Third Party, Custody and Visitation after the 2000 Legislature and *Troxel*

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I. Third Party Custody—The Unfitness Standard under the Parental Preference Doctrine


In 1949 the Stout case clearly established the appropriate test in Kansas in custody disputes between nonparents, who have actual custody of the child, as against a parent seeking to re-gain custody. In this case, the Kansas Supreme Court held that:

[under our recent and often repeated decisions, to which we have strictly adhered for many years, the established and inviolate rule has been and now is that a parent who is able to care for his children and desires to do so, and who has not been found to be an unfit person to have their custody, in an action or proceeding where that question is in issue, is entitled to the custody of his children as against grandparents or others who have no permanent or legal right to their custody, even though at the time the natural parent seeks their custody such grandparents or others are giving the children proper and suitable care and have acquired an attachment for them.

We frankly concede that on rare occasions the rule just stated leads to consequences which sometimes appear to be harsh and do not correspond with our sympathies under the exigencies of a given case. Even so we are convinced that to change it would lead to more frequent results of that character. Be that as it may the doctrine is now too firmly entrenched in the settled law of this state to permit its repudiation and we are constrained to adhere to it.

The Court also admitted that there were prior cases that did not follow this rule. The grandparents' brief cited earlier Kansas cases that used of the best-interests-of-the-child standard instead of the unfitness of the parent standard. In addressing these citations, the Court stated:

In their brief appellees cite several decisions wherein there is some language emphasizing that the welfare of children is the paramount issue in a custody proceeding that which, perhaps, justifies the inference that in a contest between a natural parent and grandparents or others who have no permanent legal right to their custody, the district court may give the children of such parent to third persons notwithstanding it has failed to find that he is an unfit person to have their custody. It is not necessary that we refer to such cases or attempt to harmonize them with those to which we have heretofore referred. It will suffice to say that if there is any language to be found in any of our decisions justifying the construction that the children of a natural parent may be given to third persons without a finding such parent is an unfit person to have their custody it should be and is hereby disapproved. [emphasis added]
B. *In re Vallimont*, 182 Kan. 334, 321 P.2d 190 (1958)

Given the precedent of the *Stout* case, some of the later cases brought a new legal strategy for the third party custodians—alleging and attempting to prove parental unfitness. For the definition of unfitness, the *Vallimont* decision relied on the standard used in the juvenile court statutes in defining a deprived and neglected child. The Court stated that:

> the juvenile court was empowered to take as "dependent and neglected" a child from its parents having custody, where the home was an unfit place for such child by reason of neglect, cruelty or depravity on the part of its parents.

... We think it entirely plain that misconduct on the part of parents which would empower a juvenile court to take jurisdiction of a child as "dependent and neglected" is likewise such breach of parental duty as to make the parents unfit to be entrusted with the custody and rearing of their child in a custody award matter. [emphasis in original]

In reaffirming the standard of proof for unfitness, the Court also stated, "[i]t has been held that a court will not deprive a parent of the custody of his minor children upon a charge of unfitness unless the charge is established by clear and convincing evidence." [emphasis in original]

III. Attempts to By-Pass the Unfitness Standard

For every firm rule established in law, there always will be those cases in which the application of the rule appears harsh and inappropriate. And when the doctrine deals with children's lives, and overrides the actual best interests of the children involved, there is even more pressure to find a way around the hard and fast rule. Numerous attempts have been made at circumventing the Kansas Supreme Court's formulation of the parental preference doctrine, either by the legislature, by the lower courts and, in one case, by the Supreme Court itself.


In this case, the divorce court had granted custody to the mother. Ten months later the father filed for custody of the 2 year old girl, requesting the court to grant him custody but that the child should reside with Mr. and Mrs. Joy Kitchen, unrelated third parties. Three years later, when the child was 5 years old, the mother filed for a change in...
custody. Her position was that the child was actually in third party custody and, as the natural mother, she had the right of custody as against the third party custodians. The evidence was that eight months following the change in custody, the father remarried. He, however, maintained physical custody with the Kitchens. His position at trial was that he did not want to disrupt his daughter's stable living arrangement. A social worker from SRS also testified that it was not in the best interests of the child to move her from the Kitchen household. The trial court maintained the previous custody order, keeping the child in the father's custody, but physical residence with the Kitchens.

On appeal, the Supreme Court affirmed the trial court's decision. According to the Supreme Court, the father had legal custody of the child, which was defined as including "the right to the child's services and earning, and the right to direct his activities and make decisions regarding his care and control, education, health and religion." The court relied on case law in which the fathers were given custody but physical custody was with the fathers' parents because the fathers' employment or inadequate living arrangements required that the child live with his parents. The Court applied this precedent in stating that "[b]ased on these cases, we believe the appellee exercised sufficient decision-making power regarding Cynthia's care and control, education, health and religion to constitute custody."

The evidence the Court relied on to substantiate the father's exercise of custody was that he visited with the Kitchens on a regular basis about the child's activities. This "regular basis" was once a month according to Mr. Kitchen's testimony and two or three times a month according to the father's testimony. However, the Supreme Court did not mention that at the trial there also was testimony from Mrs. Kitchen that the child referred to Mr. Kitchen as "Daddy" and referred to her biological father by his first name. In addition, the social worker testified that "until recently Cynthia Trompeter was not aware that the Kitchens were not her real parents. This was explained to her . . . but she..."
still thinks of Mr. and Mrs. Kitchen as her mother and father."

Obviously, the framing of this case in the context of a parental custody battle rather than a parent-third party custody dispute was the only way the Court could protect the actual best interests of this child. Consequently, if the custodial parent approves of the child living with third party custodians and evidence can show the parent has at least a marginal interest in the child, the Court can frame the case as an intra-parent custody dispute and avoid the application of the parental preference doctrine.

2. Statutory Amendments—1980

Until 1980, the unfitness standard of the Kansas parental preference doctrine was case law, not statutory law. In 1980, however, the legislature attempted to create an exception to the parental preference doctrine by amending K.S.A. § 60-1610. The amendment permitted the court, in its discretion, to award custody to a third party, without a finding of unfitness, if the custodial parent had voluntarily placed the child with the third party for more than six months and the order granting custody to the nonparent was in the best interest of the child. The amendment was immediately challenged in the case of Sheppard v. Sheppard.


In this case, Mrs. Sheppard had placed her son with her parents, who had cared for the boy for three years before they filed for custody. The trial court determined that Mrs. Sheppard was a fit parent but, pursuant to the new amendment, the court awarded custody to the grandparents based on the best interests of the child. The Kansas Supreme Court reversed the custody award, finding the 1980 amendment violated the due process rights of the parent. The court interpreted the United States Supreme Court cases of Stanley v. Illinois, 405 U.S. 645 (1972) and Quillion v. Walcott, 434 U.S. 246 (1978), stating parents have a fundamental right, protected by the fourteenth amendment, to the custody of their children. Consequently, the state can
overcome this fundamental right only by showing unfitness. In reaching its decision, the court ruled:

What we hold here is simply this: that a parent who is not found to be unfit, has a fundamental right, protected by the Due Process Clause of the United States Constitution, to the care, custody and control of his or her child and that the right . . . cannot be taken away in favor of a third person, absent a finding of unfitness on the part of the parent.

The Kansas Supreme Court's reliance on the language in Stanley and Quillion cases that parents have a fundamental right to the custody of their children appears to be somewhat misplaced when one considers that neither of these cases involved an issue of parent versus nonparent custody. Although the Court in the Stanley case required a fitness hearing before the children could be taken from their father's custody, the Court imposed this requirement in the context of a juvenile court proceeding based on neglect. This was not a case in which the father had placed the children in the custody of third parties. Clearly, a juvenile case, brought on behalf of the state, is a materially different procedure than a motion to modify a custody decree based on the moving party having actual physical custody for a substantial period of time.

The reliance on the Quillion case is even more perplexing. Quillion involved an adoption by the stepfather of a child born out of wedlock. The natural father alleged he had a due process right to a fitness hearing to determine whether his consent was necessary for the adoption. The Supreme Court found that a fitness was not required and the natural parents' consent was unnecessary if the prevention of the adoption was not in the child's best interests. Consequently, the Quillion case does not support the parental preference doctrine, but rather, the Supreme Court balanced the best interests of the child with the rights of the parents.

The result of the Sheppard case is that the legislature cannot enact legislation that allows nonparent custody in cases where the parents are fit, even if the nonparent custody is in the actual best interests of the child.

The Family Law Advisory Committee, the principal drafters of the 1982 amendments to the Kansas Divorce Code, amended the custody provisions of the Code, bringing it in line with the current case law. However, the Committee members believed that all cases of parental unfitness should be handled in the court that determines issues of unfitness on a regular basis—the juvenile court. Consequently, the Code provides that the divorce court can place the children in third party custody on a temporary custody basis, upon finding probable cause that the child is a child in need of care under the juvenile court Code for Care of Children. The divorce court then forwards the case to the prosecutor for proceedings in the juvenile court. The rationale for this statutory provision was that the juvenile court was best equipped to handle a proceeding alleging the parents were inappropriate custodians for their children. The amendment guaranteed that the same standards would be applied in all cases of nonparent custody, which would be in keeping with the holding in Vallimont, supra I.B., which relied on the juvenile court provisions to define situations in which parents were not proper custodians for their children. Also, the juvenile court statutes required the juvenile court to order a reintegration plan for the family, and the juvenile court had the authority to order services provided to the parents to facilitate reintegration. See K.S.A. § 38-1565. These procedures protected the parents' rights in an evenhanded and consistent fashion.

F. Continued Discomfort with the Kansas Parental Preference Doctrine—In re Criqui, 14 Kan. App. 2d 672, 798 P.2d 68 (1990)

Nine years after the Sheppard decision, there was another attempt to limit the unfitness standard of the parental preference doctrine, this time by the Kansas Court of Appeals. In re Criqui involved a divorce in which the court placed the four children in the custody of their mother. Later, after the father filed for a change in custody, the mother and father agreed to give custody of the children to the father's two sisters. The father withdrew his motion for a change in
custody and the parties filed an "Agreed Order Changing Custody", which the court signed, placing the children in their aunts' custody, pursuant to the agreement between the parents. Three years later, the mother filed a motion for custody of the children. The trial court denied her motion, stating that an abrupt change in custody of the minor children would be detrimental to the children at this time. The trial court also held that the best-interests-of-the-children standard was an exception to the parental preference doctrine.

In finding the parental preference doctrine inapplicable in this case, the appellate court scrutinized the language of the previous cases. The appellate court relied on language that stated a court is required to find a parent unfit if the custody dispute is between a parent and "grandparents or others who have no permanent or legal right to [the child's] custody." [emphasis in original] The appellate court said that in this case, the "Agreed Order Changing Custody" gave the aunts a legal right to custody, therefore the trial court was not required to find the mother unfit. The Court of Appeals also looked at language in the Sheppard case, which stated "the right of such parent to custody of the child cannot be taken away in favor of a third person absent a finding of unfitness on the part of the parent." [emphasis in original] The appellate court found this language meant a court could not "take the children away", but since the Criquis voluntarily placed the children in the aunts' custody, the Sheppard case did not apply.

The court relied on an Alabama case because it "found no reported Kansas case and no Kansas statute directly on point." The Alabama court stated that the presumption of parental custody "does not apply after a voluntary forfeiture of custody or a prior decree removing custody from the natural parent and awarding it to a nonparent." In those situations, the Alabama court required a showing of a material change in circumstances to alter the custody of the children. The appellate court's reliance on Alabama case law is interesting, since Alabama's "voluntary forfeiture" exception appears to be the same exception the Kansas Supreme Court held as unconstitutional in the Sheppard case. The Criqui case was not appealed to the Kansas Supreme Court, so it took several years before the Kansas Supreme Court had an opportunity to review the


*Criqui* rationale, which opportunity came in the 1994 case *In re Williams*.


The *Williams* case involved a mother's attempt to regain custody of her son, Nolynn, by filing a motion to terminate the voluntary guardianship of her friend, Cindy Hawley. Cindy began babysitting Nolynn three weeks after his birth and by the time he was 4 months old he was in her care full time. The mother was not financially and emotionally capable of caring for Nolynn and the two women agreed that a court should appoint Cindy as Nolynn's guardian. The petition for guardianship stated the child was in need of a guardian because the petitioner (mother) "is unable at the present time to give adequate care and maintenance" to Nolynn. There was no record of evidence presented that the mother was unfit and the court granted the petition based on the agreement of the parties.

When Nolynn was 15 months old, the mother filed a motion to terminate the guardianship. At the hearing, the court found the mother's fitness was not in issue. The mother asserted her right of custody under the parental preference doctrine and Cindy relied on the holding in the *Criqui* case, stating that the parental preference doctrine did not apply and, instead, the mother must show that a change in custody would materially promote the child's best interests. The trial court adopted the *Criqui* analysis, maintaining custody with the guardian, and the mother appealed.

The Kansas Supreme Court analyzed the *Criqui* case and rejected its analysis on every point. The Court noted that although the *Criqui* court stated there were no Kansas cases on point, the Kansas Supreme Court cited and analyzed, in detail, case after case in which, under every conceivable fact pattern, the Kansas Court applied the parental preference doctrine, which required a showing of unfitness. In overturning the *Criqui* decision, the Court stated:

In *Criqui* the court seized upon the words from many of our
cases in which we have held the parental preference doctrine controls against nonparents "who have no permanent or legal right" to the child's custody to fashion an unjustified exception to the general rule. As made clear by our many decisions on the issue, the "legal right" referred to means a permanent legal relinquishment by adoption, severance of parental rights, or other appropriate proceedings terminating the parent-child relationship. The "legal right" referred to does not contemplate courts orders granting custody in divorce, guardianship, or similar proceedings where the parent-child relationship is not severed or terminated and the order is not permanent but one subject to reconsideration, modification, or termination by the court.

In this language, the Kansas Supreme Court addresses every imaginable fact pattern involving child custody disputes between parents and nonparents and clearly applies the parental preference doctrine. However, in the very next paragraph, the court states "[w]e adhere to the rule that absent highly unusual or extraordinary circumstances the parental preference doctrine is to be applied in a custody dispute over minor children when the dispute is between a natural parent who has not been found unfit and a nonparent." [emphasis added] Given the history of the continued reluctance of the trial courts to remove children from third party custodians when the evidence clearly shows that a change in custody will be detrimental to the children, it probably will not take long before yet another case finds its way to the Kansas Supreme Court because the trial court maintained the custody in the third parties because the case involved "highly unusual and extraordinary circumstances." And once again, if there is no finding of parental unfitness, the Kansas Supreme Court will reverse.


In 1995 the nonparental custody statute under K.S.A. § 60-1610(a)(4)(D) was amended, adding new language under section (iii) which would allow the court to award “temporary” custody to nonparents. The new language provided that if the court, in a divorce, separate maintenance or annulment action, found that there was probable cause to believe the child was
residing with a grandparent, aunt or uncle, and the relative had actual physical custody of the child for a significant length of time, then the court could award “temporary” custody of the child to the relative if the court found the award of custody was in the best interests of the child. In addition, the award of “temporary” custody under the statute was subject to annual review to determine whether the order continued to be in the best interests of the child. This amendment appears to circumvent the parental preference doctrine, which requires the finding of unfitness, before a child can be placed in the custody of a nonparent.

The 2000 Legislature deleted this amendment, recognizing that the language violated the holding in the Sheppard case. Consequently, the new provision, now designated K.S.A. § 60-1610(a)(5)(C), provides that children will be placed with nonparents only through a procedure that requires the court to refer the case to the juvenile court under a child in need of care proceeding. Under this statutory provision, all children in court-ordered nonparent placement will be under the exclusive jurisdiction of the juvenile court. Consequently, Kansas's parental preference doctrine is probably the most protective of parental rights in the entire nation.

I. Continuing Jurisdiction and Nonparental Custody Under K.S.A. § 60-1610

Two recent cases have ruled that if the custody/residence of children was awarded under a divorce decree, the divorce court continues to have subject matter jurisdiction to modify child custody provisions, including petitions involving nonparents, so long as the provisions of the UCCJA (now known as the UCCJEA) are met. See In re Osborne, 21 Kan. App, 2d 374, 901 P.2d 12 (1995) (involving a step-mother who filed a motion, after the death of her husband, to modify her husband's custody order, seeking custody of her step-children. Her husband had been named the residential parent of her step-children, pursuant to a court order in his prior divorce. The court of appeals held that a motion to modify custody can be filed in the divorce action, even though one of the parties to the divorce has died.) and In re Burbank, 23 Kan. App. 2d 602, 932 P.2d 466 (1997) (involving a grandparent who filed a motion to change custody under the original divorce decree, seeking custody of her grandchild.) Caveat—Although jurisdiction to modify a
custody order in a divorce action continues as long as the court has jurisdiction under the UCCJEA, both of these cases involved attempts to obtain custody under language in K.S.A. § 60-1610(a)(4)(D)(iii), which was repealed by the 2000 legislature. Consequently, the cases can be relied upon for the courts' jurisdictional analysis only, but should not be relied upon concerning the statutory language that no longer exists. See I.H. supra.


The *In re M.M.L.* case involved a child in need of care (CINC) case in which the father sought custody of his daughter who had been adjudicated a CINC five years earlier. The father had not known about the proceeding because the mother had kept the whereabouts of the child from the father. After the father discovered that his daughter was in foster care in Great Bend, he was brought in to the CINC proceedings, and he obtained visitation rights with his daughter after a period of counseling prepared his daughter for the eventual visits. When the father eventually sought custody of his daughter, however, the court continued the foster care placement under K.S.A. § 38-1563 because the daughter did not want to live with her father and she had been integrated into her foster family and community. Specifically the court found that the father was not unfit, but that the unfitness standard under the Kansas parental preference doctrine did not apply when the CINC statutes were involved, but rather the appropriate standard, set out in K.S.A. § 38-1563, was the best interests of the child.

The Kansas Supreme Court reversed, applying the parental preference doctrine to cases involving placement of a child outside the parental home under K.S.A. § 38-1563 of the Kansas Code for Care of Children. The court stated:

we hold that the best interests of the child test contained in K.S.A. § 38-1563(d) is constitutional when the court has determined by clear and convincing evidence that the parent is unfit or that highly unusual or extraordinary circumstances exist which substantially endanger the child's welfare. Absent such evidence and findings, the statute is unconstitutional, and the rights of the
parent or parents under the parental preference doctrine are paramount and control over the parental power of the State. [emphasis added]

2. 2000 Amendments to the Kansas Code for Care of Children and the Juvenile Offender Code

It appears that the amendments to the Kansas juvenile court statutes were specifically directed to the language in the In re M.M.L. case, to prevent, in the language of the amendments, the "unnecessary removal of the child from the home." The most prevalent amendments add language limiting the removal of CINCs or juvenile offenders from their homes to situations in which "remaining in the home is contrary to the welfare of the child or that the placement is in the best interests of the child." Although the amended language appears throughout both of the juvenile codes, the most notable addition is to K.S.A. § 38-1563(d), the section addressed in the In re M.M.L. case.

K. The American Law Institute’s Principles Governing the Allocation of Custodial and Decisionmaking Responsibility for Children

The American Law Institute (ALI) has been drafting Principles that state legislatures can adopt in determining which parties would have substantive and procedural rights involving children. These Principles would recognize three groups of individuals who may have custody/residential rights and rights to decision-making responsibility for children. These three categories are: Legal Parent, Parent by Estoppel, and De Facto Parent. See Appendix A.


This plurality decision (by Justice O’Connor, with Chief Justice Rehnquist, Justices Ginsberg and Breyer joining) involved the constitutionality of the state of Washington’s third party visitation statute. The statute stated “Any person may petition the court for visitation rights at any time including but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interests of the child whether or not there has been any change of circumstances.” The
United States Supreme Court found the statute, as applied in the *Troxel* case, unconstitutional under the Due Process Clause, because it infringed on fundamental parental rights. The statute was unconstitutional because of several factors in the *Troxel* case. According to the plurality opinion, the statute was unconstitutional as applied because:

- There was no finding that the parent was unfit. "[S]o long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."

- No deference was given to the parent's decision as to her children's best interests. It appeared that the trial judge placed on a fit parent "the burden of disproving that visitation would be in the best interest of her daughters."

- This dispute was not over the parent attempting to cut off visitation entirely, but a dispute about how much visitation the grandparents would receive. "[T]his case involves nothing more than a simple disagreement between the [trial court] and [the mother] concerning her children's best interests... As we have explained, the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made."

In addition, the plurality decision did not consider the Washington Supreme Court holding that the Due Process Clause required that, in order to grant the visitation, the moving party must show that the denial of visitation will cause potential harm to the child. "We do not, and need not, define today the precise scope of the parental due process right in the visitation context... [T]he constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied... Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter."

Justice Souter concurred in the result, but would find the statute unconstitutional on its face, rather than as applied, because the statute allows any one to apply for visitation at any time, "subject
only to a free-ranging best-interests-of-the-child standard." Justice Thomas also concurred in the decision, but would add that the strict scrutiny standard of review should be applied to any statute that infringes on parents' fundamental right to raise their children. "Here the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second guessing a fit parent's decision regarding visitation with third parties."

The *Troxel* case does not establish a bright line rule concerning third party visitation. Rather it struck down an open-ended statute that had no guidelines for awarding visitation other than the best-interest-of-the-child standard, when it was used in a case in which the mother allowed visitation, but the grandparents disagreed with the amount of visitation. Consequently, there is no guidance in the case about the constitutionality of visitation statutes that limit who may seek visitation, such as stepparents and other third parties who have lived with, and helped raise, the child, or grandparents or other relatives who have developed significant emotional connections with the children. Nor is there any guidance as to what specific factors a court should consider in awarding visitation, or what standard the court must apply in determining whether the parents' fundamental rights must give way to a court order of visitation. Whether the Kansas visitation statutes will meet constitutional muster, consequently, remain uncertain.


In the 1982 amendments to the Kansas Divorce Code, the legislature granted grandparents and stepparents visitation rights with the children who were under the jurisdiction of the court in a divorce, separate maintenance or annulment action. Although the drafters of this legislation stated that "a child can have deep psychological attachments to a stepparent or grandparent and that often a child from a divided family can greatly benefit by maintaining contacts with a stepparent or grandparent," there is no language in the statute that conditions orders of visitation on a finding that there is a "deep psychological attachment" between the child and the stepparent or grandparent. The statute merely states "Grandparents and stepparents may be granted visitation rights." Although visitation appears to be discretionary with the court,
because the statutory language states that the third parties "may" be granted visitation rights, there are no statutory guidelines on how the court should exercise this discretion. Consequently, it could be argued that this Kansas visitation statute is even broader than the language of the Washington statute, which at least limited visitation to the best interests of the child. Because the Washington statute was unconstitutional as applied, it might be argued by a parent opposing visitation that this less-stringent Kansas statute is unconstitutional on its face.


1. Kan. Stat. Ann. § 38-129 allows grandparent visitation of an unmarried minor, regardless of the marital status of the parents of the child and regardless of whether the child has been adopted by a stepparent following the death of the grandparent's child. The statute states:

   (a) The district court may grant the grandparents of an unmarried minor child reasonable visitation rights to the child during the child's minority upon a finding that the visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established.

   (b) The district court may grant the parents of a deceased person visitation rights, or may enforce visitation rights previously granted, pursuant to this section, even if the surviving parent has remarried and the surviving parent's spouse has adopted the child. Visitation rights may be granted in this subsection without regard to whether the adoption of the child occurred before or after the effective date of this act.

   a. Limitations on Who Can Petition for Visitation

      i. Great Grandparents—This section does not address the rights of great grandparents to request visitation. (The unpublished opinion of Ballard v. Gilmore, Kan. App. Ct. No. 61881 (Oct. 11, 1988) involved great grandparent visitation.)

      ii. "Grandparent-Like Individuals"—The Kansas Supreme Court held in In re Hood, 252 Kan. 689, 847 P.2d 1300 (1993) that a person who had a "grandparent-like" relationship with the minor child could not bring an action for visitation with the child under this statute. (The petitioner
was the grandmother the child’s half-sibling, who lived with her.) The court found that there was no common law right for a third party to obtain visitation, even if the visitation may be in the child’s best interest and there is a substantial relationship established with the child. The court deferred to the legislature as the appropriate “forum to entertain sociological and policy considerations bearing on the well-being of children in our state. Any expansion of visitation rights to unrelated third parties ought to originate with the legislature.”

iii. The Effect of the Grandchild’s Adoption by Persons Other Than the One Listed under Subsection (b) of the Statute—Two cases have been decided that limit the right of a grandparent to petition for visitation rights with a minor unmarried child when the child has been adopted by someone other than a stepparent. Although in the first case, *In re Adoption of J.M.U.*, 16 Kan. App. 2d 164, 819 P.2d 1244 (1991) the court of appeals granted the visitation rights, the Kansas Supreme Court specifically disapproved of the court of appeals interpretation of subsection (b) in *Sowers v. Tsamolias*, 262 Kan. 717, 941 P.2d 949 (1997). Again the court deferred to the legislature as the appropriate forum to expand the language of the visitation statute.

iv. Standing of Grandparents Who Have Visitation Rights Under K.S.A. § 38-129 in an Adoption of Their Grandchild—In *In re Adoption of J.A.B., Jr.*, 26 Kan. App. 2d 959, 997 P.2d 98 (2000), the Court of Appeals held that a grandfather who had potential visitation rights to the child under K.S.A. § 38-129 had standing in the adoption of his grandchild as to the issue of his potential visitation, but not as to the issue of the appropriateness of the adoption.

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b. The Two Standards for Granting the Visitation Under K.S.A. § 38-129

i. A substantial relationship between the child and grandparent has been established

The purpose behind this standard is to maintain an important relationship between the child and the grandparent.

Queries:

- Could the statute be used to establish, rather than maintain, a relationship, particularly involving a newborn child?

- Is it relevant that a parent's actions prevented the grandparent from establishing a substantial relationship with the child?

In Spradling v. Harris, 13 Kan. App. 2d 595, 778 P.2d 365 (1989), the court found there had been no substantial relationship between the grandmother and the youngest child, who was an infant. However, the court stated "The lack of contact was due to [the mother's] refusal to allow [the grandmother] to see [the child]."


The appellate court found the evidence meager to support the trial court's decision that there was a substantial relationship between the grandmother and the child, but upheld the trial court's order for visitation, stating "it is in [the child's] best interests that she not be treated differently than her siblings," who had a substantial relationship with the grandmother.

In SRS v. Paillet, 27 Kan. App. 2d 295, 3 P.3d 568 (2000) (rev. granted—oral arguments before the Kansas Supreme Court were held on Oct. 24, 2000), the Kansas Court of Appeals applied the doctrine of equitable estoppel to the mother, finding that she could not
object to the grandparent visitation because her conduct had prevented
the grandparents from forming a substantial relationship with the
grandchild.

We hold that where a parent is deceased and the other parent
denies their child visitation with the parent or parents of the
deceased parent, absent some compelling reason to the
contrary, the statutory requirement of an existing substantial
relationship between the grandparent and the child shall not be
required before granting visitation rights to the grandparent.

Because this case is before the Kansas Supreme Court for review, the
Court of Appeals holding should not be relied upon until the Supreme
Court issues its opinion. Also, it is interesting to note that this case
involves competing factors that the U.S. Supreme Court set out in the
Troxel case—the issue of the parent cutting off visitation entirely vs. the
fitness of the parent and giving deference to the parent’s determination
that visitation is not in the child’s best interest.

ii. Best interest of the child

Although the grandparents and child have a substantial
relationship, the court also must find the visitation is in the child's best
interests. Some courts have held that the objection of the parents to the
visitation is sufficient reason to refuse the visitation because these
courts find the best interest of the child is maintained by keeping the
decision-making power involving the child with the parents. Other
courts, however, will award visitation rights if the feuding between the
parents and the grandparents is not having an adverse impact on the
child.

In Spradling v. Harris, 13 Kan. App. 2d 595, 778 P.2d 365
(1989), the court examined the adverse impact of the feuding between
the parties on the children. Both experts in the case agreed that, in
general, it is in a child's best interests to have a loving relationship and
visitation with grandparents. However, the experts also agreed it
would not be in the best interests of the children to visit the
grandmother without the grandmother and daughter resolving the
conflict between them. "Both agreed the conflict within the family
would, in fact be harmful to the children." Id. at 600, 778 P.2d at 369.
The court, however, found evidence that the mother was "taking an
unjustifiable position and will not make a good faith effort to work out
her problems with [the grandmother]." Id. at 601, 778 P.2d at 369.
Because the court assessed the blame for the conflict with the mother,
the court upheld the visitation order. In this case the court was
balancing the adverse impact of the feuding on the children with its
desire to prevent parents from creating unjustifiable conflict to prevent
the visitation. This balance may be difficult to maintain if the
continuing conflict substantially impairs the physical or emotional
health of the children.

In Santaniello v. Santaniello, 18 Kan. App. 2d 112, 850 P.2d 269 (1992), the district court "started with the presumption that the
grandparents were entitled to visitation and then proceeded to negotiate
with counsel to make the visitation arrangements." In addition, the
record did not state the facts that supported the order for visitation.
The Court of Appeals held that "In presuming the grandparents were
entitled to visitation, the district court placed the burden of proof upon
the mother to show that visitation was not in the children's best
interests. The burden of proof is upon the grandparents to show that it
is in the children's best interests.” Consequently, the case was reversed and remanded for an evidentiary hearing that placed the burden of proof on the grandparents, pursuant to the statutory provisions under K.S.A. § 38-129.

2. Kan. Stat. Ann. § 38-130 provides the venue for the action to establish grandparent visitation rights is the county in which the child resides with the person having lawful custody of the child. In addition, the court sets the hearing date and prescribes the method of giving notice to interested parties. The grandparents also need to establish jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act.

3. Kan. Stat. Ann. § 38-131 requires the court to award costs and reasonable attorney fees to the respondent parents unless the court finds that justice and equity require otherwise. In *Spradling v. Harris*, 13 Kan. App. 2d 595, 778 P.2d 365 (1989), the Court of Appeals held the trial court erred in ordering the mother to pay her own attorney fees because the trial court failed to find that this order was required by justice and equity. Therefore the court remanded the case, instructing the trial court to order the grandmother pay the mother's attorney fees or make a specific finding that justice and equity required a different order.


If a juvenile court finds a child is in need of care and the court's disposition places the child in the custody of a person other than a parent, the court may grant "any individual reasonable rights to visit the child upon motion of the individual and a finding that the visitation rights would be in the best interest of the child." Also, individuals who are within the fourth degree of relationship to the child can petition the juvenile court to recognize them as an interested party, who would have the right to participate in the child in need of care proceedings. Kan. Stat. Ann § 38-1541.
D. Is the Ruling in *Spradling v. Harris* That the Grandparent Visitation Statute Does Not Violate Parental Rights Still Good Law after *Troxel*?

In *Spradling v. Harris*, 13 Kan. App. 2d 595, 778 P.2d 365 (1989), the Kansas Court of Appeals held that a court order granting grandparents visitation with the grandchildren under Kan. Stat. Ann. § 38-129 does not infringe on the constitutional rights of privacy of the parents. Although the court recognized that parents have a fundamental right "to establish a home and direct the upbringing and education of children" and "the parents rights of custody and control of their children are liberty interests protected by the Fourteenth Amendment Due Process Clause," the court stated that these rights were limited by the *parens patriae* doctrine, which allows the court to act in the best interests of the child. However, given the U.S. Supreme Court's decision in *Troxel*, which stated that the best-interests-of-the-child standard was insufficient, in and of itself, to protect the Washington visitation statute from constitutional attack, the holding in *Spradling* has been weakened. Again, it is difficult to know, given the differences in the wording of the Washington statute and the limitations of the specific facts in *Troxel*, whether the requirement of the Kansas statute (that the grandparents have the burden of proving a significant relationship with the child and that the visitation is in the best interests of the child) will insulate the Kansas statute and the holding in *Spradling* from a future attack alleging that the statute is unconstitutional. The factors in the *Troxel* case that put the Kansas statute and the holding in *Spradling* in a precarious constitutional position are the plurality's discussions of the unfitness standard and the deference that should be given to the parent's decision not to allow visitation. It would appear that in *Spradling* and *Paillet* (27 Kan. App. 2d 295, 3 P.3d 568 (2000) (rev. granted--oral arguments before the Kansas Supreme Court were held on Oct. 24, 2000)), the Kansas Court of Appeals allows the best interest-of-the-child standard to override the proof of a "significant relationship" with the child. Given that the *Troxel* case involves a visitation statute in which the best-interest-of-the-child standard is the only standard applied, the holdings in these two cases may not withstand constitutional scrutiny.

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E. Factors the Court Should Consider in Grandparent Visitation Cases


According to the proposed statute, the court should grant grandparent access (visitation) only if there is a substantial relationship with the child and the access is in the child's best interests. She defines "substantial relationship" in the statute as follows:

(a) A "substantial relationship" between a grandparent and a grandchild is one that is continuous, affectionate, intimate, and stimulating to the child. In determining whether a substantial relationship has formed, the following factors must be considered:

1. the amount of time spent alone with the grandparent;
2. the frequency of contact with the grandparent;
3. the regularity of contact with the grandparent over the course of the child's life;
4. the frequency of letters and phone calls to and from the grandparent.

(b) The following are examples of situations that may give rise to the formation of a substantial relationship between child and grandparent. The examples are illustrative and are not meant to be exclusive.

1. The child has resided with the grandparent and the grandparent has had de facto custody of the child due to a nuclear family disruption such as parental death, divorce, illness, hospitalization, institutionalization, incarceration, abandonment, or informal or legal separation;
2. The child has resided with the parent(s) and the grandparent in the same household;
3. The grandparent had been a part-time primary caretaker of the child on a regular basis—e.g., has been the child's babysitter while the parents worked or were otherwise unavailable to care for the child;
4. The grandparent has provided custodial care for the child for extended periods of time when there were no nuclear family disturbances, such as when the parents were on vacation, during school vacations or holidays, or when the child was home from school due to illness. *Id.* at 131-32.

Fernandez notes that the normal grandparent relationship with a child involving visits with the child and parents for a day or two, twice or three times a year, would not qualify as a substantial relationship. She states:

In some ways, this requirement may be punitive for the grandparent who has had a rather "normal" experience, meaning that no primary care for the child has taken place or that past visitation has been infrequent and of short duration. The restriction is intentional. In order to justify an intrusion into the nuclear family
autonomy, there must be a strong attachment without which the child may suffer. *Id.* n. 82.

If, and only if, the grandparent establishes a substantial relationship exists between the grandparent and grandchild, then the court determines if the access is in the child's best interest. Fernandez lists the following "best interests of the child" criteria:

(1) whether access will promote or hinder the child's psychological or physical development;
(2) whether access will facilitate or disrupt the child's healthy psychological attachments to his or her nuclear family, particularly following a nuclear family disruption or change in membership;
(3) whether access will divide the child's loyalties and have a detrimental effect on the parent-child relationship;
(4) whether the grandparent is willing and able to encourage and facilitate a close and continuing relationship between the child and the other parties;
(5) whether the child is in favor of or against access, if the child is capable of freely forming and expressing an opinion in the matter;
(6) the potential benefits and detriments to the child in granting the visitation order;
(7) the physical and emotional health of the adults involved;
(8) the capacity of the adults involved for future compromise and cooperation in matters involving the child's physical and emotional health and development;
(9) the reasons given by the respondents for opposing access, for example, that the petitioners have constantly interfered in the parent-child relationship and criticized parental behavior or decisions that do not endanger the child and are decisions parents alone should make, such as the choice of a child's wardrobe, education, or religious training; and any other factors that the court considers relevant to a fair and just determination regarding access. *Id.* at 133-34.

F. The American Law Institute's Principles Governing the Allocation of Custodial and Decisionmaking Responsibility for Children

The American Law Institute (ALI) has been drafting Principles that state legislatures can adopt in determining which parties would have substantive and procedural rights involving children. These Principles would recognize three groups of individuals who may have visitation rights. These three categories are: Legal Parent, Parent by Estoppel, and De Facto Parent. *See* Appendix A.
PRINCIPLES GOVERNING THE ALLOCATION OF CUSTODIAL AND DECISIONMAKING RESPONSIBILITY FOR CHILDREN

§ 2.03 Definitions

For purposes of this Chapter, the following definitions apply:

(1) Unless otherwise specified, a parent is either a legal parent, a parent by estoppel, or a de facto parent.

(a) A legal parent is an individual who is defined as a parent under other state law.

(b) A parent by estoppel is an individual who, though not a legal parent, is

(i) liable for child support under Chapter 3; or

(ii) lived with the child for at least two years and

(A) over that period had a reasonable good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and

(B) thereafter continued to make reasonable, good-faith efforts to accept responsibilities as

the child’s father, even if that belief no longer existed; or

(iii) lived with the child since the child’s birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition as a parent is in the child's best interests; or

(iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child’s parent (or, if there are two legal parents, both parents), when the court finds that recognition as a parent is in the child's best interests.

(c) A de facto parent is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,

(i) lived with the child and,

(ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,
(A) regularly performed a majority of the caretaking functions for the child, or

(B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

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Comment:

a. Legal parent. This Chapter uses the term “legal parent” to refer to any individual recognized as a parent under other state law. Individuals defined as parents under state law ordinarily include biological parents, whether or not they are or ever have been married to each other, and adoptive parents. In some states, an individual may be a parent also by virtue of an unrebutted legal presumption, such as the presumption that a husband is the father of his wife’s child. An individual is not a parent under § 2.03(1)(a) if, under applicable state law, the individual’s status as parent has been terminated.

b. Parent by estoppel. An individual who is not a legal parent may be a parent by estoppel under Paragraph (1)(b). A parent by estoppel is an individual who, even though not a legal parent, has acted as a parent under certain specified circumstances which serve to estop the legal parent from denying the individual’s status as a parent. A parent by estoppel is afforded all of the privileges of a legal parent under this Chapter, including standing to bring an action and to have notice of and participate in an action brought by another under § 2.04, the benefit of the presumptive allocation of custodial time provided for in § 2.09(1)(a), the advantage of the presumption in favor of a joint allocation of decisionmaking responsibility afforded by § 2.10(2), the right of access to school and health records specified in § 2.10(4), and priority over a de facto parent and a nonparent in the allocation of primary custodial responsibility under § 2.21.

As is the case with an individual seeking to be a parent by estoppel under Paragraph (1)(b)(iii) or Paragraph (1)(b)(iv), the best course of action for an individual who expects legal recognition as a de facto parent would be formal adoption, if available under the applicable state law. Failure to adopt the child when it would have been possible is some evidence, although not dispositive, that the legal parent did not agree to the formation of the de facto parent relationship.

c. De facto parent. Occasionally, an individual who is not a legal parent under state law and who does not have a child-support obligation, did not have the good-faith belief that he was the child’s parent, did not hold himself or herself out as the child’s parent, did not have an agreement with the legal parent to serve as a co-parent, or otherwise does not meet the requirements of a parent by estoppel, may nonetheless have functioned as the child’s primary parent. Such an individual is a de facto parent, potentially able to obtain an allocation of responsibility under Chapter 2 if he or she meets the criteria set forth in § 2.03(1)(c). The requirements are strict, to avoid unnecessary and inappropriate intrusion into the relationships between legal parents and their children. The individual must have lived with the child for a significant period of time not less than two years and acted in the role of a parent for reasons primarily other than financial compensation and with the agreement of a legal parent, or as a result of a complete failure or inability of any legal parent to perform caretaking functions. In addition, the individual must have functioned as a parent, either by (a) having performed the majority share of caretaking functions for the child, or (b) having performed a share of caretaking functions that is equal to or greater than the share assumed by the legal parent with whom the child primarily lives.
§ 2.04 Parties to an Action Under This Chapter

(1) Individuals who should be given a right to bring an action under this Chapter, or to be notified of and participate as a party in an action filed by another, are

(a) a legal parent of the child, as defined in § 2.03(1)(a);

(b) a parent by estoppel, as defined in § 2.03(1)(b);

(c) a de facto parent of the child, as defined in § 2.03(1)(c), who has resided with the child within the six-month period prior to the filing of the action or who has consistently maintained or attempted to maintain the parental relationship since residing with the child;

(d) a biological parent who is not a legal parent but who has an agreement with a legal parent under which he or she reserved some parental rights or responsibilities; and

(e) an individual allocated custodial responsibility or decisionmaking responsibility regarding the child under an existing parenting plan.

(2) In exceptional cases, a court should have discretion to grant permission to intervene, under such terms as it establishes, to other individuals or public agencies whose participation in the proceedings under this Chapter it determines is likely to serve the child's best interests, but such individuals should not have standing to initiate an action under this Chapter.

§ 2.07 Parental Agreements

(1) The court should order any provision of a parenting plan agreed to by the parents, unless the agreement

(a) is not knowing or voluntary, or

(b) would be harmful to the child.

(2) The court, on any basis it deems sufficient, should have discretion to conduct an evidentiary hearing to determine whether there is a factual basis under Paragraph (1) to find that the court is not bound by an agreement. If credible information is presented to the court that child abuse as defined by state law or domestic violence as defined by § 2.03(7) has occurred, the court should be required to hold a hearing, and if the court determines that child abuse or domestic violence has occurred, it should be required to order appropriate protective measures under § 2.13.

(3) If the court rejects an agreement, in whole or in part, under the standards set forth in Paragraph (1), it should be required to allow the parents the opportunity to negotiate another agreement.
§ 2.09 Allocation of Custodial Responsibility

(1) Unless otherwise resolved by agreement of the parents under § 2.07, the court should be required to allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action, except to the extent required under § 2.13 or necessary to achieve one or more of the following objectives:

(a) to permit the child to have a relationship with each parent which, in the case of a legal parent or a parent by estoppel who has performed a reasonable share of parenting functions, should be not less than a presumptive amount of custodial time determined through a uniform rule of statewide application;

(b) to accommodate the firm and reasonable preferences of a child who has reached a specific age, as set forth in a uniform rule of statewide application;

(c) to keep siblings together when the court finds that doing so is necessary to their welfare;

(d) to protect the child's welfare when the presumptive allocation under this section would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child or in each parent's demonstrated ability or availability to meet the child's needs;

(e) to take into account any prior agreement, other than one agreed to under § 2.07, that would be appropriate to consider in light of the circumstances as a whole, including the reasonable expectations of the parties, the extent to which they could have reasonably anticipated the events that occurred and their significance, and the interests of the child;

(f) to avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child's need for stability in light of economic, physical, or other circumstances, including the distance between the parents' residences, the cost and difficulty of transporting the child, each parent's and the child's daily schedules, and the ability of the parents to cooperate in the arrangement;
(g) to apply the Principles set forth in § 2.20(4) if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the presumptive amount of custodial responsibility under this section; and

(h) to avoid substantial and almost certain harm to the child.

(2) In determining the proportion of caretaking functions each parent previously performed for the child under Paragraph (1), the court should not be allowed to consider the division of functions arising from temporary arrangements after separation, whether those arrangements are consensual or by court order. The court should be allowed to take into account information relating to the temporary arrangements in determining other issues under this section.

(3) If the court is unable to allocate custodial responsibility under Paragraph (1) because there is no history of past performance of caretaking functions, as in the case of a newborn, or because the history does not establish a sufficiently clear pattern of caretaking, the court should be required to allocate custodial responsibility based on the child’s best interests, taking into account the factors and considerations that are set forth in this section and in § 2.13 and § 2.20(4), preserving to the extent possible this section’s priority on the share of past caretaking functions each parent performed.

(4) In determining how to schedule the custodial time allocated to each parent, the court should be required take account of economic, physical, and other practical circumstances, such as those listed in Paragraph (1)(f).

§ 2.10 Allocation of Significant Decisionmaking Responsibility

(1) Unless otherwise resolved by agreement of the parents under § 2.07, the court should be required to allocate responsibility for making significant life decisions on behalf of the child, including decisions regarding the child’s education and health care, to one parent or to two parents jointly, in accordance with the child’s best interests, in light of

(a) the allocation of custodial responsibility under § 2.09;

(b) the level of each parent’s participation in past decisionmaking on behalf of the child;

(c) the wishes of the parents;

(d) the level of ability and cooperation the parents have demonstrated in past decisionmaking on behalf of the child;

(e) a prior agreement, other than one agreed to under § 2.07 that, under the circumstances as a whole, including the reasonable expectations of the parents and the
interests of the child, would be appropriate to consider; and

(f) the existence of any limiting factors, as set forth in § 2.13.

(2) The court should be required to presume that an allocation of decisionmaking responsibility to each legal parent or parent by estoppel who has been exercising a reasonable share of parenting functions for the child, jointly, is in the child's best interests. The presumption is overcome if there is a history of domestic violence or child abuse, or if it is shown that joint allocation of decisionmaking responsibility is not in the child's best interests.

(3) Unless otherwise provided or agreed by the parents, a parent should have sole responsibility for day-to-day decisions for the child while the child is in that parent's custodial care and control, including emergency decisions affecting the health and safety of the child.

(4) Even if not allocated decisionmaking responsibility under this section, any legal parent and any parent by estoppel should have access to the child's school and health-care records to which legal parents have access by other law, except insofar as access is not in the best interests of the child or where the provision of such information might endanger an individual who has been the victim of child abuse or domestic violence.
Allocations of Responsibility to Individuals Other Than Legal Parents

§ 2.21 Allocations of Responsibility to Individuals Other Than Legal Parents

(1) The court should allocate responsibility to a legal parent, a parent by estoppel, or a de facto parent as defined in § 2.03, in accordance with the same standards set forth in §§ 2.09 through 2.14, except that

(a) it should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility unless

(i) the legal parent or parent by estoppel has not been performing a reasonable share of parenting functions, as defined in § 2.03(6), or

(ii) the available alternatives would cause harm to the child; and

(b) it should limit or deny an allocation otherwise to be made if, in light of the number of other individuals to be allocated responsibility, the allocation would be impractical in light of the objectives of this Chapter.

(2) A court should not allocate responsibility to an individual who is not a legal parent, a parent by estoppel, or a de facto parent, over a parent’s objection, if that parent is fit and willing to care for the child, unless

(a) the individual is a grandparent or other relative who has developed a significant relationship with the child and

(i) a legal parent or parent by estoppel consents to the allocation, and

(ii) the parent objecting to the allocation has not been performing a reasonable share of parenting functions for the child; or

(b) the individual is a biological parent of the child who is not the child’s legal parent but who has an agreement with a legal parent under which the individual retained some parental rights or responsibilities; or

(c) the available alternatives would cause harm to the child.

Comment:

a. In general. Section 2.21 establishes the standards for allocating custodial responsibility and decisionmaking responsibility when not all of the parents are legal parents or parents by estoppel. The section gives some preference to legal parents and parents by estoppel, and it precludes an allocation of responsibility to adults other than parents except in a narrow range of cases. The standards reflect the societal consensus that responsibility for children ordinarily should be retained by a child’s parents, while recognizing that there are some exceptional circumstances in
which the child’s needs are best served by continuity of care by other adults.

b. De facto parents. Section 2.21 gives priority to a legal parent and a parent by estoppel over a de facto parent in the following two ways. First, an allocation of the majority of custodial responsibility to a de facto parent is ordinarily precluded when there is a legal parent or a parent by estoppel who is fit and willing to care for the child. A de facto parent may still obtain an allocation of custodial or decisionmaking responsibility, under the criteria set forth in §§2.09 through 2.14. This allocation may not be greater than that of a legal parent or a parent by estoppel over that parent’s objection, however, unless that parent has not been exercising a reasonable share of parenting functions, as defined in §2.03(7), or if primary care by that parent would be harmful to the child.

Second, an allocation that would otherwise be made to a de facto parent may be limited or denied if, in light of the number of other adults to be allocated responsibility, the allocation is impractical. The situation to which this provision applies will be rare, given the strict criteria defining a de facto parent. It may occur, however, when a child has two legal parents, a prior stepparent who is a de facto parent with some custodial responsibility under a prior parenting plan, and a more recent stepparent who has been providing the primary care for the child, all of whom live in separate households and seek custodial responsibility for the child. Under §2.09, allocations of custodial responsibility ordinarily are adjusted to reflect the proportion of caretaking functions a parent was previously performing. When §2.21(1)(b) applies, it may be necessary for the court to make further adjustments to avoid harmful fragmentation of the child’s custodial arrangements. In some circumstances, it may even be necessary to deny access to a de facto parent altogether. Access by a legal parent and a parent by estoppel is protected under §2.09(1)(a).

Other sections of this Chapter afford priority to a legal parent and a parent by estoppel in other ways. See, e.g., §2.09(1)(a) (legal parent and parent by estoppel, but not de facto parent, entitled to presumptive allocation of custodial responsibility); §2.10(2) (legal parent and parent by estoppel but not de facto parent, have presumption of joint decisionmaking responsibility); §2.10(4) (legal parent and parent by estoppel, but not de facto parent, have presumptive access to school and health records of child).