

## **MEMORANDUM**

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

**FROM:** Jeff Atkinson, Reporter

**DATE:** September 1, 2016

**RE:** Comparison of Non-Parent Act and Guardianship Act

At the Uniform Law Commission (ULC) Annual Meeting, ULC leadership suggested that the Reporters for Non-Parental Child Custody and Visitation Act and the Revised Uniform Guardianship and Protective Proceedings Act consult with each other regarding the two acts.

The Reporter for the Guardianship Act, Nina Kohn, and I exchanged e-mails. In addition, on August 11, I met in Chicago with David English, Chair of the Guardianship Drafting Committee; Cheryl Cesario, ABA Advisor to the Drafting Committee, Benjamin Orzeske, ULC Chief Counsel; and Lindsay Beaver, ULC Legislative Counsel. In preparation for the meeting I prepared two memos, comparing the acts. This memo presents that comparison.

For the Guardianship Act, my primary focus is on Article 2, “Guardianship of Minor.”

Section I of this memo describes differences between the acts. Section II notes the Non-Parent Act’s exclusion of guardianship and foster care cases. Section III lists similarities between the acts. Section IV provides brief discussion. And Section V describes the outcome of the August 11 meeting.

I will make reference to sections in the acts (“G” for the Guardianship Act, and “N” for the Non-Parent Act). Quotations from the acts are based on the Annual Meeting drafts.

### **I. Differences Between the Acts**

#### **A. Bases for relief**

Both acts allow a court to provide custodial arrangements for children over the objection of parents, but the acts have different bases for obtaining relief.

The Guardianship Act allows a court to “appoint a guardian for a minor if the court finds the appointment is in the minor’s best interest, and . . . (3) the parents unwilling or unable to exercise parental rights.” G. § 204(b). [The other two bases for appointment of a guardian under

§ 204(b) are “(1) the parents consent; [and] (2) all parental rights have been terminated.”]

The main focus of the Non-Parent Act is to preserve important relationships of the child with a non-parent. The Non-Parent Act allows custody or visitation for a non-parent upon a determination “that: (1) a substantial relationship exists between the child and the non-parent, (2) denial of custody or visitation to the non-parent is a detriment to the child, and (3) custody or visitation to non-parent is the best interests of the child.” N. § 8(b). [The Annual Meeting draft of Non-Parent Act also allowed custody and visitation for de facto parents and for persons who agreed before the child birth to raise a child together, but those two provisions are likely to be dropped.]

## **B. Burden of proof**

The burdens of proof of the acts are different.

I assume the burden of proof in the Guardianship Act for guardianship of a minor is preponderance of the evidence since a different burden is not specified. G. § 204. [I note that G § 310(a) regarding “Order of Appointment” for an adult states: “A court order granting a guardianship shall clearly state: . . . (2) the court’s finding that there is clear and convincing evidence that the respondent was given proper notice of the hearing on the petition.”]

The burden of proof in the Non-Parent Act is clear and convincing evidence. N. § 8(b).

## **C. Provision for visitation**

The Guardianship Act does not contain an explicit provision regarding granting non-parents or parents visitation with a minor.

G. § 202(g) regarding “Parental Appointment of Guardian of Minor” does provide: “The appointment of a guardian by a parent does not supersede the parental rights of either parent.” G. 314(b)(3) regarding duties a guardian for an adult provides the guardian shall “make reasonable efforts to identify and facilitate supportive relationships.”

The Non-Parent Act specifically provides for granting custody or visitation to a non-parent. See, e.g., §§ 8 & 9.

## **D. Financial matters concerning the minor**

The Guardianship Act allows the guardian to bring a conservator proceeding, spend money on the child’s behalf (G. § 207(b)), and to apply for money for support of the minor (G. §

208(b).

The Non-Parent Act focusses on custody and visitation, although granting “legal custody” or “physical custody” to a non-parent would carry with it the right to expend funds on the child’s behalf. N. § 2(8), (13). In addition, N. § 16, provides that a non-parent “who is granted visitation under this [act] may be ordered to pay the cost of facilitating visitation with the child, including the cost of transportation.”

#### **E. Notice to minor; attorney for a minor**

The Guardianship Act requires notice to a minor who has attained the age of 12 (G. § 205(a) and requires appointment of an attorney for the minor if the minor so requests (G. § 205(c)).

The Non-Parent Act (in the Annual Meeting draft) did not require notice to the child. The Non-Parent Act does not require appointment of an attorney for the child, but allows the court to make such an appointment “[t]o the extent available in other cases involving custody and visitation of children.” In addition, when deciding whether to grant custody or visitation to a non-parent, the court is directed to consider “the views of the child, weighed in light of the child’s age and maturity.” N. § 11(a)(4).

#### **F. Differences in terminology (“minor” vs. “child”)**

The Guardianship Act uses the term “minor.”

The Non-Parent Act uses the term “child.”

### **II. Non-Parent Act’s Exclusion of Cases Involving Guardianship and Foster Care**

The Non-Parent Act provides: “This [act] does not apply if the child is the subject of a proceeding under [cite to law of this state other than this [act] regarding custody and visitation of children in proceedings related to guardianship of the person, abuse, neglect, or dependency].” N. § 19.

### **III. Similarities Between the Acts**

The acts take similar approaches on multiple issues:

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|----|--|--------------|---------------|
| 1. | Minor/Child is an unemancipated indiv. under [18]  | G. § 2(13)   | N. § 2(1)     |
| 2. | Jurisdiction subject to UCCJEA   | G. § 104     | N. § 3        |
| 3. | Discretionary appointment of GAL   | G. § 114     | N. § 15       |
| 4. | Court should consider child's views  | G. §§ 203    | N. § 11(a)(4) |
| 5. | Temporary orders allowed   | G. § 204(d)  | N. § 13       |
| 6. | Similar duties of guardians and custodians<br>– right to have custody and to make decisions<br>pertaining to the child's health, education,<br>and welfare | See appendix |               |

### **IV. Discussion**

#### **[directed to Guardianship Committee's Chair and Reporter]**

There is some overlap in the cases involving minors covered by the Guardianship Act and the Non-Parent Act, but, in many ways, the acts operate in different domains.

You would know more about guardianship cases than I, but it my perception that guardianship of minors arises most often in cases involving the death of both parents or the unfitness of both parents (such as both parents addicted to drugs or incarcerated).

The Non-Parent Act (and current state Family Laws regarding custody and visitation for non-parents) are designed to protect a child's relationship with non-parents with whom the child has a particularly close relationship. Such non-parents may include grandparents, stepparents, and siblings. These relationships can be protected even if a fit parent(s) opposes the visitation or custody for the non-parent. The most common circumstances in which a non-parent has gained custody or visitation under Family Laws include cases in which the non-parent has raised the child for several years and the parent has not been involved or is comparatively uninvolved. The parent may be fit, but the court determines that custody or visitation for the non-parent is clearly in the child's best interests. (Another common finding is that disruption of the relationship between the child and the non-parent would be a detriment to the child.)

I believe that all, or almost all, states, have both guardianship laws and laws pertaining to non-parental rights to seek visitation or custody. During the last 30+ years, I have reviewed

hundreds of cases involving actions for custody and visitation by non-parents – cases generally brought under statutes related to divorce, separation, parentage, or third party visitation and custody. I do not recall any cases (particularly at the state supreme court level) that described conflicts between such statutes and guardianship statutes. Are you aware of such cases, perhaps reported under guardianship laws?

I'll close by noting a couple of issues you may wish to consider as you revise the Guardianship Act.

1. You may wish to more explicitly deal with presumptions and burden of proof in cases in which a person is seeking guardianship of a minor over a parent's opposition. The Supreme Court in *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) recognized a right of a fit parent to make decisions regarding the rearing of his or her child. In *Troxel*, the Court struck down Washington State's grandparent visitation statute, as applied, holding the trial court did not give sufficient deference to the decision of a fit parent to decide the amount of contact the children would have with grandparents. The Supreme Court also stated the trial court's "order was not founded on any special factors that might justify the State's interference with [the mother's] fundamental right to make decisions concerning the rearing of her two daughters." *Id.* at 68. As previously noted, the Non-Parent Act handles the *Troxel* issue by requiring clear and convincing evidence of substantial relationship, detriment to the child, and best interests.
2. You may wish to explicitly allow a court in a guardianship proceeding to provide for visitation for the child. For example, if both parents have died and the maternal grandparents have been named guardians of the child, it might be in the best interests of the child to have visits with the paternal grandparents. In some cases, it might be desirable for parents to have visits, even if a non-parent is guardian of the child.

## **V. Outcome of meeting**

David English agreed with my suggestions. The text and comments of the Guardianship Act are likely to be revised to deal more explicitly with the *Troxel* issue and to provide an explicit option of granting visitation. In addition, the Guardianship Act also is likely to specify the standards for modification of guardianship orders.

Following my review of the Guardianship Act, I have added two provisions to the Non-Parent Act that are similar to the Guardianship Act: (1) giving notice to a child who has reached the age of 12, and (2) adding a provision that "A non-parent given custody of a child may petition for and receive money for the support of the child."

**Appendix – Excerpts from Guardianship Act and Non-Parent Act pertaining to guardian's and custodian's duties**

**GUARDIANSHIP ACT**

**SECTION 102. DEFINITIONS**

§102(7): "Guardian" means a person appointed by a court to make decisions with respect to the personal affairs of an adult subject to guardianship, and a person appointed by a court or a parent to make decisions with respect to the personal affairs of a minor subject to guardianship. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem.

**SECTION 202. PARENTAL APPOINTMENT OF GUARDIAN OF MINOR.**

(a) A guardian may be appointed by will or other signed writing by a parent for any minor child the parent has or may have in the future. The appointment may specify the desired limitations on the powers to be given to the guardian. . . .

(g) The appointment of a guardian by a parent does not supersede the parental rights of either parent.

**SECTION 206. JUDICIAL APPOINTMENT OF GUARDIAN OF MINOR: PRIORITY OF MINOR'S NOMINEE; LIMITED GUARDIANSHIP.**

(b) In the interest of developing self-reliance of a protected minor or for other good cause, the court, at the time of appointment or later, on its own motion or on motion of the minor or other interested person, may limit the powers of a guardian otherwise granted by this [article] and thereby create a limited guardianship.

**SECTION 207. DUTIES OF GUARDIAN OF PROTECTED MINOR.**

(a) Except as otherwise limited by the court, a guardian of a protected minor has the duties and responsibilities of a parent regarding the protected minor's support, care, education, health, and welfare. A guardian shall act at all times in the protected minor's best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian shall: (1) become or remain personally acquainted with the protected minor and maintain sufficient contact with the protected minor to know of the protected minor's capacities, limitations, needs, opportunities, and physical and mental health; . . .

## **SECTION 208. POWERS OF GUARDIAN OF PROTECTED MINOR.**

(a) Except as otherwise limited by the court, a guardian of a protected minor has the powers of a parent regarding the protected minor's support, care, education, health, and welfare.

(b) A guardian may: . . .

- (2) if otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the protected minor, take custody of the protected minor and establish the protected minor's place of dwelling, but may only establish or move the protected minor's dwelling outside the state on express authorization of the court;
- (3) if a conservator for the estate of a protected minor has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the protected minor or to pay money for the benefit of the protected minor;
- (4) consent to medical or other care, treatment, or service for the protected minor;
- (5) consent to the marriage of the protected minor; and
- (6) to the extent reasonable, delegate to the protected minor certain responsibilities for decisions affecting the protected minor's well-being.

(c) The court may specifically authorize the guardian to consent to the adoption of the protected minor.

[The quoted sections and other sections of the Guardianship Act also govern the guardians and conservator's responsibility for protections of the minor's money and other assets.]

## **NON-PARENT ACT**

### **SECTION 2. DEFINITIONS.**

(3) “Custody” means physical custody, legal custody, or both. The term includes joint custody or shared custody as defined by the law of this state other than this [act].

(8) “Legal custody” means the power to make important decisions regarding a child, including decisions regarding the child’s education, health care, and extracurricular activities.

(11) “Parental responsibility” means exercising care and control of a child and making decisions regarding the health, welfare, and other needs of the child.

(12) “Parenting time” means parenting time as defined in [cite to definition of “parenting time” in law of this state other than this [act]].

(13) “Physical custody” means day-to-day care and supervision of a child.

(17) “Visitation” means the right to spend time with a child, which may include overnights.