KANSAS BAR ASSOCIATION

TO: **The Honorable Richard Wilborn, Chair**
And Members of the Senate Judiciary Committee

FROM: **Ronald Nelson**
On behalf of the Kansas Bar Association

RE: **SB 257 – Creating the presumption of child's equal time with parents during court determinations of legal custody, residency and parenting time.**

DATE: **January 30, 2018**

Chairman Wilborn and Members of the Senate Judiciary Committee,

I am Ronald Nelson and I appear on behalf of the Kansas Bar Association to provide this testimony in **OPPOSITION** to SB 257, creating the presumption of child's equal time with parents during court determinations of legal custody, residency and parenting time.

I am a family law attorney in Johnson County. I've practiced family law for over 25 years. My practice is focused on complex issues in family law and high conflict child custody litigation. My practice frequently involves representing parents – and grandparents – in family law disputes at the trial court level and in the appellate courts. Over my now many years in family law, I've often wrestled with the difficult issues that arise when parents fight over their children's care and custody – both in court and out-of-court.

The KBA opposes SB 257 for several reasons:

First, the bill provides parents with the presumption of 50/50 parenting time. This legal presumption of shared custody is not based on relevant factors specific to the individual case. It binds the hands of the court and forces the court to only consider altering the changes when "clear and convincing" evidence is presented.

Second, studies have shown that 50/50 parenting time may not be in the best interest of the child. I have attached information by William Eddy, "Thoughts on Shared Parenting Presumptions" discussing 50/50 custody issues.

Third, SB 257 imposes a higher evidentiary standard of "clear and convincing". Currently parents must persuade the court by using the preponderance of the evidence standard, which is to say it is more likely than not that his or her plan is in the best interest of the child. However, SB 257 imposes a stricter standard of "clear and convincing" which means a court might be forced to impose a less than ideal parenting plan because the evidence did not rise to the higher standard. This could result in plans not in the best interest of the child.

These are just three examples of issues with SB 257 that we used in this short summary of our opposition, however, the implications of this bill are far reaching. It will touch on one of the most sacred parental duties, child rearing. We should not alter long standing policy, disenfranchise the underrepresented and tie the hands of court by codifying this proposal. The KBA strongly OPPOSES passage of SB 257.

On behalf of the Kansas Bar Association, thank you for your time

About the Kansas Bar Association:

The Kansas Bar Association (KBA) was founded in 1882 as a voluntary association for dedicated legal professionals. Its more than 7,200 members include lawyers, judges, law students, and paralegals. www.ksbar.org

Thoughts on Shared Parenting Presumptions

A controversial issue today in family law is whether there should be a presumption that parents should have equal (or nearly equal) shared parenting time after a separation or divorce. In theory, I can understand the drive for such a presumption and have a lot of empathy for parents seeking this, because it is important that children are raised by both of their parents and research shows that children do best with "significant" involvement of both parents (although this is generally not defined as a percentage of time).

I have had "non-custodial" clients as a lawyer and as a high-conflict consultant, who have wanted a 50-50 presumption, as in their particular cases there has been a disturbed, high-conflict other parent who has the majority of the time and 50-50 would at least reduce the impact of that. In some of those cases, I

have fought for and won schedules that were approximately 50-50 (usually parallel parenting with little direct contact between the parents), because the courts were open-minded and focused on the standard of the "best interests of the child" and that was satisfied by 50-50 in these cases.

But I recommend strongly against a presumption to impose relatively equal parenting time. Parenting schedule decisions should be made by parents based on their own circumstances. If they have difficulty making such basic parenting decisions, they should get training in shared decision-making. They should only be handled in court if they fail to learn these skills. Then, the judge should find out what is wrong with one or both parents and make appropriate orders based on "the best interests of the child," rather than overcoming a burdensome presumption.

The Problem with Child-Rearing Presumptions

A presumption takes away the flexible thinking that parents should use when raising their children and the benefits of requiring parents to work together to develop a plan that fits their own circumstances. Children will go through many stages growing up, including times when it may be very appropriate to have more time with one or the other parent. There are also many cases of abuse and alienation in which such shared parenting time is really inappropriate and would be particularly harmful to a child.

While a presumption could be overcome in theory, in my work I have met many parents who would be too intimidated by such a presumption or lack the resources for a big court battle against a high-conflict parent. In addition, most of the families who end up in family court are there because one of the parents (sometimes both) has a serious problem: domestic violence, child abuse, child alienation, false allegations, substance abuse and so forth. These are problems that should be examined without hurdles that will make it harder to find the truth and deal with it appropriately. I have worked hard against presumptions that fathers are abusive or that mothers are alienating. After growing success at opening the minds of legal professionals, it seems like it would be a step backwards to now impose such a broad presumption.

Agreed-Upon Schedules

In reality, as a lawyer, counselor, mediator and consultant, I have worked with many parents who use shared parenting schedules that are approximately 50-50. However, these are determined by the parents by agreement, based on their own circumstances, resources, and history of flexibility and sharing. I have many more parents who have schedules in which one parent has less than 30% of the parenting time and it works very well. The key factor in these successful schedules is that these decisions are being made by the parents, not imposed on them by the court. The child feels that both parents are generally satisfied with their parenting time and both parents make the best of their parenting time in giving the child good experiences.

There is also flexibility in these families, so that they may change to more or less time as work schedules change and the child grows older. I have had cases in which the child changed from being primarily at one parent's house to the other parent's house, and then back a year later – all based on the good cooperation of the parents and the comfort of the child to express changing preferences without upsetting one or both parents.

When I started my law practice in 1993, I represented clients in family court and also did divorce mediations in my office. I went to a presentation by William Hodges, Ph.D., a divorce researcher and author of the highly regarded book Interventions for Children of Divorce (1991) which is still quite relevant. He said that research was making it clear that the best parenting schedule was one which both parents supported. Even if it was an odd schedule, including lots of exchanges or long stretches of time, what really mattered was the agreement of the parents.

Children follow their parents' lead emotionally when learning what is "normal" and what helps their parents feel "okay." On the other hand, even a very normal schedule won't work, if one or both parents are upset about it. The children absorb their parents' emotions much more than most parents realize. Dr. Hodges also said that research showed that parents followed their own agreements over 80% of the time, but only actually followed court-ordered schedules slightly more than 40% of the time.

With this in mind, I have told parents for the past 19 years in my practice that they need to put more effort into reaching an agreement than into fighting for the "right" parenting schedule for a child. It needs to be a team effort, otherwise it tends to pull children apart. However, I tell them that there are general principles for at least 3 basic age groups, which most parents take seriously in making their proposals to each other:

Different Needs at Different Ages

Birth to age 5:

Generally, this is a period when children need lots of stability and "secure attachment" experiences with both parents. Generally, it appears best to have one parent with the majority of the time and the other parent having frequent access, although this doesn't have to be long to be beneficial for this age child. It's the frequency that matters. For various reasons, biological and historical, mothers have had the majority of time during these years, although fathers have been very actively and successfully involved as long as

It's the interactive quality and consistency of the relationship that makes it secure or not, not the amount of time. A presumption for equal shared parenting time during these early years could undermine the child's ability to develop a secure attachment with either parent and thereby undermine his or her sense of security and long-term personality development (insecure early childhood attachment appears to be one of the main factors in developing adult personality disorders).

Age 5-12:

Generally, this is the age range when children seem to do fine with relatively equal shared parenting. There are a variety of schedules (2-2-5-5; alternate weeks – with a mid-week visit with the other parent; etc.) that seem to work, so long as the parents both support the schedule. If they don't both support the schedule, then it's easy to make this fail. (I've seen many cases where one parent who is uncomfortable with the schedule says "it's too many back-and-forths" or "too long away." Then the child appears to absorb this parent's concern and makes the exact same complaints – even though many other children with relaxed parents seem to do fine with these schedules.) The key here is that these are cooperative parents, and that their children have been raised with both parents actively involved.

There are many other children who experience significant distress by having a shared parenting schedule, who are much happier to have a primary parent (65% or more) and less time with the other parent. Fighting against such a schedule usually increases the child's anxiety, rather than increasing their happiness. Of course, there are some cases (domestic violence, alienation, etc.) in which I have encouraged a "noncustodial" parent to fight for a change in custody because the primary parent has had serious behavior problems.

But if the effort has not succeeded after a year or two, I have advised many parents to stop the fight if they have at least 25% of the parenting time, as it will not help the child to be raised in the context of an endless battle. I have had several cases in which the noncustodial parent developed a much stronger relationship after the child turned 18 or 20, because they had stopped the battle years before when it was clear it was not succeeding. Shared parenting time based on a presumption would have increased these conflicts rather than reducing them – and we know that stressed parents pass it on to their children.

Age 13-18:

Generally, this is an age where children should be developing friendships and social skills with peers, while counting on the support of their parents. Parenting schedules have to become more flexible during this age period, especially as a child reaches 15 or 16. Imposing a schedule just doesn't work, unless the

parents have sacrificed the child's need for increased autonomy to satisfy their own security needs through the child. Generally, children in this age group should be developing their own activity schedules – within reasonable limits set by both parents.

Thus, shared parenting time that is approximately equal often becomes highly restrictive for adolescents and they often simply don't follow it. In reality, they often have a home base that is more likely to be one parent's house, rather than spending time with that one parent. I have had many cases in which an older teenager (usually 17-18) spends a dinner a week with one parent and the rest of the time at the other parent's house. But this dinner-a-week has a lot of meaning and flexibility (just negotiating which night it will be helps the teen develop planning skills that will apply to success in the future). A shared parenting presumption for this age group will simply be ignored by many teens, unless enforced strictly by a parent who probably is uninformed about adolescent development.

For years, judges have understood that they cannot really enforce schedules with children over about age 15. A better solution for a parent who feels limited or estranged from a teenager, is to get some kind of counseling assistance that includes both parents and the child (like our New Ways for Families (http://www.newways4families.com) method, which involves both parents in structured sessions with the child). Discussing and problem-solving the teenager's relationship with each parent will help the teen learn relationships skills that an imposed schedule will not. For many years I was a child and family counselor working with many teenagers, before I became a family law attorney. Teenagers need to learn relationship skills – including dealing with one or two difficult parents – rather than learning that relationship problems can be solved simply by percentages.

Research

It has been said that you can find research to support any opinion, and that is particularly true in the area of parenting after divorce or separation. However, most of the research emphasizes different aspects of the same problem, so that we can benefit from looking at the research – so long as we make the effort to understand it. The following are quotes from studies reported in the Family Court Review, the journal of the Association of Family and Conciliation Courts (AFCC), one of the most respected sources of information on parenting in divorce.

Some studies support equal shared parenting schedules:

> *Respondents [college students in one study] wanted to have spent more time with their fathers as they were growing up, and the living arrangement they believed was best was living equal time with each parent. The living arrangements they had as children gave them generally little time with their fathers.*

Respondents reported that their fathers wanted more time with them but that their mothers generally did not want them to spend more time with their fathers. (Fabricius and Hall, Young Adult Perspectives on Divorce, Family Court Review, October 2000.)

The present findings [in another college student study] indicate that divorce leaves young people with strong feelings of "missed opportunities" and "emotional longing" for a father-child relationship – feelings that remain salient for years after the divorce has been finalized....The present results thus are consistent with calls for family law reform mandating that children spend equal amounts of time with their mothers and fathers following divorce. (Schwartz and Finley, *Mothering, Fathering, and Divorce: The Influence of Divorce or Reports of and Desires for Maternal and Paternal Involvement,* Family Court Review, July 2009.)

Other studies oppose shared parenting mandates:

Australian family law now endorses the active consideration of equal or substantively shared parenting in most cases where parents are able to share overall parental responsibility and decision-making [defined as] a division of care between parents at a rate of 35:65% or higher. [Prior to the new legislation, such an arrangement] was "relatively rare," occurring in about 9% of the general population of divorcing families in 2003. It was a parenting arrangement that proved viable for a small and distinct group of families ...electing a shared arrangement [with] the ability of parents to get along sufficiently well....

[In contrast] the literature is stronger on the poor fit between shared parenting and unremitting post-divorce conflict. Beginning two decades ago, Johnston and colleagues...identified cautions against substantively shared parenting for children whose parents' ongoing acrimony and inability to encapsulate their conflict meant continued exposure to toxic inter-personal dynamics and the diminished responsiveness of each parent....

[After] four years children in shared care arrangements... reported sustained levels of inter-parental conflict, while children in traditional [primary parent] arrangements reported significant decline [in conflict]. Children in shared care were also significantly more likely to report feeling caught in the middle of their parents' conflict [and] children more often wished to change [the shared arrangement]. (McIntosh, *Legislating for Shared Parenting: Exploring Some Underlying Assumptions,* Family Court Review, July 2009.)

It helps to look at the different emphases of these studies. The first favoring more father contact was reported during the college years. It appears that these young adults grew up when fathers were generally less involved than many are today – by the agreement of both parents. From my recent mediation cases, I have observed that younger parents are much more likely to develop parenting plans with a greater role for fathers than I observed when I started my law practice in 1993. However, the majority of these plans are not equal shared parenting plans, but often 25-30% with fathers who are satisfied with these schedules. If the young adults in the first set of studies had this amount of time with their fathers and if their mothers supported their father's relationship with them, it may be that they would have felt more satisfied. Their opinions about equal parenting time were a conjecture rather than based on experience. Their perspective may have also been based on their more recent adolescent years.

The second set of studies (McIntosh reports on Johnston's studies as well as her own), emphasize the experience of younger children living in shared parenting arrangements – and feeling distress. When I heard Jennifer McIntosh speak at the 2011 AFCC conference, I remember her examples of children about 8 years old and younger. Especially in a culture where only 9% of divorced families had a history of shared parenting, it may be these children felt frustrated because of their young age and their experiences with young peers who appeared to have the "benefit" of growing up with a "primary" parent.

What this research suggests to me is that there are two very different issues involved here:

1) At what age is a primary parent preferable and at what age is shared parenting preferable?

2) Does shared parenting work if it is imposed, rather than the agreement of the parents?

It appears to me, from reading this and a lot of other research, that there really are at least three distinctly separate age periods affected by children of divorce and separation, with different abilities and needs, as I described above. Equal shared parenting arrangements appear very likely to fail during the first 3 years – the most important formative years of a child's life. While I have seen some highly cooperative couples manage this by age 4, I have also seen children of 6 and 7 struggling with equal shared schedules. A significant factor is the parenting history. Moving suddenly from a primary parent system (say, 80-20) to shared parenting system (say, 50-50), can be traumatic for a child who might otherwise handle it as a gradual transition.

Likewise, from my experience and observations, I have seen many cooperative 50-50 parenting plans for children age 5-12 change to one primary house during the teenage years, at the insistence of an active teenager, when it became hard to keep his or her "stuff" going back and forth. It wasn't about the parents – it was about having a home base. However, I have also seen several 50-50 plans continue throughout adolescence, although not as many as those that changed to one primary household.

Legislating Shared Parenting

All states and provinces currently mandate significant parenting time for both parents, unless there are compelling reasons (domestic violence, child abuse, etc.) not to do so. It is universally seen as in "the best interests of the child." However, mandating percentages of time has been avoided, as children and parenting are too complex to resolve with a calculator, the way that child support can be done.

Yet several states and provinces have strong movements desiring mandated shared parenting. While I understand this, as described above, and have clients who are part of such movements, I think that such a mandate will not accomplish its desired goals and will be overturned within a few years of its establishment – because it is too large of an intervention for a problem that is not as widespread as it feels.

For example, in the Australian study of parenting plans developed in court-mandated mediation in which the parents were required to "actively consider equal or substantively shared parenting," the research showed that shared parenting plans (35-65% or higher) didn't last more than a year, whereas primary parenting plans (less than 35-65%) were more stable.

Primary parenting plan mediated, still in place	49%
Shared parenting plan mediated, but now primary	28%
Shared parenting plan mediated, still in place	17%
Primary parenting plan mediated, but now shared	6%

In the United States, Canada and Australia, the vast majority of separated and divorced parents (approximately 80% or more) reach agreements for parenting on their own, out of court, which is always preferable to a court imposed parenting plan. They don't need a new mandate. While some parents – especially fathers – would like to have more time, they have reached agreements that appear to fit the reality of their lives, which includes much more time than their fathers had with their children. The

fathers' rights movement dates back to the 1980's, when partly due to its efforts the courts shifted to standards that no longer gave mothers automatic priority but instead considered "the best interests of the child." Since then, fathers have dramatically increased their involvement in their children's lives. Many more have become the primary parent than ever before, and many have had equal shared parenting for some periods of their children's lives.

The majority of parents who bring their parenting disputes to family court have also been satisfied enough to accept the outcome, although not always happily. I have represented mothers who lost custody and I have represented fathers who won custody. So I know that it is not exclusively a fathers' rights issue, although that is how it may appear to the public. Nowadays, in court, mothers are getting less time with the children than they did in the past and fathers are getting more. In my almost 20 years as a family law attorney in California, we are much closer to gender neutrality than ever before.

Even when court orders are made, as I explained above, these court orders are not always followed and the parents end up doing some other arrangement anyway on their own – for better or for worse. While some parents may give up on the one hand or grab more time than the order says on the other hand, I don't believe that mandated shared parenting orders will make much of a difference to them, since they are not following the court's orders anyway.

A Small Percentage of Parents

There is a small percentage of people who have been to family court about parenting issues and were highly dissatisfied. This includes some people who have been wronged by the court system because they had one of the worst attorneys, evaluators or judges. Yes, there are some of each, but fortunately a small percentage – as in all fields. Unethical attorneys can be disbarred. Unethical evaluators can have complaints filed. Unethical judges can be relieved of their duties. This does happen occasionally.

The proponents of shared parenting presumptions are sincerely trying to make things better and see a shared parenting mandate as a solution. Unfortunately, it is a universal solution applied to a narrow problem for a few. Our legal system is an incredibly flexible system and I believe a more effective approach would be to educate the courts and the public about parenting and co-parenting, rather than imposing a presumption.

The other group of people who are highly dissatisfied includes those parents whose own bad behavior was exposed and family court decisions were made because of that – yet they are unable to see it. Some of these people have high-conflict personalities and blame others for everything to unconsciously

deflect from their own behavior. Such high-conflict people will not be satisfied regardless of what happens, including legislated presumptions. For them the "issue's not the issue," their personality is the "issue." They will always find a new issue and see others at fault.

Instead of solving a widespread problem, legislating a mandate for shared parenting with a percentage attached will create a widespread problem. Just as many people refinance their mortgages when rates are lowered, I believe that many parents with existing custody and access orders will return to court to change them if such a mandate goes through. Rather than creating less litigation, it will create more.

I also know that when "one size fits all" solutions are applied legislatively to the courts, that they sometimes end up getting overturned. In California we had the 3 Strikes law for criminals, which was supposed to solve the "problem" of judges using too much discretion in making sentencing orders. However, a few years later it had to be changed to allow judges discretion again.

Judges are not a major problem – in family law or elsewhere. Family court is not broken – it is just facing mental health problems among litigants that it is just now learning how to handle. Yes, there are huge social problems in society and huge positive social changes. Let's not try to find a large group to blame. One of the most positive social changes of the last thirty years has been having children raised with substantial involvement of both of their parents, which has been significantly promoted by the courts. Let's not mess it up with an all-or-nothing solution which ties judges' hands. Instead, let's focus on educating parents and giving them the skills to be successful co-parents, so that children are not further caught in the middle. Children should feel that their parents are with them because they love them, not because of a calculation.

Bill Eddy is a family law attorney (Certified Family Law Specialist), a therapist with children and families (Licensed Clinical Social Worker), a family mediator (Senior Family Mediator, National Conflict Resolution Center) and President of the High Conflict Institute. He has handled over 400 divorces as a lawyer and over 1100 divorces as a mediator. He is the developer of the New Ways for Families method in use in five jurisdictions in the United States and Canada. He has taught at the University of San Diego School of Law, the Pepperdine School of Law and is on the part-time faculty of the National Judicial College. He is the author of several books, including The Future of Family Court: Structure, Skills and Less Stress (http://www.unhookedbooks.com/The-Future-of-Family-Court-p/book417.htm) and It's All Your Fault! 12 Tips for Managing People Who Blame Others for Everything (http://www.unhookedbooks.com/It-s-All-Your-Fault-p/book104.htm). For more information about his seminars, consultations and books: www.HighConflictInstitute.com (http://www.HighConflictInstitute.com).

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