LAW OFFICES
RONALD W. NELSON, PA
~ A FAMILY LAW PRACTICE ~
SUITE 117
11900 WEST 87TH STREET PARKWAY
SHAWNEE MISSION, KANSAS 66215-4517

RONALD W. NELSON[*+]
ASHLYN YARNELL
———————
BETSY L. NELSON
TINA SHIPMAN
PARALEGALS

TELEPHONE: (913) 312-2500
TELECOPIER: (913) 312-2501
KANSAS-DIVORCE.COM
TWITTER: @KANSASDIVORCE
RON@RONALDNELSONLAW.COM

March 9, 2016

Kansas House Committee on Judiciary
Representative John Barker, Chair

RE: 2016 SB 393: Child custody and parenting time:
considering domestic abuse in determining the issue.

Hearing Date: January 28, 2015

TESTIMONY OF RONALD W. NELSON ON SB 393

Chairman Barker and Members of the Committee:

I am a family law attorney in Johnson County. I've practiced family law for over 30 years. My practice is focused on complex issues in family law and high conflict child custody litigation. 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 arise when parents fight over their children's care and custody, residency, and parenting time – both in and out-of court.

I participated in helping to write revisions to Kansas child custody law in 2000, 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. 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."

I speak today as a "neutral" on this bill, though I have concerns about provisions within it.

This bill seeks to make a finding of "domestic abuse" a "primary consideration" in any court decision on child legal custody, residency, and parenting time. It is the result of the work of an ad hoc group of various interested parties to increase the importance of domestic abuse and controlling behaviors in court's considerations of child custody matters. It was introduced by the Committee on Public Health and Welfare. The bill was referred to the Senate Judiciary Committee. The bill was set for hearing on

RE: 2016 SB393: Child custody and parenting time: considering domestic abuse in determining the issue.

Ronald W. Nelson Testimony

Wednesday, February 10, 2016 in Room 346-S at 3:30 pm. I was not able to attend that hearing because I found out about the hearing too late and I was already scheduled for a two-day trial in a post divorce matter that has pitted the parents against each other for nearly 10 years. It is because of those kinds of experiences that I have concerns – and hope this bill can be bettered.

While SB 393 contains many good and needed provisions, it goes too far. The first problem is that it requires not only that a court consider abusive and controlling behavior, but that it consider those allegations as a "primary factor" in when assessing a child's best interests when deciding legal custody, residential, or parenting plan – including when considering and approving an agreed parenting plan. But no other factors are listed as "primary" in the statute, so this bill has the effect of catapulting that one consideration ("domestic abuse") into the first in line consideration for all court's child custody decisions — rather than merely a significant consideration.

As written, the bill unfortunately seeks to inject into Kansas child custody and decisions more conflict, more finger-pointing, more false allegations, more "jockeying for position" by parents who dislike each other, more time consuming (and expensive) discovery proceedings and more dysfunction. It takes a good idea for needed improvements, but then skews those improvements to introduce "fault" concepts into an area of the law where fault must be removed. In short, the bill over does its good intentions. Mere removal of one word –"primary"– would make the bill much better; but there are some other changes that need to be made to make it a near perfect bill.

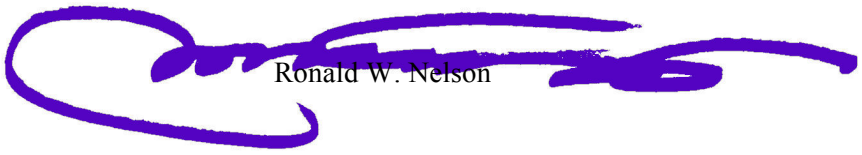
Another problem in the bill is the definition of "domestic abuse."

Emotional and economic abuse often co-exists with physical abuse. But the proposed language does not appear to require physical abuse (neither does the current statute). Only "emotional abuse" or "economic abuse" need be proved and that consideration — whether it affects the child at all — becomes the predominant factor in the court's parenting plan decisions. Such a provision is tempting for (bad) lawyers and (angry, dysfunctional, hateful, or litigious) parents to further use against their child and their child's other parent. Many people feel emotionally abused at the end of their marriage; sometimes both parties feel that way. It's human nature when an intimate relationship breaks up. Many people feel financially trapped in their marriage or have no control over the money that comes in or goes out of the couple's accounts. But with this new emphasis, more parties will allege that bad behavior or bad money choices, and claim that it amounts to emotional or economic abuse. If they can get their allegations into evidence and convince the judge that it rises to the level of domestic abuse, it becomes the predominant consideration in (and thus a way to "win") the parenting plan dispute. But even if they aren't successful in presenting it to a judge (remember that nearly 90% of all domestic relations cases are resolved between the parties before adversarial hearings), it will be a significant and detrimental factor in amicably, safely, and quickly resolving domestic disputes and will cost the state and it's citizen untold additional time in court hearings, disputes, court services officer time, and will likely create incentives for more bad actions by parties by filing more claims and motions.

Gauging how physical domestic violence affects the family, and what limitations should be placed on an abuser regarding the kids, is a lot more straight-forward than the gauging the emotional and economic abuse issues that occur in so many bad marriages. Often the financial or emotional manipulation and abuse is subtle and insidious. The children often aren't even aware of it, and it can be hard for outsiders to see or understand — especially judges who only see a very small slice of the couple's interactions and finances viewed through a prism of rules, procedures, and evidence rules. I can see experts being retained on the issue of whether "emotional abuse" or "economic abuse" occurred. Almost every fight or manipulative conversation could become relevant in an attempt to convince the judge that "domestic abuse" occurred. Thus, judges could end up trying fault issues more to determine "was this simply bad behavior that caused the marriage to fail – or emotional/economic abuse?"

Additionally, the mere entry of a final order of protection doesn't necessarily mean anything. It may have been entered because the defendant wanted to get away from the plaintiff and didn't want to interact even to defend such an action. The vast majority of protection actions are filed — and defended — by self-represented parties who often complain about things that clearly do not fall within the confines of the protection from abuse or protection from stalking acts. But the mere entry of an order would be considered as proof of "domestic abuse" in a later action over those parties' children — perhaps as an abusive action in and of itself.

I believe in the intent of this new emphasis – helping to protect victims and breaking generational cycles of violence – and the statute might work out fine. But I believe potential claims of "domestic abuse" will need to be closely examined and controlled through the pretrial conference/pretrial order process. I urge the Committee to consider these comments and those of other practitioners, to better the law, rather than to allow it to feed into the anger and resentment of litigants who often have their own, rather than their child's, interests at heart while also balancing the need for protection by those litigants and the children.



Ronald W. Nelson