

MEMORANDUM

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

FROM: Debra Lehrmann, Chair
Jeff Atkinson, Reporter

DATE: November 14, 2016

RE: Outcome of October Drafting Committee meeting

We are writing to summarize the outcome of the October 14 – 15 Drafting Committee meeting for the Non-Parental Child Custody and Visitation Act. The section that had been titled “Child Custody and Visitation When Child in Custody of Parent” [the merits] has been revised, and the committee made a variety of other decisions. The changes to the section reflect the committee’s discussions as well as some additional changes we made after the meeting. The draft of the section will be discussed further at the next Drafting Committee meeting.

Among the issues to be discussed further regarding the section:

1. Should the quantum of proof be “clear and convincing evidence” or “preponderance of the evidence,” and should the quantum vary with which elements need to be proven – e.g., quantum of proof to rebut the presumption generally; quantum of proof varying with specific elements (such as a person acting in the role of a parent vs. best interests)?
2. Can the element regarding whether “the relationship between the non-parent and the child was supported by a parent of the child” be simplified [Section 8(c)(iii)]? [This draft drops the phrase “or behaved as though the non-parent is a parent of the child.”]
3. Should the criteria for granting custody or visitation include the language from *Troxel* regarding whether “special factors” exist?
4. Should the description of a person acting in the role of a parent [Section 8(c)] include language along the lines of “within the two years immediately before the filing of a petition under this act the persons has undertaken unequivocal, committed parental responsibility in the child’s life”? Should there be a minimum period in which the non-parent has resided with the child?
5. Should the description of a person acting in the role of a parent [Section 8(c)] match the definition of “de facto parent” in the Revised Uniform Parentage Act?

6. What should be the title of the section? The title on the draft we discussed in October was “Child Custody and Visitation When Child in Custody of Parent.” An alternate title might be “Original Action between Non-Parent and Parent.” The phrase “when child is in custody of a parent” might be confusing in cases in which the child is (informally) in the custody of a non-parent and the non-parent is seeking an order of custody or visitation.

Below is the revised section, followed by a summary of other decisions that were made at the Drafting Committee meeting.

**SECTION 8. [ORIGINAL ACTION BETWEEN NON-PARENT AND PARENT]
[CUSTODY OR VISITATION WHEN CHILD IN CUSTODY OF
PARENT] [THE MERITS].**

(a) [This section applies to an original action for custody or visitation between a non-parent and a parent and to other actions between a non-parent and a parent in which the parental presumption had not previously been overcome.

[*Alternative:* This section applies to petitions for custody or visitation by a non-parent when the child is in the custody of a parent.]

Reporter’s Note: Regarding the second alternative for subsection (a) and the phrase “in the custody of a parent,” under our current draft, “‘custody’ means physical custody, legal custody, or both.”]

(b) In an action between a parent and a non-parent described in subsection (a), a parent’s decision about custody or visitation is presumed to be in the best interests of the child.

(c) A non-parent may rebut the presumption that the parent's decision is correct and can be granted custody or visitation if, the court finds [by clear and convincing evidence] [by a preponderance of the evidence] that:

(i) the non-parent has resided with the child for [a period sufficient to form a bonded and dependent relationship with the child] [six or more months];

Reporter's Note: Any specific time period is somewhat artificial, and a fixed six-month period won't deal with a case in which a non-parent (e.g., a grandparent) cared for a child from or near birth until the child is five months old.

(ii) the non-parent has consistently engaged in caretaking of the child;

(iii) the relationship between the non-parent and the child was supported by a parent of the child, and the non-parent and parent have accepted that relationship, except that if a parent has [completely] failed to exercise parental responsibility, the support and acceptance of the parent who failed to exercise parental responsibility is not required;

(iv) the individual has accepted parental responsibility without expectation of financial compensation; and

(v) custody or visitation to the non-parent is in the best interests of the child.

Reporter's Note: In this draft, there are separate subsections for custody [(subsection (d))] and visitation [subsection (e)] for non-parents who are not described by subsection (c). The elements of proof in subsections (d) and (e) are now quite similar. If that similarity continues, we may wish to consolidate the sections.

(d) If a non-parent other than a non-parent described in subsection (c) seeks custody, the non-parent may rebut the presumption that the parent's decision is correct and can be granted

custody if the court finds [by clear and convincing evidence] [by a preponderance of the evidence] that:

- (i) a substantial relationship exists between the child and non-parent;
- (ii) custody to the parent would be a [significant] detriment to the child;
[supplemental or alternative language might include “or other special factors exist”], and
- (iii) custody to the non-parent is in the best interests of the child.

(e) If a non-parent other than a non-parent described in subsection (c) seeks visitation, that non-parent may rebut the presumption that the parent’s decision is correct and can be granted visitation if the court finds [by clear and convincing evidence] [by a preponderance of the evidence] that:

- (i) a substantial relationship exists between the child and non-parent;
- (ii) denial of visitation to the non-parent is a detriment to the child; and
[supplemental or alternative language might include “or other special factors exist”], and
- (iii) visitation to the non-parent is the best interests of the child.

(f) Proof of parental unfitness is not required to rebut the presumptions described in this section.

SUMMARY OF OTHER DECISIONS MADE AT THE DRAFTING COMMITTEE MEETING

- 1. Substantial relationship.** We will add a definition of “substantial relationship.” The definition is likely to include reference to pre-existing relationships and kinship.
- 2. Pleadings.** We may add some specific facts that need to be pleaded – including the amount of time the petitioner resided with the child; caretaking that has been provided to the child; support of the relationship by a parent; and financial compensation, if any.
- 3. Physical v. legal custody.** We will consider whether to use the terms “physical custody” and “legal custody,” and, if so, how those terms should be used. [The current draft uses the term “custody,” and the definition section provides: “‘custody’ means physical custody, legal custody, or both.”]
- 4. Actions between non-parents.** It was decided (tentatively) to drop the section regarding actions that are only between non-parents [Section 9] – e.g., requests for custody by two or more non-parents when the parents have died or are otherwise not able to care for the children. Several members of the committee said that such disputes could be handled under guardianship laws.
- 5. Modification.** We will continue with the language from a prior draft that modification of orders will be governed by the law of the state for modification of custody, visitation, or parenting time applicable to disputes between parents. (We will not utilize a uniform modification standard, such as substantial change of circumstances coupled with best interests.)
- 6. Parents whose rights have been terminated.** We will specify that a parent whose rights have been terminated cannot seek relief under this act.
- 7. Limiting actions by persons living with a parent.** We will add language that a person living with a parent cannot file an action under this act when the action has the effect of modifying a judgment that has been entered in a dispute between the parents. (If a stepparent or a former cohabitant is no longer living with the parent, the step-parent or former cohabitant can file an action under this act if other requirements of the act are met.)

- 8. Technical, stylistic, and organizational changes.** The committee agreed to multiple technical and stylistic changes. Proposals for reordering sections of the act also were discussed.

Our next meeting will be in spring 2017 (at a date and place to be determined). We will, of course, circulate a complete new draft before the meeting.