

Kansas Coalition against sexual & domestic violence

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Senate Judiciary
Support SB 124
Written Testimony
February 16, 2016

Chairman Wilborn and Members of the committee,

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is a statewide non-profit organization whose membership is comprised of the 27 sexual and domestic violence programs serving survivors of domestic violence and sexual assault across the state.

Research indicates that 30-60% of children living in homes where domestic abuse occurs are also physically or sexually abused.¹ Even if the child is not the victim of direct physical or sexual abuse, these children can exhibit emotional and behavioral problems and trauma symptoms.² Additionally, a parent who perpetrates domestic abuse against the other parent can often continue abusive behavior and intimidation by using the legal system to force long and costly custody battles. These are just a few of the reasons why consideration of domestic and sexual violence in custody decisions is so important.

In Kansas, one of the many factors a court may consider in determining the issue of child custody and residency time includes, "evidence of spousal abuse, either emotional or physical."³ However, as it is currently written the statute does not specifically mention "domestic abuse." SB 124 will amend the "evidence of spousal abuse, either emotional or physical" factor and replace it with "evidence of domestic abuse." Defined as "a pattern or history of physically or emotionally abusive behavior used by one person to gain or maintain domination and control over an intimate partner or household member; or an act of domestic violence, stalking, or sexual assault." SB 124 would provide the court with a more clearly defined custody factor to consider regarding evidence of domestic abuse.

This past year, the Family Law Advisory Committee of the Kansas Judicial Council looked closely at K.S.A. 23-3203, making the recommendation that is reflected in SB 124 (opinion attached). KCSDV believes the "domestic abuse" definition provided by the Kansas Judicial Council in SB 124 recognizes the wide range of abusive behaviors to which a victim is subjected. Domestic abuse may not always be physical but can also be sexual and emotional and should be considered when making custody determinations.

Finally, KCSDV would like to take this opportunity to discuss an additional factor the court must consider in custody determinations pursuant to K.S.A. 23-3203: "*the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent.*"⁴ This factor is commonly referred to as

¹ Edleson J.L., "The Overlap between Child Maltreatment and Woman Battering." *Violence Against Women* Vol. 5, No. 2 (1999).

² Edleson, J.L. "Children's Witnessing of Adult Domestic Violence." *J. Interpersonal Violence*, Vol. 14, No.8, (1999).

³ K.S.A. 23-3203(i)

⁴ K.S.A. 23-3203(h).

the "friendly parent provision." Although SB 124 does not amend this factor, KCSDV would like to stress that this factor remains a serious concern for victims of domestic violence who are trying to protect their children from on-going exposure to domestic violence after the marriage ends. The "friendly parent provision," as written, fails to consider domestic violence and the protective parent who is trying to reduce unsupervised contact with the abusive parent. Domestic violence does not end with the marriage; it often continues to be perpetrated in whatever way the abuser has access to the other parent....quite frequently this is through the children. Sometimes victims return to abusers because they can at least be present to protect the children, as opposed a court order which allows unsupervised time with a cruel or dangerous parent.

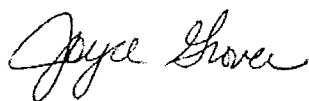
A parent who is a victim of domestic abuse may seek to protect the child(ren) from witnessing or being a victim(s) of the domestic abuse by requesting limited, supervised, or even no contact with the children by the abusive parent. As the "friendly parent provision" is currently written, this protective parent may be penalized for failing to, "...respect and appreciate the bond between the child and other parent and to allow for a continuing relationship between the child and other parent", i.e., being an unfriendly parent. KCSDV believes this custody factor should be modified to take domestic violence and safety into consideration.

The Family Law Advisory Committee discussed the "friendly parent provision" and declined to recommend a modification to the Kansas Judicial Council. However, the committee did have a minority opinion issued by three members of the committee who believed differently. The minority opinion is included with the Kansas Judicial Council report. KCSDV supports this minority opinion and believes the legislature should take a close look at it.

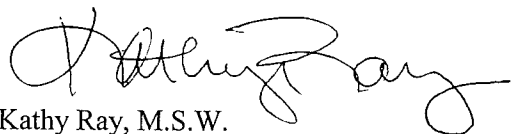
Many states have done away with their "friendly parent provisions;" have allowed for an exception to this factor in cases of domestic abuse; or, allowed the court to consider if a parent was acting to protect the child from witnessing or being a victim of domestic abuse. KCSDV supports exceptions or modifications to Kansas' "friendly parent" provision. A modification of this factor will make it clear that Kansas custody laws will not be used to allow domestic abuse to continue under the guise of calling a protective parent "unfriendly".

While KCSDV is not prepared to ask for an amendment of SB 124, we believe it is important to point out the continuing problem with this custody factor and the on-going danger for victims and their children when this factor is not modified in cases where there is domestic violence. Society wants victims to protect their children by leaving the abuser, while at the same time, society punishes them and their children for this protective behavior.

Submitted by,



Joyce Grover, Esq.
Executive Director



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Approved by Judicial Council
December 2, 2016

**REPORT OF THE JUDICIAL COUNCIL
FAMILY LAW ADVISORY COMMITTEE
December 2, 2016**

In April 2016, Representative Charles Macheers and Representative John Barker asked the Judicial Council to study and make recommendations about Senate Bill 393 relating to the list of factors judges must consider when determining legal custody, residency, and parenting time of a child. The Judicial Council accepted the study request and assigned it to the Family Law Advisory Committee.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Family Law Advisory Committee are:

Charles F. Harris, Chair, Wichita. Practicing Attorney.

Sara S. Beezley, Girard. Practicing Attorney.

Honorable Sam K. Bruner, Overland Park. Retired District Court Judge.

Prof. Gillian Chadwick, Topeka. Clinical Professor at the Washburn University School of Law.

Jamie Corkhill, Topeka. Retired Attorney.

Representative Erin Davis, Olathe. State Representative and Attorney.

Honorable Patricia Macke Dick, Hutchinson. District Court Judge.

Honorable Robert J. Frederick, Garden City. District Court Judge.

Joyce Grover, Topeka. Executive Director for the Kansas Coalition Against Sexual and Domestic Violence.

Ronald W. Nelson, Shawnee Mission. Practicing Attorney.

Cynthia Patton, Topeka. Practicing Attorney.

Ardith R. Smith-Woertz, Topeka. Practicing Attorney.

Prof. Suzanne Valdez, Lawrence. Clinical Professor at the University of Kansas School of Law.

METHOD OF STUDY

The Committee met four times between June and October 2016. In preparation for the discussion on SB 393, the Committee reviewed the bill (see copy on page 9), and the following materials:

- Written testimony from the Senate Judiciary Committee hearing and the House Judiciary Committee hearing on SB 393.

- Examples of the language and terms used in various states' statutes governing child custody decision.
- Letters from Jill Ainsworth and Crystalee Protheroe.
- Dore, Margaret K., *The "Friendly Parent" Concept: A Flawed Factor for Child Custody*, 6 Loy. J. Pub. Int. L 41 (2004).

DISCUSSION

SB 393 proposed changes to K.S.A. 23-3201 and K.S.A. 23-3203. K.S.A. 23-3201 required the court to determine the custody or residency of a child in accordance with the best interest of the child. SB 393 amended K.S.A. 23-3201 to require the court to also determine parenting time in accordance with the best interest of the child. K.S.A. 23-3203 provides a non-exhaustive list of factors judges must consider when determining legal custody, residency, and parenting time of a child. The bill amended the "friendly-parent" factor, added a domestic abuse factor, defined domestic abuse and elevated it as a primary factor, and allowed the court to order a parent to undergo a domestic violence offender assessment.

Amendments to K.S.A. 23-3201

The Committee reviewed the bill's proposed changes to K.S.A. 23-3201. The Committee supported the amendment requiring the court to determine parenting time in accordance with the best interests of the child. The Committee also decided to recommend the terminology in K.S.A. 23-3201 match the terminology used in K.S.A. 23-3203(a). The Committee recommends K.S.A. 23-3201 be modified as follows:

"The court shall determine *legal custody* ~~or~~, *residency*, *and parenting time* of a child in accordance with the best interests of the child."

Amendments to K.S.A. 23-3203

The first proposed amendment to K.S.A. 23-3203(a) was enacted through another bill during the legislature during the 2016 session. Therefore, the Committee did not discuss this amendment.

K.S.A. 23-3203(a)(8) - "Friendly-Parent" Factor

Three members of the committee do not join in this section of the committee's report and provide a counter argument in the supplemental statement on page 12 of this report.

The second proposed amendment involved K.S.A. 23-3203(a)(8). Currently, K.S.A. 23-3203(a)(8) provides that when determining the issue of legal custody, residency, or parenting time of a child, the court will consider "the willingness and ability of each parent to respect and

appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent[.]” SB 393 would qualify the factor by adding the following: “except that a parent’s actions shall not be considered with respect to this factor if the court finds that such parent is acting to protect the child from witnessing or being a victim of domestic abuse by the other parent[.]”

The Committee discussed the use of the friendly-parent factor and how it interacts with domestic abuse situations. It considered situations in which a parent may act in a way that does not demonstrate a respect for the bond and continuing relationship between the child and the other parent because the parent is acting to protect the child from the domestic abuse being perpetrated against the parent or the child by the other parent. Without the amendment to the factor proposed in SB 393, the court could hold the protecting parent’s actions against him or her. Being found an “unfriendly parent” has been one of the primary concerns the Kansas Coalition Against Sexual and Domestic Violence (KCSDV) has heard from mothers worried about protecting their children from an abusing parent. The mothers reported they had been advised not to tell the court about the domestic violence because they could then be accused of trying to harm the child’s relationship with the abusing parent. The Committee members in favor of the proposed amendment argued it would reduce the number of parents who avoid disclosing domestic abuse because they are frightened of having this factor used against them. It would also make it clear that Kansas custody laws will not be used to protect the custody and rights of those who commit domestic abuse.

The Committee considered the argument that the amendment could effectively authorize parental alienation and there could be an increase in litigation about whether the parent was appropriately acting to protect the children. Some Committee members expressed their disapproval of the amendment because the current statute already allows the judge to balance all the factors based on each case’s specific facts. If a parent’s “unfriendly” actions were in the context of an abuse situation, the judge should weigh the evidence as he or she sees fit and could conclude that the parent’s “unfriendly” behavior was warranted.

The Committee discussed situations in which the abusing parent may portray himself or herself as the more “friendly parent,” willing to work with the other parent even though it is actually another way for the abusing parent to maintain control over the other parent. The Committee noted that the statute could not dictate the correct outcome in these types of situations. Instead, it would be up to the lawyers and the judge to make case-specific decisions and rulings. The current statutory language of K.S.A. 23-3203(a) does not elevate any one factor as more important than any other factor. The statute lists the friendly-parent factor among many other factors a district court is to consider. Based on the accounts received by the KCSDV, clarification that the statute does not require the friendly parent factor to control a court’s decision may be needed. Committee members disagreed on how effectively this proposed

amendment would help clarify this issue; however, the majority of the Committee thought the issue should be addressed through training rather than through a change in the statute.

Based on a divided vote, the majority of the Committee recommends no change be made to K.S.A. 23-3203(a)(8). Rather than modifying the friendly-parent factor, the Committee recommends changing the spousal abuse factor (K.S.A. 23-3203(a)(9)) to emphasize it and to help alert parties, lawyers, and judges to the wide range of controlling behaviors that constitute domestic abuse.

K.S.A. 23-3203(a)(9) - Spousal Abuse Factor

The third proposed amendment would delete K.S.A. 23-3203(a)(9), the factor requiring the court to consider evidence of emotional or physical spousal abuse, and replace it with a factor requiring the court to consider “whether domestic abuse is occurring or has occurred.” In connection with that factor, the bill proposed a subsection be added that defined “domestic abuse” as a pattern or history of behavior used to gain or maintain domination and control over an intimate partner or household member, including emotional and economic abuse, acts of domestic violence, abuse, stalking, and sexual assault as defined by statute.

The Committee unanimously agreed the language of K.S.A. 23-3203(a)(9) needs to be modified to encompass more than abuse occurring between spouses. The Committee reviewed the terminology used in various states’ statutes and discussed whether the Kansas statute should use the term “domestic violence” or “domestic abuse.” The Committee recommends the use of the term “domestic abuse” because it is broader and the term “domestic violence” tends to invoke the idea of physical violence to the exclusion of the many other forms of domestic violence.

The Committee considered the bill’s proposal to have the definition of “domestic abuse” in a separate subsection, but ultimately decided it would emphasize the broad scope of the factor if the definitional subsections were included directly in K.S.A. 23-3203(a)(9). The Committee was concerned that defining such a broad term within the statute may impose unintended limits and prevent the courts from considering new forms of abuse in situations that arise due to changes in society and technology. To indicate that the definitional subsections are not exclusive and to make the definitional subsections fit within K.S.A. 23-3203(a)(9), the Committee reworded the factor and recommends the factor say, “(9) evidence of domestic abuse, including but not limited to....”

The Committee reviewed the bill’s two proposed definitional subsections. First, it had concerns about specifically naming economic abuse in the definition. The Committee agreed consideration of economic abuse is important but explicitly mentioning it may encourage parties to argue it in situations in which there has not really been economic abuse or when it is not actually relevant to the parenting time decision. Second, the Committee decided to qualify

“abusive behavior” with “physically or emotionally” in order to emphasize that abusive behavior may be more than only physical violence.

Third, concerns were raised about narrowing the definition of domestic abuse by including the statutory cross-references for intimate partner or household member, domestic violence, abuse, stalking, and sexual assault. The Committee discussed how eliminating the statutory cross-references would allow a broad range of situations to be considered under the domestic abuse factor. For example, the petitioner may be frightened of the respondent because of the respondent’s history of anger management issues or how the respondent has exhibited abusive behaviors towards his or her parents, siblings, close friends, etc. The Committee felt the statutory references implied that a conviction under the referenced statute would be required. The Committee decided against including statutory cross-references in the definition because it would make it clear that the court could consider an act of domestic violence, stalking, or sexual assault the abuser perpetrated against a third-party or an incident in which no conviction or other judicial determination regarding the elements of the statutes had occurred.

The Committee recommends K.S.A. 23-3203(a)(9) state:

“(9) evidence of domestic abuse, including but not limited to:

“(A) a pattern or history of physically or emotionally abusive behavior used by one person to gain or maintain domination and control over an intimate partner or household members; or

“(B) an act of domestic violence, stalking, or sexual assault.”

Proposed New Subsections K.S.A. 23-3203(b)(2) & (b)(3)

The bill proposed K.S.A. 23-3203(b)(2) be added to provide a list of evidence the court may consider in determining whether domestic abuse is occurring or has occurred. The Committee unanimously recommends this section not be adopted. The court already may consider all relevant evidence to determine whether domestic abuse is occurring or has occurred. The Committee found it unnecessary to specifically list that the court may consider the results of the domestic violence offender assessment, any protective orders, and any criminal convictions.

The bill also proposed K.S.A. 23-3203(b)(3) which would require that if the court found that domestic abuse had occurred: (A) it would be considered a “primary factor” and all the other statutory factors would be considered in light of the primary factor; (B) the court must make findings on the record about the specific information the court considered and relied upon; and (C) the court must include in the order the reasons why the order is in the best interest of the child and how the safety of the child and non-abusing parent was considered.

The Committee's main concern was with elevating the domestic abuse factor as a "primary factor." The statute would mandate that the court give one factor more weight than any other factor rather than leaving that up to the judge's discretion. The Committee agreed that if domestic abuse was an issue in the case, the judge should take that into consideration when weighing all other factors; however, making it a "primary factor" would limit the discretion of the court and encourage allegations of untrue or exaggerated claims of abuse. When the Committee originally drafted the statutory factors to be considered in child custody, residency, and parenting time decisions, it purposefully made no effort to prioritize the factors. Instead, the prioritizing and weighing of the factors in light of each case's unique facts was left completely up to the judge who is in the best position to evaluate the evidence.

The Committee agreed that if the domestic abuse factor is not elevated to be a primary factor, the proposed K.S.A. 32-2303(b)(3)(B) & (C), requiring special findings of fact are unnecessary. The Committee felt the statutes that already govern findings of fact are sufficient.

The Committee recommends the proposed subsections, K.S.A. 23-3203(b)(2) & (b)(3), not be adopted.

Proposed New Subsection K.S.A. 23-3203(b)(4)

The bill provided that the court could order a parent to undergo a domestic violence offender assessment; however, this provision was enacted through another bill during the 2016 legislative session so the Committee did not address it.

RECOMMENDATION

The Committee recognizes the need to modify the list of factors in K.S.A. 23-3203(a) to more effectively address domestic abuse and the impact it has on legal custody, residency, and parenting time decisions. For the reasons discussed above, the Committee recommends against the passage of SB 393. If the legislature chooses to amend the factors, the Committee recommends the following amendments to K.S.A. 23-3201 and 23-3203(a).

Proposed Amendments to K.S.A. 23-3201 & 23-3203

K.S.A. 23-3201. Child custody or residency criteria

The court shall determine *legal* custody, ~~or~~ residency, *and parenting time* of a child in accordance with the best interest of the child.

K.S.A. 23-3203. Factors considered in determination of child custody, residency and parenting time; domestic violence offender assessment

(a) In determining the issue of legal custody, residency and parenting time of a child, the court shall consider all relevant factors, including, but not limited to:

- (1) each parent's role and involvement with the minor child before and after separation;
- (2) the desires of the child's parents as to custody or residency;
- (3) the desires of a child of sufficient age and maturity as to the child's custody or residency;
- (4) the age of the child;
- (5) the emotional and physical needs of the child;
- (6) the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;
- (7) the child's adjustment to the child's home, school and community;
- (8) the willingness and ability of each parent to respect and appreciate the bond between the child and the other parent and to allow for a continuing relationship between the child and the other parent;
- (9) ~~evidence of spousal abuse, either emotional or physical;~~ *evidence of domestic abuse, including but not limited to:*
 - (A) *a pattern or history of physically or emotionally abusive behavior used by one person to gain or maintain domination and control over an intimate partner or household members; or*
 - (B) *an act of domestic violence, stalking, or sexual assault.*
- (10) the ability of the parties to communicate, cooperate and manage parental duties;
- (11) the school activity schedule of the child;
- (12) the work schedule of the parties;
- (13) the location of the parties' residences and places of employment;
- (14) the location of the child's school;
- (15) whether a parent is subject to the registration requirements of the Kansas offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, or any similar act in any other state, or under military or federal law;
- (16) whether a parent has been convicted of abuse of a child, K.S.A. 21-3609, prior to its repeal, or K.S.A. 21-5602, and amendments thereto;
- (17) whether a parent is residing with an individual who is subject to registration requirements of the Kansas offender registration act, K.S.A. 22-4901 et seq., and amendments thereto, or any similar act in any other state, or under military or federal law; and
- (18) whether a parent is residing with an individual who has been convicted of abuse of a child, K.S.A. 21-3609, prior to its repeal, or K.S.A. 21-5602, and amendments thereto.

(b) To aid in determining the issue of legal custody, residency and parenting time of a child, the court may order a parent to undergo a domestic violence offender assessment conducted by a certified batterer intervention program and may order such parent to follow all recommendations made by such program.

SENATE BILL No. 393

By Committee on Public Health and Welfare 2-2

1 AN ACT concerning the the Kansas family law code; relating to child
2 custody, residency and parenting time; consideration of domestic abuse;
3 amending K.S.A. 2015 Supp. 23-3201 and 23-3203 and repealing the
4 existing sections.

5

6 *Be it enacted by the Legislature of the State of Kansas:*

7 Section 1. K.S.A. 2015 Supp. 23-3201 is hereby amended to read as
8 follows: 23-3201. The court shall determine custody ~~or~~, residency *and*
9 *parenting time* of a child in accordance with the best interests of the child.

10 Sec. 2. K.S.A. 2015 Supp. 23-3203 is hereby amended to read as
11 follows: 23-3203. (a) In determining the issue of ~~child~~-custody, residency
12 and parenting time *of a child*, the court shall consider all relevant factors,
13 including, but not limited to:

14 ~~(a)~~(1) Each parent's role and involvement with the minor child before
15 and after separation;

16 ~~(b)~~(2) the desires of the child's parents as to custody or residency;

17 ~~(c)~~(3) the desires of a child of sufficient age and maturity as to the
18 child's custody or residency;

19 ~~(d)~~(4) the age of the child;

20 ~~(e)~~(5) the emotional and physical needs of the child;

21 ~~(f)~~(6) the interaction and interrelationship of the child with parents,
22 siblings and any other person who may significantly affect the child's best
23 interests;

24 ~~(g)~~(7) the child's adjustment to the child's home, school and
25 community;

26 ~~(h)~~(8) the willingness and ability of each parent to respect and
27 appreciate the bond between the child and the other parent and to allow for
28 a continuing relationship between the child and the other parent, *except*
29 *that a parent's actions shall not be considered with respect to this factor if*
30 *the court finds that such parent is acting to protect the child from*
31 *witnessing or being a victim of domestic abuse by the other parent;*

32 ~~(i)~~—evidence of spousal abuse, either emotional or physical;

33 ~~(j)~~(9) the ability of the parties to communicate, cooperate and
34 manage parental duties;

35 ~~(k)~~(10) the school activity schedule of the child;

36 ~~(l)~~(11) the work schedule of the parties;

- 1 ~~(m)~~-(12) the location of the parties' residences and places of
2 employment;
- 3 ~~(n)~~-(13) the location of the child's school;
- 4 ~~(o)~~-(14) whether a parent is subject to the registration requirements of
5 the Kansas offender registration act, K.S.A. 22-4901 et seq., and
6 amendments thereto, or any similar act in any other state, or under military
7 or federal law;
- 8 ~~(p)~~-(15) whether a parent has been convicted of abuse of a child,
9 K.S.A. 21-3609, prior to its repeal, or K.S.A. 2015 Supp. 21-5602, and
10 amendments thereto;
- 11 ~~(q)~~-(16) whether a parent is residing with an individual who is subject
12 to registration requirements of the Kansas offender registration act, K.S.A.
13 22-4901 et seq., and amendments thereto, or any similar act in any other
14 state, or under military or federal law; ~~and~~
- 15 ~~(r)~~-(17) whether a parent is residing with an individual who has been
16 convicted of abuse of a child, K.S.A. 21-3609, prior to its repeal, or K.S.A.
17 2015 Supp. 21-5602, and amendments thereto; *and*
- 18 (18) *whether domestic abuse is occurring or has occurred.*
- 19 (b) (1) *As used in this section, "domestic abuse" means:*
- 20 (A) *A pattern or history of abusive behavior that is used by one*
21 *person to gain or maintain domination and control over an intimate*
22 *partner or household member as defined in K.S.A. 60-3102, and*
23 *amendments thereto, which may include emotional abuse or economic*
24 *abuse; or*
- 25 (B) *an act of domestic violence as defined in K.S.A. 2015 Supp. 21-*
26 *5111, and amendments thereto, which may include an act of abuse as*
27 *defined in K.S.A. 60-3102, and amendments thereto, stalking as defined in*
28 *K.S.A. 60-31a02, and amendments thereto, or sexual assault as defined in*
29 *K.S.A. 74-7325, and amendments thereto.*
- 30 (2) *In determining whether domestic abuse is occurring or has*
31 *occurred, the court may:*
- 32 (A) *Consider the results of a domestic violence offender assessment*
33 *conducted by a certified batterer intervention program, or order such an*
34 *assessment; and*
- 35 (B) *consider all relevant information concerning each parent,*
36 *including, but not limited to:*
- 37 (i) *Any protective order included in K.S.A. 2015 Supp. 21-5924, and*
38 *amendments thereto; and*
- 39 (ii) *any criminal convictions.*
- 40 (3) *If the court finds that domestic abuse has occurred:*
- 41 (A) *Such finding shall be considered a primary factor, and the factors*
42 *listed in subsection (a) shall be considered in light of this factor;*
- 43 (B) *the court shall make findings on the record concerning the*

1 *specific information the court considered and relied upon in making such*
2 *finding; and*

3 *(C) the court shall state in the court's order regarding custody,*
4 *residency and parenting time the reasons why the order is in the best*
5 *interests of the child, and how the safety of the child and the other parent*
6 *have been considered.*

7 *(4) If the court ordered a parent to undergo a domestic violence*
8 *offender assessment conducted by a certified batterer intervention*
9 *program and the court finds that domestic abuse has occurred, the court*
10 *may order such parent to follow all recommendations made by such*
11 *program.*

12 Sec. 3. K.S.A. 2015 Supp. 23-3201 and 23-3203 are hereby repealed.

13 Sec. 4. This act shall take effect and be in force from and after its
14 publication in the statute book.

SUPPLEMENTAL STATEMENT REGARDING THE
DECEMBER 2, 2016 REPORT OF THE JUDICIAL COUNSEL
FAMILY LAW ADVISORY COMMITTEE

The undersigned members of the Family Law Advisory Committee submit this supplemental statement to express our dissent from the Committee's majority regarding SB 393's proposed amendment to K.S.A. 23-3203(a)(8), a provision commonly known as "the friendly parent factor." In contrast to the majority, we support the proposed amendment because it would serve to protect victims and non-offending parents who report abuse from being inappropriately denied custody and parenting time. We do not share the majority's concerns about "parental alienation" or the potential for increased litigation.

The risks posed to non-offending parents by the current version of K.S.A. 23-3203(a)(8) are grave. The Committee received written testimony from two mothers who have personally experienced the catch-22 imposed by the friendly parent factor first hand during custody litigation.¹ Those experiences are representative of the broader problem. Non-offending parents are placed in an impossible situation when reporting legitimate abuse is interpreted as "unfriendly" behavior. Research has shown that judges and lawyers are prone to disbelieving spousal and child abuse allegations, even though evidence shows that most allegations are, in fact, substantiated.²

The proposed amendment would serve the interests of justice by ensuring that the friendly parent factor not be used to punish non-offending parents who seek to protect their children from witnessing or being a victim of domestic abuse. Although we agree with the majority that the statute cannot directly control the outcome in every case, we nonetheless believe there are critically important reasons to add this exception. First, the statute provides the fundamental basis for our courts' decisions about child custody; we believe it should reflect the interests of justice and the Committee's broader consensus that the friendly parent factor ought to be weighed within the context of domestic abuse.

Second, limiting the friendly parent factor will have real positive effects on the lives of parents seeking to protect their children. The amendment would help litigants, attorneys, and judges fully recognize and understand abuse issues when dealing with friendly parent arguments. Even if, as the majority notes, there may be some judges who might misapply the new law, our judicial system has an appeal mechanism designed to correct such missteps. Without a change to the friendly parent factor, there is no remedy for a non-offending parent who is awarded less parenting time based on the "unfriendly" behavior of reporting child abuse, even when the abuse is substantiated. That alone is a strong reason to amend the statute. Under the proposed amendment offered in SB 393, a non-offending parent could successfully appeal that decision

¹ Jill Ainsworth, TESTIMONY IN SUPPORT OF SB 393 (2016) (written testimony from the February 10, 2016 Hearing before the Kansas Senate Committee on Judiciary); Crystalee C. Protheroe, TESTIMONY IN SUPPORT OF SENATE BILL 393 (2016) (written testimony from the February 10, 2016 Hearing before the Kansas Senate Committee on Judiciary).

² Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 395 (2008).

because it would be a direct misapplication of K.S.A. 23-3203(a)(8). Such an appeal would not only benefit the victim, but also appropriately shape trial judge’s interpretation and application of the law.

We do not share the majority’s concern that the proposed amendment would endorse or encourage “parental alienation.” The original theory of “parental alienation syndrome” purportedly described a campaign by one parent to turn a child against the other parent. This theory had specious origins and was eventually discredited.³ In recent years, there has been an effort by some theorists to revive the term “parental alienation” to describe a less nefarious psychological phenomenon.⁴ The current theory of “parental alienation” describes a child’s rejection of a parent based on a wide variety of reasons, including a natural affinity for a same-gender parent, and poor parenting on the part of the rejected parent.⁵ This amendment would not encourage or endorse “parental alienation” as it is currently understood.

Furthermore, there is no reason to believe the proposed amendment would meaningfully increase meritless litigation about abuse and other allegedly “unfriendly” parenting behavior. Many states have limited the friendly parent factor as this bill proposes,⁶ and even more states’ statutes have no friendly parent factor at all.⁷ There is no evidence of increased litigation or higher rates of domestic violence claims evidence in the states that have limited the friendly parent factor. Nonetheless, to the extent that the amendment would allow more victims to disclose abuse, we believe that is a positive effect for children and adults experiencing domestic abuse.

Because SB 393’s proposed amendment to K.S.A. 23-3203(a)(8) would protect non-offending parents seeking to shield their children and themselves from domestic abuse, and prevent family courts from punishing meritorious disclosures of abuse, we support the provision. While there is no evidence that the amendment would increase false allegations, there is meaningful evidence

³ See generally Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 25 FAM. L.Q. 527 (2001); Robert E. Emery, *Parental Alienation Syndrome: Proponents Bear the Burden of Proof*, 43 FAM. CT. REV. 8 (2005).

⁴ *Id.* See also Elrod & Dale at 396.

⁵ Elrod & Dale at 396 (citing Leslie M. Drozd & Nancy W. Oleson, *Is It Abuse, Alienation, and/or Estrangement? A Decision Tree*, 1(3) J. CHILD CUSTODY 65 (2004)).

⁶ Margaret K. Dore, *The “Friendly Parent” Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L 41, 43 (2004), (citing Alaska Stat. § 25.20.090(6)(E) (2004), Or. Rev. Stat. § 107.137(1)(f) (2014), and Vt. Stat. Ann. tit. 15 § 665(b)(5)). See also Iowa Code §§ 598.41(1)(c) & (3)(j) (2012); N.J. Stat. § 9:2-4(c) (1998); Va. Code § 20-124.3(6) (2012).

⁷ Custody statutes in the following states do not include a friendly parent provision: District of Columbia, Idaho, Indiana, Kentucky, Maryland, Massachusetts, Montana, Nebraska, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Washington, and West Virginia. See ABA Commission on Domestic and Sexual Violence, *CHILD CUSTODY AND DOMESTIC VIOLENCE* (2008), available at www.americanbar.org/content/dam/aba/migrated/domviol/docs/Custody.authcheckdam.pdf (last visited October 28, 2016).

that non-offending parents who see to protect their children are being harmed under the current state of the law.⁸

Regarding SB 393's other provisions, we share the majority's view as expressed in the December 2, 2016 committee report.

Respectfully signed,

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⁸ See *infra* notes 1 and 2 and accompanying text.