

MEMORANDUM

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

FROM: Jeff Atkinson, Reporter

DATE: October 6, 2017

RE: Additional issues for discussion

In advance of our meeting (October 13-14), I wanted to let you know about two issues we will be discussing (in addition to those highlighted in the “Reporter’s Notes”). I’ll also provide research on a third issue. The issues are:

1. Should the act specifically deal with cases in which the preferences of the parents differ regarding whether there should be visitation for a nonparent?
2. Should the Section 103(a) on “Scope” delete the words “over the objection of a parent.” [That section currently provides: “This act governs a proceeding in which a nonparent seeks custody of or visitation with a child *over the objection of a parent.*”]
3. Should the act contain a provision about the effect of adoption of a child on nonparent visitation (Section 104)?

1. Should the Section 103(a) on “Scope” delete the words “over the objection of a parent.”

Barbara Atwood has raised the issue of whether the nonparent Act should deal specifically with the issue of standards to apply if the parents differ regarding visitation for a nonparent. The issue arose in a recent Arizona case – *In re Marriage of Friedman*, 397 P.3d 1063 (Az. Ct. App. 2017) in which the paternal grandparents sought visitation. The mother opposed visitation. The father, who had substantial mental health issues and suicidal ideation, supported visitation. The appellate court held both parents’ views should be considered and affirmed an order of visitation.

I have reviewed the nonparent visitation statutes of all the states and not found any that deal specifically how to handle the parents’ preferences if the parent preferences differ. Statutes generally state that there is a rebuttable presumption in favor of a parent’s (or parent’s) decision.

The issue has similarities to an issue in case law and statutes about granting visitation to nonparents when the parent is deployed for military service. In such cases, there may be differing views of the parents regarding contact with nonparents who are family members or friends of the deployed parent. In those circumstances, a grant of visitation usually is viewed as furthering the deployed parent’s rights (more than the nonparent’s rights).

If we were to deal with the issue in the text of the act, here is an approach, affecting three sections:

Section 106 on “Standing” could provide a third basis for standing (in addition to “consistent caretaker” and “substantial relationship”). That basis would be along the lines of: “If a parent supports a nonparent’s petition for visitation, the nonparent has standing to file a [petition] for visitation.”

In Section 111 on “Parental Presumption,” we could have a new subparagraph (b) providing: “The presumption in subparagraph (a) does not apply if the decisions of the parents differ regarding a request for custody or visitation by a nonparent.”

Section 112 (“Elements of Action for Custody or Visitation”) could add a third basis for relief: “a parent supports a nonparent’s petition for visitation, and visitation would be in the best interest of the child.” If that provision were inserted, in Section 112(a), the burden of proof would be clear and convincing evidence. Alternatively (and probably preferably), the burden of proof could be preponderance of the evidence – in which case a separate subparagraph, such as a new Section 112(b) would be a way handle the provision.

By way of comparison, the Uniform Deployed Parents Custody and Visitation Act (Section 306) requires that the nonparent be an “adult family member of the child or an adult with whom the child has a close and substantial relationship.” The burden of proof in the Deployed Parents Act is not specified. So, in that act, the burden presumably would be preponderance of the evidence.

Instead of having new provisions in the act, we could deal with the issue in a Comment – perhaps saying that if the parents’ views differ, there would not be an automatic presumption in favor of either parent and that both parents’ views should be considered.

2. Should the Section 103(a) on “Scope” delete the words “over the objection of a parent.”

Section 103(a) currently provides: “This act governs a proceeding in which a nonparent seeks custody of or visitation with a child *over the objection of a parent.*” (Emphasis supplied.)

Courtney Joslin and Cathy Sakimura suggest deleting the phrase “over the objection of a parent” in order to make sure that if a couple wishes to voluntarily enter into an agreement approved by the court to allow visitation or custody for a nonparent, they can do so.

The proposal seems reasonable.

As I recall, the current wording of Section 103(a) grew out of discussion of what the act would not cover, and one or more commissioners said that we should have an affirmative statement what the act does cover. The main issue for coverage by the act is the standard

governing disputes between a parent and nonparent, but that should not preclude coverage of agreed orders.

3. Should the act contain a provision about the effect of adoption of a child on nonparent visitation (Section 104)?

Section 104 of the act currently provides:

SECTION 104. EFFECT OF ADOPTION OF CHILD.

[(a) In this section, “cohabitant” means an individual residing with a parent.]

(b) Adoption of a child by a relative, stepparent, or cohabitant of a parent of a child does not preclude a court from granting visitation of the child to a nonparent under this [act].

(c) If a child is adopted by a relative, stepparent, or cohabitant of a parent of the child, an order of visitation to a nonparent made under this [act] remains valid and is not changed by the adoption.

There has been a proposal to drop the section or some subparagraphs of it. The law in many states specifically allows for visitation (or continuation of visitation) by nonparents -- particularly grandparents -- in the event a child is adopted by a stepparent. (Some statutes also specifically allow visitation following adoption by a grandparent of other relatives.) The statutes are reproduced in an appendix to this memo.

The reason for such provisions is a concern that under the state’s adoption laws or other family laws, visitation could be automatically be cut off or precluded if the child is adopted, even if the adoption is by a family member. [The laws of some states approach the issue by saying that in the event a child is adopted, the nonparental visitation statute does not apply, unless the child is adopted by a stepparent (or grandparent)].

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Another issue we will discuss is whether to include the legislative notes about using the term “detriment” versus “harm.” That issue is the subject of memos from Cathy Sakimura and me (circulated earlier).

Appendix – Statues Regarding Nonparent Visitation following Adoption of the Child

Alabama: Ala. Code § 30-3-4.2(j) – “The right of a grandparent to maintain visitation rights pursuant to this section terminates upon the adoption of the child except as provided by Section 26-10A-30.” Ala. Code § 26-10A-30 – “Post-adoption visitation rights for the natural grandparents of the adoptee may be granted when the adoptee is adopted by a stepparent, a grandfather, a grandmother, a brother, a half-brother, a sister, a half-sister, an aunt or an uncle and their respective spouses, if any. Such visitation rights may be maintained or granted at the discretion of the court at any time prior to or after the final order of adoption is entered upon petition by the natural grandparents, if it is in the best interest of the child.” See *also Ex parte D.W.*, 835 So. 2d 186, 191 (Ala. 2002) (construing statute and stating: “It was the clear intent of the Legislature in enacting § 26–10A–30 to give the trial court the authority to grant post-adoption visitation rights to the natural grandparents of the adoptee, when the adoptee is adopted by a family member. The only reasonable conclusion is that the Legislature intended to limit the rights of the adopting parents by allowing the possibility of court-ordered grandparent visitation over the objections of the adopting parents.”)

California: Cal. Fam. Code § 3102(c) (West) – “This section does not apply if the child has been adopted by a person other than a stepparent or grandparent of the child. Any visitation rights granted pursuant to this section before the adoption of the child automatically terminate if the child is adopted by a person other than a stepparent or grandparent of the child.” (If some text is red, it may be because the statute was amended.)

Illinois: 750 Ill. Comp. Stat. Ann. 5/602.9(b)(2) – “This Section does not apply to a child: . . . (B) in whose interests a petition to adopt by an unrelated person is pending under the Adoption Act; or . . . (D) who has been previously adopted by an individual or individuals who are not related to the biological parents of the child or who is the subject of a pending adoption petition by an individual or individuals who are not related to the biological parents of the child”

Indiana: Ind. Code Ann. § 31-17-5-9 (West) – “Visitation rights provided for in section 1 or 10 of this chapter survive the adoption of the child by any of the following:

- (1) A stepparent.
- (2) A person who is biologically related to the child as:
 - (A) a grandparent;
 - (B) a sibling;
 - (C) an aunt;
 - (D) an uncle;
 - (E) a niece; or

(F) a nephew.”

Kansas: Kan. Stat. Ann. § 23-3301(c) (West) – “The district court may grant the parents of a deceased person visitation rights, or may enforce visitation rights previously granted, pursuant to this section, even if the surviving parent has remarried and the surviving parent's spouse has adopted the child. Visitation rights may be granted pursuant to this subsection without regard to whether the adoption of the child occurred before or after the effective date of this act.” Statute unconstitutional to the extent is distinguished between legitimate and illegitimate children. T.N.Y. ex rel. Z.H. v. E.Y., 51 Kan. App. 2d 956, 360 P.3d 433 (2015).

Kentucky: Ky. Rev. Stat. Ann. 405.021(1) (West) – “(1) The Circuit Court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so. Once a grandparent has been granted visitation rights under this subsection, those rights shall not be adversely affected by the termination of parental rights belonging to the grandparent's son or daughter, who is the father or mother of the child visited by the grandparent, unless the Circuit Court determines that it is in the best interest of the child to do so.”

Massachusetts: Mass. Gen. Laws Ann. ch. 119, § 39D (West) – “No such [grandparent] visitation rights shall be granted if said minor child has been adopted by a person other than a stepparent of such child and any visitation rights granted pursuant to this section prior to such adoption of the said minor child shall be terminated upon such adoption without any further action of the court.”

Michigan: Mich. Comp. Laws Ann. § 722.27b(5) (West) – “If 2 fit parents sign an affidavit stating that they both oppose an order for grandparenting time, the court shall dismiss a complaint or motion seeking an order for grandparenting time filed under subsection (3). This subsection does not apply if 1 of the fit parents is a stepparent who adopted a child under the Michigan adoption code, chapter X of the probate code of 1939, 1939 PA 288, MCL 710.21 to 710.70, and the grandparent seeking the order is the natural or adoptive parent of a parent of the child who is deceased or whose parental rights have been terminated.”

Minnesota: Minn. Stat. Ann. § 257C.08 (West) – “**Subd. 5. Exception for adopted children.** This section shall not apply if the child has been adopted by a person other than a stepparent or grandparent. Any visitation rights granted pursuant to this section prior to the adoption of the child shall be automatically terminated upon such adoption.

Subd. 6. Grandparent visitation with an adopted child. (a) A grandparent of a child adopted by a stepparent may petition and a court may grant an order setting visitation with the child if:

(1) the grandparent is the parent of:

(i) a deceased parent of the child; or

(ii) a parent of the child whose parental relationship was terminated by a decree of adoption according to section 259.57, subdivision 1; and

(2) the court determines that the requested visitation:

(i) is in the best interests of the child; and

(ii) would not interfere with the parent and child relationship.

(b) Failure to comply with the terms of an order for visitation granted under this subdivision is not a basis for revoking, setting aside, or otherwise challenging the validity of a consent, relinquishment, or adoption of a child.”

Statute held unconstitutional to the extent places the burden on the custodial parent to prove that visitation would interfere with the parent-child relationship by interfering with the parent's fundamental right to the care, custody, and control of his or her child).

SooHoo v. Johnson, 731 N.W.2d 815 (Minn. 2007).

Montana: Mont. Code. Ann. 40-9-102(8) – “This section does not apply if the child has been adopted by a person other than a stepparent or a grandparent. Grandparent-grandchild contact granted under this section terminates upon the adoption of the child by a person other than a stepparent or a grandparent.”

New Mexico: N.M. Stat. Ann. § 40-9-2(F) (West) – “When a minor child is adopted by a stepparent and the parental rights of the natural parent terminate or are relinquished, the biological grandparents are not precluded from attempting to establish visitation privileges. When a petition filed pursuant to the provisions of the Grandparent's Visitation Privileges Act⁴ is filed during the pendency of an adoption proceeding, the petition shall be filed as part of the adoption proceedings. The provisions of the Grandparent's Visitation Privileges Act shall have no application in the event of a relinquishment or termination of parental rights in cases of other statutory adoption proceedings.”

North Carolina: N.C. Gen. Stat. Ann. § 50-13.2(b1) – “(b1) An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, “grandparent” includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.”

North Dakota: N.D. Cent. Code Ann. § 14-09-05.1(3) (West) – “This section does not apply to agency adoptions or when the child has been adopted by a person other than a stepparent or grandparent. Any visitation rights granted under this section before the adoption of the child may be terminated upon the adoption if termination of the rights is in the best interest of the child.”

Ohio: Ohio Rev. Code Ann. § 3109.11 (West) – “The remarriage of the surviving parent of the child or the adoption of the child by the spouse of the surviving parent of the child does not affect the authority of the court under this section to grant reasonable companionship or visitation rights with respect to the child to a parent or other relative of the child's deceased father or mother.”

Oklahoma: Okla. Stat. Ann. tit. 43, § 109.4(D)(3) (West) – “Except as otherwise provided by this section, the district court shall not grant to any grandparent of an unmarried minor child, visitation rights to that child:

- a. subsequent to the final order of adoption of the child; provided however, any subsequent adoption proceedings shall not terminate any prior court-granted grandparental visitation rights unless the termination of visitation rights is ordered by the court after opportunity to be heard and the district court determines it to be in the best interest of the child, or
- b. if the child had been placed for adoption prior to attaining six (6) months of age.”

Tennessee: Tenn. Code Ann. § 36-6-306(d)(1) (West) -- “Notwithstanding § 36-1-121, if a relative or stepparent adopts a child, this section applies.”

Texas: Tex. Fam. Code Ann. § 153.434 (West) – “A biological or adoptive grandparent may not request possession of or access to a grandchild if: . . . (2) the grandchild has been adopted, or is the subject of a pending suit for adoption, by a person other than the child's stepparent.”

Utah: Utah Code Ann. § 30-5-2(3) (West) – “The adoption of a grandchild by the grandchild's stepparent does not diminish or alter visitation rights previously ordered under this section.”

West Virginia: W. Va. Code Ann. § 48-10-902 (West) – “If a child who is subject to a grandparent visitation order under this article is later adopted, the order for grandparent visitation is automatically vacated when the order for adoption is entered, unless the adopting parent is a stepparent, grandparent or other relative of the child.”

Wisconsin: (Seems to preclude grandparent visitation for child who has been adopted) -- Wis. Stat. Ann. § 767.43(3) (West) – “The court may grant reasonable visitation rights, with respect to a child, to a grandparent of the child if the child's parents have notice of the hearing and the court determines all of the following: . . . (c) The child has not been adopted.”

Wyoming: Wyo. Stat. Ann. § 20-7-102(b) (West) – “No action to establish visitation rights under subsection (a) of this section may be brought by a person related to the child by blood or by a person acting as primary caregiver for the child prior to the adoption of the minor child when neither adopting parent is related by blood to the child.”

[I may add to this list. JA.]