

D R A F T

FOR APPROVAL

**UNIFORM NONPARENT CUSTODY
AND VISITATION ACT**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SEVENTH YEAR
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**UNIFORM NONPARENT CUSTODY
AND VISITATION ACT**

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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June 13, 2018

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1 **UNIFORM NONPARENT CUSTODY AND VISITATION ACT**

2 **PREFATORY NOTE**

3 The Nonparent Custody and Visitation Act addresses issues raised when courts are asked
4 to grant custody or visitation to nonparents. The act seeks to balance, within constitutional
5 restraints, the interests of children, parents, and nonparents with whom the children have a close
6 relationship.

7
8 In 2016, the United States Census Bureau reported that there were 73,745,000 children in
9 United States under age 18. Of that number, the breakdown for the children’s living
10 arrangements was:

- 11
12 · Living with both parents: 50,679,000
13 · Living with mother only: 17,223,000
14 · Living with father only: 3,006,000
15 · Living with neither parent: 2,836,000
16 · Of the children living with neither parent, 1,556,000 were living with grandparents.

17
18 U.S. Census Bureau, America’s Families and Living Arrangements: 2016, Table C2, Household
19 Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2016
20 available at <https://www.census.gov/hhes/families/data/cps2016C.html>

21
22 The U.S. Census Bureau reports that the unmarried partner population “grew 41 percent
23 between 2000 and 2010, four times as fast as the overall household population.” U.S. Census
24 Bureau, “Households and Families: 2010” at p. 3 (C2010BR-14) (Apr. 2012), available at
25 <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

26
27 Opposite-sex unmarried partner households increased by 40 percent since 2000; same-sex
28 households increased by 80 percent. *Id.* at p. 6.

29
30 In a case before the U.S. Supreme Court (discussed later in the Prefatory Note), Justice
31 O’Connor observed: “The demographic changes of the past century make it difficult to speak of
32 an average American family. The composition of families varies greatly from household to
33 household.” *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

34
35 The provisions of this act address the legal issues raised by the growing number of
36 children who have a substantial relationship with nonparents. The act does the following:

- 37
38 • recognizes a right to seek custody or visitation for two categories of individuals:
39 (1) nonparents who have acted as consistent caretakers of a child without expectation of
40 compensation, and (2) other nonparents who have a substantial relationship with a child
41 and who demonstrate that denial of custody or visitation cause harm to the child (a
42 nonparent who is not a relative of the child and who is seeking custody or visitation on
43 the basis of a substantial relationship must have formed that relationship without
44 expectation of compensation);

- 1
- 2 • requires that the pleadings be verified and specify the facts on which the request for
- 3 custody or visitation is based;
- 4 • requires the court to determine on the basis of the pleadings whether the nonparent has
- 5 pleaded a prima facie case for relief;
- 6 • requires that notice be provided to: (1) any parent of the child; (2) any person having
- 7 custody of the child; (3) any individual having court-ordered visitation with the child; and
- 8 (4) any attorney, guardian ad litem, or similar representative for the child;
- 9 • provides a rebuttable presumption that the parent’s decision about custody or visitation is
- 10 in the best interest of the child;
- 11 • imposes a burden of proof on the nonparent of clear-and-convincing evidence in order to
- 12 obtain relief;
- 13 • provides protections for victims of domestic violence;
- 14 • provides a list of factors to guide the court’s decision regarding the child’s best interest;
- 15 • provides that a nonparent granted visitation may be ordered to pay the cost of facilitating
- 16 visitation, including the cost of transportation; and
- 17 • provides that the rights and remedies of this act are not exclusive and do not preclude
- 18 recognition of an equitable right or remedy for a de facto parent under law of the state
- 19 other than this act.

20 The act does not apply to a proceeding between two or more nonparents unless a parent is
21 party, nor does the act apply to children who are the subject of proceedings for abuse,
22 neglect, or dependency. In addition, a nonparent may not maintain a proceeding under this act
23 solely on the basis of having served as a foster parent. The degree to which this act applies to
24 children who are the subject of a guardianship depends on the guardianship law of the state.
25

26 Continuation of a relationship between a child and a nonparent can be an important – and
27 even vital – interest, both for the child and the nonparent. When deciding whether to grant relief
28 to a nonparent, courts must, of course, consider the rights of parents. The U.S. Supreme Court
29 has recognized a right of a fit parent to make decisions regarding the rearing of his or her child.
30 *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).
31

32 In *Troxel*, the paternal grandparents sought visitation with their grandchildren following
33 the father’s suicide. The children had never resided with the grandparents, but rather had visited
34 with them regularly throughout their lives. When the mother did not provide the amount of
35 visitation the grandparents requested, the grandparents filed an action under Washington State’s
36 nonparental visitation statute, Wash. Rev. Code § 26.10.160(3) (1994), which provided: “Any
37 person may petition the court for visitation rights at any time including, but not limited to,
38 custody proceedings.”
39

40 At trial, the grandparents sought visitation, including overnights. The mother “did not
41 oppose visitation altogether, but instead asked the court to order one day of visitation per month
42 with no overnight stay.” 530 U.S. at 61. The trial court gave the grandparents visitation of “one
43 weekend per month, one week during the summer, and four hours on both of the petitioning
44 grandparents’ birthdays.” *Id.* at 62. The trial court’s findings in support of the judgment were
45 that the Troxels [the grandparents] “are part of a large, central, loving family, all located in this

1 area, and the [Troxels] can provide opportunities for the children in the areas of cousins and
2 music.” *Id.* at 72.

3
4 The case (along with two other consolidated cases) was appealed to the Washington
5 Supreme Court, which held the statute was unconstitutional on its face and that visitation to
6 grandparents over objection of a parent should not be granted absent a showing of harm to the
7 child. *In re Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21, 23 (1998).

8
9 The grandparents appealed. The U.S. Supreme Court affirmed the Washington Supreme
10 Court, although on narrower grounds. In her plurality opinion, Justice O’Connor stated that the
11 statute was “breathtakingly broad,” 530 U.S. at 67, and the trial court’s findings were “slender,”
12 *Id.* at 72. The Court struck down the statute, as applied, holding the trial court did not give
13 sufficient deference to the decision of a fit parent to decide the amount of contact the children
14 would have with the grandparents.

15
16 According to Justice O’Connor’s opinion, “The liberty interest at issue in this case—the
17 interest of parents in the care, custody, and control of their children—is perhaps the oldest of the
18 fundamental liberty interests recognized by this Court.” *Id.* at 65, *citing*, among other cases,
19 *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional a Nebraska law prohibiting
20 teaching any subject in a language other than English). The Court held the statute “as applied,
21 exceeded the bounds of the Due Process Clause.” 530 U.S. at 68.

22
23 The Superior Court’s order was not founded on any special factors that might justify the
24 State’s interference with Granville’s fundamental right to make decisions concerning the
25 rearing of her two daughters.

26
27 [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will
28 normally be no reason for the State to inject itself into the private realm of the family to
29 further question the ability of that parent to make the best decisions concerning the
30 rearing of that parent’s children.

31
32 *Id.* at 68 – 69.

33
34 The plurality reasoned that because its decision was based on the “sweeping breadth” of
35 the statute and the application of the statute in this case, the Court did not need to “consider the
36 primary constitutional question passed on by the Washington Supreme Court—whether the Due
37 Process Clause requires all nonparental visitation statutes to include a showing of harm or
38 potential harm to the child as a condition precedent to granting visitation.” *Id.* at 73. For
39 discussion of state law on the issue of harm, see the comment to Section 4 regarding “Substantial
40 relationship and the showing of harm.”

1 **UNIFORM NONPARENT CUSTODY AND VISITATION ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Nonparent
3 Custody and Visitation Act.

4 **SECTION 2. DEFINITIONS.** In this [act]:

5 (1) “Child” means an unemancipated individual who is less than [18] years of age.

6 (2) “Compensation” means wages or other remuneration paid in exchange for care of a
7 child. The term does not include reimbursement of expenses for care of a child, including
8 payment for food, clothing, and medical expenses.

9 (3) “Consistent caretaker” means a nonparent who meets the requirements of Section 4.

10 (4) “Custody” means physical custody, legal custody, or both. The term includes joint
11 custody or shared custody.

12 (5) “Harm to a child” means significant adverse effect on a child’s physical, emotional, or
13 psychological well-being.

14 (6) “Legal custody” means the right to make significant decisions regarding a child,
15 including a decision regarding a child’s education, health care, and scheduled activity.

16 (7) “Nonparent” means an individual of any age other than a parent of the child. The
17 term includes a grandparent, sibling, or stepparent of the child.

18 (8) “Parent” means an individual of any age recognized as a parent under law of this state
19 other than this [act].

20 (9) “Person” means an individual, estate, business or nonprofit entity, public corporation,
21 government or governmental subdivision, agency, or instrumentality, or other legal entity.

22 (10) “Physical custody” means living with a child and exercising day-to-day care of the
23 child.

24 (11) “Record” means information that is inscribed on a tangible medium or that is stored

1 in an electronic or other medium and is retrievable in perceivable form.

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

5 (13) “Substantial relationship” means a relationship between a nonparent and child that
6 meets the requirements of Section 4.

7 (14) “Visitation” means the right to spend time, which may include an overnight, with a
8 child who is living with another person.

9 **Comment**

10

11 The definition of “child” is similar to the first portion of the definition of “child” in the
12 Uniform Deployed Parents Custody and Visitation Act, § 102(3)(A) (2012). The age of majority
13 in most states is 18 years of age, although some states set the age of majority at graduation from
14 high school, and a few states set the age higher than 18 years of age. Unlike the Deployed
15 Parents Custody and Visitation Act, this act does not include in the definition of “child” adult
16 children who are the subject of a court order concerning custodial responsibility, such as
17 individuals with a developmental disability. Rights to custody of visitation with adult children
18 would be determined under the state’s guardianship laws or other applicable law.

19

20 The term “compensation” is used in Sections 4 and 7. Section 4(b) provides that if a
21 nonparent seeks custody or visitation on the basis of being a “consistent caretaker,” the
22 relationship needs to have been formed “without expectation of compensation.” Similarly, under
23 Section 4(c) a nonparent who does not have a familial relationship with the child who seeks
24 custody or visitation on the basis of a “substantial relationship” with the child needs to have
25 formed that relationship “without expectation of compensation.” Thus, under Section 4, a paid
26 nanny who does not have a familial relationship with the child would not be able to seek custody
27 or visitation. Section 7(b)(5) requires that compensation arrangements be disclosed in the
28 pleadings.

29

30 In family law, the terms “custody” and “visitation” are flexible concepts. In most states,
31 there is not a fixed amount of time the child spends with a parent who has “custody” or
32 “visitation,” although some states utilize guidelines to specify the time the child spends with the
33 noncustodial parent. Nonetheless, a person with “custody” provides the child with a home or
34 primary home. (In the case of joint custody with equal time-sharing, neither home may be
35 primary compared to the other home.) The act was drafted with the anticipation that visitation
36 granted to nonparents will be decided on the facts of each case rather than by guidelines. The
37 definition of “custody” includes joint custody (sometimes referred to as shared custody). Thus,
38 under this act, courts have the option of granting joint custody, as well as sole custody. Although

1 many states utilize the term “parenting time” to describe the time a child spends with each
2 parent, the terms “custody” and “visitation” are still commonly used, and are appropriate, to
3 describe the time a child spends with a nonparent. “Visitation” is defined as: “the right to spend
4 time, which may include an overnight, with a child who is living with another person.” For
5 example, a nonparent may be granted the right to spend a defined period of time per month with
6 a child who lives primarily with a legal parent or lives with parents who share custody.
7 Visitation may include contact by telephone or other electronic means as well as in-person
8 contact.
9

10 “Harm to a child” can be physical, emotional, or psychological. The harm must result in
11 a “significant adverse effect.” Testimony from a mental health professional can be helpful – but
12 not required – to show the effect. Section 5(b) provides that when rebutting the presumption in
13 favor of a parent’s decision, “[p]roof of unfitness of a parent is not required.”
14

15 The definition of “legal custody” is similar to the definition of that term in many states.
16 The definition of “legal custody” also is similar to the definition of “decision-making authority”
17 in the Uniform Deployed Parents Custody and Visitation Act (2012), which provides: “the
18 power to make important decisions regarding a child, including decisions regarding the child’s
19 education, religious training, health care, extracurricular activities, and travel.” As noted
20 regarding the definition of “custody,” “legal custody” may be sole or joint. “Legal custody”
21 might include the power to enroll a child in a religious school, but it normally should not include
22 selection of a child’s religion since most courts have held both parents have a right to expose
23 their child to his or her religious beliefs or lack of religious beliefs. *See, e.g., Felton v. Felton*,
24 383 Mass. 232, 418 N.E.2d 606 (1981); *In re Marriage of Mentry*, 142 Cal. App 260, 190 Cal.
25 Rptr. 843 (1983); *Hansen v. Hansen*, 404 N.W.2d 460 (N.D. 1987).
26

27 The definition of “nonparent” is “an individual other than the parent of a child. The term
28 includes a grandparent, sibling, and stepparent of the child, as well as other relatives and
29 nonrelatives. All nonparents – whether or not related to the child – must meet the requirements
30 of the act, including clear-and-convincing evidence of status as a “consistent caretaker” or a
31 “substantial relationship” with a child.
32

33 The definition of “parent” is “an individual recognized as a parent under law of this state
34 other than this [act].” The sources of the definition of “parent” may include the state’s parentage
35 statutes, divorce statutes, and case law. In most states, “parent” would include biological
36 parents, adoptive parents, and persons who have acknowledged parentage, even if they are not
37 biologically related to the child. “Parent” also might include an individual who agrees to
38 conceive a child through assisted reproductive technology or by use of a surrogate. In addition,
39 sperm or egg donors for assisted reproduction through fertility clinics to benefit others are not
40 considered to be a parent under the law of most states. For a comprehensive framework on
41 parentage, see the Uniform Parentage Act (2017) (enacted in Washington and Vermont).
42 Generally, an individual ceases to be a parent if the individual’s rights have been terminated.
43

44 The definitions of “person,” “record,” and “state” are the definitions provided by the
45 Uniform Law Commission “Drafting Rules,” Rules 304, 305 & 306 (2012).
46

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

4
5 For discussion of “visitation,” see the entry on “custody” and “visitation.”

6
7 **SECTION 3. SCOPE.**

8 (a) Except as otherwise provided in subsection (b), this [act] applies to a proceeding in
9 which a nonparent seeks custody or visitation.

10 (b) This [act] does not apply to a proceeding:

11 (1) between nonparents, unless a parent is a party to the proceeding;

12 (2) pertaining to custody of or visitation with an Indian child as defined in the
13 Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 – 1963[, as amended], to the extent that the
14 proceeding is governed by the Indian Child Welfare Act of 1978[, as amended]; and

15 (3) a proceeding pertaining to a child who is the subject of an ongoing proceeding
16 in any state[regarding guardianship of the person or] regarding an allegation by a government
17 entity that the child is abused, neglected, dependent, or otherwise in need of care.

18 [(c) A nonparent may not maintain a proceeding under this [act] for custody or visitation
19 of a child solely because the nonparent served as a foster parent of the child.]

20 (d) An individual whose parental rights concerning a child have been terminated may not
21 maintain a proceeding under this [act] concerning the child.

22 (e) Relief under this [act] is not available during the effective period of a custody or
23 visitation order [entered under the [cite to this state’s Uniform Deployed Parents Custody and
24 Visitation Act] or other order] dealing with custody of or visitation with a child of a deployed
25 parent. A custody or visitation order entered before a parent was deployed remains in effect
26 unless modified by order of the court.

1 **Legislative Note:** *In subsection (b)(3), the phrase “guardianship of the person” is in brackets to*
2 *give the enacting state an option to include the phrase in the list of proceedings that are*
3 *excluded from coverage under the act. If a state’s guardianship law allows a court to order*
4 *visitation to a nonparent, the proceedings involving guardianship of the person of a child should*
5 *be included in the list of proceedings not covered by this act. If the guardianship law of the state*
6 *does not permit a court to order visitation with a child who is the subject of a guardianship*
7 *proceeding, the phrase “guardianship of the person” should not be included in subsection (b)(3)*
8 *to allow a court to order visitation with a child who is the subject of a guardianship proceeding.*
9

10 *Subsection (c) is in brackets to give the enacting state the option of not including this*
11 *provision if state law recognizes the right of a former foster parent to seek visitation with a*
12 *child.*
13

14 *In states in which the constitution, or other law, does not permit the phrase “as*
15 *amended” when federal statutes are incorporated into state law, the phrase should be deleted in*
16 *subsection (b)(2).*
17

18 **Comment**

19

20 The scope provisions in subsections (a) and (b)(1) encompasses disputes between a
21 nonparent and a parent regarding custody or visitation. The provision also covers proceedings in
22 which the nonparent and parent seek to enter an agreed order regarding custody or visitation.
23

24 Subsection (b)(2) is based on the Indian Child Welfare Act provision of the Uniform
25 Child Custody Jurisdiction and Enforcement Act (UCCJEA), Section 104(a).
26

27 Subsection (b)(3) provides the act does not apply to a child who is the subject of an
28 ongoing proceeding for abuse, neglect, dependency [or guardianship of the person]. Such laws
29 and related regulations have their own provisions regarding where a child will be placed and who
30 may have contact with the child. The abuse, neglect, dependency [and guardianship] laws
31 usually are in a different section of statutory compilations than laws pertaining to divorce,
32 parentage, and nonparental rights. This act should not conflict with or interfere with the laws of
33 the state regarding abuse, neglect, dependency [or guardianship]. When a child is no longer the
34 subject of such proceedings, relief may be sought under this act. This provision is similar to Or.
35 Stat. § 109.119(9) (West 2015) (excluding application of a nonparental visitation statute from
36 children who are the subject of dependency proceedings). *Cf.* Minn. Stat. Ann. § 257C.08(4)
37 (West 2015) (excluding foster parents from coverage under the state’s nonparental visitation
38 law).
39

40 Subsection (c) provides a nonparent may not use this act to seek custody or visitation
41 solely on the basis that the nonparent served as a foster parent. However, if the nonparent has a
42 relationship with the child independent of the foster care arrangement, then the nonparent could
43 rely on that relationship as a basis to seek custody or visitation. For example, if a child is
44 removed from the parent’s home and is placed with the child’s aunt and uncle with whom the
45 child had a preexisting substantial relationship, that substantial relationship could serve as a basis
46 for obtaining custody or visitation (after the foster placement has concluded).

1 States differ on the issue of visitation rights for foster parents. Some states exclude them
2 from coverage in nonparent visitation statutes. See, e.g., Or. Stat. § 109.119(9) (West 2018)
3 (excluding application of a nonparental visitation statute from children who are the subject of
4 dependency proceedings); Minn. Stat. Ann. § 257C.08(4) (West 2018) (excluding foster parents
5 from coverage under the state’s nonparental visitation law). Texas allows foster parents to seek
6 visitation. Tex. Fam. Code Ann. § 102.003(a) (West 2018) provides: “An original suit may be
7 filed at any time by: . . . (12) a person who is the foster parent of a child placed by the
8 Department of Family and Protective Services in the person's home for at least 12 months ending
9 not more than 90 days preceding the date of the filing of the petition.” See also *In re B.J.*, 242
10 P.3d 1128 (Colo. 2010) (stating the court had power to grant visitation to former foster parents,
11 subject to application of a presumption in favor of the parent’s decision).
12

13 Subsection (d) provides: “An individual whose parental rights concerning a child have
14 been terminated may not maintain a proceeding under this [act] as to that child.” If state law
15 other than this act allows a parent whose rights have been terminated to regain parental rights,
16 this act does not preclude using the other law. See e.g., 750 Ill. Comp. Stat. 50/14.5 (allowing a
17 former parent whose rights have been terminated to petition for adoption if the child is still a
18 ward of the court).
19

20 Subsection (e) regarding orders entered while a parent is deployed is designed to avoid
21 conflicts between orders entered regarding deployed parents and orders entered under this act,
22 although this act also provides: “A custody or visitation order entered before a parent was
23 deployed remains in effect unless modified by order of the court.”
24

25 The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) applies to
26 “child-custody proceeding[s] . . . in which legal custody, physical custody, or visitation with
27 respect to a child is an issue.” UCCJEA, Section 104(4) (1997). The UCCJEA applies to
28 guardianship proceedings as well as proceedings under this act. *Id.* If there are simultaneous
29 proceedings under this act and under guardianship law, the UCCJEA (as well as law of the state
30 on venue) would determine which court has priority to exercise jurisdiction.
31

32 **SECTION 4. REQUIREMENTS FOR ORDER OF CUSTODY OR VISITATION.**

33 (a) A court may order custody or visitation by a nonparent if the nonparent proves that:

34 (1) the nonparent:

35 (A) is a consistent caretaker under subsection (b); or

36 (B) has a substantial relationship under subsection (c); and

37 (2) an order of custody or visitation to the nonparent is in the best interest of the

38 child.

1 (b) A nonparent is a consistent caretaker under this [act] if the nonparent without
2 expectation of compensation:

3 (1) lived with the child for not less than 12 months, unless the court finds good
4 cause to accept a shorter time;

5 (2) regularly exercised care of the child;

6 (3) made day-to-day decisions regarding the child solely or in cooperation with a
7 custodian of the child; and

8 (4) established a bonded and dependent relationship with the child with the
9 express or implied consent of a parent of the child, or without the consent of a parent if no parent
10 has been able or willing to perform parenting functions.

11 (c) A nonparent has a substantial relationship with a child under this [act] if:

12 (1) the nonparent:

13 (A) is an individual with a familial relationship with the child by blood or
14 law; or

15 (B) formed a relationship with the child without expectation of
16 compensation;

17 (2) a significant emotional bond exists between the nonparent and the child; and

18 (3) denial of custody or visitation would result in harm to the child.

19 **Comment**

20
21 *1. Summary of bases for relief*

22
23 This section provides two bases for a nonparent to obtain custody or visitation.

24
25 The first basis [described in subsection (b)] is that the nonparent is a “consistent
26 caretaker” of a child. The second basis [described in subsection (c)] requires a “substantial
27 relationship” with the child.
28

1 Both bases require the nonparent to prove that ordering custody or visitation for the
2 nonparent is in the best interest of the child. The showing of best interest is relevant not only to
3 whether custody or visitation should be granted to a nonparent, but also to the amount of time the
4 child should be with the nonparent.

5
6 This act governs disputes between nonparents and parents. See Section 3. Disputes
7 between two or more nonparents (when parents are not a party to the proceeding) are governed
8 by other law, such as guardianship law.

9
10 2. *Consistent caretaker*

11
12 The “consistent caretaker” provision has four enumerated elements in addition to a
13 provision that the four enumerated elements occur “without expectation of compensation.” The
14 elements are drawn from the American Law Institute Principles of the Law of Family
15 Dissolution, § 2.03(1)(c) (2002); [citation will be inserted to the most recent draft of the
16 *Restatement on Children and the Law*]; and the definition of “de facto parent” in Uniform
17 Parentage Act (UPA), § 609 (2017). See also *In re Custody of H.S.H.-K.*, 193 Wis. 2d 649, 694,
18 533 N.W.2d 419, 435 (1995) (a seminal case giving rights to persons who establish “a parent-
19 like relationship with the child”).

20
21 Regarding the first element, in subsections (b)(1), the 12-month period during which the
22 nonparent lived with the child need not be consecutive months. Examples of compelling reasons
23 for shortening this period are: when a child is under 12 months of age and the petitioner has been
24 living with the child since birth or shortly after, or the period of time is only slightly shorter than
25 12 months, such as 11.5 months, and all other requirements are met.

26
27 The third element regarding making day-to-day decisions refers to minor decisions such
28 as the time the child gets up and goes to bed and what food the child will eat. The decisions may
29 include (but do not have to include) more major decision, such as whether the child should have
30 a medical procedure or enroll in a particular school.

31
32 Regarding the fourth element, the term “bonded” refers to the closeness of the
33 relationship. The term “dependent” refers to the degree to which the child relies upon, and is in
34 need of, the nonparent.

35
36 A nonparent’s status as a consistent caretaker is phrased in the present tense (“the
37 nonparent is a consistent caretaker”). The four enumerated elements are phrased in the past tense
38 (“lived,” “exercised,” “made,” “established”). Thus, if a nonparent was a caretaker of a child in
39 the recent past, but the child is no longer living with the nonparent (such as because the child is
40 back with the parent), the nonparent could still claim status as a consistent caretaker. Such an
41 approach gives the act flexibility and does not force the nonparent to immediately seek relief
42 after the nonparent has stopped living with the child or because the relationship between the
43 parent and nonparent ended. If the child has not lived with the nonparent for a significant period
44 of time, the nonparent would lose status as a consistent caretaker, but still might be able to seek
45 relief under subsection (c) (“substantial relationship”). Determining whether too much time has

1 elapsed before the nonparent sought relief will depend on multiple factors, including the child’s
2 age and whether significant contact between the nonparent and child has continued.
3

4 A showing that denial of custody or visitation would result in harm to the child is not
5 required for a consistent caretaker because severance of a bonded and dependent relationship
6 between a child and a nonparent is presumptively harmful to the child.
7

8 The “consistent caretaker” provision of this act has similarities to the definition of “de
9 facto parent” under the Uniform Parentage Act (2017), but the “consistent caretaker” provision is
10 more flexible. Unlike the Uniform Parentage Act, the “consistent caretaker” provision does not
11 require that the individual seeking custody or visitation hold the child out as his or her own. In
12 addition, the “consistent caretaker” provision does not require that the individual has undertaken
13 “full and permanent responsibilities of a parent.” Moreover, an individual who fits the definition
14 of “consistent caretaker” is entitled to request custody and visitation under this act, but is not
15 entitled to other rights associated with parentage.
16

17 In the years since *Troxel* was decided, state courts have generally held that a grandparent
18 relationship, without more, is not sufficient to justify an order of grandparent visitation over the
19 objection of a parent. *See, e.g., Dorr v. Woodard*, 2016 ME 79, 140 A.3d 467 (ME. 2016); *Neal*
20 *v. Lee*, 2000 Ok 90, 14 P.3d 547 (2000); *State Dept. of Social and Rehabilitative Services v.*
21 *Paillet*, 16 P.3d 962 (2001); *Flynn v. Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the
22 other hand, if the grandparent has raised a child for a few years, that can be the basis for granting
23 visitation to the grandparent over the parents’ objection. *See, e.g., Rideout v. Riendeau*, 761
24 A.2d 291 (Me. 2000) (the grandparents had helped raise their grandchildren for the first seven
25 years of the oldest grandchild’s life and for lesser periods for the younger grandchildren); *E.S. v.*
26 *P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007) (grandparents cared for children while the mother
27 was dying of cancer).
28

29 3. *Substantial relationship and showing of harm* 30

31 The second basis for a nonparent to obtain custody or visitation under this act requires a
32 showing of a familial or other relationship in which “a significant emotional bond exists between
33 the nonparent and child [and] denial of custody or visitation would result in harm to the child.”
34 “Consistent caretaking” is not required. If a grandparent or other relative received compensation
35 for caring for the child, that would not preclude the grandparent or other relative from seeking
36 custody or visitation. If a nonparent who is not a relative seeks custody or visitation, the
37 nonparent’s relationship with the child must have been formed without expectation of
38 compensation. Subsection (c) could be used by grandparents, siblings, stepparents or others who
39 may not have acted as a “consistent caretaker” but can demonstrate a very close relationship with
40 the child.
41

42 The definition of “substantial relationship” is drawn, in part, from Minn. Stat. Ann.
43 § 518E.301 (West 2016), which provides: “close and substantial relationship” means a
44 relationship in which a significant bond exists between a child and a nonparent.”
45

1 At least 10 state supreme courts have held, as a matter of state or federal constitutional
2 law, that harm to the child without granting visitation must be shown before visitation is granted
3 to a grandparent. *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d 453 (2002); *Sullivan v. Sapp*,
4 866 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d 1067 (Haw. 2007); *In re*
5 *Marriage of Howard*, 661 N.W.2d 183, 191 (Iowa 2003); *Blixt v. Blixt*, 437 Mass. 649, 774
6 N.E.2d 1052 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert. denied*, 540 U.S.
7 1177 (2004); *Craig v. Craig*, 253 P.3d 57, 64 (Ok. 2011); *Smallwood v. Mann*, 205 S.W.3d 358
8 (Tenn. 2006); *Jones v. Jones*, 359 P.3d 603, 612 (Utah 2015); *In re Parentage of C.A.M.A.*, 154
9 Wash. 2d 52, 109 P.3d 405 (2005). These cases did not involve nonparents who had acted as
10 consistent caretakers.

11
12 In addition, as of 2017, statutes in nine states require proof of “harm,” “detriment,” or
13 similar proof before visitation is granted to a nonparent. See Ala. Code § 30-3-4.2 (2017)
14 (harm); Ark. Code § 9-13-103(e) (2017) (harm); Conn. Gen. Stat. § 46b-59(b) (2017) (harm);
15 Ga. Code § 19-7-3(c)(1) (harm); 750 Ill. Comp. Stat.5/602.9(b)(3) (2017)(harm); Mich. Stat. §
16 722.27b(4)(b) (2017) (harm); Tenn. Stat. § 36-3-306(b)(1) (2017) (harm); Tex. Fam. Code §
17 153.432(c) (2017) (significantly impair the child’s physical health or emotional well-being); and
18 Utah Code § 30-5a-103(2)(f) (2017) (detriment). Connecticut has both case law and statute
19 requiring “harm.”

20
21 The U.S. Supreme Court in *Troxel* did not rule on the issue of whether the constitution
22 requires a showing of harm or potential harm. In her plurality opinion, Justice O’Connor said:

23
24 Because we rest our decision on the sweeping breadth of [Washington Code] §
25 26.10.160(3) and the application of that broad, unlimited power in this case, we
26 do not consider the primary constitutional question passed on by the Washington
27 Supreme Court—whether the Due Process Clause requires all nonparental
28 visitation statutes to include a showing of harm or potential harm to the child as a
29 condition precedent to granting visitation. . . . Because much state-court
30 adjudication in this context occurs on a case-by-case basis, we would be hesitant
31 to hold that specific nonparental visitation statutes violate the Due Process Clause
32 as a *per se* matter.

33
34 530 U.S. at 73.

35 36 4. Case law

37
38 Courts have recognized that a grant of custody is a greater intrusion on parental rights
39 than a grant of visitation. See e.g., *McAllister v. McAllister*, 2010 ND 40, ¶ 23, 779 N.W.2d 652,
40 660. In claims for either custody or visitation, a nonparent with a substantial relationship with
41 the child must show harm, but the focus of the evidence will vary. In general, a nonparent
42 seeking custody must show that a change in the child’s custody is necessary to prevent harm to
43 the child, while a nonparent seeking visitation will need to show that continued contact with the
44 nonparent through visitation is necessary to prevent harm. See, e.g., *Fish v. Fish*, 285 Conn. 24,
45 47 – 48, 939 A.2d 1040, 1054 (2008).

1 In the years since *Troxel* was decided, state courts have generally held that a
2 grandparent’s claim that the grandparent has a positive relationship with the grandchild is not
3 sufficient to justify an order of visitation over the objection of a parent. *See, e.g., Dorr v.*
4 *Woodard*, 2016 ME 79, 140 A.3d 467 (ME. 2016); *Neal v. Lee*, 2000 Ok 90, 14 P.3d 547 (2000);
5 *State Dept. of Social and Rehabilitative Services v. Paillet*, 16 P.3d 962 (2001); *Flynn v. Henkel*,
6 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if the grandparent has raised a child
7 for a few years – that can be the basis for granting visitation to the grandparent over the parents’
8 objection. *See, e.g., Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents had helped
9 raise their grandchildren for the first seven years of the oldest grandchild’s life and for lesser
10 periods for the younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007)
11 (grandparents cared for children while the mother was dying of cancer).

12
13 An example of a substantial relationship between the child and nonparents that resulted in
14 an order of visitation for nonparents is *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert.*
15 *denied*, 540 U.S. 1177 (2004). The New Jersey Supreme Court reinstated a trial court’s grant of
16 visitation to maternal grandparents after the mother’s death “where the children [had] a very
17 extensive relationship with the grandparents [, including] years where they were seeing the
18 grandparents every other weekend.” 827 A.2d at 224. In that case, there was “a very bad
19 relationship” between the father and the grandparents, and the father believed the grandparents
20 were “evil.” *Id.* at 225. The trial court found the grandparents were appropriate, acted in good
21 faith, and were an important link to the mother’s side of the family. The visitation was: “(1)
22 monthly visitation alternating between a five-hour day visit one month and a visit with two
23 overnights the next month and (2) one extended visitation period in July or August. The court
24 specifically noted that the reason it ordered visitation was its reliance on the grandparents’ expert
25 who opined that such visitation was ‘to protect the children from the harm that would befall them
26 if they were alienated from their grandparents.’” *Id.* at 208.

27
28 5. *Number of persons who may seek custody or visitation*
29

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

36
37 **SECTION 5. PRESUMPTION FOR PARENTAL DECISION.**

38 (a) In an initial proceeding [under this [act], a decision by a parent regarding a request for
39 custody or visitation by a nonparent is presumed to be in the best interest of the child.

40 (b) A nonparent has the burden to rebut the presumption under subsection (a) by clear-
41 and-convincing evidence of the facts required by Section 4. Proof of unfitness of a parent is not

1 required to rebut the presumption under subsection (a).

2 (c) Except as otherwise provided in subsection (d), if a nonparent rebuts the presumption
3 under subsection (a) in an initial proceeding, the presumption remains rebutted for further
4 proceedings.

5 (d) If a nonparent who has been granted an order of visitation requests an order of
6 custody in a modification proceeding, the nonparent must rebut the presumption under
7 subsection (a) as in an initial proceeding.

8 **Comment**

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

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

19
20 The Colorado Supreme Court has held that the burden of proof in a grandparent visitation
21 case is clear-and-convincing evidence – even though the state’s grandparent visitation statute did
22 not explicitly require that. In *In re Adoption of C.A.*, 137 P.3d 318, 328 (Col. 2006), the court
23 held under principles of Due Process that “[t]he grandparent bears the ultimate burden of proving
24 by clear and convincing evidence that the parental determination is not in the child’s best interest
25 and the visitation schedule grandparent seeks is in the child’s best interest.” *See also Polasek v.*
26 *Omura*, 2006 MT 103, ¶ 15, 332 Mont. 157, 162, 136 P.3d 519, 523 (2006) (holding that “clear
27 and convincing evidence” is required); *Jones v. Jones*, 2005 PA Super 337, ¶ 12, 884 A.2d 915,
28 918 (2005), *appeal denied* (Pa. 2006) (holding that “convincing reasons” are required).

29
30 The nonparent visitation or custody statutes of 22 states and the District of Columbia (as
31 of 2017) specify that clear-and-convincing evidence is the burden of proof for all or part of the
32 statutes. Ala. Code § 31-3-4.2; Ct. Gen. Stat. § 46b-59(b); D.C. Code § 16-831.03(b); Ga. Code §
33 19-7-3(c); Idaho Code § 32-1704(6); Ind. Code 31-17-2-8.5(a); Iowa Code § 600C.1; Kan. Rev.
34 Stat. §§ 403.270 & 403.280; Maine Rev. Stat. tit. 19-A, § 1891(3); Mich. Comp. Laws §
35 722.25(1); Minn. Stat. 257C.03; Mont. Code § 40-4-228(2); Nev. Rev. Stat. § 125C.050(4); N.H.
36 Rev. Stat. 461-A:6(II); Neb. Stat. § 43-1802(2); 43 Okla. Stat. 109.109.4; Or. Stat. § 109.119;
37 Pa. Stat. Ann. tit. 23, § 5327(b) (2015); R.I. Gen. Laws § 15-5-24.3(a)(2)(v); S.C. Code § 63-15-
38 60; Utah Code § 30-5a-103(2); Va. Code § 20-124.2(B); W.Va. Code § 48-10-702(b).

1 As stated in Black’s Law Dictionary, “The Burden of proof includes both the burden of
2 persuasion and the burden of production.” Black’s Law Dictionary (10th ed. 2014).

3
4 If a child’s parents disagree about a nonparent’s request for custody or visitation
5 with a child, the court should consider each parent’s wishes in determining whether the
6 nonparent has rebutted the presumption established by this Section. See *In re Marriage of*
7 *Friedman*, 397 P.3d 1063, 1068 (Ariz. Ct. App. 2017).

8
9 The term “initial” in subsection (a) is the same as used in the Uniform Child Custody
10 Jurisdiction and Enforcement Act, Section 201(a) (1997) (“initial child-custody determination”),
11 and the term should have the same meaning in this act as in the UCCJEA.

12
13 **SECTION 6. COMMENCEMENT OF PROCEEDING; JURISDICTION. A**

14 nonparent or parent may commence a proceeding under this [act] by filing a [petition] under
15 Section 7 in the court having jurisdiction to determine custody or visitation under the [Uniform
16 Child Custody Jurisdiction and Enforcement Act] [Uniform Child Custody Jurisdiction Act].

17 *Legislative Note: The applicable statute should be identified. As of 2018, 49 states and*
18 *the District of Columbia have enacted the Uniform Child Custody Jurisdiction and Enforcement*
19 *Act. Massachusetts has not adopted the Uniform Child Custody Jurisdiction and Enforcement*
20 *Act, but it has adopted the Uniform Child Custody Jurisdiction Act.*

21
22 **Comment**

23 The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has
24 been adopted in 49 states. As of May 2018, Massachusetts is the only state that has not adopted
25 the UCCJEA, although Massachusetts did adopt the Uniform Child Custody Jurisdiction Act
26 (UCCJA).

27
28 If at the time a petition is filed under this act, an action for custody or visitation is already
29 pending regarding the same child, the petition should be filed as part of the pending action
30 (assuming the pending action is filed in compliance with the UCCJEA).

31
32 **SECTION 7. VERIFIED [PETITION].**

33 (a) A nonparent who files a [petition] for custody or visitation under this [act] shall verify
34 the [petition] under penalty of perjury and allege facts showing that:

35 (1) the nonparent meets the requirements of a consistent caretaker of the child
36 under Section 4(b); or

1 (2) has a substantial relationship with the child under Section 4(c).

2 (b) A verified [petition] under subsection (a) must state the relief sought and must allege
3 specific facts, showing:

4 (1) the duration and nature of the relationship between the nonparent and the
5 child, including the period, if any, the nonparent lived with the child and the care provided for
6 the child;

7 (2) the content of any agreement between the parties to the proceeding regarding
8 caretaking for the child and custody, visitation, or other contact with the child;

9 (3) a description of any previous attempt by the nonparent to obtain custody,
10 visitation, or other contact with the child;

11 (4) the extent to which the parent is willing to permit the nonparent to have
12 custody, visitation, or other contact with the child;

13 (5) information about compensation or expectation of compensation provided to
14 the nonparent in exchange for care of the child;

15 (6) information required to establish the jurisdiction of the court under the
16 [Uniform Child Custody Jurisdiction and Enforcement Act] [Uniform Child Custody Jurisdiction
17 Act];

18 (7) the reason the requested custody or visitation is in the best interest of the child,
19 applying the factors in Section 12; and

20 (8) if the nonparent alleges a substantial relationship under Section 4(c), the
21 reason denial of custody or visitation to the nonparent would result in harm to the child.

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

1 **Legislative Note:** *In subsection (b)(6), the applicable statute should be identified. As of 2018,*
2 *49 states and the District of Columbia have enacted the Uniform Child Custody Jurisdiction and*
3 *Enforcement Act. Massachusetts has not adopted the Uniform Child Custody Jurisdiction and*
4 *Enforcement Act, but it has adopted the Uniform Child Custody Jurisdiction Act.*

5
6 **Comment**
7

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

11
12 Regarding subsection (b)(3), the description of any previous attempt to obtain custody,
13 visitation, or other contact with the child should include oral requests as well as written requests.
14

15 Among the facts required in the pleading is the information required by Section 209 of
16 the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) – a section titled
17 “Information to be Submitted to the Court.” The section provides:
18

19 “(a) [Subject to [local law providing for the confidentiality of procedures,
20 addresses, and other identifying information], in] [In] a child-custody proceeding, each
21 party, in its first pleading or in an attached affidavit, shall give information, if reasonably
22 ascertainable, under oath as to the child’s present address or whereabouts, the places
23 where the child has lived during the last five years, and the names and present addresses
24 of the persons with whom the child has lived during that period. The pleading or affidavit
25 must state whether the party:
26

27 (1) has participated, as a party or witness or in any other capacity, in any other
28 proceeding concerning the custody of or visitation with the child and, if so,
29 identify the court, the case number, and the date of the child-custody
30 determination, if any;
31

32 (2) knows of any proceeding that could affect the current proceeding, including
33 proceedings for enforcement and proceedings relating to domestic violence,
34 protective orders, termination of parental rights, and adoptions and, if so, identify
35 the court, the case number, and the nature of the proceeding; and
36

37 (3) knows the names and addresses of any person not a party to the proceeding
38 who has physical custody of the child or claims rights of legal custody or physical
39 custody of, or visitation with, the child and, if so, the names and addresses of
40 those persons.
41

42 (b) If the information required by subsection (a) is not furnished, the court, upon
43 motion of a party or its own motion, may stay the proceeding until the information is
44 furnished.
45

46 (c) If the declaration as to any of the items described in subsection (a)(1) through

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

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

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

16 **SECTION 8. SUFFICIENCY OF [PETITION].**

17 (a) The court shall determine based on the [petition] under Section 7 whether the
18 nonparent has pleaded a prima facie case that the nonparent:

19 (1) is a consistent caretaker under Section 4(b); or

20 (2) has a substantial relationship under Section 4(c).

21 (b) If the court determines that the [petition] fails to plead a prima facie case under
22 subsection (a), the court shall dismiss the [petition].
23

24 **Comment**

25 Requiring the court to determine whether a nonparent has pled a prima facie case protects
26 the interests of parents and filters out cases in which the petitioner does not have a meritorious
27 claim, while at the same time allowing the opportunity to preserve relationships between a child
28 and nonparent with whom the child has a substantial relationship.

29 To reduce the burden of litigation, a parent may be able to expedite disposition of a case
30 by using a motion to dismiss or for summary judgment.
31

32 In the U.S. Supreme Court’s plurality opinion in *Troxel v. Granville*, Justice O’Connor
33 stated: “As Justice KENNEDY recognizes, the burden of litigating a domestic relations
34 proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right
35 of a custodial parent to make certain basic determinations for the child’s welfare becomes
36 implicated.” 530 U.S. at 75, *quoting* Kennedy, J. at 530 U.S. at 101. *See also D.P. v. G.J.P.*,
37 146 A.3d 204, 213 (Pa. 2016) (stating that bifurcating proceedings with determination of
38 standing before the merits “serves an important screening function in terms of protecting parental

1 rights”); *Rideout v. Riendeau*, 2000 ME 198, ¶ 30, 761 A.2d 291, 302 (stating that determination
2 of standing before full litigation of the claim “provides protection against the expense, stress, and
3 pain of litigation”).

4
5 The statutes of many states specify the circumstances in which visitation by a nonparent
6 may be sought – circumstances which often involve some disruption of the family – e.g.,
7 divorce, separation, death of a parent, or a child born outside of marriage. Such broad
8 descriptions of circumstances in which visitation may be sought do not, by themselves, provide a
9 reliable indicator of whether nonparental visitation (or custody) should be allowed. See *Dorr v.*
10 *Woodard*, 140 A.3d 467, 472 (Me. 2016) (holding death of a parent without other compelling
11 reasons was not sufficient reason to confer standing); *D.P. v. G.J.P.*, 146 A.3d 204 (Pa. 2016)
12 (holding that separation of the parents for six months was not a sufficient basis to allow
13 grandparents to seek visitation). The criteria of this act, in contrast, focus on the factors used to
14 decide visitation or custody, particularly the closeness of the relationship between the child and
15 the nonparent.

16
17 **SECTION 9. NOTICE.** On commencement of a proceeding under this [act], the
18 nonparent shall give notice to each:

- 19 (1) parent of the child who is the subject of the proceeding;
20 (2) person having custody;
21 (3) individual having court-ordered visitation; and
22 (4) attorney, guardian ad litem, or similar representative appointed for the child.

23 **Comment**

24
25 Elements of the notice provision are similar the notice provision of the Uniform Child
26 Custody Jurisdiction and Enforcement Act, § 205(a) (1997) (“Before a child-custody
27 determination is made under this [Act], notice and an opportunity to be heard . . . must be given
28 to all persons entitled to notice under the law of this State as in child custody proceedings
29 between residents of this State, any parent whose parental rights have not been previously
30 terminated, and any person having physical custody of the child”). The methods by which notice
31 is given are governed by state and local rules. The term “person” is used in subparagraph (2)
32 because a government unit or other institution may have “custody” of a child. The term
33 “individual” is used in subparagraph (3) because only a natural person (an “individual”) may
34 have visitation with a child.

35 36 **SECTION 10. APPOINTMENT; INTERVIEW OF CHILD; COURT SERVICES.**

37 To the extent authorized by law of this state in a family law proceeding other than under this
38 [act], the court in a proceeding under this [act] may:

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

2 (2) interview the child;

3 (3) require the parties to participate in mediation or another form of alternative dispute
4 resolution between the parties to the proceeding, but a party who has been the victim of domestic
5 violence, sexual assault, stalking, or other crime against the individual by another party to the
6 proceeding may not be required to participate in mediation or another form of alternative dispute
7 resolution [unless reasonable procedures are in place to protect the party from a risk of harm,
8 harassment, or intimidation];

9 (4) order an evaluation, investigation, or other assessment of the child’s circumstances
10 and the effect on the child of ordering or denying the requested custody or visitation or
11 modifying the order; and

12 (5) allocate payment between the parties of a fee for a service ordered under this section.

13 *Legislative Note: The brackets in paragraph (3) should be removed and the phrase “unless*
14 *reasonable procedures are in place to protect the party from risk of harm, harassment, or*
15 *intimidation” should be included in the paragraph in a state that requires mediation of custody*
16 *and visitation cases, including a case involving an allegation of domestic violence. If a state does*
17 *not require mediation in those circumstances, delete the phrase and the brackets.*
18

19 **Comment**

20 A variety of personnel and court services may assist the court in making decisions
21 regarding nonparental custody and visitation. This act does not mandate the creation of new
22 services in jurisdictions where no similar services exist, but the act does make such services
23 available if the services already are utilized in other family law proceedings. The evaluations
24 referenced in subsection (4) include mental health evaluations and evaluations of parenting
25 skills.
26

27 In subsection (3), the phrase “[unless] reasonable procedures are in place to protect the
28 party from risk of harm, harassment, or intimidation” is the same as used in the Uniform Family
29 Law Arbitration Act, § 12(b)(3) (2016). Among the protections that might be used would be
30 “shuttle mediation,” in which the parties to mediation are not in the same room with each other
31 and the mediator shuttles between rooms.
32

1 have been used by the states. The second factor – “the nature and extent of the relationship
2 between the child and nonparent” – may include consideration of whether there is a family
3 relationship between the child and the nonparent.
4

5 **[SECTION 13. PRESUMPTION ARISING FROM CHILD ABUSE, CHILD**
6 **NEGLECT, DOMESTIC VIOLENCE, SEXUAL ASSAULT, OR STALKING.**

7 (a) In a proceeding under this [act], the court shall presume that ordering custody or
8 visitation to a nonparent is not in the best interest of the child if the court finds that the
9 nonparent, or an individual living with the nonparent, has committed child abuse, child neglect,
10 domestic violence, sexual assault, stalking, or comparable conduct in violation of law of this
11 state or another state.

12 (b) A finding that conduct specified in subsection (a) occurred must be based on:

13 (1) evidence of a conviction or final judgment in a civil proceeding; or

14 (2) proof by a preponderance of the evidence.

15 (c) A nonparent may rebut the presumption under subsection (a) by proving by clear-and-
16 convincing evidence that ordering custody or visitation to the nonparent will not endanger the
17 health, safety, or welfare of the child.]

18 *Legislative Note: This act is intended to provide a presumption against granting custody or*
19 *visitation to a nonparent if the nonparent or a person living with the nonparents has committed*
20 *acts of domestic violence or related conduct. This goal can be accomplished by adopting Section*
21 *13, or, in the alternative, amending existing state law concerning presumptions and rebuttal of*
22 *presumptions applicable to a dispute between parents. The same types of presumptions and*
23 *criteria for rebuttal of presumptions would apply to nonparents seeking custody or visitation.*
24

25 **Comment**

26 This section provides protection to victims or potential victims of domestic violence by
27 providing a rebuttable presumption that custody or visitation should not be granted to a
28 nonparent if the nonparent, or an individual living with the nonparent, has committed an act of
29 domestic violence or related offenses
30

31 The Legislative Note gives drafters the option of adapting existing state law concerning
32 presumptions and rebuttal of presumption applicable to disputes between parents to disputes

1 between nonparents and parents. Such state laws may provide an alternate list of offenses that
2 give rise to presumptions, provide procedures for utilizing the presumptions, and establish
3 criteria for rebutting the presumptions.

4
5 **SECTION 14. ORDER OF CUSTODY OR VISITATION.**
6

7 (a) In a proceeding under this [act] in which a nonparent seeks custody, the court may
8 order:

9 (1) sole or primary custody to the nonparent;

10 (2) joint custody to the nonparent and a parent or other party; or

11 (3) visitation to the nonparent.

12 (b) In a proceeding under this [act] in which a nonparent seeks only visitation, the court
13 may not order custody to the nonparent seeking visitation.

14 **Comment**
15

16 This section specifies the types of order a court can enter based on the relief sought. A
17 nonparent who seeks custody may be granted visitation since that could be viewed as a lesser
18 included type of relief compared to custody. However, a nonparent who seeks only visitation
19 may not be granted custody since that would be a greater intrusion on parental rights which
20 should not be granted without proper notice and proof.
21

22 Courts have recognized that a grant of custody is a greater intrusion on parental rights
23 than a grant of visitation. *See e.g., McAllister v. McAllister*, 2010 ND 40, ¶ 23, 779 N.W.2d 652,
24 660. In claims for either custody or visitation, a nonparent with a substantial relationship with
25 the child must show harm, but the focus of the evidence will vary. In general, a nonparent
26 seeking custody must show that a change in the child’s custody is necessary to prevent harm to
27 the child, while a nonparent seeking visitation will need to show that continued contact with the
28 nonparent through visitation is necessary to prevent harm. *See, e.g., Fish v. Fish*, 285 Conn. 24,
29 47 – 48, 939 A.2d 1040, 1054 (2008).
30

31 Joint custody is among the options for custody arrangements involving nonparents. *See,*
32 *e.g., Darby v. Combs*, 229 So. 3d 108 (Miss. 2017) (joint custody given to the child’s maternal
33 great-grandparents and paternal grandmother when both parents unfit); *McCormic v. Rider*, 27
34 So. 3d 277, 279 (La. 2010) (a “tripartite custody arrangement” between the grandmother, who
35 had adopted the child, but was no longer able to care for the child by herself, and the former
36 parents who had consented to the adoption a few years earlier).
37

1 **SECTION 15. MODIFICATION OF CUSTODY OR VISITATION.**

2 (a) On [motion], the court may modify a final order of custody or visitation under this
3 [act] on a showing by a preponderance of the evidence that:

4 (1) a [substantial] [material] and [continuing] change in circumstance has
5 occurred relevant to the custody or visitation of the child; and

6 (2) modification is in the best interest of the child under Section 12.

7 (b) Except as otherwise provided in subsections (c) and (d), if a nonparent has rebutted
8 the presumption under Section 5 in an initial proceeding, the presumption remains rebutted.

9 (c) If a [motion] is filed to modify an order of visitation under this [act] to obtain an order
10 of custody, the nonparent must rebut the presumption under Section 5.

11 (d) On agreement of the parties, the court may modify an order of custody or visitation,
12 unless the court finds that the agreement is not in the best interest of the child.

13 *Legislative Note: In subsection (a)(1), a state should use the words in state law governing*
14 *modification of custody or parenting time in proceedings between parents.*

15
16 **Comment**

17
18 Subsection (a) reflects the standard for modification of custody or visitation that is
19 applied in most states: a showing of substantial and continuing change of circumstance, coupled
20 with a showing that modification is in the best interest of the child. Under this approach, a
21 custody or visitation order in favor of a nonparent generally would continue unless the
22 substantial change of circumstance and best interest of the child for modification of the order
23 were shown. Subsection (c) provides that presumption in favor of parents applies if the
24 nonparent is seeking to modify an order of visitation to an order of custody.

25
26 Under subsection (b), if a nonparent obtained an order visitation and later wishes to
27 modify the order of visitation, the nonparent does not need to rebut the presumption in favor of
28 the parent in the modification proceeding since the presumption already was rebutted in the
29 earlier proceeding. The parent only needs to show the modification is in the best interest of the
30 child. If, however, a nonparent who obtained an order of visitation wishes to obtain an order of
31 custody, subsection (c) requires the nonparent to rebut the presumption under Section 5 since the
32 order of custody would be a significantly greater intrusion on the parent’s interest than the order
33 of visitation.

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Comment

This section permits a court to allocate responsibility for paying costs of facilitating visitation, including the cost of transportation. Cost of transportation could include an escort for a child. In most cases in which a nonparent is exercising visitation, the nonparent would pay the associated costs.

SECTION 19. LAW GOVERNING CHILD SUPPORT. The authority of a court to

award child support payable to or by a nonparent is governed by law of this state other than this [act].

Comment

A nonparent granted custody of a child may wish to obtain child support from a parent or apply for benefits from government or private programs to help a child. The nonparent’s right to seek support or apply for benefits is governed by law other than this act.

[SECTION 20. EQUITABLE RIGHT OR REMEDY. This [act] does not preclude

the recognition of an equitable right or remedy for a de facto parent under law of this state other than this [act].]

Legislative Note: If state law treats a de facto parent as a nonparent, but recognizes greater rights for the de facto parent than those established by this act on equitable grounds, the state should enact this section.

If state law refers to “psychological parent” or an individual acting “in loco parentis” rather than “de facto parent”, the alternate term should be substituted.

Comment

The law regarding families is more dynamic than many areas of law. This act is not intended to preclude the development of additional equitable rights and remedies in this area.

The Uniform Parentage Act (2017) recognizes legal parentage for an individual who meets the criteria for “de facto parent.” The definition of “de facto parent” under equitable principles may be different from the definition in the Uniform Parentage Act.

1 **SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
2 applying and construing this uniform act, consideration must be given to the need to promote
3 uniformity of the law with respect to its subject matter among states that enact it.

4 **SECTION 22. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
5 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
6 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
7 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
8 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
9 Section 7003(b).

10 **SECTION 23. TRANSITIONAL PROVISION.** This [act] applies to a proceeding
11 commenced before, on, or after [the effective date of this [act]] in which a final order has not
12 been entered.

13 **[SECTION 24. SEVERABILITY.** If any provision of this [act] or its application to
14 any person or circumstance is held invalid, the invalidity does not affect other provisions or
15 applications of this [act] which can be given effect without the invalid provision or application,
16 and to this end the provisions of this [act] are severable.]

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

19
20 **SECTION 25. REPEALS; CONFORMING AMENDMENTS.**

21 (a)

22 (b)

23 (c)

24 ***Legislative Note:** When enacting this act, a state should repeal: (1) general statutes, if any,*
25 *regarding visitation for a grandparent, stepparent, sibling, and other nonparent; and (2)*
26 *statutes, if any, regarding a custody dispute between a nonparent and a parent.*

1 *When enacting this act, a state should not repeal: (1) the state’s Uniform Deployed*
2 *Parents Custody and Visitation Act or other state law dealing with custody of and visitation with*
3 *a child of a deployed parent; (2) law regarding guardianship of a minor; (3) law regarding a*
4 *child in custody of the state, including a child in foster care; or (4) law providing a de facto*
5 *parent with the rights of a legal parent.*

6
7 **SECTION 26. EFFECTIVE DATE.** This [act] takes effect