



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE April 19, 2018
TO Joint Judiciary Interim Committee
FROM Brian Fuller, Staff Attorney
SUBJECT Topic Summary: De Facto Custody

This summary provides background information on de facto custody, an interim topic that Management Council has approved for this Committee to study during the 2018 interim.

Interim Topic as Approved by Management Council

Priority No. 3: De Facto Custody

The Committee will examine issues of de facto custody as they relate to current guardianship statutes.

Background

Relatives may find themselves caring for or raising children whose parents are unable or unwilling to care for their children. Generally, these relatives—the de facto custodians—simply assume responsibility for the child’s needs and well-being without going to court and securing a formal custody or guardianship order.

Under current Wyoming law, the primary mechanism that de facto custodians can use to seek legal custody of the children they are caring for is to petition to be appointed guardian of the children. See W.S. 3-2-101 through 3-2-104. Under W.S. 3-2-104, the court “may appoint a guardian if the allegations of the petition as to the status of the proposed ward and the necessity for the appointment of a guardian are proved by a preponderance of the evidence.” Relying on United States Supreme Court precedent that parents have a constitutionally protected fundamental right to “make decisions concerning the care, custody, and control of their children,” Troxel v. Granville, 530 U.S.

57, 66 (2000), and the plain language of W.S. 3-2-104, the Wyoming Supreme Court has held that a court can only appoint a guardian upon a finding of “necessity,” KO v. LDH (In re MEO), 2006 WY 87, ¶ 55, 138 P.3d 1145, 1161 (Wyo. 2006). The Wyoming Supreme Court interpreted the “necessity” requirement to require a court to find that the child’s parents are unfit before that court can consider whether it is in the child’s best interests for the non-parent petitioner—the de facto custodian—should be appointed as the child’s guardian. Id. Parents can also voluntarily place their children in a guardianship without being deemed unfit. But should the parents later wish to terminate the guardianship, the guardian must prove the parent unfit before a court can determine whether it is in the child’s best interests for the guardianship to continue. DJM v. DM (In re SRB-M), 2009 WY 22, ¶¶ 20–24, 201 P.3d 1115, 1119–21 (Wyo. 2009) (noting that a guardianship “is no more than a temporary custody arrangement established for the well-being of a child” (quoting Carla R. v. Tim H. (In re D.J.), 689 N.W.2d 238, 246 (Neb. 2004))).

For more detailed information regarding current law, please refer to the memorandum prepared during the 2017 interim (Attachment 4-02).

Overview of Work Completed During the 2017 Interim and 2018 Budget Session

At the Committee’s June 2017 meeting in Sheridan, Representative Eric Barlow provided an overview of Idaho’s de facto custody statutes and discussed situations where family members other than parents were caring for children. The Committee elected to further consider the issue at its November 2017 meeting and adopted a motion for LSO to prepare a bill draft for discussion for that meeting.

LSO drafted a bill based on Idaho’s de facto custody statutes (Attachment 4-03). In summary, the bill, as introduced, contained the following:

- A statement of purpose noting that the act was to give required deference to the decisions of fit parents in child-custody proceedings that third parties brought and, subject to that deference, meet the needs of children for caring and stable homes through a method that allows third parties to obtain legal and physical custody for children when in the children’s best interests;
- A definition of de facto custodian, which is a person who has been the primary caretaker and financial supporter of the child who resides with the person without a parent present, and with a lack of demonstrated consistent participation by both parents for a specified time period;
- Process for a would-be de facto custodian to petition for custody of a child, including requirements for the content of the petition and notice requirements;

- The appointment of custody to a de facto custodian. For a court to grant custody, it must first find by clear and convincing evidence that the petitioner is a de facto custodian and that there is a lack of demonstrated consistent participation by the child's parents that creates a compelling state interest sufficient to justify granting the petition. After this, the court must find that the petitioner proved by a preponderance of the evidence that it is in the child's best interests to be in the custody of the de facto custodian;
- Items for the court to include in an order that grants custody of a child to a de facto custodian and provision for continuing jurisdiction in the same manner as an order granting custody to a parent; and
- Provisions for the termination or resignation of a de facto custodian.

See 2018 Wyo. House Bill 0015.

After introduction in the House, the House Judiciary Committee considered House Bill 0015 and expressed several concerns about the bill, and committee members proposed several amendments (Attachment 4-04). In summary, the amendments (1) limited possible de facto custodians to only blood relatives of the child; (2) changed who could not be deemed a de facto custodian; and (3) altered the standard by which a court could grant custody of a child to a de facto custodian. In response to those concerns and to discuss those amendments, Representative Olsen, Representative Winters, Representative Stith, and Representative Pownall led a working group of interested stakeholders to further discuss the bill. After discussion, the working group stated its preference to lay the bill back and raise the topic for further study during the 2018 interim.

Suggestions for Committee Consideration

Based on comments made at the November 2017 meeting and concerns raised during consideration of House Bill 0015, the Committee may wish to consider the following in its study of this topic:

- Ensuring any proposed legislation comports with Wyoming Supreme Court and United States Supreme Court precedent regarding the fundamental rights of parents;
- The structure of any legislation the Committee may wish to propose vis-à-vis Wyoming's current guardianship statutes and Wyoming Supreme Court precedent regarding guardianships awarded to non-parents;

- The scope of persons (i.e., related by blood or a specific degree of consanguinity) eligible to be de facto custodians;
- The scope of persons who are not able to be named de facto custodians (because, for example, parents are members of the armed forces and in active duty outside the state);
- The standard and procedure a court uses to determine if a person is a de facto custodian and, if so, the standard for awarding custody of a child to a de facto custodian;
- The jurisdiction of a court to determine issues of de facto custody, and which court should have jurisdiction.

The Committee may also wish to review current law regarding termination of the parent-child relationship. Under current law, “[t]he guardian or the legal custodian of the child” (in addition to either parent or an “authorized agency”) may file a petition for termination of the parent-child relationship. W.S. 14-2-310(a). Under W.S. 14-2-309(a), the parent-child relationship may be terminated if any one of the following is established by clear and convincing evidence:

(i) The child has been left in the care of another person without provision for the child's support and without communication from the absent parent for a period of at least one (1) year. In making the above determination, the court may disregard occasional contributions, or incidental contacts and communications. For purposes of this paragraph, a court order of custody shall not preclude a finding that a child has been left in the care of another person;

(ii) The child has been abandoned with no means of identification for at least three (3) months and efforts to locate the parent have been unsuccessful;

(iii) The child has been abused or neglected by the parent and reasonable efforts by an authorized agency or mental health professional have been unsuccessful in rehabilitating the family or the family has refused rehabilitative treatment, and it is shown that the child's health and safety would be seriously jeopardized by remaining with or returning to the parent;

(iv) The parent is incarcerated due to the conviction of a felony and a showing that the parent is unfit to have the custody and control of the child;

(v) The child has been in foster care under the responsibility of the state of Wyoming for fifteen (15) of the most recent twenty-two (22) months, and a showing that the parent is unfit to have custody and control of the child;

(vi) The child is abandoned at less than one (1) year of age and has been abandoned for at least six (6) months;

(vii) The child was relinquished to a safe haven provider in accordance with W.S. 14-11-101 through 14-11-109, and neither parent has affirmatively sought the return of the child within three (3) months from the date of relinquishment;

(viii) The parent is convicted of murder or homicide of the other parent of the child under W.S. 6-2-101 through 6-2-104.

W.S. 14-2-309(a)(i)–(viii). Of note is paragraph (a)(i), listed above, which is similar to the standard in House Bill 0015 necessary for a person to be designated a de facto custodian:

(a) A de facto custodian is a person who either individually or together with another person has been the primary caretaker and primary financial supporter of the child who resides or had resided with the person without a parent present and with a lack of demonstrated consistent participation by both parents for one (1) of the following time periods excluding any time after the filing of a petition under this act:

(i) Six (6) months or more if the child is less than three (3) years of age; or

(ii) One (1) year or more if the child is three (3) years of age or older.

2018 House Bill 0015 (proposed W.S. 3-10-104(a)).

I have also attached a brief summary of what other states have passed providing for rights for de facto custodians (Attachment 4-05), along with links to the electronic versions of those laws.