

Idaho House of Representatives
Idaho State Capitol
700 W. Jefferson Street,
Boise, ID 83720

Honorable Legislators,

The undersigned, as members of the Idaho State Bar Association and family law practitioners from all corners of the great State of Idaho, write to express our unified opposition to House Bill 824, which would radically change – and do significant damage to – Idaho’s child custody laws. We are asking that you vote against this Bill for the reasons set forth below.

HARM TO CHILDREN

The current standard for making custodial determinations is a simple one – what is in the best interests of the child? This Bill shifts the focus away from children by placing unnecessary emphasis on parental rights. The Bill states that a judge cannot place a single condition upon parent’s “custody or parenting time” with a child unless the parent is engaging in conduct that poses a “risk of substantial harm to the child.”

Does a parent who consumes a bottle of vodka every night while a child watches; or a parent who constantly insults and demeans the other parent in the presence of a child; or a parent who stops taking their prescribed medication; or a parent who allows a child to skip school and avoid homework pose a “risk of substantial harm” to a child? How would the other parent meet the “clear and convincing” burden of proof, required under the new law, to prove as much? In the current system, a court could use these facts to tailor a custody schedule – temporary or otherwise – that promotes continuity and stability for a child. For example, a parent’s custody time could be conditioned upon remaining sober or ensuring a child attends school while in their care.

Under the new law, a parent would need to pose a risk of causing “substantial harm” to a child before a court could place conditions upon a parent’s contact with a child, and then only for limited time without continuous, potentially contentious, evidentiary hearings. If this becomes the new normal, children will suffer. A common lament of those who come in contact with the criminal justice system, or child protection services, is that these are reactive, not proactive, systems. Police and social workers tend to arrive on scene after a child is beaten or neglected. It is deeply concerning that in the interest of preserving parental rights, the new bill would severely limit the ability of family law courts to use proactive tools that exist to keep children safe.

Children will also feel the brunt of a system in which 50% of overnight time in each parent’s home is presumed to be in their best interests. A newborn infant who relies on their mother as a food source will spend 50% of their time in the custody of a father unless mother can establish at a hearing, with a heightened burden of proof and traditional rules of evidence, that this is unwise. The teenager who spends part of their time in Caldwell at mother’s house and part of their time in Boise at father’s house, where they attend school, will spend 50% of their time at mother’s house

even if it adds hours to their commute and makes it more difficult to consistently participate in extracurricular activities. Why? To preserve a parent's constitutional rights, apparently.

This bill has gone so far as to completely remove consideration of the continuity and stability of children when determining what is in their best interests. The harm that will be inflicted on children who are placed in parenting time arrangements that do not have any contemplation on what is best for their stability and ways to maintain continuity in their lives is significant. Children are already placed in difficult and emotional positions when families are splitting. Failure to consider continuity and stability places an unfair burden on them to absorb their parents' choices.

The proposed law will also allow a parent who commits acts of domestic violence to be given "restoration of" their "lost parenting time" if they are not criminally charged or the allegations against them are "not credible." This parent would also receive the benefit of the presumption that 50% of overnight time in each parent's home is in a child's best interests. There is no clarity as to how a court would determine whether allegations of abuse were credible. This provision ignores the reality that many times, criminal acts are not charged because they cannot be proven beyond a reasonable doubt, not because the acts themselves did not occur.

A three-year-old child beaten by a parent does not make a good witness. A wife too scared to testify against her abuser may refuse to participate in litigation. Not being charged does not always equate to an innocent parent being wrongfully accused, which seems to be position taken by the authors of this Bill. The current family court system allows our judges to weigh all available evidence to protect children and families. The proposed Bill places the burden on victims, not perpetrators of violence, to convince a court equal parenting time is not best for children. Under the new Bill, a parent who physically abused their spouse but was not charged need only sit back in court and listen as their victim attempts to convince a judge that they still pose a risk of harm to them, and to their children. The violent parent would not be required to introduce any evidence to support their position that they are a parent worthy of equal parenting time. It is unclear why a system currently designed to focus on what is best for children, being modified to a system designed to insulate abusive parents from accountability, would be an improvement.

The increased burden of proof to a clear and convincing evidence standard would make it unreasonably difficult, particularly for self-represented clients, to present important evidence to protect children. A litigant who does not know how to present evidence or does not understand how high of a standard that is, will be left disadvantaged and unable to protect his or her children.

Parents who are living in homes where there is family violence, sexual abuse, substance abuse, mental health challenges and/or housing insecurity will be less inclined to file for divorce. The stable parent will have to pick their poison: 1) pursue a divorce knowing that the law says equal time with parents is in a child's best interests, and that trying to overcome evidentiary hurdles could prove fatal to obtaining primary physical custody; 2) or stay in a relationship – and home – even though a child is suffering, because the surest way to protect that child from the unstable parent is to live under the same roof with both. This law may very well result in fewer custody cases being filed. That does not mean it is addressing the needs of children – and parents – who need help.

THE BURDEN TO THE SYSTEM

Public testimony elicited prior to the introduction of this Bill indicated that family law courts move slowly due to clogged dockets, and that some family law attorneys make significant sums of money as a result thereof.

Unfortunately, this Bill will only exacerbate both issues.

The current rules of family law procedure were established, in part, to allow parents to introduce relevant evidence to courts without being burdened by traditional rules of evidence. Specifically, parties may introduce police reports, and medical reports, without having to subpoena the authors of these reports in order to lay foundation for their admissibility.

As a result, courts have an opportunity to consider objective evidence, give it the weight it deserves, and make more informed rulings. It is a welcome change from the old system, where two parents who were unable to lay proper foundation to admit evidence were deprived of having the court consider said evidence, and motion/trial practice largely consisted of two parents providing, in many cases, subjective and wildly inconsistent testimony to the court.

This Bill will take family law back in time to the era where a parent who wants to establish the other parent is not paying child support has to subpoena a state employee to testify in lieu of submitting a written payment history; a parent who wants the court to consider the other parent's pending criminal charges must subpoena one or more police officers as opposed to admitting reports; a parent who wants the court to consider the other parent's positive drug test must subpoena the lab technician. And, these evidentiary hearings would need to occur in every custody case, every 49 days.

These evidentiary hearings, coupled with the required written findings of fact and conclusions of law, and new time requirements for hearings and written decisions, will insert months of delay into the current family court system. Moreover, the effect of this onerous requirement could cause third parties to stop offering services to families with pending custody cases. A local lab may decide not to offer drug tests in family law cases. Supervised visitation facilities may cease to exist.

Some witnesses, e.g., support enforcement and law enforcement, by virtue of their employment, will have no choice but to participate in family court proceedings. Those who create budgets at the state and local level should be prepared to budget for compensating their employees to sit in family law courts as opposed to focusing on their primary job duties.

FREE SPEECH / DECLINE IN USE OF EXPERTS

On a final note, judges possess significant free speech rights which, in turn, are critical to preserving their independence. This Bill states that judges cannot make custodial determinations that consider any "theory, doctrine or construct" unless it is defined by Idaho law. Besides being so vague as to be unenforceable, this clause seeks to minimize a family law court's reliance upon research and training to make informed decisions.

Family law judges, and attorneys, are required to participate in ongoing legal education. Failure to do so could result in disciplinary measures, like suspension of a bar license. These training mandates ensure that those who make a living in family law courts are consistently educating themselves on what is good – and bad – for children.

Under this new law, a judge could hear hours of evidence establishing one parent’s conduct is harming a child. In the judge’s opinion, the conduct falls within their own definition of “coercive control.” But, because the Legislature has not created a statutory definition of the term, the judge must disregard said evidence *even if they believe doing so is not in the best interest of the child*. Putting such stringent speech restrictions upon family law judges will lead to more judges leaving the bench. Talented public servants will grow weary of legislative interference and enter the private sector. But more important, children will spend large periods of custodial time with parents who do more harm than good simply because the Legislature has yet to put a statutory label on said harmful conduct.

We understand that no law is perfect, and that parents who have less custody time with their children as a result of family court proceedings have strong feelings about the efficacy of the system. It would be catastrophic to radically alter a statewide system in service of a very small percentage of disgruntled constituents. The changes proposed by House Bill 824 will harm children and overburden an already overburdened court system.

Sincerely,

Members of Idaho State Bar that Practice in Family
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