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Judiciary, Corrections, and Juvenile Justice

G-1 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, while parenting time 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 court can determine these issues when a petition is filed for:

- Divorce;
- Paternity;
- Protection order;
- Guardianship of a minor; or
- Adoption.

To determine custody, a court must have authority under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), KSA 23-37,101 to 23-37,405. The first time custody is considered, only a court in the child’s “home state” may make a 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 child’s best interests. KSA 23-3206. After awarding legal custody, 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 (CINC) 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 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 child's best interests, it will consider all relevant factors, including those outlined in KSA 23-3203:

- Each parent's role and involvement with the 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 child's age and emotional and physical needs;
- 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 child's school activity schedule;
- The parties' work schedules;
- 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*, regulated by Kansas Supreme Court Rules, serve as an advocate for the child's best interests and present cases in the same manner as any other attorney representing a client.

Additionally, in determining child custody, residency, and parenting time, a 2016 amendment to the statute allows courts to order a parent to undergo a domestic violence offender assessment conducted by a certified batterer intervention program and to follow all of the program's recommendations.

Modification

KSA 23-3218 allows courts to modify custody, residency, visitation, and parenting time orders, subject to the provisions of the UCCJEA, 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 it determines the child, 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 of another state determines the child, 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 loses continuing jurisdiction, another state can modify an order only if it satisfies the "home state" requirements outlined above.

To modify a final child custody order, KSA 23-3219 requires the party filing the motion to 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 the motion establishes a *prima facie* case, it will consider the facts of the situation to determine whether the order should be modified. Otherwise, it must deny the motion.

In an alleged emergency situation where the nonmoving party has an attorney, the court must first 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, the court cannot modify the order without sworn testimony to support a showing of the alleged emergency (KSA 23-3219(b)). Similarly, KSA 23-3218 states 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. Certain circumstances raise the crime to “aggravated” interference, a severity level 7, person felony.

If a noncustodial parent believes the child needs protection from the custodial parent, the parent can take action under the Kansas Protection from Abuse Act (KPAA), KSA 60-3101 to 60-3111, which allows a parent of a minor child to file a petition 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 abuse by a preponderance of the evidence. The other parent also has a right to present evidence. At the hearing, the court can 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

There are additional legal considerations if either parent is a member of the military. 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. Additionally, if either parent is a service member, KSA 23-3213 requires the parenting plan to 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 the nondeploying parent to 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 generally are awarded custody unless they have been determined unfit under the Revised Kansas Code for the Care of Children (CINC Code), KSA 38-2201 to 38-2286.

Aside from a proceeding conducted pursuant to the CINC Code, KSA 23-3207 allows a judge in a divorce case to award temporary residency to a nonparent if the court finds there is probable cause to believe the child is in need of care or neither parent is fit to have residency. To award residency, the court must find by written order 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 reasonable efforts have been made to maintain the family unit and prevent the unnecessary removal of the child from the child's home or 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 child's best interests, 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 in need of care. If the child is found not to be in need of care, the court will enter appropriate custody orders pursuant to KSA 23-3207 as explained above. If the child is found to be in need of care, custody will be determined pursuant to the CINC Code. For more information on CINC proceedings, see [Briefing Book article Foster Care Services and Child in Need of Care Proceedings](#).

Visitation

KSA 23-3301 allows a court to grant grandparents and stepparents visitation rights as part of a Dissolution of Marriage proceeding. Further, it gives grandparents visitation rights during a grandchild's minority if a court finds 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 and, absent a finding of unreasonableness, weigh grandparents' claims against the presumption that fit parents act in their child's best interests. See *In re Creach*, 155 P.3d 719, 723 (Kan. App. 2007).

Host Families Act

2016 SB 418, the Host Families Act, allows a child placement agency or charitable organization to provide temporary care of children by placing a child with a host family. Host families are subject to screening and background checks and do not

receive payment other than reimbursement for actual expenses. The Act also allows the Kansas Department for Children and Families (DCF) to provide information about respite care, voluntary guardianship, and support services, including organizations operating programs under the Act, to families experiencing financial distress, unemployment, homelessness, or other crises and to parents or custodians during a child protective investigation that does not result in an out-of-home placement due to abuse of a child.

Placement must be voluntary and shall not be considered an out-of-home placement, supersede any court order, or preclude any investigation of suspected abuse or neglect. A parent may place a child by executing a power of attorney that delegates to a host family any powers regarding the care and custody of the child, except power to consent to marriage or adoption, performance or inducement of an abortion, or termination of parental rights. The power of attorney may not be executed without the consent of all individuals with legal custody of the child, and execution is not evidence of abandonment, abuse, or neglect.

The power of attorney may not exceed one year but may be renewed for one additional year. The bill includes an exception, however, for parents serving in the military, who may delegate powers for a period longer than one year if on active duty service, but no more than the term of active duty service plus 30 days. A parent executing a power of attorney under the Act can revoke or withdraw the power of attorney at any time. Upon such withdrawal or revocation, the child must be returned to the parent as soon as reasonably possible.

Child Support and Enforcement

KSA 23-3001 and 23-3002 require courts to determine child support in any divorce proceeding using the Kansas Child Support Guidelines. Courts can order either or both parent to pay child support, regardless of custody. Child support also can be ordered as part of a paternity proceeding. 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.

To execute this charge, the Kansas Supreme Court has appointed an advisory committee made up of individuals with experience in child support, including judges, attorneys, a law professor, an accountant, legislators, and parents. Further, an independent economist provides the advisory committee an analysis of state and national economic changes 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/default.asp>.

Once established, enforcement of support orders is governed by the Income Withholding Act, KSA 23-3101 to 23-3118 and 39-7,135.

DCF 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's responsibilities include 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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