Hon. William P. Mahoney

29th Judicial District, Div. 7
710 North 7th Street
Kansas City, KS 66101
(913) 573-2929
bmahoney@wycokck.org

TESTIMONY IN OPPOSITION OF SB 257

Chairman Wilborn and members of the committee, thank you for the opportunity to appear today on behalf of the Kansas District Judges Association to testify in opposition of Senate Bill 257. My name is Judge Bill Mahoney and I am a civil and family law judge of the 29th Judicial District (Wyandotte County). I was an attorney for 20+ years prior to becoming a judge in 2010 and represented clients in family and juvenile court. For the last eight years, I have been hearing family law and domestic cases.

HOW THINGS ARE DONE NOW

Our existing law allows us to enter orders of joint legal custody of the child for both parents. In all cases that a temporary order is requested, the party requesting it must provide a verified petition and verified motion for temporary orders. The idea is the children should not be impacted by the parents' separation. In the ideal situation, any order requested would enforce the status quo or whatever the parents are doing.

When a request is made for temporary orders, most judges use their experience and judgment to determine whether or not there might be an objection to the temporary orders. If in my opinion there might be an objection to something in the temporary orders, I set it for a review hearing within a few weeks so that the other party will have an opportunity to be heard.

Most of the time, if the parties have already been separated, they have been operating on some kind of agreement with regard to support and parenting time and it is working and there is no reason to change or modify anything. I always tell the parents in a custody dispute that it is my goal that both parents should have as much time with the children as possible, given the children's needs and schedules of everyone involved. If they already have a shared parenting agreement, then we try to make that work going forward.

FACTORS THAT MIGHT MAKE IT DIFFICULT TO BEGIN EVERY CASE WITH PRESUMPTION FOR SHARED PARENTING

1. Have the parents already separated?
2. Do the parents get along and cooperate already?
3. If yes, do they both have suitable housing to have the children?
4. Do they live close enough together to effectively share parenting?
5. Do they have similar income, expenses and resources?
6. How old are the children?
7. How flexible are the work schedules of the parties to share custody?

8. Does either parent work a swing shift, making it so a third party would have to put this to bed every night or get the child up?
9. Would the parties have to pay for day care if they had shared custody?
10. Does one of the parties want shared custody to avoid paying support?
11. Is the shared parenting arrangement better for one child or none of the children?
12. Is the shared parenting arrangement convenient for the parents only?
13. Are there third parties that make it easy/difficult for the parents to work together?
14. Are the kids old enough to talk to the Court?

PROBLEMS WITH HAVING A PRESUMPTION OF SHARED CUSTODY

1. Not every case is the same, but the presumption is already that both parents should have joint legal custody and a say in decision-making regarding the children.
2. The parties have never shared responsibility before.
3. At the beginning of the case, the Court has no information other than verified pleadings.
4. If the petition is filed without counsel, then the litigant is not going to understand what a presumption means and what the burden is on them going forward or the burden on them if they are responding to a petition for divorce.
5. What does this mean for the child support guidelines? We have spent years working on these tables and now we are going to have to litigate support in every case, just because the starting point is that the parties should alternate/share custody and therefore the child support will have to be recalculated and calibrated. At the present time, a parent can ask for a modification based on the amount of time that they have with the children (other than school or sleep) and there is software that calculates and makes those adjustments.
6. Parents are going to ask for it every time, just because of the presumption.
7. This is a solution with no problem. Even though individuals may have had a bad experience in their particular case, because of their attorney, their complaints about how a judge or a court officer treated them in their case, this is not going to eliminate those issues.
8. This is going to lead to more animosity between parents that need to learn to work together. More litigation never helps with children. As they get older, they pay attention to conversations that they hear from their parents about money, the other parent, and other adult conversation.
9. If shared/alternating custody is going to work, it will end up there by agreement in most cases where it is the best choice anyway.

PROBLEMS WITH THE CLEAR AND CONVINCING EVIDENCE STANDARD

1. The burden of proof in all civil cases is a preponderance of the evidence, more likely than not.
2. Clear and convincing evidence is the standard for termination of parental rights.
3. The Court is already required by statute to make findings that the parenting plan and custody are in the best interest of the child. All of our case law and most jurisdictions use this best interest standard and we would be creating new litigation. There would be appeals and a period of time for the Court of Appeals to review findings by the trial court. Some of these appeals could last several months, which is a long time when you are dealing with children. It also might create a wish for an interlocutory appeal on an initial order if one of the parties disagrees with the ruling of the Court.

CONCLUSION

The proposed language in paragraph (a) restricts discretion from the Court to modify a parenting plan if the Court deems it not in the best interests of the children only if by clear and convincing evidence. As stated above, there is no reason to make this a clear and convincing standard. The parents are still entitled to ask for specific findings why it is not approved and if a judge is going to set aside or decline to enter an agreed order, then there should be a hearing and a record made to show why that was not approved. This contributes nothing to the best interests of the child determination that has been done for years.

The added language in paragraph (b) is also unnecessary. The Court should only order equal time if it fits with the particular facts of the case. This statute will not necessarily help and will add more litigation and conflict between the parties. In most cases, the children are going to try to spend as much time with each parent as possible. This will not change that current approach. Anyone who does not agree to a proposed parenting plan can file a motion and appear before the Court and offer proposed changes to give them more time.

On one hand, sometimes presumptions can lead to more predictability, but this goes too far and will lead to more litigation and conflict. We should be thinking of ways to reduce conflict in these cases, not increase it. Nothing in our current set of statutes and practices prevents a judge from ordering a shared custody or parenting arrangement if it is in the best interests of the child. If you want to say that you want more or equal time with each parent, that is already part of the best interests test.

Thank you.

Sincerely,

William P. Mahoney