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CHILD CUSTODY AND VISITATION PROCEDURES

This memorandum reviews Kansas statutes concerning child custody determinations and modifications, custodial interference and abuse, the implications of military service for custody, and third-party custody and visitation procedures.

Definitions

Kansas defines “legal custody” 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 2019 Supp. 23-3211). Within that context, Kansas law distinguishes between “residency” and “parenting time.” Residency (KSA 2019 Supp. 23-3207) refers to the parent with whom the child lives, while parenting time (KSA 2019 Supp. 23-3208) consists of any time a parent spends with a child. The term “visitation” refers to the time nonparents are allowed to spend with a child.

Initial Determination

The standard for awarding custody, residency, parenting time, and visitation is what is in the “best interests” of the child. Courts can determine these issues when a petition is filed for divorce, paternity, a 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 2019 Supp. 23-37,101 through 23-37,405. The first time custody is considered, only a court in the child’s “home state” may make a determination. 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 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 2019 Supp. 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 neither parent is found to be fit, to a third party. In determining residency, KSA 2019 Supp. 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 2019 Supp. 23-3211 through 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 2019 Supp. 23-3203.

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 [Rule 110a](#), serve as advocates 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 2017 amendment to KSA 23-3203 allows the court 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

Courts may modify custody, residency, visitation, and parenting time orders, subject to provisions of the UCCJEA, when a material change of circumstances is shown (KSA 2019 Supp. 23-3218). A state that previously exercised jurisdiction will have continuing authority over subsequent motions until it determines the child, child's parents, and any persons 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 persons 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 qualifies as a "home state" (KSA 2019 Supp. 23-37,202; KSA 2019 Supp. 23-37,203).

To modify a final child custody order, the party filing the motion must list 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. Similarly, no *ex parte* order can change residency of a child to the other parent unless there is sworn testimony to support a showing of extraordinary circumstances (KSA 2019 Supp. 23-3218; KSA 2019 Supp. 23-3219).

Custodial Interference and the Kansas Protection from Abuse Act

KSA 2019 Supp. 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 parents, 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 (KSA 60-3101 through 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 2019 Supp. 60-3107 requires courts to extend protection from abuse orders for at least two years and allows extensions 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 the defendant has either previously violated a valid protection order or has 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

Additional legal considerations apply if either parent is a member of the military. For instance, the Servicemembers Civil Relief Act (50 USC App. §§ 3901 through 4043), 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 2019 Supp. 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 2019 Supp. 23-3217 specifies those circumstances do not necessarily constitute a “material change in circumstances,” such that a custody or parenting time order can be modified. An order modified because of those circumstances 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 servicemember's absence, the servicemember may 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 the statute requires the nondeploying parent to accommodate the servicemember's leave schedule and facilitate communication between the servicemember 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 2019 Supp. 38-2201 through 38-2286.

Aside from a proceeding conducted pursuant to the CINC Code, a judge in a divorce case may 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 as explained above (KSA 2019 Supp. 23-3207).

If the child is found to be in need of care, custody will be determined pursuant to the CINC Code. Reports of suspected abuse or neglect may be made by anyone to the Department for Children and Families (DCF) or local law enforcement. Once a report is received, KSA 2019 Supp. 38-2226 requires DCF and law enforcement to investigate the validity of the claim and determine whether action is required to protect the child. If there are reasonable grounds to believe abuse or neglect exist, DCF must take immediate steps to protect the health and welfare of the child, as well as that of other children under the same care. If a child is removed from parental custody and not placed with the other parent, KSA 2019 Supp. 38-2286 requires the court to give substantial consideration to a grandparent who requests custody.

Visitation

Courts may grant grandparents and stepparents visitation rights as part of a Dissolution of Marriage proceeding. Further, Kansas law 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 (KSA 2019 Supp. 23-3301).

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

The Host Families Act (KSA 2019 Supp. 38-2401 through 38-2405.) 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 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 of revocation, the child must be returned to the parent as soon as reasonably possible.

Child Support and Enforcement

KSA 2019 Supp. 23-3001 and 23-3002 require courts to determine child support in any divorce proceeding using the Kansas Child Support Guidelines, which KSA 2019 Supp. 20-165 requires the Kansas Supreme Court to adopt. Additional information about the Supreme Court guidelines is available at <http://www.kscourts.org/About-the-Courts/Programs/Child-Support-Guidelines>. Courts can order either or both parents to pay child support, regardless of custody. Child support also can be ordered as part of a paternity proceeding. Once established, enforcement of support orders is governed by the Income Withholding Act (KSA 2019 Supp. 23-3101 through 23-3118 and 39-7,135).

DCF has 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' 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, 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.