MEMORANDUM

TO: Cathy Sakimura, National Center for Lesbian Rights

FROM: Jeff Atkinson, Reporter

COPY: Drafting Committee for the Nonparental Child Custody and Visitation Act

DATE: September 1, 2017

RE: Nonparental Act -- "Harm" vs. "Detriment"

Thank you again for your memo of August 26 regarding the use of terms of "harm" vs. "detriment" in the Nonparent Act and your suggestion to delete the Legislative Notes in Sections 106, 107, and 112.

This is an issue we will discuss at the October 13 – 14 Drafting Committee meeting in Philadelphia.

To facilitate that discussion, I would like to send your memo to the Drafting Committee along with this memo.

The act, as currently drafted, uses the phrase "[detriment] to the child" as a part of the standard for granting custody or visitation to a person with a substantial relationship with the child. [The alternate standard of "act[ing] as a consistent caretaker of the child" does not require a showing of "detriment.]

I agree that the act will be held to be constitutional in most states with use of the phrase "detriment to the child." My concern is that some states have imposed a higher bar – with state supreme courts holding, as a matter of constitutional law, that a showing of "harm' is required before visitation can be granted to a nonparent. In an appendix to this memo, I list the states that have required a showing of harm and quote from cases that have so held. The states include: Connecticut, Florida, Hawaii, Massachusetts, New Jersey, and Washington.

I also agree with the point at the end of your memo that Alabama does not need to be on that list. The case of *Weldon v. Ballot*, No. 2140471, 200 So.3d 654, 2015 WL 6618983, at 15 (Ala. Civ. App. Oct. 30, 2015), *cert. denied sub nom. Ex part Strange*, No. 1150152, 2016 WL 281069 (Ala. Jan. 22, 2016), did not explicitly adopt the harm standard -- although the opinion made reference to the "harm" standard and a concurring opinion suggested the "harm" standard was being adopted.

An issue related to this discussion is the degree to which there are differences in the meaning of "detriment" versus "harm." The words can be viewed as synonyms for each other. For example, The American Heritage Dictionary of the English Language (4th Edition 2000) lists

as the first definition of "detriment: "Damage, harm, or loss." ("Harm" is defined as "Physical or psychological injury or damage.")[1] I think most would agree that the term "harm" has a connotation of more negative impact than "detriment."[2]

If a state supreme court has explicitly held that a showing of "harm" is required, it seems prudent that an act in that state regarding nonparental rights would use that term rather than another term. We, of course, want to avoid having our act held to be unconstitutional. Hence, in the current draft the term "detriment" is in brackets and Legislative Notes advise drafters that, in some states, they may wish to substitute the term "harm."[3] We can argue -- including in the Comments to the act - that the terms are close enough in meaning to each other, that either term would pass constitutional muster, including in the states that require "harm." I think, however, that it is safer to avoid the issue, and explicitly give states the option of using the term "harm" rather than "detriment."

I agree with your suggestion that the Comments would benefit from more references to statutes and cases that use the term "detriment."

I look forward to more discussions.

[1] Similarly, Black's Law Dictionary (10th ed. 2014) defines "detriment" as "Any loss or harm suffered by a person or property," and "harm" is defined as "Injury, loss, damage." The New Oxford American Dictionary [--] Third Edition (Oxford University Press 2010) defines "detriment" as "the state of being harmed or damaged," and "harm" is defined as "physical injury, esp. that which is deliberately inflicted." *Compare* The Oxford English Dictionary [--] Second Edition (Clarendon Press 1989), which defines "detriment" as "loss or damage done or caused to, or sustained by, any person or thing;" "harm" in that dictionary is defined as "Evil (physical or otherwise) as done to or suffered by some person or thing."

[2] Section 102(6) of the Nonparent Act provides: "'Detriment to a child' means adverse effect to a child's physical or psychological well-being."

[3] It is possible that in at least one state (Connecticut) the standard for granting a nonparent visitation or custody is so restrictive that the Nonparent Act, as currently drafted, will be held to be unconstitutional. As noted in the Appendix, Connecticut currently requires the level of harm be analogous to the showing of harm in abuse and neglect cases. From my view, that level of harm is not constitutionally required and it would be a poor policy choice to adopt that standard.

Appendix

State Supreme Court Opinions Requiring Use of "Harm"

Connecticut: *Crockett v. Pastore*, 259 Conn. 240, 242, 789 A.2d 453, 455 (2002) -- "[W]e conclude that, because the plaintiff failed to allege and establish that she had a parent-like relationship with the child and that the child would suffer real and significant harm if visitation with the plaintiff were denied, the trial court improperly granted the visitation petition in contravention of the defendant's constitutional rights." *Id.* 789 A.2d at 455. "[T]he degree of harm must be 'analogous to the kind of harm contemplated by [General Statutes] §§ 46b-120 and 46b-129, namely, that the child is 'neglected, uncared-for or dependent.'" *Id.*at 457-58 (additional citations omitted). *Accord*, Roth v. Weston, 259 Conn. 202, 789 A.2d 431 (2002).

Florida: *Sullivan v. Sapp*, 866 So. 2d 28, 37–38 (Fla. 2004) -- "We agree with the district court below and likewise hold that section 61.13(2)(b) 2.c. of the Florida Statutes is unconstitutional as violative of Florida's right of privacy because it fails to require a showing of harm to the child prior to compelling and forcing the invasion of grandparent visitation into the parental privacy rights." As you noted, earlier Florida Supreme Court cases used the term "detriment" as well "harm." *See Beagle v. Beagle*, 678 So. 2d 1271, 1277 (Fla. 1996) ("Without a finding of harm, we are unable to conclude that the State demonstrates a compelling interest. We hold that, in the absence of an explicit requirement of harm or detriment, the challenged paragraph is facially flawed"); *Richardson v. Richardson*, 766 So. 2d 1036, 1042–43 (Fla. 2000) ("[U]nder fundamental principles of separation of powers, this Court is without authority to change the wording of section 61.13(7) by judicially inserting a harm to the child element where the Legislature clearly has not done so. . . . Accordingly, we hold that section 61.13(7) is unconstitutional on its face because it equates grandparents with natural parents and permits courts to determine custody disputes utilizing solely the 'best interest of the child' standard without first determining detriment to the child."

Hawaii: *Doe v. Doe*, 116 Haw. 323, 335, 172 P.3d 1067, 1079 & 1080 (2007) -- "In order to survive strict scrutiny, 'the statute must be justified by a compelling state interest, and drawn sufficiently narrowly that it is the least restrictive means for accomplishing that end.'. . . In sum, because we believe that a 'harm to the child' standard is constitutionally required and cannot be read into HRS § 571–46.3 without making a substantive amendment to the statute, we agree with Mother and the family court that HRS § 571–46.3, as written, is unconstitutional."

Massachusetts: *Blix v. Blix*, 437 Mass. 649, 656–57, 774 N.E.2d 1052, 1059 (2002) -- Construing a statute which provided for grandparent visitation if "such visitation rights would be in the best interest of the said minor child," the court said: "As we shall explain more fully below, the statute can be interpreted to require a showing of harm to the child if visitation is not allowed. So interpreted, the statute furthers a compelling and legitimate State interest in mitigating potential harm to children in nonintact families, an area in which the State has been

traditionally and actively involved. . . . We conclude, in rejection of the facial due process challenge made by the mother, that the statute satisfies strict scrutiny because our construction narrowly tailors it to further the compelling State interest in protecting the welfare of a child who has experienced a disruption in the family unit from harm." 774 N.E.2d 1052, 1059 & 1062 (2002).

New Jersey: *Moriarty v. Brandt*, 177 N.J. 84, 88, 827 A.2d 203, 205 (2003) -- Affirming trial court's order of visitation for grandparents and stating: "We hold that grandparents seeking visitation under the statute must prove by a preponderance of the evidence that denial of the visitation they seek would result in harm to the child. That burden is constitutionally required to safeguard the due process rights of fit parents.

Washington: *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 64, 109 P.3d 405, 411–12 (2005) -- Reaffirming the court's earlier holding in *Smith. Smith*, 137 Wash.2d 1, 969 P.2d 21 (1998) that: "required a showing of harm to the child to overcome the presumption that a fit parent acts in the child's best interests: 'Short of preventing harm to the child, the standard of 'best interest of the child' is insufficient to serve as a compelling state interest overruling a parent's fundamental rights.'"). (Citations omitted).