Judicial Impact Statement

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Senate Bill 144
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Sponsors
Sen. Michael Skindell
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Senate Judiciary Civil Justice

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As Introduced

TITLE INFORMATION

To amend sections 3105.65, 3109.03, 3109.04, 3109.041, 3109.043, 3109.051, 3109.09, 3109.56, 3119.022, 3119.24, 3313.98, and 5120.653 of the Revised Code to ensure that court orders and decrees that allocate parental rights and responsibilities with respect to the care of and access to children provide for equality between the parents except where clear and convincing evidence shows that equal legal and physical access would be harmful to the children.

IMPACT SUMMARY

The Ohio Judicial Conference has reviewed Senate Bill 144 with regard to the impact that the legislation will have on the policies and procedures of Ohio courts and judges have determined that the bill will have a significant negative impact. Senate Bill 144 will result in significant increases in court workload and court caseload which will, in turn, negatively impact the administration of justice. The bill will undermine public confidence in the law and significantly reduce judicial discretion.

BACKGROUND

Child custody laws in the United States have evolved significantly over the last two centuries. In the early part of the nineteenth century, most states had child custody laws that favored the father. In the mid-nineteenth century this preference shifted, and most states began to adopt child custody laws and practices that instead favored the mother. This preference in favor of the mother, otherwise known as the "tender years" doctrine, was standard practice with regard to child custody in most states until the 1960's when gender equality became one of the issues of the day for women and when the courts began striking down child custody laws that favored mothers as impermissible violations of

What is a Judicial Impact Statement?

A Judicial Impact Statement describes as objectively and accurately as possible the probable, practical effects on Ohio's court system of the adoption of the particular bill. The court system includes people who use the courts (parties to suits, witnesses, attorneys and other deputies, probation officials, judges and others). The Ohio Judicial Conference prepares these statements pursuant to R.C. 105.911.

the equal protection clause. In response to the women's rights movement and court decisions striking down the tender years doctrine, states began adopting gender neutral child custody laws that focused on the "best interests of the child." This standard represented a shift in divorce custody policy that recognized the enormous impact of parental separation on children. Given this impact, policymakers decided that, rather than focus on the competing interests of two parents, courts should focus on creating custody arrangements that would lead to the best possible outcomes for children. Importantly, while there was a need to create a policy that was gender neutral, policymakers also recognized that it was important for one parent or the other, regardless of gender, to be granted final decision making authority. To do otherwise would require parents who couldn't get along while they were married to reach agreements on things like medical care, schooling, and extracurricular activities after separation.

Ohio was one of the earliest states to begin to use the best interests of the child standard because the state has long recognized that children benefit from the love and support of both parents whenever possible. Because the state recognizes this premise, current law generally allows parents who agree to a parenting plan to have the plan that they desire while giving judges the discretion, in circumstances where parents fail to agree, to focus on the best interests of the child. What often gets lost in the debate over whether the state should abandon the best interests standard in favor of a presumption of equal parenting time is the fact that the current standard leads nearly eighty percent of separating parents to reach a child custody agreement before trial.[1]

Historically, some groups have opposed the policy of allowing judges to allocate parental rights and responsibilities in this manner because they feel that a presumption in favor of equal legal and physical access is, under almost all circumstances, in the best interests of children. Not only does this argument place the interest of the adult above the interests of the child, it fails to take into account that these are the twenty percent of parents who could not reach an agreement in the first place. Ultimately, the best interest of the child standard is still the common practice of most states today and Senate Bill 144 would make Ohio one of only a handful of states to adopt a presumption in favor of equal parenting time. As such, any departure from the best interest standard would constitute a radical shift in state law regarding the allocation of parental rights and would place the state in uncharted territory with regard to how our divorce custody policy impacts children.

JUDICIAL IMPACT

Increased Court Caseload
Senate Bill 144 will significantly increase court workload in both the short term and long term.

Short Term Impact
Senate Bill 144 will significantly increase motions and hearings for months or in some cases years following enactment. These short term increases would be largely due to amendments to R.C. 3109.041 that would provide parties to any current custody decree with the right to file a motion with the court that issued that decree requesting the issuance of an equal legal and physical access decree.

[1] Similar legislation has been introduced twice in the past ten years, House Bill 232 (125th General Assembly) and House Bill 688 (126th General Assembly), and has been discussed without being introduced during other General Assemblies.

Additionally, the court would be required to hold a hearing on each of these motions.
Practically speaking, many non-custodial parents who are currently subject to a shared parenting order will file a motion for a new order because they want to be more involved in their child's life. The bill, however, requires the court to grant an appropriate child support deviation when issuing an equal legal and physical access decree. As a result, many other non-custodial parents will file a motion for a new order so that they can lower their child support payments. Regardless of a parent's reasons for seeking a new equal legal and physical access order, judges expect most non-custodial parents to file a motion for a new order and judges estimate that each court will receive between several hundred and several thousand new motions depending on the size of the court. This will overload court dockets and require the use of court resources that are currently not available.

Long Term Impact
Beyond the immediate impact of motions and hearings under R.C. 3109.041, Senate Bill 144 will lead to a general increase in court workload over time due to several factors. First, the legislation is likely to lead to an overall increase in litigation (i.e. more filings, motions, cases and hearings) because divorcing parents will be less likely to settle their cases. Under current law, courts are able to use their discretion with regard to things like the division of property, spousal support, and parental rights and responsibilities to get parents to reach an agreement before the case goes to trial. By creating a presumption of equal legal and physical access, Senate Bill 144 essentially eliminates the courts' discretion with regard to the allocation of parental rights and responsibilities thereby diminishing the courts' ability to encourage settlements.

Second, the presumption of equal legal and physical access under the bill will likely result in many more post decree motions and contested hearings. This is so, because under current law, one parent is typically designated the residential parent, the residential parent and legal custodian, or the custodial parent of a child and is thus granted final decision making authority with regard to the child's care. If both parents have equal decision making authority, as would be the case under Senate Bill 144, the courts would become the final arbiter of issues related to the care of the child every time the parents have a disagreement. Moreover, because the current standard for determining the allocation of parental rights and responsibilities requires courts to focus on the best interests of children rather than on the interests of the parents, it reduces the likelihood that children will be subjected to abuse or neglect. Accordingly, by shifting the focus of the determination away from the interest of the children, courts will likely experience an increase in abuse, neglect and dependency cases.

Increased Court Workload
Senate Bill 144 will significantly increase court caseload (i.e. factors and findings, complexity, time) in the pre-trial, trial, and post-trial periods.

Pre-Trial
As described above, R.C. 3109.041 will give parties to a current custody decree the right to file a motion for a new decree providing equal legal and physical access and courts would be required to hold a hearing on each of these motions. In the short term, this will significantly increase the amount of time that courts spend on custody hearings because judges will need to hold pretrial conferences for each hearing in order to determine the number of issues and the number of witnesses each of the

parties intends to present. Moreover, judges will need to spend time interviewing children pursuant to R.C. 3109.041(B)(1). While courts typically hold these hearings and conduct these interviews, the bill would create a great influx of cases due to motions under R.C. 3109.041 and this would be extremely time-consuming.

Trial

While courts will spend a significant amount of administrative time processing R.C. 3109.041 motions and conducting pre-trial conferences, the most significant impact of Senate Bill 144 on caseload will come from the need to hold a hearing. This is because Senate Bill 144 will increase the complexity of hearings pertaining to the allocation of parental rights and responsibilities as well as the length of time that courts spend conducting these hearings.

Child custody hearings last anywhere from one hour to several days and can even be spread out over several weeks depending on the number of issues involved and the overall complexity of the case. These hearings will be prolonged by two requirements in Senate Bill 144. First, in order to issue anything other than an equal legal and physical access decree, the bill would require judges, under most circumstances, to find by clear and convincing evidence that equal legal and physical access would be harmful to the child. Whereas under current law, a court must only find by a preponderance of the evidence that a parenting plan is in the best interests of the child, the clear and convincing evidence standard is a much higher burden of proof for litigants to meet and will therefore require the presentation of a much higher caliber of evidence. Specifically, this change will require litigants who do not want equal legal and physical access to use the expert testimony of therapists, psychologists, psychiatrists and others. Given that both parties will want to present expert testimony, this requirement will likely lengthen each hearing in which expert testimony is given by several hours and will make the hearings more complex.

Second, as noted above, Senate Bill 144 will require courts to issue an appropriate deviation from child support for each equal legal and physical access decree in order to reflect the expenses incurred by each party as a result of that access. This will require the parties to give more testimony and provide more evidence on the incidental expenses that each party is likely to incur and on how the equal legal and physical access will affect the expenses in each of their households. As with the change to clear and convincing evidence, this will make hearings more complex and therefore lengthier.

In the short term, courts are likely to spend thousands of hours hearing R.C. 3109.041 motions for equal legal and physical access decrees as they will be forced to reopen cases and re-resolve issues that were previously litigated. In the long term, hearings will be lengthier due to the increased complexity of meeting a clear and convincing evidence burden of proof and the additional evidence required for courts to issue child support deviations. Additionally, mandating a child support deviation will likely lead to increased litigation over time as parents try to reduce their child support payments by using the courts to resolve disputes over who incurred what expenses and how much time was spent with the children. Even under current law, many courts are faced with parents who keep track of the time they spend with their children down to the minute and who try to litigate every time they feel that they have been shortchanged. This problem will only be exacerbated by

bringing money into the equation. In the end, the battle over days for dollars will be detrimental to the mother and father, and perhaps more importantly, detrimental to the children because they will be forced to relive their parents' separation each time one of them chooses to litigate over child support.

Post-Trial

In addition to increased time spent on pre-trial and trial matters, Senate Bill 144 will cause judges and court staff to spend additional time in the post-trial period reviewing parenting plans and issuing appropriate findings of fact and conclusions of law. While many courts currently issue findings of fact and conclusions of law in every case, such findings are only mandated when a shared parenting plan is requested by the parent or parents but is otherwise rejected by the court based on a finding that the plan was not in the best interests of the child. Under Senate Bill 144, R.C. 3109.04 will require courts to issue findings of fact and conclusions of law regardless of whether the judge approves or rejects the plan for equal legal and physical access. By placing this burden on the courts in almost every single case, court workload will increase in both the short term, due to R.C. 3109.041 motions, and in the long term, due to the need to issue findings in every case. Furthermore, this requirement will necessitate findings of fact and conclusions of law in uncontested cases. This means that courts will be forced to hold trials even when the defendant doesn't appear for any pretrial matters or for the final divorce. Moreover, the complexity of issuing findings based on clear and convincing evidence and child support deviations will only lengthen the amount of time spent on these matters.

The bill would also require courts, when modifying or terminating a prior decree in a way that allocates parental rights in an unequal manner due to the unsuitability of a parent, to create a plan to allow that parent to eliminate the reasons for unsuitability. Requiring courts to create plans under these circumstances adds a new dimension to the traditional role of Ohio's domestic relations courts and the actual creation of each plan will require additional time for both the judge and his or her staff. Perhaps more importantly, because this requirement adds a new dimension to the courts' role, court staff will need additional training in order to gain expertise in a myriad of rehabilitative options.

Impairments in the Administration of Justice

The significant increases in court workload and court caseload described above will negatively impact the administration of justice in two important ways. First, the great influx of cases will force courts to choose between hiring additional staff and forcing litigants into significant delays because of increased docket pressure. No matter what new burdens the legislature places on the courts, the present financial circumstances of the counties will not permit most courts to hire additional staff. As such, litigants will face significant delays. Adding to these delays will be the new evidentiary burden of the clear and convincing evidence standard. Because meeting this standard will almost always require expert testimony, cases will be delayed as the parties and the courts work around the schedules of therapists, psychologists, psychiatrists and others.

Second, Senate Bill 144 will increase court costs. Beyond the increased litigation expenses for the parties, which are described below, courts will incur significant additional costs for each hearing. On average, child custody hearings cost about $75 per hour and with hearings lasting anywhere from

one hour to several days the average hearing will cost the court $300 - $500. With motions numbering in the hundreds or thousands due to R.C. 3109.041, the cost of this legislation to each court will be very significant. Additionally, while most courts would prefer to hire additional staff to deal with the influx of cases that will be created by the bill, as noted above, present financial circumstances will not permit this. If the courts were to hire additional staff, however, larger courts would probably need to hire one or two additional magistrates at $55,000 - $70,000 plus benefits and at least two additional support staff at $30,000 - $35,000 plus benefits. Smaller courts may need to hire an additional magistrate or additional support staff but not necessarily both.

Public Confidence in the Law
Senate Bill 144 will undermine public confidence in the law in several important ways.

Domestic Violence
Under current law, in determining whether shared parenting is in the best interest of the child pursuant to R.C. 3109.04(F), a court is permitted to consider, among other things, any history of child abuse, spousal abuse, other domestic violence, or parental kidnapping. The court is also permitted to consider the potential for these acts. By granting judges the discretion to consider any history of domestic abuse or the potential for domestic abuse, the current statute promotes public confidence in the law. It does this by permitting elected officials, who are familiar with the individual facts of each case, and who have experience recognizing the signs of domestic abuse, to use their best judgment to issue orders that promote the safety of children.

Under Senate Bill 144, courts will only be able to consider clear and convincing evidence of a history of child abuse, spousal abuse, other domestic violence, or parental kidnapping and will only be able to consider this evidence at all in the context of determining whether equal access would be harmful to the child. This changes R.C. 3109.04(F) in two significant ways. First, it limits the courts' consideration of evidence of abuse to clear and convincing evidence. Second, it will prohibit the court from considering the potential for such abuse. Practically speaking, these changes will limit the courts' consideration of domestic abuse to cases in which there has been an actual conviction.

This limitation on judicial discretion could be disastrous for children and will seriously undermine public confidence in the law. While judges are sensitive to the concerns of some interested parties that false allegations of abuse are often used to gain an upper hand in child custody determinations, they also know that these false allegations are routinely brought to light prior to the issuance of a final decree. Perhaps more importantly, while most parents would never consider harming their children, a blanket judgment that equal access is safe for every child, absent a parent's conviction for domestic abuse or parental kidnapping, will undoubtedly result in some incidents in which children are harmed. Public confidence in the law will be lost because courts will appear to favor the ease of the equal access presumption over the safety and well being of children.

Litigation Expenses
Two requirements of Senate Bill 144 will significantly increase expenses for divorcing parties or shift those expenses between them in an inequitable fashion, thereby diminishing public confidence in the law. First, as discussed above, in order to issue anything other than an equal legal and physical access

decree, the bill requires courts to find by clear and convincing evidence that equal access would be harmful to the child. In order to meet this higher burden of proof, litigants will be forced to hire experts and present expert testimony as to what will or will not be harmful to the child. Because many litigants cannot afford expert fees courts will either have to hire social workers and evaluators to act as the parties' experts or deny justice for litigants who are unable to afford experts and who will therefore be unable to meet this burden of proof. Simply put, courts cannot afford to provide these services and access to justice will, in many cases, be denied. In many instances, this will result in the presumption of equal access being upheld even when such access will in fact be harmful to the child. In addition to expert fees, the need for expert testimony will increase legal fees because such testimony necessarily requires lawyers to do more work out of court taking depositions and preparing expert witnesses, and in court questioning those witnesses. In the end, the public will have less confidence in the law because many people will be unable to afford access to the outcomes that they believe are just.

Second, the bill would require courts, under R.C. 3109.04(B)(1), to divide the costs of any guardian ad litem (GAL) equally between the parties. Currently, courts are given wide discretion with regard to the apportionment of costs for a GAL because, as in other areas of the law, divorce and child custody cases present a wide array of circumstances that require them to make determinations that are dependent on the facts of each individual case. In most cases, courts apportion the costs of the GAL according to the income of each party. In other cases, the income of the parties may be so disparate that it would be a substantial drain on one party to divide the costs. Courts are also faced with cases where the non-custodial parent has significant child support arrearages, making it unfair or burdensome to require the custodial parent to contribute to the GAL fees. Mandating the equal division of these costs could also lead to abuse as parties would be more likely to file spurious motions or to attempt to drive up the costs of the GAL in order to work a hardship on the other party. Ultimately, requiring courts to divide the costs of the GAL equally in every case will undermine public confidence in the law because it will, in many cases, place an undue burden on one of the parties.

Medical, Psychological, and Psychiatric Examinations

Under current law, prior to trial, a court may cause an investigation to be made as to the character, family relations, past conduct, earning ability and financial worth of each parent. The court in its discretion may also order the parents and their minor children to submit to medical, psychological, and psychiatric examinations. As such, when a court orders one of these examinations under current law, it is because there is some underlying legal necessity for that examination.

Under Senate Bill 144, the court may still cause an investigation to be made but it will only be permitted to order medical, psychological, and psychiatric examinations if either or both of the parties file a written motion requesting such an examination. Not only will this eliminate the court's ability to order one of these examinations when there is an underlying legal need, but it will, in many cases, create ill will between the parties, cause them to become more entrenched in their positions against each other, and make them less likely to settle. Ultimately, this will reduce public confidence in the law because settlement gives parties the sense that the outcome of their case was self determinative rather than dependent on the judgment of an outside party. Because of this, parties

who settle generally feel like the law worked for them rather than against them and they are therefore more likely to walk away satisfied than parties who take their case to trial.

Judicial Discretion

Importantly, under current law, courts are already required to consider parents as equals when considering the allocation of parental rights and responsibilities for the care of their children. The shared parenting model, however, gives judges broad discretion to consider the individual circumstances of each case. This latitude enables judges to work with parents and children to craft parenting plans that are in the children's best interests but that also, when possible, meet the needs and desires of the parents. Significantly, in 2009, only 1 out of every 5 change of custody cases, and divorce and dissolution cases involving children, statewide, went to trial. This means that in almost 4 out of 5 such cases[2] the court was able to work with the parties to issue a parenting decree that, while maybe not ideal, was satisfactory enough that the parties did not desire to take the case to trial in order to fight for more parental rights and responsibilities. In other words, there is no epidemic of cases in which judges are abusing their judicial discretion by favoring one parent over the other or one gender over the other. To the contrary, judges are using their discretion to get most parents to come to an agreement and the parenting decrees that are being issued more often reflect a mutual decision by the parents than something that was forced upon them by the courts.

Under Senate Bill 144 judicial discretion to do what is in the best interests of children, and to work with the parents to issue a parenting decree that will meet their specific needs, would be replaced with a one-size-fits-all presumption that equal legal and physical access is, under all circumstances, what is best for everyone. Unfortunately, no two cases are alike and this approach will lead many additional parents to litigate in hopes that the court will issue an order that is more in line with their desires. Judges are elected so that they can use their knowledge of and experience with the law to fashion orders that are tailored to the facts of each case. Domestic Relations judges are elected so that they can, among other things, use their discretion to divide parental rights and responsibilities in a way that is fair but that is also in the best interests of the children and that meets the needs and desires of individual families.

RECOMMENDATION

The Ohio Judicial Conference, the Voice of Ohio's judges, strongly recommends maintaining Ohio's current standard that permits courts to allocate parental rights and responsibilities in a manner that is in the best interests of the child. By instituting a one-size-fits-all approach to the allocation of parental rights and responsibilities, Senate Bill 144 disregards the factually diverse circumstances that judges are presented with when making determinations regarding these rights. The bill would have a significant negative impact on court caseload, court workload, the administration of justice, public confidence in the law, and judicial discretion.

[2] A small number of cases are terminated due to default, voluntary dismissal, bankruptcy stay or interlocutory appeal. Others are transferred out, referred to a private judge or are terminated due to the unavailability of a party for trial.