



# Third-Party Custody Guide



*Note: This guide is intended to provide general legal advice for a third party (non-parent) seeking custody of a child.*

*If you are a grandparent or great-grandparent seeking visitation with a child, rather than custody, please see our [Grandparent Visitation Guide](#) on our website. If you are seeking guardianship of a minor child rather than custody, please see [Guardianship of a Minor](#) information on our website.*

*If you need specific legal advice regarding your situation, please contact an attorney.*

## What Does “Custody” Mean?

Custody of a child includes the rights of legal custody and physical custody.

**Legal custody** means you have the right to make major decisions for the child regarding the child’s welfare. Legal custody includes, but is not limited to, decisions related to: education (for example, where the child goes to school); medical care (for example, who the child’s doctor is); and religion (for example, what religion the child will follow, if any). Legal custody decisions do not include regular day-to-day decisions that each parent would make while the child is in his or her care.

**Physical custody** refers to the periods of time in which a child resides with, or is under the care and supervision of, each parent for the child’s daily needs.

Please see [Idaho Code Section 32-717B](#) for more information regarding legal and physical custody.

## What is Third-Party Custody?

**Third-party custody** is where a court awards legal and/or physical custody of a child to someone who is not a biological parent of the child.

This person is sometimes called a custodian.

## Why Might I Seek Third-Party Custody of a Child?

In many situations, a third-party may seek custody of a child due to situations where the child is being exposed to abuse or is being abused; has been abandoned; or, has been neglected, while in the parents’ care.

Third-Party Custody would allow a custodian to do the following for a child:

- Provide the child a safe, stable, and permanent home, especially in situations where the child is exposed to abuse or been abused or has been abandoned or neglected;
- Obtain medical insurance coverage and medical care for the child;
- Enroll the child in school or daycare and/or public assistance;
- To make clear, enforceable rules or guidelines about things like where the child is going to live and what sort of parenting time or visitation the parents may have;
- Have security that a parent can’t take the child suddenly, disrupt school or other activities; and,
- The possibility of getting child support from the parent(s) for the child.

## What are Some Differences Between Third-Party Custody, Guardianship, Conservatorship, Adoption, and a Delegation of Parental Authority?

If a third-party has **guardianship** over a child, the guardian is awarded the custody rights previously exercised by the parent(s) and is called the child's legal guardian. A legal guardianship can also be established if both parents have died. Even if a third-party becomes a child's guardian, the parents may be allowed parenting time and may have to pay child support. The child is also still the parents' legal child, including for purposes of inheritance and social security. This is accomplished through a guardianship case filed in court. A guardianship can be temporary or long-term.

If a third party has a **conservatorship** over a child, they are awarded the rights to manage financial decisions previously exercised by the parent(s) and is called the child's conservator. This is accomplished through a conservatorship case filed in court. Often conservatorship cases are combined with a guardianship case.

If a third-party has **adopted** a child, then the third-party becomes the legal parent of the child and the biological parents' rights are terminated permanently. The child no longer has inheritance rights from the biological parents because the child is no longer considered the biological parents' child.

A **Delegation of Parental Authority (DOPA)** is a legal form signed by a parent when they want a third-party to care for their child temporarily. A DOPA is not filed with the court and a parent can terminate or end a DOPA at any time.

A parent's rights are not necessarily terminated in a **third-party custody** proceeding. Even if someone gets third-party custody, the parents may be allowed parenting time and may have to pay child support to the third-party custodian. The child is still the parents' child for purposes of inheritance and social security.

## Third-Party Custody

### How Do I Seek Third Party (Non-Parent) Custody of a Child in Idaho?

Idaho allows specific third parties (non-parents) to seek custody of a child but only in certain circumstances. Below are the two ways in which a non-parent third party may ask the court to award them custody of a child:

1. **De Facto Custodian Act:** The Idaho De Facto Custodian Act allows relatives related to a child within the third degree of consanguinity (for example, a great-grandparent or grandparent, aunt or uncle, niece or nephew, or sibling) to seek custody where that third party has cared for and supported a child and third-party custody is in the child's best interests. Idaho Code Section 32-1701 *et seq.*; or,

2. **Grandparent Custody If Child Lives with Grandparent and There is a Divorce Case:** Idaho Code Section 32-717(3) allows grandparents to intervene in a divorce case where the child actually physically resides with the grandparent(s), and the grandparent(s) has cared for and supported the child, and third-party custody is in the child's best interests.

For information regarding the De Facto Custodian Act, see Pages 3-5 or the purple section of this guide.

For information on Grandparent Custody Where a Child Lives with a Grandparent and There is a Divorce Case, see Page 6, or the green section of this guide.

## Option 1:

# The De Facto Custodian Act

## What is a De Facto Custodian?

**Idaho Code Section 32-1703** (1) defines a “de facto custodian” as a person who:

1. Related to the child within a third degree of consanguinity\*;
2. Either individually, or with another third-party seeking custody, has been the primary caretaker and primary financial supporter of the child;
3. The child has resided with the third-party without a parent present and with a lack of demonstrated consistent participation\*\* by a parent in the child’s life;
4. For a period of time of at least:
  - (a) Six (6) months if the child is under the age of three (3); or,
  - (b) One (1) year if the child is age three (3) or older.

### \*What Does Within a Third-Degree of Consanguinity Mean?

The following relatives are related within a third-degree of consanguinity to a child:

Great-grandparent  
Aunt or Uncle  
Niece or Nephew  
Grandparent  
Brother or Sister

### \*\*What is “Lack of Demonstrated Consistent Participation?”

“Lack of demonstrated consistent participation” by a parent means refusal or failure to comply with the duties imposed upon the parent by the parent-child relationship. In other words, a failure of the parent to act as a parent to the child.

When determining whether the parent has shown a "lack of demonstrated consistent participation," the court may consider parent involvement in providing the child necessary food, clothing, shelter, health care, and education, and in creating a nurturing and consistent relationship for the child’s physical, mental, or emotional health and development. See Idaho Code Section 32-1703(1)(c).

### How is the Period of Time Calculated?

In determining if a petitioner or intervenor is a de facto custodian for the child according to the time period requirement, the court will consider whether the child is currently residing with the third-party and, if not, the length of time since the child has resided with the third-party. See Idaho Code Section 32-1703(2).

However, the court will not consider any time after the petition for third-party custody is filed to be included in the time period for the purpose of determining whether a third-party is a de facto custodian. See Idaho Code Section 32-1703(3).

## Who Would Not Be Considered a De Facto Custodian?

A third-party will not be considered a de facto custodian if the child resides with the third party because either:

- (1) the child was placed in the third-party’s care through a court order or a voluntary placement agreement under the Child Protection Act (Idaho Code Title 16), or
- (2) the third-party was living with, or is or was married to, a parent of the child.

See Idaho Code Section 32-1703(4).

## How Do I File for Third-Party Custody under the De Facto Custodian Act?

A third-party can either:

- (a) File a petition asking the court to find that he/she is the child's de facto custodian and asking the court to award third-party custody of the child to him/her; or,
- (b) File a motion to intervene (or a motion for intervention) in a currently ongoing divorce or custody case asking the court to find that he/she is the child's de facto custodian and asking the court to award third-party custody of the child to him/her.

See [Idaho Code Section 32-1704](#) (1).

*Legal Tip: You can find information regarding a case online through Idaho's iCourt system here: <https://icourt.idaho.gov/>*

## What Needs to be Included in a Third-Party Petition or Motion for Custody under the De Facto Custodian Act?

Under the De Facto Custodian Act, the petition for custody or a motion to intervene asking for third-party custody must include all of the following:

- (a) The name and address of the petitioner or intervenor and any prior or other name used by the petitioner or intervenor;
- (b) The name of the respondent mother and father or guardian(s) and any prior or other name used by the respondent(s) and known to the petitioner or intervenor;
- (c) The name and date of birth of each child for whom custody is sought;
- (d) The relationship of the petitioner or intervenor to each child for whom custody is sought;
- (e) The basis for jurisdiction asserted by the petitioner or intervenor;
- (f) The current legal and physical custodial status of each child for whom custody is sought, whether a proceeding involving custody of the child, including a proceeding for an order or protection due to domestic violence, is pending in a court in this state or elsewhere, and a list of all prior orders of custody, including temporary orders, if known to the petitioner or intervenor;
- (g) Whether either parent is a member of the armed services, if known to the petitioner or intervenor;
- (h) The length of time each child has resided with the petitioner or intervenor and the nature of the petitioners or intervenors role in caring for each child for whom custody is sought;
- (i) The financial support provided by the petitioner or intervenor for each child for whom custody is sought;
- (j) Whether physical and/or legal custody should be granted to and/or shared with the respondent/parent(s); and
- (k) The basis upon which the petitioner or intervenor is claiming that it is in the best interests of the child that the petitioner or intervenor have custody of the child.

See [Idaho Code Section 32-1704](#) (2).

## Verification of Petition or Motion

The petition or motion must also be verified by the third-party. See Idaho Code Section 32-1704(3).

[Idaho Rule of Family Law Procedure 213](#) defines verification as: “a written statement or declaration by a party or the party's attorney of record” sworn to or affirmed under oath before a person capable of taking depositions (for example, a notary public), that the third-party believes the facts within the petition or motion to be true based on his/her personal knowledge.

## Who Has to Receive Notice of the Third-Party Petition or Motion under the De Facto Custodian Act?

Written notice of a hearing on a petition or motion to intervene for custody of a child by a de facto custodian must be given to:

- (a) The parent(s) of the child as defined in section [16-2002](#)(11) and (12), Idaho Code; and
- (b) The guardian or legal custodian, if any, of the child; and
- (c) The child's tribe pursuant to federal law, if the child is an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. 1901, *et seq.*

See [Idaho Code Section 32-1704](#) (4).

### AND

If either parent of the child receives public assistance or child support enforcement services from the Idaho Department of Health and Welfare or the third-party receives public assistance on behalf of the child, written notice must also be given to the Idaho Department of Health and Welfare. See Idaho Code Section 32-1704(5).

## What Does the Court Need to Decide to Award Third-Party Custody under the De Facto Custodian Act?

1. First, the court has to decide if the third-party seeking custody is a de facto custodian.

This must be proven by clear and convincing evidence.\*

2. Then, if the court decides that the third-party is a de facto custodian, the court will determine whether the third-party has proved that it is in the child's best interest for the third-party to be awarded custody. The court will look at the best interest factors in Idaho Code Section 32-717 to determine the child's best interests.

This must be proven by a preponderance of the evidence.\*\*

See [Idaho Code Sections 32-1704](#) (6) and (7).

### What are the Best Interests of the Child?

The court shall consider all relevant factors to determine a child's best interests, which may include:

- (a) The wishes of the child's parent or parents as to his or her custody;
- (b) The wishes of the child as to his or her custodian;
- (c) The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings;
- (d) The child's adjustment to his or her home, school, and community;
- (e) The character and circumstances of all individuals involved;
- (f) The need to promote continuity and stability in the life of the child; and,
- (g) Whether or not domestic violence has occurred in the presence of the child, as defined in Idaho Code Section 39-6303. (Domestic violence is defined in Idaho Code Section 39-6303 as: "the physical injury, sexual abuse or forced imprisonment or threat thereof of a family or household member, or of a minor child by a person with whom the minor child has had or is having a dating relationship, or of an adult by a person with whom the adult has had or is having a dating relationship.")

The court can also consider the following in determining the child's best interests for third-party custody:

- (a) The circumstances under which the child was allowed to remain in the care of the de facto custodian, including whether the child was placed with the de facto custodian to allow the parent to seek work or to attend school; and,
- (b) Whether the child is currently residing with the de facto custodian and, if not, the length of time since the third-party last functioned as the child's de facto custodian.

See [Idaho Code Section 32-1704](#) (8).

### What is "Clear and Convincing" Evidence?\*

Clear and convincing evidence is evidence means evidence that is more than a "mere preponderance" of evidence. This means that you must show by *more than* just a mere majority of the evidence that third-party custody is in the child's best interests. *Matter of Jenkins*, 120 Idaho 379, 383, 816 P.2d 335, 339 (1991).

### What is a "Preponderance of the Evidence"?\*\*

## Option 2:

### Grandparent Custody Where a Child Lives with the Grandparent and There is a Divorce Case

#### How Do I Get Third-Party Custody if I'm a Grandparent Who Lives with the Child and a Divorce Case is Open?

[Idaho Code Section 32-717](#)(3) allows grandparents to file a motion to intervene in a divorce case to seek third-party custody where:

1. The child actually physically resides with the grandparent(s); and,
2. The grandparent(s) has cared for and supported the child; and
3. The court determines that third-party custody is in the child's best interests.

#### What are the Best Interests of the Child?

The court shall consider all relevant factors to determine a child's best interests, which may include:

- (a) The wishes of the child's parent or parents as to his or her custody;
- (b) The wishes of the child as to his or her custodian;
- (c) The interaction and interrelationship of the child with his or her parent or parents, and his or her siblings;
- (d) The child's adjustment to his or her home, school, and community;
- (e) The character and circumstances of all individuals involved;
- (f) The need to promote continuity and stability in the life of the child; and,
- (g) Whether or not domestic violence has occurred in the presence of the child, as defined in [Idaho Code Section 39-6303](#).\*

\*Domestic violence is defined in Idaho Code Section 39-6303 as: "the physical injury, sexual abuse or forced imprisonment or threat thereof of a family or household member, or of a minor child by a person with whom the minor child has had or is having a dating relationship, or of an adult by a person with whom the adult has had or is having a dating relationship."

#### What if I'm a Grandparent Who Meets the Above Requirements But It's a Custody Case and Not a Divorce Case?

Unfortunately, the Idaho Supreme Court has said that Idaho Code Section 32-717(3), the third-party custody law above, only applies in divorce actions (*In Re Doe*, 148 Idaho 432, 440, 224 P.3d 499, 507 (2009); see also *Hernandez v. Hernandez*, 151 Idaho 882, 886, 265 P.3d 495, 499 (2011)).

#### What Has to Be Included in My Motion to Intervene for Third-Party Custody under Idaho Code Section 32-717(3)?

Idaho Code Section 32-717(3) does not require specific information in the motion to intervene (unlike the De Facto Custodian Act). [Idaho Rule of Family Law Procedure 208](#)(E) also states no specific form for the motion is required but each statement in the motion should be "simple, concise, and direct."

However, all family law pleadings, including a motion to intervene in a divorce case to seek third-party custody, must be in the form required by [Idaho Rule of Family Law Procedure 207](#).

#### Attorney Services

You may represent yourself or hire an attorney to file a petition or motion and appear with you in court. If you need help finding an attorney, contact the following organizations:

- [Idaho Legal Aid Services, Inc.](#)
- [Idaho Volunteer Lawyers Program](#)
- [Idaho State Bar Association Attorney Referral Service](#)