Approved 4/12/85
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative Joe Knopp at
Chairperson

3:30 xxxx/p.m. on March 25, 1985 in room 526-S of the Capitol.

All members were present except:

Representatives Luzzati and Harper were excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Mike Heim, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes Office
Mary Hack, Revisor of Statutes Office
Becca Conrad, Secretary

Conferees appearing before the committee:

Craig Grant, Kansas National Education Association
Charles Stevenson, Social and Rehabilitation Services
Jim Robertson, Legal Services/Child Support Enforcement of SRS
Judge James Buchele, Governor's Committee on Child Support
Marjorie Van Buren, Office of Judicial Administration
Woody Houseman, Divorced Dads of Topeka
Jim Clark, Kansas County and District Attorneys Association
David Litwin, Kansas Chamber of Commerce and Industry
Bill Abbott, Boeing Military Airplane Company in Wichita
Judy Jolley, Office of Community Corrections
Stephen D. Hill, District Judge
Paul Klotz, Mental Health Centers of Kansas
Ron Smith, Kansas Bar Association
Suzanne Hardin, Johnson County Coalition for Prevention of Child Abuse
Joe Cosgrove, Assistant District Attorney for Johnson County
Jon Willard, Olathe Attorney
Clark Owen, District Attorney in Wichita
Dennis Moore, Johnson County District Attorney
Professor James Concannon, Washburn Law School
Bill Pitsenberger, General Counsel for Blue Cross Blue Shield
Dr. Gary Baker, Economist

SB 51 - Concerning support of certain persons; relating to orders for child support or maintenance; providing for enforcement thereof.

Craig Grant, Kansas National Education Association, spoke in favor of this bill. He said as the teachers observe in their classrooms, they too often see instances where children, who are from homes where there is a single parent, having problems with having enough lunch money, enough money to buy clothes and they see this as a possible help to that solution. The second reason is that some of the teachers are single parents and if their child support payments are not made, it makes it that much more difficult to deal with the problems they have as a single parent.

Charles Stevenson, Social and Rehabilitation Services, spoke in favor of this bill (for Dr. Robert Harder). See Attachment No. 1.

Jim Robertson, Legal Service/Child Support Enforcement of SRS, spoke in favor of this bill. He presented Attachment No. 2 concerning the burden imposed on employers by requiring them to honor income withholding orders issued by the courts.

Judge James Buchele, Governor's Committee on Child Support, spoke in favor of this bill. Attachments No. 3, 4 and 5 were distributed on behalf of this commission.

Marjorie Van Buren, Office of Judicial Administration, appeared neutrally on SB 51 and pointed out the impact of this bill on the court system and the fiscal note. See Attachments No. 6 and 7.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Judiciary,

room 526-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on March 25, 1985

Woody Houseman, Divorced Dads of Topeka, suggested amendments to SB 51 as shown in Attachments No. 8 and 9.

Jim Clark, Kansas County and District Attorneys Association, proposed amendments as follows: 1.) page 26, line 955, after the word "act" strike the balance of that paragraph; and 2.) on page 30, line 1105, after the word "amended", strike all reference to county and district attorneys.

David Litwin, Kansas Chamber of Commerce and Industry, spoke in opposition to this bill. He said the balance has been struck too heavily in favor of the needs of the beneficiary of support and against the legitimate needs of business people. He pointed out the following areas: 1.) Section 4(a), non-exclusive "laundry list" of information which has a potential for being very burdensome; 2.) Section 4(c) concerning arrearages is not fair because it requires business people to do calculations like this at their own risk; 3.) paragraph 4(d) concerning withholding on arrearages is also not fair to require of a business person; 4.) Section 4(a) concerning $2 is a rather small amount of money considering the time and risk taken; 5.) Section 4(g) needs mechanism to make it clear to employer exactly who to send payments to and when; 6.) paragraph 4(1) concerning the $5,000 fine is a very large amount and should be reduced substantially; 7.) paragraph 9(c), page 10, line 377, concerning the beneficiary giving notice seems to require a risk to the employer and should not be required of them; and 8.) Section 3(g), which authorizes an employee to initiate a procedure, should not be the responsibility of the employer.

Bill Abbott, Boeing Military Airplane Company in Wichita, did not speak in opposition to the bill, but proposed amendments as shown in Attachment No. 11.

SB 167 - Concerning evidence; providing for admissibility of certain prerecorded statements and televised or videotaped testimony by certain children in certain actions.

Upon questioning the audience and conferees, no opposition to this bill was found. Written testimony in support of SB 167 was accepted from the following:

Judy Jolley, Office of Community Corrections, Attachment No. 12; Stephen D. Hill, District Judge, Attachment No. 13; Paul Klotz, Mental Health Centers of Kansas, Attachment No. 14; Ron Smith, Kansas Bar Association, Attachment No. 15 (stand is neutral); Suzanne Harden, Johnson County Coalition for Prevention of Child Abuse, Attachments No. 16 and 17; Joe Cosgrove, Assistant District Attorney for Johnson County, Attachment No. 18; Jon Willard Olathe attorney, Attachment No. 19, and Clark Owen, District Attorney in Wichita, Attachment No. 20.

Dennis Moore, Johnson County District Attorney, spoke in favor of this bill. He told of several cases of child abuse he had recently dealt with and how the children were extremely upset about the prospect of appearing before an attorney and a court every day for the trial.

Representative Shriver made a motion to pass SB 167 favorably and it was seconded by Representative Solbach. The motion carried.

SB 110 - Concerning medical malpractice liability actions; relating to procedures for assessment of exemplary or punitive damages and consideration of collateral sources for indemnification in certain actions; limiting recovery of certain damages.

Professor James Concannon, Washburn Law School, explained the Collateral Source Rule as shown in Attachment No. 21.

Bill Pitsenberger, General counsel for Blue Cross Blue Shield, discussed subrogation and the policy ramifications that subrogation might have. See Attachment No. 22.

Dr. Gary Baker, economist at a private institute, spoke about how they arrive at jury verdicts and the size of the jury verdicts. He explained the calculations on Attachment No. 23.

The meeting adjourned at 5:30 p.m.

STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Testimony in Support of S.B. 51

S.B. 51 is a comprehensive child support legislation. As such, it will meet all federal mandates as set forth in the 1984 Child Support Enforcement legislation. It has a number of major features which Mr. Robertson, our Chief CSE Counsel, will explain. However, the major thrust of the services is to make child support enforcement available to everyone who needs it, and, in the long run, reduce the dependency upon assistance programs such as ADC.

During the 1985 fiscal year, Kansas is expected to spend $83.2 million on ADC. It will collect approximately $9.0 million from absent parents as a partial offset to these expenditures. These collections will be made from approximately 5,000 absent parents, or one-fourth of the families who receive assistance.

We do not know exactly how many families in this state, who do not receive public assistance, live at a very low standard because they do not receive child support. However, according to the 1980 census, there were approximately 60,000 single parent family units in the state. Of these, only 20,000 receive public assistance.

We do know that some areas of the state already do a very good job in child support collection. Johnson County, through its court trustee, collected approximately $10,000,000 last year. Shawnee County collected approximately $1,962,566. However, collections in many other counties were far less. We believe the potential for child support collection is in excess of $60,000,000 annually, based on a simple assumption of $100 per month support of 50,000 families. We believe there will always be some families for whom we cannot collect support. In order to realize this potential, a serious combined effort will need to be made by the Judicial Administration, SRS and Court Trustees throughout the state.

Attachment No. 1
House Judiciary
March 25, 1985

Current estimates of the cost of the expansion in the Child Support Enforcement Program are approximately $3.7 million of which $921,000 are state funds. This will include funding for contracts with clerks of the court to provide child support collection data, funds for developing a statewide computer network for tracking child support payments, funds for enforcement contracts with court trustees and funds for SRS to increase enforcement activity where court trustee contracts are not established.

Federal funds are available for 90% of computer development of this program, including both hardware acquisition and developmental programming, and 69% for all personnel and contractual costs. In addition, a federal incentive of at least 6% is available on all collections for both ADC related cases and cases which receive no public assistance, as long as the non-assistance collections do not exceed the ADC collections.

If ADC collections were to be raised to $11,000,000 in the 1986 fiscal year, and non-ADC collections equal or exceed that amount, the incentive income alone to Kansas would be $1,320,000. Some of this incentive collection must be shared with local contract units.

While federal matching and incentives may not cover the full cost of the expanded program in 1986 fiscal year, due to the need for lead time in developing the system, all of these additional state costs should be covered by additional federal funds in the 1987 or 1988 fiscal year.

Robert C. Harder

Office of the Secretary

Social and Rehabilitation Services

296-3271

4783E

March 21, 1985

State Department of Social and Rehabilitation Services
Testimony Regarding S.B. 51

Questions have been raised concerning the burden sections 1-14 of S.B. 51 would impose on employers by requiring them to honor income withholding orders issued by the courts. In response to these inquiries, we provide the following testimony:

The federal Child Suport Enforcement Amendements of 1984, which were unanimously passed by both houses of Congress, require the states to enact a series of laws which are geared towards enhancing the enforcement of support obligations owed to dependent persons. Failure on the part of the state of Kansas to enact these specifically mandately laws could result in the loss of from 1% to 5% of the funds the federal government provides the state for our aid to dependent children program. (1% of $41,643,146 = $416,431; 2% = $832,862; 3% = $1,249,293; 5% = $2,082,155). According to the federal government, the most likely initial penalty for noncompliance would be 2% under a new "get tough" policy. In addition, if the Kansas IV-D plan is repeatedly found out of compliance with federal regulation, the entire federal contribution to the State IV-D Program could be withdrawn (approximately $3.5 million).

The key mandated procedure in the federal law is a requirement that states establish a system in which court ordered support payments must be withheld from the wages or other income of obligors who are delinquent in making payments. In requiring this procedure, which is similar to garnishment, Congress is attempting to establish a speedy and simple method for withholding of wages. The concern Congress had for this provision is demonstrated by the detailed requirements of this new section. When fully implemented, this withholding system could have an enormous positive impact on the collection of support and should substantially change routine child support enforcement practice in intrastate and interstate cases by providing a far more effective remedy than any now available (10 FLR 3052).

The federally mandated income withholding law is <u>totally dependent</u> on employer participation in the withholding system. Consequently, federal law specifically provides that a Kansas law must be enacted which requires Kansas employers to withhold and pay over a portion of wages owed to an obligor who is behind in his or her support payments. Federal law also requires the states to enact legislation which penalizes employers who fail to abide by court orders which require the withholding of income. To partially compensate businesses for the burden such legislation imposes, employers are allowed to deduct a fee from the earnings of an employee <u>each time</u> a withholding occurs. (The fee in S.B. 51 is $2 per withholding; however, the amount could be increased). It is worthy of note that existing garnishment laws do not allow the employer to extract a fee. Also, if the employer withholds amounts for more than one employee which must be paid over to the same court, the total amount withheld may be combined in one check. This provision is an improvement when compared to the existing garnishment law which requires the issuance of one check per garnishment.

In the twenty plus states with withholding legislation already in place and operational (all states are expected to have such laws by October 1, 1985), most employers--who were at first skeptical of the potential withholding burden--agree that a withholding system is much less of an administrative burden and is much less costly than processing garnishments each month for employees who are support judgment debtors.

Attachment No. 2

House Judiciary
March 25, 1985

When a garnishment is filed and served under existing Kansas law, the employer is required to hold all earnings of the employee until further order of the court. The employer must then complete a rather detailed answer form in which several accounting calculations must be made. The answer must then be sent back to the court within 30 days, subject to judgment for the entire debt being taken against the employer if they fail to properly respond. The court must then issue an order to pay money into court to the employer to complete the garnishment process for that month; however, the employer is subject to receiving wage garnishments each month until the judgment is satisfied. With an income withholding system in place, the employer would receive only one order which would required the continuous withholding of earnings each pay period until further order of the court. Therefore, once the withholding is initiated and built into the employer's payment system (in a manner similar to social security or other existing withholdings), the employer is freed from the repetitious, costly, ahd potentially risky task of processing garnishment paperwork each month.

In summary, the legal theory requiring the employer to withhold income is the same as for garnishment, but with far less paperwork, effort and cost for the obligee, the courts and the employer.

Federal citations which require employer participation in wage withholding are as follows:

(1) 45CFR 302.70(a)(1)

(2) Social Security Act ss454(20) and 466

(3) 45CFR 303.100(a) - "The state must ensure that in the case of each absent parent against whom a support order is or has been issued or modified in the state, and is being enforced under the state plan, so much of his or her wages must be withheld, in accordance with this section, as is necessary to comply with the order."

(4) 45 CFR 303.100(d)(1) - "To initiate withholding, the state must send the absent parent's employer a notice which includes the following:....(ii) That the employer must send the amount (withheld) to the state at the same time the absent parent is paid;....(iv) That the withholding is binding on the employer until further notice by the state; (v) That the employer is subject to a fine....for discharging an absent parent from employment, refusing to employ or taking disciplinary action against any absent parent because of the withholding; (vi) that if the employer fails to withhold wages....the employer is liable for any amount up to the accumulated amount the employer should have withheld from the absent parent's wages...." (This section continues with a total of eleven specific mandated directions to the employer).

(5) 45 CFR 303.100(g) Concerning interstate income/wage withholding - "(2) The state law must require employers to comply with a withholding notice issued by the state."

(Emphasis is added to the above referenced sections.)

State Department of Social and Rehabilitation Services

Testimony Regarding S.B. 51

The comprehensive child support bill under consideration is a composite of nearly 20 different support establishment and enforcement issues, most of which must be enacted by Kansas to comply with very specific mandates found in the Federal Child Support Enforcement Amendments of 1984 (P.L. 98-378; Title IV-D, social security act § 466) and proposed federal regulations (45 CFR 301-305 and 307). Essentially, the federal government has mandated that states enact a number of specific remedies and procedures to improve their child support enforcement programs as a condition of continued state eligibility to participate in AFDC. These federal child support amendments were unanimously passed in a non-partisan effort by both houses of congress in an attempt to remedy an extremely serious national problem concerning the failure of a huge percentage of parents to support their children and the resulting cost to society in terms of skyrocketing public assistance expenses and the suffering of an alarming number of custodial parents and children.

National statistics (which are thought to be indicative of the status of Kansas chilren as well) show that in cases where courts have ordered the payment of support, fewer than 50% of the obligors pay as directed by the court and that fewer than 40% of dependent children in this country even have a court order requiring the payment of support. While the improvements in child support collection in the decade since the Title IV-D program was created have been significant, these statistics illustrate that overall non-compliance with support orders is still at epidemic proportions.

To help resolve these problems, federal law requires each state to enact a series of support-related laws (as well as make numerous program changes) which have proven effective in many jurisdictions around the country. Briefly, the laws which must be amended or enacted in Kansas include:

(1) Income withholding for use in both intrastate and interstate cases when a 30 day arrearage develops;
(2) Expedited judicial or administrative processes to speed up and make less costly the establishment and enforcement of support orders;
(3) State income tax refund offset for non-ADC and interstate support enforcement;
(4) Liens against personal property when support arrearages accrue;
(5) Eighteen year paternity statute of limitations;
(6) Imposition of security or bond to secure the payment of support;
(7) Provision of arrearage information to credit agencies;
(8) Medical and Foster Care assignment of support rights when public assistance is provided; and
(9) Enforcement of both child and spousal support.

S.B. 51 as amended is drafted to satisfy each of the enumerated federal mandates. Both SRS and the Kansas Commission on Child Support participated in the drafting of the amended version of S.B. 51 and recommend its enactment.

It is the position of SRS that the enactment of the following sections should not only enhance the support collection practices of public agencies, but also provide private legal practitioners and Kansas citizens with important new collection tools.

Attachment No. 3
House Judiciary
March 25, 1985

I. New sections 1-14 satisfy the federal mandate that Kansas enact income withholding and legislation to require the posting of security or bond to guarantee support payments. A mechanism is established which would require the courts to issue an order directing the payor of wages or other income to withhold and pay over certain percentages of income owed to an obligor who falls more than 30 days behind in the payment of either child or spousal support. Amounts withheld would be used to satisfy the current support obligation plus defray arrearages. The bill is drafted so that withholding can be used to enforce support owed in any case (not just IV-D cases - ADC and Non-ADC).

If a 30 day arrearage develops, SRS or its contractors <u>must</u> initiate the withholding process in all IV-D cases. The obligee or SRS must first send a notice of delinquency to the obligor which fully informs him/her about the process and what will occur. The obligor may contest the action by filing a motion for hearing within 7 days after receiving the notice. If a hearing is held, the court must make a decision concerning whether the withholding will occur within 45 days from the date the obligor received the notice of delinquency. (This time frame is federally mandated).

If the obligor does not contest the action, the obligee must then file an affidavit with the court which includes statements that at least a 30 day arrearage exists and that a notice of delinquency was sent to the obligor. Once the court receives such an affidavit, the court must automatically issue a withholding order which will remain effective until further order of the court. Any payor of income served a withholding order is required to withhold income from each pay period starting 7 days after receipt of the order. If a payor fails to abide by the court's order, judgment can be taken against them for the total amount which should have been withheld or for the total arrearage. Any payor who intentionally discharges, refuses to employ, or takes disciplinary action against the obligor may be subject to a civil penalty of up to $5,000. Federal law mandates payor penalty provisions.

A withholding order for support has priority over any other legal process against the same income. However, the total amount withheld each pay period cannot exceed the limits found in the Consumer Credit Protecition Act (50-65%). The payor may deduct a $2 cost recovery fee for each withholding and if the payor is required to withhold income in more than one case from the same court, the payor may combine the total amount withheld in one check.

The withholding order may be modified, suspended or terminated at <u>any time</u> by the court on the request of the obligee, obligor, or some responsible public office. However, the statute emphasizes that if withholding has occurred for one year and all arrearages are paid, the obligor may request termination of the order.

The advantages income withholding has over the typical garnishment action are that it is always continuing in nature, it applies to current or future income, amounts are taken from each pay period, it has priority

status over other types of execution, it is simpler to use and the right to implement the procedure once a 30-day arrearage develops is automatic. This portion of the bill is similar to laws already in effect in Illinois, Colorado, Missouri, Washington, Wisconsin and several other states.

II. New sections 15-27 are based on the Model Interstate Income Withholding Act which was drafted by the American Bar Association to satisfy the federal mandate that States use their income withholding provisions for the enforcement of other states' support orders and that appropriate orders are referred to other states for enforcement by use of income withholding. These sections pertain only to Title IV-D cases (ADC and Non-ADC). However, amendments to the Uniform Reciprocal Enforcement of Support Act (URESA) are proposed by the bill which could be used by anyone seeking to enforce a support order by income withholding.

Federal law prescribes the specific tasks which must be performed by the Kansas IV-D agency (SRS) in referring all IV-D cases with a 30 day arrearage or more to the state where the obligor receives income. Rather than County or District Attorneys, SRS has the sole responsibility in IV-D cases for compiling the referral and evidence necessary to register a Kansas order in a foreign jurisdiction. Similarly, SRS or its contractors must process all incoming IV-D case referrals from other states and, if necessary, represent the out-of-state obligee in District Court if the withholding is contested.

Although interstate enforcement by withholding will result in an extreme increase in the numbers of cases being processed by SRS, this law is desperately needed to enforce support in numerous situations where the obligor resides in a different jurisdiction than his or her children. Existing laws are woefully inadequate for support enforcement across state boundaries.

III. New section 28 concerns the referral of support arrearage information to Credit Bureaus as required by federal law. This section requires SRS to furnish debt information in cases with arrearages which exceed $1,000 to consumer reporting agencies upon their request. At the discretion of the secretary of SRS, the names of persons owing less than $1,000 in past due support may be so referred.

In any case, prior to referring arrearage information to credit bureaus, SRS must give prior notice to the obligor and provide information about how the obligor may contest the arrearage figures.

IV. New section 29 would satisfy the federal mandate that Kansas establish a law which would subject certain personal property of a support debtor to a lien. If the obligor accumulates a 30 day or greater support arrearage, the obligee may establish a lien upon any aircraft, vessel, or vehicle owned by the obligor.

To establish such a lien, the obligee must notify the obligor and the appropriate public office in accordance with existing statutory requirements. The most frequently used lien would be placed on vehicles by filing a notice of lien and an arrearage affidavit with the division of vehicles of the department of revenue.

V. Section 30 expands the powers of District Magistrate Judges so they can be used in an expedited judicial process to establish, modify, and enforce child support orders.

VI. Section 31 would amend the existing Kansas Uniform Reciprocal Enforcement of Support Act (URESA) by making it clear that Kansas courts can enforce arrearages based on another state's support order. This section is needed to conform Kansas law with existing URESA legislation in other states so that Kansas may perform the same enforcement services for other states as are currently being provided to Kansas citizens. In addition, federal mandates require the enforcement of current support and arrearages based on another state's order. Without this amendment, we risk being found out of compliance by the federal government.

VII. Sections 32 and 33 also amend the existing Kansas URESA by including federally mandated income withholding provisions as a method of enforcing Kansas support orders which have been established when the obligor lives in Kansas and the obligee resides in another state.

VIII. Sections 34 through 38 serve to expand the powers of court trustees to further expedite the support enforcement process in accordance with federal requirements. The amendments make it clear that the court trustee is subject to the control of the administrative judge rather than to all the judges in a particular district. Section 36 would allow a court trustee to require the appearance of persons before him/her and to take sworn testimony. The court trustee could also appoint special process servers and enter into stipulations, acknowledgments, and agreement subject to court approval.

IX. Section 39 provides that the complaining witnesses in paternity cases will be represented by the court trustee wherever a trustee has been established, by SRS if it is a Title IV-D case or by the county or district attorney if there is no court trustee and the case is not brought pursuant to Title IV-D.

X. Section 40 extends a one year statute of limitations for bringing paternity actions in the name of the mother of a child to eighteen years. This amendment is required by federal mandate to comply with U.S. Supreme Court decisions. Since the advancement of sophisticated new blood testing techniques, parentage can be determined with great accuracy despite the passage of time.

XI. Section 41 requires the payment of child support through the clerk of court or court trustee in paternity cases.

XII. Sections 42 and 43 propose amendments to the child in need of care and the juvenile offender statutes to properly facilitate the federal requirement that the Kansas IV-D agency take an assignment to support rights and pursue support establishment and enforcement activity in foster care cases in the same manner as in ADC cases. The proposed amendments to both 38-1512 and 38-1616 would make it clear that SRS could act to establish, collect, or enforce assigned support rights to reimburse the state and federal governments for expenses in providing foster care.

Both sections seek to delete portions of existing law which require SRS to make annual written demand for payment and which limit the period of time SRS has to file suit for recovery of foster care expenses. Federal law requires the assignment of support rights to SRS. Existing Kansas statutes and case law prescribe various statutes of limitations, dormancy periods and notice requirements concerning support rights. If SRS is given a true assignment of support rights, the guidelines for the enforcement of those rights should be the same as in any other support case. In addition, the Kansas IV-D agency can collect support in all types of cases (ADC, medical, non-ADC, and foster care) more efficiently and cost effectively if the rules for collection are all the same in the various types of cases.

XIII. Section 44 satisfies federal mandates that SRS take an assignment of support rights in foster care and medical assistance cases so that the state and federal governments may be reimbursed for expenses in those areas. In addition, an assignment of the support obligee's rights is created when a parent with legal custody of a child surrenders physical custody of the child to a relative who then receives ADC. Such an assignment is necessary to insure that support payments follow the child. Without this amendment, a parent who is not caring for the child and who does not have physical custody can continue to receive support payments pursuant to a court order. With the amendment, if the state provides ADC assistance for the child, the state would be assigned the legal custodians support rights concerning that child.

Subsection (g) establishes that if SRS provides medical assistance, an automatic assignment of any medical support rights and of the right to payment for medical care from a third party is conveyed to the agency in behalf of the state. This subsection was mandated by federal law to reduce the expense of providing medical assistance in cases where private insurance provides coverage.

XIV. Section 45 was drafted to further comply with the federal mandate that SRS take an assignment and pursue collection in foster care and medical assistance cases in the same manner as ADC cases. K.S.A. 39-718a is amended to establish a parental liability for repayment of expenses to SRS in cases where the agency provides ADC, medical, or foster care to a dependent child whose parent or parents are absent from the child's home.

A second change to the statute is suggested to make it clear that SRS may sue a parent for reimbursement unless the court has ruled on the issue of support and the obligor is in full compliance with the court's order.

XV. Section 46 is added to provide a mechanism for recording and providing public notice of the SRS assignment in foster care and medical assistance cases. This is accomplished by amending an existing statute which concerns the filing of notices of assignment in ADC cases.

A phrase is added to subsection (b) and (d) which makes it clear that a copy of the SRS notice of assignment need not be sent the obligor since the notice is merely to the clerk of court and concerns where payments of support should be forwarded by the court once paid. Since the statute clearly states that the notice can be filed without an order or hearing and since the notice has absolutely no effect on the court order, the amount of support to be paid, when it should be paid and where it should be paid, the obligor need not be notified. This position has been upheld in the appellate courts in the case of Whisler v. Whisler.

Proposed subsection (g) would correct an existing problem the clerks of court have in accepting statements from SRS concerning amounts of support paid directly to SRS pursuant to state and federal debt setoff and from unemployment compensation. Without statutory authority the clerks feel they cannot adjust an obligor's payment record unless court receives the payment directly. Since various statutes require payments of collected support to SRS rather than the court, this amendment is necessary to protect the integrity of the court's payment ledger and to ensure that the obligor is given full credit for all payments and collections.

XVI. Section 47 would amend an existing statute to give SRS the right to establish a medical support order based on the assignment of medical support rights and to establish a support order in foster care cases where SRS receives an assignment to support rights. This section makes complete the federal mandate that SRS take an assignment in foster care and medical assistance cases and to enforce those assigned rights.

In the last two sentences of subsection (a), this amendment satisfies the federal mandate that the statute of limitations in paternity cases brought by the IV-D agency in the name of the child be extended to 18 years.

XVII. Section 48 is proposed to satisfy the federal mandate that the IV-D agency enforce spousal support (alimony) as well as child support in cases where both types of support are found in the same order.

K.S.A. 44-718 should simply be amended by striking the word "child" before the word "support." The amended statute would then allow for the collection of "support" (which includes both child and spousal

support) from unemployment compensation. In all other cases, SRS does enforce alimony as well as support obligations if both can be enforced and if both are a part of the same support order.

XVIII. Section 49 proposes an amendment to K.S.A. 60-1610 to make it perfectly clear that the court may order support "regardless of the type of custodial arrangement ordered by the court." This amendment is suggested to encourage the courts to consider the support issue even in joint custody cases. If one parent's ability to pay is much greater than the other's, the courts should consider the establishment of a support order even though both parents share child custody. The prime considerations by the court in establishing a support order should be the ability of both parents to pay and the needs of the child.

This section also requires the payment of both child support and maintenance through the clerk of court and court trustee so that arrearages can be monitored. In subsection (d), the federal mandate for expedited processes is satisfied by requiring the supreme court to establish by rule expedited procedures for the establishment and enforcement of support orders.

XIX. Section 50 is proposed to allow SRS to disclose location information concerning ADC recipients for the sole purpose of allowing service of process when motions for custody or visitation are filed.

XX. Section 51 seeks to amend K.S.A. 60-1613 which is the state's current income assignment law. Because the federal government has mandated the enactment of numerous very specific features within income withholding (assignment) legislation, this current statute will not suffice. The proposed amendment refers to the income withholding provisions of this bill concerning the establishment of future withholding orders. As its main purpose, the amendment states that assignments established under this statute remain effective and are not negated by the new income withholding provisions.

XXI. Section 52 is proposed to ensure that support assigned to other states can be enforced by garnishment if a Kansas URESA order is established and the obligor does not pay as ordered. The current K.S.A. 60-2310 (which concerns garnishment) does not allow garnishment if a debt is assigned. However, current law makes an exception in cases where Kansas SRS is the assignee. The amendment would expand the exception to allow garnishment to enforce support debts if support rights have been assigned to SRS or any other state IV-D agency.

Other states routinely garnish pursuant to their state law to enforce URESA orders established for the benefit of Kansas citizens. Consequently, Kansas should ensure our ability to reciprocate by clarifying existing law.

XXII. Section 53 was drafted to comply with the federal mandate that states enact income tax offset provisions which could be used to enforce ADC and non-ADC support debts as well as IV-D support debts owed other states. Since Kansas already has a statute for use in collecting ADC assigned support, the K.S.A. 75-6202 definitions of "debtor" and "debt" need only be changed to include non-ADC debts and title IV-D debts (ADC and non-ADC) owed other states.

As a result of this amendment, SRS will become responsible for verifying tens of thousands of referrals from other states and from Kansas citizens who apply for non-ADC support services. Court orders must be verified, arrearages tabulated, computer tapes made and collections must be properly distributed. In addition, SRS would be responsible for representing the claimant in any appeal hearing. Consequently, the enactment of this federally mandated law is expected to generate a huge new workload for SRS personnel.

Please Note: If the committee has questions concerning S.B. 51, please contact:

Dr. Robert C. Harder	296-3271
Jim Robertson	296-3410
Professor Linda Elrod	295-6660
Larry Rute	233-2068
Honorable James Buchele	295-4323
Honorable Herbert Walton	913-782-5000 (Olathe)

Must Alimony/Maintenance be enforced pursuant to Title IV-D of the Social Security Act?

A new 45 CFR 302.70 contains the state plan requirement for use of mandatory practices to improve program effectiveness. The definition of "overdue support" from the new section 466(e) of the Social Security Act that is applicable to all mandatory practices is added to the general definitions section found in 45 CFR 301.1. "Overdue support means a delinquency pursuant to an obligation determined under a court order, or an order of an administrative process established under state law, for the support and maintenance of a minor child which is owed to or on behalf of the child or for the absent parent's spouse (or former spouse) with whom the child is living, if and to the extent that the spousal support obligation has been established and the child support obligation is being enforced under the State's IV-D plan."

Effective October 1, 1985, sections 454(4)(B) and 454(6) of the Social Security Act require states to collect spousal support if a support order has been established, the child and the spouse are living in the same household, and the support obligation established with respect to the child is being enforced under the state's IV-D plan. This amendment clarifies that spousal support must be collected only where child support is being collected along with spousal support. Prior to this amendment, collection of spousal support was optional for states.

In summary, federal law requires the use of the new mandatory support enforcement laws for the collection of spousal support in certain circumstances. Therefore, the definition of "support" must include spousal support and income withholding, and debt setoff laws among others must allow for the collection of past due spousal support.

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March 25, 1985

TESTIMONY ON SENATE BILL 51 BY LINDA ELROD, VICE CHAIRMAN OF GOVERNOR'S COMMISSION ON CHILD SUPPORT

February 26, 1985

The Governor's Commission on Child Support recommends passage of Senate Bill 51 as amended. The Commission has tried to reconcile the somewhat incompatible goals of ensuring that Kansas is in compliance with the federal Child Support Amendments of 1984 with as little intrusion on the rights of individual citizens as possible and at the least possible cost to the tax-payers.

Highlights and cornerstones of S.B. 51:

1. Naming of a Withholding Agency Sec. 13

By October 1, 1985, all states are required to have in place the machinery for wage withholding automatically upon an arrearage of 30 days in support payments. The Commission supports naming the Department of Social and Rehabilitation Services as the Title IV agency and the withholding agency.

Reasons: SRS is the existing Title IV agency in Kansas. It currently has the machinery in place to handle ADC cases and is preparing to handle nonADC cases. The Commission feels that at the present time SRS is in the best position at the least cost to be designated as the withholding agency.

2. Enforcement of Withholding Functions Sec. 12 and 40

The Governor's Commission supports the use of existing court trustees to enforce support orders. The Commission hopes to see more court trustee offices established, especially in the single county judicial districts.

Reasons: The existing court trustees in Johnson and Shawnee counties are operating efficiently and effectively in the enforcement of child support orders. The key in section 40 is to require all support payments to be made through the clerk of the district court or the court trustee. With additional computer hardware, the court trustees can monitor and track all support payments just as they are currently doing for those now ordered to be paid through their offices.

3. Expedited Process Sec. 40(d)

The federal law requires states to provide an expedited process for the establishment and enforcement of support orders. The Commission supports authorizing the Kansas Supreme Court to establish by rule an expedited judicial process within the existing system.

Reasons: Support orders are judgments of the court. The Commission feels that the Supreme Court is in the best position to provide for an expedited process that can be adapted to the varying judicial districts. The bill increases the powers of court trustees and district magistrates to help with this function.

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0160 the specified time will result in payors' being ordered to begin
0161 withholding; and (6) the action which will be taken if the obligor
0162 contests the withholding.

0163 In addition to any other penalty provided by law, the filing of
0164 an affidavit with knowledge of falsity of the declaration of notice
0165 is punishable as a contempt. The obligor may, at any time, waive
0166 in writing the notice required by this subsection.

0167 (g) On request, an obligor may establish a withholding order
0168 which shall be honored by a payor regardless of whether there is
0169 an arrearage.

0170 New Sec. ~~3~~ *4.* (a) *It shall be the affirmative duty of any*
0171 payor to respond within seven days to written requests for
0172 information presented by the obligee or public office concern-
0173 ing: (1) The full name of the obligor; (2) the current address of
0174 the obligor; (3) the obligor's social security number; (4) the
0175 obligor's work location; (5) the number of the obligor's claimed
0176 dependents; (6) the obligor's gross income; (7) the obligor's net
0177 income; (8) an itemized statement of deductions from the obli-
0178 gor's income; (9) the obligor's pay schedule; and (10) the obli-
0179 gor's health insurance coverage. This list is exemplary and not
0180 exclusive of the type of information the payor must provide.

0181 *(b)* It shall be the duty of any payor who has been served an
0182 order for withholding under this act to deduct and pay over
0183 income as provided in this section. The payor shall deduct the
0184 amount designated in the order for withholding beginning with
0185 the next payment of income ~~which is payable to~~ *due* the obligor
0186 after ~~10~~ *seven* days following service of the order on the payor. At
0187 the time the obligor is normally paid, the payor shall pay the
0188 amount withheld to the ~~obligee, public office~~ or clerk of court *or*
0189 court trustee as directed by the order for withholding and in
0190 accordance with any subsequent notification received from the
0191 public office redirecting payments.

~~0192~~ ~~(b)~~ *(c)* If the withholding is to collect current support and an
3 arrearage, the payor shall be required to withhold an amount of
0194 income equal to the order for support plus an additional sum, set
0195 out in the affidavit provided for in subsection (b) of section ~~2~~ *3* as
0196 a percentage of the amount of the support order/ or income owed the obligor, to be applied

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0197 towards liquidation of arrearages. *The payor shall withhold and*
0198 *pay over an amount sufficient to pay the current periodic*
0199 *support obligation. The additional amount to be applied toward*
0200 *liquidation of arrearages shall be withheld from each pay*
0201 *period.* If the withholding is to collect an arrearage only, the
0202 payor shall be required to withhold an amount of income equal
0203 to a percentage of ~~income~~ set out in the affidavit provided for in
0204 subsection (b) of section ~~2~~ 3.

the amount of the support order or

0205 ~~(c)~~ *(d)* The payor shall continue to withhold income to be
0206 applied toward liquidation of arrearages until the amount of the
0207 arrearage stated in the income withholding order has been paid
0208 in full or until notice to discontinue that portion of the with-
0209 holding attributable to arrearages is received from ~~the obligee,~~
0210 ~~public office or~~ the court. After arrearages are paid in full, a
0211 withholding order requiring withholding for current support
0212 shall continue in the amount of the support order until further
0213 order of the court.

0214 ~~(d)~~ *(e)* From income due the obligor, the payor may withhold
0215 and retain to defray the payor's costs a cost recovery fee of $2 for
0216 each withholding ~~of income which~~ shall be in addition to the
0217 amount withheld as support.

0218 ~~(e)~~ *(f)* Any payor subject to withholding orders for more than
0219 one obligor may combine the withheld amounts in a single
0220 payment to each clerk of court or ~~public office~~ *court trustee*
0221 requesting the withholdings if the payor separately identifies the
0222 portion of the single payment which is attributable to each
0223 individual obligor.

0224 ~~(f)~~ *(g)* If more than one order for withholding requires with-
0225 holding from the same source of income of a single obligor, the
0226 payor must comply on a first-come-first-served basis and must
0227 honor all withholding orders, subject to subsection ~~(g)~~. (h)

0228 ~~(g)~~ *(h)* The entire sum withheld by the payor, including the
0229 cost recovery fee, shall not exceed the limits provided for under
0230 section 303(b) of the consumer credit protection act (15 U.S.C.
1673(b)).

An income withholding order issued pursuant to this act shall require the withholding of earnings from each pay period and shall not be subject to the one-per-month limitation on garnishments found in K.S.A. 60-2310(b). If amounts of earnings required to be withheld in accordance with this act are less than the maximum amount of earnings which could be withheld according to the Consumer Credit Protection Act, the payor shall honor garnishments filed by other creditors to the extent that the total amount taken from earnings does not exceed Consumer Credit Protection Act limitations.

0232 ~~(h)~~ *(i)* The payor shall promptly notify the obligee, or public
0233 office initiating the withholding order of the termination of the

Testimony On Senate Bill No. 51

By

Marjorie J. Van Buren

Office of Judicial Administration

March 25, 1985

Senate Bill 51 represents a highly significant change in the way payment of court-ordered child support may be enforced in Kansas. The total ramifications of this change are impossible to foresee at this time, and I will not attempt the impossible.

However, I will address some of the effects which can be predicted as they relate to operation of the Kansas Judicial Branch. First, additional judicial work will be created. Additional hearings will be necessary to handle appeals of withholding orders, motions for change in support orders, and so on. Senate Bill 51 extends the jurisdiction of district magistrate judges to include support matters. At present, we believe that this change would permit expeditious handling of the anticipated additional judicial workload without creation of new judge positions.

Another effect which can be confidently predicted from enactment of SB 51 is an enormous increase in accounting workload in the courts due to the increased collections of support which are the measure's primary goal. More child support being paid equals more accounting in the district courts. Our child support accounting staff will require significant expansion simply to make the required postings and disburse payments. A conservative estimate, explained in more detail in the attached fiscal note, is that 47 additional accounting technicians will be required initially.

The third impact which I would like to discuss also falls into the accounting area. In order to implement New Section 13 of SB 51, it will be necessary to develop and maintain a uniform automated court accounting system for the recording of information regarding support orders and payments in each district court of the state. (An exception may be a few of the very smallest courts, where an automated system may not be cost effective.) For the four largest counties, existing computerized accounting systems will have to be modified to meet the demands of the new law. Elsewhere, microcomputers with development of suitable software can be used to convert the current "one-write" manual accounting system into an automated information system which will be able to supply data to the Child Support Enforcement Agency (SRS). (Our cost estimates for hardware, software, and line charges for central reporting are detailed in the fiscal note.)

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March 25, 1985

In order to implement the kind of information system envisoned by SB 51, a very different order of accounting system will have to be developed and put in place than is now in use in 104 counties of Kansas. (The exception is Johnson County, where all support is paid through the Court Trustee.) In effect, what is needed as an end product is an "accounts receivable" system for support. Planning, coordination of software development, maintenance, training of district court personnel, liaison with SRS and other agencies, and monitoring program effectiveness will require additional staff in the Office of Judicial Administration. In addition to a computer analyst and a lawyer with some experience in the domestic relations area, three administrative staff positions and one clerical support position will be needed to implement the statewide system. (Details are provided in the fiscal note.)

If SB 51 becomes law, the Office of Judicial Administration is prepared to give the new policies and procedures regarding enforcement of child support a high priority. This will require a significant allocation of new resources to the courts, much of which we are advised is reimbursable from federal sources. The material in the attached note represents our best current estimate of the additional resources we will need to fulfill our role if this major new policy is enacted.

Attachment

State of Kansas

Office of Judicial Administration

Kansas Judicial Center
301 West 10th
Topeka, Kansas 66612

(913) 296-2256

March 5, 1985

To: Alden Shields, Director of the Budget

From: Jerry Sloan, Budget and Fiscal Officer

Re: Amended Fiscal Note For Senate Bill No. 51

This bill would provide for the establishment of withholding orders for child support or maintenance and provide for their enforcement. It would require a separate order requiring the withholding of income to be issued whenever an order of support is issued. This withholding order could be effective immediately, but would become effective if a one month arrearage in support ever existed. This bill has a number of items which would fiscally impact the judicial branch.

Proposed amendments to Senate Bill 51 and a reassessment of our fiscal note of February 13 have materially changed our estimate of the fiscal impact of this bill.

Although Section 12, as it is proposed to be amended, provides for a contract between the Office of Judicial Administration and the Secretary of Social and Rehabilitation Services for information to be supplied by district courts, the main thrust of this amendment is to provide for currently established court trustee offices and for emergency needs which may arise for district court clerks.

The current accounting system in place in the district courts for the most part reflects the adversarial system of law which it supports. That is, district courts do not record accounts receivable except for amounts due the state. Accounting records are kept by the clerk of the court in most courts. In Johnson County, however, there are exceptions to these general rules in that the Court Trustee Office accounts for all child support and maintenance records in cases in which the recipient requests the services of the trustee and its system does keep track of cumulative amounts due.

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This system is computerized and permits arrearages to be noted as soon as they occur as well as keep a cumulative record of the amount due. In our other courts, the accounting system records amounts which are paid through the court, but does not cumulate amounts due. Whenever litigants dispute the amount due, the accounting record is available to prove that part which has been paid through the court.

In order to implement the child support enforcement system contemplated by Senate Bill 51 and its amendments, the 104 district courts other than the one in Johnson County will have to change from the present system to one which performs the functions of the system in Johnson County. The alternative suggested by the Department of Social and Rehabilitation Services is for a system under their control to which each court provides input. SRS anticipated cost of this system overlooks personnel cost to the court system. Duplicating a service of this magnitude is cost prohibitive. We would need almost as many additional positions as we now have working in domestic relations departments in order to service the central computer and to keep our own local records. However, if the central system can be configured so that its input is an informational product of the court accounting system, costs may be greatly reduced over the cost of a duplicative system. In order to achieve this result, the court would need a substitute system for the one it now maintains in 104 counties and would need software for the Johnson County computer to report to the SRS central computer. We are proposing a system, which in initial discussions with SRS, appears to meet the needs as well as be compatible with SRS's goals.

According to a survey conducted by the Office of Judicial Administration, sixteen counties in the state have computer systems available for court use. These systems coupled with the purchase of micro computers in counties without computer capabilities would provide the basis for the primary data entry component of the system.

Initial data entry on the system would take place in district court offices throughout the state. Periodically (probably daily if any activity has occurred) the data entered on the local computers would be "uploaded" to the state's computer in Topeka via telecommunications software and hardware. Once the data is loaded onto the state computer, the data would be processed for use by the state's child support enforcement agency (Figure 1).

This system would effectively "network" existing child support data sources with newly created sources to provide comprehensive, accurate and detailed information pertaining to child support enforcement activities throughout the State of Kansas. Further, this system has several distinct advantages over other types of configurations.

First, the locus of the system is in the counties. Since most of the existing child support data already exists in the district courts of the state, this configuration would prevent unnecessary duplication of existing records.

Next, this type of configuration would reduce the long term operating costs of the system. The initial need for hardware purchase will be somewhat offset by using existing computer resources. Further, the cost of this system would be much lower than any on-line real time system since data could be "up-loaded" for batch processing.

Finally, such a system would make computerization easier to achieve in the district courts. Most child support payments would be processed at the beginning of each month. Once this processing would be completed, the district courts could use the additional computer resources for other functions contingent on software availability.

This type of configuration is predicated on the establishment of a two-tiered software system. The first-tier of the system would be a software module which provides for case initiation, payment receipt and distribution and accounting functions. The data entered into this module would be shared with a second module which would handle case management and enforce- ment activities. This module would be utilized, primarily, by the State's child support enforcement agency (See Figure 2).

As previously mentioned, support orders, modifications and most enforcement proceedings are processed by the district court. Whenever the court enters or modifies a support order, local personnel will enter the pertinent information on the computer. This information will include all necessary names, addresses, social security numbers, dates of birth, support amounts, payment schedules, etc.

When an obligor or payor makes a regular payment to the local court clerk (or trustee) the payment will be recorded on the local computer. The system may even be able to automatically generate receipts, disbursement checks, and post disbursements. When the disbursement check is generated and posted, the payment will be forwarded to the child support recipient (See Figure 3).

Whenever an arrearage develops, the state computer (or local computer, if applicable) will generate a notice to the Child Support Enforcement Agency (C.S.E.A.). The C.S.E.A. will commence enforcement proceedings by causing service of any existing withholding order on both the obligor and the payor.

Assuming that the withholding order is not contested, the payor will commence payments to the local court. These payments will be processed in the same manner as any other child support payment.

Whenever other court-related enforcement techniques (e.g., garnishments, executions, etc.) are implemented, the procedure for data entry will be similar to the procedure for processing withholding orders. All court-related enforcement activities will be entered and updated at the local level.

When non-court related enforcement techniques are used (e.g., offsets of tax refunds, benefits, etc.) it will be the responsibility of the C.S.E.A. to coordinate activities with the state computer center and any other agencies (See Figure 4).

All necessary federal reports will be processed and automatically generated by the state computer center. It will be the responsibility of the C.S.E.A. to ensure that these reports are prepared and submitted as required.

Whenever an authorized individual needs access to payment information, the local court will be able to generate the necessary information from its system. Information for interstate requests and use by credit agencies can be handled by the State's computer center.

The information flow outlined in this section is predicated on the development of a centralized state child support enforcement computer fed by a network of locally operated computers. Most data will be entered at the local level, merged with existing data, and also stored in temporary files. At the end of each business day, data will be "up-loaded" to the State's computer via modems. Once the temporary files are loaded onto the State's computer, data will be merged with existing files to provide timely accurate child support records (See Figure 5).

The costs associated with such a system are itemized below. It is our understanding that 90% of the costs associated with the acquisitions and implementation of such a system would be reimbursed by the federal government.

Currently, sixteen district courts in the State of Kansas have or have access to computer hardware. Assuming that not all of these computers could be utilized for child support enforcement, it would be necessary to purchase computer equipment for 95 counites. Cost of this equipment would be approximately $633,000.00. This equipment would include an IBM PC AT micro computer, a compatible dot matrix printer and modems.

Software costs would fall into two general catagories. First, system software including the child support module and the case management/enforcement module would have to be developed. Secondly, appropriate communication software would be needed to allow local computers to "communicate" with the State's computer center. System development costs are difficult to project. The Department of Social and Rehabilitation Services has estimated software development at a cost of $1,000,000.00. This estimate is compatible with the actual costs incurred by the State of Oregon for the development of a similar system. They also estimate that these costs were evenly divided between the two software components mentioned above. Thus the cost of the court part of this software would be approximately $500,000.

According to estimates by I.B.M. Corporation communication software costs, using commercially available software, would cost approximately $84,000.00 statewide. There would also be recurring costs for line costs for data transmission. Line costs (assuming a rate of $16.87 per hour) would cost approximately $85,000.00.

These costs estimated above are only for the court component of this automated system. There would also be costs associated with the enforcement component which would be better addressed by SRS. The total costs above would be $1,302,000 with $130,200 being required from the State General Fund and $1,171,800 being paid for with federal funds.

In either the SRS computer system set forth in their fiscal note dated February 1, 1985, or in the system we recommend, the clerical staff in district court domestic relations departments will be required to read and analyze court documents generated by current domestic relations cases in order to set up a case so that it will be available in case an application for aid to dependent children is made by a named obligee, a relative providing care, children in foster care, or those for whom medical services are being provided.

In a very limited survey, it was found that approximately 60% of the domestic relations cases involved child support. This would imply that of the 23,152 domestic relation cases filed in FY 1984, 13,891 of them involved child support. The total caseload for ongoing cases might average ten to fifteen times this number. I would further assume that for accounting purposes and to verify arrearages, nearly all of these would be paid through the courts. Currently it is estimated that about 15% of these cases statewide are paid to the obligee, but of the remaining 85%, it is estimated that a substantial number are in arrears and do not actually impact the current accounting functions in the district courts. Thus we would estimate the accounting work in the district courts would be impacted by approximately 50,000 new cases and this number might be too conservative.

About 23,000 new cases per year must be screened. In those with child support, payment or nonpayment must be monitored monthly. Potentially all cases will come under the program of child support enforcement.

Even with the computerization discussed above, additional help will be needed in the district courts. In one of the urban judicial districts (Johnson County) there is a court trustee program which could probably manage the increase in caseload as long as they are allowed to continue to collect their administrative fees. In the remaining districts, accounting technicians will be required.

We currently have approximately 110 F.T.E. positions committed to child support record keeping. If we assume that we are effectively accounting for 70% of the payments that are to be made, in order to process the ones that are not currently being paid to the court would require 157 F.T.E., an increase of 47 positions. The cost of these additional positions in salaries and fringe benefits would be $646,751. It is our understanding that 69% of this cost could be reimbursed from federal funds, so the cost to the state general fund would be $200,493. We do assume that when the computer system is fully operational, this increase in personnel could be dramatically reduced. We would expect that it will take approximately two years to fully implement the proposed system and at that time we could probably reduce these increased personnel needs by about 50%.

The court trustee office in Johnson County keeps all of its accounts current using 11 clerical positions at a personnel cost of $231,031. This office processed $11 million dollars of payments of both IV-D and non-IV-D support payments in calendar year 1984. The office has been operating for about ten years.

Additional staff would also be required in the Judicial Administrator's office to act as liaison with the Department of Social and Rehabilitation Services and the district courts, to provide ongoing training to produce and distribute informational materials and to monitor operations in the district courts on the effectiveness of this bill. It is estimated that one Court Programs Analyst, two assistants, and one Secretary II would be required to monitor this system.

In addition, this bill will require our domestic relations departments to learn in a short period of time what has become routine to the Johnson County staff where they have learned entries and modification orders submitted by a variety of lawyers, few of whom agree on terminology. Because the bulk of domestic relations cases will be in courts that do not have a trustee, a staff attorney position will be needed in the office of the Judicial Administrator to help translate legal documents for clerical employees. The OJA will also require a computer analyst to coordinate the development and maintenance on the computer software discussed above.

Total salaries and fringe benefits cost for these positions would be $151,220. For operating costs, these positions would require $3,500 for travel; $4,500 for telephone costs and minor office supplies; and $13,740 for capital outlay. This capital outlay would include three terminals which could be used for both word processing and to access the data base proposed by the Department of Social and Rehabilitation Services. There would also be costs associated with printing and disseminating informational materials on this program, which should include information to obligees, obligors and payors. It is estimated that this would cost approximately $15,000 annually. Thus the total cost for this part of the operation would be $187,960.

It appears that this amount would also qualify for the 69% reimbursement from federal funds.

There would also be some additional cost and impact in other areas of the operation. New forms would need to be devised and printed for these income withholding. It is estimated this cost would be approximately $15,000 and would be borne by the counties throughout the state. The amendment to allow paternity suits to be instituted until a child is 18 or more years old will impact the courts with more work, but I do not have any statistics on how many cases this might include.

While the income withholding provisions would not become effective until January 1, 1986, funding to implement this would be required at the beginning of the Fiscal Year 1986. There is a requirement of substantial additional training as well as reviewing and updating the accounting records in these cases that must be done prior to implementation of this bill.

I have itemized and summarized the costs below:

	Total Cost	State General Fund	Federal Funds
Computer System	$1,302,000	$130,200	$1,171,800
Dist. Court Pers.	646,751	200,493	446,258
Associated OJA Costs	187,960	58,268	129,692
TOTAL	$2,136,711	$388,961	$1,747,750

It should be noted that these are first-year costs. The second year costs would be reduced by approximately $1,167,440 which is capital outlay and software development but an addition for maintenance on the hardware. If, in fact, personnel costs can be reduced as noted above, the third and following years would have even a further cost reduction of $323,376.

March 25, 1985

Testomony to the House Judiciary Committee regarding Senate Bill 51

My name is Woody Houseman. I am here today representing a group called Divorced Dads of Topeka.

I would like to share with you a story. I understand there was a convict about to be executed, who turned to the warden and asked, "Do I have any choice?" To which the warden responded, "Sure; AC or DC - the choice is yours." It seems Senate Bill 51 offers a comparable choice. Our organization believes both parents have a responsibility to their children and that includes the non custodial parent's responsibility to pay child support. I personally am not nor have I ever been behind even one child support payment. However, Senate Bill 51 should offer more than one option requiring responsibility of only one parent. For this reason we are requesting your consideration of amendments to Senate Bill 51 in three ways. These amendments relate to visitation orders, the use of child support funds in the child's best interest and, in some cases, protection of the noncustodial parent.

I would like to call to your attention an article from The Register , a California newspaper, dated November 19, 1984. Orange County, California officials say their program . . ."the most aggressive child support enforcement program in the state". . . helps families and cuts welfare dependency. However, state records show that Orange County is no more successful at collecting child support money than other counties with less punitive and less costly programs. Orange County collected $2.40 for every dollar spent for collections operations in FY 1983; while state wide, the average was $2.39 collected for each dollar spent.

I share this as an introduction to two ways of increasing child support payments. According to David Levy, president of the National Council for Children's Rights, the most effective means of collecting child support is joint custody. Dr. Howard Irving of the Toronto School of Social Science reports less than 6 - 7% default on child support payments by joint custody parents as compared to 72% in the sole custody cases studies.

The second most effective means of collecting support is through enforcement of visitation. At present, there is no such thing as visitation enforcement in this state. What we have instead is a system where a noncustodial parent must hold a job, pay support, and go to court, if visitation has been denied or interfered with. There is no county or state agency which investigates visitation complaints and makes recommendations for "make-up of visitation arrearages" or change of custody. If the State of Kansas can try to enforce support, surely it can enforce visitation. This is not to say that support is conditioned on visitation, or that visitation is conditioned on support. Quite to the contrary. It is only to state that a judge issues two orders, or two parts of one order, and both are deserving of respect and obedience.

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Visitation violations or outright denial of visitation occur in 50% of cases nationwide. As stated in the most authoritative work on this subject: Wallerstein and Kelly's book entitled "Surviving the Break-up," published in 1980,

> "One half of the mothers valued the father's contact with his children, and protected the contact with care and consideration. Twenty percent of the mothers saw no value in visitation whatsoever. The remaining thirty percent had mixed feelings about visitation; however, they did make visitation difficult by forgetting appointments, insisting on rigid schedules, not permitting the father to go with the child if he brought along a girlfriend and humiliating and deprecating the father in front of the children."

It is interesting that the figure 50% denial or interference with visitation, is the same figure that consistantly crops up in regard to less than full support payments. I might add, Michigan boasts of the highest support collection and visitation enforcement statistics in the country, at less cost per case.

For these reasons we place as our highest priority the concern of enforcement of visitation orders with an expediated process equal to that of enforcing child support orders. We also request that prior to any out of state move by the custodial parent, visitation arrangements will be agreed upon (this may include the use of an impartial mediator). We would further encourage and support a combined child support/visitation enforcement office.

Our second concern relates to the expenditure of child support dollars in the child's best interest. This may be determined through a court appointed authority (including an impartial mediator), direct payments to the children or through special educations provisions as stated in the bill amendments on page 49 provided to you.

Our third and final cocern is in regard to the protection of a noncustodial parent, whose wages have been garnished. In this case we are asking that the noncustodial parent will not be held accountable for failure of an employer to take proper actions.

In closing I would like to say that too often, out of frustration, and anger toward the system, fathers drop out of their children's lives emotionally and/or financially. But this is the easy way out. I encourage you to consider our amendments which will help fathers to remain a meaningful part of their children's lives, encourage payment of child support orders and help the children to be productive citizens.

I thank you for this opportunity and would be glad to respond to questions.

1048 to pursue all civil remedies which would be available to the
1049 obligee in establishing and enforcing payment of support.
1050 (b) The court trustee may also file motions for an increase or
1051 a decrease of the amount of support on behalf of any ~~obligor or~~
1052 ~~obligee, and may file motions for an increase of the amount of~~
1053 ~~support on behalf of any obligee who is the recipient of public~~
1054 ~~assistance~~ child. Any such motion to modify the amount of
1055 support shall not be heard until notice has been given to the
1056 obligee, the obligor and their attorneys of record, if any.

(c) The court trustee shall be authorized and empowered to pursue all civil remedies which would be available to the obligor in establishing and enforcing visitation orders.

1057 ~~(c)~~(d) The court trustee shall have the following additional
1058 powers and duties upon approval of the administrative judge:
1059 (1) To issue summonses, subpoenas and subpoenas duces
1060 tecum to obligors, obligees and other witnesses who possess
1061 knowledge or books and records relating to enforcement of
1062 support to appear in the office of the trustee or before the
1063 district court for examination;
1064 (2) to administer oaths and take sworn testimony on the
1065 record or by affidavit;
1066 (3) to appoint special process servers as required to carry out
1067 the court trustee's responsibilities under this section; and
1068 (4) to enter into stipulations, acknowledgments, agreements
1069 and journal entries, subject to approval of the court.

(5) To instruct a court appointed authority to determine if the child support funds are utilized in the child's best interest.

1070 Sec. 37. K.S.A. 23-497 is hereby amended to read as follows:
1071 23-497. To defray the expenses of operation of ~~his or her~~ the
1072 court trustee's office, the court trustee is authorized to charge an
1073 amount, not to exceed ~~five percent (5%)~~ 5% of the funds col-
1074 lected from obligors through such office, as determined neces-
1075 sary by the ~~district judge or judges. Such amounts to~~ adminis-
1076 trative judge, which amounts shall be paid to the county general
1077 fund of the county where ~~the same were~~ collected. The court
1078 trustee shall be paid compensation as determined by the ~~district~~
1079 ~~judge or judges~~ administrative judge. The board of county
1080 commissioners of each county to which this act may apply shall
1081 provide suitable quarters for the office of court trustee, furnish
1082 stationery and supplies, and such furniture and equipment as
1083 shall, in the discretion of the ~~district judge or judges~~ adminis-
1084 trative judge, be necessary for the use of the court trustee. The

Attachment No. 10
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0602 "support obligations" ~~is defined as~~ *means* only those obligations
0603 which are being enforced pursuant to a plan described in section
0604 454 of the *federal* social security act which has been approved by
0605 the secretary of health and human services under part D of title
0606 IV of the *federal* social security act.
0607 (8) For the purposes of this subsection, ~~the term~~ "state or
0608 local ~~child~~ support enforcement agency" ~~is defined as~~ *means* any
0609 agency of this state or a political subdivision thereof operating
0610 pursuant to a plan described in paragraph (7).
0611 Sec. ~~40~~ *49.* K.S.A. 60-1610 is hereby amended to read as
0612 follows: 60-1610. A decree in an action under this article may
0613 include orders on the following matters:
0614 (a) *Minor children.* (1) *Child support and education.* The
0615 court shall make provisions for the support and education of the
0616 minor children. The court may modify or change any prior order
0617 when a material change in circumstances is shown, irrespective
0618 of the present domicile of the child or the parents. *Regardless of*
0619 *the type of custodial arrangement ordered by the court,* the
0620 court may order the child support and education expenses to be
0621 paid by either or both parents for any child less than 18 years of
0622 age, at which age the support shall terminate unless the parent or
0623 parents agree, by written agreement approved by the court, to
0624 pay support beyond the time the child reaches 18 years of age. In
0625 determining the amount to be paid for child support, the court
0626 shall consider all relevant factors, without regard to marital
0627 misconduct, including the financial resources and needs of both
0628 parents, the financial resources and needs of the child and the
0629 physical and emotional condition of the child. Until a child
0630 reaches 18 years of age, the court may set apart any portion of
0631 property of either the husband or wife, or both, that seems
0632 necessary and proper for the support of the child. ***Every order***
0633 ***requiring payment of child support under this section shall***
0634 ***require that the support be paid through the clerk of the district***
0635 ***court or the court trustee.***
0636 (2) *Child custody.* (A) *Changes.* Subject to the provisions of
0637 the uniform child custody jurisdiction act (K.S.A. 38-1301 *et seq.*
0638 and amendments thereto), the court may change or modify any

[Proposed insertion after line 0624, "...18 years of age."]

In such case that the income of the custodial parent's home exceeds the income of the noncustodial parent's home, support for the minor children in excess of $100.00 monthly shall be placed into a savings account for the minor children's future educational needs. Documentation of deposits must be provided to the custodial parent consistent with support order payments. Said accounts must require signatures of both parents and the child in order that any withdrawal be made prior to the child's 18th year birthdate.

0639 prior order of custody when a material change of circumstances
0640 is shown.
0641 (B) *Examination of parties.* The court may order physical or
0642 mental examinations of the parties if requested pursuant to
0643 K.S.A. 60-235 and amendments thereto.
0644 (3) *Child custody criteria.* The court shall determine custody
0645 in accordance with the best interests of the child.
0646 (A) If the parties have a written agreement concerning the
0647 custody of their minor child, it is presumed that the agreement is
0648 in the best interests of the child. This presumption may be
0649 overcome and the court may make a different order if the court
0650 makes specific findings of fact stating why the agreement is not
0651 in the best ~~interest~~ *interests* of the child.
0652 (B) In determining the issue of custody, the court shall con-
0653 sider all relevant factors, including but not limited to:
0654 (i) The length of time that the child has been under the actual
0655 care and control of any person other than a parent and the
0656 circumstances relating thereto;
0657 (ii) the desires of the child's parents as to custody;
0658 (iii) the desires of the child as to the child's custodian;
0659 (iv) the interaction and interrelationship of the child with
0660 parents, siblings and any other person who may significantly
0661 affect the child's best interests; and
0662 (v) the child's adjustment to the child's home, school and
0663 community.

(vi) Agreement by the parents on how visitation for the child will continue assuring continued visitation, despite an out-of-state move by the custodial parent and children, at which time adjust of child support to compensate for additional costs of transportation for out-of-state visitation may be considered.

0664 Neither parent shall be considered to have a vested interest in
0665 the custody of any child as against the other parent, regardless of
0666 the age of the child, and there shall be no presumption that it is
0667 in the best interests of any infant or young child to give custody
0668 to the mother.
0669 (4) *Types of custodial arrangements.* Subject to the provi-
0670 sions of this article, the court may make any order relating to
0671 custodial arrangements which is in the best interests of the child.
0672 The order shall include, but not be limited to, one of the
0673 following, in the order of preference:
0674 (A) *Joint custody.* The court may place the custody of a child
0675 with both parties on a shared or joint-custody basis. In that event,

0787 porated in the decree, other than matters pertaining to the
0788 custody, support or education of the minor children, shall not be
0789 subject to subsequent modification by the court except: (A) As
0790 prescribed by the agreement or (B) as subsequently consented to
0791 by the parties.
0792 (4) *Costs and fees.* Costs and attorney fees may be awarded to
0793 either party as justice and equity require. The court may order
0794 that the amount be paid directly to the attorney, who may enforce
0795 the order in the attorney's name in the same case.
0796 (c) *Miscellaneous matters.* (1) *Restoration of name.* Upon the
0797 request of a spouse, the court shall order the restoration of that
0798 spouse's maiden or former name.
0799 (2) *Effective date as to remarriage.* Any marriage contracted
0800 by a party, within or outside this state, with any other person
0801 before a judgment of divorce becomes final shall be voidable
0802 until the decree of divorce becomes final. An agreement which
0803 waives the right of appeal from the granting of the divorce and
0804 which is incorporated into the decree or signed by the parties
0805 and filed in the case shall be effective to shorten the period of
0806 time during which the remarriage is voidable.
0807 ***(d) The supreme court shall establish by rule an expedited***
0808 ***judicial process which shall be used in the establishment of***
0809 ***support orders pursuant to K.S.A. 38-1101 et seq., 39-718a or***
0810 ***39-755 or K.S.A. 1984 Supp. 38-1542, 38-1543 or 38-1563, and***
0811 ***amendments thereto; the enforcement of any child support and***
0812 ***maintenance order; the modification of any child support order;***
0813 ***and the establishment and enforcement of support orders in***
0814 ***interstate cases pursuant to K.S.A. 23-451 et seq. and section 15***
0815 ***through 27, and amendments thereto.***
0816 ***Sec. 50. K.S.A. 60-1612 is hereby amended to read as fol-***
0817 ***lows: 60-1612. (a) If a party fails to comply with a provision of a***
0818 ***decree, temporary order or injunction issued under*** ~~this article~~
0819 ***K.S.A. 60-1601 et seq., the obligation of the other party to make***
0820 ***payments for support or maintenance or to permit visitation is***
0821 ***not suspended, but the other party may request by motion that***
0822 ***the court grant an appropriate order.***
0823 ***(b) Motions to modify visitation or custody in proceedings***

The enforcement of continuance and availability of visitation by the children with the noncustodial parent.

0824 *where support obligations are enforced under part D of title IV of*
0825 *the federal social security act (42 USC § 651 et seq.), as*
0826 *amended, shall be considered proceedings in connection with*
0827 *the administration of the title IV-D program for the sole pur-*
0828 *pose of disclosing information necessary to obtain service of*
0829 *process on the parent with physical custody of the child*~~.~~

To assure continued visitation, despite an out-of-state move by the custodial parent and children, an agreement shall be reached on how visitation for the child will continue including an adjustment of child support to compensate for additional costs of transportation for out-of-state visitation.

0830 Sec. ~~41~~ ***51***. K.S.A. 60-1613 is hereby amended to read as
0831 follows: 60-1613. ~~The court may order the person obligated to~~
0832 ~~pay support or maintenance to make an assignment of a part of~~
0833 ~~the person's periodic earnings or trust income to the person~~
0834 ~~entitled to receive the support or maintenance payments. The~~
0835 ~~assignment is~~ *(a) The provisions of section* ~~*2*~~ *3 shall apply to all*
0836 *orders of support issued under K.S.A. 60-1610 and amendments*
0837 *thereto.*
0838 *(b) Any assignment previously ordered under this section*
0839 *remains* binding on the employer, trustee or other payor of the
0840 earnings or income ~~two weeks after service upon the payor of~~
0841 ~~notice that the assignment has been made~~. The payor shall
0842 withhold from the earnings or trust income payable to the person
0843 obligated to support the amount specified in the assignment and
0844 shall transmit the payments to the district court trustee or the
0845 person specified in the order. The payor may withhold from the
0846 earnings or trust income payable to the person obliged to pay
0847 support an additional sum not exceeding $2 as reimbursement
0848 for expenses for each payment. An employer shall not discharge
0849 or otherwise discipline an employee as a result of an assignment
0850 ~~authorized by~~ *previously ordered under* this section.

(c) The obligee shall be held blameless and without recourse by the obligor, and none of the rights and responsibilities of the obligee shall be abridged or denied because of a failure by the employer to make proper, punctual or accurate payment of wage assigned payments.

0851 Sec. ~~42~~ ***52***. K.S.A. 60-2310 is hereby amended to read as
0852 follows: 60-2310. (a) *Definitions.* As used in this act and the acts
0853 of which this act is amendatory, unless the context otherwise
0854 requires, the following words and phrases shall have the mean-
0855 ings respectively ascribed to them:
0856 (1) "Earnings" means compensation paid or payable for per-
0857 sonal services, whether denominated as wages, salary, commis-
0858 sion, bonus or otherwise;
0859 (2) "disposable earnings" means that part of the earnings of
0860 any individual remaining after the deduction from such earnings

TESTIMONY OF

WILLIAM T. ABBOTT

HOUSE JUDICIARY COMMITTEE

SB 51

MARCH 25, 1985

I represent the Boeing Military Airplane Company in Wichita. We currently have approximately 17,500 employees at our plant.

I am appearing today to raise a concern about some sections of SB 51. Because of the complexity and size of the bill I will not go into much detail but I have attached a copy of an opinion rendered for the Boeing Company by our law firm. As you will note by the attached legal opinion, there are numerous paragraphs with which we have serious concerns. Concerns for the small employers that we rely on for our sub-contractors who don't have the sophisticated accounting systems and who could, therefore, be vulnerable to extreme penalities in case of administrative error.

Additional areas of concern that are not covered in the attachment which I would like to expand upon include Page 5, paragraph (g), lines 167 through 169. This language puts the employer in the position of a collection agency or check-off for payment at the employee's request without a court order. This should be deleted. Page 6, line 215, addresses the cost recovery fee of $2.00 which we feel is totally inadequate. Our company estimates it will cost at least $25 to process a withholding as stipulated in this bill. The cost recovery should be more representative of the actual cost.

Mr. Chairman, I respectfully suggest that action on the bill be deferred if possible. If not, consideration should be given to the points I have made.

Attachment No. 11
House Judiciary
March 25, 1985

FOULSTON, SIEFKIN, POWERS & EBERHARDT
LAW OFFICES
A PARTNERSHIP INCLUDING A PROFESSIONAL ASSOCIATION
700 FOURTH FINANCIAL CENTER
BROADWAY AT DOUGLAS
WICHITA, KANSAS 67202
(316) 267-6371
TELECOPIER: (316) 267-6345

COUNSEL
GEORGE B. POWERS

ROBERT C. FOULSTON (1889-1947)
GEORGE SIEFKIN (1895-1954)

JOHN F. EBERHARDT
ROBERT C. FOULSTON, P. A.
ROBERT N. PARTRIDGE
ROBERT M. SIEFKIN
RICHARD C. HARRIS
GERALD SAWATZKY
ROBERT L. HOWARD
CHARLES J. WOODIN
MIKEL L. STOUT
BENJAMIN C. LANGEL
JERRY G. ELLIOTT
WILLIAM H. DYE
PHILLIP S. FRICK
STANLEY G. ANDEEL
FREDERICK L. HAAG
RICHARD D. EWY
DARRELL L. WARTA
WILLIAM R. SAMPSON
HARVEY R. SORENSEN
MICHAEL KIM MOORE
JAMES M. ARMSTRONG
MARY KATHLEEN BABCOCK
CHARLES P. EFFLANDT
JAMES D. OLIVER
NICHOLAS S. DAILY
GARY L. AYERS
LINDA K. CONSTABLE
GLORIA G. FLENTJE
LARRY G. RAPP
R. DOUGLAS REAGAN
JEFFREY J. BRYANT
VAUGHN BURKHOLDER
TERRY C. CUPPS
NOLA TEDESCO FOULSTON
JAY F. FOWLER
JIM H. GOERING
DOUGLAS L. HANISCH
MICHAEL L. HAPPE
WYATT A. HOCH
CHRISTOPHER M. HURST
ROBERTA R. JOHNSON
STEPHEN M. KERWICK
GARY E. KNIGHT
AMY S. LEMLEY
LOREN J. LEMON
DAVID K. MARTIN
JOHN J. MURPHY
TIMOTHY B. MUSTAINE
TERESA J. ROLL
SUSAN L. SMITH
DOUGLAS L. STANLEY
M. KATHRYN WEBB
WYATT M. WRIGHT

March 13, 1985

Mr. Elvir Fay
Division Counsel
Boeing Military Airplane Company
Mail Stop K11-60
P. O. Box 7730
Wichita, Kansas 67277-7730

RE: Senate Bill No. 51

Dear Elvir:

At your request, we have reviewed Senate Bill No. 51 which is currently pending before the Kansas House. As discussed below, we have determined that the bill could impose significant burdens and risks on employers.

The primary means used by the bill to collect unpaid support obligations is wage withholdings. Under the bill, such withholdings impose significant affirmative duties on the employer. Initially, a major difference between this bill and current garnishment/withholding proceedings, is that the collection process under the bill imposes a continuing obligation on an employer until all arrearages are either paid or until a court orders an end to the withholding. § 4(d). Contrast this with current proceedings where the employer withholds for one pay period, answers, and is then freed from obligation unless another garnishment is served. The pending bill may continue ad infinitum for any current support payments due. Thus creating an ongoing payroll deduction for support payments.

This continuing obligation may be significant since the law is unclear as to which party has the burden to determine whether all amounts owed are paid. It may very well be that an employer's obligation to keep track of the amounts paid and any remaining balance withholding will place an employer at risk for any discrepancies which arise. This would entail significant recordkeeping expenses.

As currently set forth in the bill, the calculations as to the amount to be withheld are quite complex. See §§ 2(b), 3(b), 4(c), 4(h), 5(c). Again, the bill provides no clear statement as to who has the burden to make such calculations.

In addition to the ongoing and complex procedure of actual withholding, the bill imposes other affirmative obligations on the employer. The employer must provide an extensive, non-exclusive laundry list of information regarding its employee within seven days of a request from the support payment recipient or appropriate public office. § 4(a). The bill puts no limitations on when such a request can be made. Consequently, such requests could deluge the employer who would have no meaningful way to stem such a torrent. Additionally, the nonexclusive list of required disclosure includes items that may require time and expense to generate, e.g., itemized statement of deductions; health insurance coverage, etc.

The bill also requires the employer to promptly notify the party initiating the withholding order of the termination of the employee's employment and provide other background information. § 4(i). This obligation could result in serious consequences to an employer guilty of an administrative oversight.

§ 9(a) of the bill requires that the support recipient notify the payor and clerk of courts of any change of address, if the recipient is receiving income by withholding under the act. Thus, an employer may have to maintain obligee residence records. However, this provision appears in conflict with § 4(b), as currently amended, since the employer pays the withholding to the clerk of court or court trustee and not the support recipient.

A final complexity is in § 9(c) which requires the support recipient to report to the employer and clerk of court any other support payments received. Again, it appears that the employer is obligated to recalculate any arrearages in light of collateral support payments, and possibly modify the withholding amounts.

All the above matters may separately appear trivial, however, such trivality disappears in light of the bill's remedies and penalties. If a payor/employer intentionally violates "the provision of this act, the court shall order a judgment against the payor for the total amount that should have been withheld and paid over and may enter judgment against the payor to the extent of the total arrearage owed." § 4(k). Also an employer is subject to a civil penalty not greater than $5,000 and other equitable relief for intentionally discharging an employee because of a withholding order. Id. Finally, the above penalties are not exclusive. § 12. Consequently, an employer may be subject to other, undefined, liabilities and penalties.

All of the above procedures also apply to collection cases pursuant to part D of title IV of the federal social security act (42 U.S.C. § 651 et seq.). That act governs collection of support obligations arising in another jurisdiction.

Overall, we conclude that the present bill will impose significant administrative expenses substantially greater than the $2 permitted to be withheld. § 4(e). Gene Gentry estimates that current collection costs are $25 per matter. The current procedure appears simple in contrast to the proposed bill. Consequently, we predict a significant cost increase in handling support collection matters.

While collection and enforcement of support obligations is a laudable goal, we would urge that employers seek to have the burdensome provisions imposed on them removed from the proposed legislation.

Should you have any questions or comments, please contact me.

Very truly yours,

FOULSTON, SIEFKIN, POWERS &
EBERHARDT

By
Robert N. Partridge

RNP/mp

TO: RNP

FROM: LJL

S.B. 51 Ref.	RE: Differences Between K.S.A. 60-1613 & S.B. 51	
Sec. 3(e) pg. 4	(A) S.B. 51	clearly continuous and ongoing (current law is unclear).
Sec. 4(c) Pg. 5 & 6	(B) S.B. 51	likely to place burden on employer to make calculations on withholding amounts (current law requires withholding of an <u>amount specified</u> in the order).
Sec. 4(a) pg. 5	(C) S.B. 51	employer has affirmative duty re: information disclosure on employee (current law has no such requirements).
Sec. 4(i) pg. 6	(D) S.B. 51	employer has affirmative duty to notify court of employee termination (current law has no such requirement).
Sec. 4(i) pg. 6 & 7	(E) S.B. 51	may require employer to maintain support recipient's address files (current law has no such requirement).
Sec. 4(g) pg. 6	(F) S.B. 51	may require employer to recalculate withholding amounts reflecting other support payments received. (current law has no such requirement).
Sec. 4 (k) & (1) pg. 7	(G) S.B. 51	provides for fines and penalties for intentional failure to withhold and discharge of an employee as a result of the withholding (current law has no such provisions and only states an employer shall not discharge or discipline an employee as a result of an assignment).

In summary, additional obligations and responsibilities would be placed on employers and serious consequences would likely be imposed by courts enforcing them.

LJL/lc
03-15-85

Ladies and Gentlemen of the Committee:

My name is Judy Jolley. I am the Victim/Witness Coordinator for the Sixth Judicial District in Miami County, Kansas. In this capacity, I have to deal with many children. Some are witnesses, some are victims and some are both. Let me tell you about two of them. I will call them Jason and Mandy in order to protect their privacy.

Jason is an eight year old boy with blonde hair and blue eyes, and he is missing a couple of teeth. He has a bright smile and a cheery disposition. While other boys and girls on Halloween were going door to door "trick" or "treating", Jason was at home with his family: his mother, his stepfather, and his two older sisters. Jason's parents were arguing. That evening he was witness to not only an argument between his parents, but he got to see his stepfather take a butcher knife and stab his mother repeatedly. Jason got to hear his mother yell out in her pain, saw her life's blood flowing from her body, could hear her last screams, the gurgling of the blood in her throat. Jason did not go "trick" or "treating" that night, but got to see his stepfather stab his older sisters repeatedly, could hear their screams of fright and terror. Jason got to see one sister die trying to climb out the window. The other was kneeling as if to pray. Jason tried to hide. He pleaded for his life. His stepfather allowed him to sleep in the house with his dead family, and made Jason sleep with him. Jason was forced to commit acts of sodomy with him.

Jason has been diagnosed as having "Post Traumatic Shock Syndrome". His stepfather awaits trial. Jason is the only eyewitness.

He is afraid of his stepfather and doesn't want to ever see him again. Jason doesn't like to talk about these events. He's embarrased, he's shy, it humiliates him to talk about it. He has nightmares. At the funeral he expressed his feelings of helplessness to his dead sisters. At their open caskets he walked up to them and said "I'm sorry I couldn't help you, but I'm just a little boy".

Mandy is a six year old black girl. She has brilliant white teeth, a sunny disposition, and her hair is done in small, elegant little corn rows. Mandy's mother has to work, so Mandy spends a lot of time at the babysitter's. The babysitter's husband liked to play games with the children. He liked to be called "Grandpa". He liked to have the little girls play with his penis and lick his private parts, and in return, lick their private parts. Mandy knew that this was wrong. Mandy has a difficult time sleeping now. She has dreams. She wets the bed. She cannot communicate why she is having dreams. Something was taken from Mandy. Each time she has to tell this, more of her self esteem is taken away. Her mother suffered unnecessary agony in seeing her daughter compelled to testify in front of strangers about these perverted sexual acts and the man who forced her into performing them. In her humiliation, Mandy ran from the courtroom.

I have come to tell you about these two children to give you the perspective of the child victims and witnesses. The absolute terror that they have gone through in their lives is relived every time they have to retell it.

Do we need to terrorize them any further? Is that the purpose of our system of justice? They have been victims once. Do we intend to make them victims again? I urge you to enact Senate Bill 167 to afford some small amount of protection. Intimidation of children witnesses by lawyers and defendants should not be tolerated.

Thank you.

TO THE HOUSE JUDICIARY COMMITTEE:

TESTIMONY
STEPHEN D. HILL
DISTRICT JUDGE
SIXTH JUDICIAL DISTRICT

RE: SENATE BILL NO. 167

MARCH 25, 1985

TO THE MEMBERS OF THE COMMITTEE:

Ladies and Gentlemen of the Committee. My name is Stephen D. Hill. I am the District Judge of the Sixth Judicial District. I have come here today to speak with you concerning Senate Bill No. 167. It is my recommendation to you that this bill be passed out with a recommendation that the entire House enact the same. It is my sincere feeling and belief that if this bill becomes the law of the State of Kansas, we will provide a decree of protection for young children who are victims and who, because of our system of justice, must become witnesses.

As you know, trials have evolved over the last several hundred years of judicial experience. Our system of justice can trace its roots directly to the Anglo Saxon system of justice. Trials in those days were nothing like they are now. It was often the case in those times for an accused to be handed a red-hot iron ball. It was the belief that if he could hold that iron ball in his bare hands and not be burned that he was innocent. Of course, if he was burned it proved to his triers that he was guilty and he was, therefor, executed. Or later in time, defendants were bound hand and foot, thrown into the moat. If they floated, they were guilty and were executed. If they sank and drowned, they were innocent. Not many people wanted to go to trial.

Later developed one of the most horrid of English institutions, the Court of Star Chamber. In that Court, the accused did not know who his accusers were. Did not know what their accusations were. The defendant could never present a defense if he did not know what crime with which he was charged or upon what fact his accusers substantiated that charge. I believe that it was the Court of Star Chamber that the framers of our Constitution had in mind when they insured our right to confront and cross examine witnesses. That has long been one of our most zealously guarded constitutional rights.

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I do not believe that Senate Bill No. 167 will infringe on an accused's right to confrontation of a witness. Ladies and Gentlemen of the Committee, we now have the technology to allow our trials to evolve one step further. The defendant, under Senate Bill No. 167, can see his accuser, can hear his words, can have his counsel examine his testimony. Under the provisions of SB No. 167, the trier of fact can see the defendant's reaction to the accusations made by the witness, can hear the testimony of the accuser, can hear the cross examination. Trials are a search for the truth. SB 167 will in no way hinder that search for the truth but would rather enhance it, for now, with its provisions and safeguards, young children will give their testimony more freely and easily than ever before. It would then be up to the trier of fact to weigh that evidence, to give it whatever credit it should be given, free from any emotional demonstration from the witness stand.

As I said before, trials are a search for the truth. They are not drama. Law necessarily changes. In a democratic society it springs from the society it is enacted to protect. We have many, many young children who are victims and who are witnesses. They need some protection.

The two cases which Mrs. Jolley has testified about occurred in my courtroom. While it is my belief that the Court has the inherent authority to control it's courtroom, there is no doubt that enactment of Senate Bill No. 167 would dispel all doubts about the authority of the Courts and what may be allowed and what may not. As you know, not all Judges agree as to what the law is. Your passage of Senate Bill No. 167 will protect countless victims, some of which are not yet born. I ask you to give this bill serious consideration.

Thank you very much for allowing me to testify and if you have any questions, I'll do my best to answer them.

Association of Community Mental Health Centers of Kansas

820 Quincy, Suite 416/Topeka, Kansas 66612/913 234-4773

Paul M. Klotz, Executive Director

Judiciary Committee　　　　　　　　Chair: Joe Knopp

RE: S.B. 167

The Association of Community Mental Health Centers of Kansas supports Senate Bill 167 as written.

We believe this bill would decrease the trauma experienced by a child. It would certainly, when applicable as the bill is written, avoid a need for a child to relate the incident many times over.

-/-/-

Attachment No. 14
House Judiciary
March 25, 1985

Larry W. Nikkel
President

Dwight Young
President Elect

Paul Thomas
Vice President

Clinton D. Willsie
Past President

Michael L. Taylor
Treasurer

Steven J. Solomon
Secretary

Harriet Griffith
Bd. Mem. at Large

RON SMITH
Legislative Counsel

SB 167
House Judiciary Committee
March 25, 1985

Mr. Chairman. Members of the committee. My name is Ron Smith. I am Legislative Counsel for the Kansas Bar Association.

The Kansas Bar Association represents 4,200 of the state's 5,800 attorneys. Our attorney-members are in every county, practice all types of law, represent both plaintiffs and defendants. Their common bond is they want a good legal system within which they can help Kansas citizens with their problems.

Our legislative policies are considered by the Legislative Committee of the KBA, which makes recommendations to the Executive Council. The Council consists of 21 lawyers from across the state. Ten members are elected by geographic districts. Our Executive Council includes members of the Judiciary.

I believe SB 167 represents at least part of the future in the law. Our profession has been described as the last of the cottage industries. We require court appearances for witnesses, unless they are dead or can't be found, and then we sometimes preserve their testimony with depositions.

The use of videotaped testimony--whether for children or not--is an important new technique in preserving evidentiary

testimony.

SB 167 is the tip of a rather large high-tech iceberg that is slowly finding its way into the law and courtroom procedures. In my opinion, it will be a beneficial iceberg.

Videotaping evidence

KBA has no official position on this legislation. We did offer some suggested amendments to the bill on the Senate side which were incorporated into the bill. This bill as drafted speaks to a problem in the law, and some important constitutional criminal law concepts.

The Sixth Amendment gives people accused of crime the right to confront their accuser, and cross-examine. The Sixth Amendment is not absolute with regard to excluding all hearsay statements. (Pointer v. Texas, 380 U.S. 400, 1964; Dutton v. Evans, 400 U.S. 74, 1970)

Testimony of Children

Kansas courts have allowed very young children to testify in criminal cases. This bill will not change that fact. Our law requires a few preliminaries, however.

The person making the statement must first be a competent

witness. The statutory requirement to be a witness is that (1) a witness be able to express themselves and be understood by the jury, and (2) understand the duty of a witness to tell the truth. (K.S.A. 60-417).

Using this law, Kansas courts have allowed testimony of a 4-year-old through hearsay statements made to the Mother, under the contemporaneous statements exception to the hearsay rule. (State v. Rodriquez, 8 K.A. 2d 353, a 1983 indecent liberties with a child case). This exception states:

> "A statement which the judge finds was made (1) while the declarant (child) was perceiving the event or condition which the statement narrates, describes or explains, (2) while the declarant was under the stress of a nervous excitement caused by such perception or (3) if the declarant is unavailable as a witness, by the declarant at the time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort." [KSA 60-460(d)]

There are other problems associated with children as witnesses. One is recall of the events, and that is part of what this law tries to get at. An adult can give a statement and sign the transcription. That statement can be used later to refresh the adult's memory as to what happened. The young child can't read or write. How to refresh a young witness' memory without "coaching" is a very real problem for prosecutors.

This bill attempts to help that problem, preserve relevant testimony yet preserve fundamental rights to confrontation demanded by the Sixth Amendment to the Constitution.

I've included a copy of a New Jersey case, State v. Sheppard. It is a long case, but one which sets out all the legal arguments for the Right of the accused to confront witnesses, and the special problems that creates with child witnesses. The case was based on a motion by the prosecution to allow it to present evidence from a 10-year-old child out of the presence of the defendant. It discusses all the issues concerning this legislation, and if you can find the time to read it I think it will answer many of your questions about this delicate issue.

Attorney General Stephen indicates in his opinion that the bill is constitutional.

Thank you.

197 N.J.Super. 411

STATE of New Jersey, Plaintiff,

v.

George R. SHEPPARD, Defendant.

Superior Court of New Jersey,
Law Division (Criminal),
Burlington County.

Decided Aug. 29, 1984.

In prosecution of defendant for sexual assault, engaging in sexual conduct which would impair or debauch morals of a child, and child abuse, State moved for permission to present testimony of ten-year-old victim through use of video equipment, and defendant objected, claiming his right of confrontation would be violated by the procedure. The Superior Court, Law Division, Burlington County, Haines, A.J.S.C., held that: (1) use of videotape testimony of child victim would be permitted, and (2) defendant waived his right of confrontation by making threats to victim.

Motion to present testimony of child victim of sexual assault through use of video equipment granted.

1. Criminal Law ⇐662.1

Confrontation clause declares a fundamental right to which the states are subject by reason of the Fourteenth Amendment. U.S.C.A. Const.Amends. 6, 14.

2. Criminal Law ⇐662.1

Constitutional right of confrontation is not absolute. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐438(8)

Videotape records fall within definition of "writing" in the rules of evidence, for purposes of determining whether videotapes are admissible in evidence. Rules of Evid., N.J.S.A. 2A:84A, Rule 1(13).

See publication Words and Phrases for other judicial constructions and definitions.

4. Criminal Law ⇐662.3, 667(1)

In determining whether to allow testimony of ten-year-old sexual assault victim to be presented through use of video equipment, court must weigh great harm to victims of child abuse, inability to prosecute child abusers because evidence against them cannot be presented, and damage to children by traumatic role in testifying in court against defendant's right of confrontation. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐662.3, 667(1)

Child victim would be allowed to testify through use of video equipment in prosecution for sexual assault, engaging in sexual conduct which would impair or debauch the morals of a child and child abuse, despite resulting lack of eye contact between witness and defendant and defendant's claim of a confrontation clause violation, where defendant, judge, jury and spectators would see and hear the child clearly, where adequate opportunity for cross-examination would be provided, and in view of court's finding of harm to child if she was required to testify in court; disagreeing with *U.S. v. Benfield*, 593 F.2d 815. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, § 10.

6. Criminal Law ⇐662.7

Confrontation clause's central purpose is provision of the opportunity for cross-examination. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, § 10.

7. Witnesses ⇐268(1)

Like the right of confrontation, the right of cross-examination is not without limitations. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, § 10.

8. **Criminal Law** ⇐662.80

A defendant may waive his Sixth Amendment right of confrontation. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, § 10.

9. **Criminal Law** ⇐777

Evidence rule, providing that if a judge admits a statement, he shall not inform the jury that he has made a finding that the statement is admissible, and he shall instruct the jury that they are to disregard the statement if they find it is not credible, but if the judge subsequently determines that the statement is not admissible, he shall take appropriate action, is applicable only when statement concerned is a statement which is intended to be introduced at trial. Rules of Evid., N.J.S.A. 2A:84A, Rule 8(1, 3).

10. **Criminal Law** ⇐632(5)

Rule of evidence, providing that if a judge admits a statement he shall not inform jury that he has made a finding that the statement is admissible, and shall instruct jury that they are to disregard statement if they find it not credible, but if judge subsequently determines from all evidence that statement is not admissible he shall take appropriate action, did not apply to admissibility of psychiatrist's testimony at pretrial hearing regarding threats sexual assault defendant allegedly made to child victim, for purposes of determining whether victim's videotape testimony would be admissible without consideration of defendant's right to confrontation. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, § 10; Rules of Evid., N.J.S.A. 2A:84A, Rule 8(1, 3).

11. **Criminal Law** ⇐667(1)

Psychiatrist's testimony regarding defendant's threat to kill child victim was admissible at pretrial hearing in prosecution for sexual assault, engaging in sexual conduct which would impair or debauch morals of a child, and child abuse for purposes of determining whether defendant waived his right to confrontation by reason of such threats, and thus, whether victim would be able to testify through use of video equipment. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, § 10.

12. **Criminal Law** ⇐662.80

Standard for determining whether a defendant waived his right to confrontation by threatening a victim is preponderance of the evidence. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, § 10.

13. **Criminal Law** ⇐662.80

In prosecution for sexual assault, engaging in sexual conduct which would impair or debauch morals of a child, and child abuse, the state supported with sufficient evidence its claim that defendant waived his right to confrontation by threatening to kill the child victim, despite fact that evidence of defendant's threat to kill victim was hearsay consisting of victim's statement to a psychiatrist and repeated by him at a pretrial hearing, where child's statement to the psychiatrist was made in a setting of confidence, and was not made because child knew that her statement could effect a waiver of the confrontation clause; under the circumstances, defendant waived his right to confrontation with the child victim, and victim's testifying through use of videotape equipment was permissible. U.S.C.A. Const.Amend. 6; N.J.S.A. Const. Art. 1, § 10.

Lily Oeffler, Mount Holly, for plaintiff (Stephen G. Raymond, Burlington County Pros. Atty.).

Robert Sloan, Mount Holly, for defendant (James Logan, Jr., Mount Holly, attorney).

HAINES, A.J.S.C.

Defendant, George R. Sheppard, has been indicted for sexual assault, engaging in sexual conduct which would impair or debauch the morals of a child and child abuse. The State now moves for permission to present the testimony of the ten-year-old victim, defendant's stepdaughter, through the use of video equipment. De-

fendant objects, claiming his right of confrontation, guaranteed by the Sixth Amendment of the *United States Constitution* and Art. 1, par. 10 of the *New Jersey Constitution* (1947), will be violated by the procedure. The question has not been addressed in the published opinion of any court in this State.[1]

The State proposes to place the child, the prosecuting attorney, defense counsel, and a cameraman in a room near the courtroom at the time of trial. The room will be equipped with video and audio systems. The judge, jury, and defendant will be in the courtroom. The child will testify as though sitting in the courtroom, responding to questions from the prosecutor and the defense attorney. Defendant, the judge, the jury, and the public will see and hear her testimony through monitors placed appropriately in the courtroom. Private communication between defendant and his attorney will be available through an audio connection.

A hearing was held, in response to the State's application, at which witnesses for the State testified and were cross-examined. Defendant, who was present, represented by counsel and provided with notice and an opportunity to be heard, did not introduce any evidence.

Robert L. Sadoff, a forensic psychiatrist with substantial credentials relating to trial proceedings as well as medical matters, was the first witness. He interviewed the child victim for the purpose of testifying at the hearing. She revealed frequent incidents of sexual abuse by her stepfather beginning when she was only three or four-years old. She told him she would be able to testify in open court facing the defendant. Her willingness, however, was based upon a misconception. She was afraid of her stepfather, who had threatened to kill her if she revealed his activities, and therefore wanted to send him to jail for her protection. She believed that he could not be sentenced to jail if she testified through the use of videotape equipment. When advised otherwise, she expressed a preference for a video arrangement.

Doctor Sadoff said the victim had the capacity to testify truthfully. It was his opinion, however, that avoidance of an in-court appearance through the use of video equipment would improve the accuracy of her testimony. He provided reasons: An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of a black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She becomes fearful, guilty, anxious, and traumatized. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.

In his opinion, the child was well-oriented, with a sound memory and no evidence of psychotic-thought disorder, hallucinations or delusions. She currently receives group and individual counseling. Probable long-range emotional consequences resulting from her in-court testimony would be the continued presence of fear, guilt, and anxiety. The testimonial experience is itself traumatic and likely to be long remembered. Possible long-term effects of her testimony in court would be nightmares,

1. It has been addressed by Judge Edwin H. Stern in a New Jersey murder case. He permitted the use of video equipment in that case, stating his reasons from the bench. The transcript of his opinion has been supplied to counsel and the court.

depression, eating, sleeping, and school problems, behavioral difficulties, including "acting out," and sexual promiscuity. The psychiatric goal in these cases is to provide appropriate treatment of the offender and strong support for the child to the end that the family can be reunited. The prospect of reaching this goal will be much inhibited by face-to-face testimony.

Two attorneys with substantial experience in the prosecution of child abuse cases testified to the difficulties attending the presentation of children's testimony. In most cases, prosecutions are abandoned or result in generous plea agreements, either because the child's emotional condition prevents her from testifying or makes the testimony obviously inaccurate or inadequate. One attorney, who had handled 30 to 40 of these cases for the State, was able to complete a trial in only one. In most, while the child victim was able to provide her with information sufficient to support a prosecution and was sometimes able to appear with difficulty before a grand jury, she could not testify in court face-to-face with the accused and other relatives. The victim either refused to testify or "froze" when she got to court. Children who did testify, *e.g.*, before a grand jury, frequently "forgot" details, changed stories, or presented inconsistent facts. Ultimately, many broke down, cried, ignored questions and eventually refused to answer. Most of the victims involved in these cases were being treated by counsellors who frequently advanced the opinion that their child patients could not survive the trauma attending a courtroom appearance.

The second attorney, a member of a "charge" committee in the prosecutor's office, had reviewed 75 to 80 cases of child abuse. His committee was responsible for double-checking cases which the prosecutor believed would have to be dismissed for various reasons. Nearly 90% of the child abuse cases were dismissed as a result of problems attending the testimony of children, who could not deal with the prospect of facing fathers, stepfathers, relatives, and strangers in a courtroom setting. He described three child abuse cases which illustrated the problems.

(1) A child was the victim of a stranger's sexual molestation at age 12. The facts did not become known to the prosecutor (often the case) until she was 17. The case was dismissed on the basis of psychiatric advice that the child could not testify without having a total emotional breakdown. The child's approach to emotional survival, typically, had been to forget, forget, forget. Reinforcing her memory of this traumatic event would have been devasting.

(2) A seven-year-old boy was abused by a friend. He was precocious and articulate when speaking to the prosecuting attorney. When presented to the grand jury, the presence of many people made him hesitant, forgetful, and inconsistent. Shortly afterward, for unknown reasons, he and his family moved to Italy and the matter was resolved by a plea agreement.

(3) A father was charged with sexually abusing his daughter. The child found it very difficult to articulate the facts, and refused to discuss them with anyone except the prosecuting attorney. The complaint was therefore dismissed; the necessary facts could not be presented to a grand jury.

The final witness was a video expert. He testified that the video equipment to be used at the trial of this matter would provide instant transmission of images and voices from a remote room to the courtroom, providing more than acceptable clarity. Both video and audio would be taped to preserve the record of the child's testimony. Images could be presented in black and white or color. In the present case, color will be used. Special lighting is not

necessary. Although bright lights improve color presentation, they will not be required in this case. Monitors (picture screens with sound capacities) will be connected to the camera and placed in the courtroom. A zoom lens will be available for close-ups of the witness. The witness and both attorneys can be photographed simultaneously without difficulty.

An in-court demonstration was provided by the expert using the video equipment to be employed at trial in a conference room adjoining the courtroom. Two attorneys acted as witness and prosecutor. A monitor with a 25" screen faced the judge. The use of the zoom lens was illustrated. A well-defined picture appeared on the monitor; when the zoom lens was used, facial details were provided with great clarity. The testimony was distinct and easily understood. The color was satisfactory although no special lighting was used. The video expert testified that audio communication between the defendant and his attorney would be provided through wireless devices or a hard wire connection. Two-way communication from the judge to the conference room could also be provided.

It is the court's conclusion that the planned video arrangement for presenting the testimony of the child victim satisfies constitutional requirements. It will be allowed. That conclusion is supported by the following extended analysis.

A. The Dimensions of the Problem; Trial Effects; Social Responsibility.

According to an extensive article appearing in *Newsweek* (May 14, 1984), "somewhere between 100,000 and 500,000 American children will be [sexually] molested this year." The same article refers to a study "showing that 19% of all American women and 9% of all men were sexually victimized as children." According to the State's witnesses in this matter, the Burlington County Prosecutor's Office interviews seven to eight children a month in connection with sexual-abuse cases. The *Newsweek* article discusses the difficulties involved when these cases reach court, pointing to many of the problems mentioned by the State's witnesses. Children and relatives are ashamed and afraid. There is anxiety about the future of the child and the family. In many cases the abuser contributes all or most of their financial support. Counselors who believe that rehabilitation and the consequent preservation of family unity and security are possible, advise against prosecution.

For obvious reasons, only one witness with personal knowledge is available to prove the State's case in almost every child abuse prosecution: the child victim. These victims, as shown by the State's proofs, have been traumatized by their subjection to the abuse. They become so further traumatized by the prospect of testifying in front of their abusers that they cannot speak about the central happenings or can do so only with great difficulty and doubtful accuracy. The in-court experience may cause further lasting emotional harm. Writers in the field bear this out. Libai, "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System," 15 *Wayne L.Rev.* 977 (1969), has this to say:

> Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: repeated interrogations and cross-examination, facing the accused again, the official atmosphere in court, the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony, and the conviction of a molester who is the child's parent or relative. [at 984]
>
> . . . .

The fact is that psychiatrists all over the world repeatedly warn that 'legal proceedings are not geared to protect the

victim's emotions and may be exceptionally traumatic.' The studies do not as yet demonstrate a clear causal link between the legal proceedings and the child victim's mental disturbances, but no psychiatric study has attempted to prove, or is likely to attempt to prove in the future, such a causal link. Psychiatrists agree that they cannot isolate the effects of the 'crime trauma' from the *'prior personality damage'* or either of the foregoing from the *'environment reaction trauma'* or the *'legal process trauma.'* But psychiatrists do agree that when some victims encounter the law enforcement system, for one reason or another, the child requires special care and treatment. [at 1015]

Libai points to a study comparing a "court sample" of child victims involved in criminal proceedings with a random sample of such victims, which "found that 73% of the court sample had behavior problems and over-disturbances compared with only 57% of the random sample." At 982.

Another article entitled, "Proving Parent-Child Incest," 15 *U. of Mich. Journal of Law Reform* 131 (Fall 1981), by Ordway, addresses the need to find a better way to present children's testimony in sexual abuse cases because of the human and social costs involved:

> Our system of justice manifests a concern with human costs at many levels. The eighth amendment prohibits cruel and unusual punishment, and prisons, despite their problems, attempt to provide for more than mere physical survival. Bankruptcy procedures protect enough of the assets to cover necessaries. Tort law struggles to develop a fair system for compensating victims' loss of companionship and mental distress. Most pertinent here are the informal procedures and the 'best interest' standards of the juvenile/family courts.
>
> Furthermore, it is as sensible to establish an exception to protect the incest victim from trauma as it is to protect the taxpayer from expenditure and the accused from delay. The only difference between the first and the latter two harms is the value at risk. In light of the fact that money and time have recognizable value only in relation to human needs and values, the cost in harm to a person must be valued at least as highly as money and time. [at 148, n. 78]

New Jersey is sensitive to the needs of juveniles and to their problems. Its system of juvenile courts, culminating in the recent creation of the Family Division of the Superior Court, has always been devoted to the "best interest" of the juvenile. Judicial responsibility in juvenile matters is described in *Sorentino v. Family & Children's Soc. of Elizabeth*, 72 *N.J.* 127, 367 *A.*2d 1168 (1976), a custody case. The Supreme Court said:

> The court cannot evade its responsibility, as *parens patriae* of all minor children, to preserve them from harm. The possibility of serious psychological harm to the child in this case transcends all other issues. [at 132, 367 *A.*2d 1168; citations omitted]

Unfortunately, this all-encompassing concern for the welfare of children has not been directed toward their protection in our courts when they are obliged to testify as victims of abuse.

Testimonial problems are being addressed in other states in various ways. In California, for example, preliminary hearings may be videotaped and the taped testimony presented at a later trial. *Cal.Penal Code* § 1346 (West 1984). The arrangement, however, does not resolve the problems of fear, anxiety, and trauma affecting the child witness. She is still subjected to a face-to-face confrontation at the preliminary hearing.

Some states permit hearsay testimony, *e.g.*, by a counsellor, to avoid the presentation of a child witness. Videotaping arrangements are authorized in some juris-

dictions. Libai, *op. cit., supra,* recommends the use of a two-way glass enclosure in the courtroom which would permit a child witness to be observed by everyone in the courtroom while she remained unconscious of their presence. Statutory provisions in addition to California which illustrates the varied approaches are as follows:

(1) *Arizona*

Permits videotaped testimony of a minor witness in the presence of the court, the defendant, defendant's counsel, the prosecuting attorney or plaintiff and plaintiff's counsel for presentation to the jury at a later time as evidence. *Ariz.Rev.Stat.Ann.* § 12-2312 (1982)

(2) *Florida*

Upon application to the court on notice to the defendant and proof of a substantial likelihood that a child abuse victim will suffer severe emotional or mental strain if required to testify in open court, her out-of-court testimony may be videotaped for use as evidence. A trial judge must preside at the videotape session and shall rule on all questions as if at trial. (No mention is made of confrontation.) *Fla.Stat.Ann.* § 918.17 (West 1984)

(3) *Montana*

Videotaped testimony of a child victim is permissible as evidence even though the victim is not in the courtroom when the videotape is admitted into evidence. The judge, prosecuting attorney, victim, defendant, defendant's attorney, and such other persons as the court deems necessary shall be allowed to attend the videotaped proceedings. *Mont.Code Ann.* § 46-15-401 (1983)

(4) *New Hampshire*

In cases where the victim is under 16 years of age, the victim's testimony shall be heard in-camera unless good cause is shown by the defendant. The record of the victim's testimony is not to be sealed and all other testimony and evidence produced during the proceeding shall be public. *N.H.Rev.Stat.Ann.* § 632-A:8 (1983).

(5) *New Mexico*

Upon a showing that a child victim may be unable to testify without suffering unreasonable and unnecessary emotional or mental harm, out-of-court videotaping of her testimony is permitted. (No mention of confrontation.) *N.M.Stat.Ann.* § 30-9-17 (1982).

(6) *Colorado*

An out-of-court statement made by a child describing any act of sexual contact performed with that child which is otherwise inadmissible as evidence, is admissible in criminal proceedings in which the child is the victim of an unlawful sexual offense. The court must find that the statement is reliable and the child must either testify at the proceeding or be unavailable. *Colo.Rev.Stat.* § 13-25-129 (1983).

(7) *Washington*

Same as Colorado's statute except that, when the child is unavailable, there must be other corroborative evidence of the act.

(8) *Texas*

The "visual and aural" recording of the pretrial statement of a child is admissible at trial if no attorney for either party is present when the statement was made and the child is available to testify. Other conditions are listed. If the statement is admitted into evidence, either party may call the child to testify and the opposing party may cross-examine. Statute also permits testimony of a child by closed-circuit television from a room outside the courtroom. "The court shall permit the defendant to observe and hear the testimony of the child in person but shall ensure that the child cannot hear or see the defendant." In addition, statute permits a like arrangement for recording the child's testimony before trial and its later showing in court. *Tex.Crim.Proc.Code Ann.* § 38.071 (Vernon 1983).

Texas appears to be the only state with a complete statutory solution to the confron-

tation problem. Colorado and Washington offer partial solutions since the admission of a "statement" is obviously much less satisfactory than the presentation of all of a child's testimony by videotape.

B. The Right of Confrontation: Physical Presence.

[1] The defendant claims that the proposed video presentation of testimony violates his constitutional right of confrontation. It is his reading of our constitutions that they entitle him to confront every witness against him in person in court. The Sixth Amendment to the *Constitution of the United States* provides in part: "in all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." Art. 1, par. 10, of the *New Jersey Constitution* (1947) provides: "in all criminal prosecutions the accused shall have the right ... to be confronted with the witnesses against him...." The confrontation clause is held to be a fundamental right to which the states are subject by reason of the Fourteenth Amendment. *Pointer v. Texas*, 380 *U.S.* 400, 403–405, 85 *S.Ct.* 1065, 1067–1069, 13 *L.Ed.*2d 923 (1965); *State v. Williams*, 182 *N.J.Super.* 427, 434, 442 *A.*2d 620 (App.Div.1982).

U.S. v. Benfield, 593 *F.*2d 815 (8 Cir. 1979), provides some support for the defendant's position. In that case, after a videotaped deposition of the victim was admitted into evidence, the defendant was convicted of misprison of felony for failing to report an abduction by others. The victim testified by deposition because she feared psychological harm, if forced to confront the defendant in court. During the deposition the defendant could observe the victim through a one-way glass. He could reach his attorney, who was present while the witness was deposed, through an audio device. He appealed his conviction, arguing that his confrontation was only partial and did not satisfy the Sixth Amendment. The appellate court agreed, stating:

> Normally the right of confrontation includes a face-to-face meeting at trial at which time cross-examination takes place.... While some recent cases use other language, none denies that confrontation required a face-to-face meeting in 1791 and none lessens the force of the sixth amendment. Of course, confrontation requires cross-examination in addition to a face-to-face meeting. The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity and communication are influenced by face-to-face challenge. This feature is a part of the sixth amendment right additional to the right of cold, logical cross-examination by one's counsel. While a deposition necessarily eliminates a face-to-face meeting between witness and jury, we find no justification for further abridgment of the defendant's rights. A videotaped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm. [at 821]

Benfield, however, is distinguishable. It concerned a deposition. The jury was not present to see and hear the actual testimony. The victim was an adult, not a child, as here. The charge did not involve sexual abuse. Furthermore, *Benfield* recognized the possibility of exceptions to the right of confrontation, saying: "what curtailment or diminishment might be constitutionally permissible depends on the factual context of each case, including the defendant's conduct ... Any exception should be narrow in scope and based on necessity or waiver." *Ibid.* Indeed, the court acknowledged:

> It is possible that face-to-face confrontation through two-way closed circuit television might be adequate. By a four to three vote, the Missouri Supreme Court has approved the use of such testi-

mony by an expert witness in a case involving violation of a municipal ordinance, despite a defense based on the sixth amendment. *Kansas City v. McCoy,* 525 *S.W.*2d 336 (Mo.1975). Among the more disturbing aspects of the decision is that there was no showing of extraordinary circumstances necessitating reliance on the procedure. [*Id.* at 822]

Defendant may obtain some comfort from *Herbert v. Superior Court of the State of California,* 172 *Cal.Rptr.* 850, 117 *Cal.App.*3d 661 (Dist.Ct.App.1981). Defendant in that case was charged with sexual offenses involving a five-year-old girl. At a preliminary examination, she was reluctant or unable to testify and was therefore so positioned in the courtroom that she and the defendant could not see each other. The defendant could hear her testimony. She could be seen by the judge and the attorneys. The court held that the arrangement violated the defendant's right of confrontation, citing *Benfield.* It said:

> The historical concept of the right of confrontation has included the right to see one's accused face-to-face, thereby giving the fact finder the opportunity of weighing the demeanor of the accused when forced to make his or her accusation before the one person who knows if the witness is truthful. [172 *Cal.Rptr.* at 855, 117 *Cal.App.*3d at 671]

Herbert is closer to the point than *Benfield.* Nevertheless, it is also distinguishable. Here, the defendant will be able to see the witness; there he could not. The *Herbert* court recognized the fact that "[t]he confrontation right is not absolute," 172 *Cal.Rptr.* at 853, 117 *Cal.App.*3d at 667, but found no room for an exception on the facts of that case. Its final conclusion was motivated in part by the fact that there was no record showing that the child's conduct required the arrangement, no record of any intimidating action by defendant, no oath taken by the victim and no request from defendant or the prosecutor to make a special arrangement. 172 *Cal.Rptr.* at 855, 117 *Cal.App.*3d at 670. Here we have a record of the child's concerns, supported by the opinion of a psychiatrist who believed that emotional damage could be caused by in-court testimony. There has been a request by the prosecutor for the video arrangement. The witness will be sworn before she testifies. *Herbert* considered neither a video technique nor the special problems of child witnesses.

Additionally, doubt may be cast upon the *Herbert* conclusion by *Parisi v. Superior Court of the State of California for the County of Los Angeles,* 192 *Cal.Rptr.* 486, 144 *Cal.App.*3d 211 (Dist.Ct.App.1983). Defendant in that case was charged with sexual abuse of his eight-year-old daughter. The child appeared as a witness at the preliminary examination but became embarrassed and could not answer questions out loud. She was therefore permitted to whisper her answers to the magistrate conducting the hearing who repeated them on the record. Defendant argued that his rights of confrontation and cross-examination were impermissibly infringed by this procedure. The court, disagreeing, said:

> It is the responsibility of every court to conduct its proceedings in such a manner that the truth will be established and it is its duty to render assistance whenever such aid is needed.
>
> In the case at bar, because of her fear and discomfort, a young victim of sexual crimes committed by her father was too embarrassed to articulate aloud answers to two most intimate questions. Under such circumstances, it was not improper for the magistrate to intervene in order to help elicit her testimony. In essence, the court did but act as a "loud speaker" for a child temporarily rendered mute. [at 192 *Cal.Rptr.* 490; citations omitted]

The Court distinguished *Herbert* noting that the *Parisi* defendant was able to see the witness.

[2] As *Benfield, Herbert,* and *Parisi* all acknowledged, the right of confrontation is not absolute. *Benfield* and *Herbert* do not control the issue in the present case. Other cases and other reasons compel the conclusion here that the proposed video presentation will not offend any constitutional demands.

As early as 1895, the United States Supreme Court held that the right of confrontation "must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. U.S.,* 156 *U.S.* 237, 243, 15 *S.Ct.* 337, 340, 39 *L.Ed.* 409 (1895). In *Mattox,* witnesses died and were consequently unavailable[2] at the time of trial. Their prior testimony was admitted into evidence. The Supreme Court held this to be permissible, saying:

> A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant. [156 *U.S.* at 243, 15 *S.Ct.* at 340]

In 1980, in *Ohio v. Roberts,* 448 *U.S.* 56, 100 *S.Ct.* 2531, 65 *L.Ed.*2d 597 (1980), the Court said:

> [T]he Confrontation Clause reflects a preference for face-to-face confrontation at trial and that "a primary interest secured by [the provision] is the right to cross-examination." *Douglas v. Alabama,* 380 *U.S.* 415, 418 [85 *S.Ct.* 1074, 1076, 13 *L.Ed.*2d 934] (1965)
>
> The Court, however, has recognized that competing interests, if closely examined, may warrant dispensing with confrontation at trial. [448 *U.S.* at 63–64, 100 *S.Ct.* at 2537–2538]

In *California v. Green,* 399 *U.S.* 149, 90 *S.Ct.* 1930, 26 *L.Ed.*2d 489 (1970), Harlan, J. concurring, said: The belief that the rights of confrontation and cross-examination are co-extensive is "an understandable misconception." *Id.* at 172–173, 90 *S.Ct.* at 1942–1943.

Earlier, in *Douglas v. Alabama,* 380 *U.S.* 415, 85 *S.Ct.* 1074, 13 *L.Ed.*2d 934 (1965), the Court held:

> Our cases construing the clause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation. [380 *U.S.* at 418, 85 *S.Ct.* at 1076]

In *United States v. Tortora,* 464 *F.*2d 1202 (2 Cir.1972), *cert. den.* 409 *U.S.* 1063, 93 *S.Ct.* 554, 34 *L.Ed.*2d 516 (1972), the voluntary failure of a defendant to appear in court was held to waive his right of confrontation. In *United States v. Toliver,* 541 *F.*2d 958 (2 Cir.1976), an asthmatic defendant was absent during several days of trial while prosecution witnesses testified. The court nevertheless held that such testimony, while violating the confrontation clause, was not sufficiently probative of the defendant's guilt to constitute reversible error. In *Dutton v. Evans,* 400 *U.S.* 74, 91 *S.Ct.* 210, 27 *L.Ed.*2d 213 (1970), the Court permitted introduction of an out-of-court statement, holding that there was no violation of the confrontation clause because the testimony had other "indicia of reliability," was of "peripheral significance" and was not "crucial" to the prosecution or "devasting" to the defendant. *Id.* at 87, 91 *S.Ct.* at 219.

5 *Wigmore, Evidence* (Chadbourne Rev. 1974) § 1365, discusses the distinction between confrontation and cross-examination:

> Now confrontation is, in its main aspect, *merely another term for the test of cross-examination.* It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-ex-

2. *Evid.R.* 63(3) permits prior testimony of an unavailable witness. It does not fit the circumstances of this case.

amination is essential. The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, *i.e.*, it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable. [at 28]

Wigmore then explains the meaning of confrontation:

> There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the *judge* and the *jury* are enabled to obtain the elusive and incommunicable evidence of a *witness'* deportment while testifying, and a certain subjective moral effect is produced upon the witness.
>
> ....
>
> This secondary advantage, however, does not arise from the confrontation of the *opponent* and the witness; it is not the consequence of those two being brought face to face. It is the witness' presence before the *tribunal* that secures this secondary advantage—which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination. [§ 1395 at 153–154]

This opinion is underlined in the following note:

> The following are instances of amusing legal pedantry: *Bennett v. State,* 62 *Ark.* 516, 36 *S.W.* 947 (1896) (holding erroneous the action of the trial court in proceeding with the examination of witnesses during the accused's absence in the water closet); *State v. Mannion,* 19 *Utah* 505, 57 *Pac.* 542 (1899) (a witness for the state claiming to be afraid of the defendant, the court placed him back in the room, out of sight and hearing of the witness; held improper, on the absurd ground that the dictionaries define "confront" as meaning 'to bring face to face' .... [§ 1399 at 199]

The numerous exceptions to our hearsay rules, *Evid.R.* 63(1), *et seq.*, present daily instances of testimonial admissions without any confrontation with the witness. In *Ohio v. Roberts, supra,* the court said that to give the confrontation clause an unqualified scope "would abrogate virtually every hearsay exception...." 448 *U.S.* at 63, 100 *S.Ct.* at 2537.

Numerous cases reflect the use of electronic devices for the presentation of evidence and implicate the confrontation clause. *Benfield* has been cited above. In our own State, a defendant in a custody case excluded from a judge's private interview with a child, was permitted to hear the interview in the courtroom through an audio arrangement. The judge solicited questions from counsel in the courtroom and repeated them to the child in his chambers. The technique was approved on appeal. *N.J. Youth and Family Services v. S.S.,* 185 *N.J.Super.* 3, 447 *A.*2d 183 (1982). The court held that the confrontation clause had not been violated. It said:

> We are satisfied that under the circumstances the procedure utilized was in the best interests of the child. It is evident from the record that the child was emotionally disturbed. The trial judge described him as 'rigid.' We conclude that the judge reasonably found that a certain degree of privacy would be more likely to elicit a genuine and reliable response from the child. We are satisfied that the trial judge acted reasonably in balancing the needs of the child for protection as against defendant's need to see her child

when that child answered the judge's questions or answered questions submitted by the attorneys for cross-examination....

The use of the tape recorder and voice transmission under these circumstances is an acceptable method of balancing the interests of the child and the rights of the parties while at the same time affording the trier of fact maximum opportunity to ascertain the truth by questioning the child and observing his demeanor. [at 7, 447 A.2d 183]

N.J. Youth and Family Services cited *Kansas City v. McCoy*, 525 *S.W.*2d 336 (Mo.Sup.Ct.1975), with approval. In that case an expert witness testified against defendant via closed circuit television. On appeal defendant argued that his right of confrontation had been violated. The court, quoting *Douglas v. Alabama, supra*, said that "an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *Id.* at 338. It held that the television arrangement provided the cross-examination opportunity required by the *Douglas* court; television did not significantly affect the ability to question and observe the witness. *Id.* at 339. Jury impact was found to be little different, whether the witness appeared in court, in person or by television. *Ibid.*

The conclusion is supported by *People v. Moran*, 114 *Cal.Rptr.* 413, 420, 39 *Cal. App.*3d 398, 410 (Dist.Ct.App.1974). In *Moran*, defendant argued that the jury could not weigh the credibility of a witness whose testimony at a preliminary hearing was presented at trial by videotape. The court held, however, that the jury could adequately weigh credibility and that "the process does not significantly affect the flow of information to the jury." It satisfied the "broad purposes" of the confrontation clause. 114 *Cal.Rptr.* at 420, 39 *Cal. App.*3d at 410–411.

Moran also considered the use of videotape as a reliable medium for the presentation of evidence. It said:

We turn next to defendant's due process contentions concerning the technical distortions of the medium and its failure to accurately transmit the demeanor of the witness and the dramatic components of the testimony. In general, the advantages and disadvantages of the "filtering" effect of the medium fall equally on both sides. Therefore, its use is "fair" and there is no inherent unfairness. Conceding that testimony through a television set differs from live testimony, the process does not significantly affect the flow of information to the jury. Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function. Fair new procedures that facilitate proper factfinding are allowable, although not traditional. In any event, we do not comprehend defendant's contention that the tape is less valid or less reliable than the reading of the written transcript of the preliminary hearing....

the videotape is a modern technique that better protects the rights of all concerned. We can also take judicial notice of the fact of the ubiquity of television sets, as revealed by the 1970 census [96% of all households had at least one black and white television set], and recent availability of low-cost television cameras. With such a widespread availability of television comes a familiarity with its technical characteristics and distortions. Indeed the television camera is a stranger only in the slower moving apparatus of justice. [at 114 *Cal.Rptr.* 420; citations omitted]

The federal courts have approved the use of a videotaped confession as evidence. In *Hendricks v. Swenson*, 456 *F.*2d 503 (8 Cir.1972), cited in *Moran*, the court said:

If a proper foundation is laid for the admission of a videotape by showing that it truly and correctly depicted the events and persons shown and that it accurately reproduced the defendants' confession,

we feel that it is an advancement in the field of criminal procedure and a protection of defendants' rights. We suggest that to the extent possible, all statements of defendants should be so preserved.

[3] In discussing videotapes as evidence, ***Moran*** held that the *California Evidence Code* § 250 included them in its definition of "writing," saying that its Legislature "recognized the widespread use of videotape in our society and its relevance to legal proceedings." 114 *Cal.Rptr.* 418, 39 *Cal.App.*3d at 409. The rules in New Jersey can be read no differently. *Evid.R.* 1(13) is nearly identical to the California rule. It provides:

> "Writing" means handwriting, typewriting, printing, photostating, photography, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, combinations thereof, provided that such recording is (a) reasonably permanent and (b) readable by sight.

Videotape records obviously fall within the language of the definition; they provide a means for recording words and pictures. Motion pictures have long been admissible in evidence in our courts. *Balian v. General Motors,* 121 *N.J.Super.* 118, 125, 296 *A.*2d 317 (App.Div.1972). There is little difference between a motion picture presentation or a videotaped presentation except that the latter can provide the simultaneous photographing and transmission of information while the former cannot.

Our rules recognize the adequacy of videotaped evidence. *R.* 4:14-9, adopted in 1980, permits the taking and use of videotaped depositions in civil proceedings. *R.* 3:13-2 permits the taking and use of the deposition of a material witness who "may be unable to attend ... as provided in civil actions...." Thus, the videotaped deposition of a material witness may be introduced in evidence in our criminal courts. In addition to this formal authorization, it is apparent to this court from the demonstration of the equipment to be used in this matter and the expert testimony that the use of a videotaped presentation has the capacity to present clear, accurate, and evidentially appropriate transmissions of images and sounds to defendant, the judge, the jury, and the public.

[4] Great harm befalls the victims of child abuse. It destroys lives and damages our society. Known abusers are not being prosecuted because evidence against them cannot be presented. Children who are prevailed upon to testify may be more damaged by their traumatic role in the court proceedings than they were by their abuse. These considerations must be weighed and balanced against the right of confrontation in child abuse cases.

Any zeal for the prosecution of these cases, however, cannot be permitted to override the constitutional rights of the defendants involved. They are at great disadvantage in these cases. The testimony of a small child can be very winsome. (More winsome, perhaps, if she testifies in person than by videotape.) The difficulty of cross-examining a young child may prevent the exposure of inaccuracies. The charge of child abuse carries its own significant stigma. Defendants in these cases may find themselves ostracized, whether they are guilty or not. Like children, they too have ambivalent feelings and may decide, even though they believe they will be acquitted, that it is better for the child, the family and themselves to accept a plea agreement than to subject everyone involved to a trial. These problems must also be weighed in deciding the dimensions of the constitutional right of confrontation.

[5] The Confrontation Clause is not implacable in its demands. Nearly every authority agrees that it is subject to exceptions. In reaching the conclusion, as this court has, that the use of videotaped testimony in this case of child abuse is permissi-

ble, it is accepted as a fact that only a modest erosion of the clause, if any, will take place. The child, through the use of video, will not be obliged to see the defendant or to be exposed to the usual courtroom atmosphere. Nevertheless, the defendant as well as the judge, the jury, and the spectators, will see and hear her clearly. Adequate opportunity for cross-examination will be provided. This is enough to satisfy the demands of the confrontation clause. If it is not, it represents a deserved exception. It is more than Wigmore would require. Everything but "eyeball-to-eyeball" confrontation will be provided. No case has held eye contact to be a requirement. It is not demanded when a witness "confronts" a defendant in the courtroom. No court rule requires eye contact and courtroom distances sometimes make such contact impossible. *Benfield* required face-to-face confrontation but did not define that requirement as including eye contact. To the extent that *Benfield* would deny the opportunity to use video equipment as proposed in the present case, I am in disagreement with its conclusions.

The child in the present case said that she *could* testify. The probable and possible consequences of that testimony, however, could not have been known to her. Indeed, her willingness to testify was grounded upon fear and misconception. She believed her stepfather would kill her for revealing his abuse and felt that she would be safe only if he went to jail. She thought, erroneously, that he would be sent to jail only if she testified in court. The risk her face-to-face testimony imposes is too great to be permitted. The concern which the court must have for her, and for all children, dictates a different course, when that course will not significantly impair the rights of the defendant.

In *Ohio v. Roberts, supra,* the Court "recognized that competing interests, if 'closely examined,' may warrant dispensing with confrontation at trial." 448 *U.S.* at 64, 100 *S.Ct.* at 2538. *N.J. Youth and Family Services, supra,* 185 *N.J.Super.* at 7, 447 *A.*2d 183, is to the same effect. *See also Chambers v. Mississippi,* 410 *U.S.* 284, 295, 93 *S.Ct.* 1038, 1045, 35 *L.Ed.*2d 297 (1973). Child abuse cases present such interests. The growing awareness of the social consequences of child abuse has resulted in the enactment of significant criminal statutes and has been underlined by our Supreme Court in *State v. Hodge,* 95 *N.J.* 369, 471 *A.*2d 389 (1984):

> Crime within the family is one of the most deeply troubling aspects of contemporary life. Governor Kean recently established a task force to study the problem of child abuse. The United States Attorney General has instituted a Task Force on Family Violence to study the national dimensions of this problem. The Legislature has therefore graded sexual crimes that occur within the family differently from those occurring in other contexts. When criminal sexual conduct involves a victim who is 'at least 13 but less than 16 years old,' and the 'actor is a foster parent, a guardian, or stands in loco parentis within the household,' *N.J.S.A.* 2C:14–2(a)(2)(c), even though there may have been no force, the silent abuse inflicted deeply threatens the fabric of society. Accordingly, the Legislature graded this crime as one of the first degree. *N.J.S.A.* 2C:14–2(a). [at 377, 471 *A.*2d 389]

Truth is the ultimate quest. This is the proper interest of the prosecution, the defense, the jury, the judge and all of our society in all judicial proceedings. Philosophically, it may be argued that truth is not an absolute. If so, that conclusion does not diminish the premise. Truth, though unattainable in all of its labyrinthic extremities, must always be the judicial goal. It is the purpose undergirding our rules of evidence. *Evid.R.* 5 most appropriately in the present setting, provides:

> The adoption of these rules shall not bar the growth and development of the

law of evidence in accordance with fundamental principals to the end that the truth may be fairly ascertained.

In the present case, it is the opinion of the State's forensic psychiatrist that the video presentation of the child victim's testimony will enhance, not diminish, the prospect of obtaining the truth. His reasons for reaching that conclusion are convincing. The ambivalent position in which the child must find herself, her fear, guilt, and anxiety, become doubly oppressive when she is subjected to the courtroom atmosphere. Those factors become less burdensome through the use of video.

"Proving Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim," 15 *U. of Mich. Journal of Law Reform* 131 (1981), corroborates this conclusion:

> Making the child incest victim testify in court has another distinct failing: it produces unreliable evidence. The trier of fact in an incest case faces a dilemma. Its determination of whether abuse occurred rests primarily upon the testimony of the child victim, but child witnesses are widely acknowledged to be unhelpful. They have a subjective sense of time, an inaccurate memory—especially with regard to experience such as incest which are repeated over time, and limited ability to communicate what they do not understand and recall. These natural disabilities tend to intensify when the child is afraid or under emotional stress as a child may regress to a less mature state or withdraw entirely. Incest victims are especially likely to suffer from these disabilities because they are young and find current pretrial and courtroom procedures especially traumatic. [at 137]
>
> ....
>
> The incest victim, unlike the witness to intrafamilial violence or the victim of physical abuse, is not only the child of the defendant nor merely his adversary witness, but also his accomplice. Her confusion and sense of guilt at her involvement is thus potentially far greater than other victim's experience. It seems the trauma to the parent-child incest victim is greater, her usefulness as a witness is less; the victim is likely to have positive ties to the perpetrator; and other family members are likely to be involved. No other case, however similar in some respects, shares all of these complicating factors. [at 142–151]

Thus, the use of video which enhances the quality of a child victim's testimony, serves the essential demand for truth while satisfying the constitutional mandate.

C. The Court's Control of Cross-Examination.

[6, 7] Confrontation's central purpose is provision of the opportunity for cross-examination. *Douglas v. Alabama, supra.* Like the right of confrontation, however, the right of cross-examination is not without limitations. "The trial court has broad discretion in determining the proper limitations of cross-examination of a witness whose credibility is in issue." *State v. Cranmer*, 134 *N.J.Super.* 117, 122, 338 *A.*2d 830 (App.Div.1975); *State v. Pontery*, 19 *N.J.* 457, 472–473, 117 *A.*2d 473 (1955); *State v. Zwillman*, 112 *N.J.Super.* 6, 17-18, 270 *A.*2d 284 (App.Div.1970), certif. den. 57 *N.J.* 603, 274 *A.*2d 56 (1971).

In the present case, there is, in fact, n[o] curtailment of cross-examination, only a re[-] striction upon the means of transmittin[g] questions and answers. That restricti[ve] action is less significant than the actio[n] taken in *State v. Cranmer*. In that case, [a] defendant charged with impairing the mo[r-] als of an eight-year-old boy, who became s[o] emotionally distressed during cross-exam[i-] nation that he could not continue, was d[e-] nied any opportunity for further cross-e[x-] amination. The Appellate Division he[ld] that the circumstances permitted the limi[-]

tion upon cross-examination and did not improperly abridge the right of confrontation. In *United States v. Toliver, supra,* the court permitted the State's testimony to continue in the absence of an ill defendant. The action was affirmed on the ground that the evidence was not consequential. The use of video equipment is less consequential. It's use may be permitted as the discretionary action of the trial court in this case.

D. Waiver of the Right of Confrontation.

The State argues that defendant has waived his right of confrontation by threatening to kill the child victim if she revealed his activities. In addressing this issue, it is assumed, *arguendo,* that a videotaped presentation will not satisfy the requirements of the confrontation clause. The court also adopts the conclusion that the child cannot testify in court without risking serious emotional damage. Finally, the court takes the position that a waiver may occur even though the child is an available witness who can testify but should not because of the risk involved. That risk, in short, is one to which a child victim in a sexual abuse case should not be subjected and, consequently, one which cannot be imposed as a means of defeating a waiver claim.

[8] A defendant may waive his Sixth Amendment right of confrontation. *United States v. Carlson,* 547 *F.*2d 1346, 1358 (8 Cir.1976), *cert.* den. 431 *U.S.* 914, 97 *S.Ct.* 2174, 53 *L.Ed.*2d 224 (1977). In *Carlson,* a witness testified before a grand jury but refused to testify at trial. F.B.I. agents then testified, based upon conversations with the witness, that his refusal was the result of threats made by defendant. For this reason the grand jury testimony of the witness was admitted into evidence. The Court of Appeals affirmed the trial court's ruling that defendant had waived his right of confrontation, saying "the sixth amendment does not stand as a shield to protect the accused from his own misconduct or chicanery." 547 *F.*2d at 1359. It concluded that public policy was served by a rule permitting the admission of an out-of-court statement by a witness who has been intimidated by a defendant.

In *United States v. Balano,* 618 *F.*2d 624 (10 Cir.1979), *cert.* den. 449 *U.S.* 840, 101 *S.Ct.* 118, 66 *L.Ed.*2d 47 (1980), the court said: "under the common law principle that one should not profit by his own wrong, coercion can constitute voluntary waiver of the right of confrontation." It added:

> We recognize that often the only evidence of coercion will be the statement of the coerced person, as repeated by government agents. Consequently, a reasonable doubt standard for admission might well preclude a finding of waiver, no matter how reprehensible the defendant's conduct. On the other hand, we do not wish to emasculate the Confrontation Clause merely to facilitate government prosecutions. Thus, a prima facie showing of coercion is not enough. We hold, therefore, that before permitting the admission of grand jury testimony of witnesses who will not appear at trial because of a defendant's alleged coercion, the judge must hold an evidentiary hearing in the absence of the jury and find by a preponderence of the evidence that the defendant's coercion made the witness unavailable. [at 629]

The Court of Appeals found that the waiver determination was supported by "sufficient evidence." The trial court heard the testimony of the witness himself who, while refusing to discuss his reasons for not testifying, reiterated the truthfulness of his grand jury testimony. An FBI agent then testified to his conversations with the witness, indicating the circumstances surrounding various threats made against him by or on behalf of the defendant, if he testified, and his resulting fear. This was held to be sufficient evidence to support the claim of waiver.

In *Black v. Woods*, 651 *F.*2d 528 (8 Cir. 1981), *cert.* den. 454 *U.S.* 847, 102 *S.Ct.* 164, 70 *L.Ed.*2d 134 (1981), a witness refused to testify in a murder trial because she was afraid of being killed by defendant. Defendant had arranged a prior killing of another witness to prevent her from testifying against him in a robbery case. The murder witness was put on the stand by the prosecution but refused to testify and was held in contempt. The circuit court opinion does not set forth the evidence received at the trial level on the waiver question, but states:

> We agree with the state court that Black forfeited his confrontation right by a pattern of conduct that resulted in Link's fear which we find to be reasonable under the circumstances. The record is replete with Black's threats and attempts to intimidate against Link and others. Black had physically abused Link and threatened to kill her if she did not do what she was told. [651 *F.*2d at 531]

The court rejected the argument that there was no evidence of an express threat addressed to Link by Black, or anyone acting on his behalf, saying that the argument "ignores the facts of the case and the demonstrated tendencies of Black." It approved a comment of the Minnesota Supreme Court that Black's motive for killing the witness in the robbery case, namely, to assure himself of her silence, "provided Link with the most graphic and explicit threat possible if she testified against him." *Id.* at 532.

In the case at bar, the evidence of the defendant's threat to kill the child victim is hearsay. It consists of the victim's statement to Doctor Sadoff as repeated by him at the pretrial hearing. It is not admissible if the *Rules of Evidence* apply.

[9, 10] The question presented at the pretrial hearing was whether videotaped testimony of the victim would be admissible in evidence. The objection to its admission was based upon the claim that it would violate the Confrontation Clause. One answer to this claim is that the right of confrontation was waived by the defendant by reason of his threat. If there was a waiver, the videotaped testimony would be admissible without consideration of that right.

Evid.R. 8(1) states in part:

> When the ... admissibility of evidence ... is stated in these rules to be subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge. In his determination the rules of evidence shall not apply except for *R.* 4 or a valid claim of privilege.

Under this rule hearsay evidence is admissible for the purpose of making the *R.* 8(1) decision. *State v. Moore*, 158 *N.J.Super.* 68, 385 *A.*2d 867 (App.Div.1978); *Hill v. Cochran*, 175 *N.J.Super.* 542, 420 *A.*2d 1038 (App.Div.1980). The hearsay evidence of Doctor Sadoff is therefore admissible, provided *Evid.R.* 8(3) does not apply. That rule provides in part:

> Where by virtue of any rule of law a judge is required in a criminal action to make a preliminary determination as to the admissibility of a statement by the defendant, the judge shall hear and determine the question of its admissibility out of the presence of the jury. In such a hearing the *Rules of Evidence* shall apply and the burden of proof as to admissibility of the statement is on the prosecution.

Without more, this provision would require the *Rules of Evidence* to be applied and Doctor Sadoff's testimony would be excluded. It is apparent, however, from a reading of *Evid.R.* 8(3) in its entirety, that it does not apply. The balance of that rule reads as follows:

> If the judge admits the statement, he shall not inform the jury that he has made a finding that the statement is

admissible, and he shall instruct the jury that they are to disregard the statement if they find it is not credible. If the judge subsequently determines from all of the evidence that the statement is not admissible, he shall take appropriate action.

It therefore appears that *Evid.R.* 8(3) is applicable only when the "admissibility of a statement by the defendant" is a statement which is intended to be introduced *at the trial.* That was not the purpose of the hearing in the present case. The evidence of the threat to kill was introduced only for the purpose of supporting the claim of waiver, not for trial purposes. Consequently, *Evid.R.* 8(3) does not apply. Neither do the *Rules of Evidence,* except *Evid.R.* 4 and rules relating to privilege.

This conclusion is supported by *U.S. v. Mastrangelo,* 693 *F.*2d 269 (2 Cir.1982). In that case grand jury testimony of a witness was accepted into evidence after the witness had been killed while on his way to testify. The court, citing *Carlson* and *Balano* as well as numerous other cases, held that the misconduct of a defendant could constitute a waiver of the Confrontation Clause. It said:

> Since *Mastrangelo's* possible waiver of his sixth amendment right is a preliminary question going to the admissibility of evidence, the hearing will be governed by *Fed.R.Evid.* 104(a), which states that the exclusionary rules, excepting privileges, do not apply to such proceedings. Thus, hearsay evidence, including Bennett's grand jury testimony, will be admissible, as will all other relevant evidence. [at 273]

United States v. Thevis, 665 *F.*2d 616 (5 Cir.1982), *cert.* den. 459 *U.S.* 825, 103 *S.Ct.* 57, 74 *L.Ed.*2d 61 (1982) is to the same effect. The evidence rule was not mentioned in *Carlson* or *Balano* or *Black,* all of which decided the waiver issue, however, on the basis of hearsay testimony. It is apparent that they relied upon the same approach.

It might be asserted that what is sought is not to determine the "admissibility of evidence," but rather to decide the manner of production of that evidence. It could be said that what is to be resolved is not whether the statement of the child victim is to be admitted, but rather to decide whether that statement is to be established by in-court testimony or by videotaped proofs. The difference is vital: If the concern is the manner of production of evidence as opposed to its basic admissibility *Evid.R.* 8(1) does not apply. That rule pertains only to issues concerning "the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege." If *Evid.R.* 8(1) is not applicable, the hearsay evidence of the defendants' threat to kill is not admissible. The threat could then be proved only if the child victim appeared in court and testified against the defendant. This would be self-defeating. It would vitalize the unacceptable: permitting the defendant to gain advantage by his reprehensible conduct. This interpretation of *Evid.R.* 8(1) would thwart the truth. The *Rules of Evidence* as stressed by *Evid.R.* 5, are designed for the opposite purpose.

[11] Doctor Sadoff's testimony is therefore admissible. One problem remains: What is the burden of proof in the waiver hearing? *Balano* held that waiver might be shown by a "preponderance of the evidence." 618 *F.*2d at 629. *Thevis* required "clear and convincing" evidence. 665 *F.*2d at 631. *Mastrangelo* adopted the preponderance of evidence test but remanded the case for a further hearing on the waiver question, instructing the trial judge to make findings under the clear and convincing standard as well. The court discussed the proof issue in the following language:

> [T]he Supreme Court precedents are mixed. While the Court has held the preponderance of evidence test applicable to suppression hearings involving possible misconduct by the government, *Lego*

v. Twomey, 404 *U.S.* 477, 489, 92 *S.Ct.* 619, 626, 627, 30 *L.Ed.2d* 618 (1972) (voluntariness of confession); *United States v. Matlock*, 415 *U.S.* 164, 177–78, 94 *S.Ct.* 988, 996, 997, 39 *L.Ed.2d* 242 (1974) (consent to search), it has applied the clear and convincing standard to questions of admissibility involving constitutional requirements going to the reliability of evidence, *United States v. Wade*, 388 *U.S.* 218, 240, 87 *S.Ct.* 1926, 1939, 18 *L.Ed.*2d 1149 (1967) (circumstances surrounding identification at a showup).

These decisions are thus not dispositive. Since the right of confrontation is closely related to the reliability of testimonial evidence, the clear and convincing test may well apply to issues of admissibility arising under it. However, waiver by misconduct is an issue distinct from the underlying right of confrontation and not necessarily governed by the same rules concerning burden of proof. We see no reason to impose upon the government more than the usual burden of proof by a preponderance of the evidence where waiver by misconduct is concerned. Such a claim of waiver is not one which is either unusually subject to deception or disfavored by the law. Compare *McCormick, McCormick's Handbook on the Law of Evidence* § 340 (2d ed. 1972). To the contrary, such misconduct is invariably accompanied by tangible evidence such as the disappearance of the defendant, disruption in the courtroom or the murder of a key witness, and there is hardly any reason to apply a burden of proof which might encourage behavior which strikes at the heart of the system of justice itself. [693 *F.*2d at 273]

[12] In deciding whether the rule is to be "preponderance" or "clear and convincing" in present circumstances, we must weigh once again the confrontation right of the defendant against the "right" of a child victim to testimonial protection. It has been decided above that there is no absolute right of confrontation, that the videotaped testimony of the child victim in a sexual abuse case is admissible, either because it does not violate the Confrontation Clause or because it represents a very modest exception to that right. The purpose of the *R.* 8 hearing therefore does not deal with an absolute constitutional mandate. Further, since the hearing may be said to involve, indirectly, the reliability of the videotaped evidence, reliability is enhanced by the minimal incursion, if any, into the confrontation clause. It was the opinion of Doctor Sadoff, corroborated by other authorities, that the video presentation would be more likely than in-court testimony to produce the truth. As in *Mastrangelo*, this court sees "no reason to impose upon the government more than the usual burden of proof by a preponderance of the evidence where a waiver by misconduct is concerned."

[13] Applying that test here, I conclude that the State has supported the claim of waiver by sufficient evidence. The statement of the child to the psychiatrist was made in a setting of confidence. It was not made because the child knew that her statement could effect a waiver of the Confrontation Clause. On the contrary, it was the basis for her mistaken willingness to testify in court. It was the opinion of Doctor Sadoff that the child's fear, occasioned by the threat, was real. He also found that she was capable of telling the truth. No contradictory testimony was presented by the defendant. Under the circumstances, the proofs support the claim of waiver. The Confrontation Clause is not available to the defendant.

E. Conclusion.

The use of videotaped testimony of the child victim in this case will be permitted because:

(a) It will not unduly inhibit the defendant's right of confrontation and

therefore does not violate our constitutional provisions.

(b) The testimony of a child victim in a child sexual abuse case may be presented by videotape as an exception to the confrontation requirement.

(c) The use of the video technique is a permissible restriction of cross-examination.

(d) The defendant in this case has waived his right of confrontation.

The videotaped presentation shall be subject to the conditions set forth in the schedule annexed to this opinion.

APPENDIX

Conditions Imposed on the Use of the Videotaped Presentation

1. The testimony of the child victim shall be taken in a room near the courtroom from which video images and audio information can be projected to courtroom monitors with clarity.
2. The persons present in the room from which the child victim will testify (testimonial room) shall consist, in addition to the child, only of the prosecuting and defense attorneys together with the cameraman.
3. The only video equipment to be placed in the testimonial room shall be the video camera and such tape recording equipment as may be appropriate to carry out the conditions herein set forth.
4. The courtroom shall be equipped with monitors having the capacity to present images and sound with clarity, so that the jury, the defendant, the judge, and the public shall be able to see and hear the witness clearly while she testifies. The following monitors are deemed to be satisfactory insofar as screen size is concerned: Jury—25"; public—18"; defendant—10"; judge—7".
5. It shall not be necessary to conceal the video camera. A videotape shall be made containing all images and all sounds projected to the courtroom which tape shall be introduced in evidence as a state exhibit.
6. No bright lights shall be employed in the testimonial room.
7. Color images shall be projected to the courtroom by the video camera.
8. The video camera shall be equipped with a zoom lens to be used only on notice to counsel who shall have an opportunity to object.
9. The video camera, the witness and counsel shall be so arranged that all three persons in the testimonial room can be seen on the courtroom monitors simultaneously. The face of the witness shall be visible on the monitors at all times, absent an agreement by counsel or direction by the court for some other arrangement. The placement of counsel in the testimonial room shall be at the discretion of each counselor.
10. The defendant and his attorney shall be provided by the State with a video system which will permit constant private communication between them during the testimony of the child witness.
11. An audio system shall be provided connecting the judge with the testimonial room to the end that he can rule on objections and otherwise control the proceedings from the bench.
12. In the event testimony is being recorded by use of a mechanical system, the video monitors or one of them shall be so connected to that equipment as to record all of the child witness's testimony.
13. In the event the proceedings are being recorded by a court stenographer, that stenographer shall remain in the courtroom and shall rely upon the vid-

APPENDIX—Continued

eo monitors for the purpose of recording the testimony of the child victim.

14. All video equipment, the videotape and the cameraman, shall be provided by and at the expense of the State.
15. The oath of the child witness may be administered by the judge using the audio equipment, or by the court clerk who may enter the testimonial room for that purpose only, or otherwise as the judge may direct.
16. The testimony of the child victim shall be interrupted at reasonable intervals to provide the defendant with an opportunity for person-to-person consultation.
17. The trial court, before the child victim testifies, shall provide the jury with appropriate instructions concerning the videotape presentation.
18. These conditions have been adopted by the court after counsel has been provided with the opportunity to make objections to them.

HOUSE JUDICIARY COMMITTEE: SB 167 MARCH 25, 1985

Testimony of Suzanne H. Hardin, Advocacy Chair
Johnson County Coaltion for Prevention of Child Abuse
5311 Johnson Drive, Mission, Kansas 66205

The Johnson County Coalition for Prevention of Child Abuse is a non-profit organization that promotes the prevention of child abuse by providing community services through education and advocacy.

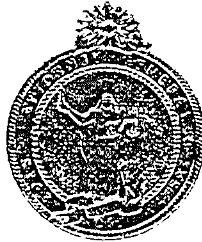
We support SB 167 because the bill clearly is in the best interest of the child and appropriately endeavors to protect the child from the courtroom trauma that could be considered one of the "system abuses" that further injures the child victim.

The bill does not violate the defendent's Sixth Amendment right of confrontation. The bill does recognize the intent of the Child In Need Code that states in 38-1501 "Construction of code. K.S.A. 1982 Supp. 38-1501 through 38-1593 shall be known as and may be cited as the Kansas Code for care of children and shall be liberally construed, to the end that each child within its provisions shall receive the care, custody, guidance, control and discipline ...as will best serve the child's welfare and the best interests of the state.". In section 38-1502. Definitions. "(b) "Physical, mental or emotional abuse or neglect" means the infliction of physical, mental or emotional injury or the causing of a deterioration of a child and may include, but shall not be limited to, failing to maintain reasonable care and treatment, negligent treatment or maltreatment or exploiting a child to the extent that the child's health or emotional well-being is endangered.".

The Code directs protection from the infliction of emotional injury or the causing of a deterioration of a child that may include failing to maintain reasonable care and treatment, negligent treatment or maltreatment to the extent that the child's health or emotional well-being is endangered. SB 167 provides the child this protection from the traumatic courtroom atmosphere and from the fear inducing close proximity of the perpetrator to the child in courtroom proceedings. SB 167 decreases the chances of additional deterioration of the child's health or emotional well-being by allowing more reasonable care and treatment of the child in any proceeding where it is alleged the child has been neglected or abused.

Are we causing these children to be further abused by requiring their participation in the courtroom. SB 167 directs the court and the state the opportunity of correcting this situation. The meritorious advantage is the humane protection it affords the already afflicted child victim. And to this end, the bill also serves the best interests of the state.

Attachment No. 16
House Judiciary
March 25, 1985



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

March 5, 1985

Senator Robert Frey, Chairman
Members of the Senate Judiciary Committee
State Capitol
Topeka, Kansas

Re: S.B. 167 - Videotape Testimony

Dear Senators:

Late last week I was requested to issue an opinion regarding the constitutionality of S.B. 167. Since your Committee needs an answer so quickly, I have chosen to respond by letter, rather than by formal opinion.

S.B. 167 would allow a child under 13 years of age who has been the victim of or a witness to child abuse or neglect or a victim of a crime to give a statement or testimony outside the courtroom on videotape which could then be admitted into evidence in a legal proceeding brought pursuant to the Kansas Code for the Care of Children or in a criminal case in which the child was the alleged victim. The issue is whether such a procedure would violate the Sixth Amendment right to confront one's accusers. Although there appear to be no cases which specifically resolve the issue as to videotaped testimony, recent cases on the right of confrontation would support the conclusion that S.B. 167 is constitutional as drafted.

Courts have held that the right of confrontation in criminal cases is not absolute, as is evidenced by the many exceptions to the hearsay rule. While the confrontation clause indicates a preference for face-to-face confrontation at trial, hearsay may be admitted in some instances if the

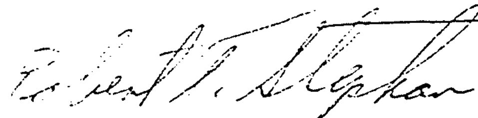
Attachment No. 17
House Judiciary

March 25, 1985

declarant is unavailable and there is a showing of "indicia of reliability." See State v. Rodriquez, 8 Kan.App.2d 353 (1983); State v. Pendleton, 10 Kan.App.2d 26 (1984). The Kansas Court of Appeals has determined that K.S.A. 60-460(dd) which permits child-victim hearsay to be admitted at trial does not violate the Sixth Amendment. The proposed bill permits far more confrontation than does K.S.A. 60-460(dd), by permitting defense counsel to be present and to cross-examine, and the defendant to view the child victim-witness without face-to-face contact. The bill establishes specific requirements as to the findings the court must make before such recording may be taken and admitted, and specifies how and by whom the recording may be made, In view of these safeguards and the above-mentioned cases, we believe S.B. 167 is constitutional.

I am greatly concerned with the difficulties in prosecuting child abusers and with the added emotional trauma prosecution may cause the victim. In that this bill would lessen the trauma and could enhance the chances of successful prosecution, I support it and urge your favorable recommendation.

Very truly yours,



Robert T. Stephan
Attorney General

RTS:BLH:may

May it please this Committee, I am Joe Cosgrove, Jr., an Assistant District Attorney for Johnson County, Kansas. I primarily prosecute criminal child sexual abuse cases.

I am grateful for this opportunity to express my support of Senate Bill 167 and House Bill 2377 and the concept of videotape testimony of children witnesses.

The availability to use videotape or television monitor testimony of young children would be a welcome, modern and humane addition to our justice system.

There are occasions where children because of fear of the defendant or courtroom or jury do not want to testify or their testimony is inhibited. I've had a child hide her face behind the doll we were using when she testified. Sometimes parents, whether right or wrong, do not want their children to testify. Prosecutors are then placed in an awkward position of balancing the worth of the case to the community and the trauma of the child and family.

However, if such legislation is enacted, I would not expect overuse or abuse by prosecutors. I've had a 6 year-old testify. No witness is more dramatic in a courtroom than a child. Obviously, not all counties would have the equipment and finances. However, legal availability for certain cases is the key.

The merits of these bills are their details on procedure for making the tapes.

Attachment No. 18
House Judiciary
March 25, 1985

Creative and progressive legislation involves some risks when reviewed by the court.

Criminal defendants and juveniles accused of committing a crime would definitely raise 6th Amendment right to confrontation issues if videotape or television testimony is allowed against them.

The 6th Amendment confrontation clause has been said to provide for face to face confrontation by the victim/accused so the demeanor of the witness can be seen and the defendant can cross-examine the witness.

In light of this guarantee there are several progressive states that have made the decision that society's interest in protection of children is great enough that videotape testimony is valuable and necessary even with the dictates of the 6th Amendment.

However, of note a couple of cases have held that if the defendant could not see the victim or the victim did not know the defendant was viewing her the 6th Amendment was violated.

Thus, the legislature must be cognizant of these type of principals and holdings when reviewing section 3 of the bills which apply to criminal cases.

Sec. 3(b)2 provides for cross-examination.

Sec. 3(b)4 allows the defendant to see and hear the testimony of the child.

The issues will center on whether it is unconstitutional under Sec. 3(b)4 if the child is not allowed to hear or see the defendant.

Obviously, the framers of the constitution and earlier jurists did not contemplate videotapes and television.

But, the constitution is a living document. In addition it should be remembered that the right to confrontation is not absolute and that cross-examination is the key to confrontation. Moreover, jurisprudence has long recognized different hearsay exceptions which technically violate the 6th Amendment.

Recently, this legislature enacted another hearsay exception, K.S.A. 60-460dd, which from my experience has enabled prosecution of cases that previously could never have been filed.

Under K.S.A. 60-460dd the child, if found to be disqualified or unavailable as a witness, never testifies about the substance of the allegations. Instead another witness testifies for him or her. Thus, there is no confrontation.

State v. Pendleton, 10 Kan. App.2d 26 (1984) recently reviewed K.S.A. 60-460dd and found that it did not violate the 6th Amendment.

The court notes hearsay is allowed upon showings of unavailability of the witness and reliability of his statements.

These bills as written are a very positive step forward in child sexual abuse prosecutions. I believe our judiciary would follow the holdings and reasoning of Pendleton if called upon to review this legislation.

However, to further limit confrontation claims of defendants the legislature may wish to consider language requiring a showing to the judge that trauma would be done to the child if she testifies and that the victim/witness be put on notice the defendant will see and hear the tape or monitor.

In sum, I urge the enactment of videotape and TV monitor legislation after consideration of the 6th Amendment issue. The availability of such legislation would be a vaulable tool to prosecutors in their representation of the children of our communities. The continued progressive legislation in this area of child sexual abuse by this body is greatly appreciated by members of law enforcement and the children of this state.

Thank you again for this opportunity and your consideration of this matter.

STATES PROVIDING FOR INNOVATIVE TECHNIQUES

Exclusion of Spectators

Alabama
Alaska
Arizona
California (1)
Florida
Georgia
Illinois
Louisiana
Massachusetts
Michigan (1)
Minnesota
Mississippi
Montana
New Hampshire (2)
New York
North Carolina
North Dakota
South Dakota
Vermont
Wisconsin (1)

Videotape in Lieu of Live Testimony at Trial

Alaska
Arizona
Arkansas
California (3)
Colorado
Florida
Kentucky
Maine
Montana
New Mexico
South Dakota (3)
Texas
Wisconsin

Abused Child Hearsay Exception

Arizona
Colorado
Illinois
Indiana
Kansas
Minnesota
South Dakota
Utah
Washington

Closed Circuit Television/ Videotaped Statement

Kentucky
Louisiana
Texas

1. Applies to preliminary hearing <u>only</u>.

2. Provides for in-camera testimony.

3. Videotape is taken at the preliminary hearing.

Law Offices
Jon S. Willard

(913) 782-3900

213B East Santa Fe, Box 575
Olathe, Kansas 66061-0575

March 22, 1985

RE: SENATE BILL NO. 167

TO: Chairman Frey and Members of the Committee

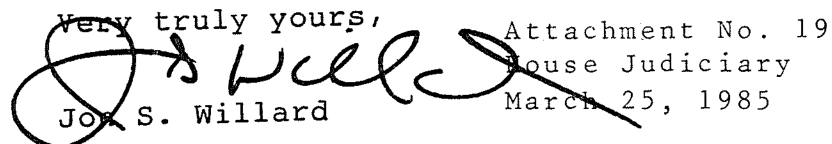
My court schedule made it impossible for me to appear in person to submit this testimony and I would like to submit my support of the above-numbered bill by way of this written testimony.

As an attorney handling many juvenile cases, I have had the opportunity to serve as guardian ad litem for probably hundreds of abused children. I have been directly involved with attempting to prepare those children to testify in cases where the perpetrator was a relative. I can tell you from that personal experience that it is a terrifying experience for a young child to have to confront the perpetrator in court and to tell of a most embarrassing and traumatic experience in the harsh atmosphere of the courtroom. I have often been the one who tried to allay that child's fear so they could be an effective witness and we could effectively obtain the court's protection of that small child.

I heartily support this proposed legislation which would vastly improve the conditions under which the child could submit their testimony. Not only does it relieve the child of having to go into the courtroom which is in and of itself terrifying, but it also relieves the child of having to face the person who was the perpetrator of the abuse. This is very often a tremendous fear which the child has of having to look at them and face them while they tell what happened.

I believe we owe this to the abused children. When telling of these traumatic and embarrassing experiences we should allow them to do so in a way which is most conducive to them being able to tell the truth and tell the whole story of what happened. If you had the same experiences I have had in working with these small children who are often the victim of abuse by a close family member, I think you would have no hesitation in facilitating their testimony. These innocent children deserve our protection and this proposed legislation will help to accomplish that goal. I heartily recommend its passage by your committee.

Very truly yours,



Jon S. Willard

Attachment No. 19
House Judiciary
March 25, 1985

JSW:mw

LUCY, A MOTHER OF TWO CHILDREN WHO WERE SEXUALLY MOLESTED, SHARES HER STORY AND INSIGHTS ABOUT THE PROBLEM AND COMMENTS ON HOW THE PROBLEM IS DEALT WITH IN LOUISVILLE, KENTUCKY.

LUCY: I think the situation my children were involved in is kind of classic. It's the way it happened. Larry was an upstanding member of the community. I'd known him for years. I was crazy about Larry and his wife. It wasn't just a babysitting situation, they were friends of mine. And she babysat, so she babysat with my children. There were a number of children there.

I'm a conscienticus mother. I didn't just drop the kids off. You know, I talked to them daily about what was happening with the children. And yet Larry molested Amy and Steven both and a number of other children for more than three years before I knew anything about it.

My little girl didn't show any signs of any problems. My little boy was having emotional problems all that time. I discussed them at length with Larry and Edith. He was seeing a counselor, being tested. It went on for years. And it went on with the other children too. There were eventually five children who testified in court. Without any of us knowing anything about it, not anything at all. The professionals who treated Steven didn't have any hints that he was involved in anything like that. So in that way it was your typical case.

Larry was a nice fellow. He was the choir director at his church, he'd been president of the Kiwanis, he'd taught at the community college here, you couldn't want to meet a nicer guy.

I've got several band wagons I've gotten on. One of them is teaching the children. I had talked to my children. My youngest sister was molested when she was little. So I was more aware of it than other people. I had taught the kids, I thought, everything I needed to teach them.

When Steven told me about it, it was just a fluke. We happened to be talking about sexual abuse that night. I had read an article in the newspaper. I guess I used the right words that night. I don't know why Steven told me that night. When I was talking about it, never dreaming for a minute that this really needed to be said in our home, it hadn't crossed my mind that this was going to happen to my kids. I was just being conscientious, and Steven just real quietly said "Mom, Larry did all those things to me."

And of course it all progressed and he told me they had been horribly molested for years. And one of the things that he said was I had told them about bad people and Larry wasn't a bad person, Larry was a nice man. I liked Larry. I told them, "Respect Larry, Larry's

a nice man, do what Larry and Edith tell you. They're good people". That was a big mistake we all make. We tell our kids about the sick people, the crazy people, the mean looking people and the child molester isn't. Larry's so typical in that.

I was immediately overwhelmed with guilt. Just overwhelmed with feeling guilty. I immediately said to the kids, "Oh God, you've been miserable all these years", and they said, "No". They liked it at Larry and Edith's except when Larry was molesting them. They're just little kids. They played. Their friends were there. They liked it there except for that and they just excepted that. That was a part of the way things were going to be.

They kept it a secret. It never crossed their minds to tell anybody. Steven said he had wanted to tell me all the time but he had never planned on telling me. It kind of slipped out that night. Amy, I think, is still real irritated with herself that she ever did tell me. It opened up a great big can of worms with her that she didn't want to deal with. She didn't want to think about that. She'd put that in a place in her head that she intended to keep it all her life. And she will still say, "I should never have told you, it didn't do anything but cause trouble." It was all over with. They weren't going to the sitters there anymore. As far as they were concerned,and I think they still feel that way a lot, life would've been easier if they'd never opened their mouths. And that's, I think, a sad reflection on our society.

Amy and Steven have been through hell. It was all over with two years ago. We reported it, we went to the police. We did all the right things. We went through the court process. It took over a year. They've been through intensive counseling. They've been through hell. And it's not over.

Larry's in jail now. But they're still scared of him. Steven was up last night talking about, "Well, what if Edith comes and tries to kill us?" They're scared, that's all there is to it. I tell Steven, "You know, Edith is not going to come try to kill us." But after I put him to bed, I went down to the basement to do the laundry, and I caught myself looking out the door. I don't ever walk past the back door that I don't look out.

I'm scared of Edith too. I have no reason to think that Edith is not going to go out to the pen and see Larry and just get all hot and decide Lucy is the one that started this, and by God I'm going to go kill her. Chances are Edith's not going to do it. I keep telling Steven Edith's not going to do it. But, I don't know that she won't. It's just, it's opened up fear in us that we didn't have before. It's gotten better of course over time.

I can't say enough about the Exploited/Missing Child Unit here. The people that worked with my kids knew so much what they were

doing. I was so paranoid, I told Leo Hobbs when we went down there for them to interview the children, the social worker and the police officer were going to take the children individually in a room and interview them. I said "No way, you don't talk to them without me." I wasn't letting anybody near my children. They were so good. It didn't take but just a minute to realize that they knew what they were doing. They know how to talk to the kids. We were down there for almost four hours. The kids walked out of there chitchatting. We were at the back door, it was after midnight and they were locking up the doors, and we looked down and Amy was dragging along one of the anatomically correct dolls. She had just gotten real comfortable with those people down there. They knew what they were doing. They're so well trained. They made Amy and Steven feel comfortable.

The police officer that we worked with did so much to make Amy and Steven feel safer. Larry was arrested but he got out the next day. They just figured he was going to come kill them. They talked to Mike Simpson, the officer that worked with us. I called him and asked "Mike, what do I do? They're scared to death." He got on the phone with them and he talked to them and he said, "I'm not going to let Larry hurt you." He said it to them over and over again. I could go on forever about how good the people were that we worked with.

We ran into a lot of court delay. It just drove me crazy. It was reported in April. We were supposed to have gone to court in November. Two days before, after meeting with the prosecutor, the social worker, the police detectives, the kids going over their testimony, visiting the courtroom, we were so scared, we were about to die, and they delayed the trial until the next April. It just about killed us, it really did. We had been miserable for months, and all we could think of was getting it over with. I know the court systems are full and crowded. I don't know if there's a way you can ask them to make a exception for children. I don't know why you couldn't. Children are darned important.

I'm not going to be ashamed of this. I don't want my children to be ashamed of it. We've been victims of a crime. If somebody had shot my kids I wouldn't have been quiet about it and I'm not going to be quiet about this. I don't want my kids to have any reason at all to feel like they have to be ashamed of being a victim of a crime. I figure I need to let them know I'm not ashamed of it. I didn't do anything wrong as a mother. I know that. I'm a good mother, they're good kids. None of us did anything wrong. Larry's the person that's wrong.

The legislation that we've passed here I think is wonderful. I wished we'd had it a couple of years ago. One thing I feel very strongly about after watching my kids is testifying in front of the offender. Every one of these kids was scared to death Larry was going

to kill them right there in the courtroom. They weren't sure he wasn't until they walked out. Leo and I were talking about the possibility of closed circuit testimony. I just think it would make the biggest difference in the world if I had been able to tell Amy and Steven, "You're not going to have to see Larry." It would've worked out the same in the end. They would've gotten Amy and Steven's testimony. Larry could've looked at them through a one way mirror or something. He could've had his rights. But they wouldn't have had to spend a year being scared Larry was going to shoot them under the table in the courtroom. That I think is terribly important.

Pre-trial video taping I think would be fantastic. Even if it couldn't be used in the courtroom. Right before the trial when I was going over the children's original statements with them, Amy got terrified two days before the trial. She couldn't remember something. It was written right there and that's what she had said. She just plain couldn't remember. It had been a long time. Amy was terrified. She thought she had made it all up. She just got hysterical and she said "Mom, I don't remember ever saying that, I must of lied, I must of made it all up." It took a couple of hours for me to be able to drop little hints until finally something clicked in her head and she remembered it all. That little girl was so relieved. "Oh God, Mom I'm so glad I haven't been lying." She really thought she was. If we'd had a video tape of Amy sitting there in the police department that she could've looked over and refreshed her mind and we didn't have to spend days reading these gory transcripts so that Amy could remember what had happended to her a year and a half before, it would've been just a tremendous help to us. Even if it can't be used in the courtroom.

One other biggie Leo and I were talking about is counseling for the children. I've been paying $62 an hour for my children to see a child psychologist. It's not time for it to stop yet. I'm going broke doing it, but they have to have it. While I was talking to Leo I said, "You know if I'd thought of it, if we had taped some of the sessions with my kids and let somebody listen to it, somebody would pay attention when they said these kids need counseling".

LEO HOBBS: How many of the other kids that were victims along with your children are in counseling or have been in counseling?

LUCY: One.

LEO HOBBS: That's a tragedy.

LUCY: The other parent's have not taken their children to counseling.

LEO HOBBS: It's easier to not confront the problem. And it's easier to just ignore it and say they're OK. As long as the children

aren't exhibiting bizarre behavior or anything like that, then you can ignore it. And the things these people don't realize is that that is back in these children's mind in a dead zone somewhere that is eventually going to manifest itself in some type of behavior.

CAPT. PRICE: All of us are involved in the area of investigating the crimes and so forth but at the same time most of us are also parents, and I want you to know we appreciate your willingness to meet with us and share your story because it could happen to any one of us. In looking back over the entire situation can you think of anything at all that had you known what you now know, would have tipped you off. Is there anything that we can watch for in our children's behavior?

LUCY: There were a few things, and the more people I talk to the more this one point keeps cropping up, little girls with bladder infections and kidney disorders. My little girl had them. Almost all the parent's I've talked to who have little girls who were molested, it turns out that these little girls had bladder infections. My pediatrician cried when I told him what had happened. He said "God, why didn't I think of that?" Amy's bladder infections particularly were caused by fecal contamination. Amy was one of those little kids who smiled all the time. Nobody would've suspected anything was ever wrong with Amy. But that's a biggie.

The psychologist said that, when he looked back over our file to write a report for the court, he noticed in the initial survey he gave me, I did put that Steven masturbated a great deal and seemed to show an unusual interest in sex for his age. A lot of kids are interested in sex today. So you don't know. He was five years old at the time. We write off a lot of things or find other reasons, and there are other reasons of course why some things happen. Steven had a great deal of real serious emotional problems all this time, but I did everything I could to get help for him. He saw a counselor. He was evaluated extensively. It never came out.

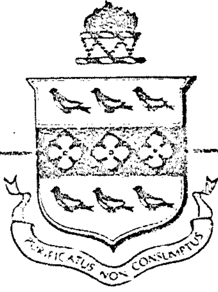
CAPT. PRICE: What was this individual telling these youngsters to keep them from telling?

LUCY: He held knives to them and told them he would kill them. If he didn't kill them he'd kill me.

Somebody pointed out to me and I think it's something that we need to do in our education of the kids, is to tell the kids and then mom, go home and ask your child if anybody has ever done that to them. I never came right out and said, "You know, Steven I've just explained these things to you. Has anyone ever done that to you?" I think if you're giving them an out, you're giving them an opportunity to say yes.

I'm convinced the key to it is educating the children. I'm absolutely convinced and my kids are to. Educational television not

long ago did a series that I thought was really good. Amy said it wasn't accurate. She proceeded to sit down and write a little skit and say, "Mom this is the way it ought to be." And Amy's little skit came right to the point. That's it. This man is putting his hands on this girl's vagina. This man is putting his mouth on the little boy's penis. And Amy, who is nine years old, sat there in the living room and said, "They don't know what they're talking about, they're not even talking about sexual abuse." Big deal if they're talking about bad touches, tell the kids what a bad touch is.



WASHBURN UNIVERSITY OF TOPEKA

School of Law
Topeka, Kansas 66621
Phone 913-295-6660

March 25, 1985

The Collateral Source Rule
Testimony on S.B. 110
Professor James M. Concannon

The Collateral Source Rule is applied in all tort cases, not just medical malpractice cases. It developed because of a collision between two of the most basic principles of tort law: first, that a wrongdoer must pay the reasonable value of all harm the wrongdoer causes; and second, that while an injured party is entitled to full recovery, he or she is not entitled to double recovery.

The collision arises when, for example, the injured party's spouse is a nurse who provides the injured party with nursing care at no cost. It is now impossible to give effect to both basic principles. If the wrongdoer is forced to pay the reasonable value of nursing care, the injured party receives a double recovery, i.e. a recovery for an amount the injured party did not spend. If we deny double recovery, then the wrongdoer receives a windfall, paying less than the value of the harm the wrongdoer has caused. The nurse-spouse intended to confer a benefit upon the injured party but the wrongdoer becomes the ultimate beneficiary.

Since the mid-1800's the law has resolved this problem by applying the Collateral Source Rule. The Rule is simply this: Payments made to the injured party or benefits conferred upon the injured party from collateral sources may not be used to reduce the wrongdoer's liability and are not admissible in evidence. A source is collateral when it is other than the wrongdoer, i.e. it is collateral to the wrongdoer. The rationale most frequently articulated is that if we have to give a windfall to someone we should give the windfall to the innocent party rather than the wrongdoer. It has also been argued that forcing the wrongdoer to pay for harms actually caused increases the deterrent effect tort law is meant to have.

To abolish the Collateral Source Rule is to hold these collateral payments will reduce the liability of the wrongdoer.

Attachment No. 21
House Judiciary
March 25, 1985

There are a number of categories of collateral sources to which the Rule has been applied:

(1) Insurance policies whether maintained by the plaintiff or a third party such as a parent, spouse or employer. Included are fire insurance, collision automobile insurance, health insurance, and life and accident insurance.

(2) Employment benefits. These may be gratuitous, as when the employer continues to pay the employee's wages during incapacity although the employer is not legally required to do so. They may also be benefits arising out of the employment contract or a union contract, such as for sick pay. They may be benefits arising by statute, as in Worker's Compensation or the Federal Employers' Liability Act.

(3) Gratuities. This applies both to cash gifts such as payments from a public fund created to aid the victim and to the rendering of services. Thus, the fact that the nurse-spouse or a doctor do not charge for their services or that the plaintiff was treated in a veterans hospital does not prevent recovery of the reasonable value of the services.

(4) Social legislation benefits. Social Security benefits, welfare payments, pensions under special retirement acts, etc.

(5) Kansas has invoked the Collateral Source Rule as authority to exclude evidence that a plaintiff-spouse in a wrongful death case has remarried prior to trial. Pape v. Kansas Power & Light Co., 231 Kan. 441, 647 P.2d 320 (1982).

Within these categories, a further distinction needs to be drawn. Sometimes the provider of the collateral payment has a right of subrogation created either by law or by contract. What this means is a right of reimbursement: the provider of the payment is entitled to reimbursement out of the first dollars received by the injured party from the wrongdoer. In fire insurance, collision automobile insurance, or no fault insurance, the insurance company is said to be subrogated to the rights of the injured party. An employer who pays Worker's Compensation is given by statute certain subrogation rights and reimbursement rights sometimes are provided by social legislation. Sometimes the party with reimbursement rights may bring an action against the wrongdoer even if the injured party does not. Sometimes there is no such right.

To the extent that subrogation or reimbursement rights exist, the Collateral Source Rule is not only defensible but is

unassailable because it does not give the injured party a double recovery. If the Collateral Source Rule is abolished but subrogation rights retained, the injured party will receive less than a full recovery because any amounts received must be passed on to the provider of the collateral payment to the extent of the reimbursement right. Our current modification of the Collateral Source Rule in medical malpractice cases, K.S.A. 60-471, properly recognizes this by providing that if the court finds that there is a reimbursement right, evidence of collateral source payments is inadmissible and may not be used to reduce damages recoverable. S.B. 110 is deficient in this respect. Now, of course, the legislature can abolish subrogation rights except those conferred by federal law. To the extent subrogation rights remain, however, you pretty much have to keep the Collateral Source Rule.

Many providers of collateral payments do not now have subrogation rights. Let's use the example of Blue Cross-Blue Shield or another health insurance provider and assume it has paid plaintiff's medical bills. Here, reasonable arguments may be made on both sides. If defendant has liability insurance and if the total claim against defendant is less than the limits of defendant's insurance, there is not likely to be much added deterrence from requiring defendant also to pay plaintiff's medical bills. They will be paid by defendant's liability insurer, not defendant. Further, since there is no right of reimbursement, the injured party will now be compensated twice. We could decide double recovery is undesirable. Premiums for both plaintiff's health insurance and defendant's liability insurance theoretically are higher because both policies are paying the same loss. An insurance actuary could tell whether this factor is actually considered in calculating premiums, but it can be argued as a matter of societal policy that we ought to have only only insurance policy making the payment and we should thus designate either the health insurance coverage or the liability insurance coverage as primary.

Thus, we could create a subrogation right in the health insurer so that ultimate responsibility falls on the liability insurer and health insurance premiums we all pay would theoretically be reduced. In the alternative, we could abolish the Collateral Source Rule for health insurance payments so that the ultimate responsibility falls on the health insurer and liability insurance premiums theoretically would be reduced. The former result, making liability insurance primary, would seem to follow from the notion that the wrongdoer should pay. However, some economic analysts argue for the latter result, making health insurance primary. Since the health insurer by contract must pay in the first instance, leaving the loss there avoids the cost of shifting that loss to the liability insurance carrier through the legal system, by litigation, settlement, etc. Lower liability insurance premiums admittedly would

benefit the wrongdoer but also would benefit innocent insureds as well.

The best argument that double recovery should be retained is primarily a practical one. Even a full recovery in tort litigation as a practical matter does not make the injured party whole. Under the American Rule, parties normally pay their own litigation costs and attorney fees and the injured party does so out of the damage award. The Collateral Source Rule by permitting double recovery allows the award to come closer to making the injured party whole.

It is also argued that the injured party is entitled to double recovery because the injured party often has paid premiums for health insurance, either directly or in exchange for lower wages in employer financed plans. The argument is that the wrongdoer should not benefit from prior payments plaintiff has made for plaintiff's own protection. I doubt many people buy health insurance with any expectation of double recovery which would be frustrated by abolition of the Collateral Source Rule. Rather their hope is simply to have full recovery. However, there are some equities behind this argument. If we eliminate double recovery by making health insurance primary, the wrongdoer at least should be required to reimburse the injured party for those premiums paid by the injured party to provide the collateral benefit. Without that, the injured party really would not receive a full recovery.

I am not here to take a position on whether the Collateral Source Rule should be retained, either in general or in medical malpractice cases in particular. I would, however, like to make three suggestions about what the legislation should look like if you decide to reduce damages because of collateral source payments.

(1) There should be a definition of what collateral sources are to be considered. As I discussed earlier, the Collateral Source Rule should be retained for any collateral payments for which there is in fact a right of reimbursement or subrogation. Beyond that, you might want to keep the current rule for the gratuitous provision of services as by the nurse-spouse. Trials would be complicated and juries perhaps confused if we have to litigate the value of gratuitous services rendered. Also, we do not want to discourage people from helping those in need. Indeed, for this reason you might exclude gratuitous payments or services altogether. You may wish to exclude evidence of remarriage in wrongful death cases consistent with the Legislature's approach to specific legislation on this topic.

You may decide that if there is no subrogation right you do want to reduce damages by the amount of health insurance, income protection insurance and payments on other items that exactly duplicate allowable elements of damages. However, you might decide not to reduce damages by the amount of life or accident

insurance which does not exactly duplicate a specific element of damages. People often purchase life insurance to provide their families with a better standard of living after they die and not merely to replace lost earnings. Dollar-for-dollar reduction of damages because of life insurance payments might frustrate carefully considered personal financial plans.

In short, you need to give separate consideration to each type of collateral source because separate policy considerations are involved.

(2) The Collateral Source Rule should be abolished only when it actually results in double payment. Carrying out this principle is complicated by our comparative negligence statute. Let me give an example. Under our current law assume a plaintiff has suffered $50,000.00 in actual damages and has received health inurance benefits of $20,000.00. Because of the Collateral Source Rule the jury will not learn of the $20,000.00 (.40 X $50,000.00) health insurance payment and presumably will return a verdict finding plaintiff's total damages to be $50,000.00. If plaintiff is found to be 40% at fault and defendant is found to be 60% at fault, plaintiff recovers a judgment against defendant for $30,000.00 (.60 X $50,000.00). Here, the $20,000.00 health insurance payment can be thought of as covering the $20,000.00 of damages attributable to plaintiff's fault and there is no double recovery. Plaintiff bought health insurance with the goal of making himself or herself whole in the event of a loss and it makes sense to credit collateral payments first to amounts attributable to the fault of the injured party.

If in this example we abolish completely the Collateral Source Rule, the jury would learn of the $20,000.00 health insurance payment. Presumably, it then would return a verdict finding plaintiff's damages to be $30,000.00. If plaintiff is 40% at fault and defendant is 60% at fault, these percentages will be applied to the $30,000.00 net damage award returned by the jury rather than the $50,000.00 actual damages. Plaintiff will receive judgment against defendant for $18,000.00 (.60 X $30,000.00). Plaintiff's total recovery will be $18,000.00 from defendant and $20,000.00 from health insurance, a total of $38,000.00. Defendant's fault is actually responsible for $30,000.00 of plaintiff's total loss (.60 X $50,000.00) but defendant escapes paying $12,000.00 of the loss defendant caused ($30,000.00 minus the $18,000.00 judgment). By contrast plaintiff is forced to absorb $12,000.00 in damages without reimbursement despite having purchased health insurance which paid the full $20,000.00 of total losses attributable to plaintiff's fault. Plaintiff's goal in purchasing the insurance was to make himself or herself whole even if plaintiff was partially at fault.

Of course, there are not many medical malpractice cases in which plaintiff is assessed a large percentage of fault but this example shows me that collateral source payments should be credited first to that proportion of total damages attributable to the fault of the injured party or the party who has provided the collateral payment. The damages awarded against the defendant should be reduced to the extent collateral payments exceed the share of total damages attributable to plaintiff's fault or that of the party who provided the collateral payment.

(3) The legislation should state whether the reduction of damages to account for collateral sources is to be done by the jury or by the judge after the jury has returned its verdict. K.S.A. 60-471 and S.B. 110 both contemplate reduction by the jury. However, because of the comparative negligence problem, it seems to me reduction should be done by the judge. The jury should continue to return a verdict determining what plaintiff's total damages are without any reduction for collateral payments. Past collateral payments in money then could be deducted by the trial judge alone. If the extent of future damages is uncertain because the duration of disability is uncertain, the extent of future collateral payments may also be uncertain. Here, the jury which determines future damages could separately determine by an answer to a separate question on the verdict form the value of future collateral payments. The ultimate crediting of the collateral payment against the judgment should be done by the judge based upon the jury's answer. The same procedure could be followed if it is necessary to determine the value of unliquidated past collateral benefits such as gratuitous services.

Corporate Office (913) 232-1000
Customer Service (913) 232-1622, or
(In-State Toll Free) 1 (800) 432-3990
State Employees 1 (800) 332-0307

Blue Cross and Blue Shield
of Kansas
1133 Topeka Avenue
P. O. Box 239
Topeka, Kansas 66629

Plan 65 Claims (913) 232-1000
SWB Employees (913) 232-1727
Federal Employees (913) 232-3379, or
(In-State Toll Free) 1 (800) 432-0379

March 26, 1985

Representative Joe Knopp
Chairman, House Judiciary Committee
Capitol Building
Topeka, Kansas 66612

RE: SUBSTITUTE FOR SENATE BILL 110

Dear Representative Knopp:

I appreciated the opportunity to visit with the House Judiciary Committee on March 25 regarding substitute for Senate Bill 110.

I am enclosing copies of my remarks, as well as some additional comments, for the Committee's future reference.

Sincerely,

William H. Pitsenberger
General Counsel

WHP:kr

Enclosures

Attachment No. 22
House Judiciary
March 25, 1985

March 26, 1985

FROM: Bill Pitsenberger

SUBJECT: TESTIMONY ON SUBSTITUTE SENATE BILL 110

I was asked to comment briefly on the subject of the exception to the collateral source rule contained in Substitute Senate Bill 110 and subrogation.

The evident intent of the exception to the collateral source rule in Senate Bill 110 is to influence jury behavior into reducing damage awards in medical malpractice cases. This may have one of two purposes:

(1) To avoid a windfall to the injured plaintiff in the form of double recovery from both a collateral source and the tortfeasor.

(2) To create a chain reaction of reducing malpractice awards, hopefully leading to reductions in malpractice insurance premiums, and ultimately to providers of health care services lowering their charges to consumers in recognition of their lowered operating costs.

The same purposes arguably might be achieved more surely and efficiently if, instead of an exception to the collateral source rule, those collateral sources, such as health insurers, had a right of subrogation.

At present, health insurance contracts issued in Kansas are prohibited from having subrogation provisions through a regulation of the Kansas Insurance Department. Others, including Medicare, contracts issued to employers outside of Kansas covering employees within Kansas, and self-insurers, do have subrogation rights.

Subrogation would seem a more efficient way to avoid windfall recoveries and reduce the ultimate costs of health care to consumers for a number of reasons:

(1) For practical purposes, only two insurers write medical malpractice insurance in Kansas, while over 400 companies compete for health insurance. There may be stronger economic incentives for health insurers to reflect in their premiums reduced claims costs attributable to subrogation recoveries than for malpractice insurers to lower their premiums in recognition of lower awards.

(2) Health insurance is, by and large, rated group-by-group, based on the claims experience of the group. While I am not sure, medical malpractice premiums may be based upon the claims experience in a region. If so, the smaller awards an exception to the collateral source rule might create would be diluted, depending on the laws of other states, and subrogation would be a more Kansas-specific method of achieving the two purposes of avoiding windfall recoveries to plaintiffs and impacting the costs of health care to consumers.

(3) People generally purchase their health care services through insurance, not directly. To the extent that the exception to the collateral source rule hopes ultimately to lower health care provider charges to consumers, it relies on two factors which offer no guarantees -- that malpractice insurers will lower their premiums, and that health care providers will pass along the savings to consumers. Health insurance is a highly competitive market, and the health insurer might be more likely to pass along to consumers lower claims costs than the hypothetical malpractice insurer -- health care provider chain reaction.

(4) Since some health insurance arrangements such as Medicare and contracts issued outside of Kansas covering persons in Kansas currently have subrogation rights, there likely will be a disparity in ultimate recoveries between persons covered under such arrangements and persons insured under a health insurance contract issued in Kansas. This would be true regardless of the retention or exception of the collateral source rule in medical malpractice cases. However, since Medicare and contracts issued outside of Kansas are essentially unreachable by the acts of the legislature, it might be better to place all Kansans on an equal basis in terms of ultimate recoveries by affording subrogation rights in health insurance contracts issued in Kansas.

To the extent that the Committee is concerned only with Substitute Senate Bill 110, I believe it is extremely important to recognize that the existence of subrogation rights and an exception to the collateral source rule seem inconsistent, even with the current provision that the trier of fact may be made aware of the collateral source's subrogation rights. Allowing a showing of collateral source recoveries likely creates too strong a potential that the recovery will be reduced first by the jury in consideration of the collateral source, and second by the subrogated collateral source demanding its payments back from the plaintiff, leaving the plaintiff less than whole.

Some collateral sources do not have, and likely should not and never will have, rights of subrogation, such as life insurance, pension benefits, and in-kind services from relatives, friends, or other volunteers. If the Legislature wishes to avoid duplicate recoveries in malpractice cases without disturbing the rights of subrogated parties, then the exception to the collateral source rule should likely be an either-or proposition; that is, the trier of fact may be shown the plaintiff's recoveries from collateral sources if the collateral source has no subrogation rights.

If the Committee wished to go further and consider authorizing subrogation rights in other collateral sources, there are several factors to consider:

1) Should the subject of subrogation rights in health insurers and others be addressed in the limited context of medical malpractice legislation, or should it be addressed in a broader context?

2) Should a party given subrogation rights by statutes have the ability to maintain an independent cause of action against a tort-feasor, or should its rights be limited to recovery when its insured obtains a judgment or settlement?

3) While abolition of the collateral source rule is an inexact way of reducing awards, subrogation does not create a dollar-for-dollar reduction in the collateral sources payments, either. Just as plaintiffs and insurers settle, subrogated insurers also recover less than their full value of payments due to the plaintiff's settlement or to the subrogated insurer's own arrangements with its insured.

BP:kr

PRESENT VALUE CALCULATIONS

The calculation of today's value of a future income stream is calculated by using the following formula:

$$\text{Present Value} = \$ \sum_{t=1}^{n} [(1+g)^t / (1+d)^t]$$

The variables in this formula are:

- \$ This represents the current dollar value of the loss.

- g This represents the anticipated future annual growth rate of the loss.

- d This represents the anticipated future annual discount rate or interest rate at which funds can be invested.

- n This represents the number of years the analysis covers. For example, if the analysis were to examine the income from age 30 to age 65, then "n" would equal 35.

This formula can be found in any standard economics or finance textbook.

As the formula indicates, there are four major areas which lead to disagreement, The dollars, the number of years to be considered, the growth rate of the dollars being estimated and the discount rate.

The larger the dollar amount used in the formula the larger will be the present value of the loss. This dollar amount could represent the lost wages, household services, nursing care, institutional care or what ever the economic loss may be. Likewise, the larger the value of "n", the number of years being considered, the larger the present value of the loss will be.

The larger the growth rate of dollars being applied, "g", the larger the present value of the loss. Finally, the larger the discount or interest rate, "i", being used, the smaller will be the present value of the loss.

The following tables show how the present value of the dollar loss varies as the growth and interest assumptions are allowed to vary.

OF YEARS TO RUN 25
DOLLARS TO BE ESTIMATED 20000
GROWTH RATE OF DOLLARS .03
BEGINNING INTEREST RATE .03

IS THIS A
(1) FRONT END ANNUITY
OR
(2) ANNUITY IN ARREARS 1

*** FRONT END ANNUITY ***

GROWTH RATE	INTEREST RATE	PRESENT VALUE
.03	.03	500,000.00
.03	.04	446,344.53
.03	.05	400,786.65
.03	.06	361,921.18
.03	.07	328,609.38
.03	.08	299,925.04
.03	.09	275,112.04
.03	.1	253,550.84
.03	.11	234,731.98
.03	.12	218,235.00

(2) ANNUITY IN ARREARS SHORT PV CONSTANT RETURN

OF YEARS TO RUN 25
DOLLARS TO BE ESTIMATED 20000
GROWTH RATE OF DOLLARS .03
SPREAD BETWEEN GROWTH AND DISCOUNT .01

IS THIS A
(1) FRONT END ANNUITY
OR
(2) ANNUITY IN ARREARS 1

*** FRONT END ANNUITY ***

GROWTH RATE	INTEREST RATE	PRESENT VALUE
.03	.04	446,344.53
.04	.05	426,819.40
.05	.06	427,285.94
.06	.07	427,744.39
.07	.08	428,194.94
.08	.09	428,637.80
.09	.1	429,073.16
.1	.11	429,501.21
.11	.12	429,922.14
.12	.13	430,336.12

SHORT PV CONSTANT RETURN

OF YEARS TO RUN 25
DOLLARS TO BE ESTIMATED 20000
GROWTH RATE OF DOLLARS .03
SPREAD BETWEEN GROWTH AND DISCOUNT .02

IS THIS A
(1) FRONT END ANNUITY
OR
(2) ANNUITY IN ARREARS 1

*** FRONT END ANNUITY ***

GROWTH RATE	INTEREST RATE	PRESENT VALUE
.03	.05	400,786.65
.04	.06	381,595.61
.05	.07	382,391.57
.06	.08	383,174.83
.07	.09	383,945.70
.08	.1	384,704.46
.09	.11	385,451.40
.1	.12	386,186.78
.11	.13	386,910.88
.12	.14	387,623.95

SHORT PV CONSTANT RETURN

OF YEARS TO RUN 25
DOLLARS TO BE ESTIMATED 20000
GROWTH RATE OF DOLLARS .03
SPREAD BETWEEN GROWTH AND DISCOUNT .03

IS THIS A
(1) FRONT END ANNUITY
OR
(2) ANNUITY IN ARREARS 1

*** FRONT END ANNUITY ***

GROWTH RATE	INTEREST RATE	PRESENT VALUE
.03	.06	361,921.18
.04	.07	342,959.59
.05	.08	343,982.71
.06	.09	344,990.89
.07	.1	345,984.44
.08	.11	346,963.66
.09	.12	347,928.87
.1	.13	348,880.36
.11	.14	349,818.40
.12	.15	350,743.30

SHORT PV CONSTANT RETURN

OF YEARS TO RUN 25
DOLLARS TO BE ESTIMATED 20000
GROWTH RATE OF DOLLARS .03
SPREAD BETWEEN GROWTH AND DISCOUNT .04

IS THIS A
(1) FRONT END ANNUITY
OR
(2) ANNUITY IN ARREARS 1

*** FRONT END ANNUITY ***

GROWTH RATE	INTEREST RATE	PRESENT VALUE
.03	.07	328,609.38
.04	.08	309,799.69
.05	.09	310,974.00
.06	.1	312,132.63
.07	.11	313,275.87
.08	.12	314,404.02
.09	.13	315,517.37
.1	.14	316,616.20
.11	.15	317,700.78
.12	.16	318,771.38

SHORT PV CONSTANT RETURN

OF YEARS TO RUN 25
DOLLARS TO BE ESTIMATED 20000
GROWTH RATE OF DOLLARS .03
SPREAD BETWEEN GROWTH AND DISCOUNT .05

IS THIS A
(1) FRONT END ANNUITY
OR
(2) ANNUITY IN ARREARS 1

*** FRONT END ANNUITY ***

GROWTH RATE	INTEREST RATE	PRESENT VALUE
.03	.08	299,925.04
.04	.09	281,210.05
.05	.1	282,479.32
.06	.11	283,733.12
.07	.12	284,971.73
.08	.13	286,195.40
.09	.14	287,404.38
.1	.15	288,598.93
.11	.16	289,779.28
.12	.17	290,945.68