



WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

Visitation by Grandparents and Other Third Parties

Wisconsin statutes permit a court to order visitation of a child by a third party, such as a grandparent, under specific circumstances including during the course of a divorce proceeding, if one or both of the child's parents is deceased, or if the child's parents never marry each other. Who may petition for visitation and the type of relationship the person must have with the child varies under each statute. In addition, the Wisconsin Supreme Court has recognized that courts have equitable powers to protect the best interest of a child by ordering visitation even in specified circumstances that do not meet the criteria of any statute governing third party visitation. In determining whether to order visitation by a third party, a court is always required to analyze the visitation request based upon the best interest of the child. The court must also give consideration to a fit parent's determinations as to what visitation is appropriate.

BACKGROUND

The Wisconsin statutes give courts the authority to order visitation of children by certain persons who are not a child's parent in several specific situations. In addition, the Wisconsin Supreme Court has held that courts have equitable powers to protect the best interest of a child by ordering visitation where none of the statutorily specified criteria exists.

The Wisconsin Court of Appeals has held that the decision whether to grant or deny visitation is within the circuit court's discretion. [*Roger D.H. v. Virginia O.*, 2002 WI App 35, 250 Wis. 2d 747, 641 N.W.2d 440.] The Wisconsin Court of Appeals has also held that, based upon the U.S. Supreme Court's holding in *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000), due process requires that courts apply a presumption that a fit parent's decision regarding non-parental visitation is in the best interest of the child and that a court may read this requirement into a non-parental visitation statute, even when the statute is silent on the topic. Therefore, in a third-party visitation case, the court must give "special weight" to a fit parent's determination regarding visitation by a third party in its analysis of whether to order visitation. [*Roger D.H.* at 758.]

It should be noted that current law prohibits any third parties covered by the statutes described below from being awarded visitation if the third party has been convicted of first- or second-degree intentional homicide of a parent of the child. Further, if such a third party had already been granted visitation rights at the time of the conviction, the court must issue an order prohibiting the third party from visiting the child upon the court's own motion or on petition of

the child or the child's parent, guardian, or legal custodian. The court could order such visitation only if it found this visitation to be in the child's best interest. The child's wishes must be considered in making such a determination. [ss. 48.925 (2m), 54.56 (3m) and (4m), and 767.43 (2m) and (6), Stats.]

VISITATION RIGHTS IN ACTIONS AFFECTING THE FAMILY

A grandparent, great-grandparent, stepparent, or person who has maintained a relationship similar to a parent-child relationship with a child may petition the court for visitation with the child subsequent to, or during, an action affecting the family (such as divorce, annulment, legal separation, and paternity actions). The court may grant reasonable visitation rights to the grandparent, great-grandparent, stepparent, or other person if:

1. The parents have notice of the hearing.
2. The court determines that visitation is in the best interest of the child. Whenever possible, in making its determination, the court must consider the wishes of the child.

[s. 767.43 (1), Stats.]

A grandparent of a child whose parents have not married each other and who has not been adopted must petition for visitation under the provision of current law relating to visitation of nonmarital children, described below. [s. 767.43 (2m), Stats.]

The Wisconsin Supreme Court has held that a person has standing to seek visitation under the above provision if: (a) an underlying action affecting the family unit has been filed; and (b) the child's family is not intact so that it may be in the child's best interest to order visitation. [*Cox v. Williams*, 177 Wis. 2d 433, 439, 502, N.W.2d 128 (1993).]

VISITATION RIGHTS OF RELATIVES SUBSEQUENT TO ADOPTION OF A MINOR CHILD

Under current law, if a child is adopted, the parent-child relationship between the adopted child and his or her birth parents is completely extinguished, unless the birth parent is the spouse of the adopted parent. However, even if all parental rights have been extinguished by the adoption, the court is still permitted to order reasonable visitation rights to other birth relatives. "Relative" is defined as a parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, brother-in-law, sister-in-law, first cousin, second cousin, nephew, niece, uncle, aunt, step-uncle, step-aunt, or any person of a preceding generation as denoted by the prefix of grand, great, or great-great, whether by blood, marriage, or legal adoption, or the spouse of any "relative," even if the marriage is terminated by death or divorce. [ss. 48.02 (15) and 48.925, Stats.]

Relative visitation subsequent to an adoption may be granted in two situations: (1) when the parents of a minor child have divorced, one of the parents has terminated his or her parental rights to the child, the child's remaining parent remarries, and the new spouse adopts the child; or (2) when both parents have terminated their parental rights to the child and the child is adopted by a relative.

Upon a petition for visitation by a relative, the court may grant reasonable visitation rights if the court determines all of the following:

1. The relative has maintained a parent-child relationship within two years prior to the filing of the petition for visitation rights.
2. The adoptive parent or parents or, if a birth parent is the spouse of an adoptive parent, the adoptive parent and the birth parent have notice of the hearing.
3. Visitation is in the best interest of the child.
4. The relative will not undermine the adoptive parent's or parents' relationship with the child or, if a birth parent is the spouse of an adoptive parent, the adoptive parent and birth parent's relationship with the child.
5. The relative will not act in a manner that is contrary to parenting decisions that are related to the child's physical, emotional, educational, or spiritual welfare and that are made by the adoptive parent or parents or, if a birth parent is the spouse of an adoptive parent, by the adoptive parent and birth parent.

Whenever possible, in making its visitation determination, the court must consider the wishes of the adopted child. [s. 48.925, Stats.]

VISITATION RIGHTS OF GRANDPARENTS AND STEPPARENTS IF ONE OR BOTH PARENTS OF A CHILD IS DECEASED

A court may grant periods of visitation to a grandparent or stepparent if one or both parents of a child is deceased and the child is in the custody of the surviving parent or any other person. Under the statute, any grandparent or stepparent of the child may petition for visitation privileges with the child, whether or not the person with the custody is married. The petition may be filed in a guardianship or temporary guardianship proceeding under ch. 54, Stats., that affects the child, or in an independent action. The court may grant reasonable visitation privileges to a grandparent or stepparent if the surviving parent or other person who has custody of the child has notice of the hearing and if the court determines that it is "in the best interest and welfare" of the child. [s. 54.56, Stats.]

The Wisconsin Supreme Court has held that a trial court's authority to grant visitation under the above provision continues even after a subsequent adoption of the child. [*In the Matter of Grandparental Visitation of C.G.F.*, 168 Wis. 2d 62, 483 N.W.2d 803 (1992).]

VISITATION RIGHTS OF GRANDPARENTS WITH RESPECT TO A NONMARITAL CHILD

The court may grant reasonable visitation to the grandparents of a nonmarital child whose parents have not subsequently married, if the court determines all of the following:

1. The paternity of the child has been determined, if the grandparent filing the petition is a parent of the child's father. (If a paternity action is pending, that action must first be completed before visitation rights may be determined.)

2. The child has not been adopted.
3. The grandparent has maintained a relationship with the child or has attempted to maintain a relationship with the child but has been prevented from doing so by a parent with legal custody of the child.
4. The grandparent is not likely to act in a manner that is contrary to decisions that are made by a parent with legal custody of the child and that are related to the child's physical, emotional, educational, or spiritual welfare.
5. The visitation is in the best interest of the child.

[s. 767.43 (3), Stats.]

OTHER VISITATION RIGHTS OF THIRD PARTIES

In 1995, the Wisconsin Supreme Court decided a case involving visitation rights of a third party when no action affecting the family had taken place or was pending. In *Holtzman v. Knott*, the court held that the former live-in female partner of the biological mother of a minor child could bring an action for visitation to the child. [193 Wis. 2d 649, 533 N.W.2d 419 (1995).] The court held that a court's powers to order visitation to a child are not solely governed by statute. The court stated that courts have equitable powers to protect the best interest of a child by ordering visitation under circumstances not included in the statutes. The court stated that these equitable powers come into play when the petitioner has a parent-like relationship with the child and a triggering event occurs that justifies state intervention.

The court created a four-part test to apply when a third party seeks visitation rights with respect to a minor child, absent an underlying action affecting the family, to establish that the petitioner has a parent-like relationship with the child. The test requires a showing of all of the following:

1. That the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child.
2. That the petitioner and the child lived together in the same household.
3. That the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support without expectation of financial compensation.
4. That the petitioner has been in a parental role for a length of time sufficient to have established a bonded, dependent relationship that is parental in nature.

To establish a significant triggering event justifying state intervention in the child's relationship with the biological or adoptive parent, the petitioner is required to prove that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and the petitioner sought court-ordered visitation within a reasonable time after the interference. The petitioner must prove all of these elements before a circuit court may consider whether visitation is in the best interest of a child.

This decision potentially has a broad impact on those seeking visitation privileges with a child. However, thus far, Wisconsin courts have declined to apply the holding in the case to grandparent visitation cases that do not meet the criteria for ordering visitation under current statutes. [See *In re Custody and Visitation of Jeffrey A.*, 221 Wis. 2d 36, 584 N.W.2d 195 (Wis. App. 1998) and *Roger D.H.*]

ENFORCEMENT OF VISITATION ORDERS

The statutes permitting visitation in the event of an action affecting the family, subsequent to the adoption of a child, or by grandparents of a nonmarital child provide that anyone who interferes with such visitation rights may be proceeded against for contempt of court under ch. 785, Stats. [ss. 48.925 (4) and 767.43 (5), Stats.] In such a contempt proceeding, the court may only impose the following remedial sanctions:

1. Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as a result of the contempt of court.
2. A forfeiture not to exceed \$2,000 for each day the contempt of court continues.

[s. 785.04 (1) (a) and (c), Stats.]

For visitation rights for grandparents and stepparents if one or both of the child's parents is deceased, the court may issue any order to enforce the visitation order and may, from time to time, modify such visitation privileges or enforcement order upon a showing of good cause. [s. 54.56 (4), Stats.]

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Anne Sappenfield, Senior Staff Attorney, on June 3, 2010.

WISCONSIN LEGISLATIVE COUNCIL

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536

Telephone: (608) 266-1304 • Fax: (608) 266-3830

Email: leg.council@legis.state.wi.us

<http://www.legis.state.wi.us/lc>