DISTRICT COURT OF KANSAS
TENTH JUDICIAL DISTRICT
JOHNSON COUNTY COURTHOUSE
OLATHE, KANSAS
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CHAMBERS OF:
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January 26, 2018

To: Senate Judiciary Committee
Sen. Rick Wilborn
Sen. Julia Lynn
Sen. David Haley

From: Keven M. P. O'Grady

Re: Testimony Regarding Senate Bill 257

Thank you for the opportunity to comment on Senate Bill 257. After twenty five years of private practice, doing mostly family law, I became a judge in late 2012. Since that time, I have been one of five Johnson County judges hearing a family court docket. My case load consists of divorces with children, parentage cases, and petitions for protection from abuse and from stalking that involve children. I write to oppose SB 257.

This bill seeks to create a legal presumption of shared, or 50/50, parenting time unless the parents agree otherwise. Essentially, the law would presume that 50/50 time is best for every family. It gives a parent wanting 50/50 time veto power over any other parenting arrangement. This presumption is neither necessary nor helpful in most cases.

First, it is important to recognize the effect of a legal presumption. Unlike a set of factors that the legislature might provide for a court to consider in making decisions, a presumption says "you will do this unless special findings are made justifying a deviation." Years ago, the courts had a legal presumption known as the "tender years" doctrine. "Tender years" said that young

children would always be placed with their mother absent extraordinary circumstances. After many years of hard work by dedicated professionals and parents, this presumption was replaced by the best interests of the child standard. While this standard is intentionally imprecise, it places the focus where it should be, on the child. The tender years doctrine prioritized mothers based on a belief that women were inherently better suited to care for children. A presumption of 50/50 time puts the parent first. Children are treated more like property being divided with each parent getting half or what is "fair" to the parent regardless of the outcome for the child. Interestingly, the tender years doctrine replaced the previous presumption in favor of fathers. Children were treated like property. Men could generally own property while women could not. Fathers were considered the natural guardians of the children, much as they were guardians of their wives. Mothers received custody if the father was unfit. The law finally did away with presumptions and for good reason. They are parent focused, not child focused, and they don't work for kids.

Presumptions also shift the burdens of proof and persuasion. Currently, each parent explains why his or her proposed parenting plan serves the child's best interests. This is a good and balanced approach. Neither parent starts in a legally superior or favored position. Neither parent carries a heavier burden than the other. Arguments must be focused on the statutory factors and best interests of the child. A presumption shifts the burden. If this bill were to become law, one parent need only sit back and take shots at the other parent's plan. The other parent must prove by clear and convincing evidence that 50/50 time is not in the child's best interests. One parent is incentivized not to be creative; not to consider the needs of the child. The other must go on the attack. Rather than a trial focused on a child's needs, and the well-considered statutory factors, the trial will turn into an argument about the faults and failings of

the parents. It becomes the stereotypical "mudslinging" trial. Children who are exposed to increased levels of conflict, particularly conflict between their parents, have increased chances for bad outcomes later in life. Exposure to toxic stress can do life long damage. This bill is very likely to increase litigation. While it is sadly true that some parents will choose the path of scorched earth litigation and negativity regardless, this bill presumes that anyone opposing 50/50 time is the one promoting conflict. That is not our experience.

SB 257 not only shifts the burden of persuasion, but radically alters the burden of proof. Today, parents must persuade the court by a preponderance of the evidence, that is to say that it is more likely than not, that his or her parenting plan serves the child's best interests. This bill says that even if a 50/50 plan is more likely than not an inferior plan for the child, it must be ordered anyway. In order to overcome the presumption, the opposing party must establish his or her case by "clear and convincing" evidence, a much higher burden. It is the same burden required to remove a child from a home in a child in need of care case or to terminate parental rights, or to make a finding substantiating abuse in a DCF investigation. This will be exceedingly difficult in many cases and virtually impossible for an unrepresented parent. A parent who cannot afford an attorney will be at a significant disadvantage.

Shifting the burden will be a significant barrier to victims of domestic violence. Judges are very careful whenever domestic violence is alleged. Recently, the legislature reemphasized its desire that judges consider domestic violence issues in creating parenting plans. With a presumption of 50/50 parenting time, the victim must prove by clear and convincing evidence that the statutorily mandated plan is inappropriate. Domestic partner violence is often difficult to prove. Many times the only witnesses are the parties. In a protection from abuse or stalking case the burden is preponderance of the evidence. Arguably, a finding of domestic violence in an

abuse or stalking case after a trial would not be enough to overcome the 50/50 presumption. To mandate that a child must be placed in a 50/50 arrangement unless domestic violence is proven by the higher burden of clear and convincing evidence seems unwise. Retrying the issues may retraumatize victims. Alleged abusers may be encouraged to litigate knowing that the burden is higher in the parenting plan case. In cases where the alleged domestic violence is just situational to the end of the relationship, the need to prove bad acts may persuade a parent that the issues should be tried instead of resolved by alternative means. Again, the presumption changes the focus from the child to the parents; from how best to serve the child's needs to whether bad acts can be proven.

While parents sometimes believe that it is important to air the relationship's dirty laundry, it is not often helpful for a judge in crafting an appropriate parenting plan. Judges typically listen for answers to three basic questions: 1) what parenting plan does the parent prefer and why, 2) how does that plan serve the best interests of the child, and 3) how does that plan promote the best possible relationship between the child and the other parent under the circumstances? A presumption changes the questions. The first question becomes: why is 50/50 parenting time clearly and convincingly not in the children's best interests? Only after answering that question do the original three come into play. Litigation will become longer and more complex. Parents will be further alienated from one another after an even more brutal courtroom experience. Family recovery from the trial will be all the more difficult.

Make no mistake, parents and children must recover from trial. Unlike the contract or personal injury case, after a parenting plan trial parents leave the courtroom and must often immediately interact with one another. They might need to exchange the children, attend a soccer practice, or go to a school conference. The parental relationship does not end just because

the judge made a decision. Creating more litigation and requiring parents to say more nasty things about one another is bad for families and bad for children.

A 50/50 presumption is based on the belief that all parents function as 50/50 parents before separation. Sometimes this is true, sometimes it is not. When parents separate, life necessarily changes for everyone, but whose life should change more, the parent or the child? Many judges look to approximate the division of parental responsibilities to line up with how the children were raised when the parents were together. This is what the children are used to. Less change may well reduce some of the negative effects they experience from the cataclysm brought on by parental separation.

Parenting plans are not mathematical equations. Children are not variables to be inserted into an algebraic formula. What is 50/50 time? Is it overnights? Is it an equal number of days per year? Is it the same number of minutes per day? Why does a parent that has not traditionally cared for the child 50% of the time now insist upon doing so after separation? Is it because he or she is changing and becoming more involved? Is it because it is "fair" and if so, fair to whom? More involvement by the traditionally less involved parent is very often a good thing. Will parents really change their habits and roles? Should they? Is that good for the children? How can we change the family dynamic for the better? All these questions get pushed aside with a presumption. Judges hope that both parents will be as involved as possible. In my experience as an attorney and as a judge, most judges do not favor moms over dads or dad over moms. They simply want to do right by the child.

Parents sharing time with children on an equal or nearly equal basis must be extremely cooperative, capable of effectively communicating, and skilled at calmly discussing and making decisions. In most contested cases, the opposite is true. Many families share time with their

children equally. Almost all of these families agreed to this arrangement, because it was similar to what they had been doing before or they had an agreed plan for making it work. They likely always worked well together when it came to the kids, even if they disagreed on other things making life as an intact family impossible. They most assuredly made decisions cooperatively and didn't fight in front of their kids. These high functioning families will continue this way. Simply assuming that parents in a contested case can do so, is misguided. Assuming that anyone who opposes 50/50 time is doing so for nefarious motives is unfair to many parents. Prohibiting a judge from making a best interests determination by requiring clear and convincing evidence that a cookie cutter parenting plan is best for everyone is a mistake.

A landmark report on whether or not courts and mental health providers should consider 50/50 parenting time the presumed norm was published by the Association of Family and Conciliation Courts in 2014. The AFCC Think Tank on Shared Parenting showed considerable professional disagreement concerning the propriety of 50/50 time as the starting point for most families. Anyone interested in a detailed and spirited discussion of these issues should consult the Family Court Review, Vol. 52, Number 2, April 2014. An excellent, and shorter, synopsis of the history of presumptions and the arguments for and against was delivered in a lecture by the late Professor J. Herbie DiFonzo. The text can be found at "Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody", Hofstra Law Review, Vol. 43, Issue 4, Art. 2 (http://scholarlycommons.law.hofstra.edu/hlr/vol43/iss4/2). The general consensus is that presumptions, any presumption, are not the best method for helping separating families address their unique needs. Several recommendations were made and we're pleased to say that Kansas has been out front in the way we handle these cases. Many Kansas courts have been doing most of the things recommended by the AFCC Think Tank long before 2014. There is

always room for improvement. The court system and allied providers continue to innovate and experiment with ways to improve outcomes for children, be that judges, court services officers, Court Appointed Special Advocates, mental health departments and court administrators. Family matters are a large part of every court's docket. We know that it is important to continually work to improve our service in an area that probably sees more public interaction with the judiciary than any other area of the law.

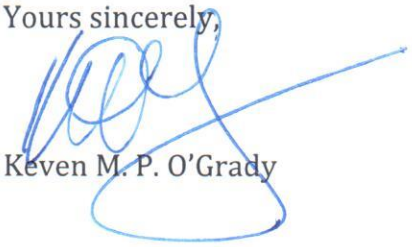
When a presumption exists that moves the focus away from the children, it becomes more important for the court to consider the unspoken needs of those children. It is extraordinarily difficult for parents in the throes of litigation to separate their needs from those of their child. This is completely understandable. The emotion of a contested case and the experience of a former loved one saying terrible and unflattering things about you can naturally lead to a defensive and aggressive response. An attack on a parent is often internalized as an attack on the entire family. For this reason, if we shift the focus to the parents and away from the children, it will become more important than ever for courts to receive independent input. Courts will desperately need more custody evaluations, family assessments, and guardian ad litems. When a parent asks to rebut the presumption, it may be nearly impossible learn, simply from the parents' presentations, how the presumed plan might play out for the child. Most parents cannot afford these services. To truly serve the child's needs, it would be imperative to fund more court services officers to conduct family assessments, and to establish funds to provide guardians ad litem or attorneys for the child, and child custody evaluations at free or reduced costs.

Presently, our courts make great efforts to help families craft creative parenting plans for their individual families. Many courts require mediation or conciliation. Limited and full case management services, private, and public alternative dispute resolution procedures and parent

education programs all strive to keep parents in control of their families. Creating a presumption that favors one outcome over another runs counter to these efforts.

In closing, we should not go backwards to a time when the law presumed to know what was best for every child. It was a mistake 100 years ago and it would be a mistake now. While the best interests of the child standard is admittedly imprecise, it places the focus and analysis where it belongs, on the child. I, and I believe any judge, would be happy to have you visit a local district court to see for yourselves the important and specialized work involved in crafting parenting plans. Please feel free to contact me if you have any questions. Thank you.

Yours sincerely,



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