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March 4, 2019

RE: HF 1666/SF 1295 & HF 887 - equal parenting time presumption legislation

To Whom It May Concern:

I am the legislative chair of the Minnesota Chapter of the American Academy of Matrimonial Lawyers (AAML-MN). Our chapter is comprised of over 50 members, recognized as some of the leading family law practitioners in the State. Fellows of the Minnesota chapter have been instrumental in shaping today's family practice, which focuses on alternative dispute resolution to help families through the divorce process in a manner aimed, if possible, at minimizing conflict. Many of our fellows are skilled mediators. Some Chapter members have been and are participants in Supreme Court task forces or committees, family court pilot projects, boards or committees governing attorneys or providers of alternative dispute resolution services, and committees making recommendations to the Minnesota Legislature.

I am writing this letter to advise you that AAML opposes HF 1666/SF 1295 & HF 887 and any similar legislation because such bills unduly restrict the discretion of judges to prioritize the best interests of children over the wishes of parents when making custody/parenting time determinations. The interests of adults and children are often in conflict when custody/parenting time is contested. A parent's desire for equal parenting time may be at odds with their child's physical, educational, emotional, developmental, social or relationship needs. In such cases, the judge tries to fashion a parenting time arrangement that works best for the individual family.

Many parties to divorce and custody proceedings agree to equal parenting time or parenting time significantly in excess of the statutorily presumed minimum floor of 25% parenting time. Judges are free to order equal parenting time even where one parent vigorously objects. However, there are a significant number of cases where equal parenting time is inappropriate due to: (1) a parent's deficits in their ability to care for their child; (2) the child's unique needs; or (3) the impracticability of equal parenting time. Replacing the 25% minimum parenting time presumption with an equal parenting time presumption means that children's needs will be subordinated to those of adults and increased numbers of parents will be litigating these marginal cases all the way through a trial. The bill's provision that the presumption can be rebutted only through clear and convincing evidence of various factors relating to the parents' flaws or inability to parent means that the bill, if passed, will lead to bitter, time-consuming and expensive fault-based litigation.

In 2014 and 2015, after Governor Dayton vetoed a previous parenting time presumption bill, AAML-MN worked with supporters of the equal parenting time presumption to enact significant, consensus-based reform of Minnesota's custody/parenting time and child support laws. It is unfortunate that the backers of the presumption have chosen to move away from consensus and instead attempt to pass controversial family law legislation notwithstanding the grave concerns

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expressed by those who work in the family law field. Collaborative work on family law policy by all of the various stakeholders is the best way of ensuring that Minnesota's custody/parenting time laws work for its families and children.

Please find attached hereto a copy of a summary of our concerns regarding the legislation.

Sincerely,

LINDER, DITTBERNER & WINTER, LTD.

A handwritten signature in cursive script that reads "Michael D. Dittberner".

Michael D. Dittberner
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MDD:jmn

Enclosure

Why HF1666/SF 1295 and HF 887 (Equal Parenting Time Presumption) Are Problematic

Current law

In considering whether to restrict parenting time due to alleged endangerment of a child, courts are required to consider the age of the child and the child's relationship with the parent prior to the commencement of the proceeding. See Minn. Stat. Section 518.175, subd. 1(b). In cases not involving a restriction of parenting time, courts are authorized to consider the age of the child in determining whether a child is with a parent for a significant period of time. See Minn. Stat. Section 518.175, subd. 1(g). There is a presumption that each parent is entitled to receive a minimum of 25% parenting time with a child. See Minn. Stat. Section 518.175, subd. 1(g).

How this bill changes current law

- The bill eliminates the requirement that the court consider the age of the child and the child's relationship with the parent prior to the commencement of the proceeding in deciding whether to restrict parenting time based on the claim that parenting time would endanger the child.
- The bill deletes the provision allowing courts to consider the age of the child in considering whether the child is with the parent for a significant period of time.
- The bill creates a rebuttable presumption that the court shall award each parent 50% of the parenting time with the child. The presumption may only be rebutted with clear and convincing evidence of one of the following 7 factors: (1) a parent's diagnosed/untreated mental health issues; (2) a parent's diagnosed/untreated substance abuse issues; (3) domestic abuse between the parents or between a parent and the child; (4) inability of a parent to provide 50% care for the child due to the parent's inability to modify their work schedule and verifiable scheduling conflicts; (5) repeated, willful failure by a parent to care for a child during parenting time awarded pursuant to a temporary order; (6) the distance between the parents' residences is too great to accommodate 50% parenting time; and (7) the child has a diagnosed medical or educational special need that cannot be accommodated under a 50% parenting time schedule.
- The bill provides that if a parent does not have a relationship with the child due to the parent's long, willful absence with minimal or no contact with the child, or if the child is one year or younger, the court may order a gradual increase in a parent's time. However, the gradual increase is supposed to last for only 6 months, at which time the parent is a candidate for 50% parenting time.
- The bill provides that the court is barred from limiting parenting time based solely on the child's age.

What are the more significant problems with this bill?

- The age of a child and a parent's relationship with the child prior to the commencement of the proceeding, are important considerations in developing a parenting time scheduling. Eliminating or minimizing consideration of the child's age in determining parenting time is antithetical to the best interests of children.
- Creating additional presumptions of minimum parenting time beyond the 25% presumption floor currently in effect hurts children by reducing judicial discretion to fashion a parenting time schedule that works best for an individual family. The fact that the bill's presumption of 50% parenting time can be rebutted by only clear and convincing evidence, the highest evidentiary standard in civil proceedings, makes this restriction of judicial discretion even more problematic. Moreover, parents will be encouraged to engage in fault-based litigation over whether the presumption can be rebutted by a particular set of facts showing whether the other parent is unfit for 50% parenting time. The seven factors for rebutting the presumption are drafted in a way that which make them either unworkable, confusing, or litigation-generating. For example:
 - Requiring that mental health or substances issues of a parent must be diagnosed before they can be considered will, in most instances, eliminate these as factors for consideration in determining parent time because only a treating therapist or physician can diagnose their patient with a mental health or substance abuse issue. Problems of proof will occur because access to mental health and medical records is restricted by state and federal law. This will be especially troublesome in cases involving self-represented parties or counties in which limited guardian ad litem/custody evaluation resources. Also, a party will be able to further avoid consideration of these factor by alleging that to the extent they have been diagnosed with a mental health or substance abuse condition, the condition cannot be considered because is being "treated."
 - The factor regarding domestic abuse is flawed because it considers only a parent's abuse of the other parent or of the individual child, and not the parent's abuse of other adults and other children, which is an important consideration for assessing risks of abuse with respect to different levels of parenting time.
 - A parent's inability to care for a child due to an unmodifiable work schedule should not require a verifiable scheduling conflict before the impracticality of 50% parenting time can be considered.
 - A parent's repeated failure to care for a child should not be dependent on whether the failure was willful or whether it occurred while a temporary order was in effect.

- A child may have needs other than diagnosed medical or educational needs (e.g., emotional/developmental/social/relationship needs) which make 50% parenting time intolerable or harmful for the child.
- If a parent has not had a relationship with a child due their long, willful absence in the child's life, it will likely take much more than six months, if ever, for the child to develop a sufficient comfort level with tolerating significant parenting time with a parent who deliberately chose to be absent from their life.