To: Members of the Drafting Committee
From: Catherine J. Ross, Observer
Re: Draft of March 2, 2015
Date: March 26, 2015

First, I want to apologize for missing the January telephone conference, when I was felled by the flu, and for unavoidable conflicts that make it impossible for me to join you on March 27-28. I have reviewed all of the materials and want to share my thoughts with the group.

Second, I want to thank Jeff for this very promising draft, and for the thoughtful and scholarly comments and road maps.

I will start with some general concerns and then provide comments on the draft in the order in which the issues arise.

My most prominent concern is that the treatment of de facto parents is out of line with the law in most jurisdictions that currently recognize equitable parents. Once a former third party is recognized as a de facto parent, he or she is a "parent," with full legal rights to seek custody and or visitation. Throughout this draft de facto parents (by whatever terminology) are referred to as third parties. This is not the law and it is not appropriate.

Second, there is no discussion of a maximum number of persons who could be found to have substantial third party relationships with a child. Maternal and paternal grandparents (each of whom then split from their partners and assume new partners) and serial cohabitants of the parents, etc. etc. While I would be reluctant to set a number, this is one reason the definition might need to be strengthened to emphasize that the relationship must include close bonding.

In a similar vein, it may also make sense to distinguish within the group of real third parties (i.e. not those recognized as de facto parents) between those with whom the child has resided for a substantial length of time (not summer visits) and those who were never part of the child's household or never had day to day responsibility for the child. The former should be allowed to seek sole or shared custody, but the latter presumably should only be allowed to seek visits (which are still "Parenting time" in modern parlance) at least if the parent is "not unfit," a different standard in private custody disputes than in the child welfare system.

Third, I don't think it wise to include foster parents in this statute. They raise distinguishable concerns – both statutory and constitutional. If they are included they should be treated in a separate part of the statute not in the general group of "third parties." Non-kinship foster parents are compensated, and under contract, and are never legal de facto parents. That said, I believe that from a child development standpoint a child may well regard a long term foster parent as his or

her primary emotional attachment, and those reciprocal rights are important for the child's stability. But we have to acknowledge Smith v. OFFER.

Now to more specific points.

Section I.

The definition of "parent" should precede the definition of de facto parent.

Comments, notes. Like Jeff I haven't seen reported cases on adult children with developmental disabilities in this context, and in any event I think it would stretch this statute too far. It is generally part of guardianship etc.

Section II.

p. 5 notes the drafting committee is not supposed to revise the ULC, but please note that if the Supreme Court overturns all bans on same-sex marriage many aspects of the ULC will need to be revised.

Section III.

p. 7 (b) – I would reverse (1) and (2). A substantial relationship must be shown before the court even considers whether denial of visits would be detrimental.

More substantively:

(a) (2) is in effect a two-year statute of limitations – must have served as a de facto parent within the last two years.

In my broad reading of these cases for the custody chapters of Contemporary Family Law (West) these cases are not generally filed until after a voluntary informal agreement breaks down and visits are cut off or severely restricted. This breakdown might not happen until more than two years have elapsed since the third party lived in the child's home. I strongly recommend alternative language along the lines of "where the non-parent has visited with the child with the parent's consent but the parent has unreasonably withheld visits, the non-parent has standing to file a petition seeking visitation for up to a year (or some other period) after a pattern of unreasonable interference with visits became apparent."

Comments, With all due respect I must quibble with Jeff, p. 8. The statutes that specify which third parties may seek visitation are widely understood to be standing statutes.

Notes—p. 8 In response to Jeff's questions, I feel strongly that – as most cases provide – conduct can be used to show parental intent, consent, agreement.

And I don't think it would be helpful to require an agreement at any particular point, Indeed it would likely undermine the goals of this project as I understand them. For example the third party might not even have known the parent before the child was conceived or born, but have developed a substantial relationship with parent and child that began when the child was X years old and continued without interruption for a substantial portion of the child's life before the adult relationship broke down.

p. 9 point 7. Siblings. Sometimes it might need to be decided on a case-by-case basis, especially where half- and step- siblings are involved.

SECTION V.

Para (a) if the treatment of de facto parents is fixed, in accordance with my overarching concern on p. 1, this para would not be needed.

Para (d)—meaning is unclear – at least to me.

Note p. 12 – detriment would be preferable to harm. Harm would substantially the limit impact of this act.

Section VI.

I would urge including language similar to many state statutes that petitions for modification should not be filed within two years of the last hearing between these parties, at least absent extraordinary circumstances. Enforcement petitions can, of course, be filed at any time.

Section VII.

p. 13 para (1) note treatment of a de facto parent as a non-parent.

Para (4) where there is "willingness" the parties are unlikely to turn to the court for help and court ordered visits. This is not comparable to "friendly" parents in custody disputes between two legal parents, or to considering whether parents can succeed in a joint custody arrangement.

Section IX.

Any reason not to encourage the court to suggest the parties consider a collaborative law process for resolving their differences, especially in jurisdictions that have adopted the uniform act?

Section X. Here I have a very major concern.

The statement that the presumptive amounts in the state's federally-mandated child support guidelines do not apply to third party visitors should be moved from the comment into the text if the text continues to allow the court to order the visitor to pay child support in some amount. This is a very different proposition from the court ordering the party seeking visitation to pay the costs associated with visits. If the third party receives some portion of custody, then support might be in order. But please note once more, this section should not be addressing de facto parents, who once recognized are legal parents and have support obligations governed by the state's guidelines.

I hope this proves useful to all of you in your deliberations over the next two days.

cjr