

ASSISTING WITH CHILD CUSTODY ISSUES

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I. BACKGROUND

A. General.

Child custody disputes are among the most emotional and stressful kinds of disputes that can occur between parents or in litigation. The dispute pits two people who care deeply about their child against one another, each bringing into the dispute their own background, histories, psychology, fears, anxieties, and agendas. The parents reactions leading up to and within the child custody dispute may spring from frustrations from the parents' own childhoods, from their continuing (or failed) relationship with their own parents, from anger and upset at the way in which the other parent has treated them in the past or from the way in which they fear they will be treated because of the parent's own psychological makeup, from past abuse or control by the other parent – or their own abuse, control or manipulation of the other parent – or myriad other reasons of which the parents themselves may not be aware.

Bringing child custody disputes into the courts, requires that judges (attorneys and legal staff) try to help the parents in their own particular way to reach a conclusion that may only be the first step in a long, continuing search by the parents to achieve a satisfactory result. In dealing with these matters, the courts are charged with determining what the best result is for the children's interests in widely disparate situations. Unlike most other disputes that come before the legal system, in addressing child custody disputes, the courts are charged not only with determining the children's current living arrangements, but also the nature of the continuing relationship between the parents, between the parents and other relatives of the children, the manner in which parental responsibilities for health, educational and other matters are handled – and, thus, the “balance of power” between those various people, and the ongoing nature of the subject children's family.

Because of these effects, the American Academy of Matrimonial Lawyers provides in its Bounds of Advocacy that:

“In representing a parent, an attorney should consider the welfare of the children.”¹

As explained by the commentary to this particular standard, “Although the substantive law in most jurisdictions concerning custody, abuse, and termination of parental rights is premised upon the ‘best interests of the child,’ the ethical codes provide little (or contradictory) guidance for an attorney whose client’s expressed wishes or interests are in direct conflict with the well-being of the children. This provision stresses the welfare of the client’s children.” To that end, a leading rule in handling child custody disputes is the oft-heard phrase: “First, do no harm.”

B. Historical Aspects.

1. *Until the 1800s, courts rarely addressed “child custody” issues:*

a. Ancient Roman law – father had absolute dominion over his children – including life and death.

b. English common law – father had claim to custody against all others.²

c. Children had no right to live separate from father.

d. Children viewed in economic terms – Father’s right to indenture.

e. Children part of adult society – contributions to family and community.³

2. *In the mid-to-late-1800s, courts started to address “child custody” issues:*

¹ American Academy Bounds of Advocacy – The American Academy of Matrimonial Lawyers Standards of Conduct (1991).

² A mother had no right to claim a child’s custody – in absence of agreement – against the father. A mother was, “entitled to no power over her children but only reverence and respect.”

³ A statute from 1535 provided that “[c]hildren under fourteen years of age, and above five, that live in idleness, and be taken by begging, may be put to serve by the governors of cities, towns, etc. to husbandry, or other crafts or labors.”

- a. Common law paternal custody rules.
- b. Modified harshness of the paternal custody rule by inquiring who could provide “better care.”
- c. Rise of the “Tender Years” doctrine (Mothers “better equipped” to care for small children).
- d. “The Tender Years Doctrine” expressed as “best interest”:

“We understand the law to be, when the custody of children is the question, that the best interest of the children is the paramount fact. Rights of father and mother sink into insignificance before that. Even when father and mother are living together, a court has the power, if the best interests of the child require it, to take away from both parents, and commit the custody to a third person. In other words, a court of chancery stands as a guardian of all children, and may interfere at any time, and in any way, to protect and advance their welfare and interests. Now, in a divorce suit, the court is limited to the question, which of the two parents is the better custodian of the children?”⁴

3. *Mid-to-late Twentieth Century.*

- a. Growing social awareness.
- b. Growing awareness of rights.
- c. Growing awareness of inequality.
- d. Growing suspicion of absolute rules.
- e. Women’s Liberation Movement – Equal Rights Amendment.
- f. Constitutional Equal Protection – Suspect Classifications
 - i. Race

⁴ *In re Bort*, 25 Kan. 215 at 216 (1881).

- ii. Sex
 - iii. Marital Status
 - iv. “Legitimate – Illegitimate”⁵
- g. Courts and Legislatures revisited “presumptions” formed in earlier times – including whether a mother is a “better parent” merely by virtue of sex.⁶
- h. In 1980, the Kansas Legislature abolished the “tender years” doctrine – as a preference or as a “tie-breaker.”⁷
- i. States sought child custody law modernization throughout the 1980s and 1990s and 2000s:
- i. Change and eliminate “labels.”
 - ii. Change and eliminate “fault.”
 - iii. Emphasize shared rights and responsibilities.

II. CURRENT STATUS OF CHILD CUSTODY LAW IN KANSAS

A. Terminology

Terminology is an important consideration in matters dealing with children. Kansas law now provides better definition of terms and de-emphasizes “possessory” language:

1. Legal Custody.

⁵ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652, 95 S. Ct. 1225, 43 L.Ed.2d 514 (1975) (“a father, no less than a mother, has a constitutionally protected right to the ‘companionship, care, custody, and management’ of ‘the children he has sired and raised. . . .’”).

⁶ The Kansas Legislature enacted statutes in the mid-1970s to reduce the influence of the tender years doctrine. 1976 Kan.Sess.Laws, Ch. 234, §1. However, the Kansas Appellate Courts held that amendment did not abolish the “tender years doctrine” in Kansas, but allowed consideration of the “maternal preference” as a “tie-breaker” – “all things being equal.” *Grubbs v. Grubbs*, 5 Kan. App. 2d 694, 696, 623 P.2d 546 (1981).

⁷ In 1980, the Kansas Legislature added the following language to the Kansas statutes: “and there shall be no presumption that it is in the best interest of an infant or young child to give custody or residency to the mother.” 1980 Kan. Sess. Laws, Ch. 175, §2.

“Legal custody” defines the parents’ relative decision-making powers. “Legal custody means the allocation of parenting responsibilities between parents, or any person acting as a parent, including decision making rights and responsibilities pertaining to matters of health, education and welfare.”⁸ Parents have a constitutional right to the “custody” of their children⁹; included is the right to determine how children are raised.¹⁰ Parental custody rights are not absolute, but may be restricted by the State’s police powers, and in ways not violative of the parents’ constitutional rights.¹¹ “Legal custody” does not address the time each parent spends with the children, the schedule for their time-sharing, the manner by which the parents exchange their children, or any other similar matter.

a. Joint Legal Custody.

Kansas law presumes that both parents should share decision-making for their children and the statutes provide that in child custody disputes, the courts are to prefer “joint legal custody.”¹² Joint legal custody means that both parents have equal rights to involvement in and responsibility for decisions affecting their children’s health, education and general welfare, and that they “shall have equal rights to make decisions in the best interests of the child.”¹³ Neither parent has a primary right to decide matters affecting the children without consulting the other parent or without that other parent’s input to that decision. However, “joint legal custody” does not mean the parents must make all decisions about their children “jointly” and it does not mean that they must consult each other before making any decision about their children. Joint legal custody requires only that the parents both have input and

⁸ K.S.A. 60-1623 (2000).

⁹ *Quilloin v. Walcott*, 434 U.S. 246, 54 L.Ed.2d 511, 98 S. Ct. 549, *reh. denied* 435 U.S. 918 (1978); *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972); *In re Guardianship Williams*, 254 Kan. 814, 869 P.2d 661 (1994). *Troxille v. Granville*, 530 U.S. 50, 147 L.Ed.2d 49, 210 S.Ct. 2054, 2060 (2000). (“the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.”)

¹⁰ *In re Hood*, 252 Kan. 689, 847 P.2d 1300 (1993). *Troxille v. Granville*, 530 U.S. 50, 147 L.Ed.2d 49, 210 S.Ct. 2054, 2060 (2000)(the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).)

¹¹ *State v. Garber*, 197 Kan. 567, 419 P.2d 896 (1966); *In re Cooper*, 230 Kan. 57, 62, 631 P.2d 632 (1981); *DeGraeve v. Holm*, 30 Kan.App.2d 865, 50 P.3d 509 (2002)(grandparent visitation allowed under certain circumstances).

¹² K.S.A. 2001 Supp. 60-1610(a)(4)(as amended by 2000 Kan. Sess. Laws, Ch. 171, § 15).

¹³ K.S.A. 2001 Supp. 60-1610(a)(4)(as amended by 2000 Kan. Sess. Laws, Ch. 171, § 15).

equal rights to make decisions about the child.¹⁴ It does not give either parent “moment-to-moment input, much less a veto power, over every large and small choice about child rearing by the other parent.”¹⁵ The parent with whom the child is then spending time makes day-to-day decisions.¹⁶ Parents having joint legal custody have equal access to all information about their children’s health, education and welfare.

b. Sole Legal Custody.

The alternative to “joint legal custody” is “sole legal custody.” A court may order sole legal custody only when the court makes specific findings why it is not in the child’s best interest that the child’s parents equally participate in and have responsibility for decisions affecting that child’s health, education and/or welfare. The designation of one parent as the “sole legal custodian” vests in that parent the primary power to make decisions affecting the child’s health, education, and welfare of the child.¹⁷ The award of sole legal custody to one parent does not preclude the other parent from any decision-making, but places in the parent having sole legal custody the ultimate decision-making power. The Kansas statutes also provide that a court may designate one parent as the primary decision maker on one or more issues of health, education or welfare without designating either parent as having “sole legal custody.”¹⁸ The statute makes it clear that sole legal custody can be ordered only when the court determines that it is in the *child’s best interest* that both parents not have equal rights to make decisions regarding that child.¹⁹ The grant of “sole legal custody” to one parent does not deprive the other parent of the right of access or ability to obtain information about the child’s health, education and general welfare. A parent’s right to access and obtain information can be restricted only if the court makes additional specific findings that the restrictions are in the child’s best interests.²⁰ The grant of

¹⁴ *Yoder v. Yoder*, 11 Kan. App. 2d 330, 333, 721 P.2d 294 (1986)(either parent may consent to marriage by minor child); *Jones v. Walker*, 29 Kan.App.2d 932, 33 P.3d 872 (2001) (“joint legal custody entitles the holder to participate in the most important of the decisions affecting the child’s life”).

¹⁵ *Jones v. Walker*, 29 Kan.App.2d 932, 33 P.3d 872 (2001) (“[Joint legal custody] does not give the holder moment-to-moment input, much less veto power, over every large and small choice about child rearing by the residential custodian.”).

¹⁶ *Jones v. Walker*, 29 Kan.App.2d 932, 33 P.3d 872 (2001).

¹⁷ K.S.A. 60-1610(a)(4)(B) (2005).

¹⁸ K.S.A. 60-1624(b)(3)(2000 Kan.Sess.Laws, Ch. 171, §26)(temporary orders) and K.S.A. 2001 Supp. 60-1625(a)(1)(2000 Kan.Sess.Laws, Ch. 171, §27)(final orders)

¹⁹ K.S.A. 60-1610(a)(4)(B) (2005).

²⁰ K.S.A. 60-1610(a)(4)(B) (2005).

sole legal custody does not automatically mean that the child lives with the parent granted sole legal custody.²¹

2. *Residency.*

“Residency” is the place where the child lives. Residency does not presume that the child lives “primarily” with one parent or the other. The Kansas statutes provide that the court may order that the child reside with one or both parents on a basis consistent with that child’s best interests. Kansas statutes do not recognize any designations of “residency” between parents other than “divided residency.” Instead, the court is to determine an appropriate schedule of “parenting time.” In determining a parenting time schedule, the statutes do not prefer any particular residential arrangement – such as “primary” residency.²² “Residency” does not affect legal custody; it does not grant one parent more rights than the other parent to decide issues in the child’s best interests; and it does not effect the court’s scheduling of “parenting time.” The elimination of labels such as “primary” residency,” means that the courts and parents can determine an appropriate parenting time schedule, instead of arguing over the “label” attached to each parent.²³

a. *Divided Residency.*

Kansas law allows the court to order that one or more children reside with each parent and have parenting time with the other “in exceptional circumstances.” The statute does not define what constitutes “exceptional circumstances,” and consideration of the applicable factors is left to the trial court.²⁴

²¹ See K.S.A. 60-1610(a)(5)(2005) (“After making a determination of the legal custodial arrangements, the court shall determine the residency of the child from the following options, which arrangement the court must find to be in the best interest of the child.”)

²² K.S.A. 60-1610(a)(5); K.S.A. 60-1625(b)(2). In the course of debate about amendments to the statute in 1999-2000, there was contentious discussion about the types of residential care the statute should prefer -- “primary residency” or “shared residency.” The Kansas Legislature eliminated all terms so that the courts and parents had broader power in deciding what arrangement would best serve the child in each individual situation.

²³ Most psychologists agree that such terms are outdated and that, in some situations, use of such terms causes undue conflict between parents, since the old designation of one parent as the “residential” parent and the other as the “visiting” parent implied that one parent was no longer a full parent, but had only a limited right to see and interact with the child. See GOLDSTEIN, *et al.*, BEYOND THE BEST INTERESTS OF THE CHILD, at 38 (1973) (“A ‘visiting’ or ‘visited’ parent has little chance to serve as a true object for love, trust, and identification, since this role is based on his being available on an uninterrupted day-to-day basis.”) See also I.RICCI, MOM’S HOUSE, DAD’S HOUSE, MAKING TWO HOMES FOR YOUR CHILD, 1 (Fireside 1997).

²⁴ K.S.A. 60-1610(a)(5). *LaGrone v. LaGrone*, 238 Kan. 630, 633, 713 P.2d 474 (1986) (“The trial court is in the best position to determine the needs and best interests of the children.”).

b. Non-parental Residency.

Kansas law provides that only in very narrow circumstances can courts award a non-parent rights of residency against a parent. First, when the child is a “child in need of care”; and Second, when neither parent is fit to have care of the child. The holding by the United States Supreme Court in *Troxel v. Granville*²⁵ makes clear that any statutory provision granting temporary custody to a third party without parental consent or a specific finding that the child’s parents are unfit is unconstitutional.²⁶

3. Parenting Time.

Parenting time is the time designated for each parents to spend with the child. Parents do not “visit” their children. The terms have changed to recognize that both parents are an integral part of their child’s life and that the time the child spends with both parents is equally important.

²⁵ *Troxelle v. Granville*, 530 U.S. 50, 147 L.Ed.2d 49, 210 S.Ct. 2054 (2000).

²⁶ See also *In re Guardianship of Williams*, 254 Kan. 814, 820, 869 P.2d 661 (1994); *Sheppard v. Sheppard*, 230 Kan. 146, 630 P.2d 1121 (1988) (finding statute unconstitutional which provided that third-party custody could be awarded without finding of parental unfitness). *State ex rel. SRS v. Clubb*, 31 Kan.App.2d 278, 39 P.3d 80 (2001) (2000 amendments put statute in conformity with case law dictating controlling nature of parental preference doctrine).

4. *Third Party Visitation.*

“Visitation” describes the time spent by a child with a third party (*i.e.* a non-parent, such as a grandparent, aunt, uncle, stepparent, sibling or other third party). A parent does *not* visit his or her own child.²⁷ A third party does not have the right to visit the child unless the parents agree to that visitation or the court orders that visitation on appropriate motion and order.

B. *Child Custody Jurisdiction.*

In order for a State to have the power to enter any child custody orders, that State must have child custody jurisdiction. If a State enters a child custody order – whether temporary or permanent – without child custody jurisdiction, the order is invalid. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) governs child custody jurisdiction in Kansas and forty-five other States. The UCCJEA is a revised, updated version of the Uniform Child Custody Jurisdiction Act, which is in effect in the four States that have not yet enacted the UCCJEA.²⁸ The UCCJEA provides a “hierarchy” under which child custody jurisdiction is determined. If another State possesses child custody jurisdiction under a higher-level provision, then that is the State in which the child custody action must proceed:

1. *Initial Child Custody Jurisdiction.*

a. *“Home State.”*

(i) If a child has lived with a parent(s) for at least six consecutive months immediately before the commencement of an initial child-custody, then that State is the child’s “home state” and a child custody order may only be issued in that State.

(ii) If a child is less than six months old, then the child’s “home state” is that State in which the child lived with a parent from birth until commencement of a child custody action.

(iii) If a child lived with a parent(s) in a State for at least six months and left that State, but a

²⁷ See Note 23.

²⁸ Missouri, Vermont, Massachusetts, and New Hampshire.

parent remains in that State, no other State may assert child custody jurisdiction until six months has passed since the child left the initial State and a child custody action was not commenced during that six-month period.

b. “Significant Connection Jurisdiction.”

If the child does not have a “home state,” then a State may assert child custody jurisdiction if

(i) the child and the child's parents, or the child and one parent, have a “significant connection with the State” *other than mere physical presence*; and

(ii) “substantial evidence” is available in this State concerning the child's care, protection, training, and personal relationships.

In order to consider child custody motions in different states as “simultaneous proceedings,” there must be a determination that both states have jurisdiction in substantial conformity with the UCCJEA. *In re Marriage of Ruth*, 32 Kan.App.2d 416, 83 P.3d 1248 (2004).

c. “More appropriate forum.”

If the child does not have a “home state” and all courts that have “significant connection jurisdiction” declined to exercise jurisdiction because another State is the more appropriate forum, to determine child custody issues, then that “more appropriate” State may exercise child custody jurisdiction.

2. *Continuing, Exclusive Jurisdiction.*

After a State properly undertakes child custody jurisdiction, that State retains exclusive jurisdiction over the child until either

(i) the child and both parents have moved from the State;
or

(ii) a court of the original State determines that neither the child, nor the child and one parent, any longer have a significant connection with the State and substantial evidence is no longer available in the State concerning the child's care, protection, training, and personal relationships.

C. Factors in Investigation and Determination of Child Custody Issues.

1. Statutory Factors.

The Kansas statutes set forth a non-exclusive listing of those things that the courts may consider in determining the question of legal custody, residency and an appropriate schedule of parenting time.²⁹ This listing also forms a basis for investigation and inquiry from the client and others:

- a.** The length of time that the child has been under the actual care and control of any person other than a parent and the circumstances relating thereto;
- b.** the desires of the child's parents as to custody or residency;
- c.** the desires of the child as to the child's custody or residency;
- d.** the interaction and interrelationship of the child with parents, siblings and any other person who may significantly affect the child's best interests;
- e.** the child's adjustment to the child's home, school and community;

²⁹ K.S.A. 2001 Supp. 60-1610(a)(3) (*as amended by* 2000 Kan. Sess. Laws, Ch.171, §15).

f. 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;

g. evidence of spousal abuse;

h. whether a parent is subject to the registration requirements of the Kansas offender registration act, or any similar act in any other state, or under military or federal law;

i. whether a parent has been convicted of abuse of a child;

j. whether a parent is residing with an individual who is subject to registration requirements of the Kansas offender registration act, or any similar act in any other state, or under military or federal law; and

k. whether a parent is residing with an individual who has been convicted of abuse of a child.

2. *Additional Factors.*

In addition to statutory factors, the Kansas appellate courts have identified other factors that judges may consider in an appropriate case as affecting the best interests. Although the list changes depending on the case and special social concerns, some of the issues identified include:

a. Parent's medical and psychological health issues

b. Children's medical, psychological, and developmental issues.

c. Parents' stability

d. Status quo arrangement.

e. Quality of the parents' respective affections and feelings for the children;

- f. Moral and ethical environment;
- g. Parents' lifestyles;
- h. Criminal record and criminal activities;
- i. Other factors.

Because the courts determine child custody issues “in the child’s best interests, and because the “best interests” standard is so flexible, the trial court has wide ability and discretion to consider any other factors that may effect the child and that assist in determining the appropriate parenting schedule.

3. Prohibited Considerations.

Although the best interests standard allows very broad consideration of factors, the Kansas appellate courts have identified a few factors that the trial court cannot consider in making various parts of the parenting plan; or, at least, must be cautiously addressed:

- a. Gender of the Parent;
- b. the “Tender Years Doctrine”;
- c. Financial income/resources of the parents and relative comparison.
- d. Religious preferences and training

D. Post-Decree Child Custody Modification.

- 1. *Standards of Consideration:*
 - a. “Material Change in Circumstances.”
 - b. “Best Interests of the Child.”

2. *Nature of Previous Child Custody Order.*

- a. Parent's Agreement
- b. Default Entry.
- c. Court Determination.

3. *Statutory Requirements.*

- a. Drafting requirements
- b. Post-Decree Temporary/Emergency Orders.
- c. Notice requirements
- d. Hearing requirements

III. OBTAINING RELEVANT INFORMATION.

A. Client Interview

B. Custody Questionnaires

C. Disclosures

D. Informal Discovery

E. Formal Discovery

1. Requests for Production

2. Interrogatories

3. Requests for Admission

4. Depositions

IV. WORKING WITH EXPERTS.

V. THE GUARDIAN AD LITEM

A. Role of the Guardian Ad Litem

1. *What is a Guardian Ad Litem?*

a. Investigator

b. Evaluator

c. Representative

d. Attorney

1. The Child's Attorney'

2. The Best Interest Attorney

B. Standards for Representation.

1. *Representation in Abuse and Neglect*

2. *Representation in Child Custody Matters*

C. Kansas Rules and Limitations

VI. PARENTING PLANS

A. Considerations in Drafting

1. Parents Together or Separate.

- a. Ever lived together?
- b. How long lived together?
- c. How recently separated?
- d. have the parents lived together?
- e. How long have the parents lived together?
- f. How long have the parents lived together with the child?

2. Children

- a. Number
- b. Ages
- c. Relationship with parents
- d. Activities
- e. Friends
- f. Special needs

2. Long Distance Parenting Plans

- a. Distance between parents

- b. Major Cities
- c. Travel time and method

3. *Parents*

- a. Work / Stay at Home
- b. Work hours/schedule/nature of work
- b. Single, remarried
- c. Previous/subsequent family
- d. Medical/Psychological/Other needs

4. *Other Considerations*

- a. Other family members
- b. Abuse/control/manipulation
- c. High Conflict
- d. Parallel parenting
- e. religious considerations
- f. psychological aspects
- g. Other.

B. “Guidelines”

C. Parenting Plan Forms/Clauses/Provisions