TEMPORARY CUSTODY ORDERS IN A MIGRATORY SOCIETY

BY ALEX H. SITZ III

Temporary custody orders usually arise in one of two circumstances. The first is at the onset of a new case, such as a divorce, when there is not already a custody order in place. If the parties cannot agree on how to deal with custody and visitation issues amongst themselves while awaiting a final trial, then they usually seek some direction from the Court in the form of a temporary order. In this circumstance Wyoming Statute 20-2-112(b), clearly states, "[o]n application of either party, the court may make such order concerning the care and custody of the minor children of the parties and their suitable maintenance during the pendency of the action as is proper and necessary . . ." The second circumstance is when there is already a custody order in place but one party seeks to permanently modify that order, and, while awaiting a final trial on that modification, seeks a temporary order modifying custody until that final determination can be made. The circumstance usually involves the custodial parent relocating and the non-custodial parent filing a modification action to prevent the child(ren) from having to relocate with the custodial parent.

But, why am I, and other family law practitioners, seeing temporary modifications more often now? It all began with the 2012 Wyoming Supreme Court's decision in *Arnott v. Arnott*, 293 P.3d 440 (Wyo. 2012), which recognized that a long-distance relocation by the custodial parent may be considered a substantial and material change of circumstances to allow the Court to revisit the underlying custody order. Prior to the *Arnott* decision it was clear that relocation could not be considered a change of circumstance to allow reopening of a custody case.

With the increase of temporary custody modifications, what are the standards and procedures that a court must use to analyze the situation? Realistically, it really depends on which judge you are dealing with as such factors involve the use of judicial discretion. There is so much discretion given to judges in domestic cases that you must know how that local judge deals with particular situations. For example, I've had one judge (retired) use the standards set forth in the child protection statutes of Title 14, and require reasonable grounds to believe the child would be injured or seriously endangered before he would consider a temporary custody modification. I've had a different judge liken the standard to Wyoming Rule of Civil Procedure 65(b), related to temporary restraining orders and the need to show "immediate and irreparable injury, loss or damage..." Other judges simply use some finding of an "emergency" before considering a temporary change. One way or another, the vast authority provided by judicial discretion requires that you know the local judge's practice before stepping in the courtroom. In addition, it is helpful to understand whether your judge will allow a full evidentiary hearing on the temporary modification, or just a shortened non-evidentiary proffer type hearing. This procedure is also discretionary and varies among districts and judges.

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Clearly, it would be helpful if the Wyoming Statutes gave both courts and family law practitioners better guidance on how to deal with temporary custody modifications. There have been recent case opinions from the Wyoming Supreme Court which have helped in giving us more direction in these circumstances.

The first noteworthy case is *Tracy v. Tracy*, 388 P.3d 1257 (Wyo. 2017), which appealed an issue related to the temporary modification of custody. The trial court in that case only allowed a shortened proffer type hearing without presentation of evidence, and after conducting such hearing it did allow for a temporary modification although normally that court was "very reluctant" to modify custody. *Id.* at 1260. The *Tracy* court considered the district court's power to enter temporary orders, as well as the kind of hearing required. In review of the applicable standard set forth in Wyoming Statute 20-2-112(b), the Court "discern(ed) no reason for the legislature to treat either type of proceeding as giving rise to a lesser need for prompt action by the district court than the other in situations like this." *Id.* at 1263. Therefore, it concluded the district court had the power to enter temporary custody modification orders with the same authority as an initial temporary custody order. It went on to state, "because the rules and statutes governing courts are seldom all-encompassing, courts have been held to have inherent power to take such actions as may be necessary to perform their duties, so long as the exercise of that power is a reasonable response to specific problems and needs in the fair administration of justice and it does not contradict any express rule or statute." *Id.* The Court further noted that "courts have inherent equitable authority to enter custody orders, even in the absence of a statute that provides that specific authority." *Id.*

When exercising the powers set forth by *Tracy*, the Court noted it must be done with a "delicate touch." It is a delicate touch because of the position it may favorably leave the prevailing party in pending a final trial. As stated by *Tracy*, "[i]f a court cannot act quickly to temporarily change custody in the best interests of children, there is a risk that the custodial parent will take action that might be harmful to a child before a full evidentiary hearing can be held. The ability to do so also positions the custodial parent to argue at trial that, having moved a child to a new home and school, it would be too disruptive to change custody and move the child back. On the other hand, if custody is changed temporarily, that decision can position the non-custodial parent to make the same argument." *Id.* at 1263.

The take away from the *Tracy* case is that our district courts do have the equitable

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power to modify custody on a temporary basis even though there may not be specific statutory authority to do so, but that the district courts are cautioned to exercise said powers with a "delicate touch."

Now that it has been made clear the district courts have the authority to modify custody on a temporary basis, the next question is whether we must first allow the custodial parent to relocate before we can determine how it will affect the child? The 2015 case of *Kappen v. Kappen*, 341 P.3d 382 (Wyo. 2015), seemed to direct us that relocation in and of itself was not enough to change custody but that one "must also demonstrate that change holds some relevance in the child's life. The test is whether the change in circumstances **affects the child's welfare**." *Id.* at ¶ 15 (emphasis added). This raised issues from a practical aspect in the courtroom because you can't prove how it affects the child's welfare until you actually allow the parent and child to relocate. As such, it allowed for a great argument on behalf of the relocating custodial parent in order to defeat motions to modify temporary custody. However, that argument was short lived.

In 2018, the Wyoming Supreme Court issued the *Jacobson v. Jacobson*, 2018 WY 108, decision clarifying the above raised question. In *Jacobson*, the Court stated, "we have never said the district court must wait until the children exhibit negative consequences before reconsidering custody and/or visitation. We have said that, in order to be considered material, the change in circumstances must affect the children's welfare, which means that the change 'holds some relevance' in the children's life. A circumstance may have relevance in a child's life **before there are outward signs of harm**." *Id.* at ¶ 19 (emphasis added). "For example, in cases where the custodial parent plans to relocate, we do not require the parent to relocate and the child to show the negative effects of relocation before we will find a material change of circumstances." Therefore, the *Jacobson* case added great clarity to the question that was often raised and argued in temporary custody modifications based upon relocation of the custodial parent.

Further, in 2018 we also received a nice reminder from the Wyoming Supreme Court in *Wood v. Wood*, 2018 WY 93, that the Court lacks jurisdiction under WRAP 1.04(c), to consider an appeal of a temporary custody order because of its limited duration. Therefore, one must wait until a final order is entered before appealing any issues related to a temporary order.

In summary, based upon recent trends in case law, Wyoming family law practitioners must understand three important points related to the temporary modification of custody: 1) district courts do have the authority to modify custody on a temporary basis even though it might not be spelled out specifically in our statutes; 2) district courts do not need to wait until there is an affect on the child's welfare before considering a temporary modification of custody; and, 3) if you do not prevail in a temporary modification of custody proceeding then you must be patient as an appeal cannot be sought until a final order is entered.

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