



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### Visitation by Grandparents and Other Third Parties

Wisconsin statutes permit a court to order visitation with a child by a third party, such as a grandparent, under specific circumstances. These circumstances include 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 interests 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 third party visitation, a court must analyze the visitation request based upon the best interests of the child, giving special consideration to a fit parent's determinations as to what visitation is appropriate.

#### **BACKGROUND**

Parents have a constitutionally protected right to raise their children without government interference. This right is based in the privacy protections of the U.S. Constitution. Privacy rights are derived from the Fourteenth Amendment, which generally prohibits government interference with a person's liberty without due process. To award visitation to a third party over a parent's objection is to interfere with the parent's constitutionally protected right to make decisions regarding the "care, custody, and control" of his or her children. [*Troxel v. Granville*, 530 U.S. 57, 67 (2000).]

Current law presumes that a fit parent's decision regarding nonparental visitation is in the best interests of the child. A court may read this requirement into a nonparental visitation statute, even when the statute is silent on the topic. Wisconsin law gives courts the authority to order visitation of children by certain persons who are not a child's parent in several specific situations, but the person seeking visitation must provide evidence to overcome the presumption, and the court must give "special weight" to a fit parent's decision in its analysis of whether to order visitation. [*Roger D.H. v. Virginia O.*, 2002 WI App 35.]

Generally, a court may not grant a third party visitation with a child if the third party has been convicted of first- or second-degree intentional homicide of the child's parent, unless a court finds by clear and convincing evidence that visitation is in the child's best interests. 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. The child's wishes must be considered in making such a determination. [ss. 48.925 (1m), 54.56 (3m) and (4m), and 767.43 (1m) 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 Wisconsin Supreme Court has held that the statutory requirement to prove a "parent-child relationship" applies only to the other "person" category listed in statute, not to grandparents, great-grandparents, or stepparents. [*In re Marriage of Meister*, 2016 WI 22 ¶ 22.]

The Wisconsin Supreme Court has held that a person has standing to seek visitation under the provision above if: (1) an underlying action affecting the family unit has been filed; and (2) the child's family is not intact so that it may be in the child's best interests to order visitation. [*Cox v. Williams*, 177 Wis. 2d 433, 439 (1993).] Generally, a child's family is intact if the child's parents are married to each other.

The court may grant reasonable visitation rights to the grandparent, great-grandparent, stepparent, or other person who has standing to seek visitation if:

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

[s. 767.43 (1), Stats.]

Wisconsin law includes a special grandparent visitation provision involving a child whose parents have not married each other and who has not been adopted (nonmarital child). The grandparent of such a nonmarital child must petition for visitation with the child under the special provision, described below. [s. 767.43 (2m), Stats.]

### **GRANDPARENT VISITATION WITH 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 interests of the child.

[s. 767.43 (3), Stats.]

### **GRANDPARENT AND STEPPARENT VISITATION IF ONE OR BOTH PARENTS OF A CHILD ARE DECEASED**

A court may grant periods of visitation to a grandparent or stepparent if one or both parents of a child are deceased and the child is in the custody of the surviving parent or any other person. This is true whether or not the person with custody of the child is married. The petition may be filed within an existing 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 interests of the child. Whenever possible, in making its visitation determination, the court must consider the wishes 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 (1992).]

### **VISITATION RIGHTS OF RELATIVES FOLLOWING THE ADOPTION OF A 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 adoption is by the birth parent's spouse who is a stepparent to the child. However, even if all parental rights have been extinguished by the adoption, the court is still permitted to order reasonable visitation rights in certain circumstances to other birth relatives who have maintained a relationship similar to a parent-child relationship with the child. "Relative" is defined as a 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.]

A relative may be granted visitation with a child following adoption if the child was adopted by either a stepparent or a relative. The visitation action may be filed at any time, regardless of the date of the adoption.

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 the 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 interests 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.]

### **OTHER THIRD PARTY VISITATION RIGHTS**

Wisconsin courts may grant third party visitation under certain circumstances when the statutory procedures do not apply. However, grandparents are not currently eligible to petition a court for visitation with grandchildren under these circumstances. Grandparents must rely upon the statutory procedures described above.

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 *Custody of H.S.H.K.*, the Court held that the former live-in female partner of the biological mother of a minor child could bring an action for visitation with the child. [193 Wis. 2d 649 (1995).] The Court held that a court's powers to order visitation with a child are not solely governed by statute. The Court stated that courts have equitable powers to protect the best interests 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 the 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 interests 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 *Wohlers v. Broughton*, 2011 WI App 122.]

### **VISITATION ORDER ENFORCEMENT**

Anyone who interferes with visitation rights granted under an action affecting the family, following the adoption of a child, or to the grandparents of a nonmarital child may be held in contempt of court under ch. 785, Stats. [ss. 48.925 (4) and 767.43 (5), Stats.] In such a contempt proceeding, the court may impose only 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 are deceased, the court may issue any order to enforce the visitation order and may 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 Rachel E. Snyder, Staff Attorney, on August 4, 2016.

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