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House Judiciary Committee
Representative Lance Kinzer, Chair

Hearing Date: March 7, 2012

RE: 2012 SB 262: Grandparent custody

TESTIMONY OF RONALD W. NELSON
In Opposition

Chairman Kinzer and Members of the Committee:

I am a family law attorney in Johnson County. I've practiced family law for over 25 years and I focus my practice on complex issues in family law. My practice frequently involves representing parents – and grandparents – in family law disputes, at the trial court level and in the appellate courts. Over my now many years in family law, I've often wrestled with the difficult issues that come about when parents fight over the their children's care and custody – and far too often when other family members, including grandparents become involved.

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 former 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. SB262 wouldn't do what its supporters desire. And even if it did, it wouldn't provide any useful improvements in current family law practices.

The bill provides:

> Notwithstanding the provisions of other statutes, when a child is removed from the custody of a parent, ~~any~~ ***a*** grandparent ~~shall~~ ***may {shall}*** receive ~~preference~~ ***consideration*** when evaluating what custody, visitation or residency arrangements are in the best interests of the child.

The bill is applicable to cases brought under the Kansas Revised Code for care of children.

1. Grandparents are already "interested parties" to a Child in Need of Care Proceeding.

The Revised Code for Care of Children is to "provide for the protection of children" from threats to the child's safety and ongoing welfare by abuse, neglect making the child's ongoing physical, mental and emotional needs the "decisive considerations in [the] proceedings." In

carrying out the directives in the code, the agencies charged with responsibility (which includes not only the courts, but also police, child protective services and other similar agencies) to provide stability in the life of a child who must be removed from the home of a parent.[1] Further, when a petition under the Code is initiated, grandparents are already given rights under the Code as "interested" parties[2] and because of that "interested party" status, they receive notice of any filings in the case,[3] the right to participate in the case,[4] the right to be represented by an attorney in the case, and other similar rights.[5] Because of their position as "interested" parties, the grandparents have input to the court and are considered by the court for possible placement if the court determines the child should not then be placed back with a parent.

2. Requiring "consideration" "notwithstanding . . . other statutes" potentially conflicts with a child's best interests determination.

The proposed bill requires that the court consider grandparent custody, residency, or visitation "[n]otwithstanding the provisions of other statutes." This provision potentially conflicts with the provision in K.S.A. 38-2241(c)(2), providing that "the court may restrict those rights if the court finds that it would be in the best interests of the child." Does the language in the new bill nullify this provision? Does it mean the court is satisfying both provisions when it weighs considerations and determines that grandparents should not be able to participate because of the child's best interests?

3. Removal of custody from "a parent" is not removal from both parents.

Just because a child is "removed from the custody of a parent" does not mean that a grandparent should be "considered." It certainly doesn't mean that a grandparent should receive any preference. If a child is removed from the custody of "a parent," there is always the probability that the child can – and should – be placed with the *other parent.* Merely because a child is removed from the custody of "a" parent doesn't mean the child is removed from the custody of *both parents.* And under the US and Kansas Constitutions, a parent has primary right to custody of the child over any third party.

4. "Consideration" of a grandparent upon "removal" isn't always possible.

There are different ways in which a child may be "removed from the custody of a parent": emergency, temporarily, and permanent.

K.S.A. 38-2232 provides that if "any law enforcement officer takes into custody a child under the age of 18 years without a court order" (and emergency) and the child is not delivered back to the child's parents" because "there are reasonable grounds to believe that such action would not be in the best interests of the child," the statutes provide places for emergency placement. But this bill would require that the police – on an emergency situation – "consider" the grandparents for placement even if they are not known, if they have no relationship with the child.

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[1] K.S.A. 38-2201(b)(9)
[2] K.S.A. 38-2202(m).
[3] K.S.A. 38-2236(b)
[4] K.S.A. 38-2241(c)
[5] K.S.A. 38-2235(a)(2)

K.S.A. 38-2231 provides when police may take a child into temporary or continuing custody for various purposes, including when there is probable cause to believe that the child is ordered into custody by this or another state, and when a child is subject to compulsory school attendance to assure that the child attends school during regular hours.

K.S.A. 38-2243(f) provides that a court may enter a temporary custody order after determining that the "[c]hild is dangerous to self or to others; child is not likely to be available within the jurisdiction of the court for future proceedings; or (3) health or welfare of the child may be endangered without further care.

Does this bill require that the police give "consideration" to grandparents custody, residency, or visitation when removing the child from a parent in an emergency situation even though investigation of the complaint was at its most difficult point and they were still trying to sort through the underlying facts? Does this bill require that grandparents be given "consideration" because the child is ordered into the state's temporary custody "to assure that the child attends school during regular hours?" Does this bill require that the court consider grandparent custody even though the child is dangerous to self or others? Does the bill require consideration of grandparent custody even though the court is dealing with critical health issues?

5. Grandparents are already considered as potential persons to be given custody.

A fit parent has absolute right to decide matters regarding their children. But when a child is removed from the parents' custody, Kansas law already provides that the court place the child with a parent and a listing of others the court may determine best serves the interests of the child at that time.[6]

K.S.A. 38-2255(d) provides that if the court decides the child should not be placed with a parent, "the court shall enter an order awarding custody to a relative of the child or to a person with whom the child has close emotional ties."

The court's job is to find the best home for children. That isn't always with the child's grandparents – who may have little or no previous contact with the child.

The proponents of this bill testified in the Senate that they needed this bill because they didn't feel the judge adequately "considered" their side when decisions were made. But that's what judges do: "consider" the facts put before them, weigh the testimony presented and consider what should be the outcome for that particular matter at that particular time under all the testimony and evidence presented.

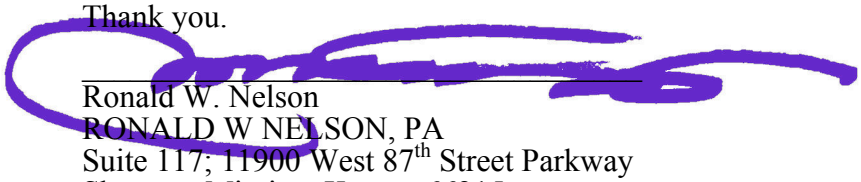
In almost every court hearing, some person feels they didn't have a fair hearing and that they didn't receive proper "consideration." But that's rarely the case. And when it is the case, the insertion of a statutory requirement that a grandparent "shall receive consideration" does nothing more than is already present in the statutes. The insertion of these provisions, therefore, gives grandparents false hope that they will get more than they already have.

[6] K.S.A. 38-2243(g) [for temporary orders].

The bill does not provide or require anything that is not already required by the Code. The Code currently requires that "each child who comes within the provisions of the code shall receive the care, custody, guidance control and discipline that will best serve the child's welfare and the interests of the state, *preferably in the child's home and recognizing that the child's relationship with the child's family is important to the child's well being.*"[7] It also is to be construed to "provide stability in the life of a child who must be removed from the home of a parent."[8] I urge the committee to either not approve this bill or to refer it to the Judicial Council for further study.

The concerns presented by the proponents are heartfelt. The problems in these cases are often complex and vexing. But the way to correct these problems is not found in this bill. While judges deciding these issues are certainly not infallible, this bill does nothing to enhance or correct those concerns. At best, all this bill may do is place an additional – and unnecessary – mandate on a judge, which that judge is already required to consider by the existing provisions of Code for Care of Children. At worst, it gives false hope to grandparents that they will receive some consideration they would not already receive.

Thank you.



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[7] K.S.A. 38-2201(b(2).
[8] K.S.A. 38-2201(b)(9).