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TESTIMONY OF RONALD W. NELSON,
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Members of the Committee: My name is Ronald W. Nelson. I practice family law in Overland Park, Kansas. Approximately 80% of my practice is domestic law, including divorce, parentage, child custody, and other areas of domestic relations law, both as an original action and post decree. 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 and residential and non-residential parents. I am a member of the American Bar Association Family Law Section, serving on the Custody Committee, the Kansas Bar Association, serving as Editorial Director of the Family Law Section, the Johnson County Bar Association, serving as Communications Director, and I am a Fellow in the American Academy of Matrimonial Lawyers. I have presented seminars on various areas of domestic law and practice and I am the author of three chapters in the Kansas Bar Association's Practitioners Guide to Kansas Family Law, including chapters on Child Custody and Child Visitation and Parental Access.

Many parts of this bill are needed changes in the law. Unfortunately, language often acts as an impediment in the law. Although lawyers usually know what is meant by the phrase "visitation," and although lawyers and judges all understand that by merely designating contact with a parent as "visitation" is in no way meant to denigrate a parent or reduce the importance of that parent, laws are read and interpreted by the general public in ways that may not be intended by the drafters. "Visitation" is generally thought of as the periodic contact exercised by a parent with whom a child does not normally live. The term "visitation" is essentially a hold over term from earlier times when one parent was grant sole legal and physical custody of a child with the other parent being allowed to see the child (or "visit" the child) periodically. Today, however, most psychologists agree the term "visitation" is now outdated and that, in some situations, use of the term itself can cause undue conflict between parents. "Visitation" in today's society implies that one parent is no longer a "full" parent, but has only a limited right to see and interact with the child.¹ Because of the problems with terminology, various other terms are now used in the legal community to describe visitation, including: "access," "partial custody," "parent-child contact," "parenting time," "physical placement," or other similar terms.²

"Visitation" rights and decisions by the courts regarding the access to a child encompasses more than merely providing for the physical transfer of the child from one person to another, however. The law regarding visitation determines the type, nature and frequency of access which a person not having physical custody of a child is allowed with the child. Thus, changing those references in Kansas law to "visitation" seems to be past time and a needed historical change. In looking at those changed terms, however, it should be noted that not all places where "visitation" appears can it be replaced by "parenting time." In making reference to "visitation rights" the

¹ See Goldstein, et al., BEYOND THE BEST INTERESTS OF THE CHILD, at 38 (1973)("A 'visiting' or 'visited' parent has little chance to serve as a true object for love, trust, and identification, since this role is based on his being available on an uninterrupted day-to-day basis.") See also I.Ricci, MOM'S HOUSE, DAD'S HOUSE, MAKING SHARED CUSTODY WORK, 1 (Collier 1980).

² See authorities cited in A.Haralambie, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES, §5.01 (1993).

UCCJA, for example, is intended to include not only *parental* rights of contact with a child, but visitation rights by parents, step-parents, grandparents, uncles, aunts, and others who may have been granted rights of access and contact under the laws of the state in which a custody decree may be entered (See e.g. K.S.A. 38-1302 and 38-1310).

It must be understood, however, that a change in terminology is just that and that as times change, terminology used inoffensively in past times becomes offensive because of the way it is used in practice. Thus, a change in terminology is not a panacea. Litigation regarding access to a child and the resulting continual interaction between parents and third parties about access is one of the most troubling areas of domestic law and is often a cause of relitigation.³ More than any other area of the law, domestic litigation (and especially litigation involving decisions regarding child custody and access) involves interpersonal relations and engenders high emotions. An intensely loving relationship, when it dissolves can easily turn into just the opposite – a relationship with a heart of intense hatred, resentment, anger at being rejected by someone with whom that person previously had a close and loving relationship. Oftentimes, the hate after the divorce is as intense as was the love at the most intense parts of the relationship.

It must be realized that the vast majority of cases in which children are involved have few, if any problems during the entire minority of the children. Most parents are able to work together toward the best interests of their children and, when properly advised, are able to resolve any issues between them without involvement of either attorneys or the court system.

Unfortunately, there is a significant minority of cases that cause the vast majority of problems in the courts. Parents who are so bent on retribution against the other parent for real or perceived wrongs, whether current or historical, will (and constantly do) use the law for their own means and continually enlist the processes of the courts in that campaign. Because of this unfortunate tendency, it is essential that the laws dealing with domestic relations consider both sides and primarily the rights of the children involved in that dispute. Because every domestic case is different (although they may involve similar disputes, similar emotions and similar requested resolutions), it is extremely important to make the law as flexible as possible leaving the detailed resolution of cases to the local judge. The local judge is the person best able to deal impartially with such disputes. The legislative crafting a detailed, cookie-cutter solution for all cases would cause more difficulties, than it would solve.

I want to focus my testimony on the enforcement of visitation procedures.

Hearing Officers. A small word change, but a dramatic terminology change is found in the amendments to the mediation provision of the visitation enforcement statute. Currently, many post decree visitation issues are dealt with by court hearing officers. This bill changes current law to require such disputes be heard by a *judge* rather than by a *hearing officer or judge*. This change is likely to increase the number of cases heard making it more difficult to obtain a timely hearing. In the urban districts it is already difficult to obtain a quick hearing because of high case loads. The use of hearing officers provides a manner for quick presentation of disputes (which are usually resolved on one hearing), leaving for the district judges the more difficult and complex cases.

Visitation enforcement. One of the important rules in domestic relations is that punitive actions, by one party or by the court's often extend the cycle or cause other ongoing problems. The provisions in the bill that the court "may impose" a \$100 civil penalty on "first offense" and a \$250 civil penalty for a "second offense" would be counterproductive and would encourage

³ W.Hodges, INTERVENTIONS FOR CHILDREN OF DIVORCE, CUSTODY, ACCESS AND PSYCHOTHERAPY, at 151 (2nd Ed. 1991). See also Goldstein, et al., BEYOND THE BEST INTERESTS OF THE CHILD, at 37 (1973) ("The lack of finality, which stems from the court's retention of jurisdiction over its custody decision, invites challenges by a disappointed party claiming changed circumstances.")

misuse of the system, rather than solving the problems it is sought to remedy. Currently, judges may impose such penalties when the judge issues an order and direct or indirect civil contempt is found. Adding such “civil penalties” for visitation violations in a hodge-podge manner, as is proposed in this bill will only tend to exacerbate those problems.

Instead, I believe the legislature should enact the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) that was recommended for passage just this past year by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and that was introduced this past year as HB 2790, should be passed. The UCCJEA includes a uniform and consistent scheme for enforcement of both custody and visitation orders. This uniform law is an update of the Uniform Child Custody Jurisdiction Act that has been passed in all 50 states and other territories of the United States. The enforcement procedures in the UCCJEA would address the concerns expressed for enforcement of visitation rights, while at the same time providing a uniform method for in-state and out-state custody and visitation orders enforcement. The UCCJEA modifies the UCCJA in consideration of all those legislative acts that have been passed since the original passage of the UCCJA in 1968, including: the federal Parental Kidnapping Prevention Act (PKPA), the federal Violence Against Women Act (VAWA), the Hague Convention on International Child Abduction, and the federal International Child Abduction Remedies Act (ICARA). Included are uniform enforcement procedures that track these other laws and provide a well thought out and uniform manner of dealing with actions by a parent that interfere with a parent’s custodial or visitation rights. Many of the remedies of the bill before the committee are included in the UCCJEA, but in more effective and uniform format.

Child Support. Included in the current bill are various provisions regarding child support and a presumption that “[d]etermination of the amount to be paid by a parent for support of the parent’s child or children shall be based on the principle that both parents have an equal duty to provide support.” In almost every case, one or the other or both parents feel the support paid should be different. That is usually the nature of disputes. A study to be published in the near future by Laura Morgan, a national expert on child support and child support guidelines, has found that the presumptive child support determined by guidelines in the vast majority of states provides less support for a child than USDA criteria for expenditures in an intact family. This is telling since it is obvious that a family will generally need to spend more as a whole once separated than it did while still intact.

Aside from the fact that Kansas currently has child support guidelines in force that fairly and justly determine the child support to be paid by separated parents, this language has the potential of causing significant problems within the system. What does this language mean? How will it be used by parents battling over their children and the amount of child support to be paid? It is apparent that, unless parents have equal incomes and resources, they are not able to provide “equal” support for their children.

Joint Shared Custody. Probably the most troubling provisions in this bill relate to requiring “joint shared custody of the minor children” including provision for “equal parenting time.”

It is generally recognized that access by both parents should be flexible and that the more parents can work with each other to maximize parental contact, the better for the child. The time spent in “visitation” may be from minimal visitation in which the nonresidential parent sees the child on an irregular and infrequent basis⁴ to what may essentially be equal residency with both

⁴ Such irregular and infrequent visitation is discouraged and, depending on the quality of such visitation, may lead to further restrictions on visitation or eventual adoption of the child. “Casual or chance happenings would not indicate that one is assuming or performing the duties of a parent, and would not establish any intention on the parent of a parent to do so. We decline to adopt the narrow definition advocated by appellant. Instead, we hold that the term incidental as used in the statute [pertaining to when a parent’s consent is necessary to terminate that

parents. Most psychologists and courts encourage nonresidential parents to have as much contact as practicable, so long as the stability of the child is not adversely affected by the contact.⁵

Often, however, because of continuing conflict between parents, because of anger or hostility built up over their relationship, or because of jealousy, suspicion, or distrust arising after the parties' separation, the parents are unable to put aside the issues between them and arrive at a mutually agreeable access schedule. In those cases, the court may have to become involved.

The Kansas appellate courts have held that only in the most unusual circumstances should alternating of a child's residency be considered and then, generally, only where both parents believe it to be appropriate. Frequent alternating of children between households is normally not in the best interests of the child and should be looked upon with skepticism. Generally, only in those cases where the parents are able to work together in a mature and cooperative fashion is it appropriate to consider a sharing of custody. Because the parents are required to work closely and intimately, if those parents have issues held over from their own intimate relationship, it is as likely the child will be harmed by that mandatory relationship than helped by it. Because there is more need for contact, there are more points at which emotions can explode. Good shared custody relationships require flexibility, respect and detailed interaction. If such a relationship is forced, it has the potential of severely damaging the children and any hope of a workable relationship between the parents. Further, such required shared parenting time often is not age appropriate. Psychologists agree that the younger the child, the more the need for stability as to where the child is living – and that a shifting of residence between parents is detrimental.

Thank you.

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parent's rights and allow adoption by another] means 'casual; of minor importance; insignificant; of little consequence.'" *In re Adoption of McMullen*, 236 Kan. 348, 351, 691 P.2d 17 (1984).

⁵ See W.HODGES, *supra* note 7, at 155. ("Visitation Frequency").