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Subject: [HB272] Family Lawyer's Statement in Opposition to the Bill

Honorable members of the House Judiciary Committee
I urge you to oppose HB272. While I commend the noble intentions of its Sponsors to protect children from abuse, the problematic way HB272 is drafted will not only fail to achieve this goal but lead to worse outcomes for children caught in the midst of divorce and separation.
First, who am I and why should you care what I have to say? I am a Salt Lake-based attorney who has exclusively practiced family law the past 14 years. I represent both survivors of domestic violence and survivors of false allegations. I handle complex child abuse and parent-child contact issues. I am an active member of the Utah Association of Family & Conciliation Courts (AFCC) and served as a family law instructor to mental health professionals. I receive regular training in the latest research and best practices for dealing with child abuse, domestic violence, and parent-child contact problems. I have no personal stake in the outcome of this legislation. Rather my desire is to ensure everyone who finds themselves involved in Utah's family justice system is treated fairly with due process of law.
No one disputes domestic violence and child abuse are serious problems. We ought to take them seriously, investigate, and if substantiated prioritize the safety of survivors. Likewise, if the judicial process determines an allegation is false, we ought to protect innocent parents and, most importantly, their children from being victimized by that. Simply put, I expect we share the goal of helping our family courts get it right and determine appropriate solutions for families in crisis. HB272 unfortunately runs counter to these objectives and creates more problems than it solves.
For example, lines 297-302 unreasonably constrain our judges' discretion to hear evidence on the critical issue of did child abuse or domestic violence take place? The Bill would require our judges hear only from experts who "work[] with victims of domestic violence or abuse, including sexual abuse" rather than "forensic" experts (professionals whose focus is on determining what actually happened versus non-forensic professionals whose focus is typically on helping folks effectively cope with strong emotions). There is no corresponding requirement that an expert called by an *accusing* parent must have experience working with victims of false allegations. This is repugnant from a constitutional equal protection and procedural due process standpoint. It is analogous to a hypothetical law saying a defendant in a criminal case can only rely on experts who represent crime victims even if they are otherwise qualified and followed proper methodology to uncover proof the defendant is innocent.
Existing law already requires judges serve as gatekeepers against unreliable expert testimony, and our judges do not uncritically admit everything cloaked in the garb of "expert" testimony. Utah Evidence Rule 702 requires experts demonstrate they are qualified and have reliably applied scientific, technical, or other specialized knowledge to sufficient facts and data in a manner generally accepted by the relevant expert community. Even if they meet this standard, it is up to the judge's discretion how much

(if any) weight to give their testimony. Both survivors of abuse and survivors of false allegations should enjoy equal due process protection in our courts. We ought not to be placing our thumb on the scales of justice either way: accuser or accused.

Lines 317-331 create a negative presumption against reunification treatment if a child is resistant to going with the disfavored parent unless that parent brings in expert testimony in support. If this were because a court found the disfavored parent posed a genuine safety risk to the child, this would make sense. But conspicuously absent *is a requirement that the Court find the disfavored parent did anything wrong* to trigger this negative presumption.

According to lines 320-323, even if the disfavored parent is innocent the Court cannot restrict contact between the child and favored parent if they are otherwise competent, protective, bonded, and "not physically or sexually abusive." The absence of any inquiry into whether the favored parent is *emotionally* or *psychologically* abusive is a glaring omission. In custody disputes we sometimes see one or both parents engage in what we call parental alienating behaviors: actions designed to lead a child to unjustifiably reject a relationship with the other parent for reasons other than the child's actual experiences with the other parent. Such behavior comes in many forms, ranging from parents mildly badmouthing each other around the kids (your mom/dad does not love you and left us for someone else) to extreme psychological abuse (I know you were supposed to visit your mom/dad this weekend, but I bought tickets for all of us to go to Disneyland instead. S/he is probably getting drunk with their lover anyways and does not love you like I do. If you want me to keep taking you on fun trips like this, you need to tell the caseworker the other parent hits you and touches your genitals. It will be our little secret.). In extreme cases of psychological child abuse, courts may consider changing custody or temporarily restricting access to the psychologically abusive behavior. This is supported by substantial social science research. Courts do not impose this remedy lightly however, and it comes on the heels of substantial investigation into the unique dynamics of the family unit, including vetting any credible allegations of abuse and safety concerns. The bottom line being courts ought to retain discretion to protect children from abuse in all its forms: physical, sexual, *and psychological*.

We next come to lines 324-331 which deal with reunification treatment in the case of parents whom a court has determined to be violent or abusive, in which case any treatment "shall primarily address the behavior of that parent or the contributions of that parent to the resistance of the child." My concern is how is HB272 defining a violent and abusive parent? Does the Bill mean a parent who has literally engaged in an act of physical/sexual violence, or does the Bill mean a parent who has been adjudicated as previously having committed any act of "domestic violence" as that term is defined by Utah Code 77-36-1 (as Lines 270, 285, and 296 suggest)? If the latter, that is problematic. The way 77-36-1 defines "domestic violence" is breathtakingly broad. It is not limited to acts and threats of sexual and physical violence. Rather it encompasses things such as electronic communication harassment (e.g. one parent sent too many rude emails/text messages to the other during an argument), any offense against property (e.g. a parent got mad and kicked a wall during an argument leaving a dent but otherwise never laid a finger on the child or partner), or violating a temporary protective order (e.g. a temporary order required that parents only email each other about scheduling parent-time, but one of them slipped up and sent an email asking the other for their child's diabetes medication). Utah domestic violence law does not distinguish between incidents that occurred yesterday versus 10 years ago. Nor does HB272. To be sure, I am not saying the foregoing behavior is acceptable and should go unpunished. But the way HB272 is broadly worded would treat a parent who raped or held his/her family hostage at gunpoint the same as a parent who sent rude emails to his co-parent many years ago but has otherwise been a law-abiding model parent since. That sweeps too broadly.

You the reader might be asking yourself: what's the problem with defining domestic violence broadly and directing courts/therapists to presume the disfavored parent is at fault if the child does not want to see them? The problem is a one-size-fits-all approach does not work because not all "domestic violence" is the same. And some issues may have been resolved long ago through the passage of time and/or effective psychological treatment. It may be there was "abuse" between parents (ranging from a fist fight to maybe shoving to maybe a rude email exchange), but the child was never exposed or was too young to remember it other than what a parent may have told them long after-the-fact. Sometimes parent-child problems are indeed the result of abuse by the disfavored parent. But a substantial amount of time they are for other reasons including ordinary family dysfunction, personality mismatch, substance abuse, lengthy separation due to a military deployment or incarceration, mental health challenges on the part of the parent or child, oppositional defiant behavior by the child, parental alienating behaviors by the other parent, or even a combination of the foregoing (as they are not mutually exclusive). That is why we give judges and therapists discretion to determine the catalyst for the problem and right intervention. Telling family courts they must presuppose any "resistance of a child" is the disfavored parent's fault is like walking into a hospital because you are sick only to be told the doctor is legally required to treat you for an entirely different (and possibly nonexistent) condition rather than diagnosing what is wrong and treating that specific illness

Family problems are messy. Many times *both* parents have engaged in bad behavior contributing to the toxic situation that exists. The myth that if one parent raises an allegation of abuse the other will retort with a cry of alienation and the court will hand over custody to an abuser is a distortion of reality. Often many factors are at play such as substance abuse, mental health, financial, poor parenting behaviors, etc. *in addition* to domestic violence issues which our courts may carefully assess in determining what arrangement will be best – or, at the risk of sounding cynical, least detrimental – for the child. These are not black and white cases. And to say our Utah judges and commissioners would knowingly place a child in a dangerous situation is an insult to their intelligence. Rather they carefully assess each family that comes before them, including any domestic violence and child abuse concerns, and make decisions based upon the best evidence available. Mistakes will of course happen, but that is why we have appellate courts and existing laws allowing parents to seek modification, even on an emergency basis, if circumstances change and new evidence comes to light.

The bill imposes several unnecessary practical problems. For example, lines 242-244 requires that if the court orders supervision of parent-time it "shall give preference to supervision by an individual trained in security and the avoidance of domestic family violence." Essentially, it creates a presumption against using free friends, family, and other non-professional supervisors. This would make sense if the Court found the need for supervision was prompted by genuine violence concerns. But what if the Court ordered supervision because of substance abuse issues and the sole reason for wanting a supervisor is to ensure the parent is not impaired during the visit? Insisting on having a trained guard present is overkill. Moreover, families navigating the family court process are often in financial distress. Affording attorneys and the cost of establishing a separate home is hard enough. If the Legislature is insisting on supervisors specially trained in "security and avoidance of domestic family violence" for ***non-violent*** parents, these specially trained supervisors are going to cost more than regular supervisors. If a parent cannot afford the cost of such guards, they may be forced out of their children's lives due to poverty.

I support 257-259 clarifying the court should have discretion to order supervision "indefinitely" if necessary to ensure the safety of the child "due to abuse by or the incapacity of the noncustodial parent."

We then come to 333-390 mandating additional training for the judiciary on domestic violence and child abuse issues. At first glance, that sounds like a great idea. But then we come to the troubling fine print: the training must be provided by a professional with experience "assisting survivors of domestic

violence or child abuse, including a victim service provider" or "survivor of domestic violence or child physical or sexual abuse" and cannot include theories, concepts, or belief systems unsupported by research not "focus[ed] solely on domestic violence and sexual violence and child abuse." In other words, the judiciary cannot hear the perspectives of survivors of *false* allegations of domestic violence nor their children who suffered from a resulting miscarriage of justice. Our judges cannot hear the substantial research into the complex field of parent-child contact problems that intimate partner violence is one of many potential reasons a child may refuse contact with a parent. Our judges cannot hear from experts that parents may utilize false allegations of domestic violence together with other psychologically abusive behaviors to force children into rejecting the other parent. And the most glaring omission of all is the Bill does not focus this training on the critical issue of helping our judges better discern true allegations of domestic violence so we can protect children and survivors of abuse ***and*** survivors of false allegations.
In summary, HB272, while well intentioned, will cause more problems than it solves. I urge you to vote against it.

I am happy to respond to any questions the Committee or individual Legislators may have and can be reached at 855-254-2600 or email at scott.wiser@wiserandwiser.com
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