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TO: Senate Judiciary Committee

FROM: Kansas Judicial Council – Prof. Gillian Chadwick, Associate Professor of Law at Washburn University School of Law

DATE: February 11, 2021

RE: Testimony in Support of 2021 SB 123 Regarding the Termination of Parental Rights When a Child is Conceived by Sexual Assault

The Kansas Judicial Council (Council) and its Family Law Advisory Committee (Committee) recommend the passage of SB 123. When someone sexually assaults another person and a child is conceived as a result of the sexual assault, it is important for Kansas' statutes to offer a variety of ways to protect the victim parent from being required to co-parent with the other biological parent.

This bill was considered during the 2020 legislative session (2020 SB 404) but did not pass due to the COVID-19 pandemic. In the 2020 session, the bill was amended to correct a technical issue and then passed the Senate unanimously. The bill then received a hearing in the House Judiciary Committee but due to the session ending early the bill was never considered by the House as a whole.

First, this bill creates a new independent cause of action enabling the victim parent to petition to terminate the parental rights of the other biological parent regardless of whether that parent was ever convicted of the sexual assault in which the child was conceived. Second, this bill clarifies that judges are to consider evidence of an act of sexual assault by a parent when making child custody, residency, and parenting-time determinations. Third, within a child in need of care case, this bill authorizes the court to find a parent unfit based on evidence that the child was conceived by sexual assault.

BACKGROUND

Each year in the United States, an average of 321,000 individuals will be sexually assaulted or raped. It is estimated that between 25,000 and 32,000 rape-related pregnancies occur in the United States each year.¹ “Of these women, an estimated twenty-six percent to fifty percent will choose to terminate their pregnancies; thirty-six percent of women who choose to carry to term will place the baby up for adoption. Based on these statistics, approximately 8,000 to 16,000 women become pregnant through rape each year in the United States and choose to raise the rape-conceived child.”²

Generally, when an individual becomes pregnant as a result of rape, absent statutes to the contrary, the victim parent and the other parent have the same parental rights. This means that if the victim parent chooses to raise the child, regardless of whether the other parent is ever convicted of the sexual assault or not, the victim parent and other parent could be forced to co-parent. In the case of an adoption, the victim parent could be forced to provide notice of the adoption to the other parent and risks that the other parent might challenge that adoption proceeding.

As of 2018,

“[f]orty-four states and the District of Columbia have enacted statutes that address the issue of rapist parents pursuing custody or visitation. States with these statutes generally restrict the parental rights of a rapist parent in one of two ways: either through terminating the rapist parent's parental rights or by enacting a prohibition on custody and visitation.

“Twenty-five states and the District of Columbia use termination of parental rights (TPR) proceedings to limit the parental rights of rapist parents. . . . Five of the twenty-five state TPR statutes regarding sexual assault and parental rights only provide grounds (based on commission of a sexual assault that results in conception) for TPR in cases of adoption. Three additional states make a finding of rape or rape conviction a mere factor in TPR proceedings, rather than grounds for mandatory TPR. In these three states, the decision to terminate is left to judicial discretion.

“Eighteen states have instituted a general prohibition on custody or visitation to the rapist parent. Fourteen states only have a general prohibition and four states provide both grounds for TPR and prohibit custody and visitation to rapist parents. Three additional states follow

¹ Anastasia Doherty, Choosing to Raise a Child Conceived Through Rape: The Double-Injustice of uneven State Protection, 39 Women's Rts. L. Rep. 220 (2018).

² *Id.*

alternative strategies (revoking paternity or going through child abuse proceedings). Two states provide means for paternity to be revoked.”³

SEC. 1-7 INDEPENDENT ACTION TO TERMINATE PARENTAL RIGHTS OF ONE PARENT

The Committee spent many months reviewing Kansas’ current statutes to determine whether any of the existing statutory causes of action would adequately enable the victim parent to avoid co-parenting with the other parent. It concluded that none were adequate. The Committee considered using Kansas’ existing parentage and domestic case framework; however, if the victim parent chose to initiate a case to establish parentage and then request sole legal custody and no parenting time by the other parent, there is always the possibility that the judge could deny the victim parent’s motion for sole legal custody, grant joint legal custody, and award parenting time to the other parent. The risk of being required to co-parent with the other parent prevents victim parents from initiating the action.

Kansas should enact an independent cause of action specifically allowing the victim parent to bring a case to terminate the parental rights of the other parent. The independent action allows the victim parent to permanently terminate the parental rights of the other parent without impacting the victim parent’s parental rights. The independent action is also crafted to provide necessary confidentiality and safety provisions, not provided in other causes of action.

Sections 1 through 7 include provisions providing for an appointed attorney for an indigent parent alleged to be a perpetrator, the appointment of a guardian ad litem for the child, the waiver of any docket fee, and the establishment of parentage according to the Kansas Parentage Act. One of the most important aspects of the independent action is that termination of parental rights can occur even if the other parent was never convicted for the sexual assault. If the other parent was convicted, such conviction satisfies the victim parent’s burden to prove the sexual assault occurred. As discussed above, only 5 out of every 1,000 sexual assaults lead to felony convictions.⁴ If the other parent is one of the many perpetrators who are never convicted of the sexual assault, the victim parent may still petition for the termination of the other parent’s parental rights; however, the petitioner must prove the sexual assault occurred by clear and convincing evidence, which is the highest standard of evidence in a civil case.

If the court suspects the parents are fraudulently claiming the child was conceived by sexual assault in order to terminate the rights of one parent, the court may appoint a guardian ad litem to investigate and protect the child’s interests. Parents would also be deterred from fraudulently claiming the child was conceived by sexual assault because the termination would not necessarily relieve the terminated parent from paying child support.

³ *Id.* at 226-227 (internal citations removed). This article uses the term “rapist parent” referring to the alleged perpetrator of the sexual assault rather than “other parent” as used in this testimony.

⁴ The Criminal Justice System: Statistics, Rape, Abuse & Incest Nat’l Network, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Feb. 2, 2021).

SEC. 8 CUSTODY, RESIDENCY, AND PARENTING TIME FACTORS

A victim parent may be involved in a divorce or parentage case involving the child conceived by the sexual assault and the perpetrator of the sexual assault. This bill amends K.S.A. 2020 Supp. 23-3203 in order to clarify that the court should consider evidence of an act of sexual assault by a parent, whether convicted of a crime or not, when making custody, residency, and parenting time decisions. Sexual assault was already referenced in K.S.A. 2020 Supp. 23-3203(a)(9), but as a subsection of domestic abuse. The Council recommends that the court consider all acts of sexual assault, not just those that take place within the context of a domestic relationship.

SEC. 9 & 10 CHILD IN NEED OF CARE – FINDING OF UNFITNESS

In a child in need of care (CINC) case, the current statute, K.S.A. 2020 Supp. 38-2269(e), allows the court to find a parent unfit if the parent “is convicted of a felony in which sexual intercourse occurred, or if a juvenile is adjudicated a juvenile offender because of an act which, if committed by an adult, would be a felony in which sexual intercourse occurred, and as a result of the sexual intercourse, a child is conceived[.]” Additionally, under K.S.A. 2020 Supp. 38-2271(a), a parent may be presumed to be unfit if the “parent has been convicted of rape, K.S.A. 21-3502, prior to its repeal, or K.S.A. 21-5503, and amendments thereto, or comparable proceedings under the laws of another jurisdiction resulting in the conception of the child[.]”

Both K.S.A. 2020 Supp. 38-2269 and 38-2271 require a parent be convicted of either rape or a felony in which sexual intercourse occurred. Out of every 1,000 sexual assaults, only 5 cases will lead to a felony conviction.⁵ It is also common that rape cases, are often pled down to less severe felonies, such as indecent liberties with a child. Therefore, it would be better for both K.S.A. 2020 Supp. 38-2269 and 38-2271 to allow the court to consider that the child was conceived by sexual assault regardless of whether the other parent was ever criminally convicted for the sexual assault. If the parent has not been convicted of the sexual assault, the court must find by clear and convincing evidence, the highest evidentiary standard in civil actions, that the parent committed the sexual assault which resulted in the conception of the child.

⁵ The Criminal Justice System: Statistics, Rape, Abuse & Incest Nat’l Network, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Feb. 2, 2021).

COMMITTEE MEMBERSHIP

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

Hon. Mike Keeley, Chair, District Court Judge; Great Bend

Sara S. Beezley, Practicing Attorney; Girard.

Prof. Gillian Chadwick, Associate Professor at Washburn University School of Law; Topeka.

Elizabeth Cohn, Program Attorney for Child Support Services, Department for Children and Families; Topeka.

Prof. Melanie DeRousse, Director of Legal Aid Clinic and Clinical Associate Professor at the University of Kansas School of Law; Lawrence.

Hon. Robert J. Frederick, District Court Judge; Garden City.

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

Rep. Susan Humphries, Practicing Attorney and State Representative District 99; Wichita.

Ronald W. Nelson, Practicing Attorney; Shawnee Mission.

Bethany Roberts, Practicing Attorney; Lawrence.

Richard Samaniego, Practicing Attorney; Wichita.

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