PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE

COMMENTS ON HB1397
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE ON FAMILY LAW
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PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE
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Thank you for the opportunity to testify about HB 1397. I am Danni Petyo, Civil Legal Representation (CLR) Attorney for the Pennsylvania Coalition Against Domestic Violence (PCADV), the umbrella organization for domestic violence programs in Pennsylvania. Our fifty-nine member programs provide a variety of services, including counseling, emergency shelter, and legal advocacy to domestic violence survivors in all sixty-seven counties. My role at PCADV consists of overseeing PCADV's seventeen Civil Legal Representation (CLR) programs that provide free, expert legal representation in civil legal matters to survivors of domestic violence. We recognize that leaving an abusive relationship is just the first step and that litigation can play an important role in helping a survivor achieve safety, self-sufficiency, and autonomy, whether that takes the form of a divorce, an award for financial support, custody of your children and their protection from an abusive parent, secure immigration status, or any combination thereof. Also, before coming to work at PCADV, I helped start the Civil Legal Representation Project serving Luzerne, Carbon, and Wyoming Counties in 2014. As a CLR Attorney, I have represented many survivors of domestic violence in contested custody matters.

PCADV has significant concerns with HB 1397, particularly the presumption in favor of 50/50 custody, the modification of several of §5328 custody factors, and the expansion of grandparents' rights. These proposed changes would create significant issues for the child custody process, making an already difficult process even harder, dividing families, and putting children at greater risk of harm.

I. The Presumption in Favor of 50/50 Custody

A presumption in favor of 50/50 custody would put the cart before the horse, putting the wants of the parent ahead of the needs of the child. While we recognize that the relationship between a parent and child is fundamental, like no other, we cannot forget that the child is an autonomous individual, as deserving of life, liberty, and pursuit of happiness. They are not a piece of furniture, or a pet, subject to equitable distribution as part of a divorce.

The current statute gets it right. It puts the child first, requiring that a court's custody determination be based on the best interest of the child. HB 1397, and its presumption in favor of 50/50 custody is fatally flawed because it puts the parents and their interest first. Every parent wants to spend as much time with their child as possible. However, contrary to what the proponents of HB 1397 would have you believe, it is not necessarily in the best interest of a child to spend an equal amount of time with both parents:

- **The physical distance between the parents** may make a 50/50 schedule highly impractical though not impossible. For example, the parents live 45 minutes away from each other. The child goes to school in mother's district, so during father's custodial time, the child has to get up an hour earlier and spend almost an hour in the car on the way to and from school.

- One parent's **work schedule** puts them in a superior position to care for the child daily. For example, one parent's work schedule has them starting work before the child needs to be in school with their workday ending after the child is out of school.
- All other things being equal, the child needs **a home base.**
- **A parent is abusive.** This is true even if the abusive parent never directly harmed the child. Abuse that a child can hear and/or see has been shown have significant negative effects on that child's mental, emotional, and physical development. It is our position and the position of common sense that a parent who batterers another parent is a bad parent. Indeed, this statute will be a boon to abusers who will now have significant access to and control over their victims by default.

Compounding the problem is that this presumption can only be overcome by "clear and convincing evidence." The clear and convincing standard is the highest burden of proof in civil law, generally reserved for matters where the state is the party and attempting to limit some significant individual rights or interest, such as termination of parental rights. A high legal standard makes little sense in custody actions as families are unique and different and they commonly require a custody award tailored to their specific situation and the specific needs of the child. The clear and convincing standard effectively makes it impossible to overcome the presumption and for families to seek creative custody solutions from the Courts.

As a result, if HB 1379 passes, the courts will be maintaining and/or establishing, custodial relationships/schedules at the expense of the child's physical, mental, or emotional well-being. There may be situations where a 50/50 custody schedule is in the best interest of the child, but that isn't

always the case and therefore it should certainly not be the starting point. The Child's best interest needs to be that lodestar.

II. Modification of the Sixteenth Custody Factor Under §5328

In turn, the proposed modification of the sixteenth custody factor at §5328 is improper as it does not concern the best interest of the child standard and it would create a retributive aspect to custody determinations. Currently, §5328(a)(16) is "any other relevant factor." HB 1397 would replace it with "the existence of a prior custody order or parenting plan that granted unequal parenting time for reasons not related to the fitness or interest of either parent." First, the factor does not address the child or their interest regarding a prior order that granted unequal parenting time. This is odd considering the factors are to help Courts determine what custody situation is in the best interests of the child. Second, there are a plethora of reasons the parties may have entered into an order that provided for unequal parenting time that has nothing to do with the fitness or interest of the parents, for example, work/school schedules, special needs, child preference, family structure, etc. A lot of these reasons have to do more with the child then the parents and thus may have been in the child's best interests at that time.

Proponents of this legislation may feel that "inequitable" custody orders should receive more scrutiny and that redress is owed to the "victims" of such orders. However, all that this factor modification serves to accomplish is make the adversarial process of custody even more so in allowing Courts to consider this evidence in determining a custody award. Such a factor would give custody a retributive angle that appeals to abusers seeking to have the Courts punish the victim for having custody. Finally, avenues already exist for individuals to challenge unjust or unfair orders, and such issues should not be a factor in considering what is in the best interest of the child.

III. Expansion of Grandparents' Custody Rights Under §5325

Finally, the proposed expansion of grandparents' custody rights under §5325 appears to be a solution in search of a problem. While there are issues with §5325 in its current form, HB 1397 is not the way to fix them. Indeed, it would make the current issues even worse and create significant new problems as well.

The purpose of §5325 is to help maintain relationships between grandparents and grandchildren that might otherwise be destroyed by death, divorce, or family estrangement. However, while well-intentioned, §5325 is not perfect. The requirements for standing, i.e. the right to bring a lawsuit, under §5325 are astonishingly low. Something as minor as an acrimonious divorce and custody case, where the parties disagree as to the extent the child should visit with the in-laws, is sufficient to give a grandparent standing to sue for custody under §5325(2). As such, §5325 seems to fly in the face of the nearly universal belief that a parent's right to the care and control of their child should be free of interference except for the other parent and/or in the event of abuse or neglect. §5325 is already regularly taken advantage of by abusers who go through their parents to gain access to a child they have been separated from due to their harmful behavior. That being said, this low burden for standing is tempered, and made acceptable, by the fact that an award of custody under §5328 is currently limited to partial or supervised physical custody. As such, the potential level of access/interference is also rather low.

Accordingly, HB 1397, which would give grandparents the right to seek the same level of custody over a child as a parent, even when the parents are taking adequate care of the child, would be a major and unwelcome change to the status quo. Indeed, given their stated position as to the importance of the parent/child relationship, I am struggling to see why the proponents of HB 1397

would support a provision that would result in a dramatic increase in third-party interference between parents and children. I can only hope that it has nothing to do with the fact that the proposed change will also make §5325 an even more popular tool for abusers and their enabling parents.

IV. Conclusion

Child custody is always a challenging issue, especially when the courts are involved. Judges and legislators are human. As such, no law, or decision is perfect. However, with luck and the cooperation of people of goodwill, improvements can be made. Unfortunately, HB 1397 is not an example of an improvement. Indeed, it would be a significant step back. It would disregard the central focus of a child custody statute, the child, make the best interest analysis even more difficult, and permit abusers and their enablers to manipulate the system and control their victims to an even greater extent. I urge the honorable members of this committee to vote against this bill.