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Kansas Legislator Briefing Book 2014

Children and Youth

D-5 Adoption

Adoption establishes a legal parent-child relationship between a child and third persons and terminates the existing rights and obligations between a child and his or her biological parents. It is a privilege created by statute and is therefore governed by statutorily designated procedures for adoption. In Kansas, the Adoption and Relinquishment Act, KSA 59-2111 to 59-2143, (the Adoption Act) governs adoptions, including both the termination of parental rights and the transfer of legal custody to and creation of legal rights in the adoptive parents after an adoption hearing and decree.

KSA 59-2113 allows any adult or husband and wife to adopt, and KSA 59-2112 defines the different methods of adopting: "adult adoption," "agency adoption," "independent adoption," and "stepparent adoption." This article will concentrate on adoption of minors using those last three methods. Agency adoptions are those handled by either a public or private entity lawfully authorized to place children for adoption, consent to the adoption, and care for children until they are adopted or reach majority. In an independent adoption, the child's parent or parents, legal guardian, or nonagency person *in loco parentis* has the authority to consent to the adoption. "Person *in loco parentis*" means an individual or organization vested with the right to consent to the adoption of a child pursuant to relinquishment or an order or judgment by a district court. These adoptions can occur directly with an adoptive family or through an intermediary such as a doctor, lawyer, or friend. Independent adoptions do not include stepparent adoptions, the adoption of a minor child by the spouse of a biological parent, which requires termination of parental rights of only one of the natural parents as the rights of the custodial parent remain intact.

Jurisdiction and Venue

The district courts in Kansas have general jurisdiction to hear adoption petitions. Many judicial districts have a probate division that handles adoption cases. Jurisdiction must exist over the subject matter of the action as well as the parties. Generally Kansas will have jurisdiction if the birth mother and adoptive parents are all Kansas residents but would not have jurisdiction if the child was born to a non-Kansas birth mother to be placed with non-Kansas adoptive parents. If the child is of Indian heritage, the Indian Child Welfare Act (ICWA), 25 U.S.C.A. 1901 to 1963, may apply. If the child born in Kansas is to be placed with adoptive parents in another state, the parties may need to comply

with the Interstate Compact for the Placement of Children (ICPC), KSA 38-1201 to 1206, likewise if the child is born outside of Kansas and an agency will be involved in the adoption in Kansas. Additional requirements exist for intercountry adoptions as well and are summarized briefly at the end of this article.

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), KSA 23-37,101 to 37,405, applies to adoption proceedings in Kansas such that, if at the time the petition is filed a proceeding concerning the custody or adoption of the minor is pending in another state exercising jurisdiction substantially in conformity with the UCCJEA or its predecessor, the Uniform Child Custody Jurisdiction Act (UCCJA), Kansas may not exercise jurisdiction unless the other state's court stays its proceeding. Similarly, if another state has issued a decree or order concerning custody, Kansas may not exercise jurisdiction unless it has jurisdiction and the court of the state issuing the order does not have continuing jurisdiction, has declined to exercise jurisdiction, or does not have jurisdiction. For more information on the UCCJEA, see briefing article D-3, Child Custody and Visitation Procedures.

KSA 59-2126(a) to (d) sets out venue as follows:

- Independent adoption. County of residence of petitioner or the child to be adopted.
- Agency adoption. County of residence of petitioner, the county in which the child to be adopted resided prior to agency custody, or where the agency is located.
- Stepparent adoption. County of residence in which the petitioner resides or where the child resides.
- If the petitioner resides on a military post or reservation and the child is residing with the petitioner, venue is in the district court of the county where the post or reservation is located or in any adjacent county.

KSA 59-2112(e) defines the residence of the child as the residence of: the child's mother if the parents are not married; the child's father if the parents are married; or the child's mother if the child

resides with the mother and she has established separate legal residence from the father. When the residence of the child serves as the basis for venue, KSA 59-2126(e) requires a sworn affidavit to be filed with the petition, setting forth the factual basis for the child's residency. The burden to prove residency is upon the person asserting a particular residency has been established.

Petition

KSA 59-2128(a) lists the required contents of the petition. If any of the information is not included, subsection (b) allows the court to stay the proceeding until the information is provided. Subsection (f) requires the following items be filed with the petition:

- Written consents to adoption required by KSA 59-2129;
- Background information for child's biological parents required by KSA 59-2130;
- Accounting required by KSA 59-2121;
- Any affidavit concerning venue required by KSA 59-2126 (discussed above); and
- Consent, Relinquishment, and Termination of Parental Rights.

For an independent adoption, KSA 59-2129(a) requires the consent of:

- The living parents of a child; or
- One of the parents if the other's consent is unnecessary under KSA 59-2136; or
- The legal guardian of the child if both parents are dead or their consents are unnecessary under KSA 59-2136; or
- The court terminating parental rights under KSA 38-2270; and
- The judge of any court having jurisdiction over the child pursuant to the Revised Code for the Care of Children (KCCC), KSA 38-2201 to 2286, if parental rights have not been terminated; and
- Any child over fourteen sought to be adopted who is of sound intellect.

For stepparent adoptions, consent must be given by the living parents of a child; one of the parents if

the other's consent is unnecessary under KSA 59-2136; or the judge of any court having jurisdiction over the child pursuant to the KCCC if parental rights have not been terminated and any child over fourteen sought to be adopted who is of sound intellect.

KSA 59-2114 requires the consent to be in writing and acknowledged before a judge of a court of record or before an officer authorized to take acknowledgments, like a notary. If the consent is acknowledged before a judge, the judge must advise the consenting person of the consequences of the consent. The consent is final when executed, "unless the consenting party, prior to final decree of adoption, alleges and proves by clear and convincing evidence that the consent was not freely and voluntarily given." The consenting party carries the burden of proving the consent was not freely and voluntarily given. Minority of the parent does not invalidate the parent's consent, however; KSA 59-2115 mandates that birth parents under eighteen have the advice of independent legal counsel on the consequences of execution of a consent. Unless the minor is otherwise represented, the petitioner or child placement agency must pay for the cost of independent legal counsel. KSA 59-2116 provides that the natural mother cannot give consent until twelve hours after the birth of the child, but says nothing about the timing of the father's consent.

KSA 59-2117 provides that a consent signed outside the state in conformity either with Kansas law or the law of the state in which the consent was executed and acknowledged is valid. If signed in a foreign country, it must comply with the law and procedure of that country. If the parent is in military service, the consent or relinquishment may be acknowledged before a commissioned officer, and the signature must be verified or acknowledged before a notary public or by a procedure in effect in the parent's branch of the military.

For an agency adoption, KSA 59-2129(b) provides that once parents relinquish their child to an agency pursuant to KSA 59-2124, consent must be given by the authorized representative of the agency and any child over fourteen sought to be adopted who is of sound intellect. KSA 59-2124(b) states that relinquishments will be deemed

sufficient if in substantial compliance with the form created by the Judicial Council and executed by both parents or one parent if the other is deceased or relinquishment is found unnecessary. Like consents, the relinquishment must be in writing and acknowledged by a notary or the court. (Again, the judge must advise the relinquishing person of the consequences of the relinquishment.) Additionally, KSA 59-2115 requires independent counsel for a minor relinquishing a child and KSA 59-2116 provides that the natural mother cannot relinquish the child until twelve hours after the birth. If the agency accepts the relinquishment, the agency stands *in loco parentis* for the child and has the rights of a parent or legal guardian, including the power to place the child for adoption. If a person relinquishes the child, all parental rights are terminated, including the right to receive notice in a subsequent adoption proceeding involving the child.

When parents consent to an adoption, they agree to the termination of their parental rights, although the rights are not terminated until the judge makes the final decree of adoption. If the parent does not sign a consent, a court can terminate parental rights pursuant to a separate petition filed under the KCCC alleging that the child is a "child in need of care" (CINC) or a motion to terminate parental rights can be made in an existing CINC proceeding. For more information on CINC proceedings, see briefing article D-4.

Additionally, KSA 59-2136 addresses circumstances where the necessity of a parent's consent or relinquishment is in question, and while it frequently refers to fathers, it specifies that insofar as it is practicable, those provisions applicable to fathers also apply to mothers. If a father is unknown or his whereabouts are unknown, subsection (c) requires the court to appoint an attorney to represent him, and if no person is identified as the father or possible father, the court must order publication notice of the hearing in such manner as it deems appropriate. Absent consent of the father, his parental rights must be terminated. The court must make an effort to identify the father, and if identified, he must receive notice of the termination proceedings. If no father is identified or if after receiving notice, he fails to appear or does not claim custodial rights, the court will terminate

his parental rights. If a father is identified to the court and asserts parental rights, subsection (h) (1) requires the court to determine parentage pursuant to the Kansas Parentage Act, KSA 23-2201 to 2225. Further, if the father is unable to employ an attorney, the court must appoint one for him. Thereafter, the court may terminate a parent's rights if it determines by clear and convincing evidence that:

- The father abandoned or neglected the child after having knowledge of the child's birth;
- The father is unfit or incapable of giving consent;
- The father has made no reasonable efforts to support or communicate with the child after having knowledge of this child's birth;
- The father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;
- The father abandoned the mother after having knowledge of the pregnancy;
- The birth of the child was the result of the rape of the mother; or
- The father has failed to assume the duties of a parent for two consecutive years preceding the filing of the petition to adopt.

In determining whether to terminate parental rights, KSA 59-2136(h)(2) allows the court to consider and weigh the best interests of the child and disregard incidental visitations, contacts, communications, or contributions.

In a stepparent adoption, KSA 59-2136(c) authorizes the court to appoint an attorney to represent a father who is unknown or whose whereabouts are unknown. Additionally, subsection (d) provides that if a mother consents to a stepparent adoption when the child has a presumed father, his consent is required unless he is incapable of giving such consent or has failed or refused to assume the duties of a parent for the two consecutive years preceding the filing of the petition for adoption. In determining whether consent is required, the statute allows the court

to disregard incidental visitations, contacts, communications, or contributions. Further, there is a rebuttable presumption that if the father, after having knowledge of the child's birth, has knowingly failed to provide a substantial portion of court-ordered child support when financially able to do so for the two years preceding the filing of the petition for adoption, he has failed or refused to assume the duties of a parent. Finally, in determining whether a stepparent adoption should be granted, it allows the court may consider the best interests of the child and the fitness of the nonconsenting parent.

Accounting for consideration

KSA 59-2121(b) requires the petition for adoption to be accompanied by a detailed accounting for all consideration given or to be given and all disbursements made or to be made in connection with the adoption and placement of a child. Subsection (a) outlines the types of consideration allowed:

- Reasonable legal and other professional fees rendered in connection with the placement or adoption, not to exceed the customary fees for similar services by professionals of equivalent experience and reputation as judged by Kansas standards;
- Reasonable fees in the state of Kansas of a licensed child-placing agency;
- Actual and necessary expenses, based on expenses in Kansas, incident to placement or the adoption proceedings;
- Actual medical expenses of the mother attributable to the pregnancy and birth;
- Actual medical expenses of the child; and
- Reasonable living expenses of the mother incurred during or as a result of the pregnancy.

The court can disapprove any consideration it determines to be unreasonable. Knowingly and intentionally receiving or accepting clearly excessive fees or expenses is a severity level 9, nonperson felony. Knowingly failing to list all consideration or disbursements is a class B, nonperson misdemeanor.

Assessments

Pursuant to KSA 59-2132, the petitioner must obtain an assessment performed by a person authorized by the statute to do so in the manner it describes and file a report of the assessment with the court at least 10 days before the hearing on the petition, including the results of the investigation of the adoptive parents, their home, and their ability to care for the child. If the petitioner is a nonresident, KSA 59-2132(f) requires the assessment and report to be completed in the petitioner's state of residence by a person authorized in that state to conduct such assessments. The assessment and report are only valid if performed within a year of filing the petition for adoption.

Temporary Custody Order

In an independent or agency adoption, KSA 59-2131 allows the court to issue a temporary custody order pending the hearing. If the court places the child in a home not licensed to provide such care, it must first be assessed by a person or agency authorized to make assessments under KSA 59-2132, or the court may "expeditiously" conduct an evidentiary hearing, including testimony by the petitioners prior to making the placement.

Adoption Hearing and Final Decree

Upon filing an adoption petition, KSA 59-2133 requires the court to set the hearing within sixty days from the date of filing. Additionally, it requires notice to be given to birth parents in independent and stepparent adoptions, unless parental rights have been terminated. The court may designate others to be notified. In agency adoptions, notice must be served upon the consenting agency unless waived. After the hearing of the petition, the court considers the assessment and all evidence, and if the adoption is granted, makes a final decree of adoption.

KSA 59-2118(b) states an adopted child is entitled to the same personal and property rights as a birth child of the adoptive parents, who likewise are entitled to exercise all the rights of a birth parent and are subject to all the liabilities of that relationship. Both KSA 59-2118(b) and KSA 59-2136(i) allow children to inherit from their birth parents after

parental rights have been terminated, although the birth parents' right to inherit is severed at that time.

Intercountry Adoptions

KSA 59-2144(b) provides that a foreign adoption decree will have the same force and effect as an adoption filed and finalized in Kansas if the person adopting is a Kansas resident; the adoption was obtained pursuant to the laws of the foreign country pertaining to relinquishment, termination of parental rights, and consent to the adoption; the adoption is evidenced by proof of lawful admission into the US; and the foreign decree is filed and recorded with any county within the state.

On April 1, 2008, the United States implemented the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, which applies when a child habitually residing in one contracting state has been, is being, or will be moved to another contracting state after adoption in the state of origin by a person habitually residing in the receiving state or for purpose of an adoption in the receiving state. Article 4 of the Convention states that an adoption is to take place only if the competent authorities of the state of origin have established the child is adoptable; determined that an intercountry adoption is in the child's best interest; ensured the persons, institutions, and authorities whose consent is necessary have been counseled about the effects of consent and have given free, unconditional, and irrevocable written consent not influenced by the payment of money; and if the child is of an appropriate age and degree of maturity, ensured that he or she has been counseled on the effects of consent, expressed his or her opinion, and given consent when necessary. Additionally, Article 5 provides the competent authorities of the receiving state must have determined that the prospective adoptive parents are eligible and suited to adopt, have been counseled when necessary, and have authorized or will authorize the child to enter and reside permanently in the receiving state. More information on the Hague Convention is available at: http://www.hcch.net/index_en.php?act=text.display&tid=45. The U.S. Department of State also has a web page devoted to intercountry adoption: <http://adoption.state.gov>.

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