
Wisconsin Legislative Council

INFORMATION MEMORANDUM



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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, in specific circumstances. These circumstances include visitation during the course of a divorce proceeding, visitation if one or both of the child's parents is deceased, and visitation if the child's parents never marry each other. Who may petition for visitation and the type of relationship that 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.

BACKGROUND

Parents have a constitutionally protected right to raise their children without government interference. This right is based on 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. Awarding visitation to a third party over a parent's objection interferes 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).]

In determining whether to order third-party visitation, a court must analyze the visitation request based upon the child's best interest, giving special deference to a fit parent's determinations as to what visitation is appropriate.

Current law presumes that a fit parent's decision regarding nonparental visitation is in the child's best interest. 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 overcome the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the parent's decision is not in the child's best interest. The Wisconsin Supreme Court has cautioned judges not to substitute their judgment for a fit parent's judgment, even if the judge disagrees with the parent's decision. A court may consider the nature and extent of third-party visitation only if the person seeking visitation has overcome the presumption in favor of a fit parent's visitation decision. [*Michels v. Lyons*, 2019 WI 57.]¹ These case law principles apply in cases involving third-party visitation, in addition to any statutory requirements discussed later in this information memorandum.

¹ Generally, a court may not grant a third-party visitation with a child if the third party has been convicted of intentional homicide of the child's parent, unless the court finds by clear and convincing evidence that visitation is in the child's best interest, after considering the child's wishes. If visitation rights had already been granted, the court must modify the order to prohibit visitation. [ss. 48.925(1m), 48.9795(12)(cm) and (dm), 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, 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 “person” category listed in statute, and not to grandparents, great-grandparents, or stepparents. [*S.A.M. v. Meister*, 2016 WI 22.]

Under this statute, 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; and (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.]

The Wisconsin Supreme Court has further held that a person has standing to seek visitation under the provision above if an underlying action affecting the family unit has been filed, and 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 (1993).] Generally, a child’s family is considered to be “intact” if the child’s parents are married to each other.

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 next 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:

- The paternity of the child has been determined, if the grandparent filing the petition is a parent of the child’s father.²
- The child has not been adopted.
- 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.
- 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.
- The visitation is in the child’s best interest.

[s. 767.43 (3), Stats.]

² If a paternity action is pending, that action must first be completed before visitation rights may be determined.

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 of a child's parents are deceased and the child is in the custody of the surviving parent or any other person. The person seeking visitation may file a petition as an independent action or within an existing minor guardianship or temporary guardianship proceeding under s. 48.9795, Stats., or ch. 54, 2017 Stats. In order for the court to grant visitation, the surviving parent or other person who has custody of the child must have notice of the hearing, and the court must determine that visitation in is the child's best interest. Also, whenever possible, the court must consider the child's wishes. [s. 48.9795 (12), Stats., and s. 54.56, 2017 Stats.]

A court may grant visitation to a grandparent or stepparent in these circumstances, regardless of whether or not the person with custody of the child is married. Moreover, a trial court's authority to grant visitation under this statute continues even after a subsequent adoption of the child. [s. 48.9795 (12), Stats., and s. 54.56, 2017 Stats.; *In re C.G.F.*, 168 Wis. 2d 62 (1992).]

VISITATION RIGHTS OF RELATIVES AFTER A CHILD'S ADOPTION

If a child is adopted, the parent-child relationship between the adopted child and his or her birth parents is 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 a birth relative³ who has maintained a relationship similar to a parent-child relationship with the child.

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 must consider the wishes of the adopted child whenever possible and may grant reasonable visitation rights if the court determines all of the following:

- The relative has maintained a parent-child relationship within the two years prior to the filing of the petition for visitation rights.
- 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.
- Visitation is in the child's best interest.
- 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.
- 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.

[s. 48.925, Stats.]

³ "Relative" means 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. [s. 48.02 (15), 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 *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 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, and that those 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:

- The biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child.
- The petitioner and the child lived together in the same household.
- 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.
- 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 court may consider whether visitation is in the child's best interest.

The *Holtzman* case could have a broad impact on those seeking visitation privileges with a child. However, Wisconsin courts have, so far, declined to apply the principles in the *Holtzman* case in circumstances to which a current statute applies. [See *Rogers v. Rogers*, 2007 WI App 50; *Wohlers v. Broughton*, 2011 WI App 122.]

ENFORCEMENT OF VISITATION ORDERS

Any person 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 a contempt proceeding, the court may impose only the following remedial sanctions:

- 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.
- A forfeiture not to exceed \$2,000 for each day the contempt of court continues.

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

With respect to visitation rights granted to grandparents and stepparents when 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. 48.9795 (12) (d), Stats.]

This information memorandum was prepared by Amber Otis, Staff Attorney, on February 26, 2021.