KANSAS JUDICIAL COUNCIL

Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ks.gov
www.kansasjudicialcouncil.org

TO: **House Judiciary Committee**

FROM: **Kansas Judicial Council – Judge Kelly Ryan**

DATE: **January 30, 2018**

RE: **Testimony in support of HB 2481 amending the Kansas Adoption and Relinquishment Act**

The Kansas Judicial Council recommends HB 2481 amending the Kansas Adoption and Relinquishment Act (KARA), K.S.A. 59-2111 *et seq*. KARA was adopted in 1990 at the recommendation of the Judicial Council and its Family Law Advisory Committee. With a few exceptions, KARA has not been significantly amended since that time. In June 2015, the Judicial Council decided it was time to undertake a comprehensive review of KARA and formed a new advisory committee for that purpose. A list of committee members may be found on the last page of this testimony.

The Council's Adoption Law Advisory Committee (Committee) spent the past two years studying KARA and drafting the amendments contained in HB 2481. The Committee agreed that, overall, KARA is functioning well and provides a good framework, though it is in need of updating in some areas. This testimony will highlight the main substantive changes to KARA being recommended by the Committee. In addition, explanatory comments keyed to each section of the bill may be found beginning at page 4.

Adoption Jurisdiction

The Committee's most important recommendation relates to adoption jurisdiction. As recognized by the Kansas Supreme Court in *In re Adoption of H.C.H.*, 297 Kan. 819, 304 P.3d 1271

(2013), the jurisdictional provisions in K.S.A. 59-2127 do not affirmatively state when a Kansas court has jurisdiction over an adoption; rather, they state when a court cannot exercise jurisdiction. The result is "an incomplete statutory scheme fraught with ambiguity." *Id.*, 297 Kan. at 830. The Court urged the legislature to address this problem. *Id.*, 297 Kan. at 845.

The Adoption Law Advisory Committee worked with members of the Judicial Council's Family Law Advisory Committee in reviewing the jurisdiction problem. Both Committees ultimately agreed that jurisdiction in adoption proceedings, including proceedings to terminate parental rights under K.S.A. 59-2136, should be governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), K.S.A. 23-37,101 *et seq*., with the exception that the notice provisions of KARA should continue to control.

One important reason to rely on the UCCJEA's jurisdiction provisions is to ensure that any adoption order complies with the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A. The PKPA governs when states must give full faith and credit to another state's child custody orders. To comply with PKPA, a child custody order must have been entered by a court with jurisdiction under several specific provisions. Those jurisdiction provisions closely mirror the language of the UCCJEA, and, in fact, the UCCJEA was specifically drafted to ensure compliance with the PKPA. Providing that Kansas adoption jurisdiction is governed by the UCCJEA will ensure that Kansas adoption orders are entitled to full faith and credit under the PKPA.

The Committee was concerned, however, that merely cross-referencing the UCCJEA might inadvertently cause the service of process provisions in K.S.A. Chapter 60 to apply to adoption proceedings. Adoption proceedings are under K.S.A. Chapter 59 and have their own specific notice provisions, which do not require service of a copy of the petition. Accordingly, the Committee added language stating that the notice provisions of KARA, K.S.A. 59-2133 and 59-2136, would continue to control.

Termination of parental rights

Another area where the Committee is recommending a substantive change is in K.S.A. 59-2136, which sets out the standard for terminating parental rights in adoption proceedings. As currently drafted, the statute contains two different standards for terminating parental rights. In general, subsection (d) applies to stepparent adoptions, and allows termination of parental rights when a parent has failed to assume the duties of a parent for two years preceding the filing of the petition. Subsection (h) applies to all other adoptions, and allows termination on the same grounds as subsection (d), but also on a number of other grounds including unfitness.

Subsection (d), however, only applies to stepparent adoptions when the child has a presumed father due to a marriage or attempted marriage. *In re Adoption of P.Z.K.*, 50 Kan. App. 2d 617, 620-21, 332 P.3d 187 (2014). The Committee believes it is inappropriate, and potentially violates equal protection, to apply different standards to the termination of parental rights based upon the marital status of the parent whose rights are being terminated. For that reason, the Committee recommends that subsection (d) be stricken from the statute so that all terminations are governed by subsection (h).

Pre-birth consents

The Committee is also recommending a substantive change to K.S.A. 59-2116 regarding the timing of consents to adoption. New subsection (b) of that statute would allow a father or possible father to sign a consent to adoption before the birth of the child, but only if he has the advice of independent legal counsel and counsel is present when he executes the consent. Such a pre-birth consent could be challenged under the same conditions as any other consent pursuant to K.S.A. 59-2114, *i.e.,* by clear and convincing evidence that the consent was not freely and voluntarily given.

Current law provides that a mother may not give a valid consent to an adoption until 12 hours after the birth of the child but does not speak to the timing of a father's consent. In the experience of Committee members, some Kansas judges will accept pre-birth consents from fathers while others will not. The Committee agreed that the statute should be clarified on this point.

The Committee recommends allowing fathers to sign pre-birth consents to adoption. While the Committee believes that this provision will not be widely used, it will be helpful in situations where a father may be unavailable or difficult to locate at the time of the birth or where the father wishes to consent and wants no further involvement in the pregnancy or subsequent adoption proceedings.

While the Committee recognizes that laws that treat similarly situated mothers and fathers differently might violate equal protection, the Committee believes there is no such concern here. The U.S. Supreme Court has held that the law may treat fathers who have never established a relationship with their child differently from mothers who have. *Lehr v. Robertson*, 463 U.S. 248 (1983). If a father wishes to sign a consent pre-birth, then by definition he is not a father who has or desires to establish a relationship with the child.

Explanatory Comments Keyed to each Section of HB 2481

Section 1, amending K.S.A. 59-2112, Definitions.

The term "residence of a child" or "place where a child resides" is currently defined by reference to the residence of a mother or father depending upon the marital status of the parents. The Committee believes it is more appropriate to define the child's residence based on the residence of either parent, regardless of marital status. Under KARA, this new definition of the child's residence will only apply in the context of determining venue, not jurisdiction.

The term "parties in interest" or "interested parties" is used several times in KARA, but was not previously defined. The new definition of "party in interest" is based in part on K.S.A. 59-2129, which lists the persons who may consent to an adoption, but it also includes prospective adoptive parents and adoptive parents.

The definition of "professional" was previously located in K.S.A. 59-2120. It has been amended to clarify that a person who receives only reimbursement for expenses is not considered a professional who is subject to the penalty provision in 59-2120.

Section 2, amending K.S.A. 59-2113, Who may adopt.

Changing the terminology "husband and wife" to "married couple" is necessary to bring Kansas law in line with the U.S. Supreme Court's decision upholding same-sex marriage in *Obergefell v. Hodges*,135 S.Ct. 2584 (2016*)*.

Insertion of the word "adult" clarifies that a minor who is emancipated as a result of marriage may not adopt.

Section 3, amending K.S.A. 59-2114, Consent.

The changes in subsection (a) are intended to clarify that a judge is not to give legal advice to a consenting party about whether to sign a consent; rather, a judge must simply inform a consenting party of the legal consequences of signing a consent.

Section 4, amending K.S.A. 59-2116, Time of execution of consent.

New subsection (b) would allow a father or possible father to sign a pre-birth consent, but only if he has the advice of independent legal counsel and counsel is present when he executes the consent. A pre-birth consent could be challenged under the same conditions as any other consent pursuant to K.S.A. 59-2114, *i.e.*, by clear and convincing evidence that the consent was

not freely and voluntarily given. A relinquishment, however, may be executed only after the birth of the child.

Current law does not explicitly speak to pre-birth consents. In the experience of the Committee, some Kansas judges will accept consents executed before the birth of the child, while others will not. The Committee believes some clarification is needed. The Committee expects that pre-birth consents will not be widely used but may be helpful in situations where a father may be unavailable or difficult to locate at the time of the birth or where the father wishes to consent and wants no further involvement in the adoption proceedings.

Section 5, amending K.S.A. 59-2117, Execution of consent outside the state.

The amendments to this section have two purposes. First, under current law, a consent or relinquishment executed in a foreign country is valid in Kansas only if executed in accordance with the law and procedure of the foreign country. Under the amendments, a consent or relinquishment would also be valid if executed in accordance with Kansas law.

Second, the amendments would allow recognition of documents that are the functional equivalent of a Kansas consent or relinquishment but may not be titled as a consent or relinquishment.

Section 6, amending K.S.A. 59-2120, Interstate adoption procedures.

The definition of "professional" was moved to the general definition section at K.S.A. 59-2112 and amended to clarify that a person who receives only reimbursement for expenses is not considered a professional subject to the penalty provision of this section.

The word "nonperson" was added to bring the language of the statute up-to-date with the current criminal code.

Section 7, amending K.S.A. 59-2121, Payment for adoption.

The amendments to this section delete provisions that limit certain fees and expenses to an amount that would be reasonable by Kansas standards, regardless of where those fees and expenses are incurred. These limitations were originally enacted to prevent out-of-state attorneys from using Kansas as a marketplace for adoptions and charging exorbitant fees. The Committee believes these limitations are no longer necessary and may actually be putting adoptive parents in Kansas at a competitive disadvantage. The Committee believes that fees and expenses should be allowed so long as they are reasonable for the location where they are incurred.

Section 8, amending K.S.A. 59-2122, Files and records of adoption.

The amendments to this section are intended to clarify who has access to adoption files and records and who must request such access from the court. As amended, subsection (a) sets out the general rule that adoption files and records are closed except to the petitioning parties and their attorneys, an adult adoptee, and certain other entities.

Subsections (b) and (c) set out the exceptions. Subsection (b) applies before a final decree of adoption is entered and allows the court to authorize a party in interest to access the files after notice and a hearing and upon making a written finding of good cause. Subsection (c) applies after the adoption is final and gives the court discretion to allow access upon good cause shown. For example, a court might find that good cause was demonstrated by a person doing genealogical research about an ancestor who was adopted many years ago.

The Committee recommends amending subsection (d) out of concern that the phrase, "genetic parent" might not be broad enough to cover, for example, a gestational carrier, who would be a birth parent but not a genetic parent.

Subsection (d) is also amended to make clear that the legal guardian of an adopted adult may consent to the disclosure of information by or request information from DCF on behalf of an adopted adult.

Section 9, amending K.S.A. 59-2123, Advertising.

The amendment to subsection (a)(1) is intended to expand the category of persons who, in adoption-related advertising, must disclose whether they are licensed. The Committee believes that the many unlicensed individuals who advertise themselves as adoption facilitators, coaches, etc. should be required to disclose that they are not licensed.

The amendment to subsection (b) makes clear that prospective adoptive parents and others are not prohibited from offering to adopt or help find a home for a child.

The amendment in subsection (c)(3) corrects an erroneous cross-reference.

Section 10, amending K.S.A. 59-2124, Relinquishment.

New subsection (d) clarifies that the same requirement of voluntariness applies to relinquishments as to consents.

The amendments to former subsection (d) (now (e)) are intended to put birth parents on equal footing if an adoption fails after only one parent has relinquished his or her rights. The language regarding inheritance rights is stricken because the inheritance rights of birth parents

who have signed a relinquishment cease upon the final adoption pursuant to K.S.A. 59-2118, not at the time the relinquishment is executed.

Section 11, amending K.S.A. 59-2126, Venue.

Under current law, venue in an agency adoption may be "where the child placing agency is located." This provision essentially allows for forum shopping in agency adoptions, because there is no requirement that the agency have a principal place of business in the county of venue. Forum shopping is not necessarily a negative; it may be done for privacy reasons. However, the Committee believes that if forum shopping is to be allowed, it should be allowed equally in agency, independent and stepparent adoptions. For that reason, the Committee recommends new subsection (f) which allows venue to be established in any county if all parties in interest agree in writing. By definition, "parties in interest" does not include parents whose parental rights have already been terminated.

Section 12, amending K.S.A. 59-2127, Jurisdiction.

As amended, this section provides that jurisdiction in adoption proceedings, including proceedings to terminate parental rights under K.S.A. 59-2136, is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), K.S.A. 23-37,101 *et seq.*, with the exception that the notice provisions of KARA continue to control. The amendments ensure that Kansas' adoption orders will be entitled to full faith and credit under the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A.

Adoption proceedings under K.S.A. Chapter 59 have their own specific notice provisions, which do not require service of a copy of the petition. See K.S.A. 59-2133. These provisions will continue to control notice, rather than any contrary provisions in the UCCJEA or K.S.A. Chapter 60.

Section 13, amending K.S.A. 59-2128, Petition.

The amendments clarify that a petition must include facts about why a relinquishment was deemed unnecessary and a copy of any relinquishment must be filed with the petition.

Section 14, amending K.S.A. 59-2130, Background information.

The amendments in subsection (a)(3) delete certain personal information from the list of information that must be filed with the petition. The Health Insurance Portability and

Accountability Act of 1996 (HIPAA) and Supreme Court rules preclude such private information from being filed.

The word "nonperson" was added in subsection (e) to bring the language of the statute up-to-date with the current criminal code.

Section 15, amending K.S.A. 59-2132, Assessment, investigation and report.

The amendments to subsection (b) and (f) delete the requirement that an assessment be filed not less than 10 days before the hearing on the petition. The Committee noted that the 10-day requirement is commonly disregarded in practice and that courts can always continue a hearing if more time is needed to review an assessment.

Section 16, amending K.S.A. 59-2133, Notice.

The amendments to this section would require notice of hearing in any adoption to be given at least 10 calendar days before the hearing, unless notice has been waived. KARA did not previously provide a minimum notice period. The Committee believes it is especially important to include a minimum notice period since this statute was amended in 2013 to allow an adoption to be finalized immediately without a 30-day waiting period.

Both subsections (b) and (c) are amended to add "person who has physical custody of the child" to the list of persons entitled to notice. This amendment is intended to ensure compliance with the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, and is not intended to confer standing to object to the adoption.

With the addition of notice to any person who has physical custody of a child, it is no longer necessary for the court to have discretion to give notice to "any other persons" and that language is stricken from subsection (b). Also, notice to an "individual in loco parentis" has been stricken because it has no application in an independent adoption.

Subsection (b) is also amended to make clear that any possible parent is entitled to notice. And subsection (c) is also amended to make clear that a parent or possible parent and a relinquishing party are entitled to notice.

Subsection (d) is amended to clarify the manner in which notice is to be provided. This language comes directly from K.S.A. 59-2136(f).

Section 17, amending K.S.A. 59-2134, Hearing.

The reference to K.S.A. 59-2127 is stricken since that section will no longer contain the factors relating to when a court should not exercise jurisdiction. Subsection (a) is also amended to

make clear that adoption decrees should include language terminating parental rights if not previously terminated.

Section 18, amending K.S.A. 59-2136, Termination of parental rights.

The amendment to subsection (c) makes the appointment of counsel for an unknown or unlocated father mandatory in all adoptions. Under current law, appointment of counsel is discretionary in stepparent adoptions.

This statute currently contains two different standards for termination of parental rights. Generally speaking, subsection (d) applies to the termination of parental rights in stepparent adoptions while subsection (h) applies to termination of parental rights in all other adoptions. However, subsection (d) only applies to stepparent adoptions when the child has a presumed father due to a marriage or attempted marriage. *In re Adoption of P.Z.K.*, 50 Kan. App. 2d 617, 620-21, 332 P.3d 187 (2014).

The Committee sees no current basis for applying different standards to termination based upon whether the petitioner is a stepparent or another individual. Also, the Committee believes it is inappropriate, and potentially violates equal protection, to apply different standards to termination based upon the marital status of the biological father. For this reason, the Committee recommends striking subsection (d) so that all terminations are governed by subsection (h).

The amendments to subsection (e) (now (d)) are intended to clarify that an action to terminate parental rights may be filed as part of an adoption proceeding or as an independent action. New subsection (d)(3) establishes that adoption proceedings shall take priority over other intrastate child custody proceedings, unless the court orders otherwise for good cause.

Subsection (f) is amended to require notice to be given at least 10 days before the hearing unless waived. See the comment to Section 16, amending K.S.A. 59-2133.

Subsection (h)(2) contains several new provisions. First, the language allowing the court to consider the best interest of the child is stricken. The best interest language was added in 2006 and has proven confusing to interpret and apply. See, e.g., *In re Adoption of Baby Boy M.*, 40 Kan. App. 2d 551, 562, 193 P.3d 520 (2008); and *In re Adoption of B.B.M.*, 290 Kan. 236, 246, 224 P.3d 1168 (2010).

The Committee suggests replacing the best interest language with a statement that the court may consider all relevant surrounding circumstances. This language comes directly from case law. See *In re Adoption of B.B.M.*, 290 Kan. 236, 245, 224 P.3d 1168 (2010).

The remaining new language in subsection (h)(4) is intended to clarify the actions a birth father must take to demonstrate his commitment to supporting his child. The amendments provide fair warning to both petitioners and fathers who intend to assert parental rights in opposition to the mother's plan to place for adoption.

All other amendments to this section are intended as clarifications.

Section 19, amending K.S.A. 59-2138, Jurisdiction and venue in adult adoptions.

KARA did not previously include an affirmative statement about when a court has jurisdiction over an adult adoption. New subsection (a) provides for jurisdiction if the petitioner or adult to be adopted resides in Kansas.

The amendments to subsection (b) allow venue to be established in any county if all parties in interest agree in writing. This is consistent with changes to the venue statute for independent, stepparent and agency adoptions found at K.S.A. 59-2126.

Section 20, amending K.S.A. 59-2141, Notice and hearing in adult adoptions.

The amendment clarifies that this section applies only to adult adoptions.

Section 21, amending K.S.A. 59-2143, Forms.

The amendment adds the waiver of notice of hearing to the list of forms to be provided by the Judicial Council.

Judicial Council Adoption Law Committee members

The Judicial Council's Adoption Law Advisory Committee consists of practicing attorneys, judges and legislators who have many years of combined experience in the area of adoption law. The members of the Committee are:

Hon. Thomas Kelly Ryan, Chair, Olathe; Chief Judge for the 10th Judicial District
Nancy Anstaett, Overland Park; practicing attorney
Kathy L. Armstrong, Topeka; Assistant General Counsel for Prevention and Protection Services, Kansas Department for Children and Families
Martin W. Bauer, Wichita; practicing attorney, past president of the American Academy of Adoption Attorneys
Jill Bremyer, McPherson; practicing attorney
Hon. Sam K. Bruner, Overland Park; retired District Court Judge
Dr. Bud Dale, Topeka; child psychologist and practicing attorney
Rep. Erin Davis, Olathe; State Representative from the 15th District and practicing attorney
Allan Hazlett, Topeka; practicing attorney and adjunct professor teaching adoption law at Washburn University School of Law
Rep. Susan Humphries, Wichita; State Representative from the 99th District and practicing attorney
Kevin Kenney, Prairie Village; practicing attorney
Rick Macias, Wichita; practicing attorney
Rachael K. Pirner, Wichita; practicing attorney, past president of the Kansas Bar Association and Kansas Women Attorneys Association, current member of the American Bar Association House of Delegates
Hon. Robb Rumsey, Wichita; District Judge for the 18th Judicial District
Austin Kent Vincent, Topeka; practicing attorney
Lisa Williams-McCallum, Topeka; practicing attorney