D R A F T

FOR DISCUSSION ONLY

NON-PARENTAL RIGHTS TO CHILD CUSTODY AND VISITATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAW

March 27 - 28, 2015 Drafting Committee Meeting

With Prefatory Note, Reporter's Notes, and Comments

March 2, 2015

DRAFTING COMMITTEE ON NON-PARENTAL RIGHTS TO CHILD CUSTODY AND VISITATION ACT

The Committee appointed by and representing the Uniform Law Commission in preparing this Act consists of the following individuals:

DEBRA H. LEHRMANN, The Supreme Court of Texas, Supreme Court Bldg., 201 W. 14th St., Room 104, Austin, TX 78701, *Chair*

BARBARA A. ATWOOD, University of Arizona, James E. Rogers School of Law, 1201 E. Speedway Blvd., P.O. Box 210176

DAVID D. BIKLEN, 799 Prospect Ave., B2, West Hartford, CT 06105

MARK J. CUTRONA, Legislative Hall, 411 Legislative Ave., Dover, DE 19901

JACK DAVIES, 1201 Yale Pl., Unit #2004, Minneapolis, MN 55403-1961

MARY P. DEVINE, 704 Big Woods Pl., Manakin-Sabot, VA 23103

GAIL HAGERTY, South Central Judicial District, P.O. Box 1013, 514 E. Thayer Ave., Bismark, ND 58502-1013

JAMIE PEDERSEN, 43rd Legislative District, 226 John A. Cherberg Bldg., P.O. Box 40643, Olympia, WA 98504-0643

ARTHUR H. PETERSON, P.O. Box 20444, Juneau, AK, 99802

CRAIG STOWERS, Alaska Supreme Court, 303 K St., Anchorage, AK 99501-2084

SAMUEL J. TENENBAUM, Northwestern University School of Law, 357 E. Chicago Ave., Chicago, IL 60611

ERIC WEEKS, Office of Legislative Research and General Counsel, 210 House Bldg., Utah State Capitol Complex, Salt Lake City, UT 84114-5210

CANDACE ZIERDT, Stetson University College of Law, 1401 61st St. S., Gulfport, FL 33707

JEFF J. ATKINSON, DePaul University, 3514 Riverside Dr., Wilmette, IL 60091, *Reporter*

EX OFFICIO

HARRIET LANSING, 1 Heather Pl., St. Paul, MN 55102-3017, *President*

GAIL HAGERTY, South Central Judicial District, P.O. Box 1013, 514 E. Thayer Ave., Bismarck, ND 58502-1013, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

ALLEN G. PALMER, 315 Post Rd. W., Suite 1A, Westport, CT 06880-4739, *ABA Advisor*

LOUISE E. TEITZ, Roger Williams University School of Law, 10 Metacome Ave., Bristol, RI 02809-5103, *ABA Section Advisor*

EDDIE J. VARON LEVY, 2276 Torrence Blvd., Torrence, CA 90501-2518, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

NON-PARENTAL RIGHTS TO CHILD CUSTODY AND VISITATION ACT

TABLE OF CONTENTS

INTRODUCTORY NOTE TO THE DRAFTING COMMITTEE
FROM THE REPORTER

The first draft includes preliminary "Comments" [or "Drafters' Notes"] that, in final form, will be published with the act.

In addition, this draft includes "Additional Comments" or "Other Options." These comments and options are intended to help guide our discussions, but will not be part of the final act.

Jeff Atkinson
Reporter
Email: Jeff Atkinson747@gmail.com

PREFATORY NOTE

[This is a partial draft of the Prefatory Note. The reporter will update commentary and data as the project proceeds.]

This act deals with the rights of non-parents to custody and visitation with children. The act seeks to balance, within constitutional restraints, the interests of children, parents, and non-parents with whom the children have a close relationship.

Continuation of a relationship between a child and a non-parent can be an important – and even vital – interest, both for the child and the non-parent. When deciding whether to grant relief to a non-parent, 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 Court struck down Washington State's grandparent visitation 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 Supreme Court also stated the trial court's "order was not founded on any special factors that might justify the State's interference with [the mother's] fundamental right to make decisions concerning the rearing of her two daughters." *Id.* at 68.

This act provides procedures and factors for courts to apply when asked grant custody or visitation to non-parents.

As Justice Connor observed in her plurality option 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 2012, the Census Bureau reported that there were 73,817,000 children in United States under age 18. Of that number, the breakdown for the children's living arrangements was:

- Living with both parents: 50,267,000
- Living with mother only: 17,991,000
- Living with father only: 2,924,000
- Living with neither parent: 2,634,000
- Of the children living with neither parent, 1,494,000 were living with grandparents.

U.S. Census Bureau, America's Families and Living Arrangements: 2012, Table C2, Household Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2012

available at http://www.census.gov/hhes/families/data/cps2012.html.

* * * * *

Generations United issued a report regarding foster care, kinship care, and "grandfamilies." The report contains the following information:

> "Grandfamilies or kinship families are families in which children reside with and are being raised by grandparents, other extended family members, and adults with whom they have a close familylike relationship, such as godparents and close family friends."

· Children raised in grandfamilies or kinship care: 2,485,000

· Children raised in foster care: 397,091

· Children in foster care who are raised in grandfamilies or kinship care: 108,822 (which is 27% of children in foster care)

Source: Generations United, "The State of Grandfamilies in America: 2014" – http://www.grandfamilies.org/Portals/0/14-State-of-Grandfamilies-Report-Final.pdf

[Additional data regarding foster care and kinship care may be provided by Howard Davidson, Director of the ABA Center and the Law, and Heidi Epstein, Director of the ABA Center's Kinship Policy and Assistant Director of State Projects.]

NON-PARENTAL RIGHTS TO CHILD CUSTODY AND VISITATION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Non-Parental Rights to Child Custody and Visitation Act.

Reporter's Note

Additional Comment: While this topic was under review by a ULC the Study Committee, the subject matter was referred to as "Third Party Custody and Visitation." The term "Non-Parental Rights" seems more precise.

SECTION 2. DEFINITIONS. In this act:

(1) "Child" means an unemancipated individual who is less than the age of majority.

(2) "De facto parent" means is an individual who:

(a) (i) has had the support and consent of the child's parent or parents to foster the formation and establishment of a parent-like relationship between the child and the de facto parent;

(ii) has exercised parental responsibility for the child without expectation of financial compensation; and

(iii) has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature; or

(b) has exercised parental responsibility of a child pursuant to a court order.

(3) "Detriment to the child" means harm to the child's physical or psychological well-being, including harm resulting from interruption of a substantial beneficial relationship with the child or removal of the child from a stable placement of a child with a non-parent.

(4) "Non-parent" mean an individual other than a parent.

(5) "Parent" means a biological, adoptive, or legal parent of a child whose rights have not been terminated or relinquished.

(6) "Parental responsibility" means the care, support and control of the child in a manner that provides for the child's necessary physical needs, including food, clothing and shelter, and also provides for the mental and emotional health and development of the child.

Reporter's Note

Depending on scope of the act, the following additional terms may need to be defined:

– "Foster parent"
– "Kinship care provider"

The federal government's definitions of these terms are provided in the section entitled "Issues Regarding Foster Parents and Providers of Kinship Care," p. 24.

Comment

The definition of "child" is "an unemancipated individual who is less than the age of majority." The age of majority in most states is 18, although some states set the age of majority at 18 or graduation from high school, and a few states set the age higher than 18. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) defines "Child" as "an individual who has not attained 18 years of age." UCCJEA, § 102(2).] The definition in this act adds the word "unemancipated" in order to make the definition more precise. The definition of "child" does not include an adult child with a developmental disability. Rights to custody of and visitation with adult children may be governed by a state's guardianship laws.

Reporter's Note

Additional comment about definition of "child":

I do not have data on the frequency with which disputes arise regarding custody of and visitation with adult children with developmental disabilities, but I have found very few (if any) reported opinions on the subject in connection with divorce or parentage actions.

* * *

The definition of "De facto parent" is based on 13 Del. Code § 8-201(c) (2015). This definition includes the element that the person seeking status as a de facto parent "has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature." Some states set specific time periods before a person may obtain custody as a de factor custodian – e.g., six months or more if the child is under three years old, and one year or more if the child is three years of age of older. See, e.g., Ky. Rev. Stat. 403.270 (2012); S.C. Code § 63-15-60 (2012). At least eleven states allow a non-parent to seek visitation if the child has lived with a person for a certain period of time, such as six or 12 months.

The Washington Supreme Court in the case of *In re Parentage of L.B.*, 122 P.3d 161, 163 (Wash. 2005) held that the state's "common law recognizes the status of de facto parents and grants them standing to petition for a determination of the rights and responsibilities that accompany legal parentage in this state." To establish standing as a de facto parent, the Supreme Court adopted the following criteria:

(1) the natural or legal parent consented to and fostered the parent-like relationship,
(2) the petitioner and the child lived together in the same household,
(3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and
(4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.

Id. at 176 (citations omitted).

The American Law Institute Principles of the Law of Family Dissolution § 2.03(1)(c) (2002) defines a de facto parent as "an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived."

The definition of "Detriment to the child" is based, in part, on Cal. Fam. Code § 3041(c) (2012) (a section entitled "Custody award to nonparent; findings of court; hearing").

The definition of "Parent" is "the biological, adoptive or legal parent of a child whose rights have not been terminated or relinquished." The word "legal" is used to encompass parents other than biological or adoptive parents. If, for example, a state recognized as a parent a person whose child was conceived through assisted reproductive technology, but that person was not biologically related to the child and that person had not adopted the child, that person would still be regarded as a parent. Similarly, a man who acknowledges paternity or is presumed to be the father may be regarded as a parent, even if he is not biologically related to the child. Under the definition, a person ceases to be a parent if his or her rights have been terminated or if the rights have been relinquished as provided by law (e.g., a sperm donor who relinquishes parental rights).

Reporter's Note

Additional comment and background information about definition of "parent":

The Drafting Committee has been directed not to modify the Uniform Parentage Act (2002). That act – which has been enacted in nine states – provides the following provisions regarding the definition of "parent":

§ 102(13) provides: "'Parent'" means an individual who has established a parent-child relationship under Section 201."

§ 201 regarding "Establishment of Parent-Child Relationship," provides:

> (a) The mother-child relationship is established between a woman and a child by:
> (1) the woman's having given birth to the child [, except as otherwise provided in [Article] 8];
> (2) an adjudication of the woman's maternity; [or]
> (3) adoption of the child by the woman [; or
> (4) an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law].
>
> (b) The father-child relationship is established between a man and a child by:
> (1) an unrebutted presumption of the man's paternity of the child under Section 204;
> (2) an effective acknowledgment of paternity by the man under [Article] 3, unless the acknowledgment has been rescinded or successfully challenged;
> (3) an adjudication of the man's paternity;
> (4) adoption of the child by the man; [or]
> (5) the man's having consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child [; or
> (6) an adjudication confirming the man as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law].

Delaware amended the state's Uniform Parentage Act to add to the list of bases for establishing a parent-child relationship "[a] determination by the court that the woman [or the man] is a de facto parent of the child." Del. Code tit. 13, § 8-201 (2015).

The earlier version of the Uniform Parentage Act, § 1 Act (1973) – which was adopted in 14 states and portions of it adopted in other states – provides: "As used in this Act, 'parent and child relationship' means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship."

The Drafting Committee could decide not to include a definition of "parent" and leave that question to existing state law. However, since only a minority of states have adopted the Uniform Parentage Act and since it is useful to clarify what "parent" means, a definition is included with this draft of the act. The definition is consistent with the definition in the Uniform Parentage Act and gives some flexibility for local variation of the meaning of "parent" by using the term "legal parent" as part of the definition.

The definition of "parental responsibility" is based on 13 Del. Code § 1101(10) (2015). Payment for the child's food, clothing, shelter, and other physical needs is not enough, by itself,

to constitute exercise of parental responsibility.

SECTION 3. JURISDICTION. A petition seeking non-parental custody or visitation may be filed only in a court that has jurisdiction under [insert citation to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)].

Comment

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has been adopted in 49 states. As of February 2015, Massachusetts is the only state that has not adopted the UCCJEA, although Massachusetts did adopt the Uniform Child Custody Jurisdiction Act (UCCJA). The Uniform Law Commission has promulgated a 2013 version of the UCCJEA (to cover international issues) as well as domestic issues. As of January 2015, the 2013 UCCJEA has not been adopted in any states.

Jurisdiction over Native American children is governed by the Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq. (2015).

SECTION 4. STANDING.

(a) A non-parent has standing to seek custody or visitation if:

(1) the non-parent has entered into a written [or oral] agreement with a child's parent or parents to co-raise a child;

(2) the non-parent has served as a de facto parent of the child within the last two years; or

(3) both parents are deceased or incapacitated, and a substantial relationship exists between the child and the non-parent.

(b) In addition, a non-parent has standing to seek visitation if:

(1) denial of visitation would be a detriment to the child, and

(2) a substantial relationship exists between the child and the non-parent.

Comment

The requirement of a standing serves to protect the interests of parents and filter out cases in which the non-parent does not have a meritorious claim, while at the same time allowing the

opportunity to preserve relationships between children and non-parents within whom the children have a particularly close relationship. Many states provide that a non-parent has standing if that person has served as a de facto parent (or stood in loco parentis) to the child – e.g., AZ, CT, DE, HA, IN, KY, MN, MT, PA, WA. A related concept is that the child has been residing with the person seeking custody – e.g., CA, MI, NV, WI. In Illinois a third party has standing if the child is not in custody of a parent.

Most states do not have a standing requirement per se for third parties who seek visitation. Many states, however, specify categories of persons who may seek visitation. E.g., grandparents, great-grandparents, stepparents, sibling, or persons who have raised the child for a certain period of time. In addition, many states specify the circumstances in which visitation may be sought – circumstances which often involve some disruption of the family – e.g., divorce, separation, death of a parent, or a child born out of wedlock.

The standing requirement for visitation in subparagraph (b) provides that "A non-parent party has standing to seek visitation if: (1) denial of visitation would be a detriment to the child, and (2) a substantial relationship exists between the child and the non-parent." Those factors are designed to reflect the holding of the U.S. Supreme Court in *Troxel v. Granville*, 530 (2000), in which the Court struck down Washington State's third party visitation statute as applied. Justice O'Connor, in a plurality decision, said "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." *Id.* at 68.

Reporter's Note

Additional comments and other options regarding standing:

1. Regarding the nature of agreement to co-raise a child:

– Should oral agreements be sufficient (as well as written agreements)?
– Could an agreement be shown by conduct?
– Should there be a requirement of heightened burden of proof, such as clear and convincing evidence (as there is in Section 5?)
– Should there be any requirement about when the agreement must take place – e.g., before conception, before birth, before the child is of as certain age?

2. Should there be a time-limit within which a non-parent seeking rights by agreement must exercise that right – e.g., a certain number of months or years from the time the non-parent has not been living with or visiting with the child? (The length and duration of the relationship between child and non-parent are factors in granting relief – See Section 7.)

3. Note that under Section 4(a)(1), conferring standing by agreement requires agreement of all parents. Thus, for example if a married couple had child, and the couple divorced, one parent could not use this provision to confer parental rights to seek custody or visitation to a new spouse or partner over the objection of the

other parent. If the act provides standing for de facto parents, that might be a separate basis for conferring standing to the non-parent, although the definition of de facto parent, as currently drafted, also requires "the support and consent of the child's parent or parents to foster the formation and establishment of a parent-like relationship between the child and the de facto parent."

4. Should the act utilize the term "de facto parent"? "De factor parent" (or "in loco parentis" is a useful concept, reflecting a trend in case law and statutory law of several states. Inclusion of the term in this act does not revise the Uniform Parentage Act, although use of the term will expand the rights of certain persons to seek custody and visitation.

5. There is overlap between the "agreement to co-raise a child" provision and the "de facto parent" provision. Both, as drafted, require agreement or consent of the parents. The "agreement" provisions focuses on the existence of an agreement, and presumably could be enforced soon after the child's birth even if the child and non-parent have not had a long-term relationship. The "de facto provision" focuses more on the quality and duration of the relationship between the child and the non-parent. The definition of "de facto parent" provides the de facto parent ". . . (ii) has exercised parental responsibility for the child; and (iii) has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature").

6. Note that an enforceable agreement to co-raise a child could be viewed as an alternative to (or a bypass of) adoption laws – at least for the purpose of custody and visitation. (Presumably this act – which focuses on custody and visitation – will not modify other areas of law, such as probate law and rights to compensation for personal injury.)

7. An interesting issued related to this section (or another section): How to handle cases in which the non-parent's level of relationship with the children varies. For example, assume the grandparents helped raise a child who is now 10 years old and have a very close relationship with that child. The parents have a second child, who is one year old at the time the grandparents seek visitation. The grandparents have a moderate relationship with the second child, but never raised the child on a day-to-day basis. If the grandparent can meet the criteria for visitation with the first child, should they also be able to obtain visitation with the second child, or should they be prevented from doing so?

8. Should non-parent visitation be allowed to continue following adoption of a child by a relative? (Many state laws so provide.)

9. A broad issue for consideration by the Drafting Committee will be the impact of the upcoming decision of the U.S. Supreme Court's on same sex marriage – *DeBoer v. Snyder* (E.D. Mich. 2014), http://archive.freep.com/assets/freep/pdf/C4220110321.PDF, *rev'd* , (6th Cir.

2014), http://www.ca6.uscourts.gov/opinions.pdf/14a0275p-06.pdf, petitions for certiorari granted by U.S. Supreme Court , Jan. 16, 2015 (docket nos. No. 14-556, No. 14-562, and No. 14-574). [The ULC has recently established a study committee that will follow developments at the Supreme Court and make recommendations as to whether the Uniform Parentage Act or other ULC acts should be revised in light of the Supreme Court decision.]

SECTION 5. PRESUMPTIONS AND BURDEN OF PROOF IN INITIAL ACTIONS. In initial actions for custody and visitation:

(a) A non-parent who has found to have entered into a valid written [or oral] agreement under Section 4(a)(1) with a child's parent or parents to co-raise a child shall have the same rights to obtain custody and visitation as the parent.

(b) In other actions regarding custody of a child between a parent and a non-parent, there shall be a rebuttable presumption that parental custody is in the best interests of the child. The non-parent seeking custody must rebut the presumption by clear and convincing evidence that custody with the non-parent is in the best interests of the child and that custody with the parent would be a detriment to the child. Proof of parental unfitness is not required to rebut the presumption.

(c) In actions regarding custody of a child between two or more non-parents, there shall be no presumption that custody should be given to a particular party. The burden of persuasion shall be by a preponderance of the evidence. If an action for custody between two or more non-parents is brought under law of this state other than this act, the other law shall govern.

(d) In actions regarding visitation when the child is in the custody of a parent or a non-parent who has been found to have entered into a valid written [or oral] agreement to co-raise a child, there shall be a rebuttable presumption that the custodian's decision regarding visitation is in the best interests of the child. In order to rebut the presumption, the non-parent seeking visitation must establish by clear and convincing evidence (i) that absence of visitation will be a

detriment to the child or that special factors exist to justify the visitation and (ii) that the visitation will be in the best interests of the child.

(e) In actions regarding visitation with a child when the child is in the custody of a non-parent who did not have an agreement to co-raise the child, visitation by a non-parent shall be allowed if the party seeking visitation establishes by a preponderance of the evidence that visitation is in the best interests of the child.

Comment

This section governs initial actions by non-parents for custody and visitation. Modification of orders is governed by Section 6.

Subparagraph (a) provides that a non-parent who has entered into a valid written [or oral] agreement with a child's parent(s) to co-raise a child to have the same rights to obtain custody and visitation as the parent. Agreements between parents regarding custody of children have been held to be of "constitutional magnitude" and entitled to presumptive enforcement. *In re Marriage of Coulter and Trinidad*, 2012 IL 113474, 364 Ill. Dec. 59, 976 N.E.2d 337, 342 (enforcing an agreement between parents regarding future relocation of the children). *See also Frazier v. Goudschaal*, 296 Kan. 730, 295 P.3d 542 (2013) (enforcing a coparenting agreement between members of a same-sex couple); Fawzy v. Fawzy, 199 N.J. 456, 973 A.2d 347, 350 (2009) (enforcing parents' agreement to arbitrate a custody dispute).

The presumption and burden of proof in subparagraph (b) recognize the superior right of parents to custody of their children in custody disputes with third parties, and also provides that the superior right or presumption can be overcome. The standard in subparagraph (b) is similar to Pa. Stat. Ann. tit. 23, § 5327(b) (2015).

The presumption and burden of proof in the first two sentences of subparagraph (c), regarding custody disputes between non-parents, is based on Pa. Stat. tit. 23, § 5327(c) (2015). The third sentence of subparagraph (b) provides: "If an action for custody between two or more third parties is brought under a law other than this act, the other law shall govern." Thus, if a state has law governing custody of children who are in foster care, the foster care law of that state would govern. If an action is brought under a state's guardianship laws, the guardianship laws will control.

The presumption and burden of proof in subparagraph (d), regarding visitation disputes between a parent and a non-parent, applies the standard in *Troxel v. Granville*, 530 U.S. 57 (2000), in which the Supreme Court struck down Washington State's third party visitation statute as applied. Justice O'Connor, in a plurality decision, said the Washington statute "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever." *Id.* at 67, 120 S.Ct. at 2061. "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." *Id.* at 68, 120 S.Ct. at 2061.

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

As stated in Black's Law Dictionary, "The Buren of proof includes both the burden of persuasion and the burden of production." Black's Law Dictionary (7th ed. 1999).

Reporter's Note

Additional comment and question (applicable to this section and other sections)

In order for relief to be granted (custody or visitation), should a showing of harm be required? [The U.S. Supreme Court in *Troxel* did not require that, although some states have required a showing of harm – E.g., Connecticut and Washington.

SECTION 6. MODIFICATION.

Alternative A

Custody and visitation orders entered under this act may be modified: (i) by stipulation of the parties or (ii) after a findings by the court that there has been a substantial change circumstances of the child or the parties, and that modification is necessary to serve the best interests of the child.

Alternative B

Custody and visitation orders entered under this act may be modified by application of [insert citation to the state's law regarding modification of custody and visitation orders applicable to disputes between parents].

End of Alternatives

Reporter's Note

This section presents two alternatives.

Alternative A presents the standard of modification of custody and visitation that is most common in the United States for custody and visitation orders in general (although a few states have different standards, such as requiring a showing of endangerment if modification is sought within two years of a prior order). See Jeff Atkinson, *Modern Child Custody Practice - Second Edition*, §§ 10.1 – 10.13 (LexisNexis 2014). Under Alternative A, the burden of proof would be on the party seeking modification. The custody or visitation order in favor of the third party would stay the same unless the substantial change of circumstances and best interests of the child were shown.

Alternative B makes reference to a state's existing law regarding modification of custody and visitation orders applicable to disputes between parents.

SECTION 7. FACTORS CONSIDERED. When making any determination under this act, the court must consider the best interests of the child and:

(1) the quality of relationship between the child and the parent and the child and non-parent, including whether the non-parent has served as a de facto parent of the child;

(2) the frequency and continuity of contact between the child and the non-parent;

(3) the views of the child, having regard to the child's age and maturity;

(4) the willingness of the parent and non-parents to facilitate, as appropriate, a positive relationship between the child, the parties to the proceedings, and family members of the child;

(5) the child's adjustment to the child's current and proposed home, school, and community;

(6) the mental and physical health of all individuals involved;

(7) a history of or threat of domestic violence, child abuse, or child neglect;

(8) the reasons for the parties' positions regarding custody and visitation; and

(9) any other relevant factor affecting the best interests of the child.

SECTION 8. TEMPORARY ORDER. After hearing, the court may enter a temporary order while the action is pending.

Comment

This section makes explicit that the court has the power to enter temporary, as well as permanent, orders. The factors listed in Section 7 apply to both temporary and permanent orders.

SECTION 9. APPOINTMENTS AND COURT SERVICES. To the extent available in other cases involving custody and visitation of children, the court may:

(1) appoint a child's attorney, guardian ad litem, or child's representative;

(2) order mediation, provided that if a party has been subject to domestic violence by another party to the proceedings, the party who was the subject of domestic violence shall not be required to participate in mediation;

(3) order evaluations or home studies; and

(4) allocate payment of fees for the services listed in this section.

Comment

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

SECTION 10. CHILD SUPPORT. The court may order a party receiving visitation under this act to pay child support or the cost of providing transportation in connection with visitation.

Comment

The court has discretion to order a party receiving visitation to pay child support or the cost of providing transportation in connection with visitation. Factors in setting child support, if any, would include the resources of the parties, the needs of the child, and the cost of transportation. The state's presumptive guidelines for child support paid by a non-custodial parent to the custodial parent would not apply to this determination.

SECTION 11. ATTORNEY FEES AND COSTS. The court may order payment of attorney fees and costs.

Comment

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

Reporter's Note

When the ABA Section of Family Law drafted a third party custody and visitation act, it adopted a similar provision regarding attorney fees and costs and added the phrase "as equity may require." Another possible addition to the provision is that fees and costs may be ordered "to a prevailing party."

SECTION 12. FINDINGS OF FACT AND CONCLUSIONS OF LAW. When making a decision under this act, the court shall make findings of fact and conclusions of law in support of its decision.

Comment

Requiring findings of fact has several benefits. The fact-finding process structures the court's review so that the court is less likely to overlook important facts or apply bias in reaching its decision. Careful fact-finding by the trial court also facilitates appellate review and may assist the parties in accepting the decision. At least twenty states and the District of Columbia require the trial court to make findings of fact in custody cases. See Jeff Atkinson, *Modern Child Custody Practice - Second Edition*, § 12-45 (LexisNexis 2014).

SECTION 13. PRIORITY ON CALENDAR. A case arising under this act must be given priority on the calendar and handled expeditiously.

Comment

The phrase "must be given priority on the calendar and handled expeditiously" is the same phrase used in the Uniform Child Custody Jurisdiction and Enforcement Act, § 107 (1997).

Reporter's Note

John Sebert has commented: "Folks representing the judicial system, such as the National Center for State Courts, often object to this type of provision, and I expect they would do so here. Having a priority provision in an act that governs determining jurisdiction is one

thing; putting it in this act is very different."

SECTION 14. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 15. TRANSITIONAL PROVISION. A petition or other request for relief regarding a non-parent's request for custody and visitation which was commenced before the effective date of this act is governed by the statutes in effect at the time the petition or other request was made.

SECTION 16. REPEALS; CONFORMING AMENDMENTS.

(a) . . . .

(b) . . . .

(c) . . . .

SECTION 17. EFFECTIVE DATE. This [act] takes effect . . . .