

# Kansas Legislator Briefing Book 2015



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## Children and Youth

### D-2 Child Custody and Visitation Procedures

In Kansas, “legal custody” is defined as “the allocation of parenting responsibilities between parents, or any person acting as a parent, including decision making rights and responsibilities pertaining to matters of child health, education and welfare.” KSA 23-3211. Within that context, Kansas law distinguishes between “residency” and “parenting time.” Residency refers to the parent with whom the child lives, compared to parenting time, which consists of any time a parent spends with a child. The term “visitation” is reserved for time nonparents are allowed to spend with a child.

#### Initial Determination

The standard for awarding custody, residency, parenting time, and visitation is what arrangement is in the “best interests” of the child. A trial judge can determine these issues when a petition is filed for:

- Divorce, annulment, or separate maintenance. KSA 23-2707 (temporary order); KSA 23-3206, KSA 23-3207, and KSA 23-3208;
- Paternity. KSA 23-2215;
- Protection, pursuant to the Kansas Protection from Abuse Act (KPAA). KSA 60-3107(a)(4) (temporary order);
- Protection, in conjunction with a Child in Need of Care (CINC) proceeding. KSA 38-2243(a) (temporary order); KSA 38-2253(a)(2)—for more information on CINC proceedings, see D-4;
- Guardianship of a minor. KSA 59-3075; or
- Adoption. KSA 59-2131 (temporary order) and KSA 59-2134.

Further, for a court to make a custody determination, it must have authority under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), KSA 23-37,101 to KSA 23-37,405. The first time the question of custody is considered, only a court in the child’s “home state” may make a custody determination. The “home state” is the state where the child lived with a parent, or a person acting as a parent, for at least six consecutive months immediately before the beginning of a custody proceeding. For a child younger than six months, it is the state in which the child has lived since birth. Temporary absences are included in the six-month period, and the child does not have to be present in the state when the proceeding begins. Exceptions apply when there is no home state, there is a “significant connection” to another state, or there is an

emergency, e.g. the child has been abandoned or is in danger of actual or threatened mistreatment or abuse. After a court assumes home state jurisdiction, other states must recognize any orders it issues.

Legal custody can be either joint, meaning the parties have equal rights, or sole, when the court finds specific reasons why joint legal custody is not in the best interests of the child. KSA 23-3206. After making that determination the court will determine residency, parenting time, and visitation.

Residency may be awarded to one or both parents, or, if the child is a child in need of care and a court has determined neither parent is fit, to a third party (third parties are addressed in a later section). In determining residency, KSA 23-3207 requires parents to prepare either an agreed parenting plan or, if there is a dispute, proposed parenting plans for the court to consider. For more information on parenting plans, see KSA 23-3211 to KSA 23-3214.

Based on the principle that fit parents act in the best interests of their children, an agreed parenting plan is presumed to be in a child's best interests. Absent an agreement, however, or if the court finds specific reasons why the parenting plan is not in the best interests of the child, it will consider all relevant factors, including those outlined in KSA 23-3203, to make a determination:

- Each parent's role and involvement with the minor child before and after separation;
- The desires of a child of sufficient age and maturity and the child's parents as to custody or residency;
- The age and emotional and physical needs of the child;
- The interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;
- The child's adjustment to the child's home, school, and community;
- The willingness and ability of each parent to respect and appreciate the bond between the child and the other parent

- and to allow for a continuing relationship between the child and the other parent;
- Evidence of spousal abuse, either emotional or physical;
- The ability of the parties to communicate, cooperate, and manage parental duties;
- The school activity schedule of the child;
- The work schedule of the parties;
- The location of the parties' residences and places of employment;
- The location of the child's school;
- Whether a parent or person residing with a parent is subject to the registration requirements of the Kansas Offender Registration Act, or any similar act; or
- Whether a parent or person residing with a parent has been convicted of child abuse.

Though not required, a court may appoint or authorize a lawyer or guardian *ad litem*, especially in contested cases, to ensure a child's interests are being represented. Guardians *ad litem* are regulated by Kansas Supreme Court Rules. They serve as an advocate for the best interests of the child and present cases in the same manner as any other attorney representing a client.

## Modification

KSA 23-3218 provides that subject to the provisions of the UCCJEA, courts can modify custody, residency, visitation, and parenting time orders when a material change of circumstances is shown. Pursuant to KSA 23-37,202, a state that previously exercised jurisdiction will have continuing authority over subsequent motions until a court of that state determines that the child, the child's parents, and any person acting as a parent either:

- No longer have a significant connection with that state and substantial evidence is no longer available in that state concerning the child's care, protection, training, and personal relationships; or
- A court of that state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in that state.

While a state exercises continuing jurisdiction, no other state may modify the order. If the state that made the original determination loses this continuing jurisdiction, another state can modify an order only if it satisfies the “home state” requirements outlined above.

KSA 23-3219(a) provides that to modify a final child custody order, the party filing the motion must list, either in the motion or in an accompanying affidavit, all known factual allegations that constitute the basis for the change of custody. If the court finds that the motion establishes a *prima facie* case, the facts of the situation will be considered to determine whether the order should be modified. Otherwise, the court must deny the motion.

KSA 23-3219(b) speaks to the requirements for modification of custody orders in alleged emergency situations. First, if the nonmoving party has an attorney, the court must attempt to have the attorney present before taking up the matter. Next, the court is required to set the matter for review hearing as soon as possible after issuance of the *ex parte* order, but within 15 days after issuance. Third, the court must obtain personal service on the nonmoving party of the order and the review hearing. Finally, it provides that the court cannot modify the order without sworn testimony to support a showing of the alleged emergency. Similarly, KSA 23-3218 states that no *ex parte* order can change residency from a parent exercising sole *de facto* residency of a child to the other parent unless there is sworn testimony to support a showing of extraordinary circumstances.

### **Custodial Interference and the Kansas Protection from Abuse Act**

KSA 21-5409 outlines the crimes of “interference with parental custody” and “aggravated interference with parental custody.” “Interference with parental custody” is defined as “taking or enticing away any child under the age of 16 years with the intent to detain or conceal such child from the child’s parent, guardian, or other person having the lawful charge of such child.” Joint custody is not a defense. This crime is a class A person misdemeanor if the perpetrator is a parent entitled to joint custody of the child; in all other cases, it

is a severity level 10, person felony. Subsection (b) lists certain circumstances in which the crime of interference with parental custody will be considered “aggravated,” including hiring someone to commit the crime of interference with parental custody; or the commission of interference with parental custody, by a person who:

- Has previously been convicted of the crime;
- Commits the crime for hire;
- Takes the child outside the state without the consent of either the person having custody or the court;
- After lawfully taking the child outside the state while exercising visitation rights or parenting time, refuses to return the child at the expiration of that time;
- At the expiration of the exercise of any visitation rights or parenting time outside the state, refuses to return or impedes the return of the child; or
- Detains or conceals the child in an unknown place, whether inside or outside the state.

This crime is a severity level 7, person felony.

These statutes highlight the fact that if a noncustodial parent believes his or her child needs protection from the custodial parent, he or she must take action under the Kansas Protection from Abuse Act (KPAA), KSA 60-3101 to KSA 60-3111. The KPAA allows a parent of a minor child to seek relief under the Act on behalf of the minor child by “filing a verified petition with any district judge or with the clerk of the court alleging abuse by another intimate partner or household member.” The court must hold a hearing within 21 days of the petition’s filing. Prior to this hearing, the parent who originally filed the petition may file a motion for temporary relief, to which the court may grant an *ex parte* temporary order with a finding of good cause shown. The temporary order remains in effect until the hearing on the petition, at which time the parent who filed the petition “must prove the allegation of abuse by a preponderance of the evidence.” The other parent also has a right to present evidence on his or her own behalf. At the hearing, the court has the authority to grant

a wide variety of protective orders it believes are necessary to protect the child from abuse, including awarding temporary custody.

Typically, the protective order remains in effect for a maximum of one year, but, on motion of the parent who originally filed the petition, may be extended for one additional year. Additionally, KSA 60-3107 requires courts to extend protection from abuse orders for at least two years and allow extension up to the lifetime of a defendant if, after the defendant has been personally served with a copy of the motion to extend the order and has had an opportunity to present evidence at a hearing on the motion and cross-examine witnesses, it is determined by a preponderance of the evidence that the defendant has either previously violated a valid protection order or been convicted of a person felony or conspiracy, criminal solicitation, or attempt of a person felony, committed against the plaintiff or any member of the plaintiff's household. Violation of a protection order is a class A, person misdemeanor, and violation of an extended protection order is a severity level 6, person felony.

## Military Child Custody and Visitation

If either parent is a member of the military, there are additional issues to consider in a custody proceeding. For instance, the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. app. §§ 501-596, a federal law meant to allow deployed service members to adequately defend themselves in civil suits, may apply. There are two ways the SCRA is used in military custody proceedings:

- When a service member fails to appear, the SCRA requires the court to appoint counsel to represent the service member; and
- Upon application by a service member, the court must grant a stay of the proceedings if the application contains the required documents. For a procedural stay, service members must show:
  - How military duties materially affect their ability to appear;
  - A date when they would be available to appear;

- That military duties prevent their appearance; and
- That they currently are not authorized for military leave.

State law also applies in these situations. KSA 23-3213 requires that if either parent is a service member, the parenting plan must include provisions for custody and parenting time upon military deployment, mobilization, temporary duty, or an unaccompanied tour. Further, KSA 23-3217 specifies that those circumstances do not necessarily constitute a "material change in circumstances," such that a custody or parenting time order can be modified. If an order is modified because of those circumstances, however, it will be considered a temporary order.

When the parent returns and upon a motion of the parent, the court is required to have a hearing within 30 days to determine whether a previous custody order should be reinstated. In the service member's absence, KSA 23-3217 also allows the service member to delegate parenting time to a family member or members with a close and substantial relationship to the child if it is in the best interests of the child, and requires that the nondeploying parent accommodate the service member's leave schedule and facilitate communication between the service member and his or her children.

## Third Party Custody and Visitation

### Custody

KSA 38-141 recognizes the rights of parents to exercise primary control over the care and upbringing of their children. This stance is consistent with the U.S. Supreme Court's recognition that a parent's fundamental right to establish a home and raise children is protected and will be disturbed only in extraordinary circumstances. *Troxel v. Granville*, 530 U.S. 57 (2000); *Meyer v. Nebraska*, 262 U.S. 390 (1923). As such, parents are generally awarded custody unless they have been determined unfit by a court under the Revised Kansas Code for the Care of Children (KCCC), KSA 38-2201 to 38-2286.

Under the KCCC, KSA 38-2286 requires substantial consideration of a grandparent who requests custody when a court evaluates what custody, visitation, or residency arrangements are in the best interests of a child who has been removed from custody of a parent and not placed with the child's other parent. The court must consider the wishes of the parents, child, and grandparent; the extent to which the grandparent has cared for the child; the intent and circumstances under which the child is placed with the grandparent; and the physical and mental health of all involved individuals. The court is required to state this evaluation on the record. If the court does not give custody to a grandparent, but places the child in the custody of the Secretary of the Department for Children and Families (Secretary) for placement, then a grandparent who requests placement must receive substantial consideration in the evaluation for placement. If the grandparent is not selected for placement, the Secretary must prepare and maintain a written report with specific reasons for the finding.

If a parent is found to be unfit, the court may appoint a permanent custodian or if parental rights are terminated, the child can be adopted. The court must consider placing the child with the grandparents or other close relatives and may grant visitation to other individuals based on a determination of what is in the child's best interests. The child also might be placed in a shelter facility or foster home with the possibility of the child returning to his or her parents depending on parental compliance with the court's reintegration plan.

Aside from a proceeding conducted pursuant to the KCCC, a judge in a divorce case can award temporary residency to a nonparent if the court finds there is probable cause to believe that the child is a child in need of care or that neither parent is fit to have residency. KSA 23-3207(c). To award residency, the court must find by written order that:

- The child is likely to sustain harm if not immediately removed from the home;
- Allowing the child to remain in the home is contrary to the welfare of the child; or
- Immediate placement of the child is in the best interest of the child.

The court also must find that:

- Reasonable efforts have been made to maintain the family unit and prevent the unnecessary removal of the child from the child's home; or
- That an emergency exists that threatens the safety of the child.

In awarding custody to a nonparent under these circumstances and to the extent the court finds it is in the best interests of the child, the court gives preference first to a relative of the child, whether by blood, marriage, or adoption, and then to a person with whom the child has close emotional ties. The award of temporary residency does not terminate parental rights; rather, the temporary order will last only until a court makes a formal decision of whether the child is a child in need of care. If the child is not found to be in need of care, the court will enter appropriate custody orders according to KSA 23-3207(c) as explained above. If the child is found to be in need of care, custody will be determined under the KCCC.

### **Visitation**

KSA 23-3301(a) allows a court to grant grandparents and stepparents visitation rights as part of a Dissolution of Marriage proceeding. Further, KSA 23-3301(b) gives grandparents visitation rights during a grandchild's minority if a court finds that the visitation would be in the child's best interests and a substantial relationship exists between the child and the grandparent. Kansas courts applying these statutes have placed the burden of proof for these two issues on the grandparents. See *In re Creach*, 155 P.3d 719, 723 (Kan. App. 2007). Further, the court must weigh grandparents' claims against the presumption that a fit parent acts in the best interests of the child and not substitute its judgment for the parent's, absent a finding of unreasonableness. *Id.*

### **Child Support and Enforcement**

KSA 23-3001 requires the court to determine child support in any divorce proceeding and allows the court to order either or both parent to pay child support, regardless of the custodial arrangement.

Child support also can be ordered as part of a paternity proceeding. In determining the amount to be paid for child support, KSA 23-3002 requires the court to follow the Kansas Child Support Guidelines. KSA 20-165 requires the Kansas Supreme Court to adopt guidelines for setting child support and consider all relevant factors, including, but not limited to:

- The child's needs, age, need and capacity for education, and financial resources and earning ability;
- The parents' standards of living and circumstances, relative financial means, earning ability, and responsibility for the support of others; and
- The value of services contributed by both parents.

The Kansas Supreme Court has appointed an advisory committee made up of individuals with considerable experience in child support, including judges, attorneys, a law professor, an accountant, legislators, and parents. The Supreme Court also uses an independent economist to provide the advisory committee an analysis of economic changes in the state and the nation regarding the costs and expenditures associated with raising children. The guidelines are intended to be fair

to all parties, easy to understand, and applicable to the many special circumstances that exist for parents and children. Additional information about the Supreme Court guidelines is available at <http://www.kscourts.org/Rules-procedures-forms/Child-Support-Guidelines/2012-guidelines.asp>.

Once established, enforcement of support orders is governed by the Income Withholding Act, KSA 21-3101 et seq.

The Kansas Department for Children and Families recently privatized Child Support Services (CSS), contracting with four vendors who began providing services on September 16, 2013. Contractor information is available at <http://www.dcf.ks.gov/services/CSS/Pages/Contractor-Information.aspx>. CSS includes establishing parentage and orders for child and medical support, locating noncustodial parents and their property, enforcing child and medical support orders, and modifying support orders as appropriate. CSS automatically serves families receiving Temporary Assistance for Needy Families (TANF), foster care, medical assistance, and child care assistance. Assistance from CSS is also available to any family who applies for services, regardless of income or residency.

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