

## MEMORANDUM

**TO:** Drafting Committee on Non-Parental Child Custody and Visitation Act

**FROM:** Jeff Atkinson, Reporter

**DATE:** October 12, 2015

**RE:** Rights of foster parents and kinship care providers

This memo accompanies the October 2015 draft of the Non-Parental Child Custody and Visitation Act. The October 2015 Draft reflects changes made at the last Drafting Committee meeting (March 27 - 28, 2015) as well as an informal edit for Style by David Biklen. (Thank you David!)

The purpose memo is to discuss the possible inclusion in the act of rights of foster parents and kinship care providers. Most of the substance of this memo has been circulated to the Drafting Committee before, although this memo contains some revisions.

### Issues

Should the Non-Parental Rights to Custody and Visitation Act explicitly deal with requests for custody or visitation by foster parents or by persons providing kinship care under authorization from the state? The question encompasses the following sub-issues:

- If the act covers foster parents / kinship care, by what standards? The same as for other non-parents? Should kinship care be preferred over non-related foster parents? If the act that we develop conflicts with a state's existing abuse and neglect laws or with contracts that foster parents and kinship care providers enter into with state, are those laws or contracts preempted?
- Should the text of the act be silent on the issue of whether the act applies to foster parents or providers of kinship care, thus perhaps making the implication that foster care and kinship care would be covered by the act to the extent that the law does not conflict with other laws or contracts? (The Reporter's "Comment" to the act could address this issue.)

## Summary of law

Most non-parental custody and visitation laws contained in the states' divorce-related statutes do not make explicit reference to the rights of foster parents or persons providing kinship care. Three exceptions are Minnesota, Oregon, and Texas.

In Minnesota, the statute excludes foster parents from rights to seek custody based on the child having lived with a person for two years or more. Minn. Stat. Ann. § 257C.08(4) (West 2015).

In Oregon, a foster parent “who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child” may petition for custody, but that provision does not apply to proceedings brought under the dependency provisions of the state’s Juvenile Code. Or. Stat. § 109.119 (West 2015).

Texas’s Family Code, § 102.003(a)(12) (West 2015) lists foster parents as among the persons who may file an original suit affecting the parent-child relationship if the foster parent has cared for the child at least 12 months.

The Minnesota, Oregon, and Texas statutes are in an appendix to this memo.

The federal Adoption and Safe Families Act, 42 U.S.C. § 675(5)(E) (2014), requires states, as a condition of receiving child welfare funding, to terminate parental rights if a child has been in foster care for 15 of the most recent 22 months. The federal law has exceptions to that rule, including the child being cared for by a relative or “a compelling reason” that termination of parental rights is not in the child’s best interests. The act also requires:

the foster parents (if any) of a child and any preadoptive parent or relative providing care for the child are provided with notice of, and a right to be heard in, any proceeding to be held with respect to the child, except that this subparagraph shall not be construed to require that any foster parent, preadoptive parent, or relative providing care for the child be made a party to such a proceeding solely on the basis of such notice and right to be heard.

42 U.S.C.A. § 675(5)(G) (2014).

In *Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 844-45, 97 S. Ct. 2094, 2109-10 (1977), the U.S. Supreme Court dealt with the issue of what procedural protections are due foster parents before a child is removed from the foster parents. The court held that the following procedures “are adequate to protect whatever liberty interest appellees may have,” 431 U.S. at 856, regarding children who have been in the foster parents’ care for 18 months: ten days’ advanced notice to the foster parents of removal (except in cases of emergency); right to request a preremoval conference with the social services department; and

a full adversary administrative hearing, subject to judicial review.

The Court (six-member majority delivered by Justice Brennan) said:

No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals.

But there are also important distinctions between the foster family and the natural family.  
...

Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.

*Id.* at 844-47 (footnotes omitted).

Justice Stewart concurred, joined by Chief Justice Burger and Justice Rehnquist. Justice Stewart said, “The foster parent–foster child relationship involved in this litigation, is of course, wholly a creation of the State.” 431 U.S. at 856. “I would squarely hold that the interests asserted by the [foster parents] are not of a kind that the Due Process Clause of the Fourteenth Amendment protects.” *Id.* at 858.

Consistent with federal statutory law, many states (perhaps most states) give foster parents rights to notice and to be heard in proceedings regarding their foster children, but the foster parents are not parties to the proceedings and are not given standing to intervene in the proceedings. *See, e.g., In re Joshua S.*, 127 Conn. App. 723, 730, 14 A.3d 1076, 1080 (2011); *Worrell v. Elkhart Cnty. Office of Family & Children*, 704 N.E.2d 1027 (Ind. 1998); *Tallman v. Milton*, 192 Mich. App. 606, 482 N.W.2d 187 (1992) (holding foster parents had no standing to seek custody when parental rights not terminated); *In re J.S.*, 2009 PA Super 141, 980 A.2d 117, 120 (Pa. Super. Ct. 2009); *Michael P. v. Greenville Cnty. Dep’t of Soc. Servs.*, 385 S.C. 407, 684 S.E.2d 211 (Ct. App. 2009); *In re Dependency of J.H.*, 117 Wash. 2d 460, 815 P.2d 1380 (1991); *In re Michael Ray T.*, 206 W. Va. 434, 525 S.E.2d 315 (1999).

Some states, however, do give foster parents standing or the right to intervene. *See, e.g., State in Interest of M.L.*, 611 So. 2d 658 (La. Ct. App. 1992), *on reh’g* (Dec. 16, 1992), *writ denied*, 613 So. 2d 977 (La. 1993); *In re A.B.*, 412 S.W.3d 588, 690 (Tex. App. 2013), *review granted* (Feb. 14, 2014), *aff’d*, 437 S.W.3d 498 (Tex. 2014), *reh’g denied* (Aug. 22, 2014); Tex.

Fam. Code, § 102.003(a)(12) (West 2014).

In states that give rights of foster parents to intervene – particularly after the foster parent has cared for the child a certain period of time – the right is often contained in the state’s child welfare laws. *See, e.g.*, Colo. Rev. Stat. Ann. § 19-3-507(5) (a) (West 2014) (5)(a) (three months); N.Y. Soc. Serv. Law § 383 (McKinney 2014) (twelve months).

It is common for foster care laws to favor kinship care (e.g., by grandparents, aunts, uncles, siblings) over care by unrelated foster parents. E.g., Cal. Fam. Code § 7950(a)(1) (2014).

In addition, adoption laws may favor adoption by foster parents over other applicants. *See, e.g.*, 750 Ill. Comp. Stat. 50/15.1 (2014) (regarding foster parents who have care for a child for one year or more).

States also have laws providing for guardianship of minors (of the person and property minors). I assume our act will not be attempting to modify guardianship or adoption laws.

## **Options**

1. The act explicitly will apply to actions for custody and visitation brought by foster parents and kinship care providers, and inconsistent laws will be repealed, even if the laws are in the states’ Juvenile Code, abuse and neglect laws, or foster care laws.
- 1A. The act will apply to a certain sub-class of foster parents and kinship care providers, but will not apply to other foster parents or kinship care providers. For example, the act might apply to foster parents and kinship care providers if they have cared for a child for a certain period of time – e.g., one year or two years.
2. The act explicitly will not apply to actions brought by foster parents and kinship care providers. A state’s existing laws (e.g., Juvenile Code, abuse and neglect laws, or foster care laws) will control such actions.
3. The act will be silent on the issue of actions brought by foster parents and kinship care providers – thus perhaps leaving the implication that our act will apply to such actions unless other, more specific laws cover the situation.

## Appendix (with statutes from Minnesota, Oregon, and Texas)

### **Minn. Stat. Ann. § 257C.08(4) (West 2015)**

If an unmarried minor has resided in a household with a person, other than a foster parent, for two years or more and no longer resides with the person, the person may petition the district court for an order granting the person reasonable visitation rights to the child during the child's minority. The court shall grant the petition if it finds that:

- (1) visitation rights would be in the best interests of the child;
- (2) the petitioner and child had established emotional ties creating a parent and child relationship; and
- (3) visitation rights would not interfere with the relationship between the custodial parent and the child.

The court shall consider the reasonable preference of the child, if the court considers the child to be of sufficient age to express a preference.

### **Or. Stat. § 109.119 (West 2015)**

- (1) Except as otherwise provided in subsection (9) of this section, any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement or guardianship of that child, or if no such proceedings are pending, may petition the court for the county in which the child resides, for an order providing for relief under subsection (3) of this section.
- (2)
  - (a) In any proceeding under this section, there is a presumption that the legal parent acts in the best interest of the child.
  - (b) In an order granting relief under this section, the court shall include findings of fact supporting the rebuttal of the presumption described in paragraph (a) of this subsection.
  - (c) The presumption described in paragraph (a) of this subsection does not apply in a proceeding to modify an order granting relief under this section.

- (3) (a) If the court determines that a child-parent relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by a preponderance of the evidence, the court shall grant custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child. The court may determine temporary custody of the child or temporary visitation rights under this paragraph pending a final order.
  - (b) If the court determines that an ongoing personal relationship exists and if the court determines that the presumption described in subsection (2)(a) of this section has been rebutted by clear and convincing evidence, the court shall grant visitation or contact rights to the person having the ongoing personal relationship, if to do so is in the best interest of the child. The court may order temporary visitation or contact rights under this paragraph pending a final order. . . .
- (9) This section does not apply to proceedings under ORS chapter 419B. [ORS chapter 419B is the dependency portion of the Oregon Juvenile Code]
- (10) As used in this section:
- (a) “Child-parent relationship” means a relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding 12 months.
  - (b) “Circumstances detrimental to the child” includes but is not limited to circumstances that may cause psychological, emotional or physical harm to a child.
  - (c) “Grandparent” means the legal parent of the child's legal parent.

- (d) “Legal parent” means a parent as defined in ORS 419A.004 whose rights have not been terminated under ORS 419B.500 to 419B.524.
- (e) “Ongoing personal relationship” means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality.

**Tex. Fam. Code Ann. § 102.003(a) (West 2015)**

An original suit may be filed at any time by: . . . (12) a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person’s home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition . . . .