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March 5, 2020

To: **House Judiciary Committee**
Rep. Fred Patton
Rep. Bradley Ralph
Rep. John Carmichael

From: **Keven M. P. O'Grady**

Re: Testimony Regarding Senate Bill 157

Thank you for the opportunity to comment on Senate Bill 157. Before becoming a judge, I was in private practice for twenty-five years, with a mostly family law practice. Since 2012, 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, sexual assault or human trafficking. I write to oppose SB 157.

This bill provides that in every temporary parenting plan, it is presumed that both joint legal custody and shared, or 50/50, parenting time is in the best interests of children provided that the parents are "fit, willing and able . . ." The bill presumes that 50/50 time is best for every family regardless of their particular circumstances. This presumption is neither necessary nor helpful in most cases.

The Law Now

For newly separating families unable to agree upon temporary parenting arrangements, the current process is straight forward. If the parents are married, K.S.A. 23-2707(a)(3) permits

courts to enter temporary orders that provide for legal custody and parenting time. Such orders may be entered *ex parte*; that is to say without a hearing. If a parent disagrees with an *ex parte* order, he or she is entitled to a hearing within 14 days. K.S.A. 23-2707(b). If the parents are not married, K.S.A. 23-2224(a)(2) allows a court to enter a temporary parenting plan that confirms the existing *de facto* parenting plan. There is no reference to such orders being entered *ex parte*. Changes to the status quo are made only after notice and an opportunity to be heard.

K.S.A. 23-3211(a) defines temporary parenting plans. Such orders must serve the best interests of the child. K.S.A. 23-3112 describes the provisions that might be contained in a temporary parenting plan. Throughout the existing statutory framework, the best interests of the child are emphasized. SB 157 redirects the court and parents from best interests of the child to the attributes of a parent.

While parents sometimes believe that it is important to air the relationship's dirty laundry, it is rarely helpful for decision making. 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? The suggested presumption drastically changes the analysis. The question becomes: is a parent fit, willing and able to handle a 50/50 parenting time schedule? If yes, the court then moves on to hear evidence to rebut that presumption. Best interests are banned from the discussion until the final trial. Litigation will become longer and more complex. Parents will be further alienated from one another after an even more brutal courtroom experience.

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.

Temporary Parenting Plans

Courts looks at custody and parenting time differently. Legal custody concerns decision making and may or may not impact parenting time. Joint legal custody describes a plan in which both parents have equal rights and responsibilities to make decisions in the child's best interests. Joint legal custody has long been the preferred custodial arrangement in Kansas. Sole legal custody is ordered only when a court makes specific findings that it is not in the best interests of the child to have his or her parents making decisions equally. K.S.A. 23-3206. Kansas courts already start from the proposition that joint legal custody will be ordered in a temporary parenting plan.

In setting temporary orders, absent special circumstances, courts will look to maintain the status quo for the children. Often parents are separated before a petition is filed. Temporary orders are intended to keep the then current parenting arrangements in place. Neither party should be allowed to change the children's schedule unilaterally. Creating a presumed parenting schedule could do just that, particularly if the orders are entered *ex parte*. A couple of examples can illustrate the point. These are real, relatively common, scenarios.

1. A couple is separated for two months while they consider divorce or reconciliation. During their separation, the children have maintained their home base with Parent A in the marital home. Parent B is staying with a friend and has the children at the friend's house overnight every Saturday night and for dinner on Wednesday evenings. Parent B decides that divorce is the preferred option, files for divorce and requests

temporary orders. SB 157 requires an order changing the children's status quo unless "documentation or other information" is provided evidencing domestic abuse (undefined). This can be done without a hearing and without Parent A having an opportunity to be heard.

2. An unmarried couple has a baby. They do not live together. The baby goes home from the hospital with Parent A. Parent B questions whether he is the father. The parents take a drug store genetic test that leads Parent B to believe he is the baby's father. He files a parentage action six months after the baby's birth. During that six months, he has had only sporadic contact with the child. SB 157 presumes that the child should immediately begin spending equal time with both parents if temporary orders are entered unless domestic abuse is supported by "good cause."

While a child's parents may not reside together, courts hope to disrupt the children's' lives as little as possible. Temporary orders should try to approximate the relative responsibilities that existed pre-separation. The children should be protected from upset. SB 157 moves the focus away from the children and puts it on the parents.

How Would the Bill Change Things?

The bill restrains courts from making orders primarily focused on a child's best interests. SB 157 requires that a court order 50/50 time if the parent requesting it is "fit, willing and able" unless a presumption is rebutted. As a practical matter, only the first and third prongs would be litigated. Fitness to be a parent is a concept commonly applied in Child in Need of Care (CINC) proceedings, not parenting plan disputes. K.S.A. 38-2269 sets out the factors for a court in a CINC proceeding when considering parental unfitness. As neither the divorce nor the parentage code defines fitness, courts would reasonably look to the CINC code. The factors used to determine

fitness differ greatly from the factors now used to establish temporary parenting plans. See K.S.A. 23-3203.

Imposing a presumptive parenting schedule ignores the child's reality. It could well upset the child's schedule at the very moment when his or her world is turned upside down by parental separation. If the presumed parenting plan is ordered *ex parte*, and it does not reflect the actual sharing of parental responsibilities, the children might be caught in the middle for at least 14 days before a court can establish an appropriate parenting plan. K.S.A. 23-2707(b). The number of hearings to modify temporary orders would be expected to increase if parents are not encouraged, as now, to approximate the actual preexisting division of parental responsibilities.

If no *ex parte* orders are entered and one party requests the establishment of a temporary parenting plan, the dynamic changes significantly if this bill becomes law. Presently, each parent must suggest a proposed parenting plan and the court takes evidence focusing on the best interests of the child considering the statutory factors. This bill instructs the court and parties to initially focus on whether the parent wanting equal parent time is "fit, willing and able." Having different factors for temporary and final orders will be confusing. The inquiry shifts from what's best for the children to a parent's fitness and abilities and then back to best interests at a final hearing.

How Does a Presumption Effect the Family?

Unlike a set of factors that the legislature might provide for a court to consider in deciding, a presumption says you must do this unless special findings are made not to do so. 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. Our statutes specifically disapprove of the tender years presumption. K.S.A. 23-3204. While the best interests 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 prioritizes the parent.

Interestingly, the tender years doctrine replaced the earlier presumption in favor of fathers. Children were treated as 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 most presumptions and for good reason.

Presumptions shift the burdens of proof and persuasion. Currently, each parent explains why his or her proposed temporary parenting plan serves the child's best interests. Neither parent starts in a superior position or carries a heavier burden than the other. Arguments must be focused on the statutory factors and best interests of the child. A presumption changes this. If this bill were to become law, one parent may unilaterally change the existing parenting arrangements.

Presumptions may be overcome by evidence. Creating a presumption requires a hearing to present that evidence. If the status quo is changed by an *ex parte* order, more hearings will be held, and more conflict stoked. The temporary orders hearing will turn into an argument about the faults and failings of the parents. It becomes the stereotypical "mudslinging" trial. Children 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 lifelong damage. Increased litigation often leads to increased family stress.

A landmark report on whether 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 about 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 consensus is that presumptions, any presumption, are not the best method for helping separating families address their unique needs. Kansas has been at the forefront in the way we handle these high conflict cases. Many Kansas courts have been doing most of the things recommended by the AFCC Think Tank long before 2014.

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 the child. This is 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 or aggressive response. An attack on a parent is often internalized as an attack on the entire family. 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 need more custody evaluations, family assessments, and guardian ad litems. Most parents cannot afford these services. 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.

Other Considerations: Domestic Violence, Unrepresented Litigants.

Shifting burdens of proof and persuasion could be a 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. The presumed presumption tells the courts to redirect that emphasis.

Unrepresented litigants and those with fewer resources may be discouraged from obtaining court assistance when needed. If the court presumes that a 50/50 temporary parenting time is appropriate in temporary plans, parents who cannot afford an attorney might stay in inappropriate relationships rather than risk placing children in unfamiliar and difficult circumstances. It is not unreasonable to expect an uptick in the use of protection from abuse and related orders to circumvent this presumption. PFA and PFSAHT cases are a significant burden on courts because of the expedited time deadlines. Many unrepresented parties do not understand these laws. Adding more cases to these already crowded dockets will delay other matters. Unrepresented victims of domestic violence would be all the more vulnerable.

Temporary orders are the exception rather than the rule. Unrepresented litigants rarely request them. Changing the law to favor a particular outcome might encourage more such filings, leading to more hearings to review temporary orders. It does not serve the best interests of children to encourage more litigation.

Application of the Presumption.

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 changes for everyone. 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 perceived as "fair?" Judges often hear the argument that 50/50 time is "fair," but fair to who? More involvement by the traditionally less involved parent is often a good thing. Will parents 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 cooperative, capable of effectively communicating, and skilled at calmly discussing and making decisions. In contested cases, generally the opposite is true. Many families share time with their children equally. Most 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. 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. Presuming that anyone who proposes or opposes 50/50 time is doing so for nefarious motives is unfair to many parents.

Technical Problems

SB 157, p. 1, lines 25-29 creates a new definition of joint legal custody. K.S.A. 23-3206 states that in joint custodial arrangements that the parents have equal rights to make decisions in the best interest of the child. SB 157 seems to restrict joint legal custody. No decisions regarding "important issues affecting a child's life" can be made without joint input and consultation. This is, of course, how good co-parents behave. Will schools, health care providers, and activity directors accept any decision if it is not clearly manifested in writing that both parents agree? Joint legal custody has long been understood to require parental cooperation but not to create choke points that inhibit effective care of children. The Johnson County Family Law Guidelines for Parenting Plans (adapted from guidelines used around the United States) defines joint custody to mean "that both parents have equal rights to participate in, contribute to, and have responsibility for their child's health, education, and general welfare in their child's best interests. Neither parent's rights are superior to the other parent's rights, and parents should cooperate with each other to decide what is in their child's best interests. Joint legal custody does not require that the parents agree on everything. Joint legal custody does not grant either party an absolute veto power over the decisions of the other parent. Each parent may make normal decisions about the child's day-to-day activities while in that parent's care without consulting the other parent." A positive statement such as this would appear more workable than the negative and restrictive statement in SB 157. I'm concerned that this new definition will not only be

confusing but has not been thoroughly considered.

It is unclear why the term "parenting time" needs to be defined and why it is defined so narrowly. Cooperative parents often have very flexible schedules. Long distance parents exercise virtual parenting time. Parenting time might be supervised.

Equal parenting time is defined as "equal or nearly equal." Given the considerable confusion over what "nearly equal" means, the Kansas Child Support Guidelines were recently amended to strike that language. What does equal or nearly equal mean? Minutes, hours, days? Over a week, two-week, month or year period?

Section 2, new section (c)(1) discusses a finding of "good cause that domestic abuse has occurred." The term "good cause" is awkward. Good cause is not a quantum of evidence but is used to help a court exercise discretion. For example, good cause might be shown to excuse a self-represented litigant's failure to meet a court deadline. Perhaps mirroring or referencing the language that already exists in K.S.A. 23-3203 (a)(9), (15), (16), (17) and (18) and K.S.A. 23-3205 would be more useful. Another solution might be to replace the term "good cause" with language requiring the moving party to establish a *prima facie* case that domestic abuse has occurred. This could be established by sworn testimony or evidence of a criminal action filed against the other parent.

Section 2(c)(2) states a presumption in favor of joint legal custody. This already exists at K.S.A. 23-3206. To rebut the presumption, the court must find that the best interests of the child are promoted by an order for sole legal custody.

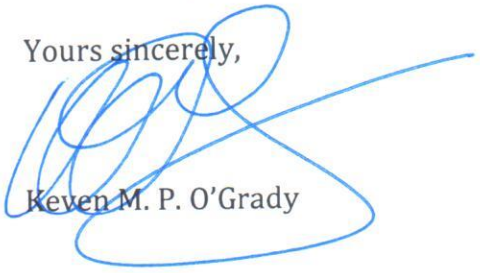
Actions seeking an order for protection from abuse or stalking can involve children. As written SB 157 clearly authorizes the court to grant sole legal custody when the alleged victim is a parent. This is appropriate as the parents cannot communicate if a temporary order is entered.

If the child is the alleged victim, it might be appropriate for the parents to continue to have joint legal custody as that term is currently understood (as opposed to how it is redefined by the bill). It might still be appropriate for parents to discuss changing the children's schools or health care providers pending a PFA trial if the residential parent is not a victim.

Closing

In closing, we should not go backwards to a time when the law presumed to know what was best for every child. While the best interests of the child standard is admittedly imprecise, it places the focus and analysis where it belongs, on the child. While well intentioned, SB 157 attempts to impose a one size fits all solution to decisions that require analysis of unique situations. No two families are alike. 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 contact me if you have questions. Thank you.

Yours sincerely,



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