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To: Members of the Senate Judicial Proceedings Committee

From: Family Law Section Council

Date: February 16, 2024

Subject: **Senate Bill 663**:
Family Law-Rebuttable Presumption of Joint Custody

Position: **OPPOSE/UNFAVORABLE**

The Maryland State Bar Association (MSBA) Family Law Section Council (FLSC) **opposes Senate Bill 663: Family Law- Custody Evaluators – Qualification and Training.**

This testimony is submitted on behalf of the MSBA's FLSC. The FLSC is the formal representative of the Family Law Section of the MSBA, which promotes the objectives of the MSBA by improving the administration of justice in the field of family and juvenile law and, at the same time, tries to bring together the members of the MSBA who are concerned with family and juvenile laws and in reforms and improvements in such laws through legislation or otherwise. The FLSC is charged with the general supervision and control of the affairs of the Section and authorized to act for the Section in any way in which the Section itself could act. The Section has over 1,200 attorney members.

In 2013, the General Assembly passed HB687, convening the Commission on Child Custody Decision Making. The Commission was charged with studying child custody decision-making and offering recommendations to improve and bring statewide uniformity to custody determinations. The Commission issued its Final Report on December 1, 2014. The Final Report included a Proposed Draft Custody Statute in similar form this year as HB1232/SB978. The Final Report concludes "there should be no presumed schedule of any kind" and "as a general rule, a minimum of 30 to 33 percent time with each parent is optimal for a child *when both parents are emotionally healthy and focused on the needs of their child, in the context of a parenting plan based on the child's developmental age and needs*.[1]

SB663 creates a rebuttable presumption in an initial custody proceeding (when there is no existing custody agreement or order) that joint legal custody and joint physical custody of equal timesharing are in a child's best interests.

[1] Final Report, p. 35, emphasis added.

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A "presumption" is a conclusion a court must make when certain threshold facts are established, even if the facts would otherwise be insufficient to reach that particular conclusion. A "rebuttable presumption" is a presumption that that must be reached in the absence of evidence to the contrary.

Custody consists of two components: 1) legal custody, which is decision-making about important issues such as health, education, and religious upbringing; and 2) physical custody, which is where a child lives and when a child spends time/has visitation with both parents.

Currently, the standard for determining custody of a child is the "best interests of the child". This requires a court to consider all the facts and circumstances of the individual family before determining custody for the specific child. Under current law, both parents are the "joint natural guardians of their minor child" and "[n]either parent is presumed to have any right to custody that is superior to the right of the other parent."[2]

Judges already have the authority to issue joint custody orders, but only after considering all the facts and circumstances and determining that it is in the best interests of the individual child/ren at issue in any given case.

A presumption does not account for the specific needs of each family and each child, but elevates the wishes of the parents over the best interests of the children. Orders based on nothing more than a presumption, without due and exacting consideration of whether joint custody is truly in the best interests of the specific children involved, is likely to lead to more discord between the parents, family chaos, and harm to the children. This is especially true when joint custody is imposed over the objections of one or both parents, which is almost certainly going to be the situation in any case that has to be resolved by litigation as opposed to an agreement.

There are additional problems with SB663:

The rebuttable presumption would apply at both the *pendente lite* hearing on temporary custody (so, custody until the final custody merits trial) and at the final custody merits trial. Not all jurisdictions determine *pendente lite* custody (i.e. Montgomery County). SB663 encourages more *pendente lite* litigation. It also prioritizes equal physical custody over temporary stability, further uprooting children. It could result in a change from the status quo that existed by the parents' agreement prior to filing suit. Additionally, in many jurisdictions, pendente lite hearings occur early in the case, when there is insufficient time to conduct discovery. This prejudices parents who are unable to sufficiently prepare before their trial or will result in delayed pendente lite hearings so parents can conduct discovery and therefore result in prolonged and more contentious litigation.

[2] Maryland Family Law Article §5-203.

SB663 refers to "permanent" proceedings, but custody is always modifiable in the event of a material change in circumstance. Custody is never "permanent", although a custody determination may be "final" and no longer appealable, subject to modification.

SB663's language intending to "equalize" the parents' positions before the court - "regardless of a parent's marital status or gender" – is too narrow. What about: sexual orientation; gender identity; age; race, color, or national origin; religious affiliation, belief, creed, or opinion; mental or physical disability; economic circumstances; or, extramarital sexual conduct? Does the presumption not apply in these circumstances? Or, does the presumption operate against a parent for these unmentioned reasons?

SB663 enumerates factors the court "may" but is not required to consider when determining the child's best interests in light of the rebuttable presumption. This invites a court to disregard the factors and simply rubber stamp joint custody regardless of the enumerated factors.

SB663 does not require the court to articulate the basis for its decision, the factors it considered, and its analysis of the presumption in a particular case. Without this, parents will continue to have no better understanding of the court's reasoning than under current law and practice (which do not require this).

SB663 ignores the Commission's Final Report, prevailing psychological research, and the best interests of children. **The FLSC urges an unfavorable report**.

Should you have any questions, please contact:

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