

MEMORANDUM

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

FROM: Jeff Atkinson, Reporter

DATE: July 27, 2016

RE: (1) Status Report Following First Reading
(2) Issue List

Status Report

The Non-Parental Child Custody and Visitation Act had its First Reading during three sessions at the Annual Meeting July 12 & 13.

There was significant push-back from the floor about de facto parents and persons who agree to accept full and permanent responsibility and raise a child together. Some commissioners were concerned that the act would allow for too many “parents” and that the concepts were too loose. Some commissioners envisioned four or more “parents” per child.

After completion of the First Reading, commissioners on the Drafting Committee met for about 90 minutes. I was directed to redraft the act – dropping the remedies for de facto parents and parents who agreed to raise a child together. The remedies of custody and visitation would be retained based on substantial relationship with the child and detriment to the child. Some commissioners on the Drafting Committee felt the Parentage and Surrogacy laws could cover cases involving persons who agree to use assisted reproduction and raise a child together.

I assume that the full Drafting Committee (including observers) will continue to discuss what should be included and excluded from the act at the next Drafting Committee meeting which will be October 14 & 15 in Washington, D.C. (Hotel to be announced later.)

I will circulate a revised draft several weeks before the meeting

Issues List

The following is a list of issues raised by commissioners during the First Reading and after the First Reading. I'll provide comments on some of the issues.

1. **De facto parents; persons who agree to accept full and permanent responsibility and raise a child together; and number of “parents” a child could have.** As noted, there was concern that a child would have too many “parents” and that the concepts were too loose. A commissioner asked if the act had a limit on how many persons could receive rights of custody and visitation. (The act does not contain such a limit, but since the act has a high burden of proof – e.g., clear and convincing evidence of substantial relationship and detriment to the child – the number of such persons for a given child is likely to be low.) Regarding the issues of de facto parents and persons who agree to raise a child together, another option mentioned was use of bracketed language – thus letting state’s decide whether to include it.
2. **Interrelationship with Guardianship Act.** Some commissioners asked about the relationship between our act and the Revised Uniform Guardianship and Protective Proceedings Act, which has an article on Guardianship of Minors, and which also is in the drafting process. One commissioner expressed a preference that custody and visitation for non-parents be handled through the Guardianship Act. Within the next month, I'll have discussions with the chair and reporter of the Guardianship Drafting Committee about the interrelationship between our two acts. I'll offer a few initial observations about the Guardianship Act and the Non-Parent Act. Both acts allow a court to provide custodial arrangements for children over the objection of as parent, but the acts have somewhat different focusses. The Guardianship Act seeks to protect a child by appointment of a guardian upon “determination that the parent is unwilling or unable to exercise parental rights.” Guardianship Act at Section 204(c). 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.” Non-Parent Act at Section 8(c). The burdens of proof of the acts seem to be different. I believe the burden of proof in the Guardianship Act is preponderance of the evidence. The burden of proof in the Non-Parent Act is clear and convincing evidence. The Non-Parent Act has an explicit visitation option; the Guardianship Act does not. In my research of cases involving non-parental custody and visitation, I do not recall courts finding a conflict between guardianship statutes and family law statutes or equitable remedies.

3. **Added definitions.** After the Annual Meeting, I received a proposal to add definitions of “action” and “clear and convincing evidence.”
4. **Notice / Joinder.** Commissioners on the Drafting Committee (and I) agree that the act should have an explicit provision providing that parents (including non-custodial parents) should be given notice of actions in which a non-parent seeks custody or visitation.
5. **Using label of “Standing;” consideration of bests interests.** Debra Lehrmann favors using the “Standing” rather than the phrase “Individuals Who May File a Petition.” “Standing” is a familiar label for lawyers and judges. Additional suggestions regarding standing: (1) best interests should be part of a determination on the merits, but not part of the determination of standing; (2) clarification should be added that affidavits should be used to determine standing; (3) consideration of using a certain time period (e.g., six months) during which child has lived with a person as a basis for standing.
6. **Submission of parenting plan.** It was suggested that petitioners submit a parenting plan (or a proposal of the amount of time to be spent with the child). This proposal may have been more applicable to persons seeking status of de facto parent or persons who allege of there was an agreement to raise a child together.
7. **Confining act to visitation cases.** One commissioner suggested confining the Non-Parent act to visitation cases. I assume we will not do that. There are many cases in which non-parents gain custody, and states need guidance on that issue as well as on visitation.
8. **Standards for custody versus visitation.** It was suggested that we might want to use different standards for obtaining custody versus visitation, with the standard for obtaining custody being higher – perhaps a showing of harm to the child before custody would be granted to a non-parent over objection of a parent.
9. **More rights for grandparents.** Some commissioners expressed hope that the standards for grandparents to gain visitation could be more flexible and easier to meet, including for grandparents who have not been able to have a substantial relationship with their grandchildren because the parents have limited the grandparents’ contact with the child. (I have sympathy for that point of view, but I also believe that *Troxel* – with its emphasis on the need for a presumption in favor of decisions of fit parents – places limits on how far a statute should go in allowing a court to override the parents’ decision.) Several commissioners on the Drafting Committee favored giving more emphasis to the kinship status of the person seeking visitation or custody. Kinship with the child could be one of the factors listed for the court to consider. A commissioner on the floor of the First Reading said grandparents can play an important role in monitoring how children are doing, particularly if the parents’ skills have been problematic in the past.

10. **Adult disabled children.** A commissioner raised the question of whether adult disabled children were covered by the act. The commissioners seemed satisfied that the Non-Parent act would not to apply to such children, and that the issue could be covered by guardianship laws.
11. **Indian children.** It was suggested that the text of the act (and not just a comment) state that custody of and visitation with Indian children are governed by the Indian Child Welfare Act.
12. **Exclusion of cases which are subject to adoption proceeding.** A commissioner suggested that cases that are subject to adoption proceedings should not be covered by the act. (I disagree with that approach since, under our act, the adoption of a child by a relative or stepparent does not necessarily cut off the right of non-parents to continue or seek visitation or custody.)
13. **Consideration of drug offenses.** When discussing the presumptions pertaining to domestic violence, a question was raised of whether a conviction of a drug offense by a person seeking custody or visitation (or a person residing with the petitioner) should give rise to a presumption against the person seeking custody or visitation. (I would note that the negative impact of a drug offense could vary with the severity of the offense and the recency of the conviction.)
14. **Modification of orders.** It was suggested the standard for modification of final orders under the act be the traditional modification standard of substantial change of circumstances coupled with best interests of the child. (The current draft provides that modification is governed by the same standard the state applies to modification of custody or parenting time in disputes between parents.)
15. **Child support.** There was a suggestion to make more clear – perhaps in a comment – that the act does not provide for child support (although the act does allow the court to order a non-parent to pay the cost of facilitating visitation). A comment also could note that if a non-parent has custody, state law likely provides that parents could be ordered to pay child support to the non-parent with custody.
16. **Other rights and remedies.** An issue was raised on the degree to which our act will replace other state laws regarding visitation for stepparents and grandparents. The current draft of Section 20 on “Other Rights and Remedies” provides: “The rights and remedies of this [act] are not exclusive and do not preclude rights and remedies under laws of this state other than this [act], including the Uniform Deployed Parents Custody and Visitation Act [or other state law dealing with custody of and visitation with children of deployed parents].” I believe the Drafting Committee intends that the Non-Parent Act would replace current state statutes regarding visitation for grandparents, stepparents, and sibling, although if a state has special protections for deployed parents and their

relatives, those provisions would remain. Part of the purpose of Section 20 was to allow other developments in the law, including for same-sex couples. Such new laws could be from statutes or equitable remedies. The Drafting Committee should discuss further what we intend to preempt and what we do not intend to preempt.

17. **Stylistic / technical suggestions.** We also received multiple stylistic and technical suggestions which we will consider for the next draft of the act.

If there are other issues raised at the First Reading, or if there are other issues you want us to consider at the next Drafting Committee meeting, please let Debra and I know.

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