



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 89- 31

Winston Barton, Secretary
Department of Social and Rehabilitation Services
Docking State Office Building, 6th Floor
Topeka, Kansas 66612-1570

Re: Minors -- Kansas Code for Care of Children;
Dispositional Procedure -- Orders of Temporary
Custody; Hearings; Placement; Authorized
Dispositions; Judicial Determinations Regarding
Welfare of Child and Reasonable Efforts to Avoid
Placement Outside Home

Synopsis: It is our opinion that Kansas law clearly and unequivocally seeks to avoid removing a child from his home, but permits such removal in order to protect and promote the welfare of the child. State law 1) unambiguously requires a judicial order for removal to be based upon the court's determination that leaving a child in the home is contrary to the child's welfare, and 2) provides for judicial determinations concerning reasonable efforts to keep children in their homes. Cited herein: K.S.A. 38-1501; K.S.A. 1988 Supp. 38-1542; 38-1543; K.S.A. 38-1562; 38-1563; K.S.A. 1988 Supp. 38-1565; K.S.A. 38-1583.

* * *

Dear Secretary Barton:

You request our opinion regarding what findings Kansas law requires before issuance of judicial orders removing a child

from the home. You state that the department believes that before a child can be removed from his home pursuant to a court order, Kansas law clearly and unequivocally requires the order to be based upon a judicial determination that (1) leaving the child in the home is contrary to the welfare of the child and (2) unless an emergency exists, reasonable efforts have been made to prevent removal from the home. We concur.

K.S.A. 38-1501 et seq. create the Kansas code for care of children. K.S.A. 38-1501 states the purpose of this code: "each child within its provisions shall receive the care, custody, guidance, control and discipline, preferably in the child's own home, as will best serve the child's welfare and the best interests of the state." (Emphasis added). (See also K.S.A. 1988 Supp. 38-1565; reintegration plan regarding attempts to return the child to his home.) Thus, Kansas statutorily recognizes and dictates a preference for leaving a child in his own home. Further statutory evidence of this preference can be found in the identical language contained in K.S.A. 1988 Supp. 38-1542(f), 38-1543(i), and K.S.A. 38-1563(h):

"The court shall not enter an order removing a child from the custody of a parent pursuant to this section unless the court first finds from evidence presented by the petitioner that reasonable efforts have been made to prevent or eliminate the need for removal of the child or that an emergency exists which threatens the safety of the child and requires the immediate removal of the child. Such findings shall be included in any order entered by the court."
(Emphasis added).

These statutes respectively discuss ex parte, temporary or dispositional court orders. In discussing K.S.A. 38-1563 dispositional orders, the Kansas Court of Appeals reviewed the current statute and remanded to the trial court with instructions to make the required findings concerning why the child could not be left in the home. In re A.B., 12 Kan.App.2d 391 (1987). Thus, it is our opinion that, unless it is an emergency situation, Kansas law clearly requires a court to "find from the evidence that reasonable efforts have been made to prevent or eliminate the need for removal of the child."

Your second question is whether Kansas law requires removal orders to be based upon a determination that remaining in the home would be contrary to the child's welfare. K.S.A. 38-1501 states the purpose of the code for care of children is to provide each child with "care, custody, guidance, control and discipline . . . as will best serve the child's welfare." (Emphasis added). Pursuant to K.S.A. 1988 Supp. 38-1543(f), a court may issue a temporary custody order if:

"(1) The child is dangerous to self or to others; (2) the child is not likely to be available within the jurisdiction of the court for future proceedings; or (3) the health or welfare of the child may be endangered without further care."

K.S.A. 1988 Supp. 38-1543(h) permits a temporary custody order allowing the child to remain at home if the court enters an order restraining any alleged perpetrator from residing in the child's home or having contact with the child. Thus, in order to protect the welfare of the child, Kansas statutes allow temporary custody orders regarding placement of the child.

K.S.A. 1988 Supp. 38-1562(c) discusses dispositional hearings and dictates that the court consider evidence concerning the child:

"(c) Prior to entering an order of disposition, the court shall give consideration to the child's physical, mental and emotional condition; the child's need for assistance; the manner in which the parent participated in the abuse, neglect or abandonment of the child; and the evidence received at the dispositional hearing."


These factors all concern the welfare of the child. K.S.A. 38-1563(d) allows a court to issue a dispositional order which places the child outside the home:


"(d) If the court finds that placing the child in the custody of a parent will not assure protection from physical, mental or emotional abuse or neglect or sexual abuse or will not be in the best interests of the child, the court shall enter an order awarding custody of the child."

Kansas case law recognizes that parental rights are fundamental in nature and are constitutionally protected. Matter of Adoption of McMullen, 236 Kan. 348 (1984). A parents' right to custody is constitutionally protected. Sweetser v. Sweetser, 7 Kan.App.2d 463 (1982). Where there is a significant encroachment upon a constitutionally protected personal liberty, the state must show a compelling interest in order to subordinate that liberty. KCCR v. Sears Roebuck and Co., 216 Kan. 306 (1975). The constitutional right to raise a child is not absolute and may be curtailed or eliminated by state law for the purpose of advancing a compelling state interest. 16A C.J.S. Constitutional Law, Sec. 464 (1984). A child's welfare "has a constitutional dimension no less compelling than that the parent's have in their preservation of family integrity." Id. Parental rights may be interfered with by the state only if the child is in need of care. In re K.G.O., 12 Kan.App.2d 7, 12 (1987); See also K.S.A. 38-1583; In re A.B., 12 Kan.App.2d 391, 392 (1987). Thus, in addition to K.S.A. 38-1501 et seq. requirements concerning consideration of the child's welfare in determining whether to remove a child from the home, case law recognizes that there must be a compelling state interest involved. This compelling interest can be found if the state action in removing the child from the home protects and promotes the welfare of the child. Removal of the child is allowed only if the welfare of the child is threatened. Without such a compelling state interest, the constitutional rights of a parent could not be interfered with by the state.

In summary, it is our opinion that Kansas statutory and case law clearly and unequivocally seeks to avoid placement of a child outside his home, but permits such placement if done in the interest of the child. State law unambiguously requires a judicial order for removal to be based upon a determination that remaining in the home would be contrary to the child's welfare and provides for reasonable efforts to leave the child in the home in nonemergency situations.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Theresa Marcel Nuckolls
Assistant Attorney General