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Senator Tim Emert
356-E State Capitol Building
Topeka, Kansas 66612

Representative Mike O'Neal
170-W State Capitol Building
Topeka, Kansas 66612

Senator Greta Goodwin
403-N State Capitol Building
Topeka, Kansas 66612

Representative Tim Carmody
174-W State Capitol Building
Topeka, Kansas 66612

Senator John Vratil
128-S State Capitol Building
Topeka, Kansas 66612

Representative Jan Pauls
272-W State Capitol Building
Topeka, Kansas 66612

RE: House Substitute for 1999 Senate Bill 150

Dear Members of the House-Senate Conference Committee on Senate Bill 150:

This past week I received a copy of Charlie Harris' letter dated March 13 which was directed to the Senators on the Conference Committee in which some concerns about some of the changes proposed by the KBA Family Law section were expressed. So that the Committee members are able to judge the provisions of the bill and the concerns expressed by Charlie Harris, I thought I would respond to those concerns.

I should point out that the version of House Substitute for SB150 with which Mr. Harris is working is apparently an early version that was in discussion before final changes were made that are found in the modified version of House Substitute SB150 submitted to the Committee at its last hearing. Many of the changes in the version with which Mr. Harris was working are found in the bill; however, many of those have been further modified, some have been deleted, and others completely revised. With that prelude, I will address the specific concerns expressed:

The first concern expressed by Mr. Harris is the proposal that requires submission of a parenting plan when a temporary order is requested or when a modification is requested of an

existing temporary order involving children. Mr. Harris expressed his concern as follows:

> "1. At page 33 of the version of House Substitute for Senate Bill 150 I am working with, there is modification to K.S.A. 60-1607(d) which requires a parenting plan to be attached to a Temporary Order. I'm not sure what this is supposed to solve, but I assume that any Temporary Order will simply include the language that the filing party should have primary residency and the non-primary person have reasonable parenting time, or even spell out reasonable parenting time. I don't see how this solves any particular problem, especially at the point the parties are just beginning to establish new households."

As was expressed to the Conference Committee at the hearings held in February on this bill, the suggested amendments to House Substitute for SB150 are the result of protracted and extensive discussions and drafts on how to work out problems with the Judicial Council draft of SB 150 and House Substitute 150. Quite a few concerns have been expressed to us by both non-custodial parents, custodial parents and domestic relations attorneys on the direction they wished the law to take. Our attempt was to correct the problems identified by the Kansas Judicial Council and, at the same time, correct problems in the way in which non-custodial parents view the application and execution of the laws regarding custody.

As the Committee is aware, over the past few years, many states have enacted requirements for negotiation and implementation of "parenting plans" in cases in which children are involved. There are now approximately fifteen states that provide some kind of requirement that a "parenting plan" be negotiated between the parties and that any such "parenting plan" consider specific items to be included in any resulting parenting plan.

As Kansas law presently exists, "plans" regarding the custody of a child may be submitted to the Court at the time of the final hearing and those "plans" are presumed to be in the best interests of the children. The bill addresses requirements for "permanent parenting plans" in a later section. This section, however, addresses requirements for parenting plans on a temporary basis. Mr. Harris indicates there is no "problem" to which these amendments are addressed. However, as I earlier discussed with the Committee, at present there is no way to make either party think about the ultimate goal of a parenting plan at the beginning of a case. Oftentimes a party will seek to use temporary orders as "leverage" against the other party to gain advantage in child custody or residency or parenting time issues without any long view on what the ultimate parenting schedule should be or the manner by which each parent will be given time with the child. These amendments seek to rectify this shortcoming in current law. By these amendments a person seeking entry of a temporary order, or modification of an existing temporary order, will have to "lay their cards on the table" and let the other side know that parties' position at an early date which will hopefully encourage thinking about what is best for the child rather than what best serves that parties strategies. Further, the court will easily be able to discern what, if any, disputes there are between the parties at an early time and determine whether the parties may need more intensive court services because of the issues raised. By this method, cooperation

should be encouraged and minor disputes will not mushroom into all out battles over the children.

Mr. Harris next expresses the concern about inclusion of "property issues" as issues that can be mediated under K.S.A. 23-602:

> "2. I am very concerned at the expanded role under the expedited visitation statute, K.S.A. 23-602, Section 7 of the Bill, at my page 5. in which the Court or the Hearing Officer is being authorized to order mediation of division of property. The existing Bill was enacted for the purpose of providing expedited visitation through the Hearing Officer system. We have developed a group of mediators across the state that are trained to handle visitation and custody issues. Unfortunately, this now expands that to include division of property which encompass a much broader range of issues. I am concerned about my clients having to be involved in mediation of property issues, for which they are not well equipped to deal with. I also have great concerns about the competency of most of the mediators to deal with property issues."

Firstly, K.S.A. 23-602 is *not* the expedited visitation statute as is stated by Mr. Harris. K.S.A. 23-601 et seq. deals with authorization to mediate domestic cases. The Kansas expedited visitation statutes are found at K.S.A. 23-701 et seq. The domestic mediation statutes are applicable to all cases, both pre-decree as well as post-decree and are not specifically addressed to enforcement matters.

Further, the current statute is open ended and there is no dispute among the bar that the court *already* has the power to order mediation on any kind of issue, whether it be for child custody, visitation, property, maintenance or other matters, even in absence of this statute. The only thing the amendments to this statute include is a specific recognition of that fact. The amendments do not change the law, but only provide clear legislative recognition of a power the courts already have and are already exercising.

Mr. Harris indicates his greatest concern is with amendments to K.S.A. 60-1610:

> "3. My biggest concerns about this bill are that the amendments to K.S.A. 60-1610(a)(4) at Section 29 of the Bill as contained on my version at page 36. The initial reason that I sought to resolve some of the confusion among the public, was the chronic difficulty with the choice in the existing statute to use the term "joint custody" and the term "shared custody". The public has become highly confused by this terminology. The Child Support Guidelines specifically define shared custody but the divorce statute does not. Without changing any priorities, I had attempted to clarify the matter by referring to the term as "joint legal custody" and then use the term "residency" for any terms pertaining to where the child would be living.
>
> "Last year's version of the statute created the ridiculous tern "joint shared custody". This

> year, the statute now uses the term "joint legal custody" as the preferred version, but now, instead of primary residency is using the term "co-residency". Of more significance, is elimination of the terminology concerning shared residency. Unfortunately, the reality is that the people of Kansas have now begun to adopt shared custody arrangements on a fairly frequent basis. The adoption of this amendment to me would almost suggest that this is an elimination of this form of custodial arrangement since shared is mentioned in the existing statute."

Unfortunately, the most recent amendments presented to the Committee drastically differ from those to which Mr. Harris refers. Nonetheless, I am able to address his concerns.

With regard to the reference to the Kansas Child Support Guidelines, it should be noted that the confusion to which Mr. Harris refers does not arise out of K.S.A. 60-1610 – it arises out of the way in which the Kansas Child Support Guidelines Committee has sought to write those guidelines. I do not believe the legislature, or this Committee, want to become embroiled in the detailed workings of those guidelines. Frankly, I think there is very little the legislature can do to stem the controversy over the way in which the guidelines handle adjustment of support as the time with the non-residential parent increases to the point where both parents have the children for an equal or near equal amount of time.

Mr. Harris expresses concern about the deletion of the term "joint shared residency." As the Committee is aware, the most recent revisions propose the elimination of the two subparagraphs in original SB150 titled "primary residency" and "shared residency." The most recent revisions take this tact to de-emphasize the "definition" of parenting time as either "primary" or "non-primary" and direct that the court simply determine a residency arrangement that is in the best interests of the minor children. This direction and elimination of language in no way eliminates the ability of either parents or the courts from fashioning whatever residency arrangement they deem appropriate. As was noted in testimony to the Committee, one of the things we tried to accomplish in our amendments was a de-emphasis of language and an emphasis on the best interests of the child. A growing number of states are amending their domestic relations laws to eliminate references to out dated concepts such as parental "visitation" and other such concepts that some take as defining a winner and loser in custody matters. West Virginia has completely done away with all "defining words" and now simply provides that the Courts are to set up an appropriate parenting time for the child. The language proposed does nothing suggested by Mr. Harris, but does provide the Courts will all options they may need to deal with these complex matters.

Mr. Harris next expresses concern about amendments to K.S.A. 60-1616:

> "4. My next concern pertains to the attempted amendment to K.S.A 60-1616 which is contained in Section 32 at my page 41 of the Bill. The major concern that I have with this is that they have added the requirement of a showing of "serious endangerment" to the child's physical, mental, moral or emotional health before a person would he denied

reasonable parenting time. To me, this would be a redundant statement because any endangerment, by its very nature, it is serious. However, by adding the phrase, it seems to me to raise the threshold of the best interest of the child standard."

In response, I would simply point out to the court that the amendment to which Mr. Harris refers does not add or delete any language. The only change in the state is to shift the order of words so that the statute fits grammatical rules.

The amendments are as follows:

(a) ***Parents.*** A parent ~~**not granted custody or residency of the child**~~ is entitled to reasonable ~~visitation rights~~ ***parenting time*** unless the court finds, after a hearing, that ~~visitation~~ **the exercise of** ***parenting time*** would **seriously** endanger ~~**seriously**~~ the child's physical, mental, moral or emotional health.

The proposed amendment does not add anything – it simply reorders the words from "endanger seriously" to make it read "seriously endanger." I do not think this change will lead to any difference in court interpretations.

Mr. Harris' last complaint regards the amendments to K.S.A. 60-1620 regarding addition of a move from county to county to the notice requirements found in the statute:

"5. My last major concern with this statute is contained in the amendments to K.S.A. 60-1620 at Section 34, page 41. In this particular situation, the proposed bill seeks to amend the longstanding statutory provision for notice if a child is being removed from the state for more than ninety days to require this provision if a child is going to be moving to another county. In the larger urban communities, such as the Kansas City metropolitan area or the Wichita metropolitan area, the language suggests the opportunity for a custody fight simply by moving from one county to the other. I can assure you there are many parents who would love the opportunity to have veto power over even a local move."

As I explained to the Committee, the addition of a requirement that notice be given when moving from county to county is preferable to a mileage requirement because of the inherent difficulty of applying such a mileage requirement by laypeople.

Contrary to the arguments of Mr. Harris, the requirement of notification does not determine that there is any "material change in circumstances" sufficient to change any custody or parenting time orders previously issued by the court. That determination can be made by the court only on presentation that there is truly a change in circumstances as that term has been defined by various Kansas appellate court cases. Furthermore, provisions have been included in the statute for guidance of the judiciary on what factors must be looked at in determining

whether there is a change of circumstances. Whether there is a change of circumstances will vary case by case, just as it does now.

The bill now before the Committee has taken well over a year to fashion after consulting with various groups having interest in the subject matter. As the Committee is aware, this area of the law involves a great deal of emotional response from all sides involved and everyone jealously guards their own position to assure that it is not harmed. We have attempted to modify Kansas law in a way that would consider all the competing interests but, in the end, produce a result by which the children of Kansas would be best served. I think the bill the Committee has before it is a good bill and I urge its quick passage.

If you have any questions, please contact our office at your convenience.

Sincerely yours,

Ronald W. Nelson

RWN/ss

cc.
Charlie Harris
Paul Davis, KBA Legislative Counsel
Keven M.P. O'Grady (President, KBA Family Law Section)

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