Approved: 3-17-99
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Michael R. O'Neal at 12:00 on February 19, 1999 in Room 519-S of the Capitol.

All members were present except:
Representative John Edmonds - Excused
Representative Andrew Howell - Excused
Representative Tony Powell - Excused

Committee staff present:
Mike Heim, Legislative Research Department
Avis Swartzman, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
James Buchele, District Court Judge Shawnee County

Hearings on **HB 2002 - joint shared child custody and parenting time; concerning child support**, were continued.

James Buchele, District Court Judge Shawnee County, appear before the committee in opposition to the bill. He was concerned with the section of the bill that would presume shared physical custody of a child. He believes that this would remove the court's focus of the best interest of a child and cause increased litigation. He stated that children do not like shared custody because it is a problem going back and forth between parents and trying to adapt to two separate households. He also suggested that lower child support would be order when there is shared custody because both parents are taking a role in their child's life but that usually one parent ends up paying for most of the things the child needs.

Judge Buchele was also concerned with the provision of the bill that would strike mediation. This is a valuable tool for bringing parents together to solve their disagreements about issues addressing their children. Many times mediation finds a cure for the conflict and the parties never have to appear before the court. (Attachment 1)

Hearings on **HB 2002** were closed.

HB 2140 - appraisals and compensation for takings pursuant to power of eminent domain

Representative Adkins made the motion to report **HB 2140** favorably for passage. Representative Loyd seconded the motion.

Representative Haley made a substitute motion to amend in **HB 2194 - transfer of real estate located in Wyandotte county upon death of owner thereof**. Representative Flaharty seconded the motion. The motion failed on a vote 6-9.

Representative Adkins made the motion to adopt the proposed amendments provided by Chairman O'Neal. (Attachment 2) Representative Carmody seconded the motion. The motion carried.

Representative Adkins made the motion to report **HB 2140** favorably for passage, as amended. Representative Carmody seconded the motion. The motion carried.

HB 2359 - small claims procedure, raising the jurisdictional amount and number of claims

Representative Long made the motion to report **HB 2359** favorably for passage. Representative Lightner seconded the motion.

Representative Swenson made the substitute motion to table **HB 2359.** Representative Carmody seconded the motion. The motion carried.

The committee meeting adjourned at 1:10 p.m. The next meeting is scheduled for February 22, 1999.

TESTIMONY OF JUDGE JAMES P. BUCHELE
TO HOUSE JUDICIARY COMMITTEE
HOUSE BILL 2002
FEBRUARY 19, 1999

My name is James Buchele. I have been a District Judge for approximately 18 years, five of those years have been devoted exclusively to handling domestic relations cases. I have made literally thousands of decisions in divorce cases.

I have been asked to appear here today on behalf of the Kansas Bar Association Family Law Section in opposition to House Bill 2002. I have been asked to stand in for attorneys Bill Ebert of Topeka and Ron Nelson of Johnson County who were designated to testify on this bill. The Family Law Section is meeting in Wichita today.

As you consider these proposed changes to statutes on divorce, it is important that you recognize that notwithstanding the acrimony generated in many divorce cases, the vast majority of divorces settle. In my judicial district the number of cases that settle is over 90%. Most parents through negotiation and compromise decide for themselves how they will parent their children.

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Attachment 1

As I listened to the proponents of this bill testify several weeks ago, it occurred to me that they are representative of the losing side of the approximately 10% of the cases that are contested in the courts. That is a very small minority. You have not heard from any significant segment of the Kansas population, or representatives of child advocacy groups, educators, mental health professionals or others who have frequent contact with parents and children involved in divorce calling for change in the Kansas law. I suggest that the absence of support for this bill from the thousands of divorced parents, mental health professionals and other experts in the field and organizations interested in the welfare of children speak loudly in support of the present law. No one except disappointed litigants have taken a position in support of this bill.

Specifically as to House Bill 2002, I am concerned that the proposal to create a presumption of shared physical custody is an effort to remove the court's focus from the best interest of the child, further, it will increase litigation and expense for divorcing couples. The best interest of the child rule which the Courts have followed since the 1930s is a "child-centered approach" in which the Courts seek to discover what is best for the child.

Joint physical custody is a "parents rights concept". It is not a child

centered approach. Its focus is upon parents rights and dividing a child's time. I agree that it is in the best interest of the child for the child to have the love, care and support of both parents, but it is a great leap from there to joint physical custody and ignores several important realities.

1. Equal time parenting does not occur in most households. Most households with children have primary caretakers. Children at different ages and stages of development will be closer to one parent or the other. Those of us who have raised children have experienced the "daddy's girl" or "mother's boy" phenomenon and know they come and go..

2. Parenting roles and responsibilities are not assumed equally in most households. Attempting to legally create equality post-divorce is superficial. The equal physical custody concept has nothing to do with the emotional bond between parent and child, parenting skills, commitment of the parent or the best interest of the child.

Reasons why shared physical custody should not be presumptive:

- Research shows, notwithstanding the type of custody arrangement, the children of divorce do best in the absence of parental conflict. Judith Wallerstein in her studies of children of divorce found that parental conflict is the factor in divorce which causes the most emotional harm to children. In making

a custody decision, reducing the parental conflict and providing a stable environment for the children must be given great weight. Equally sharing physical custody increases the parents interaction and opportunities for conflict and destabilizes a child's environment.

- Divorcing couples fashion a shared custody arrangement under our present law. The present statute provides that an agreement of the parties is presumed to be in the best interests of the child. Most of these agreements are approved by judges.
- Even among those few parents who agree to equally share physical custody, research shows that over half of the agreements do not survive one year. There are lots of reasons for this.

First equally sharing of custody is more expensive. Some estimates of the cost are as high as 1/3 more. Few divorced parents households can actually afford shared custody. Second, sharing physical custody requires considerable give and take between the parents in terms of planning and scheduling if the children's needs are placed first. This

interaction as parents post-divorce take on separate lifestyles produces significant stress and consumes more parent time. Shared physical custody does not reduce conflict but increases it. See *Maccoby and Mnookin, Dividing the Child: Social and Legal Dilemmas of custody* (1992). (Only 1/3 of the 14% of families who tried shared custody were able to attain cooperative parenting relationships).

- Presumptive shared physical custody will increase litigation. It will be necessary for the parent who does not want their children raised in two homes to come to court to establish a primary residency for the child. Those who can't afford to litigate will reluctantly agree to shared custody. A lack of commitment by both parents to shared physical custody usually spells disaster and more litigation.
- The finality, or closure, of the marriage is important for couples who divorce. A lot of post divorce litigation is because one or both of the parties can't let go. When children are involved, closure of the relationship is more difficult, but most people will make it within one to two years. Equal shared custody lengthens the closure period. Until closure is made,

continued litigation is one way of having a relationship with the Ex.

- Lower child support orders are entered when there is shared custody. But experience shows however that one parent usually ends up being the primary custodian and paying most of the expenses. The result is a lower standard of living for the children and the primary custodial parent.

In divorce cases, there are more disputes over money than custody. Telling divorced parents to equally share the expenses of their children creates a fertile ground for litigation. For example, "do we buy Nikes or the K-Mart athletic shoes." My experience asking divorced parents who are in litigation to be fair and objective with each other is much like teaching small children to share. When there is hate and distrust, many folks just can't do it.

- Presently no other state mandates or presumes equal physical custody. The closest state is Louisianna which has a statute that provideds for "shared parenting". The Louisianna courts have construed this statute to not require an equal sharing of residential custody.

California's joint custody law was first construed to mean shared physical custody. Both the courts and the legislature have backed off of this view and shared physical custody is now an option as in our present Kansas law. The practical aside to California's experience is that within two years after a court ordered shared physical custody, the parents and children evolved back to a primary custodion form of custody.

- Children don't like shared custody. Attached to my remarks is an op ed piece written by a high school student which appeared in Newsweek magazine. The views and feelings expressed by this young man are consistent with those I have have heard from the children of divorce that I talk to. Most of them, of course, do not have a 500 mile comute between parents. However the problems of going back and forth, back and forth between parents and trying to adapt to two separate households is the same even in the same county. Generally, the most positive comment that I hear from about joint custody from kids is, "I'll go along with it if it will stop the fighting."
- Presumed equal shared custody should not be enacted until

there has been a full analysis made of the economic implications. Calculating child support under the current Kansas Child Support Guidelines results in substantial reduction in child support orders. Judges and lawyers who handle divorces can give you lots of antidotes of cases where shared custody orders have been entered, child support reduced only to find very quickly that the expenses of the children are not equally shared nor is the work responsibilities of parenting equally shared. The burden will fall on the person who evolves into being the primary caretaker to continue but with less money. The result will lower the standard of living of children and increase the burden on the primary caretaker parent. I anticipate there will be increased numbers of motions seeking accounting disputes over expenses and to modify child support. I see endless hearings on who spends the most on gasoline and whose turn it is to pay for something. Again, these are parent centered issues but children too often are drawn into the battle. "Dad, I need a new pair of jeans," -- "ask your mom, I bought them last time." "Mom, I need money for scouts" -- "ask your dad, I paid for them last time."

I do not know whether or not SRS has weighed in on this bill, but I would suggest you should know the cost to the State of using the shared custody formula for calculating child support in the paternity cases brought by SRS or if their burden will be increased in bringing their clients to court to offer testimony and make an evidentiary basis for the Court to make findings why the presumptive shared physical custody should not be ordered.

It seems to me that the potential financial implications and the ramifications of shared physical custody becoming the rule rather than an exception to the rule should be studied. Family economists and mental health professionals should be consulted on these questions. I would suggest the Family Law Advisory Committee of the Judicial Council would be one place for such a study.

The provisions of the bill striking the mediation provisions I feel is a step backwards. In the area of domestic relations, mediation is a valuable tool for bringing the parties together and assisting them in finding solutions to their disagreements. The adversary system in the courtroom does not provide long term solutions to chronic visitation disagreements. Its my experience that some cases will come back over and over. In over half of our visitation motions, resolution is made in mediation. While I

cannot provide you data to support my belief, it is certainly my sense that cases resolved in mediation do not come back to court as often as those where judicial decisions are made. Without using mediation, more court time will be required both "up front and long term".

The proposed changes in the expedited enforcement of visitation process would require that hearings on visitation disputes be conducted by either a district magistrate judge or a district judge. In the urban counties, extensive use is made of hearing officers and there will be an impact on the work load of the district judges.

We have very few appeals from hearing officer decisions on visitation motions which means to me the parties are generally satisfied with the hearing officer's decision. Last year in Shawnee County I handled only two appeals from hearing officer decisions on visitation out of about 120 motions. If this bill passes, there will be 120 or so motions which must be heard by a district judge. More district judges will be required. The preponderance of the evidence is that the mediation/hearing officer procedure in the present statute is working well. Elimination of mediation in favor of specific penalties will not solve most parents disputes over visitation. Courts now can impose a wide range of sancdtions where appropriate to compel compliance with court orders.

There are other aspects to this bill which warrant discussion, but in the interest of time I have only addressed these two aspects of the bill which I feel are the most onerous. I will be happy to answer any questions you may have.

Proposed Amendments
H.B. 2140
Eminent Domain

#1 In line 21 on page 1 by adding after the comma "at least 2 of the 3 of whom shall have experience in the valuation of real estate"....

#2 In line 1 on page 2 by striking "as to" and by striking the same language on line 2 on page 2, and further, striking the "and" before (4).

#3 In line 41 on page 1 by adding after "appraisers: "on matters including, but not limited to, the following:"...

#4 By adding a new (5) in Sec. 2, page 2 as follows: " that, except for incidental contact for the purpose of verifying factual information relating to the subject real estate or to discuss scheduling matters, appraisers shall refrain from any *ex parte* meetings or discussions with representatives of the plaintiff or property owner without first advising the adverse party and providing said party with the opportunity to be present, and"...

#5 By adding new (6) in Sec. 2, page 2 as follows: "that all written material provided to an appraiser or appraisers by a party shall be provided forthwith to the adverse party." Further, by deleting the new language beginning with "The instructions..., in line 4, page 2, through "duties" in line 10, page 2.

#6 In line 41 on page 3 after "methods" by adding: "as may be appropriate for the particular [redacted] property which is the subject of the action."

#7 In line 2 on page 4 by striking "statute book" and inserting "Kansas Register".

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Attachment 2