

To Presume or Not to Presume: A Legislative Update

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For those who were able to attend the Wichita Bar Association’s 2019 Family Law CLE, “A Melting Pot of Domestic Topics,” or those who paid close attention to the proposed bills moving their way through our State legislature in recent sessions, the subject of this article will be a familiar one. This year’s legislative update provided by Ronald W. Nelson, of Ronald W. Nelson, PA, at the WBA’s CLE, highlighted a recurring bill which has gained traction in recent months and which mimics others now passed into law in Arizona, Wisconsin, and Arkansas.

Kansas Senate Bill No. 157¹, a mirroring bill to Kansas House Bill No. 2196², seeks to create a custody presumption in the temporary orders issued in divorce and paternity cases involving the custody of the minor children. That presumption, being advanced primarily by self-professed “fathers’ rights activists,” would be one which states that in cases involving two fit, able, and willing parents, the parents should have joint legal custody and equal parenting time access under temporary orders until further investigation can be conducted into what parenting plan is in the minor children’s best interests long-term.³ This presumption would apply in all cases absent a showing that the same would be detrimental to the minor children or somehow would not be in their best interests.⁴

As alluded to at the top of this article, this is not the first time a bill like this has been proposed in the Kansas legislature. In fact, a similar attempt at creating an equal parenting time presumption was proposed as recently as 2018 although the

attempted presumption affected cases at a different stage in their progression.

On Jan. 8, 2018, Senate Bill No. 257⁵ was introduced by Sen. Steve Fitzgerald and was referred to the Senate Judiciary Committee that same day.⁶ A hearing on the SB 257 was held Jan. 30, 2018 which included oral and written testimony from 18 supporters and nine opponents of the bill.⁷ As with the 2019 legislative offerings, there was a mirroring bill introduced in the Kansas House of Representatives under House Bill No. 2529⁸ on Jan. 23, 2018 and heard by the House Judiciary Committee on Feb. 6, 2018.⁹ Therein, 15 conferees offered support for the bill and 14 opposed the same.¹⁰ The 2018 proposed amendments to K.S.A. 23-3202 would have affected final orders in cases involving the custody of minor children and would have created a presumption that if the parties have agreed upon a parenting plan, that plan is presumed to be in the minor child(ren)'s best interests; a presumption which may be overcome only by clear and convincing evidence.¹¹ The proposals further created an alternative presumption for cases in which the parties have not entered into an agreed upon parenting plan. In those such cases,

“it shall be presumed that a court determination of legal custody, residency and parenting time providing for a child’s equal or approximately equal time with each parent is in the best interests of the child. This presumption may be overcome only by clear and convincing evidence and the court may make a different determination if the court makes specific findings of fact stating why equal or approximately equal time with each parent is not in the best interests of the child when considering all relevant factors pursuant to K.S.A. 2017 Supp. 23-3202, and amendments thereto.”¹²

Following these hearings, neither the House nor the Senate took further action on their respective bills.

In response to this inaction, Rep. Blaine Finch, then chairman of the House Judiciary Committee, requested the Judicial Council study 2018’s HB 2529 more closely, both independently and in relation to the comments of the Hon. R. Wayne Lampson and the 2012 Arizona law on this same topic of a parenting time presumption.¹³ The study was assigned to the Judicial Council Family Law Advisory Committee. A 14-member committee, comprised of professors, practicing and retired family law attorneys and judges and the executive director of the Kansas Coalition Against Sexual and Domestic Violence, produced a 35-page report on Dec. 6, 2018.¹⁴ The committee researched and considered not only the requested laws and submitted comments, but also the statutes in various other states and available research conducted regarding joint legal custody and equal parenting time provisions.¹⁵

On the whole, the committee had two overarching concerns regarding the proposals which led them to advise against their adoption. The committee was first concerned with a presumption being implemented at all. The committee noted, “legal presumptions are based on common sets of facts. There is no common set of facts when determining an optimum parenting time schedule for a family... Yet, the proposed presumption requires the court to presume that equal time is in the best interests of the child, with no proof that it is good for the children or that such a parenting time plan could be realistically executed under the facts and circumstances of a given case.”¹⁶

Second, the committee expressed concern over the legal standard applied to rebutting the presumption: clear and convincing evidence.¹⁷ The committee’s concern was both that the standard is the same heightened standard applied in the fact-intensive termination of parental rights cases which involve a constitutional right as opposed to the preponderance of the evidence standard applied in the majority of family law matters, as well as that it would impose a near-impossible burden upon victims in cases of domestic violence.¹⁸ In perhaps a direct response to this concern, in his written testimony to the Senate Judiciary Committee on the 2019 SB. 157, Ron Holm, president of the Kansas Family Preservation Coalition, stated their 2019 version of the bill specifically seeks to protect victims of domestic violence, “by ensuring an abusive partner can’t unilaterally gain total power and control by simply winning the race to the courthouse or requiring a parent to stay in an abusive situation in order to maintain a right to their children.”¹⁹

The committee further addressed Rep. Finch’s question regarding the Arizona law summarily by highlighting that the Arizona law does not create an equal parenting time presumption.²⁰ Rather, it requires that parenting plans maximize the parenting time of each parent.²¹ At the time of the adoption of the Arizona law, this was interpreted to mean no less than 30% of the overall parenting time available was to be allotted to the non-primary parent. The law has since been clarified via appellate court rulings which state the rebuttable presumption is for equal or nearly equal parenting time.²² Still, the committee remained staunchly opposed to any creation of a presumption. Their recommendation succinctly stated their position:

“The Committee has carefully considered the arguments for and against the amendments to K.S.A. 23-3202 contained in HB 2529 and SB 257 and concludes the proposed changes create more problems than they solve. Each case presents unique facts and circumstances and requires an individualized plan, which is the antithesis of a legal presumption. The current statutes provide courts with the flexibility to order equal parenting time if

it is in the best interests of the child, and the Committee recommends against the passage of HV 2529 and SB 257."²³

Following this nearly eight-month review which resulted in the above recommendation, two months later, an amendment seeking to institute the same presumption but earlier in custody cases was introduced in both legislative bodies. This time, instead of being sponsored only by one senator, SB 157 was backed by 17 senators,²⁴ while the mirroring HB 2196 was sponsored by eight representatives instead of the support of 10, which its predecessor enjoyed.²⁵

This new amendment, now to K.S.A. 23-3212, seeks to create the rebuttable presumption in Temporary Parenting Plans, "that it is in the best interests of the child for fit, willing and able parents to have temporary joint custody and share equally in parenting time."²⁶ This presumption may be overcome by a preponderance of the evidence,²⁷ the more common burden of proof in family law matters. The treatment of the proposed presumption is markedly different in this most recent bill, potentially due to the bolstering effect of its passage and affirmation in Arizona, Arkansas, and Wisconsin, as well as the Arizona Court of Appeals' recent ruling on the meaning of the presumption in the Arizona law.

Ron Nelson, a family law practitioner and member of the Judicial Council's Family Law Advisory Committee, has concerns about creating a presumption of equal parenting time such as set forth by this new proposal.²⁸ His written submission to the Senate Committee on the Judiciary highlights a concern many practitioners have when he states,

*"The proposal is directed at creating a "presumption" when a court enters "temporary orders." But the proposal injects a false presumption into what is the most chaotic and dangerous time in a family law case."*²⁹

Mr. Nelson cites the Local Court Rules in Johnson County which require any Temporary Orders requested and issued be bolstered by the requesting party's motion stating why they are appropriate and providing a factual basis for the requests.³⁰ In Sedgwick County, the Local Court Rules track Kansas statutes in requiring that *ex parte* Temporary Orders sought must maintain the status quo and the requesting party must affirm under oath that the requested orders are in the minor children's best interests.³¹

At the hearing on this latest version, SB 157, on March 7, 2019, 20 proponents and seven opponents testified regarding their thoughts on the presumption.³² A Topeka news station, Channel 13 WIBW, ran a story the following day quoting Ron Holm, president of the Kansas Family Preservation Coalition, as saying, "Discussion today was about the need for individualized plans and fitting families with unique needs, but it's not our experience that's what's happening in courtrooms."³³ Mr. Holm's sentiment speaks to the heart

of what proponents of SB 157 want to spotlight and what opponents want to shy away from, which is the creation of a law based upon their anecdotal evidence of rulings in cases under the current iteration of the law.

Following testimony, SB 157 was amended in the following ways:

1. A presumption opposing joint legal custody and equal parenting time is created in cases where a parent can make a good cause showing that domestic abuse is occurring or has occurred;
2. Adjusting the definition of "joint legal custody" to require input from and/or consultation with the other parent before making decisions regarding any of "the most important issues affecting a child's life, including health, education and welfare;"
3. Defining "parenting time" as "the schedule of time when each parent has actual physical access to a child, during which the scheduled parent is responsible for the physical care and supervision of the child;" and,
4. Defining "equal parenting time" as "that a child's actual physical access to each parent is regular and equal or nearly equal."³⁴

Mr. Nelson, and many Kansas family law practitioners have grave concerns regarding the adoption of a presumption in child custody determinations which presently are made on a case-by-case basis and always viewed through the lens of the best interests of the minor children.³⁵ After having heard the testimony and making its amendments, the Senate Judiciary Committee placed SB 157 on the Senate calendar for further consideration. While it is unclear what the future holds for this iteration of the equal parenting time presumption bill, the traction the argument has gained and the legislative attention it has garnered in the last year suggest it behooves all Kansas family law practitioners to monitor its progress in the coming legislative sessions.

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- 1 S.B. 157, 2019 Leg., 2019 Sess. (Kan. 2019).
2 H.B. 2196, 2019 Leg., 2019 Sess. (Kan. 2019).
3 *Id.*
4 *Id.*
5 S.B. 257, 2018 Leg., 2018 Sess. (Kan. 2018).
6 State of Kan. Judicial Council, Report of the Judicial Council Family
Law Advisory Comm., H.B. 2529, 2018 Sess., at 1 (2018).
7 *Id.* at 2.
8 H.B. 2529, 2018 Leg., 2018 Sess. (Kan. 2018).
9 State of Kan. Judicial Council, Report of the Judicial Council Family
Law Advisory Comm., H.B. 2529, 2018 Sess., at 2 (2018).
10 *Id.*
11 *Id.*
12 S.B. 257, 2018 Leg., 2018 Sess. (Kan. 2018); H.B. 2529, 2018 Leg.,
2018 Sess. (Kan. 2018).
13 State of Kan. Judicial Council, Report of the Judicial Council Family
Law Advisory Comm., H.B. 2529, 2018 Sess., at 1 (2018).
14 *Id.*
15 *Id.* at 3-4.
16 *Id.* at 5.
17 *Id.* at 4-5.
18 *Id.*
19 Creating A Presumption in Favor of Shared Parenting Time for
Temporary Orders: Hearing on S.B. 157 Before the Comm. On
Judiciary, 2019 Leg. Sess. (Kan. 2019) statement of Ron Holm, Pres.
Kan. Fam. Preservation Coalition.
20 State of Kan. Judicial Council, Report of the Judicial Council Family
Law Advisory Comm., H.B. 2529, 2018 Sess., at 7 (2018).
21 *Id.*
22 *In re The Marriage of Baron v. Baron*, No. 1 CA-CV 17-0413 FC, 2018
WL 3722815 (Ariz. Ct. App. July 31, 2018), review granted in part
(Feb. 5, 2019), vacated in part, No. CV-18-0234-PR, 2019 WL 2181295
(Ariz. May 21, 2019).
23 State of Kan. Judicial Council, Report of the Judicial Council Family
Law Advisory Comm., H.B. 2529, 2018 Sess., at 7 (2018).
24 S.B. 157, 2019 Leg., 2019 Sess. (Kan. 2019).
25 H.B. 2196, 2019 Leg., 2019 Sess. (Kan. 2019).
26 S.B. 157, 2019 Leg., 2019 Sess. (Kan. 2019); H.B. 2196, 2019 Leg.,
2019 Sess. (Kan. 2019).
27 *Id.*
28 Creating A Presumption in Favor of Shared Parenting Time for
Temporary Orders: Hearing on S.B. 157 Before the Comm. On
Judiciary, 2019 Leg. Sess. (Kan. 2019) statement of Ronald W. Nelson,
Fam. Law Practitioner, Law Offices of Ronald W. Nelson, PA.
29 *Id.* at 2.
30 *Id.* at 3.
31 Sedg.Co. Loc. Ct. Rule 402(e)(7).
32 Creating A Presumption in Favor of Shared Parenting Time for
Temporary Orders: Hearing on S.B. 157 Before the Comm. On
Judiciary, 2019 Leg. Sess. (Kan. 2019).
33 [https://www.wibw.com/content/news/Proposed-bill-would-impose-
presumption-granting-parents-temporary-joint-custody-506838491.html](https://www.wibw.com/content/news/Proposed-bill-would-impose-presumption-granting-parents-temporary-joint-custody-506838491.html)
34 Supp. Note to S.B. 157, 2019 Leg., 2019 Sess. (Kan. 2019)
35 Creating A Presumption in Favor of Shared Parenting Time for
Temporary Orders: Hearing on S.B. 157 Before the Comm. On
Judiciary, 2019 Leg. Sess. (Kan. 2019) statement of Ronald W. Nelson,
Fam. Law Practitioner, Law Offices of Ronald W. Nelson, PA.