

GRANPARENT'S RIGHTS

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Kansas
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GRANDPARENT'S RIGHTS

What your legal rights are as a grandparent will vary based upon what your situation is. Your rights depend greatly on relationship you have with your grandchild. Some grandparents see their grandchildren often, even daily, while others rarely, if ever see their grandchildren.

Some grandparents have their grandchildren thrust upon them, and basically end up wearing two hats, “grandpa and grandma,” and “mommy & daddy”, because the parent(s) of the child(ren) are either not willing, or are not able to care for the child(ren). In other words, some grandparents want to see their grandchildren, but are being forbidden, while others have a new found duty and struggle to deal with it because they have no “legal rights” set up.

This article will briefly discuss both cases by answering the following questions: 1) I want to see my grandchildren, but the parent/legal guardian will not let me, what can I do? 2) I have defacto custody of my grandchild, and so what do I need to do to set up legal rights so that I can do things a parent would normally do?

GETTING VISITATION WITH YOUR GRANDCHILD

The question is: I want to see my grandchildren, but the parent/legal guardian will not let me, what can I do? The short answer is you have to sue.

Grandchild visit denials often occurs in cases involving divorce. For example, mom and dad divorce each other, and one parent gets residential custody of the child. This means the child lives with one parent, and the other parent gets reasonable visitation. This is referred to as joint legal custody. If you are the parent of the child who gets “reasonable visitation,” you may quickly find yourself demoted to the back burner when it comes to seeing the grandchild. This is because your right to see that grandchild will flow directly from your child’s (the non-residential caretaker) right to visitation. This means that you don’t see the grandchild unless your child lets you. Therefore if your child never gets their child, then you don’t either.

The best way to remedy this condition is through mutual effort. Before going to court all attempts should be made to make things right with the residential parent. See if you can get the visits using an informal, friendly process that does not involve lawyers or judges. Legal action should always be a last resort.

Another issue occurs when your own child dies, and the remaining parent remarries, and starts a new family. This specific situation can make it even more difficult, notably when very young children are involved, and the surviving parent wants to “move on” with his/her life and put the past behind them, including you, the grandparent. This makes for a difficult and stickier case. The good news is that none of this is ever an issue if everyone gets along and there are no squabbles, again, formal lawsuits should be a last resort. Most families promote visits very easily and for the most part visitation with a grandchild is not an issue. *Who doesn't want a grandparent who is willing and able to give free babysitting and presents?* It is only in cases where there are family conflicts that lawyers have to get involved.

In Kansas, as stated earlier, your visitation rights depend mostly on the kind of bond you have with your grandchild. The rule in Kansas is that in order for the grandparent to get court ordered visitation the grandparent must show that the grandchild has a substantial relationship with the grandparent. The grandparent must also prove that the visits are in the best interests of the grandchild. On top of that, the court must give deference to a parent's decision about how much contact will be allowed the grandparent. The judge must presume that a parent's proposals about visitation are always in the best interest of the grandchild, unless the Court clearly finds that the parents' proposals are improper.

The rules just outlined above are found in the Kansas Statutes. This means that the government enacted a law extending the right to have visitation with a grandchild to the grandparent. The law precisely states:

38-129. Visitation rights of grandparents. (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 pursuant to this subsection without regard to whether the adoption of the child occurred before or after the effective date of this act.

(Emphasis added).

Even though the above is the law, it is important to understand the process of how the visit schedule is actually set up. At this point it is assumed that you have already attempted to ask for visitation, but have been denied. It is not typically suggested that you go ahead on your own, but you can. You must go to court.

If the case involves a divorce proceeding, no matter how old the divorce case, you must file a Motion to Intervene, followed by a Motion for Grandparent's Rights. When you file your motion you should make specific reference to the divorce case number, and you have to precisely explain how you have a *substantial relationship* with the child, and why it is best for the child to spend time with you. You must say more than “. . . all children should see their grandparents. . .” as that is merely a glittering general statement, and will not be convincing. In proving a substantial relationship you need to convince the judge that you have played a central part of the child's life. One example could be that the grandchild has lived with you or has had extensive daily, weekly or monthly contacts. Family traditions can be an important concern. All of these types of things need to be clearly outlined for the judge.

You should also remember that even if you are right, and you win, and the judge gives you specific visitation, that you may have to pay the attorney's fees of the person you drag into court. Yes, even if you are right, you may have to pay that person's attorney's fees! Unfortunately, it is not generally recommended that anyone try to do this on their own. You should seriously consider hiring an attorney. If you hire an attorney he or she will file a motion in the divorce case that will sound a lot like the motion you would write on your

own. Please realize this can get costly because you will be footing all of the costs of trial.

If there is no divorce case then there may be a paternity case or child support case already filed. If there isn't such a thing then you will have to file a formal Petition with the court where the grandchild lives. The filing of a formal petition is complex (involving filing fees) and will almost always need the assistance of an attorney. The process can be expensive and scary for most.

In most circumstances you will have to have a trial and prove to the judge that you have a considerable relationship with the grandchild. If you can prove the substantial relationship (as outlined previously), and that it is in the best interests of the child for you to get visitation, then you may get to see the child, however, when the court orders the visitation it will have to give great deference to the parent's wishes. It is impossible to predict how much time you will get to see the child. Usually, the more sizeable the relationship the more visitation will be given.

ESTABLISHING LEGAL RIGHTS

I have defacto custody of my grandchild, and so what do I need to do to set up legal rights so that I can do things a parent would normally do?

For many grandparents, having visitation is not the issue because the grandchild lives with the grandparent. The situation can be created in many ways. Sometimes it involves the death of the grandchild's only parent, while other times the issue can be one of neglect, refusal or inability (due to disability) to care for the child. For example, a child's parent may go to prison, be out on a drug binge, be in the military, be found to be unfit, be mentally ill or badly injured in a car accident, be a teenage parent who wants to go off to college, or any other situation you can think of.

Many times the grandparent is left to try to figure it out all on their own, with no direction as to how to proceed. Lots of legal questions arise when this happens. Many grandparents find themselves attempting to deal with legal issues they never dreamed of.

Questions begin to be raised by other adults in the child's life, by school teachers, doctors, family members, the dentist, etc. How do I get my grandchild's report card? Permit medical procedures? Obtain immunizations? Get a social security card? Get the child's birth certificate? Obtain health insurance? Consent to a school field trip? and many other questions. The reality is that most professionals will work with you, but only to a point. The day will come when you must have some legal documentation that says you have legal control over the child. There are many different ways you can get the legal power you need, but which one is appropriate?

POWER OF ATTORNEY

A power of attorney is a good short term fix. It is the easiest to obtain if your child has freely left the grandchild with you. This can occur when your children take extended vacations, military leave, long-term stay in hospital due to chronic illness (i.e. cancer treatment). Some schools, hospitals, doctors, etc. have forms that allow a parent to consent for a specific amount of time.

All that is needed is a certified statement from the child's parent(s) as to what the grandparent (or other relative) is allowed to consent to, or have access to. The power of attorney can be copied, and the copies can be given to the relevant agencies that need it, with the grandparent keeping the original. This means that the grandparent would take the original and the copy to places like the child's doctor, the school, the dentist, etc. and the respective agency will verify the copy and the grandparent will keep the original. Some agencies may need the original be on file, and in that event the parent may need to sign more than one primary document. Even though this is a good short term solution, it is not a very good long-term fix. If the grandparent has actual custody of the child, and is going to have to insure the child and/or apply for public benefits on behalf of the child, the grandparent is normally going to need something more significant, to be discussed in more detail below.

FOSTER CARE OR KINSHIP CARE

There are other times when the State has become involved and there is some sort of juvenile proceeding (Child In Need of Care Case, known as a CINC, pronounced "sink" case, is started) where the grandparent, or other relative is the foster home placement. In this precise case the grandparent will

be working with social workers and other experts. Usually the courts will be issuing very specific orders. Those orders can be used by the grandparent to get done legally whatever needs getting done. The major issues that develop in cases like these commonly stem from poor communication between the grandparent, the court, and the social workers. If your grandchild is involved in a juvenile proceeding, and you want to get involved you can ask that the court appoint you an attorney at no cost to you. If your income is too high then the court may need you to hire your own attorney. If you communicate well with the court then your needs as a grandparent should be taken care. Keep in mind that when the grandparent is providing foster care, the grandparent should be receiving child support of some kind for the grandchild.

LEGAL GUARDIANSHIP/PERMANENT GUARDIANSHIP

When a more long-term fix is needed guardianship may be sought. This can occur in a CINC case, but can also be done freely between a grandparent and the grandchild's parent(s). Sometimes it can also be done without the consent of the grandchild's parent(s) in cases where the grandchild's parents cannot be located.

When a guardianship is set up, the grandparent is given the legal duty of providing the care and control of the grandchild. The grandparent is officially labeled the "legal guardian" and will be under the control of the court (a judge) and must appear in court to give periodic reports about the status of the child. The good thing about a guardianship is that it can be a long-term fix, but still be short-term. This tool is often used in cases involving grandchildren with parents who are beating drug addiction, have to go to prison, or have some other issue that requires more than a few weeks to take care of. Setting up guardianship can be expensive depending on how much the attorneys in your area charge. Most simple guardianships will normally cost somewhere between \$1,000 and \$2,000.

The nice thing about guardianship is that the parents do not necessarily have to lose their rights, especially when they consent. When the condition forcing the guardianship is resolved, and the parent is ready to begin assuming their duties, the guardianship is simply ended.

Guardianship can also be a permanent fix, mainly where the grandparent is not ready to accept 100% legal responsibility for the grandchild, but just

responsibility until the child turns 18 years of age. Child support is not normally set up in a guardianship setting unless there is a CINC case. Also, some insurance companies will not allow the child to be insured as a dependent when there is only a guardianship. Further, if the grandparent dies while the child is in the care of the grandparent the child does not have any legal right to inherit or collect social security survivor's benefits.

ADOPTION

Adoption is the most extreme of avenues that a grandparent can pursue. In order for a grandparent to adopt, the parent(s) of the grandchild must give up his or her rights to the child. If the parents refuse to surrender then the grandparent has to prove parental unfitness, and ask for the parents' rights to be terminated. This means that the birth parent will cease to have any duty for the child. This means that the child's parent will have no say whatsoever in the upbringing of the child, and will not have any legal duty to support the child. This means the parent will not have to pay child support of any kind. It also means that the adoptive parent will legally have to do everything for the child, including paying to support the child. Before this avenue is pursued the grandparent should seriously consider and understand the effects of adoption. Legally the child will acquire the legal right to inherit from the adoptive parent, and can also receive social security survivor's benefits, if under 18 years of age when the grandparent dies.

CONCLUSION

What is proper in your particular situation, as a grandparent, depends greatly on your grandchild's needs, and your needs. No case is exactly the same. This has been only a brief discussion of a very complex set of issues. Should you have questions about this, or any other legal matter, and you are over the age of 60, please do not hesitate to contact the elder law hotline at 1-888-35-ELDER, a toll free service that costs you nothing.

**SPECIFIC POWER OF ATTORNEY
FOR CARE OF CHILD—DURABLE POWER**

BY THESE PRESENTS BE IT KNOWN THAT:

The undersigned, _____, the parent and natural guardian of the following child _____ (d.o.b. _____), a minor, has made, constituted, and appointed, _____, my child's grandparent, my true and lawful attorney-in-fact for me, and in my name and stead, to give permission, authorization, and approval for any and all medical procedures, including immunizations, medical tests, and any and all medical treatment deemed by any licensed physician to be recommended and appropriate to remedy any and all injuries, illnesses or other maladies suffered by my child named above. My attorney-in-fact may sign, execute and approve any and all papers necessary or required to be approved prior to such treatment.

I intend for my attorney-in-fact to be treated as I would be with respect to my rights regarding the use and disclosure of my child's individually identifiable health information or other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (aka HIPAA), 42 USC 1320d and 45 CFR 160-164. I authorize:

- any physician, healthcare professional, dentist, health plan, hospital, clinic, laboratory, pharmacy or other covered health care provider, any insurance company and Medical Information Bureau Inc or other health care clearinghouse that has provided treatment or services to me or that has paid for or is seeking payment from me for such services;
- to give, disclose and release to my agent, without restriction,
- all of my individually identifiable health information and medical records regarding any past, present or future medical or mental health condition, to include all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness and drug or alcohol abuse.

The authority given to my attorney-in-fact shall supersede any prior agreement that I may have made with my health care providers to restrict access to or disclosure of my child's individually identifiable health information.

The undersigned, hereby gives and grants unto the attorney-in-fact named herein full authority and power to do everything whatsoever requisite or necessary to be done in the premises, as fully as the undersigned, could or might do if personally present, with full power of substitution, and revocation reserved, and the undersigned hereby confirms and ratifies all that the aforementioned attorney-in-fact shall lawfully do, or cause to be done hereunder during the period of my absence.

This power of attorney also extends to handling the day to day activities of the child, including enrolling in school and all issues associated with that responsibility,

including but not limited to the consenting to of field trips, sex education, participation in IEP meetings, picking up and delivery to school. My attorney-in-fact shall be allowed full access to my child's educational records of all kinds, no matter where they may be situated.

This power of attorney is immediately effective and shall remain in effect until it is revoked by me in writing, or until the following date: the ___ day of _____, 20___, and if the date is blank until the child turns 18 years of age.

And I hereby ratify and confirm all that my attorney-in-fact, or his or her substitute or substitutes shall do or cause to be done by virtue hereof. No person or corporation dealing with my said attorney-in-fact shall be under any obligation to inquire into the exercise of the powers conferred upon him or her or to see to the application of any moneys coming into his or her hands as a result of the exercise of powers granted by this power of attorney. This is a durable power of attorney and it shall not be affected by my subsequent disability or incapacity.

IN TESTIMONY WHEREOF, the undersigned, has hereunto set his/her hand this ___ day of _____, 20 ___.

Name of Parent_____

State of Kansas)
County of _____) ss.

Subscribed and sworn before me, a Notary Public of and for the state of Kansas, this ___ day of _____, 20 ___.

Notary Public

My Commission Expires:

The material in this booklet is provided as a public service by Kansas Legal Services, It was compiled by Paul Shipp (Managing Attorney in the Flint Hills Offices of Kansas Legal Services). It was written to give you with helpful information about the issues covered. This writing must not be used as a substitute for the advice of an attorney. If you need legal advice then you should seek out a capable, competent attorney.

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For assistance with Elder Law Questions, Call: 1-888-353-5337

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By

Kansas Legal Services

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(Marilyn Harp, Executive Director)