

MEMORANDUM

TO: Jeff Atkinson, Drafting Committee on Non-Parental Child Custody and Visitation Act

FROM: **Terry O'Neill**, President, National Organization for Women (NOW) Foundation and Observer, Drafting Committee on Non-Parental Child Custody and Visitation Act
Renee Beeker, Chair, NOW Foundation Family Law Advisory Committee and Observer, Drafting Committee on Non-Parental Child Custody and Visitation Act
Michael R. Smalz, Member, NOW Foundation Family Law Advisory Committee and Observer, Drafting Committee on Non-Parental Child Custody and Visitation Act
Donna Matthews, Member, NOW Foundation Family Law Advisory Committee

DATE: November 10, 2015

RE: NOW Family Law Advisory Committee's comments regarding Non-Parental Rights To Child Custody and Visitation Act

General comment:

For reasons outside their control (such as the gender and gender-race wage gaps), women have far fewer financial resources with which to fight custody battles. In cases involving grandparents or third parties petitioning for custody of children where the mother of the children is being challenged, it is important to remember that the mother will likely have fewer financial resources to make her case. When domestic violence is a factor in custody challenges, it is often the mother who is the protective parent and is frequently disadvantaged by lack of financial resources -- which often and unfortunately figures in the determination of who is awarded custody. These comments are submitted with a view to protect those parents (predominantly women) who are fit parents but lack resources, or who have experienced abuse or violence and/or are seeking to protect their children from abuse or violence.

With respect to the draft Non-Parental Child Custody and Visitation Act:

Given the seriousness of these matters, we suggest the use of the clear and convincing evidence standard of proof throughout the document, rather than preponderance of evidence.

Section 2 Paragraph (3) – The Committee prefers that for a de facto parent to have visitation or custody, that person must have acted as a de facto parent of the child within the last two years.

Section 3 - The Committee suggests this language: “A petition for custody or visitation shall be verified and specify the factual basis on which relief is sought, including the nature of the relationship between the petitioner and the child, including attempts to obtain reasonable visitation or contact with the child through the current custodian, including the detriment to the child of not granting custody or visitation to the petitioner and including the detriment the child would suffer if custody or visitation decisions and control remained with the parent or with the current party legally exercising those rights.” The purpose of these additions is to require the petitioner to allege important portions of the case in detail at the very beginning of the case. If

the petitioner is not required to petition for relief in this level of detail, the case could linger on for some time before the petitioner would be required to make and prove these allegations. Requiring this level of detail will preclude frivolous filings and save the child's parents considerable amounts of money and trouble in defending them.

Section 5 (1) and Section 6 (a) - An "oral" agreement should not be sufficient to allow a non-parent to seek custody or visitation. The provision should require a written agreement.

Section 5 (1) – The Committee suggests that this section should read: "before the child's birth, the non-parent entered into a written ~~for oral~~ agreement with the child's parent or parents, if the child has more than one parent, to accept full and permanent responsibilities as a parent and to raise the child together, with the parent or parents being fully informed concerning the future ramifications of entering into such an agreement;"

Section 5 – The Committee suggests this Comment to Comment page 11, lines 33 – 38 - In many cases the number of persons who may obtain rights of custody or visitation could, in fact, be quite large. Married or unmarried parents who left the relationship that produced the child and married or developed a subsequent relationship, could find themselves with those four people in parent/step-parent relationships, with each of those "parents" bringing two (or more) grandparents into the group of those who might petition the court for time with the child. Consideration of the financial burden placed on families (across the board) should be considered, especially given the contemplation in this Model code of the participation of guardians ad litem and other court professionals. The Court should also closely monitor these cases to avoid litigation abuse and should consider limiting the number of people who have rights under this model code. It is quite common in cases of domestic violence that abusive partners practice continued abuse or coercion of one parent by another parent or by a non-parent, or other who may qualify as a de facto parent under these definitions.

In addition, "foster parents" should not explicitly be given standing to seek custody against a parent. Undue encouragement to foster parents to seek custody of children in their care could undermine the general purpose (providing temporary care while the parents obtain needed counseling and services) of the foster care system.

Section 6 (b) – Custody with the parent as being a detriment to the child is not defined in this document. Need a definition that relates to the parent and the child and that does not relate to the non-parent. Need to define how the child experiences a detriment related to the parent when the parent has not been found to be unfit.

Section 8 Alternative A paragraph 4 is, in essence, a "friendly parent" provision. Meaning, there may be a preference of custody in the parent who is most likely to facilitate positive relationships of the child with all other family members and parties. Provisions such as these put a domestic violence survivor and/or a protective parent at a distinct disadvantage. The parent protecting the child from continued abuse would be seen as the party who will not want to facilitate visitation with all the other potential parties in these cases.

Section 8 Alternative A paragraph 7, we would propose adding this language at the end of paragraph 7: “including a thorough search by the court of all available databases and sources of information, including those not available to the public or the parties’ attorneys (for example, Child Protection reports, substantiations, non-substantiations, arrests, domestic violence call-outs, expunged civil and criminal records, etc.).” The purpose of adding this language is to assure that the court has the entire picture of the parties involved with the child. Parents and others may not have any way to be aware of prior child abuse and neglect cases or arrests or charges involving petitioning parties brought for matters that would likely result in the denial of the petition, if known.

We see no mention in the document about how the agreement between the parent(s) and the de facto parents should be formalized and/or notarized, what terms it should include and whether and how coercion should be guarded against.