

MEMORANDUM

TO: Uniform Law Commissioners

FROM: Debra Lehrmann, Chair, Nonparent Custody and Visitation Act
Barbara Atwood, Vice Chair, Nonparent Custody and Visitation Act
Jeff Atkinson, Reporter, Nonparent Custody and Visitation Act

DATE: June 3, 2018

RE: Nonparent Custody and Visitation Act – Summary of Act and Significant Changes since 2017 Annual Meeting

This memo summarizes the main provisions of the Nonparent Custody and Visitation Act and explains the resolution of five issues that were raised at the 2017 reading of the Act.

Summary of Act

- The Act recognizes a right to seek custody or visitation for two categories of individuals: (1) nonparents who have served as consistent caretakers of a child without expectation of compensation, and (2) other nonparents who have a substantial relationship with a child and who demonstrate that denial of custody or visitation would result in harm to the child. Note that a nonparent who is not a relative of the child and who is seeking custody or visitation on the basis of a substantial relationship must have formed that relationship without expectation of compensation.
- Through various provisions, the Act avoids interference with a state's child welfare system: it does not apply to a child who is the subject of an abuse or neglect proceeding, an individual whose parental rights have been terminated may not proceed under the Act, and a nonparent may not proceed under the Act based solely on having served as a foster parent of the child.
- Pleadings must be verified and must specify the facts on which the request for custody or visitation is based. The court must determine on the basis of the pleadings whether the nonparent has pleaded a prima facie case for relief.
- Notice of a proceeding under the Act must be given to: (1) any parent of the child; (2) any person having custody of the child; (3) any individual having court-ordered visitation with the child; and (4) any attorney, guardian ad litem, or similar representative for the child.
- The Act recognizes a rebuttable presumption that the parent's decision about custody or visitation is in the best interest of the child.
- A nonparent must rebut the presumption by clear-and-convincing evidence in order to obtain relief.
- The Act provides protections for victims of domestic violence.
- A list of factors guides the court's discretion in determining the child's best interest.

- A nonparent who is granted visitation may be ordered to pay the cost of facilitating visitation, including the cost of transportation.
- The rights and remedies under the Act are not exclusive and do not preclude recognition of an equitable right or remedy for a de facto parent under state law.

Resolution of issues raised at the reading in July 2017

- 1. Compensation if care provided by relative.** Some commissioners were concerned that the Act would preclude granting custody or visitation to a relative of the child if the relative of the child received any compensation for caring for the child – e.g., a parent pays a grandparent to provide after-school care on a regular basis. The Act now allows a relative to seek custody or visitation on the basis of a substantial relationship, even if the relative received compensation for caring for the child. The Act still precludes non-relatives from seeking custody or visitation if the non-relative’s relationship with the child is formed in exchange for compensation (e.g., a nanny).
- 2. Parents whose rights have been terminated.** It was suggested that the Act not allow a parent whose rights have been terminated to be able to use the Act to obtain custody or visitation. Section 103(d) adopts that principle.
- 3. More flexible standard for grandparents.** At least one commissioner expressed hope that the Act would provide a more flexible standard for grandparents to obtain contact with their grandchildren, including in cases in which the parents have not permitted a substantial relationship to form between the grandparents and grandchildren. The U.S. Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000), and the state case law that has followed places limits on the degree to which courts may override the decision of a fit parent. In *Troxel*, involving grandparent visitation, a plurality held 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 the dismissal of 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 concluded that before a fit parent’s decision 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.

4. **Different standard for custody versus visitation.** In the wake of *Troxel* and the case law following *Troxel*, the burden on a nonparent seeking either custody or visitation is very high. Hence, the language in the Act for both types of relief is the same, but an order granting custody to a nonparent is a greater intrusion on parental rights than an order for visitation. Thus, it will generally be more difficult for a nonparent to meet the Act's burden of proof when seeking custody as compared to visitation. For example, when making claims for either custody or visitation, a nonparent with a substantial relationship with the child must show harm, but the focus of the evidence will vary. A nonparent seeking custody must necessarily show that a change in the child's custody is necessary to prevent harm to the child, while a nonparent seeking visitation will need to show that continued contact with the nonparent through visitation is necessary to prevent harm. See, e.g., *Fish v. Fish*, 285 Conn. 24, 47-48, 939 A.2d 1040, 1054 (2008).
5. **Domestic violence.** The Drafting Committee received multiple questions and comments about the domestic violence presumption in the Act and the circumstances under which the presumption would arise. Section 13 of the Act provides:

[(a) In a proceeding under this [act], the court shall presume that ordering custody or visitation to a nonparent is not in the best interest of the child if the court finds that the nonparent, or an individual living with the nonparent, has committed child abuse, child neglect, domestic violence, sexual assault, stalking, or comparable conduct in violation of law of this state or another state.

(b) A finding that conduct specified in subsection (a) occurred must be based on:
(1) evidence of a conviction or final judgment in a civil proceeding; or
(2) proof by a preponderance of the evidence.

(c) A nonparent may rebut the presumption under subsection (a) by proving by clear-and-convincing evidence that ordering custody or visitation to the nonparent will not endanger the health, safety, or welfare of the child.]

The section is in brackets in order to give states the option of amending existing state law concerning presumptions and rebuttal of presumptions applicable to a dispute between parents. The same presumptions and criteria for rebuttal of presumptions would apply to nonparents seeking custody or visitation.

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