

LEGISLATURE OF NEBRASKA
ONE HUNDRED FIFTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 845

FINAL READING

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

Read first time January 05, 2018

Committee: Judiciary

1 A BILL FOR AN ACT relating to families; to amend sections 30-1601,
2 30-2201, and 42-364, Reissue Revised Statutes of Nebraska, and
3 sections 42-1301, 42-1302, 42-1303, and 42-1304, Revised Statutes
4 Supplement, 2017; to define terms; to provide, change, and transfer
5 provisions relating to denial of family member visitation and court
6 proceedings related thereto; to state findings and to prohibit a
7 preference in child custody determinations based on disability; to
8 harmonize provisions; and to repeal the original sections.
9 Be it enacted by the people of the State of Nebraska,

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

3 ~~42-1301~~ For purposes of sections 1 to 13 of this act ~~42-1301 to~~
4 ~~42-1304~~:

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

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

13 (3) (-2) Family member petitioner means the spouse, adult child,
14 adult grandchild, parent, grandparent, sibling, aunt, uncle, niece,
15 nephew, cousin, or domestic partner of a resident;

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

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

18 (6) (-3) Resident means an adult resident of:

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

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

22 (7) (-4) Visitation means an in-person meeting or any telephonic,
23 written, or electronic communication; and -

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

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

27 ~~42-1302 (-1)~~ It is the intent of the Legislature that, in order to
28 allow family member petitioners ~~members~~ to remain connected, a caregiver
29 may not arbitrarily deny visitation to a family member petitioner of a
30 resident, whether or not the caregiver is related to such family member
31 petitioner, unless such action is authorized by a nursing home

1 administrator pursuant to section 71-6021.

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

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

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

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

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

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

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

- 1 (a) The nature of relationship of the family member petitioner and
2 resident;
- 3 (b) The place where visitation rights will be exercised;
- 4 (c) The frequency and duration of the visits;
- 5 (d) The likely effect of visitation on resident; and
- 6 (e) The likelihood of onerously disrupting established lifestyle of
7 resident.

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

10 ~~42-1303~~ If the petition filed pursuant to section 3 of this act
11 ~~42-1302~~ states that the resident's health is in significant decline or
12 that the resident's death may be imminent, the court shall conduct an
13 emergency hearing on the petition as soon as practicable and in no case
14 later than ten days after the date the petition is served upon the
15 resident and the caregiver. Each party to a contested proceeding for an
16 emergency order relating to visitation under this section shall offer a
17 verified information affidavit as an exhibit at the hearing before the
18 court. If the allegations made under this section to request an emergency
19 hearing are not made with probable cause, the court may order appropriate
20 remedies under section 5 of this act. Temporary orders may be issued in
21 the same manner as provided for guardianships. Temporary orders shall
22 expire ninety days after the entry of the temporary order unless good
23 cause is shown for continuation ~~filed with the court.~~

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

26 ~~42-1304~~ (1) Upon a motion by a party or upon the court's own
27 motion, if the court finds during a hearing pursuant to section 4 of this
28 act ~~42-1303~~ that a person is knowingly isolating the resident from
29 visitation by a family member petitioner, the court may order such person
30 to pay court costs and reasonable attorney's fees of the family member
31 petitioner and may order other appropriate remedies.

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

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

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

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

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

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

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

30 (c) The family member petitioner knows the name and address of any
31 person not a party to the proceeding who has physical custody of, is

1 residing with, or is providing residential services to the resident and
2 if so, the name and address of such person;

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

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

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

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

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

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

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

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

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

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

30 (3) The Supreme Court shall have the authority pursuant to section
31 30-2213 to establish rules to carry into effect the provisions of

1 sections 1 to 13 of this act.

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

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

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

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

26 Sec. 12. If the court enters a visitation order in a proceeding
27 under sections 1 to 13 of this act, it may set out a visitation schedule
28 including the time, place, and manner of visitation. Failure to comply
29 with the order may be the subject of a civil contempt proceeding and may
30 be subject to remedies under section 5 of this act. The court may provide
31 for an expiration date or a review date in its order, and such a

1 provision does not affect the appealability of an order under section 10
2 of this act.

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

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

8 30-1601 (1) In all matters arising under the Nebraska Probate Code
9 and in all matters in county court arising under the Nebraska Uniform
10 Trust Code, appeals may be taken to the Court of Appeals in the same
11 manner as an appeal from district court to the Court of Appeals.

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

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

27 (4) The appeal shall be a supersedeas for the matter from which the
28 appeal is specifically taken, but not for any other matter. In appeals
29 pursuant to sections 30-2601 to 30-2661, upon motion of any party to the
30 action, the county court may remove the supersedeas or require the
31 appealing party to deposit with the clerk of the county court a bond or

1 other security approved by the court in an amount and conditioned in
2 accordance with sections 30-2640 and 30-2641. Once the appeal is
3 perfected, the court having jurisdiction over the appeal may, upon motion
4 of any party to the action, reimpose or remove the supersedeas or require
5 the appealing party to deposit with the clerk of the court a bond or
6 other security approved by the court in an amount and conditioned in
7 accordance with sections 30-2640 and 30-2641. Upon motion of any
8 interested person or upon the court's own motion, the county court may
9 appoint a special guardian or conservator pending appeal despite any
10 supersedeas order.

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

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

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

24 30-2201 Sections 30-401 to 30-406, 30-2201 to 30-2902, 30-3901 to
25 30-3923, 30-4001 to 30-4045, and 30-4201 to 30-4210 and sections 1 to 13
26 of this act and the Public Guardianship Act shall be known and may be
27 cited as the Nebraska Probate Code.

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

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

3 42-364 (1)(a) In an action under Chapter 42 involving child support,
4 child custody, parenting time, visitation, or other access, the parties
5 and their counsel, if represented, shall develop a parenting plan as
6 provided in the Parenting Act. If the parties and counsel do not develop
7 a parenting plan, the complaint shall so indicate as provided in section
8 42-353 and the case shall be referred to mediation or specialized
9 alternative dispute resolution as provided in the Parenting Act. For good
10 cause shown and (i) when both parents agree and such parental agreement
11 is bona fide and not asserted to avoid the purposes of the Parenting Act,
12 or (ii) when mediation or specialized alternative dispute resolution is
13 not possible without undue delay or hardship to either parent, the
14 mediation or specialized alternative dispute resolution requirement may
15 be waived by the court. In such a case where waiver of the mediation or
16 specialized alternative dispute resolution is sought, the court shall
17 hold an evidentiary hearing and the burden of proof for the party or
18 parties seeking waiver is by clear and convincing evidence.

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

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

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

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

17 (4) In determining the amount of child support to be paid by a
18 parent, the court shall consider the earning capacity of each parent and
19 the guidelines provided by the Supreme Court pursuant to section
20 42-364.16 for the establishment of child support obligations. Upon
21 application, hearing, and presentation of evidence of an abusive
22 disregard of the use of child support money or cash medical support paid
23 by one party to the other, the court may require the party receiving such
24 payment to file a verified report with the court, as often as the court
25 requires, stating the manner in which child support money or cash medical
26 support is used. Child support money or cash medical support paid to the
27 party having physical custody of the minor child shall be the property of
28 such party except as provided in section 43-512.07. The clerk of the
29 district court shall maintain a record, separate from all other judgment
30 dockets, of all decrees and orders in which the payment of child support,
31 cash medical support, or spousal support has been ordered, whether

1 ordered by a district court, county court, separate juvenile court, or
2 county court sitting as a juvenile court. Orders for child support or
3 cash medical support in cases in which a party has applied for services
4 under Title IV-D of the federal Social Security Act, as amended, shall be
5 reviewed as provided in sections 43-512.12 to 43-512.18.

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

17 (6) Modification proceedings relating to support, custody, parenting
18 time, visitation, other access, or removal of children from the
19 jurisdiction of the court shall be commenced by filing a complaint to
20 modify. Modification of a parenting plan is governed by the Parenting
21 Act. Proceedings to modify a parenting plan shall be commenced by filing
22 a complaint to modify. Such actions shall be referred to mediation or
23 specialized alternative dispute resolution as provided in the Parenting
24 Act. For good cause shown and (a) when both parents agree and such
25 parental agreement is bona fide and not asserted to avoid the purposes of
26 the Parenting Act, or (b) when mediation or specialized alternative
27 dispute resolution is not possible without undue delay or hardship to
28 either parent, the mediation or specialized alternative dispute
29 resolution requirement may be waived by the court. In such a case where
30 waiver of the mediation or specialized alternative dispute resolution is
31 sought, the court shall hold an evidentiary hearing and the burden of

1 proof for the party or parties seeking waiver is by clear and convincing
2 evidence. Service of process and other procedure shall comply with the
3 requirements for a dissolution action.

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

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

10 Sec. 18. Original sections 30-1601, 30-2201, and 42-364, Reissue
11 Revised Statutes of Nebraska, and sections 42-1301, 42-1302, 42-1303, and
12 42-1304, Revised Statutes Supplement, 2017, are repealed.