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Testimony on Senate Bill 393[1]

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House Committee on the Judiciary
Representative John Barker, Chair

Mr. Chairman and Members of the Committee, thank you for allowing me this opportunity to provide testimony regarding Senate Bill 393.

I wish to make clear that I do not, nor do I believe that any reasonable person, wants children, mothers, or fathers to be harmed by violence. Nor would I wish for domestic or intimate partner violence to be downplayed, minimized or ignored in best interests of the child determinations. Protecting people from violence will always be a priority for courts and those working with children and families. Accurately diagnosing and responding to violence is an important part of any best interests task. Yet there are several reasons why I do not believe Senate Bill 393 strikes the appropriate balance among the many competing interests and perspectives in family law cases.

In my opinion, there are several problems with the bill and how it proposes to elevate domestic violence, whether as part of a pattern of behavior or as a single act, to status as THE primary factor in best interests of the child determinations in custody cases. While this may be appropriate in individual cases, it is important to refrain from overly broad applications of this principle. There are also both legal and practical problems when courts are encouraged to turn the process of outlining recommendations for interventions over to non-judicial personnel as the bill suggests.

First, family courts struggle with issues of violence and conflict every day. While they are far from perfect, they remain our society's choice for where and how to deal with families. The introduction of "primary factors" about domestic violence into best interests of the child determinations serves to limit the discretion of family court judges and raises the possibility that decisions may not even take place in family court. Family courts are our best resource, they are best situated for dealing with family issues, and they have the best tools to revolve decisions about disputes within families. When I reference

[1] My name is Milfred Dale. I am a licensed attorney and a licensed psychologist in Kansas. My law practice is in family law and includes cases involving child custody disputes in divorce and parental separation, modification of parenting plans, and guardianships. In my psychology practice, among other things, I provide therapy to children and adults, as well as custody evaluations and parenting time evaluations by court-appointment. I have been licensed to practice law in Kansas since 2009. Under my psychology license, I have practiced psychology in Kansas since 1989.

these characteristics of the family court system, I am comparing it to difficulties that other courts (e.g., criminal, PFA/PFS docket, CINC) have in dealing with these issues in any kind of child- or family-focused way.

I recently wrote a paper titled, "If we knew what happened, we would know better what to do." I noted how difficult it is to respond when allegations of abuse and violence occur because it is extremely difficult to know what happened or whom to believe. Often times, only the victims and perpetrators were present when an alleged violent event occurred. Much more often than not, family courts and the families in the case are faced with moving forward in the absence of "clear and convincing evidence" of just exactly what transpired.

Allegations of domestic violence can sometimes become "gatekeeping by allegation" in domestic cases. "Restrictive gatekeeping" is the term of art used to describe when parents attempt to control, limit, or restrict a child's access to their other parent. Allegations can be and are often used in strategic ways by angry, conflicted parents to keep children from the other parent, and to gain advantage when there are disputes about custody, residency or parenting time. When we find "restrictive gatekeeping" via allegations, several questions emerge. One question is whether or not the "restrictive" approaches are justified or unjustified. Another involves questions about what motivates children's involvements in the disputes of their parents. It could be a number of things including alignment with a preferred parent, estrangement from a poor parent, or parental alienation. Protecting children and parents from violence is justified. Unjustified, restrictive gatekeeping is the opposite of cooperative or friendly parenting, where there are statutory provisions favoring parents who facilitate and support the child's relationship with their other parent.

I do support the portion of Senate Bill 393 (#8) that addresses the "catch 22" friendly parent dilemma. This refers to when children and parents need protection from others who are violent and should not be forced to be "friendly" with those who have perpetrated violence against them. In those kinds of scenarios, requiring the potential victims to "appreciate the bond between the child and the other parent" and to support the child's relationship with that parent is unlikely be in the child's best interests. More than thirty states have "friendly parent" statutes. Many of these statute provide for the exception noted in Senate Bill 393 when domestic violence is present.

Cases involving allegations of domestic violence are complicated. An allegation of domestic violence can involve four court systems, each of which has its own procedures, timetables, standards or burdens of proof, and resources for responding. A violent incident can lead to criminal charges in criminal court where the procedures are slow and constitutional protections for alleged perpetrators are a central focus. Proving the alleged perpetrator guilty beyond a reasonable doubt can be a difficult mountain to climb for any victim.

Most jurisdictions have separate dockets for requests for protection from abuse or stalking orders. These court dockets have expedited timetables, lower burdens of proof for court action, and a limited number of interventions (e.g., usually lengthy restraining orders). In a large majority of PFA/PFS cases, the parties represent themselves and the

"trials" are brief and truncated events with little more than the testimony of the parties. Most family court judges disfavor efforts to change parenting plans or handle domestic disputes in the PFA/PFS docket. The stakes are too high and there are fewer procedural protections for all of the parties. This process was not designed for intricate decisions about family issues. But Senate Bill 393 would elevate the findings of these process to being THE primary factor in best interests of the child determinations. It is legitimate to ask whether this forum, which was modeled after a criminal proceeding, is the appropriate forum for the special task of determining what is in the best interests of children where a different kind of balancing of interests is required.

The Child in Need of Care Court is a third system that may be asked to respond to allegations of abuse and/or violence. Here timetables vary widely at different points in the process – from immediate removal of the child to lengthy processes involving completion of long lists of case objectives and tasks. The CINC Court often has resources for the family, yet these are difficult to effectively manage within a system overwhelmed by the demands and needs of the populations they serve. This system was not developed for bandages or quick fixes. It was designed to take over for parents for as long as necessary – or until whatever breaches to the safety of children were cured.

Family courts focus on compromise and cooperation because this emphasis is best for the majority of children, families, and our society. Among other things, the goals of family court are to focus parents on their children, keep both parents financially and psychologically involved with their children, and facilitate compromises rather than win/lose outcomes.

Because of these goals, the family court is sometimes a risky place for victims of violence precisely because it is the social institution our society has chosen for the tasks of encouraging cooperation between parents and balancing family routines and schedules. Yet Senate Bill 393 begs one to ask the question: should we design laws that take cases away from the social institution designed to resolve them?

I also seriously question suggestions in Senate Bill 393 that courts should effectively transfer the responsibility for responding to perpetrators of domestic violence to "certified batterer intervention" programs. In a recent case where I functioned as a court-appointed evaluator, I was provided a checklist that another professional identified as part of a certified batterers assessment. Based on that checklist, this professional insisted the mother in the case was at risk for homicide or murder by father. No one else in the case viewed this as a realistic hypothesis.

My fear would be that the domestic violence offender assessment within certified batterer intervention programs might not entertain and equally consider all of the possible explanations and hypotheses for the facts of the case. It is my experience that many in the DV community do not believe other hypotheses as possible explanations. The issue of parental alienation is an example of this. It is my experience that many in the DV community believe that only those they certified can effectively evaluate and intervene because they understand domestic violence better than others. This may be true, but assessments to inform the court must entertain and evaluator all possible hypotheses, not just those generated from within one perspective.

In addition, I fear that the attempt in (b)(1)(B)(4) to encourage the Court to follow all recommendations made by a certified batterers intervention program abrogates the court's responsibility for protect the rights of all involved parties (e.g., any child or adult victim and the rights of any alleged perpetrator). For some, a parentectomy of a targeted parent becomes the desired goal. In my opinion, courts and judges must remain our decision makers.

There are other problems with Senate Bill 393 that may not be apparent on the surface.

Not all domestic violence is alike. Senate Bill 393(b)(1)(A) references familiar and traditional notions of batterers, those persons who both physically batter their intimate partners and also exert coercive control to dominate these intimate partners or household members. But not all domestic violence is like this. Domestic violence (aka intimate partner or family violence) is a multi-faceted phenomenon. It is important to avoid labeling every perpetrator of domestic violence as a batterer because this is simply not true. Even the triggers for making domestic violence THE primary factor are not equal (e.g., all abuse, stalking and sexual assault are not equal). Clearly, a more differentiated response is needed.

Many researchers have developed typologies for different kinds of violence. For example, Janet Johnston & Linda Campbell, two noted researchers, identified five types of DV: (1) Ongoing or episodic male battering; (2) female initiated violence; (3) male controlling interactive violence; (4) separation engendered violence (or post-divorce trauma); and (5) psychotic and paranoid reactions.

Most researchers also acknowledge that the sometimes contradictory research findings in studies of domestic violence (aka intimate partner violence or family violence) result from studying different populations. On the one hand, there is sociological survey research on families that finds family violence is frequent. In some of these studies, women have been found to be more frequently violent than men. Michael Johnson, another prominent researcher, called this "common couple violence."

On the other hand, the research from women and their partners from shelter populations typically references men as the most frequent, most violent, and most harmful perpetrators. Many in the DV community reject the "typology research" and insist on making the face of domestic violence the "male batterer" who physically abuses and coercively utilizes psychological manipulations to control his victims. Their position is that patriarchy and male privilege drive form the foundation for individual (and sometimes) societal acceptance of violence against women. Michael Johnson termed this "patriarchal terrorism." It certainly does exist – but it does not exist in every DV case.

In sum, Senate Bill 393 raises many questions that are important to address when there is domestic violence or when it is alleged – and this should be done in Kansas Domestic or Family Courts by Kansas judges. I also view it important to review not just the elevation of DV to status as the primary factor, but the provisions regarding how to evaluate this factor while also giving appropriate attention to other hypotheses.

In sum, best interests of the child determinations should be made on an individualized basis and they should be made in the forum designed to best do this task.

Thank you for allowing me to provide my comments.

Sincerely,

Milfred D. Dale, Ph.D., J.D.