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March 1, 2016

Testimony to the Kansas Legislature
House Standing Committee on the Judiciary
RE: SENATE BILL No. 393
An Act concerning the Kansas family law code;…
Amending K.S.A. 2015 Supp. 23-3201 and 23-3203

Honorable Representatives:

I am a Kansas District Court Judge serving the 18th Judicial District in Wichita, Sedgwick Co. I currently serve in my 4th year as Presiding Judge of the Family Law Department in the 18th Judicial District. Of my seven plus years on the bench, more than five have been in the Family Law Department. Prior to election, I practiced law for 28 years, with a focus on family law cases.

I am writing to oppose Senate Bill 393.

In 2014, the Kansas Legislature amended the non-exclusive listing of relevant factors for a court to consider when resolving issues of custody, residency and parenting time between divorced or separated parents of a child. That list of factors is found at K.S.A. 23-3203.

The changes made in 2014 were good modifications. They added several easily determined facts to the list of considerations – the locations of the children's schools, and the parent's residences and work locations being examples. Those changes also added a clarifying limitation clause to when a child's desires should be considered. Those were all good changes. The addition of objective factors and clarifying phrases benefit the application of the statute.

Senate Bill 393 will provide neither of those benefits.

One of the weightiest statutory factors for judges in custody decisions is *"the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent;"* K.S.A. 23-3203(h).

I have directly quoted that factor to separated parents hundreds of times to emphasize the importance for a child to have two parents who focus on the child's needs. Senate Bill 393 proposes to add an exception to this factor.

I believe the proposed change will encourage parents to seek to justify disrespect of the other parent on the basis of their subjective belief that the child might be "emotionally" or "economically" abused by the other parent. The change will encourage parents to find an excuse for their own embittered and vengeful treatment of the other parent.

The law should never codify subjective excuses for disrespectful conduct. This is especially true in family law parenting decisions.

It is not surprising to see claims of abuse at the forefront of family law cases. When there is convincing evidence of domestic abuse, it routinely has significant effect on a court's decision, restraining or limiting an abuser's contact with children. Where there is clear evidence of abuse, it always carries great weight. And the existing statutory factors for custody, residency and parenting time decisions already recognizes the need to consider abuse in the decision making. References to spousal abuse and child abuse are included in K.S.A. 23-3203 (i), (p) and (r).

But having dealt with thousands of domestic cases, it is highly apparent that many of the claims of abuse are exaggerations of the truth. And sometimes claims of abuse claims are just stories concocted to gain advantage.

Why is that? Because when claims of abuse are raised, courts routinely respond with quick and restrictive rulings to protect a child until due process can be fully applied in a litigated evidentiary hearing where both parties are allowed to cross-examine the evidence. As a result, crafty litigants view making a claim of abuse as a way to gain an advantage in their litigation.

Judges are becoming more alert to the fact that claims of abuse in Protection from Abuse (PFA) cases and Protection from Stalking (PFS) cases are often being used in a vindictive way or to gain an advantage in a domestic dispute. And the same conduct extends beyond the PFA and PFS dockets to other family law cases. Over the years, in trials, I would estimate that in litigated trials claims of some types of abuse are found to be exaggerated or untrue as often as they are found them to be true.

This proposed statutory change seeks to connect the factor to allegations in PFA and PFS cases in subsection (b)(1)(B). Those cases are the easiest cases to file in Family Courts. They are filed without any filing fee. And because the trials on these cases are supposed to be heard within 14 days, they are cases in which the litigants are the least protected by due process opportunity for informed cross examination of witnesses.

Truly, victims of actual abuse should be entitled to the protection of the law and the courts. Judges in domestic cases are already experienced with assessing those types of claims. But allegations of "abuse" that are not proven should not be given greater weight or value in the trial of domestic custody matters.

As SB 393 proposes, "domestic abuse" becomes the only factor designated in statute as "primary". In doing so, the statutory change gives diminished weight to all of the other 17 factors. And because SB 393 elevates claims of abuse to the unique status as "a primary factor" for court decisions on custody, residency and parenting time, I believe the bill will unintentionally encourage more frequent allegation of untrue and exaggerated claims of abuse.

SB 393 may be well motivated to support children who are truly victims of abuse. But the change is an unnecessary and harmful change to the statute.

The existing factor at KSA 23-3203 (i) already allows the court to consider "evidence of spousal abuse, either emotional or physical". The factors at existing subsections (o), (p), (q) and (r) already alert a court's attention to criminal convictions of child abuse or crimes for which offender registration is required.

If any change is needed based on the underlying cry of SB 393, I believe the need could be met by a simple change to K.S.A. 23-3203(i) as follows:

"(i) evidence of ~~spousal~~ *domestic* abuse, either emotional or physical;"

The use of the word *"domestic"* would expand the consideration of abuse to relationships outside of marriage, but within the context of a home or family relationships. This would encompass abuse of a child or abuse of an intimate partner or household member.

Decisions of custody, residency and parenting time should not be micro-managed by focused special interest calls for attention to results in a few individual cases. Every custody, residency and parenting time decision of a court must take into consideration the unique situations and evidence proven in each individual case. Justice cannot be administered by a cookie cutter.

SB 393 also poses problems beyond the issue I have emphasized above. Here are a few examples:

(A) Though I have seen cases that might be considered to include actions that could be construed as "economic abuse", I do not believe that phrase has any generally recognized legal definition. And it seems that abuse that is "economic" would be within the gamut of "emotional abuse" meant to devalue the victim.

(B) Section (b) of the proposed change to K.S.A. 23-3203 gives increased weight to determinations made outside the court without subjection of those determinations to effective due process.

(C) Section (b)(3) and (4) of the proposed change to K.S.A. 23-3203 may require the trial court to make specific findings with regard to "domestic abuse" in every trial, even when no allegations of abuse have been raised.

I ask this committee to deny the changes proposed by SB 393.

Respectfully submitted,

Eric A. Commer
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