# THIRD PARTY VISITATION

**Drafted by the Family Law Advisory Committee**

**Kansas Judicial Council**

**Submitted for Consideration June 4, 2004**

**K.S.A. 38-129. Visitation rights of non-parents.** (a) A person may file a verified petition, or a motion in a pending action, requesting visitation rights with an unmarried minor child. The party filing a petition or motion for visitation under this statute shall include with specificity in the verified petition or motion, or in an accompanying affidavit, factual allegations constituting and supporting that both factors of a (1) substantial relationship between the filing party and the minor child exists and (2) visitation would be in the best interest of the child. The filing party shall also state in the initial pleading whether the parent of the minor child is fit or unfit.

## Comment

This proposed statute replaces the existing K.S.A. 38-129 in its entirety. This statute is intended to apply the Unites States Supreme Court's holding in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), (hereafter "*Troxel*"). The statute has been carefully crafted to apply only to the people in relationships that are truly important and beneficial to the minor child. The statute also protects the 14th Amendment rights of fit parents to make decisions concerning the rearing of their children.

(A) If the petition or motion alleges that the parent is unfit, the court shall dismiss the visitation request filed pursuant to this statute and the court, in its discretion, may refer the matter to the local district attorney's office for further action pursuant to K.S.A. 38-1501, et seq.

(B) If the petition or motion alleges the parent is not unfit and

(i) the court finds that the allegations set forth in the petition, motion or accompanying affidavit fail to establish a prima facie case, the court shall deny the petition or motion, or

(ii) the court finds that the petition, motion or accompanying affidavit establishes a prima facie case, the court shall require the party to file a bond or sureties in an amount sufficient to pay the attorneys' fees of the respondent and the costs in the action. The court may reduce or waive the requirement of filing a bond or sureties when the court determines that justice and equity otherwise require. Upon the party filing the requisite bond, if ordered, the court may either (1) issue an ex parte order for mediation in accordance with K.S.A. 23-601, et. seq. and amendments thereto, or (2) set a time and place for a hearing on the petition or motion.

**Comment**

Subsection (A) makes clear that K.S.A. 38-129 may not be used to

allege that a parent is not fit to make proper decisions regarding the minor child. Any allegations of unfitness must be made pursuant to the provisions of the Kansas Code for Care of Children. Subsection (B)(i) allows the court to deny a petition on its face if it fails to establish a prima facie case, which is discussed further in Subsections (b) and (c) below. (B)(ii) is intended to further reduce the likelihood of frivolous filings by requiring the filing party to file a bond or sureties to cover attorneys' fees and costs.

(b) In determining whether there is a prima facie case that a substantial relationship exists as required in subsection (a), the following special factors must be alleged:

(1) the child has resided with the filing party in the same household; and

(2) the filing party has acted as a parent by estoppel or a de facto parent to the child, as defined by subsection (h).

(c) In determining whether best interest exists as required by subsection (a), the court shall consider the following:

(1) whether visitation will promote or hinder the child's psychological or physical development;

(2) whether visitation will divide the child's loyalties and have a detrimental effect on the parent-child relationship;

(3) whether the child is in favor of or against visitation with the filing party, if the child is capable of freely forming and expressing an opinion in the matter;

(4) the physical and emotional health of the adults involved;

(5) the capacity of the adults involved for future compromise and cooperation in matters involving the child's physical and emotional health and development; and

(6) any other potential benefits and detriments to the child in granting visitation to the filing party.

(d) If a hearing is held on the matter, the court shall apply the presumption that the fit parent has acted in the best interest of the child concerning the parent's decision to allow or disallow visitation with the filing party. If the parent has denied visitation to the filing party altogether, the trial court shall determine whether the parent's denial for visitation is reasonable.

(e) The burden of proof rests with the filing party requesting visitation with the minor child to rebut the parental decision concerning visitation. The filing party shall prove by clear and convincing evidence existence of a substantial relationship with the child and that visitation would be in the child's best interest.

(f) In determining whether to award visitation to the filing party, the court shall: (1) give substantial weight to the fit parent's decision concerning visitation and (2) take into consideration whether the fit parent has allowed meaningful visitation between the minor child and filing party to occur. If the court finds that the parent has allowed meaningful visitation to occur between the filing party and the child, the court shall adopt the visitation schedule proposed by the fit parent. If the court finds that a substantial relationship exists between the filing party and the minor child and that the parental decision concerning visitation is not in the best interest of the child, the court shall make specific findings of fact to support any court order awarding visitation to the filing party.

**Comment**

> Subsections (b) through (f) set forth the factors that must be taken into consideration when determining whether a prima facie case has been established and whether to award visitation to a non-parent. These factors directly address the deficiencies pointed out in the *Troxel* decision, including the burden of proof, the presumption that a fit parent has acted in the best interest of the child and substantial weight being given to the fit parent's decision.

(g) The court may modify or terminate any prior order under this section whenever modification or termination would serve the best interest of the child.

(h) Definition of terms.

(1) "Legal parent" is an individual who is defined as a parent by state law.

(2) "Parent by estoppel" is an individual who, though not a legal parent,

(A) is obligated to pay child support; or

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

(i) 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

(ii) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or

(C) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as 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 of the individual as a parent is in the child's best interests; or

(D) 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 of the individual as a parent is in the child's best interests.

(3) "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,

(A) lived with the child and,

(B) 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 failure or inability of any legal parent to perform caretaking functions,

(i) regularly performed a majority of the caretaking functions for the child, or

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

**Comment**

Subsection (b) above contained the requirement that the filing party must establish that he or she has acted as a "parent by estoppel" or a "de facto parent" in order to make a prima facie case under this statute. The very specific definitions of these two terms as set forth in Subsection (h) have been drafted to assist the courts in making consistent determinations in third party visitation matters and to ensure that such visitation can only be awarded to persons who have acted as a parent to the minor child. The hurdles have been purposely set very high to both protect minor children and to preserve the rights of fit parents to make decisions regarding the rearing of their children.

**60-1616. Parenting time; visitation orders; enforcement.** (a) *Parents.* A parent is entitled to reasonable parenting time unless the court finds, after a hearing, that the exercise of parenting time would seriously endanger the child's physical, mental, moral or emotional health.

(b) *Grandparents and stepparents.* Grandparents and stepparents may be granted visitation rights pursuant to the procedures set forth in K.S.A. 38-129 through 38-131 and amendments thereto.

(c) *Modification.* The court may modify an order granting or denying parenting time or visitation rights whenever modification would serve the best interests of the child.

(d) *Enforcement of rights.* An order granting visitation rights or parenting time pursuant to this section may be enforced in accordance with the uniform child custody jurisdiction and enforcement act, or K.S.A. 23-701, and amendments thereto.

(e) *Repeated denial of rights, effect.* Repeated unreasonable denial of or interference with visitation rights or parenting time granted pursuant to this section may be considered a material change of circumstances which justifies modification of a prior order of legal custody, residency, visitation or parenting time.

(f) *Court ordered exchange or visitation at a child exchange and visitation center.* (1) The court may order exchange or visitation to take place at a child exchange and visitation center, as established in K.S.A. 75-720 and amendments thereto.

(2) Any party may petition the court to modify an order granting visitation rights or parenting time to require that the exchange or transfer of children for visitation or parenting time take place at a child exchange and visitation center, as established in K.S.A. 75-720 and amendments thereto. The court may modify an order granting visitation whenever modification would serve the best interests of the child.

**Comment**

The only change to K.S.A. 60-1616 is the addition of the underlined phrase at the end of subsection (b). This change is intended to codify the holding in Troxel, *infra*, and to clarify that the new requirements set forth in K.S.A. 38-129 (as amended) apply equally to grandparents and stepparents. No third parties have preferential standing under this statutory process.