To: Drafting Committee
Re: Non-Parental Child Custody and Visitation Act
From: Cathy Sakimura, Family Law Director, National Center for Lesbian Rights;
Courtney Joslin, Professor of Law, UC Davis
Date: November 16, 2015

First, thank you so much Jeff for again putting a draft together for us to consider. This is such an important project and we appreciate your attempts to corral us all, and for involving us in this effort.

Second, we thought it might be helpful to circulate some of our major comments and concerns in advance of the meeting. We look forward to continuing to work on this important project.

- **Overall**:
    - Many states do not distinguish between visitation and physical custody. It may be necessary to distinguish between legal custody (decision-making authority) and parenting time in the draft, rather than custody (which seems to generally refer to physical custody) and visitation. Perhaps using bracketed terms would assist here. We also offer some suggestions to address this issue in our comments on Section 6, below.
    - We think a general savings clause should be added to the end of the act stating that this act does not limit or reduce the ability of persons other than legal parents to seek custody or visitation under other sources of law, including equity/common law.

- **Section 2. Definitions.**
    - We think it would be extremely helpful to add into this Section a term for and a definition related to those people who entered into an agreement with the child's parent(s) to accept full and permanent responsibilities as a parent and to raise the child together. Adding a term and definition here will help clarify and streamline Sections 5 and 6.
        - We could cover this group by adding a separate, independent basis for establishing that one is a de facto parent.
        - Alternatively, we could create a new word/phrase for this group of people. They could, for example, be called "parents by estoppel."
    - Our notes indicate that we agreed to delete (3)(B) (people who have "exercised parental responsibility of a child pursuant to a court order."). If we want to continue to include this category of people, it is our position that exercising parental responsibility pursuant to a court order *alone* should not be sufficient to establish that a person is a *de facto* parent.
    - We think it is important that the definition of *de facto* parent clearly exclude people who could be parents under a separate statute or by case law/equity, including under the holding out provision of the Uniform Parentage Act. We might be able to accomplish this by stating something along these lines: "'De facto parent of the child' means an individual who is not a legal parent under another statute or in equity who …" There are quite a number of states that provide greater rights to *de facto*/functional parents than this uniform law does. We are concerned that without this type of saving clause, some courts might interpret this act as reducing their rights

currently existing under other sources of law, even if that was not the intention of the legislators.

- **Section 5. Standing.**
    - Oral agreements. We think it is important to allow oral agreements, as many parents who have raised children together don't have written agreements. To address some of the concerns that have been raised, however, we could impose a higher standard of proof (such as a clear and convincing evidence requirement) when a person is relying on the existence of an oral rather than a written agreement.
    - Written agreements.
        - We are concerned about adding a notarization requirement for written agreements. These agreements are virtually never notarized. Such a requirement would only exclude low-income families who did not seek legal counsel. Indeed, specific requirements about the formalities or specific content of such agreements only exclude uninformed parents rather than preventing abuse.
        - We do not think that a higher burden of proof than preponderance makes sense for written agreements.
        - We also think that it if an oral agreement is not included, it is important <u>not</u> to have a time restriction on when a written agreement can be entered. Many times, parents enter these agreements upon separation as a form of ADR and then co-parent together for a time before a dispute arises. These agreements should be able to be a basis for custody as well as agreements entered before conception or birth.
    - Agreements generally.
        - We also think it would be helpful to have some way for a person to qualify under this provision if they had the consent of one of the two legal parents where the other legal parent was completely absent. For example, maybe the provision could make clear that if one of the legal parents has acted in a way that would meet the standard for abandonment of a child, or their rights are later (after the agreement is entered) terminated, their consent would not be required.
    - Time period for asserting rights. We have concerns about adding a time limit after the non-legal parent stops living with the child in which the action must be brought. A high percentage of cases that would fall into this category involve parents who break up and co-parent peacefully after a break up for two years or even longer before litigation is necessary. Adding in a time limit would encourage litigation rather that peaceful, non-litigation arrangements.
    - Visitation continuing after adoption by another party. We are aware of a number of cases where, after a person was adjudicated to be a *de facto* parent, the legal parent then consented to allow another party to adopt the child for the purpose of trying to cut off the *de facto* parents rights. It is important to clarify that the adoption does not cut off their contact with the child.

- **Section 6. Presumptions.**
    - It is our recollection that we agreed at the last meeting that *de facto* parents would be treated similarly to the way parents by agreement are treated in this draft. We

strongly support that position, and we have very strong concerns about the draft as written. As written, *de facto* parents are treated the same as all other non-parents. In order to be awarded custody or visitation, they must rebut the parental presumption by showing detriment. That standard is much higher than the standard in the vast majority of states for *de facto* parents. Because both an agreement and the creation of *de facto* parent status require the consent of the parent(s), we think treating these two categories of people similarly is appropriate. When someone meets the high bar of the *de facto* parent test, that should be sufficient to move the case to a best interests determination.

- Generally, this section is confusing. In addition, as written, this section may create problems, particularly in states that do not distinguish between physical custody and visitation. In light of these concerns, we wonder if it would be possible to combine what are now subsections (b) and (d). The new, combined section would then address both custody and visitation claims brought by nonparents other than parents by agreement (and, we would argue, de facto parents). In such cases, there would be a presumption that the custodial parent's decisions about custody and visitation are in the best interests of the child. To rebut that presumption, the nonparent would have to establish that failure to award them custody or visitation would be a detriment to the child.
- We recommend deleting subsections (c) and (e). We think they are unnecessary and confusing. If they are kept, we believe that these provisions must distinguish between parents by agreement and *de facto* parents on the one hand, and other nonparents on the other.

- **Section 7. Modification.**
  - We strongly agree that general modification rules should apply (That is, we agree that the non-legal parent would not have to overcome the initial burden in each subsequent attempt to modify the original custody/visitation determination). This is how the majority of states that have considered this issue for modifications of non-parent custody/visitation arrangements have treated the issue. Doing otherwise would allow the legal parent to simply relitigate the issue numerous times without some change in circumstances.

- **Section 11. Child Support.**
  - We do not think it makes sense to allow child support for all non-parents receiving visitation. Child support is typically only for parents, so we don't think it makes sense for, for example, to require grandparents with limited visitation to pay support consistent with the child support guidelines. It may be appropriate to make them bear the costs associated with the visitation, but, again, not child support consistent with the guidelines.
  - There are some categories of people, however, who we think could and should be required to pay support (where appropriate under the guidelines). These people would include people who are parents by agreement or de facto parents, and maybe also true third parties who have been granted significant physical custody and/or legal custody.

- **New Section 14. Savings Clause.**

- Consistent with our comment at the beginning, we strongly support the addition of a provision making clear that nothing in this act eliminates or affects rights a person may have under other sources of law.