

IN THE NEBRASKA SUPREME COURT

) Case No. \_\_\_\_\_  
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IN RE: NEBRASKA CHILD  
WELFARE COMMITTEE

) PETITION TO ADOPT UNIFORM  
) PARENTING TIME GUIDELINES AND  
) REPEAL INCONSISTENT LOCAL  
) RULES AND PRESUMPTIONS  
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NEBRASKA SUPREME COURT  
COURT OF APPEALS

The Nebraska Child Welfare Committee (the "Committee") hereby petitions the Nebraska Supreme Court to adopt Uniform Parenting Time Guidelines and repeal inconsistent local rules, guidelines, presumptions and customs.

In support of this Petition, the Committee states as follows:

1. Nebraska's existing custody and parenting time regime is governed by a patchwork of written and unwritten rules, guidelines, presumptions and individual judicial customs, which vary widely across the state. Three judicial districts have adopted written parenting time guidelines (one by local rule approved by this Court), all of which are different. The remaining courts rely on written and unwritten presumptions and judicial customs, which vary by district and often by individual judges within districts.
2. None of these rules, guidelines, presumptions or judicial customs is research-based. The strong consensus in the mental health literature indicates that parenting time arrangements that maximize the parenting time of both parents and allow both parents to be involved in the daily activities of their children provide the best outcomes for children while parenting time awards that minimize the parenting time of either parent are harmful to children, both mentally and physically. Children who have insufficient parenting time with either parent are less likely to finish school, more likely to engage in high-risk activities and more likely to be involved in criminal behavior than if they have two parents actively involved in their daily lives, regardless of whether their parents are living together.
3. According to the *Nebraska 2002-2012 Custody Court File Research Study* (Dec. 31, 2013), published by the Nebraska Administrative Office of the Courts (the "**Nebraska Court File Study**"), mothers were awarded sole or primary custody in 72.0% of Nebraska cases, fathers were awarded sole or primary custody in 13.8% of cases, and joint custody with shared residence was awarded in only 12.3% of

cases. The study also found the average parenting time for non-custodial parents in Nebraska is less than 20% of the total annual parenting time, which is far below the threshold mental health studies find particularly harmful to children.

4. According to the Nebraska Court File Study, the vast majority of cases do not involve domestic violence or high conflict. The study found “verified” instances of domestic violence in only 5.9% of cases. The study also found only 12% of cases could be classified as “high conflict.”<sup>1</sup>
5. The Nebraska Court File Study found significant variation in custody awards among Nebraska judicial districts. For example, sole custody to mothers ranges from 75.0% in District 12 to 30.8% of cases in District 8. Sole custody to fathers ranges from 23.1% in District 8 to 2.6% of cases in District 4. Joint custody with shared residence ranges from 26.3% of cases in District 1 to zero in Districts 9 and 12.
6. This variation in court practice means the same facts often result in materially different outcomes. For example, a case involving two fit, involved parents who live in close proximity may result in joint legal custody and 50%-50% parenting time in District 1, joint legal custody and 70%-30% parenting time in District 3, and sole legal custody and 85%-15% parenting time in Districts 11 and 12. Similarly, this same case may result in joint legal custody and 50%-50% parenting time before one judge in District 4 and sole legal custody and 85%-15% parenting time before another judge in the same district. This lack of uniformity undermines the legitimacy of the family law system and reduces confidence in the judiciary.
7. This variation in court practice violates Article V-19 of the Nebraska Constitution, which provides:

**V-19. Practice of all courts to be uniform.**

The organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law and the force and effect of the proceedings, judgments and decrees of such courts, severally, shall be uniform.

8. This variation in outcomes creates a strong inference that Nebraska’s parenting time regime violates the Due Process Clause of the Fourteenth Amendment. The United States Supreme Court has characterized a parent’s right to raise his or her child as “perhaps the oldest of the fundamental liberty interests recognized by this

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<sup>1</sup> The Study’s definitions of “verified” and “high conflict” have been questioned by scholars and practitioners as overbroad. For example, the term “verified” includes unsubstantiated allegations contained in witness affidavits while the term “high conflict” includes several “indicators of high conflict” of questionable relevance, such as any “previous court involvement” regardless of when the previous court involvement occurred or its relationship to the particular custody case.

Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). See also *Michael E., et al. v. State*, 286 Neb. 532 (2013) (“When an unmarried father has established familial ties with his biological child and has provided support his relationship acquires substantial constitutional protection.”); *L.F. v. Breit*, 285 Va. 163 (2013) (“In light of this demonstrated commitment, we conclude that the Due Process Clause protects [an unmarried father’s] fundamental right to make decisions concerning [the child’s] care, custody and control, despite his status as an unmarried [sperm] donor.”). Any state practice that interferes with a parent’s fundamental rights survives constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

9. In *Richmond v. Case*, 275 Neb. 757 (2008), this Court held:

both parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship. In other words, the substantive due process right to family integrity protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by [his or her] biological parent. It is clear, therefore, that both parents and their children have cognizable substantive due process rights to the parent-child relationship.

10. The Nebraska custody and parenting time regime does not serve a compelling state interest nor is it narrowly tailored. It frequently produces outcomes that mental health research shows harm children, and encourages conflict between parents. It also frequently infringes one parent’s fundamental right to the companionship, care, custody, and management of his child as well as the child’s reciprocal fundamental right to be raised and nurtured by both biological parents.

11. According to the Nebraska Court File Study, mothers are five times more likely to receive sole or primary custody of their children than fathers. This disparate impact creates a strong inference the Nebraska parenting time regime, as applied, violates the Equal Protection Clause. To withstand scrutiny under the Equal Protection Clause, classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives. *Orr v. Orr*, 440 U.S. 268, 269 (1979). As the U.S. Supreme Court held in *Orr*, gender classifications “cannot be validated on the basis of the State's preference for an allocation of family responsibilities under which the wife plays a dependent role. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.” *Id.* (holding a state alimony statute unconstitutional).

WHEREFORE, THE UNDERSIGNED, ON BEHALF OF THE NEBRASKA CHILD WELFARE COMMITTEE, PETITION THE NEBRASKA SUPREME COURT TO APPROVE AND ADOPT THE UNIFORM PARENTING TIME GUIDELINES

CONTAINED IN EXHIBIT A AND TO REPEAL ALL INCONSISTENT LOCAL RULES, GUIDELINES, PRESUMPTIONS AND CUSTOMS.

Respectfully submitted,

NEBRASKA CHILD WELFARE COMMITTEE, Petitioner

/s/ Galen Hadley  
Sen. Galen Hadley  
Kearney

/s/ Russ Karpisek  
Sen. Russ Karpisek  
Wilber

/s/ James Bocott  
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North Platte  
Member, NSBA Ad Hoc Parenting Time  
Committee

/s/ Kristina Guerrero-Sisneroz  
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Past member, NSBA Ad Hoc Parenting Time  
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/s/ Chris Johnson  
Chris Johnson  
Hastings  
Member, Parenting Act Research Advisory  
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Past Chair, NSBA Family Law Section

/s/ Kent Schroeder  
Hon. Kent Schroeder  
Kearney  
Past member, NSBA House of Delegates

/s/ Amy Sherman  
Amy Sherman  
Omaha  
Member, Children in the Courts District Court  
Subcommittee  
Past member, NSBA House of Delegates and  
NSBA Legislation Committee

/s/ Dr. Les Veskrna  
Les Veskrna, M.D.  
Lincoln  
Executive Director, Children's Rights Council  
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Member, Parenting Act Research Advisory  
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*[affiliations are shown for identification purposes only]*

## **Exhibit A – Proposed Parenting Time Guidelines**

### Article 5: Parenting Time Guidelines

#### §4-501. Introduction.

Both parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship. The substantive due process right to family integrity protects not only the parent's right to the companionship, care, custody, and management of his or her child, but also protects the child's reciprocal right to be raised and nurtured by his or her biological parent. Both parents and their children have cognizable substantive due process rights to the parent-child relationship.

Each minor child should have frequent and continuing contact with both parents after the child's parents separate or the marriage of the parents is dissolved. Parents should be encouraged to share the rights and responsibilities of parenthood. It is the right of each child to have as full and complete a relationship with both parents as possible.

#### §4-502. Best interests of the child requirements.

In determining custody and parenting arrangements, the court shall consider the best interests of the minor child, which shall include, but not be limited to, consideration of the following factors:

- a. The desires and wishes of the minor child, if of an age of comprehension but regardless of chronological age, when such desires and wishes are based on sound reasoning;
- b. The general health, welfare, and social behavior of the minor child;
- c. The respective environments offered by each parent, taking into account whether a negative environment was caused by the action or inaction of the other parent;
- d. The past, present and potential future relationship between the child and each parent;
- e. The age, development, and health of the child and parents;
- f. The effect on the child as a result of continuing or disrupting an existing relationship;
- g. The parental capacity to provide physical care and satisfy educational needs of the child;
- h. The time which a parent is willing and able to devote to a child;

- i. The demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime;
- j. The ability of either parent to minimize disruption of the child's education, daily routine and association with friends;
- k. The geographic proximity of the parents;
- l. The mental or physical health of a party, child, or other person living in a proposed custodial household that negatively affects the child's intellectual, physical or emotional well-being, taking into account the impact of domestic intimate partner abuse has had on such mental or physical health;
- m. Credible evidence of abuse inflicted against the child, a parent of the child, or any other person residing within the child's household. For purposes of this subdivision, abuse and family household member shall have the same meaning prescribed in section 42-903;
- n. Credible evidence of child abuse or neglect or domestic intimate partner abuse. For purposes of this subdivision, the definition in section 43-2922 shall be used.
- o. Credible evidence that a parent has knowingly made a false allegation of abuse, child abuse or neglect, or domestic intimate partner abuse;
- p. Credible evidence that the parent has interfered with the other parent's access to the child;
- q. Credible evidence that the parent has interfered with the child's relationship with the other parent; and
- r. Each parent's willingness to encourage a positive and continuous relationship between the child and the other parent.

#### §4-503. Parenting Time

If the parents cannot agree on a parenting plan, each parent shall submit a proposed parenting plan to the court. The court is encouraged to adopt a parenting plan that provides for joint legal custody and maximizes the parenting time of each parent.

The court shall not prefer a parent's proposed plan because of the parent's or child's sex. In no event shall the court adopt a parenting plan in which one parent has less than forty percent (40%) of the total annual parenting time unless:

- a. Such parent consents,
- b. The court finds grounds exist to terminate the parent's rights pursuant to section 43-292,
- c. The court finds the parent has engaged in (i) a pattern of child abuse or neglect involving the child, or (ii) domestic intimate partner abuse as defined by section 43-2922(8) involving the child or members of the child's immediate household.
- d. Such parent has been convicted of (i) a physical assault against a family or household member under any state or tribal law, (ii) violating a validly issued protection order under section 28-311.09 or similar order issued by another state or tribal court or (iii) violating a validly issued domestic abuse protection order under section 42-924 or similar order issued by another state or tribal court.
- e. The court finds the parent has persistently failed to exercise parenting time previously awarded to such parent,
- f. The court finds there is a pattern of substantial parental unfitness by the parent, or
- g. The court finds that geographic separation of the parents makes such an award physically impractical.

#### §4-504. Parental Consultation and Communication

Regardless of the type of legal custody awarded, the parenting plan shall require the parents to engage in meaningful consultation with one another regarding each legal custodial decision and make a good faith attempt to reach mutual decisions. If (a) the court finds the parent has engaged in (i) a pattern of child abuse or neglect involving the child, or (ii) domestic intimate partner abuse as defined by 43-2922(8) involving the child or members of the child's immediate household. or (b) a parent has been convicted of (i) an assault against a family or household member under any state or tribal law, (ii) the violation of a validly issued protection order under 28-311.09 or a similar order issued by another state or tribal court, or (iii) the violation of a validly issued domestic abuse protection order under 42-924 or a similar order issued by another state or tribal court, the parenting plan shall include a high conflict communication protocol.

#### §4-505. Legal Custody

In order to comply with each parent's fundamental liberty interest in the companionship, care, custody, and management of his or her child, awards of joint legal custody are favored in Nebraska. With respect to awards of joint legal custody, the parenting plan may assign to one parent final decision-making responsibility over particular categories of fundamental decisions if the parents cannot reach a mutual decision. The court may also divide legal custody between the parents so one parent has authority and responsibility for making

fundamental decisions regarding certain categories of the child's welfare and the other parent has authority and responsibility for making fundamental decisions regarding other categories of the child's welfare. Such categories may include religion, education, health care, extracurricular activities and any other categories the court finds applicable to a particular family.

#### §4-506. Manipulation of Proceedings

If, at any time during a proceeding in which parenting functions for a child are at issue, the court finds by a preponderance of the evidence that a parent has engaged in a pattern of willfully creating conflict to manipulate such proceeding; knowingly made false allegations of abuse, child abuse or neglect, or domestic intimate partner abuse; intentionally interfered with access to the child; or willfully interfered with the child's relationship with the other parent, the court shall consider such behavior in its decision.

#### §4-507. Written Findings

When rendering decisions regarding court-created parenting plans, the court shall provide written findings of fact and conclusions of law regarding its decision, unless waived by both parents.

#### §4-508. Effect on Child Support

When rendering decisions regarding court-created parenting plans, the court shall not consider the effect a legal custody or parenting time award may have on the child support payable from one parent to the other parent. In cases where a parenting plan would call for child support to be determined in accordance with Worksheet 3 of the Nebraska Child Support Guidelines, the court may, solely for purposes of determining child support, consider the ability of the parents to communicate and cooperate such that they can adequately exchange information and reimburse expenditures made for the child. If the court finds that the parents cannot so communicate and cooperate, the court may deviate from the Nebraska Child Support Guidelines and award child support pursuant to Worksheet 1. If the court deviates from the Nebraska Child Support Guidelines as set forth in the preceding sentence, the parenting plan shall provide that the parent receiving child support (i) shall be solely responsible for all direct expenses of the child, such as extracurricular activities, educational expenses and clothing, except those that are consumed exclusively during the parenting time of the parent who pays child support and (ii) shall account annually pursuant to §6-1442 for the use of the child support if such parent receives child support in excess of \$1,500 per month.



## Exhibit B Background Materials

1. Memorandum, dated August 22, 2013, to the NSBA Ad Hoc Parenting Time Committee With District-by-District Survey of Practices Regarding Court-Created Parenting Plans
2. Parenting Time Guidelines for the 3<sup>rd</sup> Judicial District
3. Parenting Time Guidelines for the 7<sup>th</sup> Judicial District
4. Parenting Time Guidelines for the 8<sup>th</sup> Judicial District
5. Standard Parenting Time Order Used by One Court in 11<sup>th</sup> Judicial District
6. *Nebraska 2002-2012 Custody Court File Research Study*, Nebraska Administrative Office of the Courts (Dec. 31, 2013)
7. Richard A. Warshak, “*Social Science and Parenting Plans for Young Children: A Consensus Report*,” 20 *Psy., Pub. Pol. & Law* 46 (2014) (consensus report on parenting time supported by 120 mental health experts)
8. Edward Kruk, “The Equal Parent Presumption,” McGill-Queens Univ. Press (2013)
9. Linda Nielsen, “*Parenting Time & Shared Residential Custody: Ten Common Myths*,” *The Nebraska Lawyer*, (Jan-Feb 2013)
10. William V. Fabricious, Karina R. Sokol, Priscila Diaz and Sanford L. Braver, “*Parenting Time, Parent Conflict, Parent-Child Relationships, and Children's Physical Health*,” (2012)
11. Linda Nielsen, “*Shared Residential Custody: Review of the Research*” (Parts I and II), *Am. J. of Fam. L.* (Spring 2013 and Summer 2013)
12. Rachel Birnbaum and Nicholas Bala, “*Toward the Differentiation of High-Conflict Families: An Analysis of Social Science Research and Canadian Case Law*,” 48 *Fam. Ct. R.* 403 (July 2010)
13. Michael Friedman, “*The So-Called High-Conflict Couple: A Closer Look*,” 32 *Am. J. Fam. Therapy* 101 (2004)
14. “*The New ARS Title 25: One Year Later – A Sea Change or Sandbar*,” Conf Materials Prepared for the Annual AFCC Sedona Conference (Feb. 2014) (analyzing early experience under Az. Rev. Stat §25-403.02, which is the model for the proposed Uniform Parenting Time Guidelines)

15. *"Inequality -- Gender disparity in child custody awards is a judicial relic that needs to end,"* Official Editorial of the Scottsbluff Star Herald (Jan. 19, 2014)
16. *"Fathers Have Their Day in Court,"* KETV (July 14, 2013) (describing the "Fathers for a Lifetime Program" run by Legal Aid of Nebraska)