

MEMORANDUM

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

FROM: Debra Lehrmann, Chair
Jeff Atkinson, Reporter

DATE: July 27, 2017

RE: Issues raised at Annual Meeting

This memo summarizes issues raised regarding the Nonparental Child Custody and Visitation Act at the Uniform Law Commission Annual Meeting. The memo will cover issues raised on the floor during a reading of the act and other issues raised by committee members before and after the reading. We will offer comments on some of the suggestions

Our thanks to committee member Barbara Atwood, who shared her notes regarding comments made by commissioners during the reading and offered perspectives on how to handle the issues.

Comments by Commissioners During the Reading

- 1. Consistent caretaker.** In contrast to the significant pushback the committee received last year to "de facto parenting," committee members received favorable comment throughout the week about the concept of "consistent caretaker." Positive comments were made about the two categories of individuals dealt with in the act: 1) consistent caretakers, and 2) individuals with substantial relationship. Commissioners liked that this approach distinguishes between the type of nonparent dealt with in *Troxel*, and those caregivers who have resided with child.
- 2. More flexible standard for grandparents.** 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. [Comment: The act, as currently drafted, gives added emphasis to grandparents or other family members seeking contact with a child in three ways: The definition of "nonparent" in Section 102(10) explicitly provides, "The term includes a grandparent;" (2) the definition of "substantial relationship" in Section 102(18) provides that the term "means a familial or other relationship in which a significant emotional bond exists between a nonparent and a child;" (3) the best interest factor in Section 113(2) regarding "the nature extent and quality of the relationship" includes consideration of "whether the nonparent has a family relationship with the child." As has been discussed at prior meetings, *Troxel* and the state law that has followed *Troxel* places limits on the degree to which courts may override the decision of a fit parent. A broad issue for the committee to consider is the degree to

which there is “wiggle room” under *Troxel* and the cases that followed *Troxel*.

3. **Concern for rights of parents.** Another commissioner focused on the rights of parents and seemed to assert that courts should not grant visitation to a nonparent over the opposition of a parent if the parent is fit. [Comment: Section 111(b) provides, “Proof of unfitness of the parent is not required to rebut the presumption in subsection (a).” Under Section 112, in order for a nonparent to receive custody or visitation, the nonparent must prove by clear and convincing evidence that the nonparent has (1) acted as a consistent caretaker or (2) has a substantial relationship with the child and that the denial of custody or visitation would result in [detriment] to the child.]
4. **Expectation of compensation.** Several commissioners were concerned about the requirement under Sections 106(a)(1) and 112(a)(1) that a nonparent who has acted as a consistent caretaker shall have done so “without expectation of financial compensation.” Commissioners were concerned that the standard might exclude nonparents who simply received child support. An example was raised of a grandparent who cares for the child while a parent works overseas and the parent sends the grandparent money for care of the child. [Comment: We may wish to have the provision of “without expectation of financial compensation” not apply to family members who are caring for the child. We also may consider the ALI language that care be provided “for reasons primarily other than financial compensation.” Another approach is to distinguish financial “compensation” from financial “reimbursement” for financial support provided. Such an approach would acknowledge that child support received in the traditional sense differs from compensation. A commissioner also asks if the issue of expectation of financial compensation should apply to the “substantial relationship” criteria.]
5. **Six-month period applicable to consistent caretaker.** Questions were raised about how to calculate the six-month period applicable to eligibility to seek custody or visitation as a “consistent caretaker” under Sections 106 and 112. [Comment: We may wish to more closely track the UCCJEA definition of home state (“at least six consecutive months immediately before the commencement of” the proceeding; periods of temporary absence count as part of the six-month period). However, at a prior Drafting Committee meeting, there may have been a consensus for more flexibility. E.g., Grandparents care for child for several years; child is returned to parent, in part to see how that will work out; nine months later, the child is not doing well and grandparents would like to seek custody.]
6. **Different standard for custody versus visitation.** An issue was raised about whether there should be different standards for granting custody versus visitation. (Comment: We have discussed this issue at multiple Drafting Committee meetings. We have noted that the burden on a nonparent seeking custody or visitation is high for both types of relief, and the distinction between custody and visitation can be blurry.
7. **Clarification of need for standing before application of elements.** A commissioner suggested that Section 112 on “Elements” clarify that it applies (only) to nonparents who have standing.

8. **Domestic violence.** There were multiple questions and comments regarding the domestic violence presumption in Section 114. At least one commissioner seemed to oppose custody or visitation to anyone who had committed an act of domestic violence. Others would weigh factors such as how long ago the offense occurred and the severity of the offense. Should the presumptions apply to any act of domestic violence, regardless against whom it was committed? Should the burden to overcome the presumption be preponderance of the evidence or clear and convincing evidence? A commissioner on the Drafting Committee favors having a legislative note that would provide that states may utilize existing state law regarding presumptions and rebuttal of presumptions in other family law cases (such as of standards applicable to domestic violence between spouses or cohabitants).
9. **Parents whose rights have been terminated.** It was suggested that a father whose rights have been terminated as a result of the father's sexual assault of the mother should not be able to obtain custody or visitation under our act. (The new Uniform Parentage Act has a provision for termination of parental rights of a father whose sexual assault of the mother resulted in birth of a child. In Section 103 of our act on "Scope," we may wish to include such a policy – or broaden the policy to not have the act apply to any action brought by a parent whose rights have been terminated.

Additional Issues Raised by Drafting Committee Members and Reporter

The following are additional issues that have been raised by Drafting Committee members and the reporter at the committee meeting prior to the reading or on other occasions.

10. **Guardianship.** The act's "Scope" (Section 103(c)) currently excludes coverage of cases in which the child is the subject of a guardianship proceeding. We may wish to reconsider that provision, particularly if a state's guardianship law has no provision allowing a court to grant a nonparent visitation with a child, even if the nonparent has a close relationship with the child. If we wish to allow a state to use the Nonparent Act for children who are the subject of a guardianship, we could place the word "guardianship" in brackets and add a legislative note.
11. **Foster parents.** Similar to the guardianship provision, Section 103(c) provides that the act does not apply if the child is subject to proceeding regarding child abuse, child neglect, or dependency. We should clarify whether foster parents have any rights under the act after such proceedings have concluded (or if rights of former foster parents are governed by law other than this act). (The compensation issue also could be applied to foster parents seeking custody or visitation. See entry #3.)
12. **Cohabitant provision.** Section 104(b) provides that if a child is adopted by a cohabitant of a parent (or specified others), a visitation order in favor of a nonparent entered before the adoption remains in effect. Questions have been raised regarding whether we need this provision, and, if so, whether "cohabitant" should be defined. Another approach is to

require that all nonparents with court ordered visitation be made parties in adoption proceedings.

- 13. Granting custody when visitation is sought.** Section 112(b) allows a court to grant visitation to a nonparent who commenced a proceeding seeking custody. Should the act also explicitly provide for the converse – allowing a court to grant custody to a nonparent who commenced a proceeding seeking visitation?
- 14. Cost of facilitating visitation.** Does Section 117 regarding “Cost of Facilitating Visitation” include allowing a court to order payment of attorney’s fees, or are attorney’s fees governed only by the section on “Attorney’s Fees and Costs” (Section 119). If a non-parent is granted “custody” two days per week (as opposed to “visitation”), should the act explicitly provide that the nonparent can be ordered to pay the cost of transportation.
- 15. Attorney’s fees.** An issue was raised regarding whether the attorney’s fee provision (Section 119) should just refer to a state’s existing state law -- such as provisions for allocation of attorney’s fees between spouses. [In prior Drafting Committee discussions, most on the committee wanted to give the court discretion to order nonparents to pay the parents’ attorney’s fees. Under the current draft, the court also has authority to order parents to pay the nonparents’ fees, but the bar was higher (“the parent asserted a position without merit”). Some commissioners expressed concern that this requirement unduly limits the court’s discretion.]
- 16. Indian Child Welfare Act.** We will continue to consider Section 103(d) regarding the degree to which the Indian Child Welfare Act (ICWA) governs custody and visitation disputes involving an Indian child. The degree to which tribal courts may hear nonparent custody and visitation cases under ICWA will be part of that discussion.
- 17. Legislative notes regarding “detriment” versus “harm.”** A commissioner suggests that there be fewer (or no) legislative notes regarding the use of the term “harm” instead of “detriment.” Some commissioners have expressed concern that this note injects unnecessary confusion because the distinction between harm and detriment is not clear. Others on the committee note that the term “harm” is required in some states, and legislative drafters should have the explicit option to use that term. Another concern expressed: the note does not acknowledge that regardless of the term used (“harm” or “detriment”), in many states it is presumed that the child will suffer when contact is severed from a nonparent who has acted as a consistent caretaker.
- 18. Modernizing terminology.** A suggestion has been made to modernize terminology in the act. [Although “parenting time” is the more modern term used to describe allocation of time between parents, “custody” and “visitation” are still the more common terms used describe rights given to nonparents.]
- 19. Providing a list of examples.** It has been suggested that we provide a list of examples, illustrating when visitation or custody would be granted -- or not granted -- under the act.

[Comments to the act currently provide examples from case law, but the examples also could be provided in a separate document, perhaps in more detail.]

Our next Drafting Committee meeting will be in Philadelphia October 13 and 14 (at a hotel that will be announced later by ULC).

Best wishes

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