

MEMORANDUM

TO: Drafting Committee for Non-Parental Rights to Child Custody and Visitation Act

FROM: Jeff Atkinson, Reporter

DATE: March 2, 2015

RE: Additional issues for first drafting committee meeting

To help guide our discussions at the first drafting committee meeting, I have prepared this list of “Additional Issues.” Most alternative options for provisions contained in the first draft are presented in the first draft in the form of alternative language or in “Reporter’s Notes.” This memo focuses on issues that are not explicitly in the first draft.

The memo is divided into two parts: (1) “Foster Parents and Providers of Kinship Care” and (2) “Additional Issues” (of which 11 are listed).

FOSTER PARENTS AND PROVIDERS OF KINSHIP CARE

If the Drafting Committee decides to deal explicitly with issues of foster care and kinship care, we will need to discuss the following issues:

1. Definitions of “foster parent” and “kinship care provider”

The following are definitions of “foster care” and “kinship care” utilized by the federal government:

“Foster care means 24-hour substitute care for children placed away from their parents or guardians and for whom the title IV–E agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State, Tribal or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.”

Source: 42 C.F.R. 1355.20 (2015)

“Kinship care is commonly defined as ‘the full-time care, nurturing, and protection of a child by relatives, members of their Tribe or clan, godparents, stepparents, or other adults who have a family relationship to a child.’”

Source: U.S. Department of Health and Human Services, Child Welfare Information Gateway, Definitions and Language of Kinship Care,

<https://www.childwelfare.gov/topics/outofhome/kinship/about/definitions/>

[Reporter's note: Foster placements generally are made by the government or a social-service agency authorized by the government to make placements. Kinship care may be authorized by the government, but also may include informal arrangements between the parties without a legal change of custody.]

2. Are the rights to custody and visitation for foster parents and kinship care providers the same as, or different from, the rights of other non-parents?
3. Should kinship care be preferred over (other forms of) foster care?
4. Should the act deal with the degree of notice and opportunity to be heard to be given to foster parents and kinship care providers before a child's placement is changed (including from one foster home to another or return of the child to the parents)?
5. For certain rights granted to foster parents or kinship care providers, should there be a requirement that the child has lived with the foster parent or kinship care provider for a specified length of time (e.g., six or 12 months)? [This requirement also could apply to other non-parents.]
6. Should the period of living with the foster parent or kinship care provider have taken place within a specified recent period of time (e.g., within the last six or 12 months)? [This requirement also is potentially applicable to other non-parents.]
7. Will the statutory provisions regarding foster parents and kinship care providers invalidate or preempt inconsistent contracts that the foster parent or kinship care providers entered into with the state or child care agency?

ADDITIONAL ISSUES

- A. Rights of siblings when parental rights have been terminated, or other circumstances in which children are not in custody of their parents** – Should the act explicitly deal with the rights of siblings to seek contact with each other after parental rights have been terminated, or other circumstances in which children are not in custody of their parents?
- B. Detailed categories of persons seeking third party custody and visitation** – With the exception of persons who have agreed to co-raise a child and de facto parents, this draft of the act does not list detailed categories of persons who might seek visitation or custody. The reason for that is that non-parents, as a group, have similar potential interests and are subject to the same constitutional restrictions on the degree to which their requests for custody or visitation can be granted. In any event, here is a list of additional potential parties who may be seeking custody or visitation (with some overlap between categories). Some state statutes – many enacted before *Troxel* utilize these categories:

- Grandparents (and great-grandparents)
- Stepparents
- Partners of the parent (of the same sex or of different sex) – who may have lived with or cared for the child for varying periods of time
- Foster parents and providers of kinship care
- Siblings
- Other relatives (e.g, aunts and uncles)
- Primary caretakers / de facto parents – including, in some states, a requirement that child has resided with the non-parent for certain period of time, such as six or 12 months.

C. **Specific circumstances in which visitation can be sought**

Many state statutes addressing non-parent custody and visitation specify the circumstances in which third parties may seek visitation (or perhaps custody). The circumstances usually involve some disruption in the family. Most of these statutes also were enacted before the Supreme Court significantly limited the situations in which visitation could be sought. *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054 (2000). From the reporter’s view, these situations, by themselves, do not provide a reliable indicator of whether non-parent visitation (or custody) will be allowed, and thus most specific predicate circumstances were not included the draft of the act. [One predicate circumstance which is listed in the act is death or incapacity of both parents – Section 4(a)(3) – since there might be situations a child needs to be placed with a non-parent, even though the child may not have an existing close relationship with that non-parent.] Here is the list of situations in which some states have allowed non-parents to seek visitation. (The first three bulleted categories are the most common):

- Divorce; dissolution of marriage; separation; annulment
- Death of parent
- Child born out of wedlock
- Child living with a third party
- Parent incarcerated
- Parent abandoned child
- Parental rights terminated (but child not adopted by non-family member)
- Parent found to be incompetent

Statutes that allow de facto parents to obtain custody or visitation may focus on whether or not the person seeking custody or visitation has, in fact, been a de facto parent. Such a statute may not require showing of an additional circumstance, such as one or more of the specified disruptions in the family.

A few states have included the following issues in the state’s non-parent visitation and custody laws. (Some of these issues would be covered by a state’s rules of civil procedure.) [John Sebert comments: “ULC usually tries to avoid including in ULC acts sections re procedural matters such as those listed below; those matters are almost always

better left to other law of the state.”]

- D. Pleading requirements – generally**
- E. A requirement of affidavits with initial pleading**
- F. Venue**
- G. Notice**
- H. Limitation of frequency with which actions can be filed**
- I. Explicit enforcement provisions**
- J. Visitation for children whose parents are military members [covered by the Uniform Deployed Parents Custody and Visitation Act (2012)]**
- K. Should the act contain a provision that the act may be supplemented by principles of common law?**

Uniform Law Commission, Drafting Rules, Section 502 (2012) provides:

RULE 502. PROVISION DUPLICATING GENERAL PROVISION OF LAW.

(a) Do not include a provision concerning civil, criminal, administrative, or appellate procedure unless the act is intended to establish a procedure different from general procedures.

(b) Do not include a provision stating that the act is supplemented by common-law principles unless, without such an affirmative statement, the act is likely to be construed as occupying the field, displacing common-law principles.

[ULC] Comment

The incorporation of procedural provisions may impair the enactability of a uniform or model act. Repetition of general procedural provisions especially creates problems in states in which such procedures are established by court rule rather than by legislation.

State statutes are usually presumed to be supplemented by the common law. The rare exception is an act, such as a workers’ compensation act, that is intended to preempt the field and displace common-law remedies. Unless there is a legitimate concern that a uniform or model act, although not intended to occupy the field, will nevertheless be so construed, it is unnecessary and confusing to include a provision that repeats this settled principle of common law.