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H.B. 5505 -- Family court procedures

Judiciary Committee public hearing -- March 11, 2015

Testimony of Raphael L. Podolsky

Recommended Committee action: **NO ACTION ON THE BILL**

This bill contains four separate proposals affecting family law. We believe that all four are undesirable and therefore recommend that the Committee take no further action on the bill. What links the four sections is that none seem to give any weight to what is in the best interest of the child and all limit the ability of the court to fashion an appropriate resolution to the dispute. In addition, all place a heavy burden on victims of domestic violence (and the less aggressive party in general) by restricting the court's ability to protect the weaker party.

Section 1 -- Supervised visitation: The bill prohibits a court from ordering supervised visitation unless the court finds one of the following:

- Neglect or abuse substantiated by DCF. Unless a complaint had been filed, investigated, and substantiated by DCF, evidence of neglect or abuse would be insufficient, regardless of the adverse impact or danger to the child. There are numerous reasons why DCF may not have been brought into a contested divorce or why DCF had not completed an investigation or substantiated a complaint.
- No established relationship with the child. Apparently a minimal, weak, hostile, or dangerous relationship with the child would be insufficient.
- Criminal conduct that is a potential risk to the child's health, safety, or well-being. Any abusive or neglectful conduct less than "criminal" would be insufficient. Indeed, since conduct is probably not "criminal" unless the person has been convicted of the crime, evidence of misconduct that had not been prosecuted or for which a prosecution was pending would probably be insufficient to justify supervised visitation.
- "Severe mental disability" that presents a health, safety, or well-being of the child. Evidence of past or on-going conduct presenting a health, safety, or well-being risk to the child would apparently not be sufficient in the absence of proof of "severe mental disability." There does not need to be mental disability for supervision to be needed.

Without meeting one of these extremely narrow tests, visitation would have to be without supervision and the court would be powerless to protect the child from abusive or dangerous conduct. This would invite situations that put a child at serious risk.

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Section 2 -- Guardian ad litem (GAL) and attorney for the minor child (AMC) liability: The bill authorizes lawsuits against GALs and AMCs, eliminates defenses related to judicial immunity, and prevents GALs and AMCs who prevail from getting their attorney's fees reimbursed, even if the litigation was frivolous. GALs and AMCs are appointed as officers of the court, and some form of immunity is needed if people are to accept such appointments. In high-conflict custody disputes, the risk is high that the losing party will blame the GAL or AMC, and the risk of litigation is real. Existing law provides more suitable ways to deal with inappropriate conduct by a GAL or AMC -- by a motion to replace the GAL or AMC (for which standing was explicitly provided by statute last year) or, if the person is an attorney, by filing a grievance. We are already seeing the consequences of aggressive – but often meritless – litigation in federal court against GALs and AMCs. An increasing number of lawyers are refusing to accept appointments. The availability of court-appointed GALs in particular is of special importance to low-income litigants, who cannot afford to hire such persons of their own.

Section 3 -- Court-ordered psychological evaluations and treatment: This section seems to be intended in a high-conflict case to allow each parent to choose his or her own evaluator so as to produce competing evaluations. This is contrary to the well-established practice of having a single evaluator see each parent and examine the ways in which they and the child interact. It also imposes a cumbersome and unnecessary procedure for selecting a health-care professional and appears to immunize an objecting party for sharing in the cost of an evaluation, without regard to the unreasonableness of the objection.

Section 4 -- Presentation to the court of the report of a treating health professional: The bill prohibits a GAL from presenting information about the child or the parents from a health professional, even when the GAL is in possession of and can provide the court with the professional's written report. It ignores the fact that either party can subpoena the treating physician or other professional if they wish. More important, however, it seeks to to impose a rule in all cases that is reasonable only in high-conflict cases. In most cases, the professional's personal presence in court is unnecessary. The practical effect of forcing such professionals to routinely be present will be to deter them from seeing the patient in the first place. Doctors and other professionals are often resistant to accepting patients if they will be forced to take off extended time to testify in court. This will have a particularly negative impact on low-income litigants, who cannot offer adequate compensation to secure attendance.