Approved 2-14-91
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative John M. Solbach at
Chairperson

3:30 ~~a.m.~~/p.m. on January 31, 1991 in room 313-S of the Capitol.

All members were present except:

Representatives Douville and Gomez who were excused

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee:

Representative Don Rezac
Marilyn Ault, Program Director, Battered Women Task Force
Alita Brown, Director of the Kansas Coalition Against Sexual and Domestic Violence
John Ackeret, a private citizen
George McCasland, General Secretary for Non-Custodial Parents for Equal Rights
Patricia Henshall, Mediator, in behalf of Office of Judicial Administration

The Chairman called for introductions of legislation by Representative Don Rezac. Representative Rezac requested a bill which would allow garnishment of KPERS when set out in the divorce decree. (Attachment #1).

Representative Smith made a motion to introduce the legislation and to limit it to KPERS. Representative Carmody seconded the motion. The motion carried.

Representative Smith made a conceptual motion to introduce legislation that would allow any person who has been a patient of a doctor, hospital or other medical institution to obtain their medical records upon request. Representative Macy seconded the motion. The motion carried.

The Chairman called for hearings on HB's 2008 and 2009.

Marilynn Ault, Program Director for the Battered Women Task Force appeared in support of portions of HB 2008 but asked the committee to not pass the mandatory mediation portion. (See Attachment #2).

Alita Brown, Director of the Kansas Coalition Against Sexual and Domestic Violence, appeared in support of the intent of HB 2008, but suggested amendments to the bill. (Attachment # 3).

Ms. Brown also appeared in connection with HB 2009 and asked for the same amendments for HB 2009 as were indicated for HB 2008.

A member asked if mental abuse should be considered along with physical abuse and the language to amend might read,"if there has been physical or mental abuse in the marriage". Ms. Brown concurred.

Mr. John Ackeret, a divorced father, appeared in opposition to the mediation process. (See Attachment 4). The Chairman asked the conferee to edit defamatory language which appears in his attachment from his testimony and the conferee complied with the request.

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.

George McCasland, General Secretary for Non-Custodial Parents for Equal Rights, Kansas City, Kansas, appeared to state concerns and views on HB's 2008 and 2009. (See Attachment # 5).

A committee member questioned whether or not the statistics reported in Mr. McCasland's testimony are based on state or national reportings.

Mr. McCasland urged the committee to consider the plight of service persons shipped overseas who cannot adequately defend their parental rights while they are out of the state or country.

Mr. McCasland distributed excerpt from the UMKC Law Review, Vol. 57, No. 4, 1989, "Fathers are Parents Too: Pros and Cons of the New Missouri Domestic Relations Statute". (Attachment # 6).

Patricia Henshall, a mediator and attorney, speaking on behalf of the Office of Judicial Administration, appeared and addressed two issues of concern with HB 2008. (See Attachment #7).

A committee member asked how a mediator's question of how to mandate mediation, if the mediator cannot be accessed in a reasonable period of time, should be dealt with.

It was suggested that mental health departments might be a source for future mediation.

Ms. Henshall said there are some contra-indications to mediation which must be considered in each case; that mediation is a fairly new field with criteria still being developed.

A committee member suggested using home studies to formulate decisions in lieu of legislation.

Ms. Henshall said she believes the law should not be expanded if resources are not available to make it be done right. Ms. Henshall noted that Gary Kretchner, Director of Domestic Court Services, Johnson County District Court, strongly supports HB 2009.

A committee member stated he is hesitant to support the language "shall" throughout the bill. Ms. Henshall said she believes there is a need for a good cause waiver and it should be left to the judges discretion.

There being no further conferees, the hearings on HB's 2008 and 2009 were closed.

The Chairman called for a sub-committee report regarding HB 2005 on the issue of terminating parental rights. Representative Hamilton appeared as chairperson of the sub-committee and presented the sub-committee's recommendations for rewording of HB 2005. (See Attachment # 8).

The Chairman asked Representative Smith and Representative Carmody (sub-committee members) if they concur with the addition of the word "may" in the first line of (e). Represenative Smith and Representative Carmody concurred.

A committee member asked if the word "snall" following the statute citation be "may" also. Representative Hamilton said she would like to see this current language remain.

Representative Smith made a motion that the sub-committee report be adopted. Representative Carmody seconded the motion.

Discussion followed regarding use of the word "shall" in the proposed language.

Representative Hamilton made a substitute motion to amend the sub-committee report by incorporating words "if offered", prior to the words "subject to the provisions of K.S.A. 60-419..." Representative Sebelius seconded the motion.

Research Staff questioned if the sub-committee intended to leave out the cross examination. The sub-committee affirmed as it is taken care of.

The substitute motion to amend the sub-committee report carried.

Representative Smith made a motion that the sub-committee report on HB 2005 be adopted as amended. Representative Carmody seconded the motion. The motion carried.

Representative Sebelius made a motion that HB 2005 be recommended favorably for passage. Representative Carmody seconded the motion. The motion carried.

Written testimony from Mr. Jim Benage, dated February 1, 1991, regarding HB's 2007, 2008 and 2009 is made a part of these minutes as (Attachment # 9).

The meeting adjourned at 4:40 p.m. The next meeting of the committee is scheduled for Monday, February 4, 1991, at 3:30 p.m. in room 313-S.

GUEST LIST

COMMITTEE: House Judiciary DATE: 1/31/91

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Marilynn Ault	P.O. Box 1883 Topeka	Battered Women Task Force
Delma Rourke	PO Bx 651 Ia LA	Hope Unlimited Inc
John Ackeret	2421 SW 26th Dr, Topeka, Ks 66611	Divorced Fathers
Will Belden	1136 Louisiana "3-S Lawrence, KS	League of Women Voters
Michelle Moore	Topeka	Kansas Action for Children
TIMOTHY H. HEUP	10908 W 65TH TERR #204 SHAWNEE KS 66203	Non-Custodial Parents For Equal Rights
George & Teri McCasland	1403 S 37 St. Kansas City, Ks. 66106	Non-Custodial Parents For Equal Rights
Don Rezac	Leg	
PATRICIA HEANSHALL	OJA TOPEKA	OJA
Paul Shelby	Topeka	OJA
Roy Farley	Topeka	OJA

5515 Canterbury Lane
Lincoln, NE 68512
January 29, 1991

Representative Don Rezac
Kansas Legislature
Room 278-W Statehouse
Topeka, Kansas 66612

Dear Respresentative Rezac:

I wish to thank you for your interest and concern in my behalf regarding the introduction in the legislature a bill that would allow me to garnish my ex-husband's KPERS so that I can survive as I retire this July.

I know Mr. Don Smith from Dodge City, Kansas as we lived in Dodge City for 9 years and when he received my communications he wrote me that "I have studied your communications carefully and it seems to me the remedy of garnishment is available to you not withstanding Mr. Crowther."

Mr. Crowther is director of the KPERS and will not allow garnishment of the KPERS for me.

Civil Service Employees, Federal Employees, Social Security can all be garnished for unpaid alimony. My ex-husband knows that Mr. Crowther will not permit garnishment of the KPERS and that is why he is comfortable that I can never get the portion that was decreed to me and to which he agreed. His new wife will be able to garnish her ex-husband's retirement because he is a Federal Employee. This is so unfair and I'm hopeful that with your help we can change that.

I'm anxious to know if any progress has been made regarding this matter but I also want to thank you for all your help.

I shall be awaiting any news.

Thank you so kindly,
Lois L. Peterson
Lois L. Peterson

HJUD
Attachment 1
1/31/91

Ba. ered Wome Task Force
Domestic Violence and Sexual Assault Programs

at the YWCA

Box 1883 • Topeka, KS 66601 • (913) 354-7927

Testimony before the House Judiciary committee
January 31, 1991

Re: HB 2008

Our agency commends the section of this bill requiring both parents to attend educational classes whenever a contested issue of child custody occurs in divorce or separate maintenance proceedings. These classes have been optional in Shawnee County for the last two years and have been required the last two months. Our clients have found them very useful.

However, we urge the committee to NOT pass the mandatory mediation portion of this bill. The victims of domestic violence that we serve would be better represented by an advocate than in a mediation setting. If mediation is most useful when the parties coming for mediation are in equal positions of power then couples with a history of physical and emotional abuse will not be well served with this technique. If one member of the couple has been injured by their spouse it will be extremely difficult to sit with the abuser, and a mediator, and work out an amicable arrangement.

We frequently observe how intimidated victims are when they are with their abusers even when others are nearby. Many victims fear for their own safety when they exchange their children for visitation. I know of two families who exchange their children in the lobby of the Topeka Police Department so that everyone feels safer. When one has been abused and threatened it is difficult to assertively stand up for one's rights even in the presence of others.

Our intervention program for batterers worked with 162 men and 4 women last year. One of the common characteristics of batterers is an amazing Dr. Jekyll/Mr. Hyde personality that could challenge a highly trained and skilled mediator. When the charm is turned on it is difficult for most observers to believe that this partner would be capable of harming anyone. After being battered the victim's self esteem is usually so low that it is difficult to be assertive and stand up for what one wants and needs with the abuser in the same room. We strongly believe that mandating mediation would be detrimental to most of the domestic violence victims that come to us for help.

Respectfully,

Marilynn Ault, Program Director

HJUD
Attachment 2
1/31/91

Testimony before the House Judiciary Committee by Alita Brown
January 31, 1991

RE: HB 2008

The Kansas Coalition Against Sexual and Domestic Violence represents the more than thirty programs across the state which provide services to the victims of sexual and domestic violence. While we appreciate the intent of HB 2008, we must take issue with a number of its specifics.

Our primary concern is that mandatory mediation for most of the victims we serve could, in fact, do more harm than good. The dynamics of abusive relationships center on the use of power and control, with violence being just one of many tactics used to perpetuate the domination of the abuser (see attached Power and Control Wheel). When the abuser senses that he is losing this advantage - when the victim is leaving or has left the relationship - he is most likely to resort to whatever measures are needed to reestablish his claim. The victim is then most vulnerable for serious or fatal injury and enticements to return.

Currently, we are seeing an increased number of cases where the abuser will use the legal system itself to reestablish control: through child custody battles; child abuse or neglect reports; counter filings of PFA's; and misuse of contacts for child visitation. Mandating mediation would create yet another tool for him to abuse. The use of violence in a relationship changes the balance of power so dramatically that mediation could not work (see attached statement from the National Coalition Against Domestic Violence).

Children are often the most unrecognized victims of domestic violence. They can and do become the bargaining chips, the targets, or the artillery in parental abuse. The United States Congress clearly outlined its conclusions and concerns by passing Concurrent Resolution 172 in the last session (see attached copy). It suggests a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive parent. We believe that child custody, visitation, support, and residency decisions must take spousal abuse into consideration because of its potential damage to children.

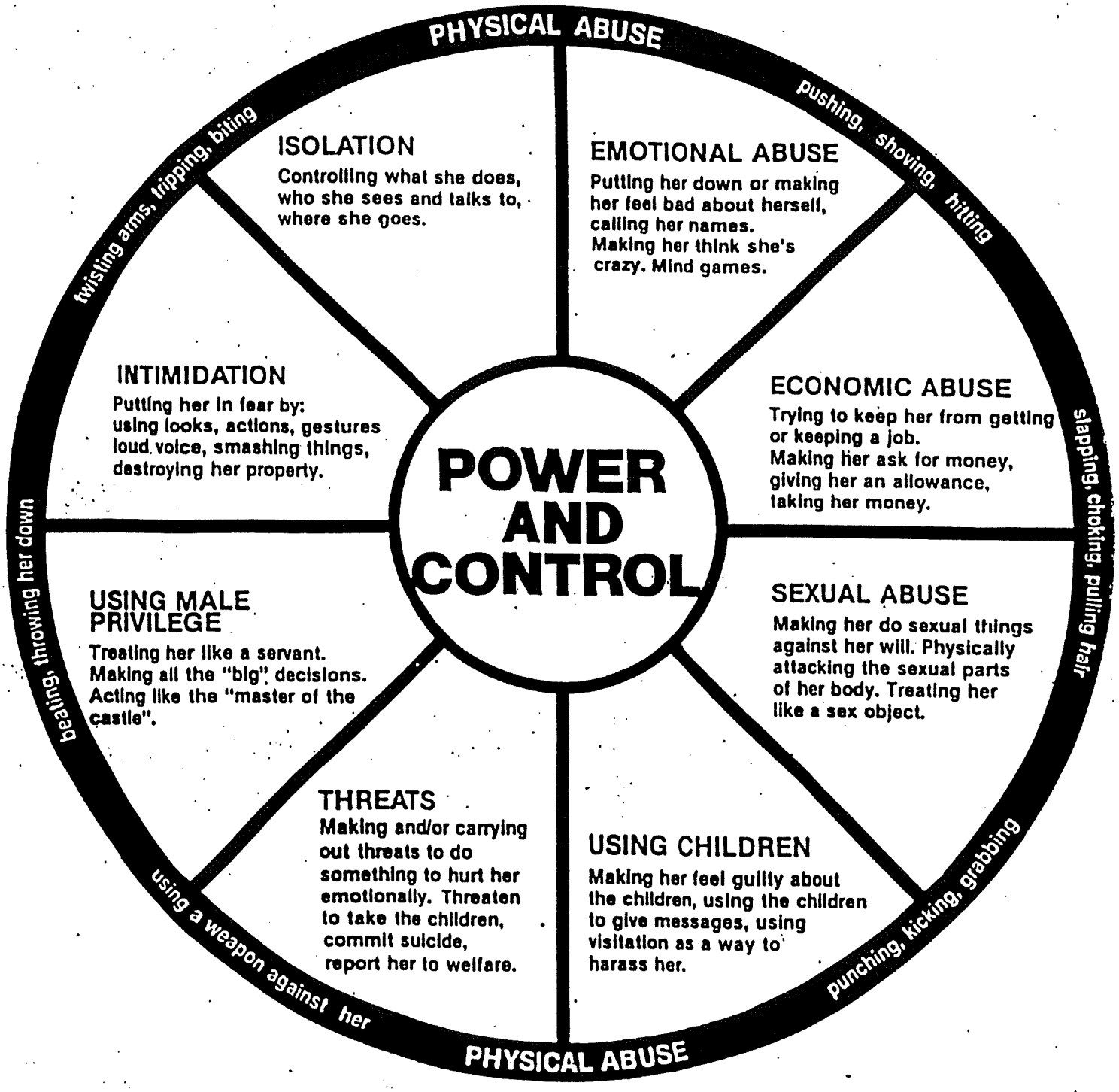
We suggest the bill be amended as follows:

pg 1 - Sec. 1, (b) - add "(5) that if there has been violence in the marriage, no mediation be ordered."

pg 2 - lines 33-36 be amended to included "except in marriages where there has been violence."

pg 3 - (B) add "(vii) the presence of domestic violence."

HJUD
Attachment 3
1/31/91


PHYSICAL ABUSE
pushing, shoving, hitting
slapping, choking, pulling hair
punching, kicking, grabbing
PHYSICAL ABUSE
using a weapon against her
beating, throwing her down
twisting arms, tripping, biting
ISOLATION
Controlling what she does, who she sees and talks to, where she goes.
EMOTIONAL ABUSE
Putting her down or making her feel bad about herself, calling her names. Making her think she's crazy. Mind games.
INTIMIDATION
Putting her in fear by: using looks, actions, gestures loud voice, smashing things, destroying her property.
ECONOMIC ABUSE
Trying to keep her from getting or keeping a job. Making her ask for money, giving her an allowance, taking her money.
POWER AND CONTROL
USING MALE PRIVILEGE
Treating her like a servant. Making all the "big" decisions. Acting like the "master of the castle".
SEXUAL ABUSE
Making her do sexual things against her will. Physically attacking the sexual parts of her body. Treating her like a sex object.
THREATS
Making and/or carrying out threats to do something to hurt her emotionally. Threaten to take the children, commit suicide, report her to welfare.
USING CHILDREN
Making her feel guilty about the children, using the children to give messages, using visitation as a way to harass her.

National Coalition Against Domestic Violence
P.O. Box 34103, Washington, DC 20043-4103 202/638-6388

STATEMENT ON MEDIATION

The National Coalition Against Domestic Violence opposes the use of mediation within relationships where violent abuses have taken place. Mediation is a relatively new tool for conflict resolution. While it may be appropriate and effective in some situations, it is not appropriate between intimates where one fears the other.

The underlying tenet of mediation is the ability of disputing parties to resolve their differences through negotiation and compromise. As with all negotiation and compromise, in order to be successful the parties must operate from positions of relative equality. In labor relations, the organized union acts as an equilizer between the workers and management. Hence, making the use of mediation more of a possibility. Between a battered woman and her perpetrator, the balance of power swings distinctly away from the woman who has been victimized, leaving the possibility of compromise as a mere illusion.

It has been purported that in situations between a battered woman and her abuser the mediator can, should, and does act as an equalizer. This contradicts the basic principle underlying the work of mediators. They are to be impartial facilitators without even the facility for enforcement to taint their objectivity. Fundamentally, the mediator cannot perform effectively where one party can use violence or the threat of violence to intimidate the other.

The practice of forced or coerced mediation is particularly abhorrent in the resolution of child custody and child support issues between a battered woman and her perpetrator. For the children's physical well-being she must then subject herself to a process which may place her in increased jeopardy.

It should always be remembered that women are killed every day by the same people with whom they could be forced into mediation. And, it is exactly at the point when she is making a clear break that she is most likely to be killed. Behavior which has such sweeping negative impact upon society mandates the most unequivical proscription. Forcing battered women into mediation trivializes the violence, thereby giving tacit approval to the perpetrator for such behavior.

January 1991

Child Custody Resolution

On July 20, 1989, **House Congressional Resolution 172** was introduced by Representative Connie Morella (R-MD), to express the adverse effects of domestic violence on children and the need to incorporate evidence of domestic violence in child custody litigation.

Although Congress does not have jurisdiction to legislate how state judicial systems decide child custody cases, Congressional resolution can serve as an important tool for education at the state and local level. This resolution is currently awaiting a report to the Judiciary Committee.

101st Congress, 1st Session H. Con. Res. 172

Expressing the sense of the Congress that, for purposes of determining child custody, evidence of spousal abuse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive parent.

IN THE HOUSE OF THE REPRESENTATIVES

July 20, 1989

Mrs. Morella (For herself and Mr. Miller in California) submitted the following concurrent resolution; which was referred to the Committee on Judiciary

CONCURRENT RESOLUTION

Expressing the sense of the Congress that, for purposes of determining child custody, evidence of spousal abuse should create a statutory presumption that it is detrimental to the child to be placed in the custody of an abusive parent.

Whereas State courts have thus far not recognized the detrimental effects of the batterer as a custodial parent due to their failure to hear or weigh evidence of domestic violence in child custody litigation;

Whereas joint custody guarantees the battered spouse's life through their children;

Whereas joint custody forced upon hostile parents can create a dangerous psychological environment for a child;

Whereas a batterer's violence toward an estranged spouse often escalates during or after a divorce, placing both the abused spouse and children at risk through shared custody arrangements and unsupervised visitation;

Whereas spouse abuse is relevant to child abuse in child custody disputes;

Whereas the effects of spouse abuse on children include actual and potential emotional and physical harm, the negative effects of exposure to an inappropriate role model, and the potential for future harm where contact with the batterer continues;

Whereas children are emotionally traumatized by witnessing physical abuse of a parent;

Whereas children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent;

Whereas even children who do not directly witness spousal abuse are affected by the climate of violence in their homes and experience shock, fear, guilt, long lasting impairment of self-esteem, and impairment of developmental and socialization skills;

Whereas research into the intergenerational aspects of domestic violence reveals that violent tendencies may be passed on from one generation to the next;

Whereas witnessing an aggressive parent as a role model may communicate to the children that violence is an acceptable tool for resolving marital conflict; and

Whereas few States have recognized the interrelated nature of child custody and battering and have enacted legislation that allows or requires courts to consider evidence of spouse abuse in child custody cases: Now therefore, be it

Resolved by the House of Representatives (the Senate concurring), That it is the sense of the Congress that, for purposes of determining child custody, evidence of spousal abuse should create a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive parent.

January 31, 1991

CHILD CUSTODY HEARING

Comments from a divorced father

Why is it that every year the legislature if making changes to the custody/residency laws? Is it because the present conditions are cruel, inhuman and unworkable. Maybe the legislature means well but as long as judges, lawyers and numerous other parasites can make money from this injustice the problems will continue. The problem is the court's policy that after divorce there will be only one home for the children.

That home is always with the mother unless she chooses to make other arrangements. She makes all decisions regarding the children. The court views her as the only parent and in reality she is. This system has not worked in the past it is not working now nor will it work in the future. The efforts of the legislature are a total complete waste of time. Things will not change until both parents are consider important and allowed to be involved in the decisions that effect the children. Also the children will have to be allowed to live with both parents in some type of shared arrangement. This is not being done in spite of what these lying judges and lawyers say.

In 1984 the Wichita Eagle-Beason carried a picture of a judge on the front page saying that there was no discrimination by the courts in deciding the custody of children in divorce cases. Ken Johnson and I did a study of the custody decisions of the Wichita court covering a year and one half.(copy attached) The father got the children in10% of the cases and this was always done by an agreement outside of the court. When the mother got the children it was ordered by the judge in the majority of the cases. Not in any case did the judge award custody to the father if the mother wanted the children. An interesting note: the Eagle-Beacon refused to print our study.

In 1987 the Legistlative Post Division did a study of "Child Custody Determinations in Kansas Divorce Courts." The results were the same only 10% of the time fathers got custody. The Eagle-Beacon also refused to print this study! Interestingly, shortly before this study was released the Topeka Capital-Journal did a story on child custody. Judge Buchele stated very plainly that again the courts did not discriminate against fathers. The results of tht study revealed the Topeka courts to be one of the worst in the state. ~~This butcher is presently in charge of the domestic court in Topeka.~~

Now they play a diferent game but the score is still the same. The judge supposedly has the parents decide how they want custody divided. In reality the lawyer tells the father that he has to give custody to the mother or it will make the judge mad and the judge will give the children to the mother anyway. Also if the father doesn't consent to this then the lawyer will tell him it will cost thousands of dollars to fight it in court the lawyer needs his fees upfront. Which of course the father doesn't have therefore he has no choice. But this looks good on paper because the judge can say he didn't make the decision although he really did.

HJUD
1/31/91
Attachment 4

The lastest gimmick is mediation. This is nothing more than a sham to employ more lawyers. If the mother knows that she doesn't have to give up the children because the judge will always decides in her favor, why should she cooperate during the mediation process. It is completely useless. Of course it sounds good on paper. The judge can say look what were doing to help the children.

The courts now require an "education class" when parents divorce. Again the only real purpose of it is to spread the money around. I have attended these classes and they are nothing more than a grain-washing session. They tell you that you should cooperate with judge because he is doing what is "best for the children."

A comment on the judge's "bounty hunter." (court trustee) The court takes a percentage of the money I pay as child support and hires worthless lawyers to hunt down fathers that don't pay child support. These people show large dollars values saved to justify their exsitence. What happens is when the money doesn't come into the courthouse on the first day of the month the computer this as money not paid. Then when it comes in a couple of days later these bounty hunters claim this as money they have saved the state.

Would someone explain to me why my children and I are required to support this? If this service is needed why isn't society supporting it? Your system will not work no matter how many bandaids you put on it until fathers are treated with with some kind of understanding and fairness.

John Ackeret
2421 SW 26th DR
Topeka, KS 66611
Phone day 295-6619

TABLE A

ON THE MEANINGLESSNESS OF JOINT CUSTODY FOLLOWING DIVORCE IN THE 18th JUDICIAL DISTRICT OF KANSAS
A PRELIMINARY STUDY ENDING NOVEMBER, 1984

Column One CASES SURVEYED	Column Two Cases Involving Children	Column Three THEORETIC CUSTODY Sole	Joint	Column Four JOINT (shared) CUSTODY GRANTED* Judge Ordered	Agreed Out of Court
#'s 83D1-83D520	215	39	176		12
#'s 83D1000-83D1360	134	21	113		7
#'s 83D2001-83D2190	66	12	54		1
#'s 84D1-84D266	86	17	69		4
TOTALS	501	89	412		24
PERCENTAGES		17.7%	82.2%		4.8%

*In five of the cases we examined it was not possible for us to determine from the court file (largely due to ambiguous writing and case organization) whether the shared custody granted was agreed to out of court or mandated independently by the judge. Shared custody, in this instance, means at a minimum that the divorcing spouses were granted equal time with their children.

Column Five MAN NAMED REAL CUSTODIAL PARENT Judge-Ordered	Agreed Out of Court	Column Six WOMEN NAMED REAL CUSTODIAL PARENT (Not distinguished as to judge-ordered or out of court)
	20	183
	12	115
	8	57
	9	73
TOTALS	49	428
PERCENTAGES	9.8%	85.4%

NON-CUSTODIAL PARENTS FOR EQUAL RIGHTS

1403 South 37th Street Kansas City, Kansas 66106 (913) 432-3860

Good day, ladies and gentlemen, I am George R. McCasland. I am the General Secretary for the organization of Non-Custodial Parents For Equal Rights, in Kansas City. We cover the Kansas City metropolitan and surrounding areas, in both Kansas and Missouri. I have been asked by our President, Debbie James, to give testimony concerning our groups combined views of some of the House Bills before this committee. I am specifically to address our concerns and views of House Bills 2007, 2008, and 2009.

First I wish to apologize, in advance, for any mistakes I will be making in my English. I am a retired long haul truck driver, and I am sure that many of you know, truck drivers tend to speak a language all their own.

I would like to first, briefly address House Bill 2007. In reviewing this, we find that this would be an unnecessary law. Simply put, it is a Medical Support Act for Children. As I am sure many of you know, medical benefits for children are already covered under Administrative Order 75, the current Child Support Guidelines. If a law is going to be enacted to replace the portion of the child support guidelines, then the guidelines as a whole should be replace, and not in a piece meal fashion. We believe this law to be inconsistent and unnecessary. We already have a provision in the Child Support guidelines covering Medical Support, and should stay with it. We believe it to be a redundancy of the existing guidelines, and recommend that it not be passed.

In general, our views on House Bill 2008 are that we see items in this proposed legislation that are both favorable and unfavorable. I would like to first address that which we favor.

On page 5 of the legislation, lines 7 through 12. We believe that the addition of an educational process to this Kansas Statutes would give parents a better understanding, and working knowledge, of the affect, unsettled disputes between them, in regard to custody and/or visitation rights, have on their children. If the intent of this section, is to create a better environment for the children of divorce, and to teach their parents how to create that environment, then we are in favor of it's passage.

But, on the first page, beginning with line 16, we have some reservations concerning requiring the courts to order mediation whenever the issue of a contested visitation comes before it. Our concern centers around how the interpretation of this will affect motions for an ***Expedited Procedure*** for the enforcement of court ordered visitations, as is set out in the Kansas Statute 23-701.

HJUD
1/31/91
Attachment 5

As you know, the purpose of 23-701, is to expedite a motion for enforcement of the court ordered visitations. It has been our experience, based on evidence taken from persons who have filed these motions, both here and in other states, that when a custodial parent is uncooperative in allowing the visitations to take place, they are not going to be any more cooperative in a mediation process. And generally, mediators are not allowed to tell the court that the parent was being uncooperative.

We have found that requiring mediation, results in delays in having the motion heard, sometimes for months, at which time the motion is dismissed as being moot. An example of this is a case that has come to our attention just two nights ago. A non-custodial parent filed for an expedited procedure for the enforcement of his court ordered visitation. That violation took place last Easter holiday. The court ordered mediation, as is the option under the current law. It has yet to have a hearing. In the meantime, the child has become further alienated from the non-custodial parent.

It is believed by some of our members that the court does this just to get the issue pushed back, in the hope that the non-custodial parent will give up, pay their child support, and not make waves by demanding the court ordered visitations. And, it can be used as a weapon to further deny the child's right of access to the non-custodial parent.

We also believe that this change may tie the hands of judges who do believe in enforcing the visitation rights of the non-custodial parent. Requiring them to order mediation, even though these judges believe in treating this issue the same as they would treat violations of court ordered child support.

If this change in wording is made, we would like to see, in regard to visitations, that the court order the visitations, as is stipulated in the decree, to take place, with makeup for pass time loss. At least until mediation is completed, and it is taken before the court, for a final decision.

I do not believe that anyone on this committee wants children to be alienated from a parent, just because there is an ongoing dispute between their parents, but this change, without a further amendment, would do just that.

A final point, regarding mediation. If mediation can, or is, ordered in regard to a dispute over custody and/or visitation, then to make all things equal, it should also be ordered in regard to disputes over court ordered child support.

As to House Bill 2009, I would like to state, for the record, some statistics that relate to children raised in sole custody or single parent homes, with little or no input from the other living parent, whether by choice or design.

In a 1988 NBC special, called 'A White Paper On Divorce,' it was shown that children raised in a sole custody home, where the child, or children, do not have the influence of both living parents, are three times (3X) more likely to incur trouble with the law.

Some more astonishing facts came out of a report from the 1989 Georgia Commission on Children and Youth. They found the following statistical results regarding children raised in sole custody or single parent homes:

65% of the children who use drugs or alcohol
70% of the underage pregnancies
70% of the children who attempt or commit suicide
65% of this country's high school drop outs
60% of the runaways or homeless children
And finally, 85% of all the persons, male and female, in prison today, came from sole custody or single parent homes.

Finally, two significant statistics from the same U.S. government report that established that 50% of all child support is either not paid or fully paid. Seventy-seven percent (77%) of the court ordered visitations are denied by the custodial parent. And that of parents who do have equal and continued access to their children, less then 26% pay less then their full amount of child support, with a connection usually made to a reduction of their income due to change of jobs or layoffs. The number one reason given for not paying the court ordered child support is lack of enforcement of the court ordered visitations.

Now how this relates to House Bill 2009. We favor the changes proposed in this Bill. One very important matter concerning all non-custodial parents, is the fact that they believe they are no longer considered parents. Changing the wording to designate visitation a form of parenting, reinforces the idea that a child of divorce really has two parents, not just one. But we have reservations concerning the change in wording regarding Joint Custody, or Joint Residency, on page 12, lines 2 through 18.

In Kansas today, Joint Custody is still just a name, with no significant, or enforceable, meaning. The designated changes here still leaves it open to interpretation and allowing for primary residency to be placed with one parent or the other. In other words it will have no affect on the statistics I mentioned before.

We we are to do what is best for our children, then they must have the right to equal and continued access to both parents, after the divorce. To assure this we suggest the following addition be made. In the final sentence of this paragraph, lines 15 to 18, we suggest it to read as follows:

"If the court does not order joint *equal* residency, it shall include in the record the specific findings of fact upon which the order for residency other than joint *equal* residency is based."

We believe that this change would alleviate any possible interpretations of an order that would lead to anything other the child having equal access to both parents. Having both their guidance and help in order not to become one of those statistics. These children were born from two parents, and with the possible exception of extra ordinary circumstances involving proven abuse by either parent, only death should be able to take one away from them.

We ask that you consider this addition, and make it retroactive to joint custody cases already decreed. We ask that you do this, not for the parents, but for the children, in the hope that they do not become another statistic.

All of us at Non-Custodial Parents For Equal Rights wish to thank you for time in hearing our testimony as regards House Bills 2007, 2008, and 2009.

Fathers are Parents Too: Pros and Cons of the New Missouri Domestic Relations Statute

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I. INTRODUCTION

Recent years have seen the rise of the men's rights movement in the United States. Across the nation several hundred men's rights groups have been organized.[1] "In 1980, in an effort to coalesce the movement and keep the different men's groups from becoming too scattered, the National Congress for Men was formed. Now 100,000 strong, it is an umbrella association for 20 groups in the United States, Europe and Australia . . . ."[2] Among the groups' concerns are iality in law enforcement, prison reform, and joint custody.[3] These groups /e been seeking legislative reforms, particularly in the area of joint custody. Since 1978, members of the Fathers United for Equal Rights and other groups have been influential in bringing about new or revised custody legislation in 24 states, nine in the last year alone."[4]

In August of 1988 the latest legislative revision of the Missouri Domestic Relations Statutes went into effect.[5] Arguably, joint custody has been changed from an option to a preference by the new statute.[6] In addition, a "friendly parent" provision has been added,[7] and a "motion for contempt" has been provided to a non-custodial parent for non-compliance with the visitation provisions of the original decree.[8]

Enactment of this legislation followed a report to the Speaker of the Missouri House of Representatives by a specially appointed interim committee.[9] The Committee recommended, among other things, "[p]assage of legislation sponsored by the Missouri Bar Association's Family Law Section in regard to custody, support, maintenance, and property division, with the addition of family violence as a factor for consideration in awarding custody of the child(ren). Specifically, a preference for joint custody . . . ."[10]

This Note focuses on the relation between concerns of divorced fathers and the new statutory provisions listed above.[11] Section II examines some concerns of divorced fathers and relates them to a few of the new statutory provisions. Section III analyzes some of the arguments, pro and con, relating to those provisions.

II. FATHER'S RIGHTS AND THE NEW MISSOURI STATUTE

"Men are fighting the battle against male stereotypes in the courts, in the marketplace, in society and in the home. These stereotypes—that men are competitive, aggressive, without emotion—are just as demeaning and confining, they say, as those affecting women."[12] If the women's movement has brought about changes for women in our culture, it has also brought about changes for men. "A radical restructuring of maleness and fatherhood is currently under way."[13] Part of that restructuring includes an increasing desire on the part of men to be nurturing to their children. However, that desire often flies in the face of societal expectations, stereotypes, and the socialization processes of men.

> In our society it is a high compliment to tell a father that he is a 'good provider' as if that were his primary, if not his only role. Boys learning to be men are taught to be macho, real he-men — the strong silent type. Seldom are they encouraged to be nurturant in a society that is shocked and embarrassed when a man cries.[14]

The theories behind custody laws and decisions have shifted from one extreme to the other over the last two centuries.[15] In the early nineteenth century, custody in divorce cases was granted almost exclusively to the father based on the English common law theory that children were possessions of the father, and he was entitled to their services. At the turn of the century, with the advent of the Industrial Revolution in the United States, courts began to give custody of children to the mother on the theory that mothers were more suited—both by biology and by the fact that mothers were generally the primary caretakers of the children while the father was earning a living. Blond cites a 1938 Missouri

1. McCant, *The Cultural Contradiction of Fathers as Nonparents*, 21 FAM. L.Q. 127, 141-42).

2. *Real Men Cry: Fighting Stereotypes*, 11 HUM. RTS. 4 (1983).

3. *Id.*

4. *Id.*

5. H.B. 1272, 1273, 1274, 84th Gen. Assembly, 2d Reg. Sess., 1988 Mo. Laws, signed by Missouri Governor John Ashcroft on June 15, 1988, with an effective date of August 13, 1988. Hereinafter, the new provisions will be referred to by Mo. REV. STAT., the sections delineated in the bill, and the year of enactment, 1988.

6. Mo. REV. STAT. § 452.375(4) (Supp. 1988). *See infra*, Section II for an analysis of the statutory ambiguity with regard to joint custody.

7. *Id.* § 452.375(2) (1988).

8. *Id.* § 452.400(3).

9. MISSOURI HOUSE OF REPRESENTATIVES, REPORT TO THE SPEAKER ON CHILD CUSTODY, VISITION, CHILD SUPPORT ENFORCEMENT, AND DIVORCE MEDIATION BY THE INTERIM COMMITTEE ON CHILDREN, YOUTH AND FAMILIES 1 (1987) [hereinafter REPORT TO THE SPEAKER].

10. *Id.* at 7.

11. The author writes from the perspective of a divorced father who received visitation rights under the old statute, as well as a student of the law, and acknowledges all biases evident herein.

12. *Real Men*, *supra* note 2.

13. McCant, *supra* note 1, at 132.

14. *Id.* at 140-41. *See also* Blond, *In The Child's Best Interests — A Better Way: The Case for Presumptive Joint Custody in Missouri*, 52 UMKC L. REV. 567 (1984) for another discussion of the social and legal biases against men as nurturant parents.

15. *See, e.g.*, Blond, *supra* note 14, at 576-82, and Comment, *Child Custody and Support: An Analysis of Missouri Law and the Child's Best Economic Interest*, to be published in 57 UMKC L. REV. 289, 290-94 (1989) for an analysis of the changes in custody determinations in Missouri.

appellate court decision which said: "There is but a twilight zone between a mother's love and the atmosphere of heaven, and all things being equal, no child should be deprived of that maternal influence unless it be shown that there are special or extraordinary reasons for doing so."[16] From this thinking developed the "tender years presumption" in family law courts.[17]

Many fathers reject the assumptions underlying the tender years presumption. They point to studies which show that there

> are few significant differences in the ways children attach to fathers and mothers. Concerning the maternal "attachment bond," we now know that "initially this bond is but a one-way attachment. The newborn has no innate preference for one parent over another or for the natural parents rather than a foster parent." Men have as much parenting potential as women.[18]

/ fathers feel that, despite this research, family law courts continue to hold to outmoded stereotypes and disenfranchise fathers as parents. Under the title "Gender Bias?" the *American Bar Association Journal* in 1987 discussed an Iowa Court of Appeals decision of that year upholding a trial court's reduction of a father's visitation rights. The trial court judge restricted the visitation on the grounds that the father "is an unemployed househusband"[19] and said,

> It wouldn't be a good role model for him [the child], because in our society, it is still accepted that the husband and father is the breadwinner and works and that is the role model that Jeremy should have unless he is going to be socially crippled when he is an adult.[20]

This trial court judge apparently not only accepted out-moded stereotypes of males but also favored instilling them in future generations to the point of penalizing a father and his child if the father chose not to conform to them. When such stereotypical thinking comes from society at large, fathers become frustrated; however, the frustration is greatly increased when the stereotypical thinking accompanies the power of family law courts to limit a father's contact with his children on the basis of such thinking. Fathers will like to think that discrimination against them would not occur in the halls of blind justice. However, "there is hardly any place in our society where the discrimination against fathers as parents is more blatant or painful than in the courtroom where custody 'awards' are made. When custody 'awards' are made, it is customary to view the father as a nonparent."[21]

16. Blond, *supra* note 14, at 578 (citing Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938)).

17. *See*, Dodson, *Joint Custody in Missouri*, 31 St. Louis U.L.J. 111, 125 n.94 (1986) for a statutory history of the tender years presumption in Missouri.

18. McCant, *supra* note 1, at 132 (citing H. Biller & D. Meredith, Father Power, 59

19. *Gender Bias?*, 73 A.B.A. J. Sept. 1, 1987 at 21.

20. *Id.*

21. McCant, *supra* note 1, at 135.

Statistics indicate that mothers obtain custody in over 90 percent of the cases. This suggests that "an underlying preference for maternal custody continues in important ways to affect the decision process and the expectations of parties. It seems clear that fit mothers tend to be favored for custody."[22] Scott and Derdeyn cite studies which indicate that (1) courts continue to prefer mothers for custody, (2) 98 percent of the attorneys surveyed believe that judges favor mothers, and (3) fathers are not encouraged to seek custody unless the mother is unfit or has abandoned the child.[23] Even though courts ostensibly use the best interests of the child as the standard in awarding custody, it appears that the standard does not really function "in a sex-neutral manner."[24] Many fathers simply give up their desire for custody in the face of this apparent social and judicial prejudice.

Legal commentators are not always sensitive to this point. One recent commentator, opposing a preference for joint custody in Missouri, says, "As the primary caretaker, the mother is likely to feel more threatened by the possibility of losing custody, or partial custody, of her child . . ."[25] But why is the child "hers" and not "theirs," and why assume that there is a greater attachment and sense of loss for the mother because she does the laundry as opposed to the father because he mows the grass? What does "primary caretaker" really mean? After all

> the world in which fathers work and mothers stay home with the children is changing. Both parents now work outside the home in many families. It may no longer be clear, even with young children, that the mother is the primary caretaker or the obvious custodian when the parents separate. . . . Just as mothers may share in the wage-earning function, fathers are receiving encouragement to become more involved in caring for their children.[26]

Further, "[d]epression associated with the loss of children has been observed in many divorced men."[27] Scott and Derdeyn cite studies which found increased anxiety and depression as well as actual physical illness in divorced men associated with this loss of children, as well as studies which show "a high rate of psychiatric hospitalization of divorced men (three times higher than divorced women)."[28]

But fathers are not supposed to admit these feelings; they are, after all, merely economic support personnel. It is stereotypes like these which anger and threaten men who want desperately to nurture their children as fathers. Fathers would like society, and especially family law courts, to realize that when a "male

22. Scott & Derdeyn, *Rethinking Joint Custody*, 45 Ohio St. L.J. 455, 468 (1984).

23. *Id.* at 468 n.58.

24. *Id.* at 468.

25. Comment, *supra* note 15, at 296.

26. Scott & Derdeyn, *supra* note 22.

27. *Id.* at 459-60.

28. *Id.* at 460 n.21.

is nurturant, he is fathering, not mothering"[29] and that children "need the nurturance provided by both fathering and mothering."[30]

As noted above, the Report to the Speaker recommended that joint custody become a preference in Missouri. This report contained excerpts of testimony presented to the committee during its investigation. For example, Barton Blond, J.D., who had been a member of the Missouri Bar Family Section Child Custody Study Committee, is quoted as saying:

> The vast majority of the testimony and data presented to the committee by parents, mental health professionals and attorneys . . . strongly supported the concept of preferential joint custody and was consistent with the growing trend in child custody laws in the United States. The unanimous findings of the committee . . . were that statutory changes were required . . . to better assure greater equity, fairness and reason to all parties involved . . . .[31]

Tom Neumeyer of the Children's Rights Coalition said "[c]hildren have a right to co-parenting after their mother and father divorce. However, the system encourages the loss of one parent. He or she, [sic] is replaced by an occasional visitor . . . ."[32] And a clinical psychologist testified that "[w]hen you grant all decision making to one parent, and usually the mother, you are essentially telling the child the other parent's input doesn't count."[33]

The above indicates that some of the concerns of fathers discussed above were expressed to the committee and were influential in its recommendation, and so were indirectly influential in the legislative changes. Fathers do not want to become a mere occasional visitor in their children's lives. They want to nurture and to have a meaningful role in their child's development, both physically and emotionally. But in a system which favors maternal sole custody, "meaningful parental roles by non-custodial parents, usually fathers, are discouraged and often illusory; and, they can be virtually eliminated by an uncooperative or hostile sole custodian."[34]

It is not clear, however, from the language of the statute, that joint custody now a preference in Missouri. The revised section 452.375(4) provides that prior to awarding the appropriate custody arrangement in the best interest of the child, the court shall consider each of the following *as follows*" (emphasis added). Joint custody is then listed first, sole custody second, and third-party custody is last. Given the recommendations which were received by the legislature and discussed above, it is likely that this statute is intended to be read as setting out a preference.[35] Further, the policy statement in section 452.375(3) that it is

29. McCant, *supra* note 1, at 132.
30. *Id.*
31. REPORT TO THE SPEAKER, *supra* note 10, at 15.
32. *Id.* at 12.
33. *Id.* at 13.
34. Blond, *supra* note 14, at 567.
35. *See* Comment, *supra* note 15, at 295-96 for further analysis of arguments supporting a "preference" interpretation.

in the "public interest to encourage parents to share decision-making rights and responsibilities of child rearing" and which directs the court to "determine the custody arrangement which will best assure that parents share such decision-making responsibility and authority and such frequent and meaningful contact with the child" as is in the child's best interests, strongly supports reading the statute as setting out a preference. Such a reading would greatly increase the number of joint custody awards in Missouri and would go a long way toward recognizing the truly parental rights and obligations, as opposed to merely economic obligations, of divorced fathers. It would provide a step toward putting into practical, not merely theoretical, effect the public policy of providing "frequent and meaningful contact"[36] between the children and both parents.

In terms of visitation, fathers' rights proponents have three basic objections to the present system. First, being merely an occasional visitor in the child's life is painful and does not adequately provide for the meaningful contact through which parental nurturing can take place. For some, the pain is so severe that in addition to resulting in emotional and physical distress to the noncustodial parent, it also results in that parent removing himself from the source of his pain.[37] Perhaps a more general acceptance of joint custody, with its rights and obligations, will decrease this trauma.

Second, "the unequal enforcement of child support and child custody/visitation rights causes distress for fathers."[38]

> There presently is no procedure to assist the father in receiving his visitation with the children except to return to the courtroom. Whereas, [sic] the mother receives public funds to collect the child support due her, the father is forced to spend hundreds or even thousands of dollars for attorney and legal expenses just to obtain visitation rights with his children.[39]

To be accurate, the child support is due the child, not the custodial parent. However, in the great majority of cases, it is the mother to whom the check is written and it is she who has the right to public assistance for enforcement of child support obligations.

With sole custody, the custodial parent has great latitude in cooperating or not with the noncustodial parent in terms of visitation. Though the visitation rights are often spelled out in the decree, they are very difficult to enforce. This is partially due to lack of an appropriate remedy and partially to the fact that the state does not take an interest in enforcing those provisions. The collection of child-support payments is vigorously enforced. In fact a national locator system has been implemented to chase down obligors who fail to meet their obligations. Yet the violation of visitation rights goes virtually unpunished by

36. MO. REV. STAT. § 452.375(3) (Supp. 1988).
37. *See* Blond, *supra* note 14, at 596.
38. McCant, *supra* note 1, at 137 n.52.
39. REPORT TO THE SPEAKER, *supra* note 9, at 24.

district attorneys and the courts. There is sound economics behind this unequal enforcement. By tracking down errant support obligors, the county is able to cut down on its welfare costs.[40]

Finally, fathers object to the slow grinding of judicial wheels in cases of visitation infringement. Speaking of the need for a "quick fix" in these cases, the Chairman of the Family Law Section of the Missouri Bar Association testified that the judicial proceeding "should be something that would be short of the necessary full hearing so that you don't get to Christmas Eve—find out Mom or Dad is denying the visitation over the holidays—and then wait six months for a hearing until the issue is moot."[41]

In response, the Missouri legislature added a subsection to the statute on visitation providing that the noncustodial parent may bring a motion for contempt en there is non-compliance with the visitation rights.[42] The same section vides that if the court finds that its visitation order has not been complied with, "without good cause," the court will have discretion in providing a remedy and define the noncustodial parent's visitation in detail. This provision is indeed a step, but it is woefully short of being either adequate or equitable, as will be shown in the following section.

Fathers are becoming more vocal in their desire to be significant persons in the nurturing of their children. Many fathers, including many in Missouri, applaud the new joint custody preference as a way of promoting real and indeed meaningful contact with their children. Many fathers are no longer willing to accept the stereotype that men are mere economic support systems for their children; they will no longer accept the pain of the loss of their children without a fuss. The Missouri legislature changed portions of its statutes in response to this movement. The next section will evaluate only three of those changes.

III. ARGUMENTS FOR AND AGAINST RECENT CHANGES IN DOMESTIC LAW

A. Preferential Joint Custody

Two main arguments are offered in opposition to a preference for joint custody. The first is that joint custody is "not appropriate for everyone."[43] Particularly, joint custody is not appropriate in cases involving domestic violence and/or child abuse, and it is not appropriate in situations where the parents simply cannot cooperate. The second refers to "custody blackmail."[44] It begins with the questionable assumption that the mother is "likely to feel more threatened

40. McCant, *supra* note 1, at 139.
41. REPORT TO THE SPEAKER, *supra* note 10 at 24.
42. Mo. REV. STAT. § 452.400(3) (Supp. 1988).
43. REPORT TO THE SPEAKER, *supra* note 10, at 10.
44. Comment, *supra* note 15, at 296; *see also* Dodson, *supra* note 17, at 123.

by the possibility of losing custody, or partial custody,"[45] adds the unstated assumption that fathers are concerned primarily, if not exclusively, with saving support money, and then deduces that joint custody provisions permit "fathers to use the threat of a custody dispute to negotiate for a lower amount of child support."[46] Each of these arguments will be examined in turn.

Even if the new statute establishes a preference for joint custody,[47] it is clear that any custody award is to be made "in the best interests of the child."[48] The statute also provides the court with "relevant factors" which must be considered in determining the child's best interests. One factor is the "mental and physical health of all individuals involved, including any history of abuse of any individuals involved."[49]

The words "including any history of abuse of any individuals involved" were added by the 1988 amendments. Clearly, this language directs the court to take abuse into consideration before awarding custody. Further, the legislature was concerned that spousal abuse, as well as child abuse, be considered. It is likely that the legislature was responding to the concerns of womens groups, such as those mentioned above. Thus, *prior* to awarding custody, the court must look to the health of the individuals and to "any history of abuse." It would appear that a joint custody preference under these guidelines would not lead to inappropriate awards.

Some are concerned, however, that "a judge is prevented from even hearing about the abuse due to several factors . . . ."[50] They note that some will refuse to raise the issue because of costs of litigation, fear of reprisal, and social stigma.[51] One way of alleviating this concern is to add a provision to the statute requiring the court in all custody decisions, whether contested or not, to make an inquiry to the Division of Family Services for any record of abuse. Since the Division now maintains records of all allegations, at least temporarily, as well as all confirmations on a state-wide basis, at least those cases will be available to the judge. In addition, since the inquiry will be routine, fears of shame and reprisal will no longer dissuade persons from raising the issue.

That is only a partial solution, however, since presumably many cases of abuse are not reported. The legislature must find ways to accurately discover and record confirmed cases of abuse, both of children and of spouses, and must tie that statutorily to divorce and custody cases. It is hoped that the developing awareness of the problems of domestic violence will have such a result.

45. Comment, *supra* note 15, at 296.
46. *Id.*
47. *See supra* note 32 and accompanying text.
48. Mo. REV. STAT. § 452.375(2) (Supp. 1988).
49. *Id.*
50. REPORT TO THE SPEAKER, *supra* note 9, at 10.
51. *Id.*

It is also argued that joint custody is inappropriate since a divorcing couple, almost by definition, cannot cooperate. However, a joint custody award does not require "that the parents have an amicable relationship."[52]

> [A] successful joint custody arrangement requires only that the parents be able to isolate their personal conflicts from their roles as parents and that the children be spared whatever resentments and rancor the parents harbor. Moreover, the potential for cooperation should not be assessed in the "emotional heat" of the divorce.[53]

Since the new statute requires a "written plan setting forth the terms"[54] of any joint custody decree, and since the plan may include a provision for mediation f disputes,[55] both the possibility of cooperation and the likelihood of its success . terms of parenting the child are increased. Parents should be expected to continue to be parents even after separation from one another.

The second argument referred to above opposes a preference for joint custody on the grounds that fathers may use it as a weapon to win monetary concessions from the mother. As noted, this argument assumes that fathers do not really want custody and that they feel less loss than mothers; rather, they really want to save money. As a general statement, this is inaccurate and misleading.[56] However, even if it is assumed that it is true in some cases, it is not clear either that a joint custody preference increases the likelihood of success of such "blackmail," or that repeal of the preference is the best way to prevent it.

First of all, a father wishing to "blackmail" his spouse with the threat of joint custody could do that when joint custody was an option. He could simply threaten to move for joint custody and then win the economic negotiations which follow. As compared with a mere option, a preference "encourages and promotes bad faith requests for joint custody, made solely for the purpose of bartering on other issues,"[57] only if either: (1) the option is not a real option in that fathers requesting joint custody under the option provision simply will not get it or will denied it upon the mother's veto, in which case the father has no superior rgaining power but he also has no real opportunity for joint custody; or (2) the "friendly parent" provision[58] is used by the court to deny sole or even joint

52. Blond, *supra* note 14, at 605 (citing Beck v. Beck, 86 N.J. 480, ____, 432 A.2d 63, 72 (N.J. 1981)).

53. *Id.*

54. Mo. Rev. Stat. § 452.375(7) (Supp. 1988).

55. *Id.*

56. *See supra* notes 26-28 and accompanying text.

57. Comment, *supra* note 15, at 297 (citing Schulman & Pitt, *Second Thoughts on Joint Child ustody: Analysis of Legislation and Its Implications for Women and Children*, 12 Golden Gate .L. Rev. 539, 554 (1982)).

58. Mo. Rev. Stat. § 452.375(2)(8) (Supp. 1988) lists as a factor to be used in determining custody "[w]hich parent is more likely to allow the child frequent and meaningful contact with the other parent."

custody to mothers who object to joint custody.[59]

Thus, under the first possibility, the argument that a preference is inequitable turns on itself. It is equally inequitable to have an option that is not a real option or to deny fathers the right equally to be parents with mothers simply because the mother refuses. In addition, there is no evidence that courts will use the friendly parent provision in the way described. However, in order to prevent such blackmail, the legislature should adopt a provision whereby the court, on finding bad faith, may require the offending party to pay attorney's fees.[60] Such a provision is a more appropriate way of handling bad faith than returning to an option under which fathers become mere providers and visitors.

B. Abatement of Child Support

In addition to providing a preference for joint custody, the new statutes provide that child support obligations "shall abate, in whole or in part, for such periods of time in excess of thirty consecutive days that the custodial parent has voluntarily relinquished physical custody of a child to the noncustodial parent."[61] This provision is opposed by some[62] on the grounds that, though the custodial parent will experience a reduction in expenses during such a period, the custodial parent will have continuing expenses, such as maintaining the family home, awaiting the child's return. This argument is also somewhat self-defeating since it follows that the noncustodial parent will have the same continued expenses throughout the year as the custodial parent. If the custodial parent cannot "move to smaller accommodations"[63] during the child's absence, neither can the noncustodial parent move to larger accommodations during the child's presence. It would appear that partial abatement of support obligations during extended periods of physical custody is an equitable acknowledgement that, continuing expenses aside, physical custody creates added expenses.

Perhaps the objection is really to the words "in whole" in the statute. Such an abatement would be appropriate only when the custodial parent has voluntarily relinquished physical custody for significantly extended periods of time. Presumably this provision is intended to address the cases where the custodial parent voluntarily relinquishes physical custody, with no apparent intention of regaining it, but wishes to continue to receive the support. In these cases, the claim tha

59. *See* Comment, *supra* note 15, at 298 for an argument that a joint custody preference coupled with the friendly parent provision will have such a result.

60. Solender, *Family Law—Parent and Child*, 42 Sw. L.J. 55, 56 (1988) cites to a Texas statute pertaining to the more frequent modification hearings possible in joint managing conservatorship and providing, "If a party tries to take advantage of these notification provisions in order to harass the other party, a court may require the offending party to pay attorney's fees." Tex. Fam. Code Ann. § 14.082 (Vernon Supp. 1988).

61. Mo. Rev. Stat. § 452.340(2) (Supp. 1988).

62. *See, e.g.*, Comment, *supra* note 15, at 307.

63. *Id.*

"child support belongs to the child"[64] implies that the custodial parent relinquishes that money along with physical custody. Since the question of whether the obligation abates in whole or in part, and indeed to what extent it will abate in part, is presumably a matter of judicial discretion, judges should abate the obligations in whole only in extraordinary circumstances and should balance the continuing expenses of both parties when determining the extent to which the obligations abate.

The provision does not adequately address the practicalities of its implementation. It says that the obligations "shall" abate, but it does not specify whether the non-custodial parent must wait until the end of the thirty days and then petition the court or whether the original decree could specify the amount of each abatement. In addition, the words "any future obligation," discussed below, might be taken to mean that the abatement order completely replaces the original order. That would be a curious result in cases where physical custody is voluntarily transferred each summer and fall since, under that analysis, a new order would be required twice each year. It is likely that many custodial parents will seek to avoid application of this section by limiting transferral of physical custody to less than thirty days and will further attempt to formalize that in the original visitation decree provisions. The legislature must amend this section to clarify its intention and eliminate these possibilities.

C. Visitation

In addition, a "court may abate, in whole or in part, any future obligation of support or may transfer the custody of one or more children"[65] if it finds both that the custodial parent has, without good cause, failed to provide visitation to the non-custodial parent as provided by the decree, and that the non-custodial parent is current in support payments.[66] This is in response to concerns expressed father's rights groups and others concerning inadequate remedies for visitation enforcement as discussed above. However, as written, it is ill-advised.

Missouri courts have "been unwilling to link support to visitation."[67] This provision statutorily links the two in a way which curiously harms the children[68] but does not fix the problem. The children are deprived of some or all of the economic support to which they are entitled while the non-custodial parent is still forced to seek the custodial parent's cooperation in exercising visitation rights. Since the procedure requires a hearing, the "quick fix" which is needed remains unavailable. Perhaps this provision will provide economic coercion to custodial parents to allow visitation, but that seems inappropriate. Modifying the custody award is more appropriate and more consistent with the "friendly parent"

64. *Id.* at 304.
65. Mo. Rev. Stat. § 452.340(6) (Supp. 1988).
66. *Id.*
67. Comment, *supra* note 15, at 304.
68. *See id.* at 304-06 for a good analysis of the negative impact of this provision on children.

factor in custody determinations. In addition, it remains to be seen how the courts will interpret "good cause" in the statute. An amendment to this provision is in order.

Perhaps the legislature should consider a remedy for parents who are wrongfully denied visitation rights by the custodial parent which has been implemented in Michigan. By statute,[69] a "friend of the court," who is a court official having the responsibility of supervising compliance with custody and visitation decrees, is authorized to establish a makeup visitation policy. The statute permits the non-custodial parent to choose a makeup day for a denied visitation day within one year of the denial. The makeup day must be of the same type and duration as the day that was denied; for instance, a weekend day for a weekend day. Certainly such a procedure would speed up the process, though a "quick fix" remains elusive. Permitting the non-custodial parent to choose the makeup day is not only equitable but is also an incentive to the custodial parent to comply with the decree in the first instance.

Finally, the legislature provided that "the court shall mandate compliance with its order by both the custodial parent and the child. In the event of non-compliance, the non-custodial parent may file a motion for contempt."[70] Clearly, this is in response to "frustration over the lack of an effective enforcement mechanism."[71] This section permits the court to fashion, according to its discretion, a proper remedy and to define the visitation in detail.[72] This may help non-custodial parents who were granted "reasonable visitation" rights under prior decrees and who find themselves at the mercy of the custodial parent who defines "reasonable."

There are, however, three problems with this section. First, the court must find that visitation has not been complied with, "without good cause."[73] It is unclear what "good cause" might be in such a case. Second, since this involves a court proceeding, it will not provide a quick fix when visitation is denied on the day the Christmas holiday begins. The legislature must find a way to provide speedy enforcement of visitation rights. Third, though the court shall mandate compliance by the custodial parent and the child, there is no compliance required by the non-custodial parent.

There is some problem of non-custodial parents choosing not to exercise their visitation rights. Perhaps some of them have voluntarily removed themselves because of a sense of loss as discussed above. In any event, this must be seen by the children as abandonment and it subverts the public policy to "assure children of frequent and meaningful contact with both parents."[74] This can be illustrated by excerpts from two testimonies reported by the Interim Committee

69. Mich. Comp. Laws Ann. § 552.642 (West 1985).
70. Mo. Rev. Stat. § 452.400(3) (Supp. 1988).
71. Comment, *supra* note 15, at 303.
72. Mo. Rev. Stat. § 452.400(3) (Supp. 1988).
73. *Id.*
74. Mo. Rev. Stat. § 452.375(3) (Supp. 1988).

ildren Youth and Families to the Missouri House of Representatives:

he problem that I have is that my husband does not see my children. I cannot rce him to see my children. He has not talked to the children since June. He ll pass a message to my oldest son, because my oldest son works right across e street from him. He does not talk to the children.

• • •

y ex-husband has never bothered to take advantage of his visitation rights ther. After one year of myself and his children calling him to come visit his ildren, we gave up. He has had no contact with his children, living in the same wn for three years, by his own choice.[75]

f a father does not take advantage of his visitation rights, perhaps he needs ther obligations to his children. A court that can mandate compliance visi chedules by unwilling children can also mandate compliance by ling ers. No child should feel abandoned by his or her father simply se the father is inconvenienced. The statute should be amended to include ustodial parents among those mandated to comply. The phrase "without cause" will protect non-custodial parents who have good and legitimate ns for their failure to comply. Perhaps the expectation of joint custody on art of both parents will eventually prepare both to continue to be parents after dissolution.

IV. CONCLUSION

Many fathers are no longer willing to assume merely the role of economic der for their children. "They want to be, and to be accepted as, nurturant ts. Increasingly men are asking for custody or joint custody of their en."[76] Fathers have begun to realize that "inadequate father-child interaction s men a source of pleasure and emotionally gratifying relationships with children."[77] To be a parent is to nurture, not simply to provide economic art T a parent is to have meaningful input into educational, religious, socia iction of children. It is to be more than a mere visitor or neyland Dad." It is to spend time sharing values, teaching skills, and helping rify goals.

Fathers who wish to be nurturing parents have faced great difficulty from y law courts following dissolution. It is hoped that a preference for joint dy will alleviate some of the distress men have felt because of social myths tereotypes. Perhaps more joint custody awards will prepare future divorcing ies to understand that parenting is forever. If so, there is good reason to ve that cooperation, at least as far as the interests of the child are concerned, ccur ly because it is expected. Perhaps some of the difficulty the state

75. REPORT TO THE SPEAKER, *supra* note 9, at 25.
76. McCant, *supra* note 1, at 141.
77. *Id.*

has in enforcing child support obligations will be relieved as more fathers have more meaningful contact and input into their children's lives.

The new statute provides a preference for joint custody but retains its primary emphasis on the best interests of the child. Further, it provides that any history of abuse will be a factor in determining any custody arrangement. The legislature and the courts will need to find and implement ways to insure that the court is made aware of *any* abuse. The written plan which must accompany each joint custody award should provide a framework from which divorcing couples can find means to cooperate with each other regarding the children.

The problems of visitation remain, however. Tying child support obligations to visitation works only to deny children necessary economic support. A quick fix remains lacking when visitation is denied at the last moment. Non-custodial parents should be required to comply with visitation schedules. Frequent and meaningful contact between the children and both parents is indeed a proper public policy. Fathers who do not realize that must be encouraged in every possible way to make that discovery. Many fathers, however, recognize the joys of parenting and nurturing.

> Fathers are no longer, if they ever were, merely a biological necessity—a social accident. They are an important influence on their children's development. And a close relationship between father and child benefits the father as well as the child. Children need their fathers, but fathers need their children too.[78]

Dan Menzie

78. *Id.* at 140-41.

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UNIVERSITY OF MISSOURI
KANSAS CITY
LAW REVIEW

TESTIMONY ON HOUSE BILL 2008

January 31, 1991

Patricia Henshall

Office of Judicial Administration

The Office of Judicial Administration acknowledges mediation's great benefits in resolving parenting conflicts between divorced or divorcing parents. In considering HB 2008, however, we believe there are two issues to be raised.

First, we are concerned about whether mediators are available throughout the state. The membership lists of the state and national mediation associations indicate most mediators in Kansas are located in the large urban counties and the counties surrounding them. With a few notable exceptions, court services officers are not trained to mediate and their statutorily mandated duties do not leave them time to mediate. Before mandating mediation, the state should ensure that mediation is available to all divorcing families.

Second, the bill would require mediation in <u>all</u> contested custody and visitation cases. There is no provision for waiver. Mediation may not be appropriate in a particular case. For example, the mediation community is split on the

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question of whether mediation is appropriate when physical abuse has occurred in the family. Gary Kretchmer, who is in charge of Johnson County District Court's mediation program, also pointed out to me that mediation also may be inappropriate when one parent lives in Kansas and the other lives in a distant state. Inserting "Unless good cause is found" in line 16 of page 1 and line 33 of page 2 would allow the needed flexibility.

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

January 31, 1991

From: Sub-Committee of the Judiciary Committee

Joan Hamilton, Chairperson; Tim Carmody; Don Smith

RE: House Bill 2005

After meeting on January 31, 1991, with much discussion, it is the recommendation of the sub-committee to change the wording of HB 2005 to include the following:

(e) The existence of any one of the above standing alone, may but does not necessarily, establish grounds for termination of parental rights. The determination shall be based on an evaluation of all factors which are applicable. In considering any of the above factors for terminating the rights of a parent, the court shall give primary consideration to the physical, mental or emotional condition and needs of the child. Subject to the provisions of KSA 60-419 the court shall consider as evidence testimony from a licensed health care professional expressing an opinion which explains the nature, frequency and duration of health care relating to the physical, mental or emotional condition and needs of the child.

If any questions, or answers, please feel free to contact any sub-committee member.

Joan Hamilton

Joan Hamilton

Committee Member

Committee Member

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1/31/91
Attachment 8

B. TERMINATION OF PARENTAL RIGHTS

Task Force Activity

Judge Jean Shepherd of Lawrence told the Task Force that the process for severing parental rights in Kansas was time-consuming, but that it includes safeguards that are necessary to protect the rights of parents. She expressed concern about the delay in finding permanent homes for children after their biological parents' rights have been severed. Mr. Michael Petit of the Child Welfare League of America, Inc., was of the opinion that although severance was an extremely serious step, it ought to be used more readily in cases in which it served the best interests of children. The needs and best interests of children should be the primary consideration in deciding whether parental rights should be terminated, and not the biological parent-child relationship, said Mr. Petit.

Conclusions and Recommendations

The Task Force realizes that the severance of parental rights is one of the most serious measures that the state can employ in fulfilling its duty to protect Kansas children. The Task Force is, nevertheless, cognizant of the sad reality that the termination of parental rights is, at times, necessary in order to save children from situations that can have detrimental impact on their physical and emotional well-being, and which can, at times, even prove to be life-threatening. The Task Force is, accordingly, of the opinion that the legal modalities for the use of severance of parental rights should be refined and perfected so that when the use of severance proves necessary, it can be done in a way that is least detrimental to the children involved, and that allows children to be placed in suitable adoptive homes as soon as possible.

The Task Force, therefore, recommends that Kansas' statutes regarding the severance of parental rights be brought into line with guidelines published by the National Conference of State Legislatures. To this end, the Task Force urges the Chairs of the Judiciary committees of the Senate and the House of Representatives to confer and set in motion a review of Kansas' severance statutes, and, if necessary to recommend drafts of bills that would effect appropriate statutory changes.

The Honorable John Solbach
Chairmen House Judiciary Committee
State Capitol
Topeka, KS 66612

February 1, 1991

RE: Proposal No. 15

Dear Mr. Solbach:

Let me take this opportunity to congratulate you on becoming the chairmen of this committee.

I have several comments on three specific bills this committee held hearings on during the past week. I wish I could have testified concerning these bills but schedules did not permit me to get to Topeka. My comments are for each bill are attached.

I ask that you distribute these comments to the members of the committee for their consideration. I ask that for the sake of the children of divorce in Kansas that these proposals in these comments be adoption into these bills as is appropriate.

I thank you and the committee for having the interest in taking some positive initiative in helping the children of divorce in the State of Kansas.

Sincerely,

Jim Benage
1431 Otis
Wichita, KS 67214-1010
(316) 265-1778 home
(316) 946-2367 office

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1/31/91

Comments by Jim Benage on HB 2007
The Medical Support Act

I believe this bill should NOT be recommended for passage. The Kansas Supreme Court has issued Administrative Order Number 75. This Administrative Order specifically addresses child support. In the formulation of child support orders, the Administrative order makes provisions for Medical/Health insurance. There is therefore no need to make additional law for an issue that is being addressed by the Administrative Order.

If at some time in the future the legislature wishes to pass a legislative child support guideline, then it may be appropriate at that time to look at the Medical/Health insurance issue.

This bill has several proposals in it which are very problematic. One issue that seems replete in the bill is that it is requiring activity and/or making authorization of several organizations which are not parties to an action in court. It will be extremely difficult for these parties to know which way to turn when. For example, page 4 lines 12-19, require that the insurance company follow certain rules for making insurance payments. They must make payments upon the submittal of claims by either parent. How is the insurance company to know who the real parents are when the policy is held in one parent's name (traditionally women change their last names when they remarry) ? The other parent has no privity of contract from the insurance company's perspective. Currently, insurance companies only except the signature of the policy holder for claims. This is manageable. The proposal is burdensome to the insurance companies.

Additionally, I personally know of situations where fraud was propagated upon the insurance company by parents who were not policy holders. This proposal would make the investigation and prosecution of such fraud much more difficult.

Lastly, this bill follows along the same pattern that proves itself to be misguided time and time again. That pattern is the idea that we are going to make parents take care of their children. The reality is that the real problem with these parents not taking care of these children is that they are being driven away. This bill only propagates that condition by making it much more difficult for a parent to stay in the same community and maintain a relationship with the child. It then becomes more financially burdensome. It is not that these parents do not love their children. It is that they are made second class parents because they rarely are allowed to have a significant relationship with their children. Yet they are being required to pay unconscionable dollar amounts in child support. If we truly want to do some good for these children rather than pass bills like HB2007 the legislature will do better to pass legislation that will foster continued relationships of parents with their children after a divorce.

Please DO NOT recommend this bill for passage by the House.

Comments by Jim Benage on HB 2008
Requirements for Mediation and Educational Classes

This bill has some good features to it. The new requirement on page 5 lines 7-11 for educational classes should be very helpful in getting parents to respect each other as equal partners in the rearing of their children after a divorce. These classes, if properly developed and taught, should aid in fostering parents to continue their relationship with their children.

I do not feel the changes on page one; lines 16, 17, 18, & 21 are beneficial. These changes remove judicial discretion in an area where such should be retained. Mediation is only effective when both parties approach it with an open mind. To require a judge to order mediation when he can see clearly that one or both parties is going to approach it in bad faith is an unnecessary delay and burden upon the court. The court will still have to hear the matter again when the mediation is declared at an impasse.

I have seen situations where visitation rights were deliberately violated without cause. A motion was filed under the expedited visitation enforcement statutes. The judge decided to order mediation. Mediation is drawn out over several months without good cause. And the visitation ends up not being enforced.

If anything is changed in the statutes concerning these type of issues, the change should be to require the judges to enforce existing court orders unless good cause is shown where such order would be harmful to the child. In today's court rooms the judges are allowing visitation rights to be violated only on the allegation of harm to the child. The result is that the child is harmed by being deprived of their relationship with the parent they are being denied the right to visit. We need to somehow require the courts to get back to factual matters and stop acting on allegations.

One possible resolution might be to assign arbitrators to cases. The arbitrators could get to know the cases much better that the judges. This would be because the arbitrators could spend more time with the cases and get to know the real issues in the case. Such arbitrator could then make effective decisions because they would be able to better to sort out the real facts from the allegations.

This bill should be passed with the above recommended changes.

Comments by Jim Benage on HB 2009
Changing Custody to Residency in Statutes

This bill has some real potential to foster parents continual relationship with their children after a divorce. However, it will require some minor enhancements. Without these enhancements this bill may only be a semantical change in the statutes and make no real difference for the children of divorce in the state of Kansas.

The first enhancement that is needed is on page 12 lines 16 and 18. The proposal should change the word "custody" to "equal residency". The current wording of HB 2009 only replaces "custody" with "residency". This change in wording is needed in order to make joint equal residency the presumption in the Kansas courts. In today's courts many judges presume that joint custody with one primary residential parent will be ordered. The other parent is relegated to visitation rights. This current practice has no significant difference from the days of sole custody presumptions. By making the changes in wording to "joint equal residency," as I am proposing, in these two places in the bill the presumption will be changed and the law will begin to foster equal partnerships in the continual parenting of the children.

The second enhancement that is needed in this bill is that it needs to define how current court orders are effected by this statute. The preponderance of current court orders is joint custody with a primary residential parent. If this bill is passed without addressing the effect on current court orders, we will see attorneys and judges agreeing that a parent who has joint custody but is not the primary residential parent being told that they only have visitation rights and have no parental rights or residential rights. The children of these parents then will be systematically denied to even visit the parent who does not have primary residency. This does not foster the relationship of the children with both parents.

I would propose that wording as follows be added to this bill "Effect on current court orders. Unless otherwise specifically defined in current court orders, all current court orders as of the date of effect of this statute will be defined as follows. Joint custody is one and the same as joint residency. Parents with joint custody and primary residential rights will be considered to have parental rights and residency rights. Parents who have joint custody but do not have primary residency will be considered to have parental rights and residency rights equal to the primary residential parent. Parents with joint custody and visitation rights will be considered to have parental rights and residency rights equal to the other parent. Parents with only visitation rights but no custody rights will be considered to have parental rights and residency rights to the visitation granted in the current court orders. Parents with any other rights related to custody, residency, and/or visitation granted in current court orders shall be considered to have parental rights and residency rights in those rights as are specifically delineated in current court orders".

I recognize that this will not solve all problems for children of divorce. The difference proposed here will be that the state fosters the relationships of parents with their children rather than the current practice of discouraging parents from continuing their relationships with their children. Lets give the parents the dignity they deserve. Lets give the children the best opportunity we can to have a continuing relationship with both parents after a divorce.

This bill should be passed with the recommended changes.