



Public Hearing on House Bill 1499
House Republican Policy Committee

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Thank you for the opportunity to provide written testimony about one of the most serious and precious issues in the Commonwealth: children.

The Pennsylvania Bar Association (“PBA”) opposes House Bill 1499, just as it has opposed similar legislation historically. Most recently, the PBA testified in opposition to HB 1397 in 2019. The attorneys in the PBA Family Law Section handle child custody cases daily. We work to advocate for the best interest of the child as zealous advocates for our clients, the parents.

The Pennsylvania Supreme Court has made it clear that presumptions are antithetical to a best interest analysis in a custody matter. Additionally, a presumption in place of custody factors, as is set forth in HB 1499, could further minimize this best interest analysis. The burden in a child custody matter is equally shared between the parents, and a presumption of any kind shifts the burden to weigh more heavily on one parent than the other.

The only presumption that has survived a constitutional challenge to the Pennsylvania Supreme Court is the presumption in favor of parents over third parties when primary custody is being awarded as outlined in 23 Pa. C.S.A. §5327(b). That presumption has survived judicial scrutiny, because of the federal constitutional right to parent one’s child as discuss in *Troxel v. Granville*, 120 S. Ct. 2054 (2000).

The Tender Years Doctrine that placed young children with their mothers, was struck down in 1997 in a case called *Commonwealth ex rel. Spriggs v. Carson*, 368 A.2d 635 (Pa. 1977). The court specifically stated:

Courts should be wary of deciding matters as sensitive as questions of custody by the invocation of ‘presumptions.’ Instead, we believe that our courts should inquire into the circumstances and relationships of all the parties involved and reach a determination based solely upon the facts of the case then before the Court.

In *Spriggs*, the father was awarded primary custody because he provided stability. In 2021, the legislature has codified that gender should not be considered in a custody determination at 23 Pa. C.S.A. §5328(b). This was in part through the work of the Joint State Government Commission. The prohibition on considering gender has, in fact, contributed to more fathers being awarded primary custody.

In 2005 the Pennsylvania Supreme Court struck down a presumption against homosexual parents in the case of *M.A.T. v. G.S.T.*, 989 A.2d 11. The Supreme Court again emphasized that presumptions interfere with an analysis of the best interest of the child, specifically stating:

But courts may no longer reason by presumption in child custody cases. Not only has the tender years presumption been explicitly repudiated, but so have all other presumptions. In a custody dispute between parents, no one has the burden of proof; no presumption may be resorted to; instead, the court must determine according to the evidence in the particular case before it what will

serve the children's best interests.

M.A.T., 989 A2d at 17, citing *In re Custody of Temos*, 450 A.2d 111, 121-22 (Pa. Super. 1982). “[I]t is well established that presumptions are generally not appropriate in custody proceedings.” *Id.* at 23.

The current custody law prohibits inexperienced judges and/or overworked judges from taking the easy way out and ruling without an analysis of the factors. When ruling in a custody matter judges must analyze each factor in any ruling that awards primary physical, shared physical custody, or legal custody. This analysis gives litigants an understanding of why a custody determination was made. It also allows parents to better understand what they can work on to achieve a different outcome in the event of a future modification. If a presumption applies, the factors become less relevant, and more importantly, the best interest of the child becomes less relevant. The appellate court strictly enforces the factor analysis requirement. If a judge skips a factor, it is a reversible error, and the case goes back to the judge to fix the error; however, HB 1499 undoes that. A presumption negates the need for a thoughtful analysis of the factors.

Act 8 of 2024, also known as Kayden's Law, introduced a new presumption in favor of safety that has yet to be vetted by the Pennsylvania Supreme Court. Kayden's Law confirmed that the safety weighting of the custody factors is of increased importance. It triggered a higher scrutiny in cases where there was a history of domestic violence. When there is a history of safety issues, supervised custody is warranted unless a court determines the parent is not a risk to the child. A consideration of past abuse is a lower standard created by Kayden's Law. HB 1499 undoes Kayden's Law and eliminates the factors that have been thoughtfully consolidated and crafted in the best interest of the child.

Further, the elimination of the “partial physical custody” and “primary physical custody” terms in HB 1499 is additionally concerning. In the event a Court does find a reason to find for custody other than shared, there is no language to use to indicate the type of custody that is being awarded. Currently, grandparents have standing to sue for partial custody which is a limited interference of the parental right to parent. Changing the language around grandparent custody to permit shared custody instead of partial custody increases grandparents' rights while reducing the rights and, potentially, the custody time of parents.

There is no shortcut by a presumption to a child's best interest. A presumption for shared physical custody would not consider the child's preference. A presumption would not consider parental challenges such as substance abuse, untreated mental health, employment requirements, and lack of childcare arrangements. A presumption would not consider whether a child knows or is bonded to a parent. A presumption would not consider when parents live in different school districts, different counties, or different states. A presumption would not consider the special needs, medical needs, or mental health needs of the child. A presumption ignores the best interest of the child. The child and his/her specific needs should not be forgotten or minimized by a presumption of shared physical custody. The best interest of a child should require thoughtful consideration by a judge.

We have made great strides in Pennsylvania to eradicate the presumptions that shifted the focus off of the children, such as the Tender Years Doctrine. If we create presumptions again, we will undo what we have accomplished and from where we have come.

For all the reasons outlined above, the Pennsylvania Bar Association opposes HB 1499. Thank you for affording the PBA the opportunity to address our concerns with this legislation.