LAW OFFICES
RONALD W. NELSON, PA
~ A FAMILY LAW PRACTICE ~
SUITE 117
11900 WEST 87TH STREET PARKWAY
SHAWNEE MISSION, KANSAS 66215-4517

RONALD W. NELSON*+
ASHLYN YARNELL
———————————
BETSY L. NELSON
PARALEGAL

TELEPHONE: (913) 312-2500
TELECOPIER: (913) 312-2501
KANSAS-DIVORCE.COM
TWITTER: @KANSASDIVORCE
RON@RONALDNELSONLAW.COM

March 20, 2014

Kansas House Committee on Judiciary
Representative Lance Kinzer, Chair

RE: Informational Hearing on Domestic Relations Case Management
2014 HB 2558, 2014 HB 2664, and 2014 SB 389

TESTIMONY OF RONALD W. NELSON

Chairman Kinzer and Committee Members:

I am a family law attorney in Johnson County. I've practiced family law for over 25 years. My practice is focused on handling complex issues in family law and high conflict child custody litigation. My practice frequently involves representing parents – and grandparents – in family law disputes in Kansas trial and appellate courts. Over my now many years in family law, I've often wrestled with the difficult issues that arise when parents fight over their children's care and custody – both in court and out-of-court. I've also been deeply involved with domestic relations case management ever since shortly after the Kansas Legislature enacted statutes authorizing case management, mostly for clients trying to deal with the fall out from the ways in which those statutes were being used, but also working with others trying to fix the problems we all saw with the case management statutes, the ways in which they were being misused, and trying to help create better practices by attorneys, courts, and case managers in those cases in which case management was deemed appropriate.

Domestic relations case management came about in Kansas in 1996, when the Kansas Legislature provided for this "new" additional tool for use in high conflict child custody cases.[1] These statutes provide for the appointment of a "neutral case manager" to be appointed by the court (or by a hearing officer when enforcement proceedings are instituted) to assist parents in working out their disputes over parenting issues when other forms of alternative dispute resolution (e.g. mediation) have failed. As originally envisioned, domestic relations case managers would be appointed to assist the court by devoting more time to a family in conflict than could any court – allowing for ongoing and intensive management of the interfamily conflicts over parenting issues that otherwise would take up an inordinate amount of court time. The statutes attempted to define what cases might be benefited by the use of these intense services. Section 2 of the original bill (now K.S.A. 23-3508) provides:

> "Cases in which case management is appropriate shall include one or more of the following circumstances:

---

1. 1996 Kan. Sess. Laws Ch. 159, originally placed at K.S.A 23-1001 to K.S.A 23-1003, now located at K.S.A. 23-3507 to K.S.A. 23-3509.
2. *In re* Marriage of Gordon-Hanks, 27 Kan. App. 2d 987, 990, 10 P.3d 42 (2000).
3. *In re* Marriage of Gordon-Hanks, *Id.*

> (1) Private or public neutral dispute resolution services have been tried and failed to resolve the disputes;
>
> (2) other neutral services have been determined to be inappropriate for the family;
>
> (3) repetitive conflict occurs within the family, as evidenced by the filing of at least two motions in a six-month period for enforcement, modification or change of residency, visitation, parenting time or custody which are denied by the court; or
>
> (4) a parent exhibits diminished capacity to parent.

If a case manager is appointed, that case manage is supposed to attempts to work out disputes between the parties on any issues regarding custody, residency, and parenting time. This is where the current statute begins to fail.

Instead of focusing on those cases that are truly intransigent, the statutes allow for the assignment of a case manager in a much broader range of cases. The fact that "one" of the listed events has occurred means very little about the ability or inability of the separated family to deal with disagreements appropriately.

- Neutral dispute resolution services have "failed" or been deemed not appropriate in virtually every child custody case that proceeds to a trial or hearing in front of a judge. But we wouldn't say that every one of those cases should be assigned a case manager.

- Multiple filings within a short time period is certainly indicative of an increased level of conflict for a separated family; but at least two motions are often filed in post-decree child custody litigation within a very short time period when one parent seeks to enforce parenting time and the other believes the scheduled parenting time isn't appropriate.

- Many parents exhibit a "diminished capacity to parent" because of alcohol, substance abuse, cognitive impairment, mental or physical illnesses; but that situation has little to do with the parents' willingness or ability to appropriately work through parenting issues – even in highly emotional or other polarizing situations. There are many parents who are both affected by some condition that diminishes their capacities to parent, but they may handle those situations more appropriately than couples who have no condition for which a diminished capacity is attributable.

The first problem, therefore, is that the statutes cast too broad a net – or allow for the inclusion of far too many people in the category of cases for which a case manager may be appointed. This "broad net" has become a larger problem because it allows judges, attorneys, and parties to "opt in" to a system many of them don't understand and don't know the future effect on those consigned to case management protocols. It allows courts and attorneys to order parties into case management as an "easy way" to resolve impending disputes over parenting time by putting the resolution off on someone else (the case manager) at some future time (when the case manager addresses the issues).

The second problem with the current statutes (although bettered somewhat by the recent Kansas Supreme Court Administrative Order 276, filed December 9, 2013) is that the statutes do not provide how a domestic relations case manager is to go about managing the assigned case.[2] Instead, the case manager decides how the process proceeds, what the parties must do within the process, how and when those duties are performed, and when and whether it is time to "pull the trigger" to make a recommendation for decision to the court, rather than continue on working through the issues.[3] Because the case management procedure has been left to the case manager, practice has varied widely.

---

2. *In re* Marriage of Gordon-Hanks, 27 Kan. App. 2d 987, 990, 10 P.3d 42 (2000).
3. *In re* Marriage of Gordon-Hanks, *Id.*

A case manager is not a mediator.[4] Unlike mediation, where the person charged with mediating the issues is to remain strictly neutral in all discussions leading to an eventual agreement, the statutes providing for case management specifically provide that, in the event of impasse, "the case manager shall make recommendations to the court."[5]

In the event the parties cannot come to agreement on their own or with assistance of the case manager, the case manager may make recommendations to the court for resolution.[6] Any recommendations of the case manager are to be noted in writing and reported to the court with a copy of the recommendations delivered to the attorneys of record within ten working days.[7] Recommendations for resolution of disputes and implementation of the recommendations must be made in good faith, not arbitrarily – "the case manager must first attempt to work with the parties and must have some basis for making any recommendation."[8] The case manager may recommend to the parties or the court any appropriate language to be used in any order dealing with permanent issues[9] between the parties.

Here rises the third problem: that the case manager may recommend to the court appropriate orders on "permanent issues" (changes or restrictions of legal custody, change of residence, significant changes in parenting time, allowing or disallowing a parent's move with the child, etc.). While certainly a case manager may be the professional with the best and closest contact with the family, and have significant reason to make these kinds of recommendations, there is a significant danger that upon receiving recommendations on these "permanent issues" from the case manager, a court will consciously or subconsciously side with the case manager's recommendation because of that fact, rather than because the evidence presented in court supports the finding.

Case managers do have significant knowledge and information about these issues that may be helpful to the court, but case management is intended to deal with ongoing *minor* issues between parents over parenting time and exchanges that would be too costly, time-sensitive, or minor to present to a court. The case management statutes were never intended to grant to case managers the powers of the court to decide disputes between parents affecting their significant rights – including residency, relocation, or decision-making.

When the case manager makes recommendations for resolution of problems regarding child-custody, residency or parenting time, the court may adopt them as orders of the court.[10] A motion by one of the parties is not required, nor is a hearing required unless a party opposes the recommendation. If neither party opposes the recommendations, the case manager's recommendations become orders of the court ten working days after submission.[11] Recommendations on permanent issues "shall be entered into the court record within ten working days of receipt of the recommendation."[12] If either party disagrees with any of the recommendations made by the case manager, the party must file an objection to the court for review "at which time an order shall be made by the court."[13]

This presents the fourth, and perhaps worst, problem with the current statutes: A party who disagrees with the case manager's recommendations has the burden of proving to the court that the case

---

4. *In re* Marriage of Gordon-Hanks, *Id.* at 990.
5. K.S.A. 23-3507.
6. *In re* Marriage of Gordon-Hanks, *Id.*
7. K.S.A. 23-3509(d)(2).
8. *In re* Marriage of Gordon-Hanks, 27 Kan. App. 2d at 990-91.
9. "Permanent issues" include a designation of custody, primary residence, and child support. K.S.A. 23-1003(b)(5).
10. K.S.A. 23-3509(d)(1).
11. K.S.A. 23-3509(d)(5).
12. K.S.A. 23-3509(d).
13. K.S.A. 23-3509(d)(6).

manager's recommendations should not be adopted.[14] While this burden is not explicitly provided for in the statute, the fact that the statute requires the party contesting the recommendations to file a motion combined with the general rule that a person who asks for action by a court bears the burden of proving that the motion should be granted has had the effect of turning upside down the usual procedures in court. Usually, the burden of proof in court is placed upon the party seeking to change the status quo, not on the person seeking to preserve it. But the case management statutes effectively reverse that burden. For example, *In re Gordon-Hanks*,[15] dealt with a situation in which the case manager recommended that the children's residency change from their mother to their father. Despite the fact that normally, the burden would be placed on the parent seeking to change residency, showing that the children would be better off, the burden was placed on the parent defending against the changed placement. Recent cases have limited the effect of this ruling,[16] but only to significant issues of factual dispute underlying the case manager's recommendations – not to the recommendations themselves.[17]

Appointment of a case manager should be reserved only for those cases in which traditional court rulings and enforcement actions have not settled ongoing disputes between the parents and such involvement would help the parents move toward reasonable and appropriate decisions for the child.[18] Further, it is important that the responsibilities of the case manager be strictly defined by the court or parties to assure that the case manager acts within the limited confines of statutory authority. Although courts in a number of states have authorized the use of trained third parties to act as arbiters of visitation and parenting time disputes, Kansas is the only state that has a statute specifically authorizing case management.[19]

Despite these issues, I do not believe 2014 HB 2558 is an appropriate way to deal with the problems in the existing statutes. The repeal of the case management statutes and voiding existing case management orders would not resolve any problems; but would instead, create more serious issues. It would throw already conflicted families into more conflict; it would result in hundreds of cases having be resolved again in court on issues that may have already been appropriately resolved, and it would enable conflict and litigation that could be avoided by more measured and well thought out remedies to the problems with the statutes.

Instead of "throwing the baby out with the bathwater," the changes proposed in 2014 HB 2664 and 2014 SB 389 should be considered. Although there are certain some changes that need made in these bills, they are a step towards a better-drafted process for case management in difficult cases. If amended to provide protections to everyone, domestic relations case management can be an asset to families in conflict, a way for those families to self-determine, and a way to save the courts huge amounts of time that could better be devoted to other issues.

Ronald W. Nelson

---

14. In re Marriage of *Gordon-Hanks*, 27 Kan. App. 2d at 990-91.
15. *In re* Marriage of Gordon-Hanks, 27 Kan. App. 2d 987, 990, 10 P.3d 42 (2000).
16. See In re Marriage of Hutchison, 27 Kan.App.2d 851 (2012); In re Marriage of Merrill, 47 Kan.App.2d 943 (2012).
17. See In re Marriage of Hutchison, 27 Kan.App.2d 851, Syl. 1 (2012)
18. K.S.A. 23-1003(b) provides criteria for evaluation of cases for which case management may be appropriate.
19. R.W. Nelson, *Managing the High-Conflict Case: Parenting Coordinators and Case Management,* 13 AM. J. FAM. LAW 207 (Winter, 1999). *See* P. Stahl, *The Use of Special Masters in High Conflict Divorces,* CAL. PSYCHOLOGIST, Apr. 1995.