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TESTIMONY OF RONALD W. NELSON
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Members of the Committee: Good morning. My name is Ronald W. Nelson. I am a lawyer who exclusively practices domestic relations law in Overland Park. . I am also heavily involved in appellate advocacy in domestic cases, with decided cases in all areas of domestic practice. My clientele is fairly evenly split between representation of men and women. I am a member of the American Bar Association Family Law Section, serving as Vice Chair of the Child-Custody Committee, I served three terms as the President of the Kansas Bar Association Family Law Section, I am a Fellow of both the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers, and I've served the Johnson County Bar Association Family Law Section as chair of the subcommittee considering revisions of the Johnson County Bar Association Parenting Guidelines. I often present seminars on high conflict child custody issues in Kansas and around the country for the ABA. I am the author of two chapters of the Kansas Bar Association's Practitioners Guide to Kansas Family Law, including a chapter on Child Custody and Parenting Time. I worked closely with the KBA and the Judiciary Committee in 2000 fashioning compromises that allowed the passage of Substitute Senate Bill 150, which updated the Kansas custody statutes. I am also the divorced father of two great teenagers. I've seen the way the courts deal with child custody cases from every direction. As such, I hope to provide this Committee some insights gained from that somewhat unique position.

Today I am testifying about Senate Bill 61, which seeks to amend K.S.A. 60-1610 to include language "allowing" "shared residency" and attempting to define that term. The proposed modification reads:

> (5) *Types of residential arrangements.* After making a determination of the legal custodial arrangements, the court shall determine the residency of the child from the following options, which arrangement the court must find to be in the best interest of the child. The parties shall submit to the court either an agreed parenting plan or, in the case of dispute, proposed parenting plans for the court's consideration. Such options are:
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> (A) *Primary Residency.* The court may order a residential arrangement in which the child resides with one or both parents on a basis consistent with the best interests of the child.

> (B) *Shared residency. The court may order a residential arrangement in which the child resides with both parents on an equal or near equal basis. For the purposes of this paragraph, ''equal or near equal'' means at least 45% of the child's time, not including eight hours of overnight sleep every night, or time the child is in school or in extracurricular school activities.*

The proponents (and the SRS and Office of Judicial Administration as cited by the Fiscal Note) state this amendment "would offer another custody option to be considered…" The fact is, it would not have any effect on current Kansas law and may cause more fights between parents trying to resolve parenting arrangements after their separation and would create more problems in child custody disputes.

The current statute reads:

> (5) *Types of residential arrangements.* After making a determination of the legal custodial arrangements, the court shall determine the residency of the child from the following options, which arrangement the court must find to be in the best interest of the child. The parties shall submit to the court either an agreed parenting plan or, in the case of dispute, proposed parenting plans for the court's consideration. Such options are:
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> (A) *Residency.* The court may order a residential arrangement in which the child resides with one or both parents on a basis consistent with the best interests of the child.

I participated in the drafting of the amendments enacted to the domestic relations code in 2000 (found in Senate Bill 150 [conference committee amendments]). At that time, the different interest groups involved had strong disputes over the language that (or should not) be included in the Kansas Domestic Relations Code. Some sides wanted the statutes to specifically mandate a preference for "joint physcial custody." Others desired the statutes to say that the legislature should prefer "primary residency" with one parent designating the other as the "visiting parent."

The amendments the conference committee adopted in 2000 did away with any "preference," "mandate," or "cookie-cutter presumption" in child custody cases. In fact those changes had the effect of pleasing everyone. I wrote in explanation of the 2000 amendments in my chapter in the Practitioner's Guide to Kansas Family Law:

> "The overhaul of the Kansas custody statutes by the 2000 Legislature has made clear that there is no real difference between "custody" and "parenting time." Under the revised statutes, both parents have "physical custody" whenever the child is in that paerent's care. The revised Kansas custody statutes deemphasize the possessory nature of custody law and seek to focus parents and the court on determining a schedule of time that each parent is to be with the child, rather than which parent will have "custody." No "primary physical custodian" need be designated under the statutes." "Instead of setting out the various types of

> residential care that a court may grant the parents (e.g. primary residency or shared residency) the statutes direct the court to make decisions regarding residency of the child "on a basis consistent with the best interests of the child." By using this language, the drafters sought to avoid disputes as to what kind of residential situation may be implicitly "preferred" by the legislature, opting to leave those decisions to a case-by-case analysis by the court."
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> "What constitutes the "best interests of the child" is generally a determination to be made by the trial judge in evaluation of numerous factors. A determination of custody is generally subject to reversal only where such determination is an "abuse of discretion" as the trial judge is "in the most advantageous position to judge how the interests of the children may best be served.""

The 2000 Amendments took well over a year to fashion after consulting various groups having interest in the subject matter including the bar, residential and non-residential parents, judges, mental health professionals and other dealing with child custody issues. This area of the law involves a great deal of emotion from all sides and everyone jealously guards their own position. In making the changes in 2000, we attempted to modify Kansas law so that it would consider all competing interests but while producing the best result for Kansas children and separating families.

The most recent revisions to this statute 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 and it does not prohibit or limit the ability of either parents or the court to fashion of shared residency arrangement if the court believes that arrangement to be in the child’s best interests. The added language would be surplusage without any effect or rationale. In fact, prior to the 2000 amendments, the statute “muddled” the concepts of decision-making (legal custody) and time spent with a parent by allowing either “Joint custody,” “Sole custody,” “Divided custody,” or “Nonparental custody.” The 2000 amendments were made just so there was no question that the courts could make whatever parenting time arrangement they deemed appropriate and that the legislature would not interfere in that determination – which is particularly fact sensitive and varies on a case-by-case basis. This Amendment may have the unintended consequence of encouraging parents to fight about the hours and minutes they spend with their children to gain a title rather than concentrating on their children’s best interests.

The 2000 amendments attempted to de-emphasis the importance of the statutory language and increase the emphasis on allowing parents and the courts to make the best decision for children. In fact, the trend across the country is just what the 2000 Legislature accomplished: the elimination of out-dated concepts of parental “visitation” and defining a cookie-cutter view of parenting arrangements. For example, both Colorado and West Virginia have completely done away with all “defining words” and now simply provide the Courts are to set up an appropriate

parenting schedule. The statutes existing language provides all necessary flexibility and does not involve the legislature in the sensitive and political issues surrounding child custody.

With the 2000 Amendments the courts have the power to order *any* appropriate parenting schedule after looking at the peculiar needs of the family. These amendments granted the power to determine the children's best interests without any presumption whether mom or dad is better merely by reason of gender, and did not include language that could be used by either parent to advance their own agenda by pointing to any real or perceived preference in the statutes for primary or equal schedules. Injecting any preference – whether real or implied – into a good law would only serve to detrimentally affect the children of Kansas and bow to political expediency.

Unfortunately, one of the strongest fights in child-custody cases over the years has been for a parent to seek an upper hand against the other parent by *either* seeking a ruling from the court that that parent is the "primary" parent, or to force on the other parent a schedule by presumptions not beneficial to the particular family at bar. Although it may not be the intent of this Amendment, the inclusion of language "defining" a particular kind of residency or providing statutory examples of the residential arrangement plays into some parent's desires to use the statutes for their own good, rather than for the good of their children. The Amendment is ill-conceived and is bound to result in more fighting (rather than less), more positioning (rather than less), and less consideration of what is truly in the child's best interests (as opposed to a parent seeking to impose his or her own selfish will on the other -- which more than likely arises from that parent's desire to control rather than a real concern for the child or the child's welfare).

If you have any questions I am glad to address them.

Ronald W. Nelson

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