A Proposed Third-Party Visitation Statute: A Recommendation for Legislative Change in Kansas

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On June 5, 2000, the United States Supreme Court decided *Troxel v. Granville*[1], a case involving grandparents' request for court-ordered visitation with their grandchildren. The Court's willingness to dabble in family law, an area of law historically left for the states to muddle through, created interest among the legal community[2] and the public.[3] The *Troxel* decision was awaited with much anticipation. Would the Court define the term "family" and end the ongoing debate over its definition?[4] Would the Court stand firm and protect a parent's fundamental constitutional right to make child-rearing decisions or would the Court go the extra mile to recognize grandparents' right to court-ordered visitation?

Once *Troxel* was decided, there were conflicting interpretations of the Court's decision.[5] The decision did little to concretely define grandparents' right to visit with their grandchildren. Moreover, the Court did little to guard parents' right to raise their children. The fact that there was no majority opinion but rather a plurality opinion, two concurring opinions, and three dissenting opinions made it abundantly clear that the Court was divided on how to approach and resolve the issue of third-party visitation rights. After *Troxel*, many questions surfaced. Do grandparents and other third parties have any protected right to visitation? What does *Troxel* mean for parents and the fundamental right to make child-rearing decisions? What about the child and his interests?[6] The Court side-stepped many of the tough questions inherent in third-party visitation issues and refrained from directly addressing the constitutionality of third-party visitation statutes per se. Rather, the plurality opinion created somewhat hazy parameters for third-party visitation requests apparently attempting to balance parents' constitutional right to raise their children with the interests of third parties and children. To me, *Troxel* made it clear that while parents have a right to make decisions

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regarding the upbringing of their children, the parental right is not absolute, thus forcing the trial court into a precarious, but nonetheless essential position of evaluating on a case-by-case basis all the interests involved in third-party visitation disputes.

All fifty states, including Kansas, have statutes that allow grandparents to request court-ordered visitation.[7] Some states allow other third parties such as stepparents[8], siblings[9], and other blood relatives to request visitation[10] One of the Kansas statutes allows stepparents to seek visitation with their stepchildren.[11] Since the *Troxel* decision, states have been left to deal with its fallout. Litigation involving third-party visitation requests continues throughout the country.[12] Some states have legislatively amended their statutes.[13] In other states, courts have grappled with how to interpret and apply *Troxel* in cases involving visitation requests made by grandparents, siblings, and other third parties. Interestingly, in 2001, the Kansas Supreme Court decided two cases involving grandparents' request for visitation in light of the *Troxel* decision.[14] In both cases, the court seemingly reviewed the issue with a triage-like approach and upheld the constitutionality of both Kansas statutes. While the Kansas third-party visitation statutes remain viable, the onus is on the Kansas legislature to review the statutes and draft amendments that would put them in compliance with the *Troxel* decision.

Part One of this article includes a short introduction to the issue of third-party visitation rights and a review of the *Troxel* plurality opinion. Part Two discusses the three Kansas third-party visitation statutes and Kansas case law, including the two recent Kansas Supreme Court decisions of *State (SRS) v. Paillet*[15] and *Skov v. Wicker*[16] and the Kansas Court of Appeals case of *In the Interest of T.A.*[17] Finally, Part Three lays out my recommendations for legislative change to two of the Kansas third-party visitation statutes.

PART ONE: INTRODUCTION

The American family has evolved from traditional intact nuclear families in which father, mother, and children comprise the make-up of the family to blended families where children live with grandparents, stepparents and other third parties who often play a significant role in child-rearing. The preliminary results of the 2000 census indicate that many of our nation's children live in non-traditional households.[18] In Kansas, it is estimated that 106,000 of children under the age of eighteen are being raised by single parents, grandparents, or other third parties such as an aunt, uncle, or stepparent.[19]

Quite often, children build and maintain strong relationships with third parties, such as grandparents, so judicial intervention is unnecessary. But in some instances, typically when there is a breakdown in the relationship between the child's parent and the third party, the child is caught in the middle. The parent sometimes will attempt to

restrict the amount of time the child spends with the third party or the parent will decide to terminate the relationship outright. The third party is left out in the cold without little or no contact with the child and the child may similarly suffer as a result of the loss of contact with the third party.

States have attempted to recognize and protect third party-child relationships through enactment of third party, or nonparental visitation statutes.[20] Third-party visitation statutes throughout the country remain viable after the *Troxel* decision, but states are struggling with the post-*Troxel* effects.

The *Troxel* case[21]

Troxel v. Granville was a case involving grandparents' desire to obtain a visitation order under a broad Washington state third-party visitation statute. In a 6-3 decision, with only four justices joining in the plurality opinion and two justices concurring separately, the Court held that the Washington statute *as applied to the facts of the case* was unconstitutional.[22]

The facts in *Troxel* involved paternal grandparents seeking visitation with their two granddaughters after the father of the girls died.[23] The mother, Tommie Granville, and the father, Brad Troxel, were never married.[24] After Tommie and Brad ended their relationship in 1991, Brad lived with his parents, Gary and Jenifer Troxel (the "Troxels"). Brad's weekend visitation with his daughters often took place at his parents' home.[25] In 1993, Brad committed suicide. The Troxels continued to see the girls regularly until October 1993 when Granville informed the Troxels that they would be allowed one monthly visit with her daughters.[26]

In December 1993, the Troxels, unhappy with Granville's restriction of visitation, filed a petition with the Washington Superior Court to obtain increased visitation with their granddaughters.[27] The Washington statute whereby the Troxels sought court-ordered visitation provided: "*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 interest of the child whether or not there has been any change of circumstances."[28]

During the trial, Granville did not request denial of visitation altogether, but asked the court to limit the Troxels' visitation to one day per month with no overnight stay.[29] The trial court entered an oral order giving the Troxels extensive visitation.[30] Granville, dissatisfied with the amount of visitation granted to the Troxels, appealed the trial court's ruling to the Washington Court of Appeals.[31] The appeals court remanded the case to the trial court for a written order. On remand, the trial court found that grandparent visitation was "in Isabelle and Natalie's best interests" and ordered more visitation than offered by Granville, but less than requested by the Troxels.[32] Thereafter, the appeals court reversed the trial court's order and dismissed

the Troxels' visitation petition holding that "nonparents lack standing to seek visitation under § 26.20.160(3) unless a custody action is pending."[33]

The Washington Supreme Court reviewed the *Troxel* case and affirmed the appeals court decision.[34] The supreme court, however, disagreed with the rationale of the appeals court.[35] It refused to accept the appellate court's narrow construction of the statute and instead reasoned that the broad language of the statute violated parents' right to raise their children guaranteed under the federal Constitution, in part, because no showing of harm to the child was required.[36]

The United States Supreme Court granted certiorari and affirmed the judgment of the Washington Supreme Court on a different basis, holding that the Washington statute, as applied to Granville and her family, was unconstitutional. Justice O'Connor, writing the plurality opinion in which Chief Justice Rehnquist and Justices Ginsburg and Breyer joined, narrowly defined the issue in *Troxel* as "whether 26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution."[37] In doing so, the plurality declined to consider the primary constitutional question of "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to a child as a condition precedent to granting visitation."[38]

Justice O'Connor's analysis of *Troxel* began with a review of prior Supreme Court cases that hold that parents' right to raise their children is a protected right inherent in the Due Process Clause of the Fourteenth Amendment.[39] Implying that the parental right was not absolute, the plurality of the Court seemingly approved of the notion that there might be instances where state intervention is appropriate to entertain third-party visitation requests. Justice O'Connor said nothing definitive about grandparent visitation rights in her analysis of *Troxel* and did not bestow on grandparents any special status. In fact, Justice O'Connor seemed to lump grandparents with other third parties. However, she recognized the significance that grandparents have in children's lives and was quick to state the Court's hesitance to declare all nonparental visitation statutes unconstitutional as a per se matter.[40]

Although murky, the plurality opinion, it seems, first criticized the Washington third-party visitation statute and then analyzed the statute with the *Troxel* facts. In the plurality's estimation, the Washington nonparental statute suffered from three possible constitutional defects. First, the statute was "breathtakingly broad" because it failed to restrict the types of persons who can petition the court for visitation by allowing "any person" standing to seek visitation.[41] Any person could mean grandparents, stepparents, caregivers, teachers, or any other independent third party. The plurality was bothered by the "any person" language in the statute, and while it is apparent after *Troxel* that grandparents may continue to have standing to petition for visitation, it remains uncertain whether other third parties would have similar rights.

The second criticism by the plurality was that the Washington statute fails to limit the circumstances in which a petition for nonparental visitation may be granted by the trial court.[42] It is unclear, however, what circumstances are required before a parental decision concerning visitation can be subjected to judicial intervention because there was no further elaboration by Justice O'Connor on this point. There may be two possible interpretations of the plurality's insistence that limited circumstances must exist before a petition for third-party visitation can be granted. The first interpretation can be extracted from the plurality opinion itself where Justice O'Connor stressed that "special factors" must exist to justify state intervention in the parental decision concerning visitation, but Justice O'Connor did little to define what she meant by "special factors."[43] The second interpretation, though not specifically mentioned in the plurality opinion, is that an unusual familial circumstance such as a divorce or death of a parent must exist before a trial court can review a third-party visitation request. Most states that have third-party visitation statutes include a special circumstances provision allowing the third party to file a request for court ordered visitation only if there is a "triggering event" such as divorce or death of a parent.[44]

Finally, Justice O'Connor stated that the statute did not include a provision that attributed any special weight to the parental decision concerning visitation.[45] Justice O'Connor noted that the problem in the *Troxel* case is not that the trial court intervened, but that when it did so, it failed to give any special consideration to Granville's determination of her daughters' best interest.[46] The Washington statute placed the best interest determination solely in the hands of the trial court, effectively allowing the trial court to substitute its determination of best interest for the parent's determination of best interest and thus, giving the trial court discretion to overturn any parental decision.[47] *Troxel* dictates that a fit parent has the right to determine initially whether it is in the best interest for the child to have visitation with the third party and a presumption in favor of the parental decision must be considered by the trial court.[48] The language "best interest" is not specifically defined in *Troxel*, but the plurality hesitated to require that best interest include a finding of harm or potential harm to the child.[49]

After reviewing the flaws inherent in the language of the Washington third-party visitation statute, Justice O'Connor analyzed the judicial application of the statute to Granville and her family.[50] Justice O'Connor began her examination of the *Troxel* facts by emphasizing that there was no allegation by the Troxels that Granville was an unfit parent.[51] The determination of parental fitness is important because it dictates whether the parent's decision concerning visitation is protected by the "parental presumption."[52] The notion of the parental presumption is that the parent acts in the best interest of the child.[53] As long as a parent is fit, Justice O'Connor stated there "will normally be no reason for the state to inject itself into the private

realm of the family" to question a parent's decision-making ability.[54]

Justice O'Connor then discussed the Washington state court's failure to attribute any special weight to Granville's decision concerning visitation.[55] Rather, the plurality of the Court noted, the state court placed on Granville, the fit parent, the burden of disproving that visitation with the Troxels would be in the best interest of her daughters.[56] It is apparent after *Troxel* that the third party requesting visitation clearly has the burden to demonstrate that judicial intervention is necessary. While the plurality opinion did not articulate the appropriate burden of proof required by the third party, it referenced the Nebraska and Rhode Island grandparent visitation statutes, both of which employ a "clear and convincing evidence" standard.[57]

Summarizing its review of the visitation order issued by the trial court, the plurality declared that the order was based on nothing more than a "mere disagreement" between Granville and the Troxels.[58] Justice O'Connor added that the Washington Superior Court's decision to award visitation was not "founded on special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters."[59]

After *Troxel*, a mere disagreement between the parent and the third party about the amount of visitation is probably not enough for a trial court to intervene and overturn the parental decision. The plurality provided in *Troxel* that Granville was a fit parent who did not intend to cut off visitation entirely. [60] The Washington trial court should have given special weight to the fact that Granville acquiesced to the Troxels having some "meaningful" visitation with her daughters prior to the Troxels' decision to file the petition.[61] Unfortunately, the term "meaningful" is left undefined by the plurality, but Granville's willingness to allow the Troxels one day of visitation per month with her daughters could be used as a benchmark to define the term. After *Troxel*, it seems that a parent's decision to limit visitation is probably not a special factor unless the trial court makes a determination that the amount of visitation allowed the third party is not "meaningful."[62]

Troxel did not directly address the situation in which a parent has denied third-party visitation altogether. In *Troxel*, the plurality implied throughout its factual analysis that Granville was reasonable in allowing the Troxels some visitation prior to their lawsuit. More notably, Justice O'Connor stated that "significantly, many other States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party." Justice O'Connor intimates through this statement that in instances where the parent has denied visitation to the third party altogether, the trial court may be forced to determine whether the parent's decision to refuse or terminate visitation is reasonable. A finding by the trial court that a parent has unreasonably denied visitation to the third party puts the parent's position in a more precarious light, and might justify a court's decision to

subvert the parental decision and grant some visitation to the third party as long as the due process requirements of *Troxel* are met.[63]

In summary, the *Troxel* case fails to give clear directives to the states on how to handle third party requests for court-ordered visitation. It seems that each case must be reviewed on a case-by-case basis. The Court itself refused to find that all state third-party visitation statutes were unconstitutional, commenting in *Troxel*, that "state-court adjudication in this context occurs on a case-by-case basis."[64] Isn't this a good thing? After all, these issues are delicate and often tear at the very fabric of family. A trial court should review these issues carefully. Rather than apply clear-cut, rigid rules, *Troxel* implies that a trial court must engage in a delicate balancing act and review the arguments of all the interested parties, including those of the affected child and the third party. It is also incumbent upon the trial court to understand the circumstances surrounding the request for court-ordered visitation and to give deference to the parental decision regarding visitation before intervening.

PART TWO: KANSAS LAW[65]

The Kansas Statutes

Kansas has three statutes that allow third parties to seek visitation with minor children. Two of the three statutes, K.S.A. 60-1616(b) and subsection (a) of 38-129, have been the subject of post-*Troxel* scrutiny by the Kansas appellate courts. One statute, K.S.A. 60-1616(b), located in the divorce code, simply provides that "grandparents and stepparents may be granted visitation rights."[66] Under this statute a grandparent or stepparent can file a visitation request in either a pending or final divorce action.

The other statute, K.S.A. 38-129, has two subsections.[67] K.S.A. 38-129(a) states "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."[68] A grandparent's right to seek visitation under subsection (a) of this statute is broad and rooted in the grandparent's legal status as a grandparent, separate from any exceptional family circumstance such as a divorce or death of a parent. This subsection allows a grandparent to seek court-ordered visitation even when the nuclear family is intact (i.e. father, mother and children are living as a family unit). For visitation to be granted under this subsection, the trial court must make a finding that visitation is in the best interest of the child and that a substantial relationship grandparent-grandchild relationship exists.

Subsection (b) of K.S.A. 38-129 applies in stepparent adoption cases when one of the natural parents has died, the surviving spouse has remarried, and the surviving

parent's spouse has adopted the child. The statute reads, "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."[69] Unlike subsection (a) of K.S.A. 38-129, this subsection does not explicitly require a finding of best interest or substantial relationship before a trial court can award visitation. While there are no Kansas appellate cases that have interpreted the constitutionality of subsection (b) of the statute since the *Troxel* decision, it appears that subsection (a) and (b) should be read in conjunction with each other and that the two-prong test of best interest and substantial relationship be applied by the trial court if a grandparent requests visitation pursuant to either subsection.[70]

Finally, the last third-party visitation statute, K.S.A. 38-1563(f) located in the Child in Need of Care ("CINC") code, provides: "If custody of a child is awarded under this section to a person other than the child's parent, the court may grant *any individual* reasonable rights to visit the child upon motion of the individual and a finding that visitation rights would be in the best interests of the child."[71] This statute does not explicitly require proof of a substantial relationship between the third party and the child as a preceding condition for visitation. Interestingly, in CINC cases the fitness of the parent or parents is at issue and the child may be removed, at least temporarily, from parental custody due to alleged abuse or neglect. Pending the outcome of the CINC case, the trial court often relies on the child's extended family, the state, and other significant persons to assist with the child's custody and care. As such, an award of third party visitation under these circumstances wherein the fitness of the parent is questioned, would not appear to be as burdensome on the parental right, thus allowing the trial court discretion to award visitation to any person as long as visitation would be in the best interest of the child. There has not been any post-*Troxel* litigation involving this third party visitation statute. In my opinion, K.S.A. 38-1563(f) is less vulnerable to constitutional scrutiny after *Troxel* because in *Troxel* the fitness of the parent was not at issue. If the parent's fitness is at issue, as it typically is in CINC cases, *Troxel* intimates that there may be a stronger basis for court intervention, at least in the context of third-part visitation requests.

Since *Troxel*, the constitutionality of both K.S.A. 60-1616(b) and 38-129(a) has been litigated. Although neither of these statutes presupposes that the parent is fit, I suggest that there is an inherent presumption under both statutes that the fitness of the parent is not at issue. One of the potential problems with K.S.A. 60-1616(b) and 38-129(a) is that both statutes use the term "may," leaving it solely to the discretion of the trial court to decide whether to grant third-party visitation to a requesting party. The

statutes, as written, effectively submit all parental decisions regarding visitation to review by the trial court if the third party files a request with the court. The fit parent is then forced to defend the action. Another problem is that neither statute contains a requirement that the trial court accord the fit parental decision regarding third-party visitation any special weight whatsoever. Third, while K.S.A. 38-129 (b) and 60-1616(b) are applicable in stepparent adoptions and divorce actions respectively, the language in K.S.A. 38-129(a) appears too broad, like the Washington statute, allowing grandparents to file a petition for court-ordered visitation at any time. Fourth, K.S.A. 60-1616(b) and 38-129(b) do not explicitly include, at a minimum, the best interest requirement. Finally, both statutes fail to articulate that the burden of proof rests with the third party requesting visitation to show that visitation is in the best interest of the child and the existence of a substantial relationship with the minor child.

Pre-Troxel Kansas Cases

Before I review the post-*Troxel* Kansas appellate cases, a discussion of pre-*Troxel* Kansas cases is appropriate. Since the inception of K.S.A. 38-129 in 1971, by the Kansas legislature, there have been only a handful of appellate cases interpreting this statute.[72] Prior to the *Troxel* decision, there were no Kansas appellate cases addressing the grandparent visitation issue in the divorce context under K.S.A. 60-1616(b). To date, there are no Kansas appellate cases involving a stepparent's request for court-ordered visitation.

In 1989, one Kansas appellate case addressed the question of whether grandparents should be awarded court-ordered visitation when there is an apparent intact family. In *Spradling v. Harris*[73], a grandmother, ("Harris") sought visitation rights with her daughter's ("Spradling") children under K.S.A. 38-129(a) after the daughter refused to allow visitation. Spradling divorced the father of her two oldest children and was married to the father of her third child, Brianna.[74] The district court ordered visitation with the three children after finding that Harris had proven she had substantial relationship with the children and that it would be in the best interest of the children for visitation to occur.[75]

In Spradling's appeal, she obstensibly argued that because she was married to her second husband, the father of Brianna, the youngest child, the court's intervention was improper because it violated her right to family privacy.[76] Not persuaded by this argument, the Kansas Court of Appeals upheld the trial court's ruling, remarking that the district court retained jurisdiction to monitor the case and make appropriate changes in the visitation order if needed.[77] The appeals court noted that review of the evidence showed a substantial relationship between Harris and the two oldest children, but insufficient evidence as to the youngest child, Brianna.[78] Nevertheless, the appeals court determined that it was in Brianna's best interests that she not be treated

differently than her siblings and upheld the district court's visitation order.[79]

The question arises whether *Troxel* would change the outcome of *Spradling*. The *Troxel* decision itself was limited to the circumstances surrounding Granville and her family. The fact that Spradling, her husband and Brianna could be considered an intact family might be problematic especially if Brianna's father opposed visitation. Additionally, it is unclear from the case whether the trial court applied the parental presumption or gave any deference to Spradling's or her second husband's decision concerning visitation. Spradling's refusal to allow any meaningful visitation could be viewed as a special factor under the *Troxel* plurality opinion that a trial court must consider; however, the trial court should give a parent's decision substantial weight nonetheless. Finally, the *Spradling* court found that there was not a substantial relationship between Harris and Brianna as required by the Kansas statute.[80]

While the *Spradling* case involved an apparent intact family, it was not a nuclear family in the traditional sense where father, mother and all children are living together as a family unit. Imagine the scenario in which both parents who are married to each other decide to deny access of their children to a third party, such as a grandparent, for whatever reason. Under existing K.S.A. 38-129(a), the grandparent has standing to sue the parents for court-ordered visitation. Should the district court award visitation under these circumstances? While the *Troxel* decision said nothing about court intervention in this type of case, the fact that two fit parents in a nuclear family jointly make a decision regarding grandparent visitation should be given substantial, if not absolute, deference by the trial court because of the family status. The grandparent's burden to prove that court-ordered visitation is appropriate becomes more difficult to meet in this type of case.

Another notable Kansas case, *Browning v. Tarwater*[81], involved statutory language in K.S.A. 38-129(b) that was subsequently amended by the Kansas legislature. In 1979, in *Browning*, the Kansas Supreme Court reviewed a natural mother's request to terminate the paternal grandmother's visitation rights with her child after the mother's second husband adopted the child. Relying on the Kansas adoption statute, the Kansas Court of Appeals held that the adoption had the effect of prohibiting the grandmother from exercising visitation rights "because the child, when adopted, has new parents and new grandparents."[82] In an apparent response to the *Browning* decision, the Kansas legislature amended subsection (b) of the K.S.A. 38-129 both in 1982 and again in 1984. The current subsection (b) allows grandparents to seek visitation with their grandchildren when their child has died, the surviving parent has remarried, and the surviving parent's spouse has adopted the child.

In 1991, the Kansas Court of Appeals interpreted the current language of K.S.A. 38-129(b) in *In the Matter of the Adoption of J.M.U.*[83] Both J.M.U.'s natural parents had died, and maternal relatives had subsequently adopted J.M.U. Following

the adoption, J.M.U.'s natural paternal grandmother, Victoria Elder, requested court-ordered visitation rights with J.M.U.[84] The district court denied Elder's request. Reversing the district court, the court of appeals held that Elder was entitled to visitation. This decision, in effect, gave a natural grandparent rights to visit a child who had been legally adopted by third parties.

The Kansas Supreme Court had opportunity to comment and modify the *J.M.U.* decision in the 1997 case of *Sowers v. Tsamolias*[85], which involved a request by biological maternal grandparents for court-ordered visitation with their grandchild, A.E. who had been adopted by third parties after the natural mother's parental rights had been terminated. Although the grandparents were caring for A.E.'s natural sibling, the Kansas Supreme Court held that the grandparents did not have standing to petition for visitation rights.[86] The termination of parental rights and A.E.'s subsequent adoption by third parties created a new legal status. A.E. had new parents and new grandparents.[87]

More significantly, the Kansas Supreme Court in *Sowers* declared its disapproval of the *J.M.U.* decision.[88] The Court stated that K.S.A. 38-129 did not apply to the facts in *J.M.U.* because there was no surviving parent who had subsequently remarried or a stepparents who had adopted *J.M.U.* The criticism of *J.M.U.* in the *Sowers* decision seemed to result in a narrow reading of K.S.A. 38-129. According to the Court, under subsection (a) of the statute, "any grandparent" means any legal grandparent as provided in the Kansas probate code concerning adoption at K.S.A. 59-2111, et seq.[89] In cases in which the child has been legally adopted by third parties, the natural grandparents no longer have standing to request court-ordered visitation under subsection (a) because the legal status of the natural grandparent has been terminated.[90] Furthermore, the Court made it clear that subsection (b) applies to stepparent adoptions but does not apply to third-party adoptions.[91] Whether the *J.M.U.* or *Sowers* decisions would survive scrutiny under *Troxel* is questionable, but neither decision indicates that the courts found special circumstances to overcome the fit parental presumption.[92]

Finally, *Santaniello v. Santaniello*[93] was a Kansas Court of Appeals case that addressed the burden of proof issue. In *Santaniello*, paternal grandparents requested and were granted court-ordered visitation with their grandchildren after the natural father died.[94] The trial court stated: "If we start with the proposition that grandparents are entitled to visitation, from there it looks to me the question is how much and how often, if at all. Maybe there is some reason why there shouldn't be visitation."[95] The trial court awarded the grandparents visitation and the mother appealed the order.[96] The court of appeals noted 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."[97] The appellate court remanded the

case to the district court holding that the "burden of proof is upon the grandparents to show that it is in the children's best interest for visitation to occur."[98]

Post-Troxel Kansas Cases

2001 was a landmark year for the Kansas appellate courts because the issue of grandparent visitation rights arose on three separate occasions.[99] In two separate cases, the Kansas Supreme Court faced the opportunity to interpret K.S.A. 60-1616(b) and 38-129(a) in light of the *Troxel* decision.[100] Subsequent to the Kansas Supreme Court decisions, the Kansas Court of Appeals issued a decision regarding grandparents' request for visitation in a case involving the statutory application of K.S.A. 38-129(a). The first supreme court case, *State (SRS) v. Paillet*[101], decided February 5, 2001, involved a parentage case in which paternal grandparents ("the Paillets") sought court-ordered visitation with their granddaughter ("S.D.S.") pursuant to K.S.A. 38-129(a) after their son died. The facts of this case were strikingly similar to the *Troxel* facts. Danielle S. ("Danielle") and Joshua Paillet ("Joshua") had been dating only briefly when she became pregnant with S.D.S.[102] Danielle and Joshua never married.[103] The State of Kansas Department of Social and Rehabilitation Services ("SRS") filed a paternity petition on behalf of Danielle and S.D.S.[104] In August 1997, the district court issued a written order finding that Joshua was the natural father of S.D.S. and ordered him to pay monthly child support.[105] Acrimony between Danielle and Joshua ensued sometime thereafter. Danielle's attorney sent a letter to the Paillets (Joshua and his parents collectively) informing them that if they wanted to visit S.D.S., they would have to do so at Danielle's home; otherwise, visitation would not be allowed. In June 1998 Joshua died.[106] His parents never visited S.D.S. at Danielle's home while Joshua was alive.[107] In October 1998, they filed a petition for court-ordered visitation pursuant to K.S.A. 38-129(a).[108]

The district court awarded the Paillets visitation with S.D.S.[109] The Kansas Court of Appeals affirmed the district court's visitation order but disagreed with the trial court's rationale. The Kansas Supreme Court granted review of the case. Two of the key issues reviewed by the court included: (1) whether the Paillets met the two conditions of "substantial relationship" and "best interest" required under K.S.A. 38-129(a); and (2) whether K.S.A. 38-129(a) is constitutional under *Troxel*. Regarding the issue of whether the Paillets met the conditions of K.S.A. 38-129(a), the court concluded that the evidence at trial "establishes that no relationship, let alone a substantial one, existed between the Paillets and their granddaughter."[110] The Paillets never visited S.D.S. They never sent her gifts or cards and they never telephoned S.D.S.'s mother, Danielle, to inquire about her. [111] The Court stated that "[t]he provisions of K.S.A. 38-129(a) are clear and unambiguous and do not provide for an exception to the requirement of finding the existence of a substantial relationship

between the grandparents and grandchild."[112]

Regarding the issue of whether K.S.A. 38-129(a) is constitutional after *Troxel*, the court stated that the trial court's application of the statute to the facts in *Paillet* was unconstitutional.[113] The court opined that Danielle, like Tommie Granville in *Troxel*, sought restrictions on visitation rather than prohibition of it.[114] Additionally, the trial court failed to consider Danielle's fitness as a parent.[115] *Troxel* dictates that if a parent is fit, the trial court is obliged to accord deference to the parent's decision regarding third-party visitation.[116] Furthermore, *Troxel* clearly provides that there is a "presumption that a fit parent will act in the best interest of his or her child."[117] In *Paillet*, the trial court presumed that visitation with the Paillets was in S.D.S.'s best interest and effectively substituted its judgment of best interest for that of Danielle.[118] Finally, in *Paillet*, the Kansas Supreme Court affirmed the *Santaniello* holding by emphasizing that the burden of proof rests with the grandparent seeking visitation to prove that visitation would be in the child's best interest.[119]

The second post-*Troxel* third-party visitation case decided by the Kansas Supreme Court, is *Skov v. Wicker*[120]. *Skov* involved a maternal grandmother, Melinda Skov, and a maternal great-grandmother and step great-grandfather, the Tankersleys, seeking court-ordered visitation with Mona Wicker's three children.[121] Two separate lawsuits were filed. One suit was filed in Ms. Wicker's prior divorce case under K.S.A. 60-1616(b) wherein all three "grandparents" sought court-ordered visitation with the two older children born of Ms. Wicker's first marriage to Sean Boydson.[122] The other suit was filed pursuant to K.S.A. 38-129(a), wherein the grandparents sought visitation with the third and youngest child belonging to Ms. Wicker and her current husband Vance Wicker.[123] No evidentiary hearing was held.[124] The trial court dismissed the grandparents' requests in the two cases holding that both grandparent visitation statutes were unconstitutional on their face.[125] The cases were consolidated and the Kansas Supreme Court granted review.[126]

Citing its earlier decision in *Paillet*, the Kansas Supreme Court affirmed that K.S.A. 38-129(a) is constitutional if properly applied by the trial court.[127] The Court reiterated that for the statute to be correctly applied and pass constitutional muster, a trial court must make a finding that the grandparent has proven that visitation is in the best interest of the child.[128] The trial court must also find that a substantial grandparent-grandchild relationship exists. Additionally, the trial court must also assure that the due process parental protections articulated in *Troxel* are met.[129] These parental protections require the trial court to give special weight to the fit parental decision regarding visitation.[130] The trial court must also apply the presumption that a fit parent's decision regarding visitation is in the best interests of the child.[131]

The Kansas Supreme Court upheld the constitutionality of K.S.A. 60-1616(b), but construed it to include the requirements provided in K.S.A. 38-129(a) – the two-

prong test of best interest and substantial relationship.[132] The court required the grandparents to bear the burden of showing that visitation is in the best interest of the child.[133] The *Troxel* due process requirements that protect the parental right must be applied by the trial court too. Finally, the court strictly interpreted "grandparent" and held that great-grandparents are not included in the term.[134] The issue of whether a step great-grandparent is a "grandparent" under both statutes was moot because Mr. Tankersley had died.[135] However, because the court held that a great-grandparent did not have standing to request court-ordered visitation under the statutes, it would logically follow that a step great-grandparent would not have standing either.[136]

Finally after *Paillet* and *Skov* were decided by the Kansas Supreme Court, the Kansas Court of Appeals was given the opportunity to address yet another grandparent visitation case. The decision of *In the Interest of T.A.*[137] was issued on December 21, 2001. In this case, the mother allowed her child to visit with the paternal grandparents, but she and the grandparents disagreed about a visitation schedule.[138] The mother requested modification of a prior agreement between her and the grandparents that allowed the grandparents visitation with the child every other Sunday from 7 a.m. to 7 p.m.[139] The mother requested that visitation occur one Sunday every 3 or 4 weeks from 12 p.m. to 7 p.m. The trial court refused to adopt the mother's proposed schedule, but modified the agreement giving the grandparents visitation one Saturday per month for 8 hours. [140] The mother appealed the trial court's modification order.[141]

On appeal, the mother argued that as a fit parent, her decisions concerning her child could not be substituted by decisions of the court.[142] The court of appeals disagreed with her argument stating that while the presumption that a fit parent will act in the best interest of his or her child must be given special weight, "a parent's determination is not always absolute; otherwise the parent could arbitrarily deny grandparent visitation without the grandparents having any recourse."[143] While grandparents were allowed to seek court-ordered visitation under K.S.A. 38-129(a), the court stated that the burden of proof rests with the grandparents to prove that visitation would be in the best interest of the child and that a substantial grandparent-grandchild relationship exists.[144]

The court nevertheless determined that the trial court failed to sufficiently articulate its reasons for not adopting the mother's visitation schedule. The court stated, "[a]bsent findings of unreasonableness, a trial court should adopt the grandparent visitation plan proposed by a fit parent."[145]

PART THREE: A PROPOSAL FOR LEGISLATIVE CHANGE

Evident in both the *Paillet* and *Skov* cases was the Kansas Supreme Court's application of a "Band-Aid" on K.S.A. 60-1616(b) and 38-129(a) in attempt to keep the statutes constitutional in light of *Troxel.* Also, inherent in the two Kansas cases is

the Kansas Supreme Court's willingness to accept the notion that while the parent has a protected fundamental right to make child-rearing decisions, there may be situations in which state intervention to protect third party-child relationships may be necessary.

A long time ago, the Kansas legislature decided to give grandparents and stepparents standing to request court-ordered visitation. The underlying reasons for giving these particular parties standing to request visitation remains unclear in the legislative history. One can surmise that the legislature's goal was to recognize these third party-child relationships because of the blood and legal ties respectively. Another possible reason is that Kansas joined the litany of states that enacted third-party visitation statutes in the 1970s and 80s to remedy social woes like divorce, drug addition, and teen pregnancy. Whatever the impetus for enactment of the statutes, today, grandparents and stepparents remain the only third parties who have standing to request court-ordered visitation in Kansas.

Both K.S.A. 60-1616(b) and 38-129 should be revised to reflect the mandates of the *Troxel* decision. Furthermore, the dynamic of the American family has evolved and continues to do so creating the need for change in the legal system.[146] Years ago, the recognition of the parental right was based on the deeply rooted notion that children were chattel owned by the parents who bore them.[147] More recently, however, the United States Supreme Court has sought to justify protection of the fundamental parental right based upon the role that parents presumably play in their children's lives.[148] As blended non-traditional families and alternative child-rearing arrangements have become mainstream, third parties have begun to rely on nonparental visitation statutes to request state court intervention in an effort preserve their ongoing presence in a child's life.[149] The *Troxel* decision, while murky, has recognized the fundamental constitutional parental right without shutting the courthouse door to the interests of third parties and affected children. Kansas needs a third-party visitation statute that protects the parental right while recognizing the interests of third parties and their relationships with children.

Below is my proposal for a third-party visitation statute in Kansas. Following the proposed substantive statute are arguments and support for my recommended changes. This statute would repeal K.S.A. 60-1616(b) and replace K.S.A. 38-129 in its entirety. K.S.A. 38-1563(f) would be unaffected by this proposed statute and remain intact because this statute allows the trial court discretion to award third-party visitation in termination of parental rights cases in which the fitness of a parent is at issue. A brief review of K.S.A. 38-130, which currently addresses enforcement of grandparent visitation rights, and K.S.A. 38-131, which deals with mandatory costs and attorney fees in a grandparent action for court-ordered visitation, follows the discussion of the proposed substantive statute.

Proposed Third-Party Visitation Statute (K.S.A. 38-129):

(a) Any person may file a petition or motion in a pending action requesting visitation rights with an unmarried minor child. The person, 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 a substantial relationship between the person and the minor child exists and that visitation would be in the best interest of the child.

(b) The person requesting visitation with a minor child shall also state in the initial pleading whether the parent of the minor child is fit or unfit. If the petition or motion alleges that the parent is unfit, the court shall dismiss the visitation request filed pursuant to this statute or refer the matter to the local district attorney's office for further action pursuant to K.S.A. 38-1501 et seq.

(c) In determining whether a substantial relationship exists as required in subsection (a), the court shall consider the following special factors affecting the minor child's life:

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

(2) whether the third party has acted as a de facto parent to the child.

The court shall consider special familial circumstances such as parental death, divorce, illness, hospitalization, institutionalization, incarceration, abandonment, addiction, informal or legal separation, or any other circumstance affecting the child.

(d) 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 third 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 third party.

(e) If the court finds that the allegations set forth in the petition are insufficient to state a cause of action, the court shall deny the third party visitation petition or motion. If the court finds that the petition or motion is sufficient to state of cause of action, the court may either (1) if deemed appropriate, 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 an evidentiary hearing on the petition or motion.

(f) If an evidentiary 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 third party. If the parent has denied visitation to the third party altogether, the trial court shall determine whether the parent's denial for visitation is reasonable.

(g) The burden of proof rests with the third party requesting visitation with the minor child to rebut the parental decision concerning visitation. The third 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.

(h) In determining whether to award visitation to the third 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 third party to occur. If the court finds that the parent has allowed meaningful visitation to occur between the third 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 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 third party.

(i) The court may modify or terminate any prior order of third-party visitation whenever modification would serve the best interest of the child.

Support for revised K.S.A. 38-129:

Subsection (a)

Kansas allows grandparents to seek court-ordered visitation under both K.S.A. 60-1616(b) and 38-129. As already noted, a grandparent's right to seek visitation in Kansas is apparently associated with a grandparent's legal status as a grandparent. Stepparents have standing to request visitation with their stepchildren under K.S.A. 60-1616(b) presumably when the stepparent and the parent are in the midst of a divorce.[150] Currently, K.S.A. 60-1616(b) and 38-129 seemingly protect the status of the grandparent and stepparent because they allow these limited persons the right to seek court-ordered visitation with a minor child. The purpose of a third-party visitation statute should be to preserve the relationships that children make with persons who have loved and cared for them. In other words, standing to request third-party visitation should be given to any person who can demonstrate a significant role in a child's life. The United States Supreme Court previously observed in *Smith v. Org. of Foster Families for Equal. & Reform*[151], "[t]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, as well as from the fact of blood relationship."[152] Acceptance of the notion that extended or nontraditonal familial relationships exist in today's fluid society necessitates response from the legal system. Why not open the door for other third parties and allow them to seek visitation

with a child whom they may have a strong and symbiotic relationship?

The recent Rhode Island case of *Rubano v. DiCenzo*[153] illustrates the necessity of recognizing the ever-changing dynamics of familial relationships. In *Rubano*, two females were involved in a same-sex relationship and agreed to become parents together.[154] They arranged for DiCenzo to conceive through artificial insemination. When the child was born, his last name on the birth certificate was listed as Rubano-DiCenzo.[155] For four years the couple raised the child as their son, then the two separated.[156] The boy remained with DiCenzo, the natural mother, and Rubano sought court-ordered visitation.[157] The Rhode Island Supreme Court, in a lengthy opinion, held that the family court was vested with jurisdiction to hear Rubano's visitation request on two separate grounds: (1) The Uniform Law on Paternity allowed an "action to declare a mother and child relationship," between Rubano and the child; and (2) Another Rhode Island state statute granted jurisdiction to the family court "over matters relating to adults who shall be involved with paternity of children born out of wedlock."[158] In Kansas, under any of the state's third-party visitation statutes, Rubano could not seek court-ordered visitation and would be unable to visit her "son."

What about an aunt who has graciously agreed to care for a child because the mother is addicted to drugs and cannot care for the child and the father is unknown? Sometime later, after the child has lived with the aunt for a lengthy period of time, the mother undergoes rehabilitation for her drug addition, has become a fit parent, and now wants her son back. Aunt wants to maintain ties with the child she has raised for the last two years, but the mother is uncooperative. Under both the current applicable Kansas third-party visitation statutes, the aunt previously described would not have standing to request visitation with the child.

This proposed subsection would obviate the distinction between grandparents, stepparents and any other significant third parties. Rather than give a person standing to seek visitation with a child because of a blood or legal relationship, the person requesting visitation must play a significant role in the child's life. The third party must file a verified petition or motion or attach an accompanying affidavit to the request for visitation that specifically alleges the two-prong test of substantial relationship and best interest. The burden is on the third party upfront to articulate facts that support an assertion that a substantial relationship exists between him and the child and that visitation is in the best interest of the child. The requirement of factual specificity would weed out requests by third persons who might have an ancillary or minimal relationship with the child.

If the third party meets the burden in the initial written filing of sufficiently pleading the two-prong test of substantial relationship and best interest, the request for visitation remains viable. If the petition or motion does not sufficiently state a cause of action because it fails to adequately meet the two-prong test of substantial relationship

and best interest, it can be denied by the trial court outright pursuant to subsection (e) of the proposed statute.

While subsection (a) seemingly gives standing to an array of third parties by allowing "any person" standing to seek court-ordered visitation, it also provides protection to the parent who may be forced to defend such a request. It gives the trial court the authority to review all written third-party visitation requests and the discretion to dismiss any frivolous request outright. Early dismissal of frivolous third-party visitation requests by the trial court would dramatically reduce the amount of litigation in these matters while simultaneously minimizing any potential burden that may be placed on parents and their decision-making authority. Consider the following scenario: Grandparents file a request for court-ordered visitation with their grandchild after the parent is uncooperative regarding their request for visitation. The parent and child live in Kansas. The grandparents also live in Kansas and visit the grandchild 3 or 4 times a year. The visits usually occur to celebrate birthdays and holidays. While the grandparents could argue that it is in the best interest of the child for visitation to occur because there is a blood relationship and it is important for the child to have ties with extended family, the grandparents would not meet the first part of the two-prong test which requires them to prove a substantial relationship with the child. After all, should a few short visits per year in which the grandparents spend time with the parent and child be enough to meet the substantial relationship test? The grandparents' brief – and possibly obligatory – visits with the parent and child are not enough to meet the "substantial relationship" prong of the two-part test which requires much more under subsection (c) of the proposed statute. As such, the trial court should deny the grandparents' written request for visitation on its face and the parent (and child) is prevented from undergoing further litigation.

Subsection (b)

Subsection (b) of the proposed statute requires that the third party state in the initial pleading whether the parent is fit or unfit. This is an important element required in the initial pleading. *Troxel* dictates that the fundamental parental right to make child-rearing decisions only attaches to a parent who is fit.[159] If the parent is unfit, that is, unable or unwilling to adequately care for the child, *Troxel* intimates that there may be a stronger basis for judicial intervention into the family unit at least in the visitation context.

K.S.A. 38-1501 et seq., the Kansas Code for Children ("CINC statute"[160]), addresses the interests of children who may be in need of care, custody, control, guidance and discipline.[161] The purpose of the statute is to ensure the well-being of a child who may be at risk because the parent is allegedly unable or unwilling to serve in a parenting capacity. Often times, the fitness of the parent is at issue in these types of

cases. CINC actions can be filed by the state or by private individuals.[162] If a third party believes that a parent's fitness is at issue, a CINC action would be a more appropriate venue for the court to address the matter of the child's welfare. The trial court may also entertain a third-party visitation request in a CINC action pursuant to K.S.A. 38-1563 (f) which allows any person to seek visitation with a minor child in termination of parental rights cases. In CINC cases, because the fitness of the parent is being questioned, it would seem that a trial court would have more latitude to award visitation to third parties under K.S.A. 38-1563(f) when appropriate.

In summary, if the third party states in the initial pleading that the parent is fit, the request for court-ordered visitation under this proposed statute remains viable, assuming of course, that the third party has sufficiently alleged the two-prong test of substantial relationship and best interest. If the third party alleges that the parent is unfit, the trial court can dismiss the visitation request outright even if the third party successfully pleads the two-part test of substantial relationship and best interest. The trial court can also refer the matter to the local district attorney's office for potential action under the CINC statute. The third party can then request visitation pursuant to K.S.A. 38-1563(f) if such an action is filed.

Subsection (c)

Subsection (c) of the proposed statute attempts to provide a guideline on what the third party must specifically allege in the written verified petition or motion to survive the first prong of "substantial relationship." The statute lays out the special factors that the trial court must consider in determining whether the third party has met the initial burden of pleading the existence of a substantial relationship with the child. Quite simply, the substantial relationship test focuses on the role the third party has played in the child's life.

The text of this subsection is responsive to two concerns the plurality of the Supreme Court expressed in *Troxel*: (1) that the Washington state third-party visitation statute placed no limitations on the persons or circumstances by which court-ordered visitation can be granted; and (2) that the Washington trial court's order was "not founded on any special factors that might justify the State's interference" with a parent's fundamental right to make child-rearing decisions.[163] Justice O'Connor did not elaborate on either of these concerns, so her criticisms remain open to interpretation. I would guess that the plurality's criticisms were one and the same, and were in response to the broad language of the Washington state third-party visitation statute that allowed "any person" to seek court-ordered visitation "at any time."

Proposed subsection (c) eliminates the concerns articulated by the plurality in *Troxel* because it restricts the persons who can request court-ordered visitation by providing special circumstances by which a third party can assert a basis for requesting

visitation with the minor child. In the same regard, the language of the subsection articulates what is meant by "substantial relationship." [164] The substantial relationship test requires that the third party demonstrate that he and the child have resided in the same household. Moreover, there must exist a special circumstance or triggering event in the child's life resulting in the necessity of a third party becoming a parent-like figure in his life. This subsection identifies events occurring in the child's life, such as a parent's drug addiction or incarceration, which prevent or limit the parent's ability or opportunity to perform parenting duties.

The language is also broad enough to cover situations in which the parent has voluntarily shared parenting duties with a third person. The Rhode Island case of *Rubano v. DiCenzo* is the perfect example of a special circumstance wherein the natural mother of the child shared parenting rights and duties with her female partner until the couple separated. The female partner, Rubano, effectively became the child's other mother resulting in a symbiotic third party-child relationship deserving of statutory protection. The underlying rationale for the substantial relationship test is anchored to the notion that the third party and child have a significant relationship that is "continuous, affectionate, intimate, and stimulating to the child."[165]

Included within the definition of "substantial relationship," in subsection (c) is the requirement that the third party act as a "de facto parent" to the child for a period of time due to a special family circumstance affecting the child. "De facto parent" has been defined by the American Law Institute (ALI) in its suggested *Principles* addressing child custody and visitation issues.[166] The ALI *Principles* were drafted to assist and inform legislative bodies on the issues that arise as a result of divorce and the breakdown of other familial relationships. A "de facto parent" is defined pursuant to the ALI *Principles* as an individual:

> "Who for a significant period of time not less than two years,
>
> (i) lived with the child;
>
> (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 form caretaking functions,
>
> (A) regularly performed a majority of the caretaking functions for the child, or
>
> (B) regularly performed a share of the caretaking functions at least as great as that of the parent with whom the child primarily lived.[167]

This definition of de facto parent recognizes that a nonparent, under specified circumstances, may qualify to request court intervention to protect a close-knit relationship he has built with a child. To qualify as a de facto parent under the ALI

Principles, the third party must have lived with the child and have performed some or all of the parenting duties for the child for a minimum of two years and for reasons other than financial compensation. Some examples of caretaking functions found in the *Principles* include feeding, dressing, bathing, imparting skills and discipline, and arranging heath care and schooling.[168] Persons like nannies, daycare providers, and even foster parents would fail to qualify as "de facto parents" because they perform the caretaking functions for monetary compensation.[169] These restrictions effectively limit standing to those persons who have played a significant role in a child's life and have done so for reasons other than remuneration.

The ALI's definition of de facto parent realistically describes the important role that the third party must play in a child's life. However, the ALI's suggestion that the third party act as the child's de facto parent for a period of at least two years is arbitrary and does not serve a functional purpose in determining whether a third party has established a substantial relationship with a child. The comments to the *Principles* suggest that the two-year minimum is intended to tease out any potential third party claimants with incidental or temporary relationships with the child.[170] The comments further state that beyond the two-year minimum, "the length of time that constitutes a significant period will depend on many circumstances, including age of the child, the frequency of contact, and the intensity of the relationship."[171]

Proposed subsection (c) does not adopt the two-year minimum requirement. Rather, it only requires that the third party and the child reside in the in same household for some period of time. The trial court must then determine on a case-by-case basis whether the period of time spent by the third party and the child is significant to the child's dependence on the third party and whether the third party has participated in or taken over the parenting duties for the child.

The following illustrations demonstrate the need for flexibility in measuring the length of the substantial relationship: A single father enlists in the military and is required to attend boot camp away from home for six months. He entrusts his parents with his infant son while he is away. His parents perform all the caretaking functions for their grandchild. They dress, diaper, feed, bathe, comfort and love the child. Under this fact pattern, the grandparents should be considered "de facto parents" because they have supported the physical and psychological needs of an infant child. A six-month period in which the grandparents have taken over the parental role is significant with regard to an infant child. On the other hand, if the child were an adolescent, the role of the grandparents might not be as pivotal because presumably the child would be more independent and self-sufficient. Therefore, a longer period in which the grandparents have performed the caretaking duties for an adolescent might be required .

Simply stated, the language of proposed subsection (c) focuses on the role that

the third party must play in a child's life in order to meet the substantial relationship test. A third party who has had only an incidental or minor role in a child's life could not satisfy the substantial relationship test under this subsection so his third-party visitation request would be dismissed under subsection (e) of the statute.

Subsection (d)

All states include the nebulous best interest principle in their nonparental visitation statutes.[172] The "best interest" principle in almost every legal context, including child custody and visitation matters, is extremely difficult to define. The Kansas courts have determined that the best interest test is comprised of many factors that must be balanced in effort to ensure the welfare of the child.[173] Although the best interest test is universally applied in the family law context, its definition is debatable and often results in the subjective application of the principle by the trial courts.

Subsection (d) provides guidance to the trial court on how to define the indeterminate "best interest" test in the context of third-party visitation requests. It focuses the trial court solely on the interests of the child in these types of matters. In a situation where the child is caught in the middle between the parent and the third party requesting visitation, the best interest test attempts to ensure that the well-being of the child is paramount.

Assuming that the third party has met the burden of proving the existence of a substantial relationship, the trial court must next consider how the interests of the child will be affected if visitation is awarded. For example, consider the 2001 Oregon case of *Harrington v. Daum*[174], which involved a third party's request for court-ordered visitation with the two children belonging to his deceased girlfriend. The girlfriend was previously married to Randi Daum.[175] Two sons were born of the Daum marriage.[176] After the Daums divorced, the mother was granted residential custody of the two boys and Randi was granted substantial visitation.[177] Soon after the divorce, the mother became romantically involved with Bruce Harrington. Their relationship lasted approximately two years when she was killed in an automobile accident.[178] Although Bruce and the mother never married, Bruce and the boys formed a close relationship.[179] The mother and children had often spent weekends at Bruce's apartment where Bruce established a play area for the boys. Bruce often picked up the boys after school and spent time with them until their mother got off work. After the mother's death, the boys went to live with their father, Randi.[180] Randi allowed Bruce to see the boys numerous times and then became concerned that Bruce was seeking to undermine his parental authority. Randi then limited Bruce's visits with the boys and insisted that visitation take place in his home. Bruce was dissatisfied with the arrangement and sought court-ordered visitation.[181]

Although Bruce might arguably meet the substantial relationship test of the

statute, Bruce might not meet the best interest test if such an action were filed in Kansas under this proposed statute.[182] The trial court would need to consider the effects a visitation order would have on the children. For example, the trial court would have to determine whether any further relationship between the deceased mother's boyfriend and the children would promote or hinder them psychologically. Arguably, such a relationship would not promote, and could possibly hinder, the children psychologically. Furthermore, the acrimony between the father, Randi, and Bruce, the third party, could divide the children's loyalties and detrimentally effect the children's relationship with their father. On balance, while Bruce and the boys enjoyed a significant relationship, the best interests of the children would not be furthered by visitation with Bruce.[183] Therefore, denial of a request for court-ordered visitation in this case might be appropriate.[184]

Subsection (e)

The third party who wants visitation with a child has a high hurdle to jump over if his request is to remain viable with the court. The third party must plead with specificity in the written request that the third party and child have a substantial relationship and that visitation would be in the child's best interest. The third party must also state that the parent is fit. At this point, the written request is before the trial court to determine whether the third party has sufficiently stated a cause of action for court-ordered visitation. A third party's failure to properly allege and provide supporting facts regarding the two-prong test of substantial relationship and best interest results in dismissal of the visitation request by the court outright and the litigation ends. The parent is subjected to minimal state intervention and has incurred nominal monetary expense to defend the frivolous request if the court dismisses the third-party visitation request early in the process.[185]

If the trial court finds that the third party has sufficiently stated a cause of action, then the court can either issue an ex parte order for mediation, pursuant to K.S.A. 23-601 et seq., or set the matter for hearing. Including mediation in this subsection as an alternative to further litigation takes the parties out of an adversarial environment and in many instances enables them to focus on preserving the relationship between the third party and the child. Also, if there is conflict between the parent and the third party, mediation may assist the parties in dealing with their own relationship issues. Mediation may be the perfect outlet to handle these disputes. If mediation is unsuccessful, K.S.A. 23-604 provides that mediation can be terminated.[186] The trial court then will have to resolve the third-party visitation matter.

This subsection also allows the trial court discretion to schedule a future evidentiary hearing in which the parent and the third party are forced to litigate the visitation matter. An evidentiary hearing, rather than a proffer hearing, is specifically

required in this subsection because an evidentiary hearing requires that all testimony be taken under oath and that any corroborating evidence be properly admitted before consideration by the court. While the parent will typically bear no burden of any kind at such a hearing, the parent will be forced into the uncomfortable position of witnessing his parental decision-making authority being attacked by the third party. More significantly, the fit parent is forced into the position of defending his parental decision regarding visitation.

Subsection (f)

The *Troxel* presumption that a fit parent acts in the best interest of the child is specifically included in subsection (f) of this proposed visitation statute. A trial court must begin an evidentiary hearing with the notion that a fit parent's decision regarding third-party visitation is what is best for the child. Furthermore, a trial court must refrain from substituting its determination of best interest for that of the fit parent.[187] In cases in which the parent is allowing the third party to visit the child but there is a disagreement as to the amount of visitation or when visitation is to occur, the trial court must give substantial weight to the fit parent's decision regarding visitation. For example, if the parent was willing to allow the child to visit with the third party for a few hours once a month and the third party is insistent on more visitation, the trial court should give deference to the parent's decision and in most cases refuse to amend the visitation schedule. Interference with the parental decision in an effort to achieve a middle ground between the parent and the third party effectively subverts the protected parental presumption.[188] Only in extremely rare cases, should the fit parental decision regarding limited visitation be overturned by the trial court. The Kansas Court of Appeals, in *In the Interest of T.A.*[189], stated that if a fit parent is willing to offer some visitation, absent a finding of unreasonableness, the trial court must uphold the parent's decision regarding visitation.[190]

The issue of a trial court's role in situations where the parent has denied third-party visitation altogether was not addressed in *Troxel*. This matter has not been directly resolved by the Kansas appellate courts either since the *Troxel* decision. How should a trial court handle cases in which the third party has successfully pleaded the two-prong test of substantial relationship and best interest, but the parent has unilaterally decided to deny or cut off visitation altogether? Recall the fact pattern provided earlier in which a mother of a young child becomes addicted to street drugs. The father is unknown. The mother takes to the streets in pursuit of her drug addiction and the young child is left with the mother's sister ("Aunt"). The aunt provides all the love and care for this child for two years. The mother successfully undergoes rehabilitation and wants to resume her parenting role with the young child. The aunt wants to maintain ties with the child and the mother refuses visitation outright. The

aunt and presumably the child are harmed by the mother's decision to deny the aunt access to the child. The child is prohibited from spending quality time with the one person who served as his de facto parent for two years. The aunt, on the other hand, has in essence, lost a "son." The mother's denial of visitation suggests that the mother may harbor unreasonable expectations or thoughts about the child's relationship with the aunt.

To balance the interests of Aunt and child with the parent's decision to deny visitation, a trial court should be allowed to hear evidence regarding the reasonableness of the mother's decision. If indeed the trial court finds that the mother has unreasonably denied visitation, the court, it seems should be given some latitude to protect the interests of Aunt and child. A judicial award of some limited visitation may be appropriate in this case pursuant to subsection (h) of this proposed statute which is outlined below.

Consider another scenario involving a single teen mother who turns to her parents for assistance in raising her newborn child. Both the mother and the child live with the maternal grandparents for a length of time until the mother has completed her schooling and is financially stable. During the time that the young mother and her child are living with the maternal grandparents, the grandparents are controlling and somewhat abusive to the mother. Once the young mother and her child move out of the grandparent's home, mother decides to deny the grandparents visitation with her child. The grandparents seek court-ordered visitation with their grandchild. Should an evidentiary hearing be held in this case, the trial court would need to apply the fit parental presumption that the mother's decision to deny visitation is in the best interest of the child. Because the mother denied visitation altogether, trial court is forced to address the reasonableness of the mother's decision. In doing so, the interests of the child and the third parties, the grandparents, are considered and given some weight.

Subsection (g)

In 1992, the Kansas Court Appeals articulated in *Santaniello v. Santaniello,* that the burden of proof rests with the grandparents to demonstrate that visitation is in the child's best interests should they desire court-ordered visitation under K.S.A. 38-129(a).[191] More recently, the Kansas Supreme Court in *Paillet*, noted its approval of the *Santaniello* holding by stating "[t]he decisional framework of *Santaniello* conforms with *Troxel's* 'traditional presumption that a fit parent will act in the best interest of his or her child.'"[192] In the case of *In the Interest of T.A.*, the Kansas Court of Appeals extended the burden of proof mandate to require that the grandparent meet both the best interest test and prove the existence of a substantial relationship with the child under the current version of K.S.A. 38-129(a).[193] Under proposed subsection (g), the language specifically requires that the third party rebut the parental decision

concerning visitation. More significantly, the third party bears the entire burden of meeting the two-part test of substantial relationship and best interest. The parent bears no burden whatsoever.

While the Kansas appellate cases of *Santaniello*, *Paillet,* and *In the Interest of T.A.* are steadfastly firm that the burden of proof rests with the third party to prove that court-ordered visitation should be granted, all three cases are silent on the appropriate evidentiary standard that the third party must meet. This proposed subsection would require the third party to show by clear and convincing evidence that court-ordered visitation is in the best interest of the child and that a substantial relationship exists between the third party and the child. The clear and convincing evidentiary standard effectively protects the fundamental parental right, yet it recognizes the interests of the third party and the child.

In the *Troxel* plurality opinion, the Supreme Court recognized that third-party visitation statutes "can place a substantial burden on the traditional parent-child relationship." [194] The plurality, however, did not articulate an appropriate evidentiary standard, but made significant reference to the Rhode Island and Nebraska third-party visitation statutes, both of which require the clear and convincing evidence standard.[195] In referencing these third-party visitation statutes, the plurality noted that "[t]he decisional framework employed by the [Washington] Superior Court directly contravened the traditional presumption that a fit parent will act in the best of his or her child. In that respect, the court's presumption failed to provide any protection for Granville's fundamental constitutional right to make decisions concerning the rearing of her own daughters."[196] Justice O'Connor's reference to the Rhode Island and Nebraska statutes strongly suggests that a parent's fundamental right to make child-rearing decisions deserves heightened protection making clear and convincing evidence the appropriate evidentiary standard in third-party visitation cases.

The Supreme Court has previously determined the evidentiary standard required to protect the fundamental parental right. In 1982, in *Santosky v. Kramer*,[197] the Court addressed the evidentiary standard required in termination of parental rights cases. Implicit in the Court's evaluation of an appropriate evidentiary standard was its intent to properly balance the interests of the parents, the state, and the affected children. In *Santosky*, the state of New York attempted to permanently sever the parental rights of two parents, the Kramers, as to their three children. The New York Family Court Act under which the Kramers were prosecuted required that only a "fair and preponderance of the evidence" support the finding of permanent neglect. The Supreme Court held that fair and preponderance of the evidence burden of proof standard, required under the New York act, violated the Due Process Clause of the Fourteenth Amendment. In reaching its conclusion, the Court determined that the parents faced two possible conflicting interests by the state: (1) the state's interest in

the children's well-being; and (2) the state's monetary and administrative interest in reducing the cost and burden of termination proceedings.[198] The Court ultimately balanced the interests of the parents with the interests of the state and declared that "at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the state is constitutionally intolerable."[199] Finding that a clear and convincing evidence standard struck a fair balance between the interests at stake, the Court held that "such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process."[200] A lower evidentiary standard, such as preponderance of the evidence, in third-party visitation cases, would, as the Court noted in *Santosky*, allocate the risk almost evenly between the fit parent and the third party requesting court-ordered visitation. Admittedly, third-party visitation requests do not rise to the level of intrusion on the fundamental parental right as does a state's attempt to terminate a parent's rights as to his child. However, the interest of the third party requesting court-ordered visitation is not on par with a state's interest in protecting the well-being of children in termination of parental rights cases. In *Troxel*, the plurality recognized the fundamental parental right and dictated that a fit parent's decision regarding third-party visitation must be given substantial weight by the trial court. The mandates of *Troxel* support the proposition that a clear and convincing evidentiary standard be applied in third-party visitation cases. This elevated standard would protect the fundamental parental right without imposing substantial burden on the third party requesting court-ordered visitation.

Subsection (h)

Once the third party has proven by clear and convincing evidence the two-prong test of substantial relationship and best interest, subsection (h) directs the trial court to consider and give substantial weight to the parental decision regarding third-party visitation before entering a visitation order. At this point in the process, the third party has presented evidence to the trial court that demonstrates the third party's significant role in the child's life. Additionally, the third party has offered evidence that visitation with the child will serve the child's best interests. While the interests of the third party and the interests of the child, to some degree, have been identified and articulated to the trial court, the court has had almost no exposure to the parent's position regarding visitation. The trial court must now balance the established interests of the third party and the child, with the parent's fundamental right to make child-rearing decisions, including decisions regarding third-party visitation.

The *Troxel* plurality opinion dictates, without more, that the trial court must give substantial weight to a fit parent's decision regarding visitation. With this mandate in mind, notwithstanding the third party's strong evidentiary case for

visitation, the trial court should proceed with the visitation request in a delicate manner. There are different possible avenues the trial court can take at this point in the process. The direction that the trial court takes depends heavily on the facts of each case.

If the fit parent has allowed some visitation to occur between the third party and the child, the trial court must then determine whether the visitation allowed by the parent is "meaningful." If the trial court determines that visitation is meaningful, then the proposed statutes states that the court shall adopt the visitation plan offered by the parent. In *Troxel*, the mother, Tommie Granville, was willing to allow the grandparents visitation with her daughters one day a month. The plurality in *Troxel* deemed Granville's offer of visitation to the grandparents as "meaningful" without further defining the term.[201] It seems that whether or not a parent's willingness to offer some visitation to the third party should be deemed meaningful, depends of the circumstances involved in each case and the amount of visitation the parent is willing to allow.

The following example illustrates the necessity for the trial court to carefully review the facts of each case. Consider again the *Rubano* case wherein two females involved in a same-sex relationship had a child and raised the child together until their breakup. The natural mother remained the custodial parent. The other mother, a de facto parent, requested court-ordered visitation with the child. If the natural mother was willing to offer visitation only on Christmas and on the child's birthday, the visitation allowed by her might not be meaningful under the particular facts of the case. As such, because the parental decision concerning visitation is not in the best interest of the child, under this proposed statute the trial court could enter an order for more visitation as long as the trial court makes specific findings of fact to support such a decision.

What about a fit parent who has denied visitation altogether to a third party who has proved the two-prong test of substantial relationship and best interest? If the fit parent has withheld visitation from the third party altogether, subsection (f) requires the trial court to determine whether the denial of visitation is reasonable. If the trial court finds that the parent's denial of visitation is reasonable, the third party's request for court-ordered visitation is denied. If the trial court finds that denial of third-party visitation is unreasonable, and therefore is not in the best interests of the child, the court can enter an order for third-party visitation as long as the court makes specific findings of fact on the record to support its order.

Subsection (i)

Finally, subsection (i) provides that the trial court retains continuous jurisdiction over the parties so that it has authority to modify an order of third-party

visitation. This provision closely models the modification provision pursuant to K.S.A. 60-1616(c) in the Kansas divorce code wherein visitation awarded to non-custodial parents[202] pursuant to K.S.A. 60-1616(a), and visitation awarded to grandparents and stepparents under 60-1616(b), can be modified by the court whenever modification would serve the best interest of the child. Unlike K.S.A. 60-1616(c), this provision allows also the trial court to terminate third-party visitation whenever termination would serve the best interest of the child. The modification power of the court is important because there may be instances where an initial order of visitation is necessary, but over time the child has weaned himself or has become less attached to the third party and therefore visitation should be reduced or terminated.

For example, a stepparent has requested court-ordered visitation with his stepchild in the stepparent's divorce from the child's natural mother. The mother is willing to allow the stepparent to visit the child one Sunday per month. The trial court upholds the mother's decision concerning visitation and enters an order for third-party visitation in the couple's divorce case. Visitation between the stepparent and the child proceeds for about a year or so with the stepparent visiting the child pursuant to the court's order. Eventually, the stepparent and the child's relationship begins to wane and the child is no longer interested in spending time with the stepparent. The mother can request modification or termination of the visitation order under this subsection.

Necessary Modifications to K.S.A. 38-130 and 38-131:

Enactment of the proposed substantive third-party visitation statute, K.S.A. 38-129, would necessitate modification of the current language of K.S.A. 38-130. The existing language of K.S.A. 38-130 addresses the procedure involved in enforcement of grandparent visitation rights. It should be revised to provide:

> An action for third-party visitation rights as provided by this act shall be brought in the county in which the child resides with the child's parent, guardian or other person having lawful custody.

K.S.A. 38-131, which relates to costs and attorney's fees, should remain intact. The current language of this statute forces the party requesting court-ordered visitation to pay for all costs and attorney's fees of the parent unless otherwise ordered by the court. Retention of this statute protects the parent from undue financial burden and potentially discourages frivolous actions filed by third parties.

CONCLUSION

The United States Supreme Court in *Troxel* refused to apply a strict constitutional standard to resolve the issue of whether third parties, including

grandparents, should be given a right to court-ordered visitation with a minor child. The fact that no majority of justices could agree on a particular constitutional standard to apply in this context suggests that a more fluid and flexible approach by the trial courts is required in assessing these types of cases.[203] It is now up to the individual states to determine how to react to the *Troxel* decision. There is no perfect formula for trial courts to apply in dealing with third-party visitation requests. Rather it is a balancing act that requires a trial court to review each request on a case-by-case basis, thus forcing the court to consider the fit parent's decision regarding visitation in conjunction with the competing interests of the third party and the affected child.

While the language of this proposed statute is lengthy, the substance of the substantive statute, in my estimation, comports with the mandates of *Troxel.* The effect of the statute is to protect the fundamental parental right by narrowing the opening in which any person can request court-ordered visitation with a minor child. Grandparents and stepparents are no longer given any special consideration because of their blood or legal status respectively. More importantly, all persons deserving of recognition and protection are given standing to request visitation as long as they have played a significant role in a child's life. Effectively, this statute allows a third party to request visitation only when the parent has previously abrogated or shared his parental rights and duties either voluntarily or involuntarily to a third party, the third party has assisted in or taken over the parenting role, and the child will benefit from a continued, albeit restricted relationship, with the third party. It is time for the Kansas legislature to consider a progressive and realistic view of the changing American family and to adopt a third-party visitation statute that responds to these familial changes.

Notes

1. Troxel v. Granville, 530 U.S. 57 (2000).
2. *See* Jeffrey W. Doeringer, *Grandparent Visitation: Dead or Alive?* 42 ORANGE COUNTY LAW 32 (2000); Joan Catherine Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 DRAKE L. REV. 279 (2000).
3. Kim Cobb, *Grandparents Put Visitation Law to Test,* HOUSTON CHRONICLE, May 28, 2000, at A1; David G. Savage, *Fractured Families at Core of Visitation Issue,* LOS ANGELES TIMES, May 22, 2000, at A1; Marc Kaufman, *Raising One Generation After Another: Grandparents Find Child-Rearing Can Be Harder the Second Time Around,* WASHINGTON POST, January 25, 2000, Z7.
4. David Meyer, *Constitutional Pragmatism Over for a Changing American Family,* 32 RUTGERS LAW J. 711 (2001) (citing Linda Greenhouse).

5. *Id.*
6. *See generally* Sally F. Goldfarb, *Visitation for Nonparents after Troxel v. Granville: Where Should States Draw the Line?*,32 RUTGERS L.J. 783 (2001).
7. *See* Stephen Elmo Everett, *Grandparent Visitation Rights Statutes,* 13 BYU J. PUBLIC LAW 355 (1999).
8. *See* K.S.A. 60-1616(b)(2001); M.S.A. 257.022(2001); N.H. Rev. Stat. 458:17 (2001).
9. A.R.S. 8-525.01(H)(1999); L.S.A. 9:344 (2001); M.D.Cts & Jud. Pro. 3-815(f)(4)(vii)(2001).
10. Okla. Stat. Ann. 7505-6.5 (1998); Va. Code Ann. 16.1-278.15 (2001).
11. K.S.A. 60-1616(b)(2001).
12. *See* Crocket v. Pastore, 2002 WL 78698 (2002); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *In Re T.J.K.*, 62 S.W.3d 830 (Tex. App. 2001).
13. *See* I.C. 32-719 (2001); A.S. 25.20.065 (2001); C.R.S.A. 19-1-117.5 (2001).
14. State of Kansas (SRS) v. Paillet, 16 P.3d 962 (Kan. 2001); Skov v. Wicker, 32 P.3d 1122 (Kan. 2001).
15. 16 P.3d 962 (Kan. 2001).
16. 32 P.3d 1122 (Kan. 2001).
17. 38 P.3d 140 (Kan. 2001).
18. Avail. at http://www.census.gov/prod/2001pubs/p20-537.pdf (visited on April 1, 2002).
19. Avail. at http://factfinder.census.gov/ (visited on April 5, 2002).
20. Throughout this article, I will use the terms third party, nonparent, and grandparent interchangeably.
21. My synopsis of the *Troxel* case was extracted directly from my Kansas Bar Journal article. 69 J.KANS.. BAR ASSOC. 14 (2000).
22. Troxel v. Granville, 530 U.S. 57, 67 (2000). Summaries of the *Troxel* concurring and dissenting opinions were contributed by my former research assistant, Stefan Padfield, KU L'01.
    Concurring opinions:
    Justice Souter opined that the Washington statute was unconstitutional on its face, precluding any analysis of its application: "*Meyer v. Nebraska*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he could make a 'better decision' than the objecting parent had done." *Id.* at 2066-67.
    Justice Thomas recognized that the "fundamental right of parents to direct the upbringing of their children." *Id.* at 2068. Noting that all of the justices except Justice Scalia had recognized such a right, he added that any statute seeking to infringe upon that right would need to pass strict scrutiny. "Here, the State of Washington lacks even a legitimate interest – to say nothing of a compelling one – in second-guessing a fit parent's decision regarding visitation of third parties." *Id.*
    Dissenting opinions:
    In his dissent, Justice Stevens stated that it is improper to affirm the facial invalidation of a statute on the basis of its application. He also disagreed with Justice O'Connor's characterization of the trial court as applying a presumption in favor of the grandparents. He went on to argue that because the state supreme court was incorrect on in its application of the constitution to the statute (finding that the statute was too broad on its face and that the constitution required a harm

standard), the case should be remanded to allow the state to thoroughly define the best interest of the child standard. He noted that while the parent certainly has a protected liberty interest at stake here, that interest has never held to be inviolable and must be balance with "the child's own complementary interest in preserving relationships that serve her welfare and protection." *Id.* at 2072. Protection of that interest may well fall to the state as *parens patria.*

Justice Scalia noted his belief in the existence of an unenumerated parental right, stated that "I do not believe that the power which the Constitution confers upon as me *as a judge* entitle me to deny any legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right." *Id.* at 2074. Determination of such unenumerated right should be left to the legislature.

Justice Kennedy argued that because it was error for the state supreme court to conclude that a best interest of the child standard could never be appropriate in third-party visitation cases, and that the Constitution required instead a harm-to-the-child standard, the case should be reversed as to that ruling and remanded for further consideration. Noting that while "court-ordered visitation appears to be a 20th century phenomenon," and that "[h]istorically, grandparents had no legal right of visitation," Justice Kennedy argued that "[c]ases are sure to arise... in which a third party... had developed a relationship with a child which is not necessarily subject to absolute parental veto. *Id.* at 2077-78. He went on to note that a best interest of the child standard may be appropriate where statutes employ some type of limitation on the parents' exposure to third party visitation petitions.

23. *Troxel,* 530 U.S. at 60.
24. *Id.*
25. *Id.*
26. *Id.*at 60-61.
27. *Id.* at 61.
28. *Id.* (emphasis added).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 62.
34. *Id.* at 62-63.
35. *Id.* at 63.
36. *Id.*
37. *Id.* at 65.
38. *Id.* at 73.
39. *See generally id.* at 65-66.
40. *See generally id.* at 65-66.
41. *Id.* at 67.
42. *Id.* at 67.
43. *Id.* at 68.
44. *See* Everett, *supra note* 8, at 355.
45. *Troxel,* 530 U.S. at 69-70.
46. *Id.*
47. *Id.*

48. *Id.*
49. *Id.* at 67.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 69.
56. *Id.*
57. *Id.* Referencing Neb. Rev. Stat. 43-1802 (1998) (court must find "by clear and convincing evidence" that grandparent visitation "will not" adversely interfere with the parent-child relationship) and R.I. Gen. Laws 15-5-24.3 (a)(2)(v)(Supp. 1999) (grandparent must rebut, by clear and convincing evidence, presumption that a parent's decision to refuse grandparent visitation was reasonable).
58. *Troxel.*, 530 U.S. at 68.
59. *Id.*
60. *Id.* at 69-70.
61. *Id.* at 72.
62. *See generally Id.* at 69-72.
63. *Id.* at 72-73.
64. *Id.*
65. A majority of this part is also extracted from my Kansas Bar Journal article. 69 J.KANS. BAR ASSOC. 14 (2000).
66. K.S.A. 60-1616(b)(2001).
67. K.S.A. 38-129 (2001).
68. K.S.A. 38-129(a)(2001).
69. K.S.A. 38-129(b)(2001).
70. In In re Adoption of J.A.B., Jr., 26 Kan. App.2d 959, 997 P.2d 98 (2000) the Kansas Court of Appeals addressed the issue of whether a paternal grandfather had standing to contest the adoption of his grandchild by the child's stepfather. The court held that the grandfather did not have standing to contest the adoption but did have standing to request reasonable visitation with the child pursuant to K.S.A. 38-129(b).
71. K.S.A. 38-1563(f) (emphasis added).
72. Prior to 1971, there were no statutes that allowed grandparents standing to request court-ordered visitation. One case addressed the issue, *Leach v. Leach*, 180 Kan. 545, 306 P.2d 193 (1957)(holding the district court's decree granting grandparents visitation and right to have person of the child for one weekend every sixty days was erroneous because the fit father was entitled to custody of the child).
73. 778 P.2d 365 (Kan. 1989).
74. *Id.* at 595.
75. *Id.* at 366.
76. *Id.*
77. *Id.* at 368.

78. *Id.*
79. *Id.*
80. *Id.*
81. 524 P.2d 1135 (Kan. 1974).
82. *Id.* at 1139.
83. 819 P.2d 1244 (Kan. 1991).
84. *Id.* at 1244.
85. 941 P.2d 949 (Kan. 1997).
86. *Id.* at 950.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *See generally id.*
93. 850 P.2d 269 (Kan. 1992).
94. *Id.* at 270.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *In re Adoption of J.A.B., Jr.*, 26 997 P.2d 98 (Kan. 2000).
100. *State, Dept. of Social & Rehab. Services v. Paillet,* 16 P.3d 962 (Kan. 2001); *Skov v. Wicker,* 32 P.3d 1122 (Kan. 2001); *In the Interest of T.A.*, 38 P.3d 140 (Kan. 2001).
101. *State, Dept. of Social & Rehab. Services v. Paillet,* 16 P.3d 962 (Kan. 2001).
102. *Paillet*, 16 P.3d at 964.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id*
111. *Id*
112. *Id.*
113. *Id*
114. *Id.* at 967.
115. *Id.*
116. Troxel v. Granville, 530 U.S. 57, 70 (2000).
117. *Id.* at 68.
118. *Id.*
119. *Paillet*, 16 P.3d at 647.

120. Skov v. Wicker, 32 P.3d 1122, (Kan. 2001).
121. Melinda Skov was Mona Wicker's mother; the Tankersleys were Ms. Wicker's grandparents.
122. *Skov*, 32 P.3d at 1123.
123. *Id.* at 1124.
124. *Id.*
125. *Id.*
126. *Id.* at 1125.
127. *Id.* at 1124.
128. *Id.* at 1125.
129. *Id.* at 1126.
130. *Id.* at 1127.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* In 1992, in *In re Hood*, the Kansas Supreme Court upheld a district court's decision to dismiss a petition for visitation filed pursuant to K.S.A. 38-129(a) by an unrelated third party. The petitioner was the grandmother of the child's half-brother and served as the child's daycare provider. 252 Kan. 689 (1992).
135. *Id.* at 1127.
136. *Id.*
137. 38 P.3d 140 (2001).
138. *Id.* at 141.
139. *Id.*
140. *Id.*
141. *Id.* at 143.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. David D. Meyer, *Constitutional Pragmatism for a Changing American Family,* 32 Rutgers Law J. 711, 718 n.30 (2001).
147. *Id.*
148. *Id.*
149. Earl M. Maltz, *Who Gets the Children? Parental Rights after Troxel v. Granville,* RUTGERS L. J. 693, 693 (2001).
150. K.S.A. 38-1563(f) allows grandparents, stepparents and any other third person to request visitation with a minor child involved in a CINC case.
151. 431 U.S. 816 (1977).
152. Meyer, *supra* note 145, at at718 n.31.
153. *Rubano v. Dicenzo*, 759 A.2d 959 (2000).
154. *Id.* at 961.
155. *Id.*
156. *Id.*

157. *Id.*
158. *Id.* at 976.
159. Troxel v. Granville,, 530 U.S. 57, 68 (2000).
160. The Kansas Code for Children is also referred to as the CINC (Child in Need of Care) statute.
161. CINC actions can be filed by the state or by private individuals. Ft: K.S.A. 38-1510 and 1529.
162. K.S.A. 38-1510 and 1529.
163. *Troxel,* 530 U.S. at 68.
164. See Patricia S. Fernandez, *Grandparent Access: A Model Statute,* 6 Yale L.& Pol'y Rev. 109 (1988). Professor Nancy Maxwell of the Washburn Law School included the Fernandez model statute in her Continuing Legal Education materials entitled *Third Party Custody and Visitation after the 2000 Legislature and Troxel.*
165. *Id.*
166. Principles of the Law of Family Dissolution: Analysis and Recommendations (Tentative Draft No. 4, 2000).
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at Illustration No. 25,225.
171. *Id.*
172. Everett, *supra* note 8, at 789.
173. *See generally,* Grubbs v. Grubbs, 623 P.2d 546 (Kan. 1981); Parish v. Parish, 551 P.2d 792 (1976).
174. Harrington v. Daum, 18 P.3d 456 (Or. 2001).
175. *Id.* at 456.
176. *Id.*
177. *Id.* at 457.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 456-57.
182. *Id.*
183. *Id.*
184. In *Harrington*, the Oregon Court of Appeals concluded that under the Oregon third-party visitation statute, there was no interest of Harrington, the third party, that could outweigh Daum's parental right to decide the issue of visitation.
185. The trial court may also order that the third party pay the parent's attorneys fees pursuant to K.S.A. 38-131.
186. K.S.A. 23-604.
187. *See* Troxel v. Granville, 530 U.S. 57, 70 (2000).
188. *Id.* at 72.
189. 38 P.3d 140 (Kan. 2001).
190. In the Interest of T.A., 38 P.3d 140, 143-44 (Kan. 2001).
191. *See* Santaniello v. Santaniello, 850 P.2d 269 (1992).

192. *State of Kansas (SRS) v Paillet,* at 16 P.3d 962, 970 (Kan. 2001).
193. In the Interest of T.A., 38 P.3d at 142.
194. Troxel v. Granville, 530 U.S. 57, 64 (2000).
195. *Id.*
196. *Id.*
197. Santosky v. Kramer, 455 U.S. 745 (1982).
198. *Id. at* 766.
199. *Id. at* 768.
200. *Id.* at 769; In Kansas, termination of a parent's rights with regard to his minor child requires a clear and convincing evidence standard.
201. Troxel v. Granville, 530 U.S. 57, 72(2000).
202. *See* K.S.A. 1616(c); Visitation awarded to non-custodial parents is termed "parenting time."
203. Meyer, *supra* note 145, at 717.