

MEMORANDUM

TO: Uniform Law Commissioners

FROM: Debra Lehrmann, Chair, Nonparental Child Custody and Visitation Act
Jeff Atkinson, Reporter, Nonparental Child Custody and Visitation Act

DATE: June 7, 2017

RE: Issues Memo and Summary of Act -- Nonparental Child Custody and Visitation Act

This memo summarizes the main provisions of the Nonparental Child Custody and Visitation Act and addresses some of the concerns that were raised at the First Reading of the Act in 2016.

Summary of Act

The main provisions of this act are:

- a right to seek custody or visitation for two categories of individuals: (1) nonparents who have acted as a consistent caretaker of the child without expectation of financial compensation, and (2) other nonparents who have a substantial relationship with the child and who demonstrate that denial or custody or visitation would be as detriment to the child;
- a provision that act does not apply to a proceeding between two or more nonparents, nor does the act apply to children who are the subject of proceedings for guardianship, abuse, neglect, or dependency;
- a requirement that the pleadings be verified and specify the facts on which the request for custody or visitation is based;
- a requirement of notice to: (1) any parents whose parental rights have not been previously terminated; (2) any person having physical custody of, or visitation with, the child; and (3) the child who is at least 12 years of age.
- a rebuttable presumption that the parent's decision about custody or visitation is in the best interest of the child;
- a burden of proof on the petitioner of clear and convincing evidence;
- protections for victims of domestic violence;
- a list of factors to guide the court's decision;
- a provision that a nonparent granted visitation may be ordered to pay the cost of facilitating visitation, including the cost of transportation; and
- a provision that the rights and remedies of this act are not exclusive and do not preclude additional rights and remedies under laws of the state other than this act.

Concerns raised at the First Reading in July 2016

1. **Use of the term “de facto parent” and concern about a child having too many parents.** At the First Reading, the Nonparent Act used the term “de facto parent” and provided that an individual who was adjudicated to be a de facto parent had the same right to seek custody and visitation as a parent. Concerns were expressed that the concept of de facto parent was too loose and that a child could have too many “parents.” The act no longer uses the term “de facto parent.” The act, however, does give rights to seek custody and visitation to persons who have served as a “consistent caretaker” of the child. The act does not declare that a “consistent caretaker” is a “parent” for all purposes. Rather, the act grants rights to seek custody and visitation. (The criteria for making an individual a “parent” is part of the subject matter of the Revised Uniform Parentage Act.)
2. **Added protections for grandparents.** Some commissioners at the First Reading expressed hope that the act could provide more protection for grandparents, including grandparents who have not been able establish a substantial relationship with their grandchild because the parents have limited the grandparent’s contact with the child. The act, as revised, now specifies that the definition of “nonparent” (who may seek custody or visitation) includes a “grandparent.” See § 102(10). The act also provides that among the best interest factors courts should consider when deciding whether to grant custody or visitation is “whether the nonparent has a family relationship with the child.” See § 113(2).

Regarding providing a more flexible standard for grandparents to obtain visitation, we are constrained by the U.S. Supreme Court’s decision *Troxel v. Granville*, 530 U.S. 57 (2000), which held courts must presume the parent’s decision is correct and that “so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.” 530 U.S. at 68-69. Similarly, in *Dorr v. Woodard*, 2016 ME 79, 140 A.3d 467 (Maine 2016), the Supreme Judicial Court of Maine affirmed dismissed a paternal grandmother’s petition for visitation with her two-year-old granddaughter following death of the father. The court stated: “[D]espite the benefits to a child that could accompany a healthy and loving relationship with the child’s grandparents, it will be difficult for a grandparent to demonstrate a compelling state interest sufficient to infringe on a fit parent’s fundamental right when there is no threat of harm to the child. Such an intrusion in the context of a petition for court-ordered grandparent visitation will be court-enforced only when the grandparent demonstrates ‘urgent reasons’ for the intrusion.” 140 A.3d at 472 (citation omitted). The Drafting Committee believes that before a fit parent’s decisions can be overridden, there must be special factors, such as a nonparent having served as a consistent caretaker of the child or otherwise having a

substantial relationship with the child along with a showing that there will be a detriment to the child without continuation of that relationship.

3. **Relationship between the Nonparent Act and the Guardianship Act.** Both the Nonparent Act and the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act allow a court to grant custody of a child to a nonparent over objection of a parent. The acts have somewhat different focusses. Under the Guardianship Act, § 201(b) (March 2017 Draft), “The court may appoint a guardian for a minor . . . if the court finds the appointment . . . is in the minor’s best interest, and: . . . (3) the court finds by clear and convincing evidence that the parents are unwilling or unable to exercise their parental rights.” The main focus of the Nonparent Act is to preserve an important relationship the child has with a nonparent. The chairs and reporters of the Nonparent Act and the Guardianship Act have communicated with each other to promote consistency and lack of conflict between the acts. Under the Nonparent Act, § 103(c), when a child is subject of a guardianship proceeding, the Nonparent Act does not apply. In addition, if the child is subject to a custody or visitation dispute between two or more nonparents (and the parents are not parties to the suit), the Guardianship Act and would apply. (The Nonparent Act would not apply.)

4. **Domestic Violence and Stalking.** The Nonparent Act provides multiple protections to victims of domestic violence. See §§ 109(2), 113(4) & 114. At the First Reading, a commissioner asked if a reference to “stalking” was necessary since the definition of domestic violence may include stalking. While it is true that the domestic violence laws of some states include stalking in the definition of domestic violence, some states do not. Thus, the Nonparent Act provides protections if an individual involved in a nonparent dispute has engaged in stalking, as well as other forms of domestic violence.

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