March 8, 2016

To: House Judiciary Committee

Rep. John Barker, Chair

From: The Kansas District Judges Association

Re: Testimony Regarding Senate Bill 393

Thank you for the opportunity to comment on Senate Bill 393. The Kansas District Judges Association is comprised of the 176 District Court trial judges in Kansas. We welcome the improvements the bill makes to K.S.A. 23-3203. Unfortunately, in some respects, the bill adds uncertainty where it intends to create clarity. Domestic violence is a serious issue in a family law case. When domestic violence is alleged the matter often falls into one of two categories: the obvious and the difficult. Where there is clear evidence of abuse that evidence carries great weight. It's the cases where things are not so clear that are particularly difficult. Situations where a person is convicted of domestic violence are already referenced in the statute. K.S.A. 23-3203(p) and (q). Specifically, we offer the following comments.

Section 2, Subsection (a)(8)

The willingness and ability of a parent to appreciate and respect the bond between a child and the other parents is an excellent predictor of a child's recovery from his or her parents' separation. That said, protecting a victim of abuse does not evidence a failure to respect those parental bonds. Protecting from abuse might well be the best way to promote a positive relationship. In most cases the parent seeking to protect wants nothing more than for that child to have a healthy relationship with the other parent. When victimized children and the offending parent receive appropriate services it is sometimes possible for the parent child-relationship to be repaired and even improved. However, other related and unrelated actions might well show that a parent acting appropriately in one situation is acting inappropriately in another. Cases are rarely clear cut. To simply say that a court should never consider the ability of the parents to appreciate the value of a continuing relationships between parent and child when domestic abuse is involved is a step too far. Finding that a parent is not supporting the ongoing relationship with the other parent is rarely based upon a single factor. We suggest that the language could be modified along the following lines: "*except that if the court finds that such parent is acting to protect*

the child from witnessing or being a victim of domestic abuse by the other parent a parent's *protective* actions shall not be ~~considered~~ *the basis for a finding* with respect to this factor ~~if the court finds that such parent is acting to protect the child from witnessing or being a victim of domestic abuse by the other parent~~." Limiting the language in this way promotes the bills goal of making it clear that appropriate protective measures should not reflect negatively on a parent while retaining the legislature's prior desire to encourage healthy co-parenting.

Section 2, Subsection (b)(1)(A)

The reference to the K.S.A. 60-3102 definitions of "abuse" is confusing. Is the intent to define abuse as per the definitions in KSA 60-3102(a), to define "intimate partner or household member" as per K.S.A. 60-3102(b), or both? If it intends to define abuse, the language following the comma expands upon the definition of abuse found in the Protection from Abuse statutes. If it is intended to apply only to the intimate partners section found at 60-3102(b), judges already consider allegations of abuse directed at new spouses, significant others and the like but this can be easily clarified. The deletion of the prior language referring to spousal abuse as either "emotional or physical" should be reinstated.

The added reference to economic abuse is an expansive and undefined term that could be used by some to pull in lots of acts not typically considered abuse in a parenting plan case. Every case is different and must be looked at individually in light of its special facts. Emotional and economic abuse often, but not always, co-exist with physical abuse. Economic duress and control are certainly hallmarks of an abusive relationship and are part of the analysis when considering whether abuse has occurred.

The bill is unclear. Does it intend to make "economic abuse" a stand-alone factor? If only *economic abuse* need be proven and that can become the predominant factor in the court's parenting plan decisions, we foresee litigation increasing. This will be tempting new avenue for lawyers and parents. Many people feel emotionally abused at the end of their marriage; sometimes both parties. Many feel financially trapped in their marriage or have no control over the money. With this new emphasis, more parties may allege that bad behavior or bad money choices amount to emotional or economic abuse. If the judge is convinced that economic abuse occurred it would rise to the level of domestic abuse which

then becomes the predominant consideration in (and thus a way to "win") the parenting plan dispute.

Gauging how physical domestic violence affects the family, and what limitations should be placed on an abuser regarding the kids, is more straight-forward than gauging the emotional and economic issues that occur in so many bad marriages. Often the financial or emotional manipulation and abuse is subtle and insidious. The children are often unaware of it, and it can be hard for outsiders to see or understand. It is foreseeable that lawyers will hire experts solely on the issue of whether "emotional abuse" or "economic abuse" occurred. Almost every fight or manipulative conversation could become relevant. 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?"

Economic and emotional abuse can be indicators of Coercive Controlling violence and are routinely considered by judges. A slight modification of proposed new section (b)(1)(A) can improve the bill and help judges working with lawyers and parties to emphasize the importance of domestic violence issues. To help reduce some of these tensions the subsection could read something like:

> *"(A) A pattern or history of abusive behavior that is used by one person to gain or maintain domination and control over an "intimate partner or household member" as defined in K.S.A. 60-3102**(b)**, and amendments thereto, which may include emotional ~~abuse~~ or **physical** ~~economic~~ abuse; or"*

Section 2, Subsection (b)(2)(A):

Domestic violence offender assessments are useful. Courts already order mental health evaluations that, in appropriate circumstances, include domestic violence assessments. Cost is often a major problem. In most cases the parties will not be able to afford assessments. State funding would be needed if it is to be ordered whenever domestic abuse is alleged. Courts can already order investigations and reports per K.S.A. 23-3210. .This proposed language may actually be confusing in that it would seem to prefer one type of provider over another. Domestic Violence Assessments are available from multiple sources, not just certified batterer intervention programs. A batterer intervention program is most the intensive and highest level service typically available. As written, it could be

argued that this language restricts the options for investigating domestic abuse rather than expanding them. It could be argued that domestic abuse assessments can only be done by a certified batterer intervention program as it is specifically referenced in the parenting statute. It could be useful to allow reports done pursuant to a court order in a domestic violence or criminal case involving the same parties to be considered in the parenting time dispute case. While this writer is unaware of a party being denied the opportunity to present such a report when properly admitted into evidence, if this has been a problem a simpler resolution could be to simply add a new section to K.S.A. 60-3210. That said, we do not see this as a problem as the court's already have the authority to order appropriate investigations. Later language, section (b)(4), stating that the court may order a party to follow the recommendations of an assessment is redundant. This is a power that courts already have.

Section 2, Subsection (b)(2)(B):

This section does not really add anything to what family court judges already consider. The proposed language might encourage more litigation by not limiting the type of criminal convictions to be considered. Not every criminal conviction may be relevant to a parenting plan proceeding but this new wording might encourage parents to "throw the kitchen sink" in an attempt to gain a tactical advantage. Too many unhappy parents try this much too often and we'd respectfully request an effort to avoid encouraging more. That approach will not help the court make a better decision and might do little more than prolong litigation and increase costs.

Section 2, Subsection (B)(3)

This proposal is the most concerning. It says that if domestic abuse has occurred the finding becomes a "primary factor" in determining the best interests of a child. When established, courts always give abuse significant weight. Calling the evidence of domestic abuse a "primary" consideration makes all other considerations "secondary." Judges will have no problem with making findings with regard to "domestic abuse" and how it affects parenting plan decisions. We make findings about "spousal abuse" under the current statute. However, prioritizing this factor could move us back in the direction of conducting "fault" trials whenever the parenting plan is at issue. Having a "primary" consideration will encourage parents and attorneys to look for ways to fit into the trump position attempting

to improve their chances of "winning." Rather than just clarifying what is meant by domestic abuse and providing the courts more tools in dealing with this serious problem, the bill, as written, will likely inject more conflict and more finger pointing into child custody decisions. It adds a temptation to make more borderline allegations thereby increasing family dysfunction. It takes a good idea but goes too far. We believe the bill would be much improved by deleting subsection (A) entirely.

Another problem with the prioritization of best interests considerations is the failure to fully appreciate the differences between the types of domestic violence situations. Treating every divorce or paternity case the same is not appropriate. Situational Couples Violence is very different from Separation Instigated Violence and both are radically different than Coercive Controlling Violence. Addressing each type requires different approaches with different outcome goals. Judges are in the best position to analyze the specific situations and weigh the factors appropriately. The bill's attempt to spotlight the scourge of domestic violence would not, in our opinion, be diminished by these changes.

Conclusion

We thank the committee for its concerns and desire to assist the courts in dealing with the problem of domestic violence in its many forms. We believe the changes proposed above will make this a stronger bill and will help to promote the safety and welfare of our most vulnerable citizens without encouraging inappropriate, tactical, allegations. We wholeheartedly share these concerns and goals.