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March 7, 2019

Kansas Senate Committee on Judiciary
Senator Richard Wilborn, Chair

RE: 2019 SB 157: Family Law; temporary parenting plans, presuming equal parenting time

Hearing Date: March 7, 2019

TESTIMONY OF RONALD W. NELSON OPPOSING SB 157

Chairman Wilborn and Members of the Committee:

I am a family law attorney in Johnson County. I have practiced family law in Johnson County and surrounding areas for over 30 years. My practice is focused in helping clients work their way through complex family law matters, including divorce, determination of parentage, and child custody matters in which parenting time and third party visitation is the primary issue. I represent both mothers and fathers in and out of court trying to help my clients through one of the most difficult and emotionally trying times of their lives. Although I am a family law trial attorney, I never try to go to court. Everything that I do for my clients is aimed at trying to help them avoid those difficult, expensive, and almost never satisfying trips into court. Sometimes it's necessary; but I try to impress on my clients that going to court is almost always the last choice.

I have participated in helping write revisions to the Kansas family law statutes since 2000, including the complete change in the language used in Kansas child custody law in 2000 that did away with outdated terms of "parent visitation," vague court orders that didn't provide definition in parenting plans so that parents could make sure that they were able to exercise time with their children, and procedures that allowed a parent to quickly enforce their parenting time when it was denied or refused. I was also involved in the 2011 Recodification of Kansas family law, updates to the Kansas Parentage Act and statutory criteria for parenting-time determinations in 2014, and other changes in Kansas family law practice and procedure. I have also assisted drafting family law forms for state-wide use in Kansas, including forms for divorce, post-decree child support and parenting time modifications, protection from abuse, and protection from stalking, and I am involved in seeking to find ways to improve access to the courts for self-represented individual and to reduce the conflict and acrimony in family law cases, while protecting vulnerable children and adults.

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+Fellow of the International Academy of Matrimonial Lawyers

A large portion of my practice deals with post-decree modification matters, including helping parents who seek the return of their children from interstate and international child abductions by their former partners–truly some of the most devastating and horrific of all matters involving children — and which clearly constitute "child abuse."

A focus of my career in law has been to make the system more open and unbiased for all parents to come into court and

I understand the fear and pain that comes from those situations and counsel my clients – and other family law attorneys – about how to deal with those situations and the resulting legal issues. But I also know that sometimes litigants are overzealous in their desire to correct perceived injustices in their own cases by trying to change the law for everyone – to the detriment of all. SB 157 is an example of that kind of bill. There are many problems with this very short proposal; many of them are addressed by others presenting testimony today, but I want to highlight a few:

The proposal is directed at creating a "presumption" when a court enters "temporary orders." But the proposal injects a false presumption into what is the most chaotic and dangerous time in a family law case.

The purpose of temporary orders is to protect the "status quo" that exists when the orders are filed. Kansas statutes provide that temporary orders may be issued to protect the way things are at the time of the entry of the temporary orders. That is, a court may issue temporary orders to (1) restrain the parties from disposing or encumbering assets; (2) restrain the parties from bothering or harassing the other of them; restraining the parties from canceling or modifying insurance policies and coverages as well as the beneficiaries of those policies; and (3) for other provisions to protect the status quo.

Although many people think temporary orders are always entered, they are not. Temporary orders are typically requested and entered only when there is some need to protect the way things are because of some threat or because the situation is so unpredictable and chaotic that court orders need to be made to confirm that the way things have been will continue until the court and parties are able to investigate and rationally determine what should happen.

The first weeks after a new divorce or parentage action is filed can be the most uncertain and chaotic. It is the time when parties' emotions may be the highest in conflicted cases and when there is the most risk that someone will do something stupid. It is the time when divorcing and separating parties are trying to emotionally and psychologically deal with an unexpected and often unwanted circumstance: that an intimate couple has come to the point in their relationship where they may not continue to be a couple and likely will not continue to live together – possible not close to each other. It is the time when people often act out of character. When they act unpredictably and sometimes violently because they are on edge, panicked, angry, fearful, and acting irrationally grasping at straws. That is why the statutes direct the court to protect "the status quo."

Initial temporary orders – ex parte temporary orders – are entered in many few cases than generally thought. Initial temporary orders are not issued in the majority of cases filed. In fact, initial temporary orders are issued in a distinct minority of cases. That is because there is no

reason to enter temporary orders in the vast majority of cases because the vast majority of cases are filed between spouses who agree they should be divorced and in situations where the spouses have either already agreed on how to deal with the issues of their breakup or they are low conflict and can easily work with each other to resolve those issues without involving the court.

That means that the vast majority of cases in which temporary orders are issued are cases in which the parties are in moderate to high conflict when the divorce is filed. In these cases, emotions, hostility, and suspicion is often especially high. It is also the time when making generalized assumptions about cases may make the situation more hostile, more fragile, and more dangerous. It is the reason why the judges in Johnson County, for example, have imposed a requirement that anyone asking that temporary orders issue must file a motion stating what temporary orders are being requested, why those particular temporary orders are appropriate, and the factual basis supporting the issuance of the particular temporary orders. In addition, any temporary orders issued must be submitted using standard language for restraining orders. The Johnson County judges frequently change and reject motions temporary orders that are submitted that don't meet these criteria – because the judges don't "assume" anything, but require that anyone who submits a request for temporary orders justifies why the orders are needed and why the orders are appropriate.

Not all judges in all judicial districts are this careful when considering and entering temporary orders. This is one of the reasons why proponents put forward the proposal that "In making an order for a temporary parenting plan, there shall be a *presumption* that it is in the best interests of the child for fit, willing and able parents to have temporary joint custody and share equally in parenting time." But this proposal does the exact opposite of what it purports to do. The proposal before this Committee does not make things better; it does not correct problems that now exist; it does not help families; and it will not make the process of asking for or issuing temporary orders "more fair" or "more considered" or "more likely to calm the chaos" at the beginning of an emotional divorce case. It will likely do the opposite.

As is pointed out in the fiscal note, "SB 157 has the potential to increase the time spent by district court judicial personnel in reviewing parenting plans. . . . it is not possible to estimate the amount of time that would be spent on those plans." The fiscal note is a vast understatement of the cost and expense of this bill. This will would have the effect of making cases more hostile, more chaotic, more expensive, and it will encourage parties to seek temporary orders more often and lead to more hearings to modify temporary orders and encourage more dysfunction.

In the law, a legal "presumption" is a set of assumptions based on general experience and common practice. A presumption arises because a basic fact is recognized to exist in overwhelming number of circumstances. A presumption is an assumption of generalized fact resulting from a rule of law that requires that fact be assumed unless a contrary or conflicting circumstance is shown to exist in the particular matter. A legal presumption is a fact of generalized common knowledge. Kansas law, for example, presumes that a child born during a marriage is the biological child of the husband and wife.

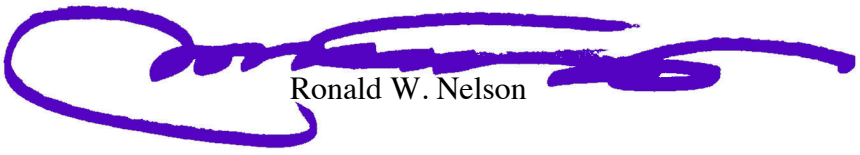
One of the things that becomes abundantly clear when dealing with family law situations is that there is no common set of facts when determining the best parenting time schedule for a

family. And any assumption that one or another imposed parenting plan is good for all families is doomed to failure. Every family is different. Every family is set up in its own way depending on the parents' abilities, work schedule, agreements before and after the children are born, the ages and number of children in the family, whether the child is a baby, a toddler, elementary, middle, or high school aged. It is the reason why psychological and legal experts agree that there is no one suggestion for division of parenting time is good for any family. Every family is unique. It is the reason why the Johnson County Bar Association Family Law Committee years ago abandoned one-size fits all "guidelines" for parenting times in cases.

Although it is certainly in the best interests of a child to have both parents involved in the child's life, best interests does not necessarily mean that those parents have "equal or approximately equal time with their child. Equal time may not even be possible when considering the schedules and logistics involved in a certain case. Yet, the proposed presumption requires the court to presume that equal time is in the best interests of the child, with no proof that it is good for the children or that such a parenting time plan could be realistically executed under the facts and circumstances of a given case.

If the Committee cares to reduce conflict and dysfunction in family law cases, I suggest that instead of imposing generalized presumptions, the Committee instead insert into the temporary orders statute procedural protections to make sure that a court has the best information in front of it when considering and issuing temporary orders. That is, the statute should require that when temporary orders are requested, a motion must be filed setting out the basis for the requested temporary orders, the basic facts supporting the request – including a summary of the child's current living situation, information about the parents' work schedules and the child's then current school or daycare schedule, and why the requested temporary parenting orders are best for the child.

For all of these reasons and more, I urge the committee not to advance this bill as it is now written. If the Committee advances the bill, it should remove the presumptions included and should instead focus on procedural protections to make sure that any temporary orders requested fit the family, instead of making family fit the unsupported presumptions included in this bill.



Ronald W. Nelson