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Kansas Senate Judiciary Committee
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RE: HB 2621
Child Custody and Military Deployment

TESTIMONY OF RONALD W. NELSON
On HB 2621 – Issues Surrounding Child Custody Disputes with Military Servicemembers

Members of the Committee: Good morning. My name is Ronald W. Nelson. I practice domestic relations law with my offices in Shawnee Mission, Kansas. My practice emphasizes handling complex domestic relations issues in divorce, parentage and other domestic relations disputes including child custody and child support. My clientele is fairly evenly split between representation of men and women. Over the years, a significant number of my clients are associated with the United States Military; either as the servicemember or as the spouse of a servicemember. In the context of those cases, I've often had to wrestle with the difficult issues that arise when the family dynamics and existing practices of sharing a child's custody are disrupted by military service including a servicemember's overseas assignment or orders to a new duty headquarters.

I appear today to suggest significant changs to HB 2621. Although, as others have testified, problems have arisen across the country in child custody cases involving children of some military service members, this bill now before the Committee does not solve the problems addressed in the best interests of those children involved and, in fact, may very well complicate and compound those problems. The bill, as written and passed by the House, is a confusing mass of potentially contradicting provisions that may have many charged with interpreting those changes unsure what they are to do and what are the mandates and desires of this body.

As others have testified, recently, with the increasing number of mothers and fathers deployed overseas, some significant issues have arisen with child custody arrangements in military families. The problems are not unique to military families; however, because of the large number of families affected and because these deployments are often for uncertain and multiple periods, family disputes that had been limited to a small number of people now affect a much larger number. As a result, legislation is now being considered in a number of States in addition to Kansas. In addition, because of these problems, in January 2008, Congress passed an amendment to the Servicemembers Civil Relief Act (SCRA) that makes sure that the protective provisions of that act – including the power of a servicemember to stay proceedings while that servicemember is involved in active duty and is unable to get away from those duties to attend to domestic matters.

Among the legislation proposed is an Act passed by the North Carolina Legislature – some provisions of which HB 2621 contains. Unfortunately, HB 2621 expands upon that legislation and

includes other provisions that do not adequately consider the effect upon the children to whom it may apply and does not even adequately protect the Servicemember.

Many of the provisions proposed to deal with this issue are good and appropriate; however, many of them do not necessarily take into consideration what would truly be in the subject child's best interests. Unfortunately, some of the proposed "remedies" use a sledgehammer to deal with a fly and others fail to consider that a general rule imposing the same result on all cases has as much chance of harming the child as benefiting the servicemember parent. These cases are tricky; these cases are delicate; these cases are complex. There is no "one-size-fits-all" solution and any attempt to impose such a solution is bound to cause as many or more problems in execution as does the existing legal landscape.

Potentially serious problems with HB 2621 as it is now drafted are:

1. The bill purports to require that "Kansas courts shall retain jurisdiction over any custody or parenting time matter concerning a parent who receives deployment, mobilization or temporary duty orders from the military."

This is in direct competition with provisions of the UCCJEA and may cause the Kansas version of the UCCJEA to be non-complying and out-of-step with every other state in the country. There are a number of court decisions around the country interpreting when a parent has left a state for purposes of that state no longer having jurisdiction under the UCCJEA and it is imperative that Kansas maintain the uniform nature of our own UCCJEA.

2. Section 1(d) provides that, "If a parent who has joint legal custody receives deployment, mobilization or temporary duty orders from the military that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise custody responsibilities" then certain things may happen.

However, "legal custody" is the power given to parents of "decision-making." The ability of two parents to act as "joint legal custodians" is not effected by where a parent lives or works or whether a parent is or is not oversees or on active military duty. The essence of "joint legal custody" is cooperation and information sharing between the two parents. "Joint legal custody" has nothing to do with "time sharing" or with which parent the child lives or how often. The inclusion of this provision is nonsensical. The purpose of the bill is to provide for those situations in which a parents mobilization effects parenting time or the co-parenting relationship; mobilization does not affect a parent's ability to be a parent or to express their desires for their child's best interests. Simply put: the bill seems to confuse concepts of legal custody and physical custody.

3. The bill provides that "Any custody order for the child entered because of such parent's deployment, mobilization or[,] temporary duty [or unaccompanied tour] orders during the parent's absence shall end no later than 10 days after the parent returns, but shall not impair the discretion of the court to conduct a hearing for emergency custody upon return of the parent and within 10 days of the filing of a verified motion for emergency custody alleging an immediate danger of irreparable harm to the child."

This provision does not adequately define what is an appropriate absence time for this rule to apply. There are sometimes when the parent who was the primary residential parent has been gone for

military duty a month to a year or more, but this bill treats them all the same – even though in the eyes a child (and depending on that child's age and other factors) the circumstances are vastly different. Whenever there is an "automatic" provision in child custody laws, those "automatic" rules do not consider a child's best interests, but consider only expediency and rules. In child custody matters, only flexible rules are appropriate because of the wide variety of situations that are covered and the wide variety of personalities and needs involved.

How does an automatic termination of a temporary custodial change consider the best interests of the child? What if the child has become settled in a new environment? What if the child is in the middle of the school year in another school district or another city or state? What if the original custody order did not truly consider the child's best interests, but was made as an accommodation of circumstances that existed at the time the custody arrangement was originally made that have completely changed in the interim? What if the child and the non-servicemember parent have formed a different bond than they had before the servicemembers deployment that did not exist before the child changed residence from the servicemembers home? What if upon returning from deployment the servicemember chooses to locate to a different place than the servicemember lived before deployment?

The "saving provision" that the provision "shall not impair the discretion of the court to conduct a hearing for emergency custody upon return of the parent and within 10 days of the filing of a verified motion for emergency custody alleging *an immediate danger of irreparable harm to the child.*" Is "immediate danger to the child" really the standard we want to impose? What happens to those children who are in the middle of a regular school year in another district or state with the other parent whose academic studies, extracurricular activities and other "stabilizing" events are upended by this "automatic" termination of the previous orders? Does such an event constitute "irreparable harm?" Probably not. Does such an event cause an "immediate danger?" Perhaps; but who is to decide and what is the standard? Will this bill cause fewer problems, or more?

4. The bill provides that "If a parent with parenting time rights receives deployment, mobilization or[,] temporary duty [or unaccompanied tour] orders from the military that involve moving a substantial distance from the parent's residence or otherwise have a material effect on the parent's ability to exercise parenting time rights, the court may delegate the parent's parenting time rights, or a portion thereof, to a family member or members of the service member's family with a close and substantial relationship to the minor child for the duration of the parent's absence."

This provision may violate a parent's constitutional rights (Troxel vs. Granville). It also treats a third party as if they are on the same level as a parent -- which they are not (see Troxel). This provision likely injects more conflict into a family than it solves by setting up a conflict.

What happens, however, when this "assignment" is made without consultation with the other parent? What if the person to whom rights are assigned is unknown or unacceptable to the non-servicemember parent? What if the person to whom the rights are assigned has an adversarial relationship with the non-servicemember parent? What if a servicemember seeks to assign primary residency status to another family member in derogation of the rights of the non-servicemember parent?

5. The bill amends KSA 60-1625(b)(4) to provide that "if either parent is a service member, as defined in section 1, and amendments thereto, provisions for custody and parenting time upon military deployment, mobilization or temporary duty of such service member."

However, the bill puts this provision in 60-1625 as a required provision rather than as an option, allowed provision (as is inferred in other language in the bill). This kind of provision can already be included in a parenting plan if the parents' desire and it should be included in the statutory language, if at all, as an example of a detailed provision included in a parenting plan under KSA 60-1625(c).

6. The bill likely conflicts with provisions of the federal Servicemembers Civil Relief Act, rather than enhances it as it seems is the intent.

As mentioned in the first part of my testimony, in January, 2008, Congress enacted an amendment to the Servicemembers Civil Relief Act, which explicitly states that "child custody" matters are included within the category of "civil actions" in which the issuance of orders are subject to the SCRA and against which the SCRA's prohibitions apply.

7. Finally, the bill indicates in a few places that despite the language of the bill, the court must consider the child's best interests above all, which seems to minimize some of the protections given by other parts of the bill.

These problems are significant and complex. The Committee must be aware of the effect that any change in current law may have on children in child-custody disputes. Children are already too often used as pawns by the adults who love them for their own selfish, manipulative, and hurtful reasons. This legislature should not play into the hands of those who would misuse a law meant to protect the rights of children. Any changes should be made with a consideration of the effect of that change on the whole family and the ways in which it will affect the child upon whom it primarily acts.

What is my suggestion to meet the problems identified by the proponents of this Bill? How are we to balance the desires of the Servicemember, the valid concerns and interests of the non-Servicemember, and most importantly, the child who is going to gain – or suffer – from whatever this Legislature passes into law?

A bill is now winding its way through the Virginia Legislature that, in my view, is far superior to the current bill in its value to protect everyone involved in a child custody case where one or both parents are servicemembers. I suggest this Bill as a Substitute for HB 2621:

VIRGINIA MILITARY PARENTS EQUAL PROTECTION ACT.

§ 20-124.7. Definitions.

For purposes of this chapter:

"Deploying parent or guardian" means a parent of a child under the age of 18 whose parental rights have not been terminated by a court of competent jurisdiction or a guardian of a child under the age of 18 who is deployed or who has received written orders to deploy with the United States Army, Navy, Air Force, Marine Corps, or a reserve component thereof.

"Deployment" means compliance with military orders received by a member of the United States Army, Navy, Air Force, Marine Corps, or a reserve component thereof to report for combat operations or other active service for which the deploying parent or guardian is required to report unaccompanied by any family member.

§ 20-124.8. Deployment is not change of circumstances.

A. A deploying parent's or guardian's absence, relocation, or failure to comply with a custody or visitation order shall not, by itself, constitute a material change in circumstances warranting a permanent modification of a custody or visitation order if the reason for the absence, relocation, or failure to comply is the parent's or guardian's deployment.

B. Any court order limiting previously ordered custodial or visitation rights of a deploying parent or guardian due to the parent's or guardian's deployment shall specify the deployment as the basis for the order and shall be entered by the court as a temporary order. Any such order shall further require the nondeploying parent or guardian to provide the court with 30 days advance written notice of any change of address and any change of telephone number.

C. The court, on motion of the deploying parent or guardian returning from deployment seeking to amend or review the custody or visitation order entered based upon the deployment, shall set a hearing on the matter that shall take precedence on the court's docket, and shall be set within 30 days of the filing of the motion. Service on the nondeploying parent or guardian shall be at that parent's or guardian's last address provided to the court in writing. Such service, if otherwise statutorily sufficient, shall be deemed sufficient for the purposes of notice of the deploying parent's or guardian's motion to amend or review custody or visitation. For purposes of this hearing, the nondeploying parent or guardian shall bear the burden of showing that reentry of the custody or visitation order in effect before the deployment is no longer in the child's best interests.

D. This section shall not otherwise preclude a parent or guardian from petitioning for a modification of a custody or visitation order based upon a change in circumstances.

§ 20-124.9. When no order is in place; expedited hearing.

If no court order exists as to the custody, visitation, or support of a child of a deploying parent or guardian, any petition filed to establish custody, visitation, or support for a child of a deploying parent or guardian shall be so identified at the time of filing by the deploying parent or guardian to ensure that the deploying parent or guardian has access to the child, and that reasonable support and other orders are in place for the protection of the parent-child or guardian-child relationship, consistent with the other provisions of this chapter. Such petition shall be expedited on the court's docket in accordance with § 20-108.

§ 20-124.10. Contents of temporary custody or visitation order.

Any order entered pursuant to § 20-124.8 shall provide that (i) the nondeploying parent or guardian shall reasonably accommodate the leave schedule of the deploying parent or guardian, (ii) the nondeploying parent shall facilitate opportunities for telephonic and electronic mail contact between the deploying parent or guardian and the child during the deployment period, and (iii) the deploying parent or guardian shall provide timely information regarding his leave

schedule to the nondeploying parent or guardian. Willful violation of such order shall constitute contempt of court.

Thank you.

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