Chapter 12

Grandparent Custody and Visitation Issues

Melissa S. Jensen, J.D.
Edited and 2024 updates by:

Adam Graber, Esq.
ASG Law Office, LLC

SYNOPSIS

(Editor's note: The term "grandparents" throughout this chapter incorporates both grandparents and great-grandparents.)

12-1. Options for Co-parenting Without Court Orders

Many grandparents are involved in some aspect of raising their grandchildren, from picking up children from school to taking them to medical appointments to being the primary caretaker for their grandchildren for weeks, months, or even permanently. Parents can voluntarily delegate their authority without involving the court. This authority can include registering a child for school, consenting to medical or mental health treatment, and traveling with the child. Delegations are authorized by Colorado Revised Statute § 15-14-105. The court form for a delegation is JDF 751. Instructions are provided in JDF 750. Delegations are only valid for a stated term and cannot last for longer than one year from the date of signature. Although the delegation expires, a parent can sign a new delegation each year. Delegations must be notarized. Parents can revoke delegations at any time. Only one parent is needed to sign a delegation. However, a parent can only delegate the power that he or she has. If there are court orders that limit one parent's decision making or power, that parent cannot assign power that has been removed from him or her.

12-2. Intervening in an Existing Case

If a court has made or is considering orders concerning a grandchild in a domestic relations, probate, or dependency and neglect case, a grandparent can intervene and become a party in the court case. The court form for a motion to intervene is JDF 1131, and the proposed orders are JDF 1132. A grandparent must serve (provide a copy to) the child's parents or the parents' attorneys if they have them, and all other parties, which may include a county department of human services, the county attorney's office, a guardian *ad litem*, a counsel for youth, a child's legal representative, a child's caretaker or custodian, or other people. The court form explaining how to serve other parties is JDF 1099. If the motion to intervene is granted by the court, a grandparent becomes a limited party to the case. As an intervenor, a grandparent is able to file motions and present evidence to the court.

12-3. Grandparent Family Time (Visitation)

Colorado courts assume that a parent makes decisions, including decisions about a child's contact with his or her grandparent, in that child's best interests. When a family is intact and there are no court orders concerning the children, a court will not intervene to disrupt a parent's decision about contact with grandparents. However, when there are qualifying existing cases involving a child, a grandparent can intervene into the case and request grandparent visitation under C.R.S. § 14-10-124.4. Due to recent legislative changes relating to the terminology of grandparent contact, the courts now refer to those visits as "family time". Qualifying existing court cases include:

1) Decrees of invalidity of the parent's marriage (annulment), decrees of dissolution of marriage (divorce), and legal separation;
2) Domestic relations cases allocating parental responsibility (APR) between parents who were never married (APR cases);
3) Domestic relations cases in which APR was granted to someone other than a parent;
4) Dependency and neglect cases that have removed a child from the care of his or her parents; and
5) Situations in which a child's parent, who was the child of the grandparent, has died.

To request family time in one of these situations, a grandparent must first file a motion to intervene in the existing court case. If it is granted and the grandparent becomes a party, a grandparent may file a motion for grandparent family time. The court form for this type of motion is JDF 1131, and the proposed order is JDF 1132. A motion for grandparent family time must include a sworn affidavit that explains why the family time or contact being requested is in the best interests of the grandchild. A grandparent must serve a copy of the motion on the other parties in the case. The other parties will be able to respond to the motion with their own affidavits. Any party can ask the court to hold a hearing so that the court can hear the testimony of witnesses and receive evidence. If no party asks for a hearing, then the court may make a decision based on the sworn affidavits.

The court can only order grandparent family time if it determines that the contact requested is in the best interests of the child. The United States Supreme Court and the Supreme Court of Colorado have said that a court must presume that a parent is making decisions that are in the child's best interests. The court must give a parent's position special weight. A grandparent may overcome this presumption either by showing that a parent is unfit due to, for example, drug use

or abuse of the child, or by showing that what the grandparent is asking for is in the child's best interests with a high degree of probability (clear and convincing evidence).

Even if a grandparent were to show that contact with the grandparent is in a child's best interests, there are important limitations to what the court can order:

1) A court cannot order a parent not to move outside of Colorado to preserve contact with grandparents, even if there is a grandparent family time order in place. Instead, the court can modify the prior order to accommodate a parent's move.
2) A court cannot order that a grandparent have family time to take a child to a religious service. A grandparent or great-grandparent may not interfere with a parent's wishes or decisions regarding religious training.
3) If a child was adopted after the termination of his or her parent's rights, a court cannot order contact or family time with the biological grandparent.

If grandparent family time is ordered, either the grandparent or custodian can ask the court to enforce the order if it is violated with a verified motion for enforcement. The motion must include an affidavit that describes how and when the order was violated. The motion must be served on the other parties, who will have an opportunity to respond with their own affidavits about what happened. The court will determine if the violation occurred and if substantial and continuing noncompliance is likely to occur in the future. The court may hold a hearing or order that the grandparent and other parties attend mediation to try to come to agreement. If the court finds that the order was not followed, the court can make new conditions, modify the order, or order makeup family time. The court could hold the person who violated the order in contempt of court. The court also has the power to make the violator of the order repay the other parties for their attorney fees and court costs.

Motions for grandparent family time or to modify grandparent family time can only be filed once every two years unless the court finds good cause. Good cause might include a major change of circumstances, like a change in the child's mental health or a change in a parent's or custodian's ability to make good decisions for the child. If a grandparent files a motion before the two years have passed and the court finds there is not good cause, the grandparent may have to pay the parent's or custodian's attorney fees and costs.

12-4. Decision-Making (Custody) under APR

An APR order is a decision-making order (formerly known as custody) that is entered through the domestic relations court. A grandparent can ask the court to enter orders that give the grandparent full or shared decision-making regarding the child. Orders can require a child to live with certain parties and can give rules and requirements around parenting time between the child and his or her parents.

If there is not an existing domestic relations case in which to intervene, a grandparent seeking decision-making can petition the court to open a new case to enter orders. New cases should be filed in the county where the child lives or is located. The court form for a petition for APR is JDF 1413.

A grandparent can only motion the court for decision-making after a grandchild has been in the grandparent's physical custody for 182 days. If a grandchild returns to the care and custody of a parent or other person, the petition or motion must be filed less than 182 days after the

grandchild is no longer in the grandparent's physical custody. A grandparent must serve a copy of the motion on the other parties in the case. The other parties will be able to respond to the motion. If all the parties agree, then the parties can file a stipulated motion that everyone signs. Any party can ask the court to hold a hearing where the court can hear the testimony of witnesses and receive evidence that will help the court make a decision that is in the child's best interests.

A grandparent filing a motion or petition for APR must also file proposed orders. The court form for proposed orders is JDF 1422; however, parental responsibilities orders can be as detailed or as general as a particular situation requires.

In a domestic relations case, parents retain certain rights, including the right to later modify any orders that are entered, the right to have parenting time, and the right to have their wishes be given special consideration by the court. The United States Supreme Court and the Supreme Court of Colorado have said that a court must presume that a parent is making decisions that are in the child's best interests. This is called the *Troxel* presumption. The court must give a parent's position special weight under the *Troxel* presumption. A parent is entitled to the *Troxel* presumption even if he or she voluntarily gave up care and custody in the past or involuntarily had care and custody removed from him or her through a court proceeding, like a dependency and neglect action or a criminal charge that resulted in the parent's incarceration.

A non-parent bears the burden of overcoming the *Troxel* presumption. A grandparent may overcome this presumption either by showing that a parent is unfit due to, for example, drug use or abuse of the child, or by a showing that what the grandparent is asking for is in the child's best interests with a high degree of probability (clear and convincing evidence). The court has to make special findings that justify interference in a parent's decision-making.

The court must consider the best interest factors contained in the statute, C.R.S. § 14-10-124, which include:

1) The wishes of the parents;
2) The wishes of the child if he or she is mature enough to express a reasoned preference;
3) The relationship of the child, parents, grandparents, family members, and any other people who affect the child's best interests;
4) The child's adjustment to home, school, and community;
5) The mental and physical health of all parties involved;
6) The adults' respective abilities to encourage the sharing of love and contact between the child and the other parties;
7) The past pattern of the parents' and grandparents' involvement with the child;
8) Credible evidence of a history of child abuse or neglect on the part of the parents or grandparents;
9) The abilities of the adults to put the child's needs and best interests ahead of their own; and
10) Where each party lives and how physical proximity may affect the ability of a parent to participate in parenting time.

There is a strong presumption that decision-making orders that were previously entered by the court will continue to be in a child's best interests. A presumption for keeping prior orders can be overcome if all the parties agree to the change or if the person wanting to change orders

can show that the current orders put the child in a dangerous environment. The party wanting to change the orders must show that (1) there are new facts or facts that were not known to the court when the prior orders were entered or (2) there has been a change in circumstances for either the child or the person who has decision-making under the current orders. The person asking for a modification must also show that new orders are necessary for the child's best interests and the advantages to changing the orders likely outweigh potential harms.

In a domestic relations case, any party can ask the court to appoint a child and family investigator (CFI) or a parental responsibilities evaluator (PRE) to conduct an investigation and make recommendations to the court about what orders would best serve the child's best interests. The court can require all the adults in the case to cooperate with any evaluations, and can grant the evaluator access to records, documents, reports, and other court cases. The court can also appoint a child's legal representative (CLR), an attorney who represents the child's best interests in the court proceeding. In cases where a child's mental health is likely to come under scrutiny in the case, the court can appoint a limited CLR to either hold a child's therapeutic privilege or assist a young person in exercising his or her own therapeutic privilege.

If the court grants decision-making authority to a grandparent through an APR, those orders can be changed when the parties agree. Any agreements made to change the terms of an APR order should be made in writing. Agreements do not have to be filed with the court, but a court will only enforce the orders that are in the court file. If the court orders parents to have visits with their children on Wednesdays, but circumstances change, all the parties can agree to move the visits to Sundays. If a motion to enforce is filed by a party that wants to move back to Wednesdays, the court will not enforce the informal agreement and will require a move back to the originally ordered day.

If a grandparent who has decision-making under an APR wants to change the residence the grandparent lives in with the child, he or she must consider if the move will affect the child's ability to see the biological parent under the APR orders. Typically, a move within the same town is not considered a relocation, but a move of greater distance may be, depending on what kind of parenting time was ordered. If the move will affect parenting time, it is considered a relocation. A grandparent who has custody must ask the court for permission to relocate and must propose new parenting time orders that fit the new circumstances. The court form with instructions for filing a motion to relocate is JDF 1400.

12-5. Guardianship of Grandchildren

A guardianship is governed by a different set of statutes and is entered by a probate court. A young person, age 12 and older, must be given notice (service) of a petition for guardianship at the same time that notice is given to the biological parents. A young person over age 12 must also be given the opportunity to consent or not consent to the appointment of a guardian. A court can grant a guardianship over the objections of a young person if the court finds that the guardianship is in the young person's best interests.

A grandparent asking to become a guardian or conservator must submit criminal background checks and credit reports with the grandparent's petition. A guardianship may be granted on an emergency basis, as a short-term solution, while the parties prepare for permanent orders hearings. The court form with instructions for requesting appointment of a guardian is JDF 823.

Similar to in a domestic relations case, the court presumes that a biological parent is acting in his or her child's best interests. If a parent does not consent to a guardianship, a non-parent bears the burden of overcoming the presumption. A grandparent may overcome this presumption either by showing that a parent is unfit due to, for example, drug use or abuse of the child, or by showing that what the grandparent is asking for is in the child's best interests with a high degree of probability (clear and convincing evidence). The court must make special findings that justify interference in a custodial parent's decision making.

During a guardianship, a biological parent's decision-making and other parental rights are partially suspended during the life of the guardianship. A biological parent retains his or her right to petition the court to dissolve a guardianship or conservatorship, but typically there are not parenting time orders connected with a guardianship.

A probate court has the power to appoint a guardian *ad litem* (GAL) for a child in a probate action. The GAL is an attorney who has authority to complete an investigation and advocate for the child's best interests in the probate case. If the parties are found to be indigent, the court may require the State to pay for the GAL.

A grandparent may also petition the probate court to become a child's conservator. A conservator handles financial matters for a child. This may become necessary if a child has independent income or the right to money through a settlement or court order but the child's parents are not available to manage the child's money or, for some other reason, should not control money belonging to the child. Petitions for conservatorship are often, but not always, filed with petitions for guardianship, and the same notice and opportunity for hearing must be given.

Both guardianships and conservatorships have reporting requirements each year. These are formal check-ins with the probate court to ensure that the child's needs are being met and that the appointed guardian or conservator is acting in the child's best interests. The court form with instructions for appointment of a conservator for a minor is JDF 860.

A guardian or a conservator has the ability to nominate his or her successors in the event that something happens to the appointed guardian or conservator. The court can use an appointed guardian or conservator's nomination as a guide when appointing a new person to these roles.

12-6. Grandparent Adoption

Grandparents may be eligible to adopt a grandchild under Colorado's kinship adoption statute, C.R.S. § 19-5-203(1)(j). If the grandparent is married, both partners must adopt together. Grandchildren who are subjects of a dependency petition have different rules for termination and adoption and are not eligible for adoption under C.R.S. § 19-5-203(1)(j).

Termination and adoption petitions are filed together. The court's guiding principle is the best interest of the child. In making its decision, the court may consider: the stability of the family; the effects of a possible adoption, including any detrimental effects of a severing of the parent/child relationship; the child's emotional ties to and interactions with the parties; the child's adjustment to his or her living situation; the child's age; and the mental and physical health of all the parties.

The court must first determine if the grandchild is available for adoption. Children become available for adoption when they have been in the physical custody of a relative for one year or more, there is no pending dependency case, and either:

1) The parents have abandoned the child for one year or more; or
2) The parents have failed without cause to provide reasonable support for one year or more.

There do not need to be court orders for the year that a grandchild has spent in the physical custody of a grandparent. If there are not orders, a grandparent will need to demonstrate by some other evidence or testimony that the grandchild has lived in the grandparent's home for at least one year before the adoption petition was filed.

Termination due to abandonment is a question of intent. A grandparent seeking to adopt must demonstrate a parent's intent to abandon the child by clear and convincing evidence. The court considers the totality of the circumstances. There does not need to be a showing of no contact whatsoever to demonstrate an intent to abandon. However, the court will consider extenuating circumstances that may have restricted a parent's ability to spend time with or work towards caring for his or her child. For example, a parent who is incarcerated typically does not demonstrate an intent to abandon his or her child.

Termination due to lack of reasonable support is typically more straightforward to prove. The court expects a parent to provide reasonable support regardless of whether there are child support orders in place. A court will consider if support was provided in the past and the likelihood of support being provided in the future. A parent's past non-compliance with court orders for child support is strong evidence that there will be non-compliance in the future. The Colorado Supreme Court has said that termination will be granted if it is unlikely that a parent will make future support payments on a regular and continuing basis.

When a grandparent petitions to adopt a grandchild, the grandparent must show that he or she is of good moral character, has a suitable home, and has the ability to support and educate his or her grandchild. As evidence of these requirements, a grandparent must give the court credit checks and a state TRAILS check showing that the grandparent does not have any child protection history. A grandparent must also complete a home study or petition the court to waive the requirement for a home study. A grandparent might be eligible to waive the home study if, for example, the grandparent was a certified kinship home through a dependency action but his or her certification has lapsed.

As with other types of court cases, a grandparent must provide service of the grandparent's petition to terminate the parent-child relationships and the grandparent's petition to adopt the child to the child's parents. A parent can consent to an adoption by a grandparent by completing JDF 510, but consent is not necessary. If a grandparent cannot locate a biological parent to provide service, the grandparent can ask the court to allow him or her to provide service by publication. Some parts of the petition for adoption, such as the credit and background checks, do not have to be served on the parent and are sealed by the court so that they are kept confidential. If a grandparent has safety concerns with sharing other information with the parents, the grandparent can ask the court to keep other parts of the petition confidential as well.

If a parent objects to termination of his or her rights and adoption of his or her child by a grandparent, the parent must file a response to the petition within three weeks of being given a copy. A parent can ask for a hearing if the parent disagrees with the facts that a grandparent has alleged in the petition. Because maintaining the parent-child relationship is a fundamental right under the Constitution, a parent is entitled to an attorney in a termination hearing. If the parent is incarcerated or otherwise indigent, the court may appoint the parent an attorney for the termination hearing.

12-7. More Information

For more information and legal aid on custody and visitation see Appendix A: Resources, Chapter 12.