

LEGISLATIVE BILL 845

Approved by the Governor April 23, 2018

Introduced by Briese, 41; McDonnell, 5; Lowe, 37.

A BILL FOR AN ACT relating to families; to amend sections 30-1601, 30-2201, and 42-364, Reissue Revised Statutes of Nebraska, and sections 42-1301, 42-1302, 42-1303, and 42-1304, Revised Statutes Supplement, 2017; to define terms; to provide, change, and transfer provisions relating to denial of family member visitation and court proceedings related thereto; to state findings and to prohibit a preference in child custody determinations based on disability; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 42-1301, Revised Statutes Supplement, 2017, is amended to read:

~~42-1301~~ For purposes of sections 1 to 13 of this act ~~42-1301 to 42-1304~~:

(1) Adult child means an individual who is at least nineteen years of age and who is related to a resident biologically, through adoption, through the marriage or former marriage of the resident to the biological parent of the adult child, or by a judgment of parentage entered by a court of competent jurisdiction;

(2) Caregiver means a guardian, a designee under a power of attorney for health care, or another person or entity denying visitation access between a family member petitioner and a resident;

(3) ~~(2)~~ Family member petitioner means the spouse, adult child, adult grandchild, parent, grandparent, sibling, aunt, uncle, niece, nephew, cousin, or domestic partner of a resident;

(4) Guardian ad litem has the definition found in section 30-2601;

(5) Isolation has the definition found in section 28-358.01;

(6) ~~(3)~~ Resident means an adult resident of:

(a) A health care facility as defined in section 71-413; or

(b) Any home or other residential dwelling in which the resident is receiving care and services from any person; ~~and~~

(7) ~~(4)~~ Visitation means an in-person meeting or any telephonic, written, or electronic communication; ~~and -~~

(8) Visitor means a person appointed pursuant to section 30-2619.01.

Sec. 2. Section 42-1302, Revised Statutes Supplement, 2017, is amended to read:

~~42-1302~~ (1) ~~It is the intent of the Legislature that, in order to allow family member petitioners members to remain connected, a caregiver may not arbitrarily deny visitation to a family member petitioner of a resident, whether or not the caregiver is related to such family member petitioner, unless such action is authorized by a nursing home administrator pursuant to section 71-6021.~~

(2) ~~If a family member is being denied visitation with a resident, the family member may petition the county court to compel visitation with the resident. If the resident has been appointed a guardian under the jurisdiction of a county court in Nebraska, the petition shall be filed in the county court having such jurisdiction. If there is no such guardianship, the petition shall be filed in the county court for the county in which the resident resides. The court may not issue an order compelling visitation if the court finds any of the following:~~

(a) ~~The resident, while having the capacity to evaluate and communicate decisions regarding visitation, expresses a desire to not have visitation with the petitioner; or~~

(b) ~~Visitation between the petitioner and the resident is not in the best interests of the resident.~~

Sec. 3. (1) If a family member petitioner is being denied visitation with a resident, the family member petitioner may petition the county court to compel visitation with the resident. If a guardian has been appointed for the resident under the jurisdiction of a county court, the petition shall be filed in the county court having such jurisdiction. If there is no such guardianship, the petition shall be filed in the county court for the county in which the resident resides. The court may not issue an order compelling visitation if the court finds any of the following:

(a) The resident, while having the capacity to evaluate and communicate decisions regarding visitation, expresses a desire to not have visitation with the family member petitioner; or

(b) Visitation between the family member petitioner and the resident is not in the best interests of the resident.

(2) In determining whether visitation between the family member petitioner and the resident has been arbitrarily denied, the court may consider factors including, but not limited to:

(a) The nature of relationship of the family member petitioner and resident;

(b) The place where visitation rights will be exercised;

- (c) The frequency and duration of the visits;
- (d) The likely effect of visitation on resident; and
- (e) The likelihood of onerously disrupting established lifestyle of resident.

Sec. 4. Section 42-1303, Revised Statutes Supplement, 2017, is amended to read:

~~42-1303~~ If the petition filed pursuant to section 3 of this act ~~42-1302~~ states that the resident's health is in significant decline or that the resident's death may be imminent, the court shall conduct an emergency hearing on the petition as soon as practicable and in no case later than ten days after the date the petition is served upon the resident and the caregiver. Each party to a contested proceeding for an emergency order relating to visitation under this section shall offer a verified information affidavit as an exhibit at the hearing before the court. If the allegations made under this section to request an emergency hearing are not made with probable cause, the court may order appropriate remedies under section 5 of this act. Temporary orders may be issued in the same manner as provided for guardianships. Temporary orders shall expire ninety days after the entry of the temporary order unless good cause is shown for continuation filed with the court.

Sec. 5. Section 42-1304, Revised Statutes Supplement, 2017, is amended to read:

~~42-1304~~ (1) Upon a motion by a party or upon the court's own motion, if the court finds during a hearing pursuant to section 4 of this act ~~42-1303~~ that a person is knowingly isolating the resident from visitation by a family member petitioner, the court may order such person to pay court costs and reasonable attorney's fees of the family member petitioner and may order other appropriate remedies.

(2) No costs, fees, or other sanctions may be paid from the resident's finances or estate.

(3) If the court determines that the family member petitioner did not have probable cause for filing the petition, the court may order the family member petitioner to pay court costs and reasonable attorney's fees of the other parties and may order other appropriate remedies.

(4) Remedies may include the payment of the fees and costs of a visitor or a guardian ad litem.

(5) An order may be entered prohibiting the family member petitioner from filing another petition under sections 1 to 13 of this act in any court in this state for any period of time determined appropriate by the court for up to one year.

Sec. 6. (1) Any action under sections 1 to 13 of this act shall be commenced by filing in the county court a verified petition described in section 3 of this act. The family member petitioner shall include, if reasonably ascertainable under oath, the places where the resident has resided and the names and present addresses of the persons with whom the resident has lived during the previous five years. The petition shall include a statement under oath identifying whether:

(a) The family member petitioner has participated as a party, as a witness, or in any other capacity or in any other proceeding concerning custody or visitation with the resident and if so, identify the court, the case number, and the date of any order which may affect visitation;

(b) The family member petitioner knows of any proceeding that could affect the current proceeding relating to domestic violence, a protective order, termination of parental rights, adoption, guardianship, conservatorship, or habeas corpus or any other civil or criminal proceeding, and if so, identify the court, the case number, and the date of any order which may affect visitation;

(c) The family member petitioner knows the name and address of any person not a party to the proceeding who has physical custody of, is residing with, or is providing residential services to the resident and if so, the name and address of such person;

(d) The resident needs a guardian ad litem or a visitor appointed;

(e) Any other state would have jurisdiction under the Nebraska Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act;

(f) A bond or probation condition exists which would affect the case; and

(g) The family member petitioner has filed petitions under section 3 of this act within the preceding five years and if so, the court, the case number, and the date of any order resolving the prior petitions.

(2) Any matters which may be confidential under court rule or statute shall be filed as a confidential document for review by the court as to whether such matters shall remain filed as confidential matters.

(3) If the information required by subsection (1) of this section is not furnished, the court, upon the motion of a party or its own motion, may stay the proceeding until the information is furnished.

Sec. 7. Any proceeding involving a guardianship, conservatorship, power of attorney for health care decisions, or power of attorney granted by the resident may continue in the trial court while an appeal is pending from an order granted under sections 1 to 13 of this act.

Sec. 8. At any point in a proceeding under sections 1 to 13 of this act, the court may appoint a guardian ad litem or a visitor.

Sec. 9. (1) Jurisdiction under sections 1 to 13 of this act applies to any resident who is in this state or for whom the provisions of Nebraska Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act vests authority over such resident in the courts of this state in a guardianship.

(2) Venue shall be determined pursuant to section 30-2212 and section 3 of this act.

(3) The Supreme Court shall have the authority pursuant to section 30-2213 to establish rules to carry into effect the provisions of sections 1 to 13 of this act.

(4) The notice provisions of section 30-2220 shall apply to a proceeding under sections 1 to 13 of this act.

(5) When final orders relating to proceedings under sections 1 to 13 of this act are on appeal and such appeal is pending, the court that issued such orders shall retain jurisdiction to provide for such orders regarding visitation or other access or to prevent irreparable harm during the pendency of such appeal or other appropriate orders in aid of the appeal process. Such orders shall not be construed to prejudice any party on appeal.

Sec. 10. Any order that is not intended as interlocutory or temporary under sections 1 to 13 of this act shall be a final, appealable order. Such order may be appealed to the Court of Appeals in the same manner as an appeal from the district court directly to the Court of Appeals. The Court of Appeals shall conduct its review in an expedited manner and shall render its judgment and write its opinion, if any, as speedily as possible. The court may modify an existing order granting such visitation upon a showing that there has been a material change in circumstances which justifies such modification and that the modification would serve the best interests of the resident.

Sec. 11. In a proceeding under sections 1 to 13 of this act, the court may examine any medical evidence in camera or issue any protective discovery orders needed to comply with the provisions of federal Health Insurance Portability and Accountability Act of 1996, any regulations promulgated under such federal act, or any other provision of law.

Sec. 12. If the court enters a visitation order in a proceeding under sections 1 to 13 of this act, it may set out a visitation schedule including the time, place, and manner of visitation. Failure to comply with the order may be the subject of a civil contempt proceeding and may be subject to remedies under section 5 of this act. The court may provide for an expiration date or a review date in its order, and such a provision does not affect the appealability of an order under section 10 of this act.

Sec. 13. In a proceeding under sections 1 to 12 of this act, the burden of proof is upon the family member petitioner to establish his or her case by a preponderance of the evidence.

Sec. 14. Section 30-1601, Reissue Revised Statutes of Nebraska, is amended to read:

30-1601 (1) In all matters arising under the Nebraska Probate Code and in all matters in county court arising under the Nebraska Uniform Trust Code, appeals may be taken to the Court of Appeals in the same manner as an appeal from district court to the Court of Appeals.

(2) An appeal may be taken by any party and may also be taken by any person against whom the final judgment or final order may be made or who may be affected thereby.

(3) When the appeal is by someone other than a personal representative, conservator, trustee, guardian, or guardian ad litem, the appealing party shall, within thirty days after the entry of the judgment or final order complained of, deposit with the clerk of the county court a supersedeas bond or undertaking in such sum as the court shall direct, with at least one good and sufficient surety approved by the court, conditioned that the appellant will satisfy any judgment and costs that may be adjudged against him or her, including costs under subsection (6) of this section, unless the court directs that no bond or undertaking need be deposited. If an appellant fails to comply with this subsection, the Court of Appeals on motion and notice may take such action, including dismissal of the appeal, as is just.

(4) The appeal shall be a supersedeas for the matter from which the appeal is specifically taken, but not for any other matter. In appeals pursuant to sections 30-2601 to 30-2661, upon motion of any party to the action, the county court may remove the supersedeas or require the appealing party to deposit with the clerk of the county court a bond or other security approved by the court in an amount and conditioned in accordance with sections 30-2640 and 30-2641. Once the appeal is perfected, the court having jurisdiction over the appeal may, upon motion of any party to the action, reimpose or remove the supersedeas or require the appealing party to deposit with the clerk of the court a bond or other security approved by the court in an amount and conditioned in accordance with sections 30-2640 and 30-2641. Upon motion of any interested person or upon the court's own motion, the county court may appoint a special guardian or conservator pending appeal despite any supersedeas order.

(5) The judgment of the Court of Appeals shall not vacate the judgment in the county court. The judgment of the Court of Appeals shall be certified without cost to the county court for further proceedings consistent with the determination of the Court of Appeals.

(6) If it appears to the Court of Appeals that an appeal was taken vexatiously or for delay, the court shall adjudge that the appellant shall pay the cost thereof, including an attorney's fee, to the adverse party in an amount fixed by the Court of Appeals, and any bond required under subsection (3) of this section shall be liable for the costs. In a proceeding under sections 1 to 13 of this act, the Court of Appeals may also order remedies under section 5 of this act.

Sec. 15. Section 30-2201, Reissue Revised Statutes of Nebraska, is amended to read:

30-2201 Sections 30-401 to 30-406, 30-2201 to 30-2902, 30-3901 to 30-3923, 30-4001 to 30-4045, and 30-4201 to 30-4210 and sections 1 to 13 of this act and the Public Guardianship Act shall be known and may be cited as the Nebraska Probate Code.

Sec. 16. The Legislature finds that individuals with disabilities, as defined in section 42-364, continue to face unfair, preconceived, and unnecessary societal biases as well as antiquated attitudes regarding their ability to successfully parent their children.

Sec. 17. Section 42-364, Reissue Revised Statutes of Nebraska, is amended to read:

42-364 (1)(a) In an action under Chapter 42 involving child support, child custody, parenting time, visitation, or other access, the parties and their counsel, if represented, shall develop a parenting plan as provided in the Parenting Act. If the parties and counsel do not develop a parenting plan, the complaint shall so indicate as provided in section 42-353 and the case shall be referred to mediation or specialized alternative dispute resolution as provided in the Parenting Act. For good cause shown and (i) when both parents agree and such parental agreement is bona fide and not asserted to avoid the purposes of the Parenting Act, or (ii) when mediation or specialized alternative dispute resolution is not possible without undue delay or hardship to either parent, the mediation or specialized alternative dispute resolution requirement may be waived by the court. In such a case where waiver of the mediation or specialized alternative dispute resolution is sought, the court shall hold an evidentiary hearing and the burden of proof for the party or parties seeking waiver is by clear and convincing evidence.

(b) The decree in an action involving the custody of a minor child shall include the determination of legal custody and physical custody based upon the best interests of the child, as defined in the Parenting Act, and child support. Such determinations shall be made by incorporation into the decree of (i) a parenting plan developed by the parties, if approved by the court, or (ii) a parenting plan developed by the court based upon evidence produced after a hearing in open court if no parenting plan is developed by the parties or the plan developed by the parties is not approved by the court. The decree shall conform to the Parenting Act.

(c) The social security number of each parent and the minor child shall be furnished to the clerk of the district court but shall not be disclosed or considered a public record.

(2) In determining legal custody or physical custody, the court shall not give preference to either parent based on the sex or disability of the parent and, except as provided in section 43-2933, no presumption shall exist that either parent is more fit or suitable than the other. Custody shall be determined on the basis of the best interests of the child, as defined in the Parenting Act. Unless parental rights are terminated, both parents shall continue to have the rights stated in section 42-381.

(3) Custody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both, (a) when both parents agree to such an arrangement in the parenting plan and the court determines that such an arrangement is in the best interests of the child or (b) if the court specifically finds, after a hearing in open court, that joint physical custody or joint legal custody, or both, is in the best interests of the minor child regardless of any parental agreement or consent.

(4) In determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent and the guidelines provided by the Supreme Court pursuant to section 42-364.16 for the establishment of child support obligations. Upon application, hearing, and presentation of evidence of an abusive disregard of the use of child support money or cash medical support paid by one party to the other, the court may require the party receiving such payment to file a verified report with the court, as often as the court requires, stating the manner in which child support money or cash medical support is used. Child support money or cash medical support paid to the party having physical custody of the minor child shall be the property of such party except as provided in section 43-512.07. The clerk of the district court shall maintain a record, separate from all other judgment dockets, of all decrees and orders in which the payment of child support, cash medical support, or spousal support has been ordered, whether ordered by a district court, county court, separate juvenile court, or county court sitting as a juvenile court. Orders for child support or cash medical support in cases in which a party has applied for services under Title IV-D of the federal Social Security Act, as amended, shall be reviewed as provided in sections 43-512.12 to 43-512.18.

(5) Whenever termination of parental rights is placed in issue the court shall transfer jurisdiction to a juvenile court established pursuant to the Nebraska Juvenile Code unless a showing is made that the county court or district court is a more appropriate forum. In making such determination, the court may consider such factors as cost to the parties, undue delay, congestion of dockets, and relative resources available for investigative and supervisory assistance. A determination that the county court or district court is a more appropriate forum shall not be a final order for the purpose of enabling an appeal. If no such transfer is made, the court shall conduct the termination of parental rights proceeding as provided in the Nebraska Juvenile Code.

(6) Modification proceedings relating to support, custody, parenting time, visitation, other access, or removal of children from the jurisdiction of the court shall be commenced by filing a complaint to modify. Modification of a

parenting plan is governed by the Parenting Act. Proceedings to modify a parenting plan shall be commenced by filing a complaint to modify. Such actions shall be referred to mediation or specialized alternative dispute resolution as provided in the Parenting Act. For good cause shown and (a) when both parents agree and such parental agreement is bona fide and not asserted to avoid the purposes of the Parenting Act, or (b) when mediation or specialized alternative dispute resolution is not possible without undue delay or hardship to either parent, the mediation or specialized alternative dispute resolution requirement may be waived by the court. In such a case where waiver of the mediation or specialized alternative dispute resolution is sought, the court shall hold an evidentiary hearing and the burden of proof for the party or parties seeking waiver is by clear and convincing evidence. Service of process and other procedure shall comply with the requirements for a dissolution action.

(7) In any proceeding under this section relating to custody of a child of school age, certified copies of school records relating to attendance and academic progress of such child are admissible in evidence.

(8) For purposes of this section, disability has the same meaning as in 42 U.S.C. 12102, as such section existed on January 1, 2018.

Sec. 18. Original sections 30-1601, 30-2201, and 42-364, Reissue Revised Statutes of Nebraska, and sections 42-1301, 42-1302, 42-1303, and 42-1304, Revised Statutes Supplement, 2017, are repealed.