WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE	October 27, 2017
TO	Joint Judiciary Committee
FROM	Brian Fuller, Staff Attorney
SUBJECT	18LSO-0104: De Facto Custodian Act

This memo accompanies 18LSO-0104, the De Facto Custodian Act. This act would permit certain relatives to petition for custody of children for whom they provided primary care and financial support for a specified period of time. It is possible that parents whose children are awarded to de facto custodians will challenge the constitutionality of the act under United States and Wyoming Supreme Court precedent.

Discussion

The right to familial association is a fundamental right that both the United States and Wyoming Constitutions protect.[1] The United States Supreme Court has long recognized that the "liberty" protected by the Due Process Clause includes the right of parents to raise, establish a home for, and make education decisions for children under their control.[2] More recently, the Court has held that parents have a constitutionally protected fundamental right to "make decisions concerning the care, custody, and control of their children."[3] Similarly, the Wyoming Supreme Court has held that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . ."[4]

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[1] See Stanley v. Illinois, 405 U.S. 645, 651 (1972); KO v. LDH (In re MEO), 2006 WY 87, ¶ 21, 138 P.3d 1145, 1152 (Wyo. 2006).

[2] Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).

[3] Troxel v. Granville, 530 U.S. 57, 66 (2000).

[4] Nulle v. Gillette-Campbell Cty. Joint Powers Fire Bd., 797 P.2d 1171, 1174 (Wyo. 1990) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

The United States Supreme Court noted and relied on this fundamental right in Troxel v. Granville. There, a Washington state statute permitted any person to petition a state court for child-visitation rights at any time. The statute also authorized state courts to order visitation for any person when it might serve the best interests of the child.[5] Relying on that statute, grandparents petitioned a state court for the right to visit their two grandchildren.[6] The children's mother opposed the petition, and the Washington Supreme Court held that the statute unconstitutionally interferes with parents' fundamental right to raise their children.[7]

In a divided opinion, the United States Supreme Court affirmed.[8] A plurality held that Washington's statute unconstitutionally infringed on the mother's fundamental right to make decisions regarding the care and custody of her children because: (1) the grandparents did not allege, and no court found, that the mother was an unfit parent; (2) there was a traditional presumption that fit parents acted in the children's best interests; and (3) the grandparents never alleged that the mother ever sought to entirely end visitation.[9]

Similarly, the Wyoming Supreme Court has rejected family members' attempts to gain custody or visitation as infringements on parents' fundamental rights. In Wyoming, a 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."[10]

In one case, the Wyoming Supreme Court reversed a permanent guardianship because the mother was not first found to be unfit.[11] In In re MEO, grandparents sought guardianship of their granddaughter over the mother's objections. The district court granted temporary and later permanent guardianship of the child to the grandparents. In doing so, the district court concluded that it was in the child's best interests for her grandparents to have custody. The district court never found that the mother was an unfit parent.[12] The mother argued on appeal that the award of guardianship violated her fundamental parental rights, and the Wyoming Supreme Court agreed. Relying on Troxel, the Court noted that, under

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[5] Troxel, 530 U.S. at 60.
[6] Id. at 60–61.
[7] Id. at 60.
[8] Id. at 63.
[9] Id. at 68–71.
[10] W.S. 3-2-104(a).
[11] In re MEO, ¶¶ 10–16, 138 P.3d at 1149–50.
[12] In re MEO, ¶¶ 10–16, 138 P.3d at 1149–50.

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Wyoming's guardianship statutes, a court can award guardianship only after a finding of "necessity"—in other words, a court must first determine that the child's natural guardian—her parent—is not fit before considering whether it is in the child's best interests for the non-parent petitioner to be appointed the child's guardian.[13] The Court stated that the "necessity" requirement arose out of the plain language of W.S. 3-2-104.[14] Notably, the Wyoming Supreme Court's discussion regarding a parent's fundamental liberty interest focused primarily on Troxel and the Due Process Clause of the United States Constitution.[15] In addition, the Court held that the district court erred in concluding that the mother did not did not have a constitutional right to either notice or a hearing before considering the grandparents' petition for a temporary guardianship.[16]

Similarly, the Wyoming Supreme Court refused to permit an established guardianship to continue without a court finding that a parent was unfit.[17] In In re SRB-M, the paternal great-grandmother was appointed guardian after the mother had voluntarily placed the child (who was one at the time) in the great-grandmother's care when the child was two weeks old.[18] Nearly three years later, the mother moved to terminate the guardianship. The district court denied the motion and did so without finding the mother unfit.[19] The Court concluded that "a finding of parental unfitness is required in order to continue an established guardianship over a parent's objection."[20] Again, the Court noted that a guardianship is not necessary if a parent is deemed fit.[21] The Court noted that "under 'exceptional circumstances' or for 'compelling reasons' exceptions may be made to the principal that a fit parent is entitled to custody of his or her child."[22] In this case, the Court concluded that exceptional circumstances were not present, noting that the exceptions "acknowledge a child's real family unit or emotional attachment, or take account of a biological parent's failure to accept parental responsibility."[23]

Other states have enacted de facto custodian acts that have withstood constitutional challenges. For example, Montana's de facto custodian statute permits courts to award a "parental interest" to a person when he shows by clear and convincing evidence that the

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[13] Id. ¶ 55, 138 P.3d at 1161.
[14] Id. ¶¶ 42–46, 138 P.3d at 1157–58.
[15] Id. ¶¶ 49–53, 138 P.3d at 1159–61.
[16] Id. ¶¶ 34–36, 138 P.3d at 1156.
[17] DJM v. DM (In re SRB-M), 2009 WY 22, 201 P.3d 1115 (Wyo. 2009).
[18] Id. ¶ 14, 201 P.3d at 1118–19.
[19] Id. ¶ 1, 201 P.3d at 1116.
[20] Id. ¶ 19, 201 P.3d at 1120.
[21] Id. ¶ 20, 201 P.3d at 1120.
[22] Id. ¶ 21, 201 P.3d at 1120.
[23] Id.

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natural parent engaged in conduct contrary to the child-parent relationship, the person has established a child-parent relationship with the child, and continuing that relationship is in the child's best interests.[24] Montana's de facto custodian act specifically states that it is unnecessary "for the court to find a natural parent unfit before awarding a parental interest to a third party."[25] The Montana Supreme Court rejected a parent's constitutional challenge under Troxel, noting that Montana's de facto custodian act did not require a finding of unfitness. The Montana Supreme Court also distinguished the statute in Troxel from Montana's statute, which limited the potential persons who could seek custody to those who had established a parent-child relationship with the child.[26]

Similarly, the Kentucky Court of Appeals upheld Kentucky's de facto custodian statute, which permitted the child's half-sister who had been the child's primary caregiver and financial supporter for a period of time to have the same standing as the parents in custody matters.[27] The Kentucky court disagreed with the mother's argument that she had preferred status. Once the half-sister established by clear and convincing evidence that she was a de facto custodian, she could have the same standing as the parents without having to establish that the parents were unfit.[28] In another case, the Kentucky Court of Appeals noted that finding someone to be a de facto custodian implicated two factors of parental unfitness: the parent's lack of primary care and the lack of financial support.[29] In a recent case, the Wyoming Supreme Court listed 12 factors "that will, in sufficient combination, support a conclusion that a parent is unfit to have custody and control of her children."[30] Those factors are:

- An inability to assist with therapy and recovery of a child with significant mental health needs
- Lack of contact with and expressed lack of desire to take custody of the child
- Contribution to the child's mental health or behavioral problems
- Unstable living situation relating to employment or maintenance of a suitable home
- A criminal record, particularly on primarily related to drug use, or a pattern of ongoing drug use

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[24] Mont. Code § 40-4-228.
[25] Mont. Code § 40-4-228(5).
[26] Kulstad v. Maniaci, 220 P.3d 595, 605 (Mont. 2009).
[27] Ky. Rev. Stat. § 403.270; J.M.D. v. N.D., 2015 Ky. App. Unpub. Lexis 596 (Ky. Ct. App. Aug. 21, 2015).
[28] J.M.D., 2015 Ky. App. Unpub. Lexis 596, at *44–46.
[29] Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky. Ct. App. 2002), overruled on other grounds by Benet v. Commonwealth, 253 S.W.3d 528, 533 (Ky. 2008).
[30] LeBlanc v. State (In re ARLeB), 2017 WY 107, ¶23, 401 P.3d 932, 936 (Wyo. 2017).

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- Failure to take responsibility for past conduct
- A lack of an emotional bond with the child
- A failure to develop child-rearing skills
- Convictions for crimes that create potential harm to the child
- An inability to monitor or make healthy nutritional choices or to provide a safe environment
- A history of the parent surrounding himself and the child with unsafe individuals
- The child has become upset by or resistant to visitation with the parent[31]

Research did not reveal a case where a parent (or parents) succeeded on a constitutional challenge against a state's de facto custodian act that is similar to 18LSO-0104. Instead, state courts have upheld de facto custodian statutes that require would-be de facto custodians to show by clear and convincing evidence that they have been the primary caregiver and financial supporter of a child for a specified period of time.[32] Other state courts have rejected constitutional challenges under Troxel to statutes that give grandparents the same standing as parents to seek custody or visitation of children.[33]

This bill draft is different from the statute at issue in Troxel. First, this bill draft limits a de facto custodian—one who can petition for custody or intervene in a custody action—to someone who (1) is related to a child within the third degree of consanguinity and (2) who has been the primary caretaker and financial supporter of the child for a specified period of time (six months to one year depending on the child's age). Second, a de facto custodian has to meet a higher evidentiary standard—clear and convincing evidence—to establish that he is a de facto custodian before a court will consider if awarding custody to the de facto custodian is in the child's best interests. Third, the bill draft does not make it necessary for a court to find a parent unfit before considering the child's best interests. Fourth, the bill draft requires that a petitioner moving for de facto custody of a child give notice of the petition (and notice of any hearings) to, among others, the child's parents.

Finally, it is important to consider W.S. 14-2-206, which expressly provides that the "liberty of a parent to the care, custody and control of their child is a fundamental right that resides first in the parent." This section also provides that the state "shall not infringe the parental right as provided under this section without demonstrating that the interest of

[31] Id.

[32] See, e.g., W.H. v. D.W., 78 A.3d 327, 341 (D.C. 2013); Hunter v. Hunter, 771 N.W.2d 694, 707–09 (Mich. 2009); Ramirez v. Luna, 830 N.W.2d 163, 167–71 (Minn. Ct. App. 2008).

[33] See, e.g., Hernandez v. Hernandez, 265 P.3d 495, 497–500 (Idaho 2011); Hamit v. Hamit, 715 N.W.2d 512, 519–31 (Neb. 2006)

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the government as applied to the parent or child is a compelling state interest addressed by the least restrictive means." This section codifies the holding from Troxel and imposes a high burden before infringing on that fundamental parental interest.[34] Because this law took effect on July 1, 2017, it is unclear how a Wyoming court would apply this statute to the de facto custodian act.

Conclusion

If the de facto custodian act is enacted into law and courts grant custody of children to de facto custodians, it is possible that parents will challenge this law under the Due Process Clause of the United States Constitution and Troxel. At a minimum, a Wyoming court must be satisfied that the law gives appropriate deference to the parent's fundamental rights and interest in raising his own children. While LSO cannot predict how a reviewing court would rule on any challenge, I wanted to provide this background information.

[34] Although courts consider the parents' interest in directing the care and custody of their children, children also have an interest in being cared for in a normal home setting and in maintaining contact with their parents. See Troxel, 530 U.S. at 64–65; Santosky v. Kramer, 455 U.S. 745, 759–60 (1982).

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