

February 10, 2025

***LETTER SUBMITTED THROUGH LEGISLATIVE TESTIMONY PORTAL***

Re: House Bill 1242

Dear Representative Kelmin and Members of the House Judiciary Committee:

We are attorneys at Elsberry & Shively, P.C., based here in Bismarck. We respectfully ask this Committee to urge a “do not pass” on this legislation. HB 1242 focuses on the rights of parents rather than the best interests of children, erasing decades of law designed to protect North Dakota’s most vulnerable citizens. We believe that the best interests of children are paramount to the rights of parents.

Approximately ninety percent of our firm’s caseload is in the area of family law. The cases that pull at our heartstrings are those involving children facing stressors far beyond what their years on Earth have prepared them for – alcohol and substance abuse, physical and emotional abuse, illness of a parent, and intentional and disruptive conflict by a parent. It is these children, the ones who have already endured more stress than can be imagined, that will be forced through additional litigation and have their worlds turned upside down should this bill pass.

HB 1242 is about the rights of parents, while current law properly focuses on the best interests of children. Under current law, when constructing a parenting plan, including determining residential responsibility, district courts rely on the best interest factors outlined in N.D.C.C. § 14-09-06.2. HB 1242 would eliminate analysis of the best interest factors on the front end of a case and grant equal residential responsibility unless that arrangement may: (1) cause harm to a child; (2) endanger the child; or, (3) is not feasible due to the circumstances of the parties. The best interest factors would only apply to the construction of the parenting time schedule.

Applying the above standards to the living arrangements of the children of this state would be sending the message that the bare minimum is enough. If you “may not be harmed” in a home, then a child, whether he be three months old or 16 years old, needs to be in both parents’ homes an equal amount of time. The same analysis applies to the second and third permissive rebuttal options.

Perhaps what is most dangerous about HB 1242 is its retroactivity clause which would allow any party who does not currently have equal residential responsibility to reopen their cases and engage in litigation to determine whether or not the other party can rebut the presumption. This means individuals convicted of domestic violence where a civil domestic violence protection order (DVPO) was never sought or entered, who were found in their family law cases to have abused their children, who have engaged in constant emotional abuse, refusals to cooperate or coparent, and with mental health and substance abuse disorders that they have failed to treat as required in their parenting plans have the ability to rechallenge the other parent at his or her expense. The increased litigation would occur in an already overpacked judicial system and at the expense of North Dakota's children.

HB 1242 is an avenue for abusers to continue abusing. Looking at the records of the supporters of this and the other bill on presumptive parental rights, it is not uncommon to see DVPOs, domestic violence criminal convictions, and civil orders detailing proven domestic violence. This is so prevalent, that it would be interesting for the Committee to ask each individual who stands in support of the bill whether or not that individual has a criminal or civil Judgment finding that they perpetrated domestic violence.

In high emotion cases that come through our office, we often see emotional, financial, and/or physical abusers use children as pawns. These abusers seek to gain their victims' compliance and concessions by threatening to seek as much parenting time as possible. The children are affected by this behavior, by the stress of continued litigation between their parents, and by reduced funds in the household due to continued litigation. HB 1242 misplaces the burden in these kinds of cases. It requires the victims of domestic abuse to rebut the presumption giving those victims a higher wall to scale than the person who abused them.

HB 1242 is also short cited in that it ignores the significant impacts of psychological abuse on children. Whether psychological abuse is aimed at the other parent or the children themselves, those of us who practice law in this area cannot deny that the impacts of psychological abuse, in many if not most cases, surpass those of physical abuse. We have had clients explain that they can understand being hit and that hitting is wrong and so can others, but it is much harder to explain or justify the significant and terrifying impacts of psychological abuse. Abusers who use psychological abuse cause victims to disbelieve their own eyes and ears or cause them to believe they are stupid or mentally ill. Psychological abuse undermines victims on nearly every level. Removing consideration of the best interest factors with regard to residential responsibility erases the factors under which judges review the impacts of psychological abuse, again leaving children at risk of the potential lifelong effects of psychological abuse.

Finally, HB 1242 does not adequately address substance abuse and the mental health of a parent and the potential dangers to a child. It is unclear from the bill how it will impact residential responsibility cases with parents who struggle with substance abuse or mental health disorders. In many of these cases, protections are put in place requiring a parent to

test for alcohol or drugs prior to parenting time, or for continued and consistent contact with mental health professionals. These tools ensure children are not harmed pursuant to the Court's findings under the best interest factors in current law. Under this bill, it appears that parents who have these struggles may have a right to equal parenting time without restriction, absent the other parent proving they may cause harm to their child. Unfortunately, in the practice of family law, a parent causing harm to a child is often proved through history, and often the only witnesses are the children themselves. If a parent drinks throughout their parenting time, to prove harm may come to the child, we, as practitioners, will be relying on these children to establish harm may come to them. In other words, the kids will have to protect themselves. That is a very big burden to put on a young person who should be focusing on their childhood.

We respectfully urge that the Committee urge a "do not pass" on HB 1242 and that its members vote "no" on this bill.

Sincerely,

*/s/ Betsy Elsberry, Erica Shively, Chris Rausch, & Quinn Harmon*

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