Approved April 23, 1983
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Elwaine F. Pomeroy at
Chairperson

10:00 a.m./~~p.m.~~ on March 21, 1983 in room 514-S of the Capitol.

All members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Gaines, Hein, Hess, Mulich, Steineger and Werts.

Committee staff present: Mary Torrence, Revisor of Statutes
Mike Heim, Legislative Research Department

Conferees appearing before the committee:

Dr. William Albott, Kansas Psychological Association
Dr. Martin Leichtman, Children's Division, Menninger Foundation
John Peterson, Kansas Association of Professional Psychologists
Judge Herbert Walton, Family Law Advisory Committee, Kansas Judicial Council
Dr. Walter Menninger, Menninger Foundation

Sub. for House Bill 2131 - Divorce, annulment, separate maintenance.

The chairman pointed out the persons who support the substitute bill were opponents to the original bill; proponents of original bill are opponents.

Dr. Bill Albott spoke in support of the bill in its present form. A copy of his remarks is attached (See Attachment #1). He stated the court can order an evaluation, and that is more relevant to the issue that is coming up in the divorce. A committee member inquired if joint custody is working. Dr. Albott answered, he didn't know. The committee member inquired of the impact in regard to the child. Dr. Albott replied, his personal belief is that it is the preferred way to be going as it has fewer adverse consequences for the child. Sometimes when people are apart, it relieves some of the tension in the family.

Dr. Martin Leichtman testified in support of the substitute bill. He stated he is speaking as an individual. A copy of his remarks is attached (See Attachment #2).

John Peterson appeared in support of the substitute bill as introduced by the House Judiciary Committee. He stated the way the law currently reads, when people come to him in regard to divorce, he has to explain he can't represent both of them. If they are considering counseling, the current law would have you advise them if child custody would become an issue, and if they go to a counselor, all privileges would be waived. He stated he thinks there are several reasons for needing the bill in its present form.

Judge Herbert Walton appeared before the committee, and a copy of his remarks is attached (See Attachment #3). Also attached is a balloon copy of House Bill 2131, before the House added the amendments (See Attachment #4). Committee discussion with him followed. In reply to a statement by John Peterson that the social worker does not have a complete privilege, Judge Walton explained the court can order the privilege be waived when they appear in court. The chairman pointed out that SRS has requested to be deleted from making investigation in child custody matters. Judge Walton replied, it would put judges in a very difficult situation if they can't have investigations done. Discussion was had with Judge Walton concerning the meetings of the advisory committee, who served on it, etc.

Dr. Walter Menninger testified in support of the substitute bill as passed by the House, and he urged its adoption by the Senate. A copy of his remarks is attached (See Attachment #5). During discussion, the chairman inquired if he had objection to the cleanup portions of the original bill. Dr. Menninger replied, he is focusing on the confidentiality portion of the bill. He stated the key criteria is not

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./p.m. on March 21, 1983.

Sub. House Bill 2131 continued

negative, it is positive. A committee member inquired of the long term effect of joint custody? Dr. Menninger answered, it can't be determined by joint custody or not, it is the function of the individual parents. You can have joint custody, and it is not working out. The committee member inquired if joint custody works more often? Dr. Menninger replied, the bottom line is how well the parents can agree on the differences they have, rather than using the child. Another committee member said he is concerned about the same topic, that many times parents will work it out for themselves. He is concerned when that situation doesn't exist at the time of the divorce, and they are still fighting over that child; are we helping the child when that judge says you will have joint custody? Dr. Menninger answered, in rare instances it may help some resolution; it is hard to give a flat answer at this time. Surveys on stress of the judiciary, revealed they feel the weight in custody cases. Another committee member inquired, shouldn't the judge see the records? Dr. Menninger replied, the key word is what is relevant. He stated he would like to protect the rights of the individual seeking treatment. The chairman inquired, how are they going to know about things in the past. Judge Walton stated a study is needed of the entire spectrum of this whole matter.

Time for adjournment had arrived, and the chairman asked Dr. Richard Maxfield if he could return a week from tomorrow, March 28, to present his testimony.

A copy of Dr. Maxfield's testimony that was presented in the House Judiciary Committee on House Bill 2131 is attached (See Attachment #6).

The meeting adjourned.

3-21-83

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
R. Hannell	Topeka	Kansas Judicial Council
M. Lysaught	Topeka	"
Herbert W. Walton	Olathe	Family Law Committee "
Nancy L. Maxwell	Topeka	" " " "
Richard Mayfield	Topeka	None
Martha Fechtner	Topeka	The Menninger Foundation
Pat McKinley	Topeka	Mental Health Assn in KS
Larry Humes	Lawrence	Steinegger
John Peterson	Topeka	Ks Assn of Prof Psychologists
Barb Reinert	Topeka	Ks. Womens Political Caucus
M. Hawver	"	Capitol-Journal
Lee Hess	Wichita	private attorney

3-21-83

KANSAS PSYCHOLOGICAL ASSOCIATION #1

March 21, 1983

Mr. Chairman, members of the committee, thank you for the opportunity to appear before you today on behalf of the Kansas Psychological Association in the matter of the Substitute for H.B. 2131. My name is Dr. William L. Albott.

Several weeks ago the Kansas Psychological Association began to call attention to two sections in the current statutes regarding Divorce and Maintenance which we saw as abridging the rights of patients to have a voluntary confidential, priviledged relationship with physicians and psychologists. The House Committee on Judiciary after hearing testimony from us and other professional and layman groups, agreed that the sections in question were best handled by striking them, as is done in the Substitute for H.B. 2131 before you.

You might wonder why associations such as ours are active in this matter and why not patients'. It is our belief that patients (current and past) are not comfortably able to advocate for their rights in such situations, given the realities of stereotypes and prejudices and inherent risks such advocacy would obviously play on their private lives. It is our belief that such individuals rely implicitly upon Professionals and groups such as the Mental Health Associations, to carry out this advocacy on their behalf. Thus, to a large extent, when we ask you to act favorably on this bill, we are asking on behalf of our patients - past, present, and future. It is afterall, their privilege which is being addressed, not the privilege of the physician or the psychologist.

It is then in this spirit of advocating for patients rights that we ask that you pass favorably the Substitute for H.B. 2131 as it was passed by the House of Representatives.

Thank you. If I may answer any questions I will be happy to do so at this time.

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Mr. Chairman, Members of the Committee, thank you for the opportunity to give testimony in support of those sections of the Substitute for House Bill 2131 that pertain to the "Waiver of Privileges" /the deletion of Sections 1610 (C) and 1615 (B)/. My name is Dr. Martin Leichtman. I am the Director of Psychology in the Children's Division of The Menninger Foundation and a member of the faculty of the Menninger School of Psychiatry. The views I will express are based on 15 years experience in the assessment and treatment of emotionally troubled children and their families as well as supervision of the work of psychologists, psychiatrists and social workers working with children and their families. Although the views I will express are almost universally shared by my colleagues in the Children's Division of The Menninger Foundation, they are my own and should not be taken as necessarily representative of those of The Menninger Foundation.

The Substitute for House Bill 2131 corrects major problems posed by those sections of the earlier bill that stripped any shred of confidentiality or privacy from mental health records in any court cases in which child custody is an issue. One can readily appreciate the motives that led to the enactment of the original law--it was clearly an effort to protect the rights of children in custody cases in which parents may be suffering from emotional problems or in which the child's own mental health was an issue. However, in practice, 1) the law was unlikely to accomplish those ends in the long run; 2) insofar as its provisions became known, it was likely to do serious harm to the very parents and children it was intended to protect; and 3) far better means of accomplishing the goals underlying the law are available, ones that do not have such harmful consequences. Hence, in deleting Sections 1610 (C) and 1615 (B) the current substitute represents an important improvement in that bill. In support of this point, I would like to note 1) the problems inherent in the earlier "waiver of confidentiality" and 2) the procedures currently available to courts that allow for the protection of children's rights without the waiver of confidentiality.

Detrimental Consequences of the Waiver of Confidentiality

In order to understand the detrimental consequences of the waiver of confidentiality for children and their families, it is necessary to briefly consider the reasons people may seek treatment and the nature of the treatment process. Let me focus chiefly on problems between parents and children, since this is the material in which the law may be most interested. Few human experiences are more intense, more demanding, and at times more draining than raising children and all parents have mixed feelings toward their children. No human relationships call forth more love and sacrifice, but few relationships also call forth as much exhaustion, frustration, and anger as trying to deal with one's children. Even the most normal parents will hence have a mixture of attractive and unattractive, positive and negative feelings toward their children and themselves as parents. In cases where parents have emotional problems this mixture of feelings will be more extreme, though by no means necessarily abnormal. In cases where there is marital strife, particularly the kind that precedes a divorce, and especially the kind that precedes a divorce in which there will be a bitter custody dispute, it is likely that all problems parents experience within themselves and with their children will be exacerbated. To take myself as an example, the times I am in the midst of an argument with my wife are the very times I am most likely to experience conflicts with my children and the times at which they are most likely to act up. When

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family strife is protracted and intense, as in the case of a divorce with a custody dispute, such problems are likely to be multiplied many times over. The process of psychotherapy with children and with parents requires openly acknowledging the problems being experienced; it involves recognizing and seeking to come to terms with ambivalent attitudes and negative and hostile feelings. Indeed, it is only as individuals recognize such conflicts and deal with them openly and honestly that they are likely to come to terms with them. If such problems are hidden or ignored, treatment is likely to accomplish little with regard to them.

If one puts these facts together, one can readily appreciate how detrimental a law waiving confidentiality can be for any kind of psychotherapy process insofar as parents are aware of that law. Ask yourself, what action you would take as an individual if you were a parent in the midst of a marital conflict that could lead to a divorce who felt that you or your child was troubled and could benefit from treatment and knew that anything you said in that process could be used as part of a court hearing that might determine whether you keep your child. Among the likely, and perfectly reasonable consequences of such a situation are:

1) If you truly loved your child, you might decide not to seek treatment out of fear that it would jeopardize keeping your child.

2) If you did seek treatment, you would have good reason to be very careful about what you said, to be neither candid nor honest about any problems with the child or anything else that might be interpreted to reflect mixed feelings, negative attitudes, or any other problem of which you were ashamed or which you wished to change. Rather, you would have a strong incentive to disguise, to hide, and even to lie about any feelings or actions that might be recorded and used against you in a court hearing.

3) If you wished your child to get treatment, there would be a strong incentive for giving direct or indirect messages to the child to say only good things about you, to not reveal problems, conflicts, bad feelings, or other difficulties that might reflect negatively on you as a parent. Moreover, instead of taking actions as a parent that, however necessary, might temporarily upset a child (e.g., providing discipline for an unruly or unmanageable youngster), you would have an incentive to take actions that might keep the child happy and saying good things about you rather than risk the youngster's temporary anger or dissatisfaction.

In short, insofar as parents are aware of sections of the law relating to confidentiality, the law will interfere with their seeking help for necessary problems and may well distort the treatment process if they or their children seek help. That is to say, it is a law that may well result in children living in troubled family situations for which parents fear to seek help and undertake change.

There are two additional negative consequences of this law. The first is the effect it will have on psychiatrists, psychologists, and other mental health professionals providing treatment. Insofar as no records are confidential, treaters will have to bear in mind that their records can easily be turned over to adversaries of their patients who wish to deprive them of custody of their children. Under such circumstances, treaters will often feel a responsibility to include nothing in treatment records of a sensitive nature, to write treatment records in which the most significant treatment issues are disguised or omitted. In effect, by removing the privacy and confidentiality that is essential to treatment, this law strongly encourages responsible professionals to produce treatment records that are a travesty.

The last negative consequence of the current sections of the law regarding confidentiality relates to the opportunities it opens for serious abuse of privacy and to harm to the individuals involved. Thus far, we have proceeded on the assumption that the law will be applied in the most sensitive and intelligent manner possible. At the same time, we must recognize that this is not always the case. I know of few legal issues likely to generate as much bitterness, hostility, and distress to the parties involved as disputes over one's adequacy as a parent or the custody of one's child. For sensitive, personal material--indeed, one's most private thoughts and feelings--to be introduced not merely into a public arena, but into an adversarial battle in which one's most valued relationship is at stake, is to expose parents to a potentially destructive human experience.

Better Procedures for Protecting Children's Rights

Even given these drawbacks, there would be reason to support the present law if in fact it was the best way of accomplishing the ends it is intended to serve or even a good way; that is to say, that it would help protect the rights of children in custody disputes. However, this is not the case for a number of reasons.

First, for reasons noted above, as it becomes more widely known, the law will undermine the treatment of children and parents who most need help and distort the treatment records it is intended to garner. Moreover, even if it succeeds temporarily in obtaining reasonably good records, these records are likely to be introduced into an adversarial situation in which their meaning will be misunderstood and the information potentially misused. This misuse is likely to arise as much because of the failings of mental health professionals as the actions of lawyers, although this need not change the consequences. Let me give you an example. For better or for worse, mental health professionals often talk in a language and use terms in a way that may be understood by other mental health professionals, but can be easily misinterpreted by others. In our own setting, for example, to indicate that an individual is "neurotic," far from suggesting that they are seriously disturbed, is meant to connote many strengths. As it is used, the term implies that, while the individual exhibits anxiety in particular symptoms, they have good reality testing, a well developed conscience, and an ability to adapt to the world around

them despite costs to themselves. Indeed, it is meant to indicate that the individual is able to live their life in a way that the emotional costs and suffering they have experienced in growing up is contained within him or her rather than chiefly inflicted on others. For reasons that probably do them more credit than psychologists or psychiatrists, lawyers are unlikely to interpret the word "neurotic" in these ways.

Second, and far more important, if there is a serious question about the fitness or competency of a parent to have custody of a child or if there are concerns that the parent's actions are detrimental to the child, there are far better means of addressing these questions than obtaining records of past treatment. In particular, one can require psychiatric and psychological evaluations of the parent, the parents, the child, and/or their interaction. Such evaluations are likely to be far superior to the use of past records for a number of reasons:

1) They involve no betrayal of confidence nor will they interfere with the treatment of parents and children who need help.

2) Such evaluations will be current. They will take place at precisely the time the court is concerned with making decisions rather than at some point in the past when the problems and life circumstances facing parents and children may have been quite different.

3) These evaluations can be focused. They can address directly the specific concerns of the court. Information can be obtained that bears directly on the issues of parental competence and child welfare rather than trying to glean such information from past records that have been written for other purposes and may omit relevant information.

4) Such evaluations will be more accurate. By knowing exactly what the current issues are and what questions they are being asked to answer, professionals can gather information bearing on the court's questions better, they can examine and organize data so that its bearing on those questions is clear, and, knowing their audience, they can write and speak simply and directly thereby minimizing any possibilities of misinterpretations.

Finally, and this is speaking simply as a clinician, the kind of evaluations that I have suggested is most useful in helping the court deal with issues that really trouble it in custody disputes. In my experience, custody issues are rarely a black and white ones in which the question is simply "Is the parent fit?" or "What is good for the child?" Usually, the court and all others involved with the family are in a gray area. One parent may have many problems yet still love their child; the other parent who may have as many problems; and the alternative of placing the child in

foster homes or some other setting poses yet another set of problems. Typically, what the court most needs help with is how to make practical decisions that are in the best interests of the child at a given time, and typically these decisions do not involve simply the question of is the parent fit, but rather how both parents can be more fit, how they can get help with the problems they experience with their children and how the bitter battles between the parents and the current custody dispute can be kept from being traumatic experiences for the child at that very time. In short, such evaluations can make a host of practical recommendations to the court, often opening a middle ground for resolving conflicts or addressing anxieties judges are likely to feel as they make decisions. For example, where there are doubts about the fitness of a parent yet the best decision is still for the child to remain with them, on the basis of these evaluations the court can also recommend that custody be granted on condition that treatment is sought and parent-child problems monitored in the course of the coming months.

To be sure, this approach is not without problems and uncertainties. Yet if we are truly concerned about protecting the rights of children in custody disputes, such an approach offers the hope of addressing these concerns effectively in contrast to the current provision for the waiver of confidentiality in treatment which will be ineffective and detrimental to the interests of parents and children.

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STATEMENT OF DISTRICT COURT
JUDGE HERBERT W. WALTON
TENTH JUDICIAL DISTRICT
BEFORE THE SENATE JUDICIARY COMMITTEE
March 21, 1983

Mr. Chairman and members of the Committee. My name is Herbert W. Walton. I am a District Judge from the Tenth Judicial District and Chairman of the Family Law Advisory Committee of the Kansas Judicial Council. Prior to being appointed as district judge, I served as Probate Judge and Juvenile Judge of Johnson County for approximately five years and was an Assistant County Attorney of Johnson County for more than three years.

I sincerely appreciate the opportunity to testify before this august body concerning Substitute for House Bill No. 2131. Original House Bill No. 2131 contained clean-up amendments to the new divorce code as proposed by the Family Law Advisory Committee and as approved by the Judicial Council. The original bill was not favorably reported by the House Judiciary Committee for the reason that the new law had not been in effect long enough. Instead, the House passed Substitute for House Bill No. 2131 that deleted the waiver of the physician-patient and psychologist-client privilege as contained in K. S. A. 1982 Supp. 60-1610 (a)(2)(C). I have since talked with several members of the House and House Judiciary Committee concerning the urgency of attention to the clean-up provisions and I believe it is a fair statement that they do not object to the Senate re-consideration of the original clean-up provisions.

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Appearing with me today are Professor Nancy Maxwell from the School of Law, Washburn University and Mr. Matthew B. Lynch, Research Associate with the Judicial Council. I would like to state that Professor Maxwell has recently written an exhaustive law review article on the new divorce code that will be published later this month. I have secured an advance copy of the article for the use of this committee for the reason it contains an in-depth basis and need for the clean-up provisions.

As you know several committees made contributions to the final provisions of the new divorce code. As could be anticipated from a work of this magnitude, clean-up for technical matters was necessary. The FLAC made a study and recommended certain amendments to the Judicial Council. The recommendations were approved and were later put in bill form in House Bill No. 2131. I have appended to this statement a copy of the FLAC recommendations as approved and have secured copies of House Bill No. 2131 for your use.

With your permission I will briefly highlight the clean-up provisions. To start with, FLAC recommends that 60-1610 (a)(3) concerning child custody criteria be enlarged. We believe that both parents are in a better position than the district court to consider the best interests of the child when determining custodial arrangements. Therefore, if the parents have agreed to a custody arrangement, the agreement should be presumed to be in the best interests of the child. This should encourage parents to come to agreement. However, the presumption can be rebutted if the court states reasons

why the agreement is not in the child's best interests. Furthermore, we have enlarged the child custody criteria to be considered. The additional criteria was obtained from the codes of Iowa, Alaska, and a recent appellate decision. By weighing these additional factors, the court, the parties, and expert witnesses should be better prepared to investigate and determine the feasibility of joint custody.

The second amendment concerns nonparental custody. The amendment removes any question over conflicting orders of the divorce court and the juvenile court concerning severance of parental rights and other custodial orders. Times does not permit a detailed statement but the recommendations of FLAC are contained on pages 2,3, and 4 of the FLAC recommendations to the Judicial Council.

The section on maintenance or K. S. A. 1982 Supp. 60-1610 (b)(2) has been amended to clean up the problems of (1) when a recipient can request reinstatement of maintenance and (2) the inconsistency of the reinstatement of maintenance beyond the original decree. The amendment provides in essence that if maintenance is to be continued beyond the time period of the original award, the decree must reserve the power of the court to hear motions for reinstatement. The recipient must file the motion for reinstatement prior to the expiration of the time period of the previous award of maintenance.

There are several other amendments. The effective date of remarriage has been corrected to more accurately reflect the

limited nature of prohibited marriages after a decree of divorce has been granted. The provisions on assignment of wages has been amended to provide that "Costs" should be "expenses" to avoid any confusion with costs in domestic actions. The section on definition of maintenance to include alimony in prior orders has been amended to clarify the present provision that supports a technical argument that old cases can be re-opened to further consider the award of maintenance (alimony). Finally, the provisions of K. S. A. 1982 Supp. 60-1619 should be deleted from the law. The purpose or meaning of the statute is unclear. It more or less provides an additional grounds for an action of separate maintenance with different provisions that the main code. It only confuses and should be deleted.

Members of FLAC requested that I state that they are realistic. If the Senate Judiciary Committee believes that certain areas should not be disturbed - particularly the provisions on joint custody criteria - the FLAC can understand. However, please do not reject the remainder of the needed amendments simply because of this provision.

I have one last statement to make with your permission and this concerns the deletion of the physician-patient and psychologist-client privilege. As you know we have an interface membership in the FLAC. We have as a member Paul C. Laybourne, Jr., M. D., professor of psychiatry and family practice, associate professor of pediatrics, and director of child psychiatry at the University of Kansas Medical

Center. Dr. Laybourne participated in our comprehensive study and recommendations on the divorce code. However, he was not in attendance at the recent meeting of FLAC. Furthermore, the committee had no forewarning of the concern of the psychiatrists or psychologists over the waiver of the privilege. The committee simply placed the welfare of the child in a higher plane that the treatment need of the parents in child custody. Yet, the committee has great respect for the position of the behavioral scientist. Many of our study recommendations followed closely their position and concerns as found in the literature. We would, however, like the opportunity to study this request. If the privilege, at first blush, is deleted as recommended by the behavioral scientists before the House Judiciary there is an obvious problem. While the physician-patient privilege can be of no effect under K. S. A. 60-235 and 60-427, the psychologist-client privilege would be effective. Should there be a distinction between the two professionals? As as lay person in this area I can think of none but maybe there is. It simply points out the need of proper study and consideration. The consequences are very significant.

Session of 1983

HOUSE BILL No. 2131

By Representative R. Frey

(By request)

1-27

AN ACT concerning domestic relations; relating to actions for divorce, annulment and separate maintenance; amending K.S.A. 1982 Supp. 60-1610, 60-1613 and 60-1618 and repealing the existing sections; also repealing K.S.A. 1982 Supp. 60-1619.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1982 Supp. 60-1610 is hereby amended to read as follows: 60-1610. A decree in an action under this article may include orders on the following matters:

(a) *Minor children.* (1) *Child support and education.* The court shall make provisions for the support and education of the minor children. The court may modify or change any prior order when a material change in circumstances is shown, irrespective of the present domicile of the child or the parents. The court may order the child support and education expenses to be paid by either or both parents for any child less than 18 years of age, at which age the support shall terminate unless the parent or parents agree, by written agreement approved by the court, to pay support beyond the time the child reaches 18 years of age. In determining the amount to be paid for child support, the court shall consider all relevant factors, without regard to marital misconduct, including the financial resources and needs of both parents, the financial resources and needs of the child and the physical and emotional condition of the child. Until a child reaches 18 years of age, the court may set apart any portion of property of either the husband or wife, or both, that seems necessary and proper for the support of the child.

(2) *Child custody.* (A) *Changes.* Subject to the provisions of

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the uniform child custody jurisdiction act (K.S.A. 38-1301 *et seq.* and amendments thereto), the court may change or modify any prior order of custody when a material change of circumstances is shown.

(B) *Examination of parties.* The court may order physical or mental examinations of the parties if requested pursuant to K.S.A. ~~1982 Supp.~~ 60-235 *and amendments thereto.*

(C) *Waiver of privileges.* All physician-patient and psychologist-client privileges, except with respect to communications arising in counseling pursuant to K.S.A. ~~1982 Supp.~~ 60-1608 and amendments thereto, shall be waived when the custody of a child is in dispute.

(3) *Child custody criteria.* The court shall determine custody in accordance with the best interests of the child.

(A) If the parties have a written agreement concerning the custody of their minor child, it is presumed that the agreement is in the best interests of the child. This presumption may be overcome and the court may make a different order if the court makes specific findings of fact stating why the agreement is not in the best interest of the child.

(B) In determining the issue of custody, the court shall consider all relevant factors, including but not limited to:

~~(A)~~ *(i)* The length of time that the child has been under the actual care and control of *either parent or* any person other than a parent, and the circumstances relating thereto;

(ii) the active involvement of each parent in the care of the child before and since the parties' separation;

~~(B)~~ *(iii)* the desires of the child's parents as to custody;

~~(C)~~ *(iv)* the desires of the child as to the child's custodian;

~~(D)~~ *(v)* the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests; ~~and~~

~~(E)~~ *(vi)* the child's adjustment to the child's home, school and community;

(vii) the proximity of each parent to the other and to the child's school;

(viii) the feasibility of travel between the parents;

FAMILY LAW ADVISORY COMMITTEE COMMENT

The Committee amended the child custody criteria because the committee members believed that, generally, parents are in a better position than the district court to consider the best interests of the child when determining custodial arrangements. Therefore, if the parents have agreed to a custody arrangement for their children, the agreement should be presumed to be in the best interests of the child. However, this presumption can be rebutted if the court states reasons why the agreement is not in the child's best interest.

The child custody criteria also were amended by enlarging the specific criteria the court must consider in awarding child custody. Criteria were added because of two legislative changes in the custody statute. First, the legislature created a preference for joint custody. And, second, the legislatue required the court to make a record of "specific findings of fact upon which the order for custody other than joint custody is based." See K.S.A. 1982 Supp. 60-1610(a)(4)(A). Because of these legislative changes, FLAC believed the court should be given more guidance in determining when joint custody is appropriate. By weighing these additional factors, the court, the parties and expert witnesses will be better prepared to investigate and determine the feasibility of joint custody.

(ix) the mental and physical health of all individuals involved;

(x) the parents' ability to communicate with each other regarding the child's needs;

(xi) each parent's ability to be supportive of the child's relationship with the other parent; and

(xii) whether the child's emotional and psychological needs and development will be enhanced because of active contact with both parents.

Neither parent shall be considered to have a vested interest in the custody of any child as against the other parent, regardless of the age of the child, and there shall be no presumption that it is in the best interests of any infant or young child to give custody to the mother.

(4) *Types of custodial arrangements.* Subject to the provisions of this article, the court may make any order relating to custodial arrangements which is in the best interests of the child. The order shall include, but not be limited to, one of the following, in the order of preference:

(A) *Joint custody.* The court may place the custody of a child with both parties on a shared or joint-custody basis. In that event, the parties shall have equal rights to make decisions in the best interests of the child under their custody. When a child is placed in the joint custody of the child's parents, the court may further determine that the residency of the child shall be divided either in an equal manner with regard to time of residency or on the basis of a primary residency arrangement for the child. The court, in its discretion, may require the parents to submit a plan for implementation of a joint custody order upon finding that both parents are suitable parents or the parents, acting individually or in concert, may submit a custody implementation plan to the court prior to issuance of a custody decree. If the court does not order joint custody, it shall include in the record the specific findings of fact upon which the order for custody other than joint custody is based.

(B) *Sole custody.* The court may place the custody of a child with one parent, and the other parent shall be the noncustodial

parent. The custodial parent shall have the right to make decisions in the best interests of the child, subject to the visitation rights of the noncustodial parent.

(C) *Divided custody.* In an exceptional case, the court may divide the custody of two or more children between the parties.

(D) *Nonparental custody.* If *during the proceedings* the court ~~finds~~ *determines that there is probable cause to believe that the child is a child in need of care as defined by subsections (a)(1), (2) or (3) of K.S.A. 1982 Supp. 38-1502 and amendments thereto or* that neither parent is fit to have custody, the court may award *temporary* custody of the child to another person or agency if the court finds the award of custody to the other person or agency is in the best interests of the child. The court may make ~~any~~ *temporary* orders for care, support, education and visitation that it considers appropriate. *Temporary custody orders are to be entered in lieu of temporary orders provided for in K.S.A. 1982 Supp. 38-1542 and 38-1543, and amendments thereto, and shall remain in effect until there is a final determination under the Kansas code for care of children.* An award of *temporary* custody under this paragraph shall not be a severance of parental rights nor give the court the authority to consent to the adoption of the child. ~~A nonparent or agency custodian shall be deemed to have the same powers concerning the child as a parent. The court may refer a transcript of the proceedings to the county or district attorney for consideration with regard to the best interests of the child, with the costs to be paid from the county general fund. Any finding of unfitness under this paragraph shall not be binding with regard to any proceedings under article 8 of chapter 38 of the Kansas Statutes Annotated, and any order under that article shall supersede any order under this paragraph.~~ *When the court enters orders awarding temporary custody of the child to an agency or a person other than the parent, the court shall refer a transcript of the proceedings to the county or district attorney. The county or district attorney shall file a petition as provided in K.S.A. 1982 Supp. 38-1531 and amendments thereto and may request termination of parental rights pursuant to K.S.A. 1982 Supp. 38-1581 and amendments thereto. The costs of the proceedings shall be*

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Subsection (D) now provides for nonparental custody where the court finds that neither parent is fit to have custody, but such custody placement does not permanently deprive the parents of their parental rights nor give the court authority to consent to the adoption of the child. The present provision makes it permissive as to whether the court refers a transcript of the proceedings to the county or district attorney for further consideration and likewise makes it permissive as to whether or not the county or district attorney will file proceedings to determine whether the child is in need of care or to file proceedings to determine parental fitness. The present provision gives the court power to place children with a person other than the parent for an indefinite period of time, possibly years, without follow-up evaluation or effort to reintegrate the child into the parental home. This situation could leave children in an untenable position where they are placed outside the custody of their parents without being adoptable and with no required plan for reintegration back into the home. The Committee has concluded that the present provision allows a finding of unfitness by the court hearing the divorce case without appropriate and fundamental due process.

The Kansas Code for Care of Children provides the necessary and appropriate due process safeguards to determine the question of parental fitness. Some general provisions in the Kansas Code for Care of Children which insure fundamental fairness and due process of law are: (1) Provision for the county or district attorney to proceed under the parens patriae interests of the State. (2) Provision for the appointment of an attorney and guardian ad litem for the child and the appointment of an attorney for the parent or guardian if indigent. (3) Provision for appropriate notice to the parties, confidentiality of proceedings, rules of evidence for the adjudicatory hearing and provision for investigation and preparation of evaluations and social reports. (4) Provision setting forth specific factors for

the court to consider in determining whether the child is in need of care and factors for the court to consider in determining the question of parental fitness. (5) Provision for "clear and convincing" burden of proof on the part of the State.

When a child is found to be in "need of care" under the Kansas Code for Care of Children, appropriate protections for the child and the parents are provided such as: (1) Provision for evaluation and development of the needs of the child and an evaluation of parenting skills. (2) Provision for placing the child with the parent subject to terms and conditions, including supervision of the child and parent by the court services officer. (3) Provision where the court may require the child and parent to participate in appropriate programs and the court may require treatment and care necessary for the child's physical and emotional health.

When the child is placed with an agency or persons other than a parent, the Kansas Code for Care of Children provides: (1) A plan must be presented to the court for reintegration into the parental home within 60 days after the placement order. (2) Written reports of progress of the child and parents are required at least every six months. (3) Specific criteria are set out for consideration of permanent parental severance if parents fail to carry out a reasonable plan or otherwise fail to assume the reasonable duties and responsibilities of a parent.

The proposed revision makes mandatory the referral of the divorce transcript by the court to the county or district attorney and the institution of proceedings by the county or district attorney to appropriately ascertain whether the "child is in need of care". The decision of the county or district attorney to request parental severance is discretionary. The proposed revision empowers the court hearing the divorce matter to place the children in the temporary custody of an agency or person other than the parent if the court finds probable cause to believe that the child is a child in need of care or that the parents are unfit. This temporary order is in lieu of the provisions of the Kansas Code for Care of Children which requires a probable cause temporary custody hearing and the temporary placement order is in effect only until the final determination. The proposed revision provides for further orders of the district court hearing the divorce matter if the child is found "not to be in need of care" and the parents are "found not to be unfit".

paid from the general fund of the county. When a final determination is made that the child is not a child in need of care, the county or district attorney shall notify the court in writing and the court, after a hearing, shall enter appropriate custody orders pursuant to this section. If the same judge presides over both proceedings, the notice is not required. Any disposition pursuant to the Kansas code for care of children shall be binding and shall supersede any order under this section.

(b) *Financial matters.* (1) *Division of property.* The decree shall divide the real and personal property of the parties, whether owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts, by:

(A) A division of the property in kind;

(B) awarding the property or part of the property to one of the spouses and requiring the other to pay a just and proper sum; or

(C) ordering a sale of the property, under conditions prescribed by the court, and dividing the proceeds of the sale.

In making the division of property the court shall consider the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; and such other factors as the court considers necessary to make a just and reasonable division of property.

(2) *Maintenance.* The decree may award to either party an allowance for future support denominated as maintenance, in an amount the court finds to be fair, just and equitable under all of the circumstances. The decree may make the future payments modifiable or terminable under circumstances prescribed in the decree. In any event, the court may not award maintenance for a period of time in excess of 121 months. *If the original court decree reserves the power of the court to hear subsequent motions for reinstatement of maintenance and such a motion is filed prior to the expiration of the stated period of time for maintenance payments,* the court~~, upon the expiration of the stated period of~~

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Under the proposed amendments, if maintenance is to be continued beyond the time period of the original award, the decree must reserve the power of the court to hear motions for reinstatement. The recipient must file the motion for reinstatement prior to the expiration of the time period of the previous award of maintenance.

~~time for maintenance payments to be made,~~ shall have jurisdiction to hear a motion by the recipient of the maintenance to reinstate the maintenance payments. Upon motion and hearing, the court may reinstate the payments in whole or in part for a period of time, conditioned upon any modifying or terminating circumstances prescribed by the court, but the reinstatement shall be limited to a period of time not exceeding 121 months. The recipient may file subsequent motions for reinstatement of maintenance ~~at~~ *prior to* the expiration of subsequent periods of time for maintenance payments to be made, but no single period of reinstatement ordered by the court may exceed 121 months. Maintenance may be in a lump sum, in periodic payments, on a percentage of earnings or on any other basis. At any time, on a hearing with reasonable notice to the party affected, the court may modify the amounts or other conditions for the payment of any portion of the maintenance originally awarded that has not already become due, but no modification shall be made without the consent of the party liable for the maintenance, if it has the effect of increasing or accelerating the liability for the unpaid maintenance beyond what was prescribed in the original decree. ~~Nothing in this paragraph shall limit the right of the recipient of the maintenance to request by motion that the court reinstate maintenance payments at the expiration of the duration of time set for the maintenance payments by the court.~~

(3) *Separation agreement.* If the parties have entered into a separation agreement which the court finds to be valid, just and equitable, the agreement shall be incorporated in the decree. The provisions of the agreement on all matters settled by it shall be confirmed in the decree except that any provisions for the custody, support or education of the minor children shall be subject to the control of the court in accordance with all other provisions of this article. Matters settled by an agreement incorporated in the decree, other than matters pertaining to the custody, support or education of the minor children, shall not be subject to subsequent modification by the court except: (A) As prescribed by the agreement or (B) as subsequently consented to by the parties.

(4) *Costs and fees.* Costs and ~~attorneys'~~ *attorney* fees may be

awarded to either party as justice and equity require. The court may order that the amount be paid directly to the attorney, who may enforce the order in the attorney's name in the same case.

(c) *Miscellaneous matters.* (1) *Restoration of name.* Upon the request of a spouse, the court shall order the restoration of that spouse's maiden or former name.

(2) ~~*Effective date.*~~ *Effective date as to remarriage.* ~~Every decree of divorce shall contain a provision to the effect that the parties are prohibited from contracting marriage with any other persons within or without the state until the expiration of the time for appeal from the judgment of divorce or, if an appeal is taken, until the judgment of divorce becomes final.~~ Any marriage contracted *by a party, within or outside this state, with any other person* before ~~the~~ *a* judgment *of divorce* becomes final shall be ~~null and void, but any~~ *voidable until the decree of divorce becomes final. An* agreement which waives the right of appeal ~~and which is approved in the decree~~ *from the granting of the divorce and which is incorporated into the decree or signed by the parties and filed in the case* shall be effective to shorten ~~that~~ *the* period of time *during which the remarriage is voidable.*

Sec. 2. K.S.A. 1982 Supp. 60-1613 is hereby amended to read as follows: 60-1613. The court may order the person obligated to pay support or maintenance to make an assignment of a part of the person's periodic earnings or trust income to the person entitled to receive the support or maintenance payments. The assignment is binding on the employer, trustee or other payor of the earnings or income two weeks after service upon the payor of notice that the assignment has been made. The payor shall withhold from the earnings or trust income payable to the person obligated to support the amount specified in the assignment and shall transmit the payments to the district court trustee or the person specified in the order. The payor may ~~deduct from each payment a~~ *withhold from the earnings or trust income payable to the person obliged to pay support an additional* sum not exceeding ~~$2.00~~ *$2* as reimbursement for ~~costs~~ *expenses for each payment.* An employer shall not discharge or otherwise discipline an employee as a result of an assignment authorized by this section.

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The amendment to this statute would change, from void to voidable, the status of marriages contracted before a divorce judgment becomes final. The change more accurately reflects the limited nature of this prohibited marriage. Under present law, the prohibited void marriage can be challenged at any time, by any person. Consequently, if one of the parties marries some other person before the time for appeal expires, the marriage can never be recognized as valid, even though no appeal is taken and the judgment becomes final. However, according to the amendment, the prohibited marriage would be voidable only during the time the judgment is not final and once a final judgment is entered, the prohibited marriage would become valid and unchallengeable.

FAMILY LAW ADVISORY COMMITTEE COMMENT

This amendment would specify that the reimbursement for the expenses of the payor is to be paid by the person obligated to pay support and is not to be taken from the support payment. Some court trustees were uncertain about the meaning of the present statute.

"Costs" has been changed to "expenses" to avoid any confusion with costs in the domestic action.

Sec. 3. K.S.A. 1982 Supp. 60-1618 is hereby amended to read as follows: 60-1618. ~~When applicable, statutory references to maintenance shall be construed to include alimony granted prior to the effective date of this act~~ *For purposes of interpretation, the terms "alimony" and "maintenance" are synonymous.*

Sec. 4. K.S.A. 1982 Supp. 60-1610, 60-1613, 60-1618 and 60-1619 are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

FAMILY LAW ADVISORY COMMITTEE COMMENT

The apparent intent of this statute is to clarify statutory language concerning alimony and maintenance. It provides that statutory references to maintenance shall be construed to include alimony granted prior to the effective date of the act. A technical argument could be advanced that the statute permits the re-opening of old cases concerning the award of alimony. While this does not appear to be a valid contention, it might be helpful to have the provisions clarified by clean-up amendments.

60-1619. Separate maintenance. When a person has a cause of action for divorce or has been deserted and the desertion has continued for 90 consecutive days, the person, without petitioning for divorce, may maintain in the district court an action against the person's spouse for separate maintenance. In an action for separate maintenance, the court shall make provisions for the support and education of the minor children and may award maintenance to either party, in the same manner as in an action for divorce.

History: L. 1982, ch. 152, § 18; Jan. 1, 1983.

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The purpose or meaning of this statute is unclear. Other provisions of the code cover an action for separate maintenance and it would appear that this provision is unnecessary. It was reported that this statute was enacted to have a definition of separate maintenance included in the law. Instead, the Legislature has provided an additional grounds for a cause of action for separate maintenance upon desertion for a period of 90 consecutive days. However, the statute provides that the court ". . . shall make provisions for the support and education of the minor children and may award maintenance to either party" without inclusion of the power to divide property in an action for separate maintenance. Therefore, this statute should be the subject of repealer by the Legislature.

3-21-83

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Testimony for Committee on Judiciary - Kansas State Senate

By: W. Walter Menninger, M.D.
On behalf of the Kansas Psychiatric Association

Re: Substitute for House Bill No. 2131 - An act concerning domestic relations and child custody decisions stemming from divorce

May I express my appreciation to present views on behalf of the Kansas Psychiatric Association on this legislation. As noted in testimony before the House Committee on Judiciary when it was considering this bill, we acknowledge that the Legislature worked long and hard last year in preparing the present law. Because of concern about some other provisions of the statute, we somehow failed to appreciate the impact of one section of that law, the so-called waiver of privileges, K.S.A. 1982 Supp. 60-1610, Sect. 2(C). That section, as it presently exists in the law, strips parties who are involved in a child custody determination of confidentiality in any voluntarily sought therapeutic relationship with a physician, psychiatrist or psychologist, except where marriage counseling has been ordered by the court pursuant to K.S.A. 60-1608.

There is continuing concern and some difference of opinion about what is truly in the best interests of the child in divorce. Regrettably, in many instances it is a no-win situation for all concerned. We are particularly troubled that information which arises from the effort of a parent to seek professional help might be used against that parent under the provisions of the present law, even when that treatment might have taken place long before the issue of divorce and custody is raised. As it stands, the law compromises parties who at any time in their life have sought professional counseling or psychotherapy and later become involved in a divorce action and child custody determination. Further, the present law discourages couples who may be considering divorce from seeking professional assistance on a voluntary basis, and from being open and honest about their feelings in any such professional therapeutic relationship because they can have no assurance that their communications will not get into the court.

We are most appreciative that the members of the Committee on Judiciary of the Kansas House of Representatives, in response to our earlier testimony, voted unanimously to strike this section from the law, thus restoring confidentiality in voluntarily sought therapy. We also are appreciative that the full House overwhelmingly endorsed this provision.

We strongly urge that you support the substitute for House Bill No. 2131, as forwarded to you by the House of Representatives, and urge its adoption by the Senate as a whole.

Thank you.

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March 2, 1983

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Mr. Chairman, members of the Committee, thank you for the opportunity to give testimony regarding House Bill 2131. I am Dr. Richard Maxfield. Although I am President-elect of the Kansas Psychological Association and a staff member of the Adult Outpatient Department of The Menninger Foundation, the views I express today are my own and are not necessarily representative of the two previously mentioned organizations, neither of which have taken official positions regarding the proposed amendments to Section 1610(3) of the Divorce and Maintenance Statute. I would like to note that in my official capacity as well as by virtue of being a divorced father, and psychotherapy patient, I most emphatically support the testimony of Drs. William Albott and Walter Menninger regarding the seriousness of the breach of confidentiality of psychiatric and psychological records contained in Sections 1610(C) and 1615(b). In the interest of time, I will not comment further on those sections in my testimony.

My fundamental objection to all of the proposed amendments to 1610(3) is that, though they appear at first blush to be important psychological variables, they are largely irrelevant for consideration by the Court in determining what custody arrangement is in the best interest of the child. For the sake of brevity I will restrict my comments to proposed amendment (B) (xii), similar points can be made regarding each of the proposed amendments, please see the attached for a brief note on each of those amendments. Proposed amendment (xii) reads as follows, "whether the child's emotional and psychological needs and development will be enhanced because of active contact with both parents". The phrasing of that section might well lead one to believe that there are numerous instances wherein not having active contact with both parents would be best for the child. The psychological-psychiatric literature is clear that the "child's emotional and psychological needs" will nearly always "be enhanced because of active contact

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with both parents".

Wallerstein and Kelly in a 1980 book entitled "Surviving the Breakup: How Children and Parents Cope with Divorce," which was based on a landmark study of 60 divorcing families over a five year period, make the following statement in summing up their findings, "Taken as a whole our findings point to the desirability of the child's continuing relationship with both parents during the post-divorce years in an arrangement which enables each parent to be responsible for and genuinely concerned with the well-being of the children." Further on the authors note, "Put simply, the central hazard which divorce poses to the psychological health and development of children and adolescents is in the diminished or disrupted parenting which so often follows...(the divorce)." Elsewhere the authors note that the only exception to the above is if a parent is severely psychologically disturbed and physically, sexually or emotionally abusive toward the child.

The Group for the Advancement of Psychiatry in a 1981 monograph entitled "Divorce, Child Custody, and the Family" make the following statement "Even where 'objective' evidence of one parent's inappropriate behavior toward the child can be presented, it may be better for the child's development to allow an ongoing relationship in order to work through the ambivalence toward such a parent, unless there is a risk to the child's safety". Further on they state, "The child's need for 'having' parents is absolute; it does not depend on the parents' psychological or socio-economic circumstances. Even 'bad' relationships are often preferable to the prospect of unrelatedness".

In my reading of the literature on the effects of divorce on children there is clear and convincing evidence that the best interests of the child are served when the child continues to have a relationship with both parents. Hopefully, that relationship will be active and ongoing, with each parent being responsible for as much of the day to day care and responsibility for

the child as is possible. Such a relationship with both parents is likely to mitigate against some of the negative effects that divorce has on children. The only exceptions to the above are for parents who are physically, sexually or emotionally abusive toward their children or who are severely psychiatrically disturbed and allow their disturbance directly to come into play in their relationship with their children.

I have chosen only one of the many proposed amendments for brief discussion. Similar points of view could be expressed about the other proposed amendments. I would also like to respectfully remind the Committee that the Statute as now written [1610(3)] states, "Child custody criteria. The Court shall determine the custody in accordance with the best interests of the child. The Court shall consider all relevant factors, including but not limited to:" There then follows a listing of relevant criteria. Leaving the Statute as it is now written [except for Sections 1610(C) and 1615(b)] will allow flexibility on the part of Judges and will further allow for the expansion of psychological data on the effects of divorce which can enable the Courts to make the wisest possible decision for the child. Further, leaving the Statute as it is now written will not add erroneous information for the Courts to consider, thus decreasing the likelihood that the Court will be misinformed by misleading arguments.

Thank you for your patience in hearing my testimony. I would be happy to attempt to answer any questions the Committee might have.

Comments on Proposed Amendments Contained in 1610(3) of HB 2131

(A.) Often the issue of custody is used as a negotiating point in a divorce settlement; therefore, a parent may submit to a custody agreement as a compromise rather than because they believe it is best for the child--see for instance GAP[1] page 86.

(i) Fathers typically are the breadwinners, sacrificing more contact with their children in favor of family financial security. Following the divorce there is also a significant shift in the amount of time a parent spends with his/her child, typically fathers visit more frequently after the divorce is final. Wallerstein and Kelly state,[2] page 315, "by 18 months after the separation there is no correlation between the regularity or frequency of the visits by the parents and the pre-divorce relationship" (between parent and child).

(ii) Similar objection to (i). In addition, the stress of the period of separation may temporarily significantly affect the parents ability to "care" in an active way. After the initial period he/she may be more capable of devoting additional time. See for instance Wallerstein and Kelly,[2] page 48. From their study the typical amount of time it took a parent to "recover" from the divorce was 18 months.

(vii) This is a matter of convenience for the parents, even when there are substantial distances between the parents' homes these obstacles can be overcome for the benefit of the child with effort on the part of the parents. See for instance Luepnitz,[3] page 53.

(vii) Similar to (vii) above. Even when there is not equal visitation, joint custody fathers are more likely to continue to pay child support (56% of single custody mothers had to return to Court for payment versus 0% for joint custody mothers in the Luepnitz[3] study, page 69).

(xi) The mental health of the parent was addressed in testimony, presumably physical health problems should affect custody only if they are so severe as to eliminate care giving on a physical basis: e.g. paralysis if the child is so young as to need considerable physical handling and the parent is unable to make accommodations, e.g. a babysitter or "parent helper".

(x) This is a critical variable, but one that cannot be accurately assessed until after the divorce, perhaps several years after. See for instance the GAP, page 104 and Wallerstein and Kelly,[2] page 15. Note also that the rate of relitigation over a two year period was no higher for joint custody parents than single custody parents even when the joint custody was opposed by one or both the parents at the time of the divorce, Ilfeld, Ilfeld and Alexander, 1982.[4]

(xi) This is also a critical variable. However, in the heat of a custody battle it may be impossible to assess, similar to (x) above. Further, it is a skill which needs to be developed over time as the parent begins to adjust to the fact of the divorce which typically causes a disruption in all normal life routines and expectations.

(xii) Discussed in testimony.

1. Group for the Advancement of Psychiatry; Divorce, Child Custody, and the Family. GAP Report #106, San Francisco:Jossey-Bass, 1981.

2. Wallerstein, J. S. and Kelly, J. B. Surviving the Breakup: How Children and Parents Cope with Divorce. New York:Basic Books, 1980.

3. Luepnitz, D. A. Child Custody: A Study of Families After Divorce. Lexington: D.C. Heath and Co., 1982.

4. Ilfeld, F. W., Ilfeld, H. Z. and Alexander, J. R. Does Joint Custody Work? A First Look at Outcome Data of Relitigation. American Journal of Psychiatry, 1982, 139(1), 62-66.