BRIEFING FOR THE GENERAL ASSEMBLY

Grandparent Visitation in Kentucky

Statutory Framework, Controlling Case Law, and Legislative Options

Hon. William J. Fooks
Family Court, 14th Judicial Circuit, Division IV
Scott, Bourbon, and Woodford Counties

Current through October 2026

The views expressed are my own and not those of the Kentucky Court of Justice.



Scott, Bourbon, and Woodford Counties



Scott County Courthouse · Georgetown



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Woodford County Courthouse · Versailles

Purpose of Today's Briefing

- **Explain the law as it actually operates** — the statute together with the Kentucky Supreme Court decisions that now control it.
- **Identify the drafting problems only the General Assembly can fix** — text that is printed in the KRS but no longer valid, and a cross-reference that points to it.
- **Review what 2026 SB 281 attempted**, what it would have accomplished, and what questions it left open.
- **Lay out options for the 2027 Regular Session**, separating what the Constitution requires from what is a policy choice for this body.

I take no position on which option the committee should choose. My aim is to give you an accurate picture of the law and the drafting landscape.

Three Layers That Actually Decide These Cases

Every grandparent-visitation petition is decided at the intersection of three bodies of law:

- **Federal constitutional floor** — *Troxel v. Granville*, 530 U.S. 57 (2000): a fit parent's decision gets special weight under the Due Process Clause.
- **Statute** — KRS 405.021, of which only subsections (1)(a), (2), and (3) remain operative after *Pinto v. Robison* (2020).
- **Kentucky Case Law** — the Supreme Court supplies the real standard: *Walker v. Blair* (2012) sets the presumption, burden, and factors; *Morton v. Tipton* (2019) sets a lower burden where no parent has custody; *Pinto v. Robison* (2020) struck part of the statute.

The statute's bare text ("if it determines that it is in the best interest of the child") is **not** *the operative standard. The case law is.*



Supreme Court of the United States

What the Printed Statute Still Says

- **(1)(a)** Circuit Court may grant reasonable visitation to paternal or maternal grandparents if in the child's best interest. Rights once granted survive TPR of the grandparent's son/daughter unless the court finds otherwise. **OPERATIVE**
- **(1)(b)** Deceased-parent presumption: visitation presumed in best interest if grandparent proves a pre-existing "significant and viable relationship." **UNCONSTITUTIONAL**
- **(1)(c)** Relationship proven by preponderance via: child resided with grandparent 6 consecutive months; grandparent was regular caregiver 6 consecutive months; frequent/regular contact 12 consecutive months; or other facts showing loss of relationship likely to harm the child. **UNCONSTITUTIONAL**
- **(2)** Venue: Circuit Court of the county where the child resides. **OPERATIVE**
- **(3)** If grandparent's child is deceased and grandparent assumes that parent's child-support obligation, court may grant *noncustodial parental* visitation unless not in the child's best interest. No visitation, no support duty. **OPERATIVE**

Pro se parties, lawyers, and occasionally courts still cite the void text — it is what anyone reading the KRS will find.

Why (1)(b) and (1)(c) Were Struck

- Unanimous Court reinstated the trial court's ruling that the 2018 additions — **KRS 405.021(1)(b) and (1)(c)** — are unconstitutional.
- Defect: the deceased-parent presumption could be triggered on a **preponderance** showing of a "significant and viable relationship," displacing the fit-parent presumption that *Troxel* and *Walker* require.
- Severed, not voided: **(1)(a)** and **(3)** remain available, so long as the trial court applies *Walker* in applying them.
- The struck subsections still appear in the printed KRS. Petitions and orders citing (1)(b)/(c) are relying on dead text.



Supreme Court of Kentucky courtroom

Drafting note: KRS 620.090(6) still directs the DNA court, when placing a child with one grandparent, to consider visitation for any other grandparent with a "significant and viable relationship … as established in KRS 405.021(1)(c)" — a cross-reference to the invalidated subsection. Courts must work around it; only a statutory amendment fixes it.

The Real Standard Against a Fit Parent

The controlling construction of KRS 405.021(1)(a) after *Troxel*:

- **Presumption.** A fit parent is presumed to act in the child's best interest. That presumption is the *starting point*, not one factor among many.
- **Burden.** The grandparent must rebut it by **clear and convincing evidence** that visitation is in the child's best interest — i.e., that the parent is *clearly mistaken*.
- **Default.** Absent that showing, parental opposition alone is sufficient to deny visitation.
- **No fitness hearing.** The court does not first adjudicate fitness; it presumes it. Fitness is addressed inside the factors. The grandparent need not prove unfitness.
- **Limit on the court.** A judge may not override the parent merely because the judge thinks a better decision could be made.
- **Factors.** Eight non-exhaustive factors guide the analysis — listed on the next slide.

The Walker / Vibbert Factors

1	Nature and stability of the child–grandparent relationship
2	Amount of time the grandparent and child spent together
3	Potential detriments and benefits to the child from visitation
4	Effect of visitation on the child's relationship with the parents
5	Physical and emotional health of all adults — parents and grandparents
6	Stability of the child's living and schooling arrangements
7	Wishes and preferences of the child
8	Motivation of the adults in the proceeding (added by Walker)

Source. Factors 1–7 from *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. 2004) (en banc); factor 8 added in *Walker*.

Non-exhaustive. The list is illustrative.

Findings. Best practice is to address each factor, but what matters on review is that the order reflects actual consideration — not its format. *Morton v. Tipton*.

A Different Standard When No Parent Has Custody

- Facts: maternal grandfather and step-grandmother held permanent custody (from DNA proceedings); paternal grandfather sought a set visitation schedule.
- **Holding:** where someone *other than a parent* — including another grandparent — is the custodian, the court uses the **preponderance of the evidence** standard. Clear and convincing applies only against a custodial parent.
- Rationale: the heightened burden protects a *parent's* constitutional liberty interest. Non-parent custodians do not hold it.
- The *Walker* factors still apply; read "parent" as "non-parent custodian."
- Matters most in DNA and kinship placements, where a grandparent or other relative is raising the child.
- **Open question:** de facto custodians. An unpublished Court of Appeals decision (*Cooper v. Ivey*, 2021) applies *Morton* to them, but KRS 403.270 treats de facto custodians like parents for custody purposes. No published decision reconciles the two.

QUICK REFERENCE

Who Has Custody Decides the Burden

Custodian	Presumption	Grandparent's burden	Authority
Fit parent(s)	Parent acts in child's best interest	**Clear and convincing** that visitation is in best interest (parent clearly mistaken)	*Troxel*; *Walker*
Parent, where grandparent's child is deceased	Same — no statutory presumption for grandparent	**Clear and convincing** under (1)(a); (1)(b) presumption unavailable	*Walker*; *Pinto*
Grandparent or other non-parent (de facto custodian status unsettled)	None of constitutional weight	**Preponderance** that visitation is in best interest	*Morton*
Parent, grandparent assumes deceased parent's support — KRS 405.021(3)	Statutory: granted "unless" not in best interest	Text shifts burden; apply *Walker* deference to fit parent	KRS 405.021(3); *Walker* Part D; *Pinto*

Legislation That Could Align Applicable Statutes to Current Law

- **Dead text.** KRS 405.021(1)(b)–(c) remain in the printed code six years after *Pinto* held them unconstitutional.
- **A cross-reference to dead text.** KRS 620.090(6) tells DNA courts to measure the other grandparent's visitation by the invalidated (1)(c).
- **The real burdens appear nowhere in the statute.** The fit-parent presumption, clear and convincing evidence (*Walker*), and preponderance for non-parent custodians (*Morton*) exist only in case law.
- **Adoption after TPR is unresolved.** The statute says visitation survives TPR; KRS 199.520 says adoption severs the biological family. Courts have carved out stepparent (*Hicks*) and intra-family (*Blackaby*) adoptions, but a stranger adoption is unaddressed.
- **Subsection (3)'s "unless" language** — visitation granted "unless" not in the child's best interest — can be read to shift the burden to the parent, in tension with *Walker*.

2026 SB 281 — What It Attempted

History: passed the Senate 36-0 (Mar. 17, 2026); reported favorably by House Judiciary (Mar. 25); House Floor Amendment 1 filed; recommitted to House Appropriations & Revenue (Apr. 15), where it died.

As passed by the Senate, it would have rewritten KRS 405.021 to:

- Codify *Walker*: clear and convincing proof of "compelling factors" to overcome the fit-parent presumption *and* that visitation is in the child's best interests.
- Codify *Morton*: preponderance where someone other than a parent is custodian.
- Enact the eight factors, expanded (capacity for love and guidance; whether loss of the relationship is likely to harm or distress the child; custodian health) plus a ninth: the special circumstance of a deceased parent or dissolved marriage.
- Repeal the dead (1)(b)–(c) text and fix the KRS 620.090(6) cross-reference.

House Floor Amendment 1 (Burke) would have added an express rebuttable presumption that a fit parent acts in the child's best interest.

TEXT COMPARISON

Comparison of SB 281 to Current Law

Issue	Current law (statute + case law)	SB 281 (Senate-passed text)
Parent-custodian standard	*Walker*: presumption for fit parent; grandparent proves by clear and convincing evidence that visitation is in best interest (parent "clearly mistaken")	Clear and convincing proof of **both** (a) "compelling factors" to overcome the presumption **and** (b) best interests — §1(1)(a)1
Non-parent custodian	*Morton*: preponderance	Preponderance — §1(1)(a)2
Factors	Eight judge-made factors, "including" (non-exhaustive)	Nine statutory factors the court "may consider"; adds petitioner's capacity for love and guidance, likely harm or distress from loss, custodian's health, and a deceased-parent / dissolved-marriage "special circumstance" — §1(2)
Deceased-parent presumption	Printed but void after *Pinto*	Repealed outright
Subsection (3) support route	Visitation granted "unless" not in best interest	Same, but best interest judged "under subsections (1) and (2)"
KRS 620.090(6)	Cross-references void (1)(c)	Best interests "as established in KRS 405.021"
Adoption / TPR survival	TPR clause in statute; adoption governed by *Hicks* / *Blackaby*	TPR clause kept; adoption **not addressed**

ANALYSIS

Strengths of SB 281

- **The code would finally say what the law is.** Litigants — especially pro se grandparents — read KRS 405.021 today and see a deceased-parent presumption that has been void since 2020. SB 281 removes it and states the real burdens.
- **Fixes the KRS 620.090(6) cross-reference** to the invalidated (1)(c).
- **Locks in Morton for kinship placements.** The preponderance standard for non-parent custodians moves from case law into statute, giving DNA and kinship cases a clear rule.
- **Factors gain statutory footing** and some precision: factor (c) expressly asks whether loss of the relationship is likely to harm or distress the child — *Walker*'s "something more" made explicit.
- **Closes a gap in subsection (3).** The support route's "unless" language arguably shifted the burden to the parent; tying it to subsections (1) and (2) imports the *Walker* analysis.
- **Constitutional risk is low.** The core standard tracks *Troxel* and *Walker*, so it is unlikely to meet *Pinto*'s fate.

ANALYSIS

Questions Presented by SB 281 or Any Legislative Rewrite

- **"Compelling factors" is undefined.** The bill requires clear and convincing proof of compelling factors *and* of best interests. Is that one inquiry or two? Read as a separate element, it raises the bar above *Walker*; read as surplus, it invites litigation over its meaning.
- **Factor (i) is vague and may revive what Pinto struck.** A "special circumstance" for a deceased parent or a dissolved marriage, with no stated weight, could operate as a soft presumption — and making divorce a special circumstance may encourage petitions.
- **"May consider the" factors.** The bill drops *Walker*'s "including." Is the list now exhaustive? And "may" does not require findings on any of them.
- **Weight for non-parent custodians.** Under the bill, as under *Morton*, a grandparent raising a child receives no presumption against other grandparents' petitions. Whether caregivers in that position should receive some deference is a policy question the bill does not address.
- **Silent where the law is unsettled:** post-adoption survival (*Hicks*/*Blackaby*, KRS 199.520), mixed custody (one parent plus a non-parent), de facto custodians, step-grandparents, and the modification standard.
- **Factor (e) — health of "all the adults"** — invites mental-health discovery into fit parents and custodians.

Options for Future Legislative Fixes

- **A. Minimal clean-up.** Repeal KRS 405.021(1)(b)–(c) and correct the KRS 620.090(6) cross-reference. Smallest change; no new policy; leaves the burdens in case law.
- **B. Codify current law.** Enact the *Walker* presumption and burden, the *Morton* standard, and the factors — the approach of SB 281.
- **C. Codify and resolve open questions.** Option B, plus decisions on post-adoption survival, de facto and mixed custody, the factor list, step-grandparents, and modification.
- **D. Status quo.** Leave the statute as printed and continue to rely on case law. Dead text and the stale cross-reference remain.

Options A through C are cumulative: each includes the clean-up in A.

Constitutional Limits vs. Policy Choices

Required by the Constitution

Troxel, *Walker*, *Pinto*

- A presumption that a fit parent acts in the child's best interest
- A heightened burden on a grandparent who opposes a fit parent
- No presumption that shifts the burden to a fit parent — including one triggered by a parent's death
- No visitation simply because a judge thinks a better decision could be made

Policy Choices for the General Assembly

Within constitutional limits

- The standard when a non-parent has custody (now preponderance under *Morton*)
- Whether the factor list is exhaustive, and whether written findings are required
- Whether visitation survives adoption, and which adoptions
- Treatment of de facto custodians, mixed custody, and step-grandparents
- Any deference to relatives raising a child

IN SUMMARY

The governing standard is settled in Kentucky Supreme Court decisions.

The printed statutes no longer reflect that standard.

Whether and how to align the two is the General Assembly's decision.

Questions

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Handout follows: Table of authorities



Table of Authorities

Statutes

KRS 405.021 (as amended 2018 Ky. Acts ch. 197, HB 517)

KRS 199.520 (effect of adoption)

KRS 620.090(6) (DNA temporary custody — grandparent visitation)

Failed legislation

2022 RS HB 157 (died in Senate Judiciary)

2026 RS SB 281 — passed Senate 36-0 (Mar. 17, 2026); recommitted in House (Apr. 15, 2026)

2026 RS SB 281, House Floor Amendment 1 (Burke) — filed

Cases

Troxel v. Granville, 530 U.S. 57 (2000)

Walker v. Blair, 382 S.W.3d 862 (Ky. 2012)

Pinto v. Robison, 607 S.W.3d 669 (Ky. 2020)

Morton v. Tipton, 569 S.W.3d 388 (Ky. 2019)

Blackaby v. Barnes, 614 S.W.3d 897 (Ky. 2021)

Hicks v. Enlow, 764 S.W.2d 68 (Ky. 1989)

Vibbert v. Vibbert, 144 S.W.3d 292 (Ky. App. 2004) (en banc)

Scott v. Scott, 80 S.W.3d 447 (Ky. App. 2002) — overturned

King v. King, 828 S.W.2d 630 (Ky. 1992) — abrogated

Cooper v. Ivey (Ky. App. 2021) (unpublished)

Baker v. Perkins — overruled in part by *Walker*