing them to seek approval of relocation plans that are currently accomplished without court intervention. For some abused parents, moving away from an abusive former partner is the best safety strategy, especially if it moves them closer to supportive family members or friends. For others, such a move is necessary to obtain the employment they need to maintain a household without the assistance of an abuse perpetrator. A 40-mile restriction gives parents in these situations less flexibility, creates a greater need for court intervention, and keeps abuse perpetrators closer.

5. Third-party Parenting Time

Sections 7(4) and 7a(19) of the bill provide that "in order to ensure and maintain the established custodial environment and stability for the child, the parent on deployment may designate a third party who may exercise the deployed parent's parenting time while that parent is on deployment." Although the Board recognizes and sympathizes with the need for children to maintain their relationships with deployed military parents, this provision does not adequately protect children. It contains no opportunity for the child's other parent to raise reasonable objections to designees who present a risk of sexual or other forms of abuse against the child; neither does it direct the court to conduct any inquiry into whether the designation of the third party is in the best interests of the child.

Please note that the Board's position and rationale are solely that of the Board and do not represent the views of the Michigan Department of Health and Human Services or any other body. Although the Board is administratively housed within MDHHS, it is an independent, legislatively-created body with members appointed by the Governor. (See MCL 400.1502.)

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[1] Some programs that seek to reunite children with "alienated" parents are quite controversial and potentially harmful to children. See Tabachnik, *They were taken from their mom to rebond with their dad. It didn't go well.* (Washington Post Magazine, May 11, 2017), online at https://www.washingtonpost.com/lifestyle/magazine/a-divorced-father-his-estranged-kids-and-a-controversial-program-to-bring-them-together/2017/05/09/b50ac6f6-204c-11e7-ad74-3a742a6e93a7_story.html?tid=ss_mail&utm_term=.c197b3583e11