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March 16, 2015

Kansas House Committee on Judiciary
Representative John Barker, Chair

RE: 2015 SB 159: Power of Attorney for Care and Custody of a Child

Hearing Date: March 17, 2015

TESTIMONY OF RONALD W. NELSON
OPPOSING SB 159

Chairman Barker and Members of the Committee:

I am a family law attorney in Johnson County. I've practiced family law for over 25 years. My practice is focused on complex issues in family law and high conflict child custody litigation. Many of those cases involve parents who are trying to keep a child away from the other parent – for good reasons or bad, but usually for reasons that are selfish, spiteful, and not considerate of either the rights or best interests of the child involved. This bill falls into the category of bills that would enable bad behavior from parents, encourage using a child as a pawn for hateful and manipulative purposes, and would create havoc in – and out – of litigation over parenting rights and time.

SB 159 purports to create a “power of attorney” allowing “a parent” to “delegate to another person” for a period of up to one year “any of the powers regarding the care and custody of the child.”

The bill appears to be written with military servicemembers in mind; but the bill doesn't actually limit its coverage to that situation. Although section 1 references a “serving parent,” other portions of the bill simply refer to “a parent.” The bill is not thought out in any way. It appears written to cover a situation to prevent a child from being taken into State care when a parent is unavailable and the parent has delegated some other person to take care of the child; but again, the bill applies to many more situations than where potential Child In Need of Care proceedings might be instituted. It would apply when there are two full-engaged and fit parents – one or both of whom don't want the other parent to have any involvement with their child.

The bill does not seem drafted with Kansas law in mind.

For example, the bill allows that, “A parent or legal custodian of a child may . . . delegate to another person . . . any of the powers regarding the care and custody of the child, except the power to consent to marriage or adoption of the child.” But it's unclear what those rights of “care and custody of the child” encompasses. Kansas law has generally done away with the term “custody.” It is a possessory

RE: 2015 SB 159: Power of Attorney for Care and Custody of a Child
 Ronald W. Nelson Testimony in **Opposition**

term that describes very little and is often improperly used to cover a whole range of actions and desires that, in law, it doesn't. It potentially allows the "attorney" for care and custody to assume some type of "co-custodial rights" with a parent or parents – the division of which is unclear.

The bill would allow a parent in a high conflict child custody cases to assign his or her "rights" to someone else without the other parent's knowledge or consent, with the "attorney for child custody" then taking over unspecified powers and seeking to exercise control over the child even if the other parent disagreed with the decisions.

As concerning as those things in the bill are, perhaps more concerning are the provisions NOT in the bill:

- (a) Notice to the other parent;
- (b) Whether the Power of Attorney is filed with any authority or court or is made known to anyone else;
- (c) Effect on the application of the federal Indian Child Welfare Act if the child is on a Tribal Roll;
- (d) No Limits on whom the Power of Attorney can be delegated (e.g. a person already found to be an unfit parent, a person with child-abuse or child-endangerment filings, charges or concerns);
- (e) Effect on child support obligations and receipt

Since the power of attorney is invokable and revocable at any time by "a" parent, how does a third party know at any given time whether or not a power of attorney exists, can be relied upon if presented, or has been revoked or re-instituted?

Because of the provision in the bill providing for "automatic termination" after one year, how does anyone know when the power began? Did it begin when signed? Did it begin when first exercised? Did it begin when first presented to a third party? Did it begin at some other time? And how does anyone find out when this beginning time is or when the one year is complete resulting in "automatic termination?"

Section 3(d) provides the execution of a power of attorney by a parent or legal guardian, "shall not constitute abandonment, abuse or neglect" unless the parent or legal guardian "fails to take custody of the child or execute a new power of attorney after the one-year time limit has elapsed." But what does any of this mean? What constitutes a "fail[ure] to take custody?" ("custody" in this context is not term used in Kansas law.) Would the failure of a parent to execute a new power of attorney at the end of the one-year time limit constitute prima facia evidence that the child was abandoned, abused or neglected? Can a parent execute an unending series of "powers of attorney for custody" giving a non-parent total authority over a child without court order, action, or oversight?

Section 3(e) provides that, "the child or children subject to the power of attorney shall not be considered as placed in foster care and the parties shall not be subject to any of the requirements or licensing laws, rules or regulations for foster care or other regulations relating to community care for children it is important to specify the time period that the power of attorney is in effect." So does this mean that a parent can give the child to another person without any restrictions on whom that person is? On their qualifications or safety concerns? Can this bill be used as a way to "sell" or "give" children to another without any government intervention, oversight, or regulation? How is the child protected?

RE: 2015 SB 159: Power of Attorney for Care and Custody of a Child
 Ronald W. Nelson Testimony in **Opposition**

The bill raises other questions – without any answer:

Who will claim the child as a dependent on an IRS 1040 Return for the calendar year?

Does the person designated “power of attorney for custody” meet the IRS requirements for claiming the child under 26 U.S.C. §152?

How is qualification for State assistance of the child determined? What are the effects on the child’s KanCare benefits? Is the child’s qualification determined by the parent’s needs? By the needs of the person designated “power of attorney for custody?”

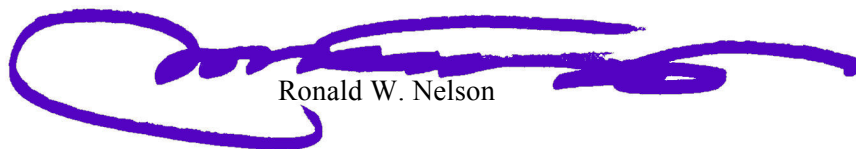
Who provides health insurance coverage if the child is not eligible for State assistance?

What if the child is seriously injured and receives a financial settlement? Who is to administer those funds for the child’s benefit?

Is the person designated as “power of attorney for custody” an “interested party” in CINC proceedings? Is the person designated as “power of attorney for custody” a necessary party in proceedings to modify a parenting plan? To establish a parenting plan? To modify a child’s residence between parents?

The provisions of the bill are not well thought out. The provisions do not consider what really happens in Child in Need of Care cases or any other kind of case; but seems based on a reaction to a few cases based on limited information. This Committee should not approve this bill. It has the potential of being more harmful to children who need care than to the rights of the parents it purports to help. It has the probability of creating higher conflict in already conflicted cases, of inserting more litigants into already complex cases, and to encourage dysfunction between parents by allowing one parent to “give” the child to another person without notifying, discussing, information, or considering the rights, wishes, desires, or expressed opposition by the other parent. And the child’s best interest appear to have NO considerations in the bill.

I strongly oppose this bill and ask that this Committee decline to move it forward.



Ronald W. Nelson