

D R A F T

FOR DISCUSSION ONLY

**NONPARENTAL CHILD CUSTODY
AND VISITATION ACT**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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**NONPARENTAL CHILD CUSTODY
AND VISITATION ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 13, 2017

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PREFATORY NOTE

The Nonparental Child Custody and Visitation Act provides procedures and factors for courts to apply when asked to grant custody or visitation to nonparents. The act seeks to balance, within constitutional restraints, the interests of children, parents, and nonparents with whom the children have a close relationship.

Continuation of a relationship between a child and a nonparent can be an important – and even vital – interest, both for the child and the nonparent. When deciding whether to grant relief to a nonparent, courts must, of course, consider the rights of parents. The U.S. Supreme Court has recognized a right of a fit parent to make decisions regarding the rearing of his or her child. *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

In *Troxel*, the paternal grandparents sought visitation with their grandchildren following the father’s suicide. In the six months after the father’s death, the grandparents saw their grandchildren “on a regular basis.” *Id.* at 60. Then the mother informed the grandparents “that she wished to limit their visitation with her daughters to one short visit per month.” *Id.* at 61. The grandparents filed an action under Washington State’s nonparental visitation statute, Wash. Rev. Code § 26.10.160(3) (1994), which provided: “Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings.”

“At trial, the Troxels [the grandparents] requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville [the mother] did not oppose visitation altogether, but instead asked the court to order one day of visitation per month with no overnight stay.” 530 U.S. at 61. The trial court gave the grandparents visitation of “one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents’ birthdays.” *Id.* at 62. The trial court’s findings in support of the judgment were that the Troxel’s “are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music.” *Id.* at 72.

The case (along with two other consolidated cases) was appealed to the Washington Supreme Court, which held the statute was unconstitutional and that visitation to grandparents over objection of a parent should not be granted absent a showing of harm to the child. *In re Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21, 23 (1998).

The grandparents appealed. The U.S. Supreme Court affirmed the Washington Supreme Court, although on narrower grounds. The court said the statute was “breathtakingly broad,” 530 U.S. at 67, and the trial court’s findings were “slender,” *Id.* at 72. The Court struck down the 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 Court said, “The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Id.* at 65, *citing*, among other cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional a Nebraska law prohibiting teaching any subject in a language other than English). The Court held the statute “as applied, exceeded the bounds of the

Due Process Clause.” 530 U.S. at 68.

The Superior Court’s order was not founded on any special factors that might justify the State’s interference with Granville’s fundamental right to make decisions concerning the rearing of her two daughters. . . .

[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.

Id. at 68–69.

The Court said that because its decision was based on the “sweeping breadth” of the statute and the application of the statute in this case, the Court did not need to “consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.” *Id.* at 73.

Justice O’Connor observed in her plurality opinion in *Troxel*: “The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” *Id.* at 63.

The U.S. Census Bureau reports that the unmarried partner population “grew 41 percent between 2000 and 2010, four times as fast as the overall household population.” U.S. Census Bureau, “Households and Families: 2010” at p. 3 (C2010BR-14) (Apr. 2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

Opposite-sex unmarried partner households increased by 40 percent since 2000; same-sex households increased by 80 percent. *Id.* at p. 6.

In 2016, the Census Bureau reported that there were 73,745,000 children in United States under age 18. Of that number, the breakdown for the children’s living arrangements was:

- Living with both parents: 50,679,000
- Living with mother only: 17,223,000
- Living with father only: 3,006,000
- Living with neither parent: 2,836,000
- Of the children living with neither parent, 1,556,000 were living with grandparents.

U.S. Census Bureau, America’s Families and Living Arrangements: 2016, Table C2, Household Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2016 available at <https://www.census.gov/hhes/families/data/cps2016C.html>

The main provisions of this act are:

- a right to seek custody or visitation for two categories of individuals: (1) nonparents who have acted as a consistent caretaker of the child without expectation of financial compensation, and (2) other nonparents who have a substantial relationship with the child and who demonstrate that denial of custody or visitation would be a detriment to the child;
- a provision that act does not apply to a proceeding between two or more nonparents, nor does the act apply to children who are the subject of proceedings for guardianship, abuse, neglect, or dependency;
- a requirement that the pleadings be verified and specify the facts on which the request for custody or visitation is based;
- a requirement of notice to: (1) any parents whose parental rights have not been previously terminated; (2) any person having physical custody of, or visitation with, the child; and (3) the child who is at least 12 years of age.
- a rebuttable presumption that the parent's decision about custody or visitation is in the best interest of the child;
- a burden of proof on the petitioner of clear and convincing evidence;
- protections for victims of domestic violence;
- a list of factors to guide the court's decision;
- a provision that a nonparent granted visitation may be ordered to pay the cost of facilitating visitation, including the cost of transportation; and
- a provision that the rights and remedies of this act are not exclusive and do not preclude additional rights and remedies under laws of the state other than this act.

1 **NONPARENTAL CHILD CUSTODY AND VISITATION ACT**

2 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Nonparental Child
3 Custody and Visitation Act.

4 **SECTION 102. DEFINITIONS.** In this act:

5 (1) “Child” means an unemancipated individual who has not attained [18] years of age.

6 (2) “Child abuse” means child abuse as defined in [cite to definition of “child abuse” in
7 law of this state other than this [act]].

8 (3) “Child neglect” means child neglect as defined in [cite to definition of “child neglect”
9 in law of this state other than this [act]].

10 (4) “Consistent caretaker” means an individual who has consistently exercised care and
11 control of a child and has exercised care or made decisions solely or in cooperation with a parent
12 or other custodian regarding the welfare of the child.

13 (5) “Custody” means physical custody, legal custody, or both, as well as joint custody or
14 shared custody as defined by the law of this state other than this [act].

15 (6) “Detriment to a child” means adverse effect to a child’s physical or psychological
16 well-being.

17 (7) “Domestic violence” means domestic violence as defined in [cite to definition of
18 “domestic violence” in civil law of this state other than this [act]].

19 (8) “Individual” means a natural person of any age.

20 (9) “Legal custody” means the power to make important decisions regarding a child,
21 including a decision regarding the child’s education, health care, and extracurricular activity.

22 (10) “Nonparent” means an individual other than a parent. The term includes a
23 grandparent.

24 (11) “Parent” means an individual recognized as a parent under law of this state other

1 than this [act].

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

4 (13) “Person” means an individual, estate, business or nonprofit entity, public
5 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
6 entity.

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

8 (15) “Sexual assault” means sexual assault as defined in [cite to definition of “sexual
9 assault” in law of this state other than this [act]].

10 (16) “Stalking” means stalking as defined in [cite to definition of “stalking” in civil law
11 of this state other than this [act]].

12 (17) “State” means a state of the United States, the District of Columbia, Puerto Rico, the
13 United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of
14 the United States. The term includes a federally recognized Indian tribe.

15 (18) “Substantial relationship” means a familial or other relationship in which a
16 significant emotional bond exists between a nonparent and a child.

17 (19) “Visitation” means the right to spend time with a child, including an overnight.

18 **Comment**
19

20 The definition of “child” is the same as that used in the Uniform Deployed Parents
21 Custody and Visitation Act, § 102(3)(A) (2012). The age of majority in most states is 18,
22 although some states set the age of majority at graduation from high school, and a few states set
23 the age higher than 18. This act does not include in the definition of “child” adult children who
24 are the subject of a court order concerning custodial responsibility, such as individuals with a
25 developmental disability. Rights to custody of visitation with adult children would be
26 determined under the state’s guardianship laws.
27

28 In Family Law, the terms “custody” and “visitation” are flexible concepts. In most states,
29 there is not a fixed amount of time the child spends with a parent who has “custody” or

1 “visitation,” although some states utilize guidelines to specify the time the child spends with the
2 noncustodial parent. Nonetheless, a person with “custody” provides the child with a home or
3 primary home. The drafters anticipate that visitation granted to nonparents will be decided on
4 the facts of each case rather than by guidelines. The definition of “custody” includes joint
5 custody or shared custody as defined by other state law. Thus, under this act, courts have the
6 option of granting joint custody or shared custody (as well as sole custody). A guardian of the
7 person of the child would be considered to have “custody.”
8

9 The definition of “detriment to the child” is based on Cal. Fam. Code § 3041(c) (2016) (a
10 section entitled “Custody award to nonparent; findings of court; hearing”). That section
11 provides: “As used in this section, ‘detriment to the child’ includes the harm of removal from a
12 stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his
13 or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for
14 care and affection, and who has assumed that role for a substantial period of time. A finding of
15 detriment does not require any finding of unfitness of the parents.” *See also* D.C. Code § 16-
16 831.07 (2017) (providing among the bases for granting a third party custody is a finding by clear
17 and convincing evidence “[t]hat that custody with a parent is or would be detrimental to the
18 physical or emotional well-being of the child”).
19

20 The definitions of “person” and “state” are the definitions provided by the Uniform Law
21 Commission “Drafting Rules,” Rule 305 & 306 (2012).
22

23 The definition of “legal custody” is similar to the definition of “legal custody” in many
24 states. The definition of “legal custody” also is similar to the definition of “decision-making
25 authority” in the Uniform Deployed Parents Custody and Visitation Act (2012), which provides:
26 “the power to make important decisions regarding a child, including decisions regarding the
27 child’s education, religious training, health care, extracurricular activities, and travel.” “Legal
28 custody” might include the power to enroll a child in a religious school, but it normally should
29 not include selection of a child’s religion since most courts have held both parents have a right to
30 expose their child to his or her religious beliefs or lack of religious beliefs. *See, e.g., Felton v.*
31 *Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981); *In re Marriage of Mentry*, 142 Cal. App 260,
32 190 Cal. Rptr. 843 (1983); *Hansen v. Hansen*, 404 N.W.2d 460 (N.D. 1987). Decisions about
33 travel are not included since persons with custody, as well as persons with visitation, generally
34 have a right to travel with the children, including on vacation. A person with “legal custody,”
35 however, generally would determine if the child were to travel on his own her own, such as for
36 an educational or athletic program.
37

38 The definition of “nonparent” is “an individual other than a parent. The term includes
39 grandparents.” Other persons could obtain relief under the act provided they meet the
40 requirements of the act (including clear and convincing evidence of substantial relationship with
41 the child and detriment to the child if custody or visitation was not granted).
42

43 The definition of “parent” is “a person recognized as a parent under law of this state other
44 than this [act].” The sources of the definition of “parent” may include the state’s parentage
45 statutes, divorce statutes, and case law. In most states, “parent” would include biological
46 parents, adoptive parents, and men who have acknowledged paternity (even though they are not

1 biologically related to the child). “Parent” also might include persons who agree to conceive a
2 child through assisted reproductive technology or by use of surrogates. Generally, a person
3 ceases to be a parent if his or her rights have been terminated. In addition, a man who donates
4 sperm or a woman who donates an egg usually are not considered to be parents.
5

6 The definition of “parenting time” is made with reference to law of the state other than
7 this act. The term is a comparatively modern term designed to supplement or replace the terms
8 “custody” and “visitation,” particularly in disputes between parents. The term is generally used
9 to focus attention on parenting of the child and allocation of time with the child rather than
10 which parent has “custody.” The term does not apply to nonparents since they are not parents.
11 The Illinois definition of “parenting time” is: “the time during which a parent is responsible for
12 exercising caretaking functions and non-significant decision-making responsibilities with respect
13 to the child.” 750 Ill. Comp. Stat. 5/600(e) (2016). If a state does not use the term “parenting
14 time,” the definition of “parenting time” could be omitted.
15

16 The definition of “physical custody” is similar to the definition of “physical custody” in
17 the Uniform Child Custody Jurisdiction and Enforcement Act, § 102(14) (1997) (“the physical
18 care and supervision of a child”).
19

20 The definition of “substantial relationship” is drawn, in part, from Minn. Stat. Ann. §
21 518E.301 (West 2016), which provides: “‘close and substantial relationship’ means a
22 relationship in which a significant bond exists between a child and a nonparent.”
23

24 **SECTION 103. SCOPE.**

25 (a) This act governs a proceeding in which a nonparent seeks custody or visitation over
26 the objection of a parent.

27 (b) This [act] does not limit a parent from requesting custody or visitation under law of
28 this state other than this [act].

29 (c) This [act] does not apply:

30 (1) to a proceeding between nonparents, or

31 (2) when the child is the subject of a proceeding under [cite to law of this state
32 other than this [act] regarding custody and visitation related to guardianship of a person, child
33 abuse, child neglect, or dependency of a child].

34 (d) The Indian Child Welfare Act, 25 U.S.C. Sections 1901 through 1923, governs
35 custody and visitation rights of a nonparent of an Indian child as defined in that act.

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Comment

This act does not provide for custody or visitation to nonparents for children who are the subject proceedings for guardianship of the person, abuse, neglect, or dependency. Such laws and related regulations have their own provisions regarding where a child will be placed and who may have contact with the child. The guardianship, abuse, neglect, and dependency laws usually are in a different portion of the statutes than laws pertaining to divorce, parentage, and nonparental rights. The drafters of this act do not wish for this act to conflict with or interfere with the laws of guardianship, abuse, neglect, or dependency. When a child is no longer the subject of such proceedings, relief may be sought under this act. The provision in this section is similar to Or. Stat. § 109.119(9) (West 2015) (excluding application of a nonparental visitation statute from children who are the subject of dependency proceedings). *See also* Minn. Stat. Ann. § 257C.08(4) (West 2015) (excluding foster parents from coverage under the state’s nonparental visitation law).

The Uniform Child Custody Jurisdiction and Enforcement (UCCJEA) applies to “child-custody proceeding[s] . . . in which legal custody, physical custody, or visitation with respect to a child is an issue.” UCCJEA, Section 104(4) (1997). The UCCJEA applies to guardianship proceedings as well as proceedings under this act. *Id.* In the event there are simultaneous proceedings under this act and under guardianship law, the UCCJEA (as well as state venue laws) would determine which court has priority to exercise jurisdiction.

This act, as well as the Uniform Child Custody Jurisdiction and Enforcement Act, § 104(a) (1997), do not apply to Indian children who are covered by the Indian Child Welfare Act, 25 U.S.C. Section 1901 through 1923.

SECTION 104. EFFECT OF ADOPTION OF CHILD.

(a) Adoption of a child by a relative, stepparent, or cohabitant of a parent of a child does not preclude a court from granting visitation of the child to a nonparent under this [act].

(b) If a child is adopted by a relative, stepparent, or cohabitant of a parent of the child, an order of visitation to a nonparent made under this [act] remains valid and is not changed by the adoption.

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Comment

As of 2013, the statutes of 24 states explicitly allow visitation for nonparents if the child has been adopted by a relative, including a stepparent. Jeff Atkinson, *Shifts in the Law Regarding Rights of Third Parties to Seek Visitation and Custody of Children*, 47 Fam. L. Q. 1, 20-23 (Spring 2013).

1 **SECTION 105. JURISDICTION.**

2 (a) Subject to Section 103(d), a proceeding under this [act] must be commenced in the
3 court having jurisdiction to determine custody or visitation under [cite to this state’s Uniform
4 Child Custody Jurisdiction and Enforcement Act].

5 **Comment**

6 The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has
7 been adopted in 49 states. As of May 2017, Massachusetts is the only state that has not adopted
8 the UCCJEA, although Massachusetts did adopt the Uniform Child Custody Jurisdiction Act
9 (UCCJA). The Uniform Law Commission has promulgated a 2013 version of the UCCJEA (to
10 cover international issues as well as domestic issues). As of May 2017, the 2013 UCCJEA has
11 not been adopted in any states.

12
13 If at the time a petition is filed under this act, an action is already pending regarding the
14 same child, the petition should be filed as part of the pending action (assuming the pending
15 action is filed in compliance with the UCCJEA).

16
17 **SECTION 106. STANDING.**

18 (a) A nonparent has standing under this [act] to file a [petition] for custody or visitation
19 of the child if the nonparent:

20 (1) has acted as a consistent caretaker of the child without expectation of financial
21 compensation and:

22 (A) has resided with the child for six or more consecutive months, or for a
23 child less than six months of age, since the birth of the child, excluding each period of temporary
24 absence; and

25 (B) a parent of the child explicitly or tacitly accepted the development of a
26 bonded and dependent relationship between the child and the nonparent, or

27 (2) has a substantial relationship with the child and denial of custody or visitation
28 would result in [detriment] to the child.

1 (b) The court shall determine standing of a nonparent in a proceeding under this [act] on
2 the basis of the [petition] under Section 107. The court may hold a hearing to determine disputed
3 facts material to the issue of standing. If the court holds a hearing, the hearing must be held on
4 an expedited basis.

5 **Legislative Note:** *A state may wish to substitute the term “harm” for “detriment” in paragraph*
6 *(a)(2) if a court in those states has held, as a matter of constitutional law, that harm to a child*
7 *without granting visitation must be shown before visitation is granted to a nonparent.*
8

9 **Comment**

10 The requirement of standing serves to protect the interests of parents and filter out cases
11 in which the petitioner does not have a meritorious claim, while at the same time allowing the
12 opportunity to preserve relationships between a child and nonparent with whom the child has a
13 particularly close relationship.
14

15 To reduce the burden of litigation, a parent may be able to expedite disposition of a case
16 by using a motion to dismiss or for summary judgment to challenge whether the nonparent has
17 standing to pursue the action. Alternatively, the parent may challenge whether the facts alleged
18 by the nonparent are sufficient to warrant a trial on the merits.
19

20 In the U.S. Supreme Court’s plurality opinion in *Troxel v. Granville*, Justice O’Connor
21 stated: “As Justice KENNEDY recognizes, the burden of litigating a domestic relations
22 proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right
23 of a custodial parent to make certain basic determinations for the child’s welfare becomes
24 implicated.” 530 U.S. at 75, *quoting* Kennedy, J. at 530 U.S. at 101. *See also D.P. v. G.J.P.*,
25 146 A.3d 204, 213 (Pa. 2016) (stating that bifurcating proceedings with determination of
26 standing before the merits “serves an important screening function in terms of protecting parental
27 rights”); *Rideout v. Riendeau*, 2000 ME 198, ¶ 30, 761 A.2d 291, 302 (stating that determination
28 of standing before full litigation of the claim “provides protection against the expense, stress, and
29 pain of litigation”).
30

31 The statutes of many states specify the circumstances in which visitation by a nonparent
32 may be sought – circumstances which often involve some disruption of the family – e.g.,
33 divorce, separation, death of a parent, or a child born outside of marriage. Such broad
34 descriptions of circumstances in which visitation may be sought do not, by themselves, provide a
35 reliable indicator of whether nonparental visitation (or custody) should be allowed. *See Dorr v.*
36 *Woodard*, 140 A.3d 467, 472 (Me. 2016) (holding death of a parent without other compelling
37 reasons was not sufficient reason to confer standing); *D.P. v. G.J.P.*, 146 A.3d 204 (Pa. 2016)
38 (holding that separation of the parents for six months was not a sufficient basis to allow
39 grandparents to seek visitation). It is preferable to focus on the factors used to decide visitation
40 or custody, particularly the closeness of the relationship between the child and the nonparent.
41

1 The following court opinions have held, as a matter of state or federal constitutional law,
2 that harm to the child without granting visitation must be shown before visitation is granted to a
3 grandparent. *Weldon v. Ballow*, No. 2140471, ___ So.3d ___, 2015 WL 6618983, at 15 (Ala.
4 Civ. App. Oct. 30, 2015), *cert. denied sub nom. Ex parte Strange*, No. 1150152, 2016 WL
5 281069 (Ala. Jan. 22, 2016); *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d 453 (2002); *Sullivan*
6 *v. Sapp*, 866 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d 1067 (Haw. 2007); *Blixt*
7 *v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203
8 (2003); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005).

9
10 **SECTION 107. [PETITION.]**

11 (a) A nonparent who [petitions] for custody or visitation under this [act] shall verify the
12 [petition] under penalty of perjury and state facts sufficient to show standing under Section 106,
13 including:

14 (1) the duration and nature of the relationship between the nonparent and the
15 child, including the period of time, if any, the nonparent lived with the child and the caretaking
16 provided for the child by the nonparent;

17 (2) the content of any agreement between the parties regarding caretaking for the
18 child and custody, visitation, or other contact with the child;

19 (3) information about any financial compensation provided to the nonparent in
20 exchange for caretaking of the child;

21 (4) a description of any attempts by the nonparent to obtain custody, visitation, or
22 other contact with the child;

23 (5) the information required by [cite to Section 209 of this state's Uniform Child
24 Custody Jurisdiction and Enforcement Act];

25 (6) the reason why a continuing relationship between the nonparent and the child
26 is in the best interest of the child, applying the factors in Section 113;

27 (7) the reason why denial of custody or visitation to the nonparent would result in
28 [detriment] to the child if the nonparent is claiming a substantial relationship with the child; and

1 (8) the relief sought.

2 (b) If an agreement described in subsection (a)(2) is in writing, the nonparent must attach
3 a copy of the agreement to the [petition].

4 **Legislative Note:** *A state may wish to substitute the term “harm” for “detriment” in paragraph*
5 *(a)(7) if a court in those states has held, as a matter of constitutional law, that harm to a child*
6 *without granting visitation must be shown before visitation is granted to a nonparent.*

7
8 **Comment**
9

10 Requiring verified pleading and specificity in pleadings is intended to reduce actions that
11 are not meritorious and facilitate disposition of non-meritorious cases by motions to dismiss or
12 for summary judgment.

13
14 Among the facts required in the pleading is the information required by Section 209 of
15 the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) – a section entitled
16 “Information to be Submitted to the Court.” The section provides:

17
18 “(a) [Subject to [local law providing for the confidentiality of procedures,
19 addresses, and other identifying information], in] [In] a child-custody proceeding, each
20 party, in its first pleading or in an attached affidavit, shall give information, if reasonably
21 ascertainable, under oath as to the child’s present address or whereabouts, the places
22 where the child has lived during the last five years, and the names and present addresses
23 of the persons with whom the child has lived during that period. The pleading or affidavit
24 must state whether the party:

25
26 (1) has participated, as a party or witness or in any other capacity, in any other
27 proceeding concerning the custody of or visitation with the child and, if so,
28 identify the court, the case number, and the date of the child-custody
29 determination, if any;

30
31 (2) knows of any proceeding that could affect the current proceeding, including
32 proceedings for enforcement and proceedings relating to domestic violence,
33 protective orders, termination of parental rights, and adoptions and, if so, identify
34 the court, the case number, and the nature of the proceeding; and

35
36 (3) knows the names and addresses of any person not a party to the proceeding
37 who has physical custody of the child or claims rights of legal custody or physical
38 custody of, or visitation with, the child and, if so, the names and addresses of
39 those persons.

40
41 (b) If the information required by subsection (a) is not furnished, the court, upon
42 motion of a party or its own motion, may stay the proceeding until the information is
43 furnished.

1 (c) If the declaration as to any of the items described in subsection (a)(1) through
2 (3) is in the affirmative, the declarant shall give additional information under oath as
3 required by the court. The court may examine the parties under oath as to details of the
4 information furnished and other matters pertinent to the court’s jurisdiction and the
5 disposition of the case.
6

7 (d) Each party has a continuing duty to inform the court of any proceeding in this
8 or any other State that could affect the current proceeding.
9

10 [(e) If a party alleges in an affidavit or a pleading under oath that the health,
11 safety, or liberty of a party or child would be jeopardized by disclosure of identifying
12 information, the information must be sealed and may not be disclosed to the other party
13 or the public unless the court orders the disclosure to be made after a hearing in which the
14 court takes into consideration the health, safety, or liberty of the party or child and
15 determines that the disclosure is in the interest of justice.]”
16

17 Regarding the Legislative Note and the wording of subsection (a)(7), seven states require a
18 showing of “harm” (rather than “detriment”) before visitation can be granted to a grandparent.
19 The states are listed in the Comment to Section 106.
20

21 **SECTION 108. NOTICE.** On commencement of a proceeding under this [act], the
22 nonparent shall give notice to:

- 23 (1) a parent whose parental rights to the child have not been previously terminated;
24 (2) any person having custody of or visitation with the child; and
25 (3) the child, if the child is at least 12 years of age.

26 **Comment**
27

28 Elements of the notice provision are similar the notice provision of the Uniform Child
29 Custody Jurisdiction and Enforcement Act, § 205(a) (1997) (“Before a child-custody
30 determination is made under this [Act], notice and an opportunity to be heard . . . must be given
31 to all persons entitled to notice under the law of this State as in child custody proceedings
32 between residents of this State, any parent whose parental rights have not been previously
33 terminated, and any person having physical custody of the child”). The Uniform Revised
34 Guardianship and Protective Proceedings Act, §§ 202(d)(2), 205(a) (2017) requires notice to
35 minors who have attained 12 years of age.
36

37 **SECTION 109. APPOINTMENT; COURT SERVICES.** To the extent available in
38 other proceedings to determine custody or visitation under law of this state other than this [act],
39 the court may make an order:

1 (1) appointing an attorney, guardian ad litem, representative, or similar personnel for the
2 child;

3 (2) requiring mediation or other form of alternative dispute resolution between the parties
4 to the proceeding, but a party who has been the victim of domestic violence, sexual assault, or
5 stalking by another party to the proceeding may not be required to participate in alternative
6 dispute resolution [unless the court can make an order adequately protecting during alternative
7 dispute resolution the safety of the party who was victim of domestic violence, sexual assault, or
8 stalking];

9 (3) ordering an evaluation or home study of the child, parent, or nonparent; and

10 (4) allocating payment between the parties to the proceeding of fees for the services
11 ordered under paragraphs (1), (2), and (3).

12 *Legislative Note: The brackets in paragraph (2) should be removed and the phrase “unless the*
13 *court can make an order adequately protecting during alternative dispute resolution the safety of*
14 *the party who was victim of domestic violence, sexual assault, or stalking” should be included in*
15 *the section in a state that requires mediation of custody and visitation cases, including a case*
16 *involving an allegation of domestic violence.*

17

18

Comment

19 A variety of personnel and court services may assist the court in making decisions
20 regarding nonparental custody and visitation. This act does not mandate the creation of new
21 services in jurisdictions where no similar services exist, but the act does make such services
22 available if the services already are utilized in other custody and visitation cases.

23

24 In subsection (2), the phrase “unless the court can make an order adequately protecting
25 during mediation the safety of the party who was victim of domestic violence” is similar to a
26 phrase in the Uniform Collaborative Law Act, Section 15(c)(2) (2010). Among the protections that
27 might be used would be “shuttle mediation,” in which the parties to mediation are not in the
28 same room with each other and the mediator shuttles between rooms.

29

30 **SECTION 110. EMERGENCY ORDER.** On finding that the child or a party is in

31 danger of imminent harm, the court may expedite a proceeding under this [act] and may issue an

32 emergency order.

1 **Comment**

2
3 This section makes explicit that the court has the power to enter an emergency order, as
4 well as final orders. Generally, other provisions of the act -- including the requirements for
5 pleadings, burden of proof, presumptions, and factors considered – should apply to the issuance
6 of emergency orders in addition to final orders.
7

8 **SECTION 111. PARENTAL PRESUMPTION.**

9 (a) A decision of a parent about a request for custody or visitation by a nonparent is
10 presumed to be in the best interest of the child. The presumption applies in an original
11 proceeding under this [act] brought by a nonparent against a parent and continues to apply unless
12 the presumption is rebutted.

13 (b) A nonparent has the burden to rebut the presumption in subsection (a) by producing
14 clear and convincing evidence of the elements set forth under Section 112. Proof of unfitness of
15 the parent is not required to rebut the presumption in subsection (a).

16 **Comment**

17 The presumption and burden of proof contained in this section recognize the superior
18 right of parents to custody of their children in custody disputes with nonparents, and also provide
19 that the superior right or presumption can be overcome.

20 The presumption and burden of proof is designed to meet the requirements of *Troxel v.*
21 *Granville*, 530 U.S. 57 (2000), in which the Supreme Court struck down Washington State’s
22 third party visitation statute as applied. Justice O’Connor, in a plurality decision, said the
23 Washington statute “contains no requirement that a court accord the parent’s decision any
24 presumption of validity or any weight whatsoever.” *Id.* at 67. “The Superior Court’s order was
25 not founded on any special factors that might justify the State’s interference with Granville’s
26 fundamental right to make decisions concerning the rearing of her two daughters.” *Id.* at 68.
27

28 The Colorado Supreme Court has held that the burden of proof in a grandparent visitation
29 case is clear and convincing evidence – even though the state’s grandparent visitation statute did
30 not explicitly require that. In *In re Adoption of C.A.*, 137 P.3d 318, 328 (Col. 2006), the court
31 held under principles of Due Process, “The grandparent bears the ultimate burden of proving by
32 clear and convincing evidence that the parental determination is not in the child’s best interest
33 and the visitation schedule grandparent seeks is in the child’s best interest.” *See also Polasek v.*
34 *Omura*, 2006 MT 103, ¶ 15, 332 Mont. 157, 162, 136 P.3d 519, 523 (2006) (holding that “clear
35 and convincing evidence” is required); *Jones v. Jones*, 2005 PA Super 337, ¶ 12, 884 A.2d 915,
36 918 (2005), *appeal denied* (Pa. 2006) (holding that “convincing reasons” are required).

1 The nonparent visitation or custody statutes of 22 states and the District of Columbia (as
2 of 2017) specify that clear and convincing evidence is the burden of proof for all or part of the
3 statutes. Ala. Code § 31-3-4.2; Ct. Gen. Stat. § 46b-59(b); D.C. Code § 16-831.03(b); Ga. Code §
4 19-7-3(c); Idaho Code § 32-1704(6); Ind. Code 31-17-2-8.5(a); Iowa Code § 600C.1; Kan. Rev.
5 Stat. §§ 403.270 & 403.280; Maine Rev. Stat. tit. 19-A, § 1891(3); Mich. Comp. Laws §
6 722.25(1); Minn. Stat. 257C.03; Mont. Code § 40-4-228(2); Nev. Rev. Stat. § 125C.050(4); N.H.
7 Rev. Stat. 461-A:6(II); Neb. Stat. § 43-1802(2); 43 Okla. Stat. 109.109.4; Or. Stat. § 109.119;
8 Pa. Stat. Ann. tit. 23, § 5327(b) (2015); R.I. Gen. Laws § 15-5-24.3(a)(2)(v); S.C. Code § 63-15-
9 60; Utah Code § 30-5a-103(2); Va. Code § 20-124.2(B); W.Va. Code § 48-10-702(b).

10 As stated in Black’s Law Dictionary, “The Burden of proof includes both the burden of
11 persuasion and the burden of production.” Black’s Law Dictionary (7th ed. 1999).

12
13 **SECTION 112. ELEMENTS OF AN ACTION FOR CUSTODY AND**
14 **VISITATION.**

15 (a) A court may grant custody or visitation to a nonparent if the nonparent proves by clear
16 and convincing evidence that:

17 (1) the nonparent has acted as a consistent caretaker of the child without
18 expectation of financial compensation and:

19 (A) has resided with the child for six or more consecutive months, or for a
20 child less than six months of age, since the birth of the child, excluding each period of temporary
21 absence;

22 (B) a parent of the child explicitly or tacitly accepted the development of a
23 bonded and dependent relationship between the child and the nonparent; and

24 (C) granting custody or visitation to the nonparent is in the best interest of
25 the child; or

26 (2) the nonparent has a substantial relationship with the child, denial of custody or
27 visitation would result in [detriment] to the child, and granting custody or visitation to the
28 nonparent is in the best interest of the child.

29 (b) A court may grant visitation to a nonparent who commenced a proceeding seeking

1 custody.

2 **Legislative Note:** *A state may wish to substitute the term “harm” for “detriment” in paragraph*
3 *(a)(2) if a court in those states has held, as a matter of constitutional law, that harm to a child*
4 *without granting visitation must be shown before visitation is granted to a nonparent.*

5
6

Comment

7 This section provides two bases for a nonparent to obtain custody or visitation.

8

9 The first basis [which is in subsection (a)(1)] is that the nonparent has been a “consistent
10 caretaker of the child without expectation of financial compensation.” Such a finding includes
11 three enumerated elements. The first element (regarding the length of time the nonparent resided
12 with the child) has a timeframe similar to the time frame in the definition of “home state” of a
13 child under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), § 102(7)
14 (1997).

15

16 The second element of “consistent caretaker” -- acceptance by at least one parent of a
17 “bonded and dependent relationship between the child and the nonparent” – is one of the
18 elements utilized in the definition of “de facto parent” in the Revised Uniform Parentage Act
19 (RUPA), § 204 (2017). The term “bonded” refers to the closeness of the relationship. The term
20 “dependent” refers to the degree to which the child relies upon, and is in need of, the nonparent.

21

22 The third element is that granting custody or visitation to the nonparent is in the best
23 interest of the child. A showing that denial of custody or visitation would result in a detriment to
24 the child is not required.

25

26 The “consistent caretaker” provision of this act has some similarities to definition of “de
27 facto parent” under the RUPA, but the “consistent caretaker” provision is more flexible. Unlike
28 the RUPA, the “consistent caretaker” provision does not require that the individual seeking
29 custody or visitation hold the child out as his or her own. In addition, the “consistent caretaker”
30 provision does not require that the individual has undertaken “full and permanent responsibilities
31 of a parent.”

32 The second basis for a nonparent to obtain custody or visitation under this act [which is in
33 subsection (a)(2)] requires a showing of three elements: (1) “a substantial relationship with the
34 child;” (2) “denial of custody or visitation would result in [detriment] to the child,” and (3)
35 “granting custody or visitation to the nonparent is in the best interest of the child.” Under this
36 basis, the focus is on “substantial relationship” and the “detriment to the child” without the
37 relationship. “Consistent caretaking” is not required. Subsection (a)(2) could be used by
38 grandparents, siblings or others who have a very close relationship with the child, but may not
39 have acted as a “consistent caretaker.”

40

41 The showing of best interest under both bases is relevant not only to whether custody or
42 visitation should be granted to a nonparent, but also to the amount of time the child should be
43 with the nonparent.

44

1 The Supreme Court in *Troxel* did not rule on the issue of whether the constitution
2 requires a showing of harm or potential harm. In her plurality opinion, Justice O’Connor said:

3
4 Because we rest our decision on the sweeping breadth of [Washington Code] §
5 26.10.160(3) and the application of that broad, unlimited power in this case, we
6 do not consider the primary constitutional question passed on by the Washington
7 Supreme Court—whether the Due Process Clause requires all nonparental
8 visitation statutes to include a showing of harm or potential harm to the child as a
9 condition precedent to granting visitation. We do not, and need not, define today
10 the precise scope of the parental due process right in the visitation context. In this
11 respect, we agree with Justice KENNEDY that the constitutionality of any
12 standard for awarding visitation turns on the specific manner in which that
13 standard is applied and that the constitutional protections in this area are best
14 “elaborated with care.” *Post*, at 2079 (dissenting opinion). Because much state-
15 court adjudication in this context occurs on a case-by-case basis, we would be
16 hesitant to hold that specific nonparental visitation statutes violate the Due
17 Process Clause as a *per se* matter.

18
19 530 U.S. at 73.
20

21 In the years since *Troxel* was decided, state courts have generally held that a
22 grandparent’s claim that the grandparent has a positive relationship with the grandchild is not
23 sufficient to justify an order of visitation over the objection of a parent. *See, e.g., Dorr v.*
24 *Woodard*, 2016 ME 79, 140 A.3d 467 (Maine 2016); *Neal v. Lee*, 2000 Ok 90, 14 P.3d 547
25 (2000); *State Dept. of Social and Rehabilitative Services v. Paillet*, 16 P.3d 962 (2001); *Flynn v.*
26 *Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if the grandparent has a
27 substantial relationship with the grandchild – such as raising the child for a few years – that can
28 be the basis for granting visitation to the grandparent over the parents’ objection. *See, e.g.,*
29 *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents had helped raise their
30 grandchildren for the first seven years of the oldest grandchild’s life and for lesser periods for the
31 younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007) (grandparents cared
32 for children while the mother was dying of cancer).

33
34 This act does not set a maximum number of persons who may obtain rights of custody or
35 visitation. In most cases, the number of actively involved persons with a valid claim for custody
36 or visitation will not be large. As courts sort through complex family structures, the number of
37 persons with potential claims for custody or visitation is a factor that should be considered -- but
38 without applying a fixed rule about how many persons with rights to time with the child is too
39 many. The focus needs to remain on the best interest of the child.
40

41 This act governs disputes between nonparents and parents. See Section 103. Disputes
42 between two or more nonparents (when parents are not part of the proceeding) are governed by
43 other laws, such as guardianship laws.
44

45 Regarding the Legislative Note and the wording of subsection (a)(2), seven states require
46 a showing of “harm” (rather than “detriment”) before visitation can be granted to a nonparent.

1 The states are listed in the Comment to Section 106.

2

3

SECTION 113. BEST INTEREST OF CHILD. The court shall consider the

4 following factors to determine whether a grant of custody or visitation to a nonparent would be

5 in the best interest of the child:

6 (1) the nature, extent, and quality of the relationship between the child and parent,

7 including any period of temporary absence;

8 (2) the nature, extent, and quality of the relationship between the child and nonparent,

9 including specific caretaking activity by the nonparent and whether the nonparent has a family

10 relationship with the child;

11 (3) the views of the child, considering the age and maturity of the child;

12 (4) a history or threat by any individual of domestic violence, child abuse, child neglect,

13 sexual assault, or stalking towards any of the following individuals:

14 (A) a party;

15 (B) the child;

16 (C) siblings of the child;

17 (D) a parent or guardian of the child, or

18 (E) an individual residing with a party or with whom the party previously resided;

19 (5) the applicable factors in [insert citation to laws of this state other than this [act]

20 pertaining to factors considered in custody, [parenting time,] or visitation disputes between

21 parents]; and

22 (6) any other relevant factor affecting the best interest of the child.

23

Comment

24 The nonparental visitation statutes of most states, as they existed in 2017, list factors a

25 court should consider (other than best interest of the child). This section reflects factors that

1 have been used by the states.

2

3 **SECTION 114. PRESUMPTION REGARDING DOMESTIC VIOLENCE, CHILD**
4 **ABUSE, CHILD NEGLECT, SEXUAL ASSAULT, OR STALKING.**

5 (a) It is presumed that it is not in the best interest of a child to grant custody or visitation
6 to a nonparent if the nonparent, or an individual residing with the nonparent, has committed any
7 of the following acts against a party, the child, siblings of the child, a parent or guardian of the
8 child, or an individual residing with a party or with whom the party previously resided:

9 (1) domestic violence;

10 (2) child abuse;

11 (3) child neglect;

12 (4) sexual assault; or

13 (5) stalking.

14 (b) The nonparent may rebut the presumption established in subsection (a) by proving
15 that granting custody or visitation to the nonparent will not endanger the child and that it is in the
16 best interest of the child to grant custody or visitation.

17 **Comment**

18 This section provides protection to victims or potential victims of domestic violence by
19 providing a rebuttable presumption that custody or visitation should not be granted to a
20 nonparent if the nonparent, or an individual residing with the nonparent, has committed an act of
21 domestic violence or related offenses. Domestic violence is defined by reference to state law.

22

23 **SECTION 115. PETITION TO MODIFY CUSTODY OR VISITATION.**

24 Modification of an order for custody or visitation entered under this [act] must be decided under [cite
25 to the law of this state other than this [act] governing modification of a custody [or] visitation, [or
26 parenting time] order entered in a dispute between parents.

1 **Comment**

2 This section makes reference to a state’s existing law regarding modification of custody,
3 visitation, or parenting time orders applicable to disputes between parents. In most states, that
4 standard is a showing of substantial change of circumstances coupled with a showing that
5 modification is in the best interest of the child (although a few states have different standards,
6 such as requiring a showing of endangerment if modification is sought within two years of a
7 prior order). Under this approach, a custody or visitation order in favor of a nonparent generally
8 would continue unless the substantial change of circumstances and best interest of the child for
9 modification of the order were shown.

10
11 **[SECTION 116. FINDINGS OF FACT AND CONCLUSIONS OF LAW.** When

12 making a decision under this [act], the court shall make findings of fact and conclusions of law
13 on the record in support of its decision.]

14 *Legislative Note: This section should be omitted in a state where requirement or lack of*
15 *requirement of making findings of fact is governed by court rule rather than by statute and in a*
16 *state that requires findings of fact and conclusions of law in all cases involving family law.*

17
18 **Comment**

19 Requiring findings of fact has several benefits. The fact-finding process structures the
20 court’s review so that the court is less likely to overlook important facts or apply bias in reaching
21 its decision. Careful fact-finding by the trial court also facilitates appellate review and may
22 assist the parties in accepting the decision. At least twenty states and the District of Columbia
23 require the trial court to make findings of fact in custody cases. See Jeff Atkinson, *Modern Child*
24 *Custody Practice - Second Edition*, § 12-45 (LexisNexis 2016).

25
26 **SECTION 117. COST OF FACILITATING VISITATION.** In a proceeding under

27 this [act], a court may order a nonparent granted visitation to pay the cost of facilitating visitation
28 with the child, including the cost of transportation.

29 **Comment**

30 Individuals who receive visitation under this act may, in the court’s discretion, be
31 required to pay the cost of facilitating visitation. The cost of facilitating visitation may include
32 the cost of transportation. An obligation, if any, for a nonparent to pay child support is governed
33 by law other than this act.

34
35 **SECTION 118. AUTHORITY OF NONPARENT TO SEEK SUPPORT FOR**

36 **CHILD.** The authority of a nonparent given custody under this [act] to [petition] for and receive

1 support of the child is governed by law other than this [act].

2 **Comment**

3
4 A nonparent granted custody of a child may wish to obtain child support from a parent or
5 apply for benefits from government or private programs to help a child. The nonparent’s right to
6 seek support or apply for benefits is governed by law other than this act. Section 208(b) of the
7 Revised Uniform Guardianship and Protective Proceedings Act (2017) contains a similar
8 provisions. That section provides: “A guardian may: (1) apply for and receive money for the
9 support of the protected minor otherwise payable to the protected minor’s parent, guardian, or
10 custodian under the terms of any statutory system of benefits or insurance or any private
11 contract, devise, trust, conservatorship, or custodianship.”

12
13 **SECTION 119. ATTORNEY’S FEES AND COSTS.** In a proceeding under this [act],
14 the court may allocate and order payment of attorney’s fees, including interim fees, and costs
15 among the parties to a proceeding [, except that a parent may not be ordered to pay the fees and
16 costs of another party unless the parent asserted a position without merit in the proceeding].

17 **Comment**

18 Litigating issues of nonparental custody and visitation can be financially burdensome,
19 including to the parent. This section gives the court discretion to order payment of attorney’s
20 fees and costs. An award of such fees may deter non-meritorious cases.

21
22 **SECTION 120. OTHER RIGHT OR REMEDY.** A right or remedy under this [act] is
23 not exclusive and does not preclude an additional right and remedy under law of this state other
24 than this [act], including [cite to the Uniform Deployed Parents Custody and Visitation Act] [or
25 other state law dealing with custody of and visitation with a child of a deployed parent].

26 **Comment**

27 The law regarding families is more dynamic than many areas of law. The drafters of this
28 act do not wish to preclude the development of additional rights and remedies in this area,
29 including rights and remedies dealing with children of deployed parents.

30
31 **SECTION 121. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
32 applying and construing this uniform act, consideration must be given to the need to promote
33 uniformity of the law with respect to its subject matter among states that enact it.

1 **SECTION 122. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL**

2 **AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the
3 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
4 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
5 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
6 U.S.C. Section 7003(b).]

7 **SECTION 123. TRANSITIONAL PROVISION.** This [act] applies to a proceeding
8 commenced before, on, or after [the effective date of this [act]] for a [petition] for custody or
9 visitation by a nonparent of a child on which a judgment has not been issued.

10 **[SECTION 124. SEVERABILITY.** If any provision of this [act] or its application to
11 any person or circumstance is held invalid, the invalidity does not affect other provisions or
12 applications of this [act] which can be given effect without the invalid provision or application,
13 and to this end the provisions of this [act] are severable.]

14 *Legislative Note: Include this section only if this state lacks a general severability statute or a*
15 *decision by the highest court of this state stating a general rule of severability.*
16

17 **SECTION 125. REPEALS; CONFORMING AMENDMENTS.**

18 (a)

19 (b)

20 (c)

21 *Legislative Note: When adopting this act, a state should repeal: (1) existing general statutes, if*
22 *any, regarding visitation for a grandparent, stepparent, sibling, and other nonparent, and (2)*
23 *statutes, if any, regarding a custody dispute between a nonparent and a parent.*
24

25 *A state should not repeal: (1) the Uniform Deployed Parents Custody and Visitation Act*
26 *or other state law dealing with custody of and visitation with a child of a deployed parent; (2)*
27 *laws regarding guardianship of a minor; (3) laws regarding a child in custody of the state,*
28 *including a child in foster care; and (4) laws providing specific rights for a de facto parent.*
29

1 **SECTION 126. EFFECTIVE DATE.** This [act] takes effect