

D R A F T  
FOR DISCUSSION ONLY

# **NON-PARENTAL CHILD CUSTODY AND VISITATION ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAW

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November 20-21, 2015 Drafting Committee Meeting

*With Prefatory Note, Reporter's Notes, and Comments*

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*The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the Uniform Law Commission or the Drafting Committee. They do not necessarily reflect the views of the Commission, its Commissioners, the Drafting Committee, its Members, and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.*

October 12, 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. 14<sup>th</sup> 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, Washington State Senate, 43rd 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 61<sup>st</sup> St. S., Gulfport, FL 33707

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

### **EX OFFICIO**

RICHARD T. CASSIDY, 100 Main St., P.O. Box 1124, Burlington, VT 05402, *President*

WILLIAM W. BARRETT, 600 N. Emerson Ave., P.O. Box 405, Greenwood, IN 46142, *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**

LIZA KARSAI, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this act may be obtained from:

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ON UNIFORM STATE LAWS  
111 N. Wabash Ave., Suite 1010  
Chicago, Illinois 60602  
312/450-6600  
[www.uniformlaws.org](http://www.uniformlaws.org)

**NON-PARENTAL CHILD CUSTODY AND VISITATION ACT**

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**INTRODUCTORY NOTE TO THE DRAFTING COMMITTEE  
FROM THE REPORTER**

This draft includes preliminary “Comments” [or “Drafters’ Notes”] that, in final form, will be published with the act.

In addition, this draft includes “Reporter’s Notes.” These notes are intended to help guide our discussions, but generally will not be part of the final act.

This draft also used brackets in some sections. At this stage, the bracketed materials are not intended to be part of the final act. The brackets are intended to show alternative language, and the committee will decide which language to use. Some final drafts of uniform acts do utilize brackets to provide legislators with options for handling particular issues, but usually it is best when drafting uniform acts to not use brackets or to keep their use to a minimum.

Jeff Atkinson  
Reporter  
Email: [Jeff Atkinson747@gmail.com](mailto:Jeff Atkinson747@gmail.com)

1                                   **NON-PARENTAL CHILD CUSTODY AND VISITATION ACT**

2  
3                                   **PREFATORY NOTE**

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

6  
7           This act provides procedures and factors for courts to apply when asked to grant custody  
8    or visitation to non-parents. The act seeks to balance, within constitutional restraints, the  
9    interests of children, parents, and non-parents with whom the children have a close relationship.

10  
11           Continuation of a relationship between a child and a non-parent can be an important –  
12    and even vital – interest, both for the child and the non-parent. When deciding whether to grant  
13    relief to a non-parent, courts must, of course, consider the rights of parents. The U.S. Supreme  
14    Court has recognized a right of a fit parent to make decisions regarding the rearing of his or her  
15    child. *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000). In *Troxel*, the Court struck down  
16    Washington State’s grandparent visitation statute, as applied, holding the trial court did not give  
17    sufficient deference to the decision of a fit parent to decide the amount of contact the children  
18    would have with grandparents. The Supreme Court also stated the trial court’s “order was not  
19    founded on any special factors that might justify the State’s interference with [the mother’s]  
20    fundamental right to make decisions concerning the rearing of her two daughters.” *Id.* at 68.

21  
22           Justice Connor observed in her plurality opinion in *Troxel*: “The demographic changes of  
23    the past century make it difficult to speak of an average American family. The composition of  
24    families varies greatly from household to household.” *Id.* at 63.

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

30  
31           Opposite-sex unmarried partner households increased by 40 percent since 2000; same-sex  
32    households increased by 80 percent. *Id.* at p. 6.

33  
34           In 2012, the Census Bureau reported that there were 73,817,000 children in United States  
35    under age 18. Of that number, the breakdown for the children’s living arrangements was:

- 36  
37    ·     Living with both parents:     50,267,000  
38    ·     Living with mother only:     17,991,000  
39    ·     Living with father only:     2,924,000  
40    ·     Living with neither parent:   2,634,000  
41    ·     Of the children living with neither parent, 1,494,000 were living with grandparents.

42  
43    U.S. Census Bureau, America’s Families and Living Arrangements: 2012, Table C2, Household  
44    Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2012  
45    available at <http://www.census.gov/hhes/families/data/cps2012.html>.

1 \* \* \* \* \*

2 A nonprofit organization, Generations United, issued a report regarding foster care,  
3 kinship care, and “grandfamilies.” The report contains the following information:

4  
5 “Grandfamilies or kinship families are families in which children reside with and are  
6 being raised by grandparents, other extended family members, and adults with whom  
7 they have a close familylike relationship, such as godparents and close family friends.”

- 8
- 9 · Children raised in grandfamilies or kinship care: 2,485,000
- 10
- 11 · Children raised in foster care: 397,091
- 12
- 13 · Children in foster care who are raised in grandfamilies or kinship care: 108,822 (which is  
14 27% of children in foster care)
- 15

16 Source: Generations United, “The State of Grandfamilies in America: 2014” –  
17 <http://www.grandfamilies.org/Portals/0/14-State-of-Grandfamilies-Report-Final.pdf>

18  
19 *[Additional data regarding foster care and kinship care may be provided by Howard Davidson,*  
20 *Former Director of the ABA Center and the Law, and Heidi Epstein, Director of the ABA*  
21 *Center’s Kinship Policy and Assistant Director of State Projects.]*  
22

1                                   **NON-PARENTAL CHILD CUSTODY AND VISITATION ACT**

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

4                                                           **Reporter’s Note**

5                   While this topic was under review by a ULC the Study Committee, the subject matter  
6 was referred to as “Third Party Custody and Visitation.” The term “Non-Parental Rights” seems  
7 more precise.

8  
9                   At the March 2015 Drafting Committee meeting, some participants favored utilizing a  
10 term other than “Non-Parental,” although there was not a consensus on what that term would be.

11  
12                   **SECTION 2. DEFINITIONS.** In this act:

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

14 **[Reporter’s Note:** The Uniform Deployed Parents Custody and Visitation Act, § 102(3) (2012)  
15 defines “child” as follows:

16                   (A) an unemancipated individual who has not attained [18] years of age; or

17                   (B) an adult son or daughter by birth or adoption, or under law of this state other than  
18 this [act], who is the subject of a court order concerning custodial responsibility.”]

19  
20                   (2) “Custody” means physical custody, legal custody, or both.

21                   (3) “De facto parent of the child” means an individual who [within the last two years]:

22                                   (A)(i) has had the support and consent of the child’s parent or parents, if the child  
23 has more than one parent, to foster the formation and establishment of a parent-like relationship  
24 between the child and individual;

25                                                           (ii) has exercised parental responsibility for reasons primarily other than  
26 financial compensation; and

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

29                                   (B) has exercised parental responsibility of a child pursuant to a court order;

30                   (4) “Detriment to the child” means adverse effect [harm] to the child’s physical or



1 psychological well-being, including adverse effects resulting from interruption of a substantial  
2 beneficial relationship with the child or removal of the child from a stable placement of a child  
3 with a non-parent.

4 (5) “Legal custody” means the power to make important decisions regarding a child,  
5 including decisions regarding the child’s education, health care, and extracurricular activities.

6 (6) “Non-parent” mean an individual other than a parent.

7 (7) “Parent” means a person defined as a parent under [insert reference to other law in  
8 the state that defines “parent.”]

9 (8) “Parental responsibility” means the care and control of the child in a manner that  
10 provides for the child’s necessary physical needs, including food, clothing and shelter, and  
11 provides for the mental and emotional health and development of the child.

12 (9) “Physical custody” means day-to-day care and supervision of a child [for a majority  
13 of the child’s time].

14 (10) “Visitation” means access to the child.

### 15 **Reporter’s Note**

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

- 17 – “Foster parent”
- 18 – “Kinship care provider”

19  
20  
21 The federal government’s definitions of these terms are provided in a memo from the  
22 reporter to the Drafting Committee entitled “Additional Issues for the Drafting Committee.”  
23 [End “Reporter’s note”]

### 24 **Comment**

25  
26 The definition of “child” is “an unemancipated individual who is less than the age of  
27 majority.” The age of majority in most states is 18, although some states set the age of majority  
28 at 18 or graduation from high school, and a few states set the age higher than 18. The Uniform  
29 Child Custody Jurisdiction and Enforcement Act (UCCJEA) defines “Child” as “an individual  
30 who has not attained 18 years of age.” UCCJEA, § 102(2). The definition in this act adds the

1 word “unemancipated” in order to make the definition more precise. [The first definition of  
2 “child” does not include an adult child with a developmental disability. Rights to custody of and  
3 visitation with adult children may be governed by a state’s guardianship laws.]  
4

5 **Reporter’s Note regarding definition of “child”**  
6

7 The committee should decide whether the definition of “child” will include adult disabled  
8 children (like the Uniform Deployed Parents Custody and Visitation Act) or not include adult  
9 disabled children (like the UCCJEA).

10 [End “Reporter’s Note”]  
11

12 The definition of “De facto parent of the child” is based on 13 Del. Code § 8-201(c)  
13 (2015). This definition includes the element that the person seeking status as a de facto parent  
14 “has acted in a parental role for a length of time sufficient to have established a bonded and  
15 dependent relationship with the child that is parental in nature.” Some states set specific time  
16 periods before a person may obtain custody as a de factor custodian – e.g., six months or more if  
17 the child is under three years old, and one year or more if the child is three years of age or older.  
18 See, e.g., Ky. Rev. Stat. 403.270 (2012); S.C. Code § 63-15-60 (2012). At least eleven states  
19 allow a non-parent to seek visitation if the child has lived with a person for a certain period of  
20 time, such as six or 12 months.  
21

22 The Washington Supreme Court in the case of *In re Parentage of L.B.*, 122 P.3d 161, 163  
23 (Wash. 2005) held that the state’s “common law recognizes the status of de facto parents and  
24 grants them standing to petition for a determination of the rights and responsibilities that  
25 accompany legal parentage in this state.” To establish standing as a de facto parent, the  
26 Washington Supreme Court adopted the following criteria:  
27

- 28 (1) the natural or legal parent consented to and fostered the parent-like relationship,
- 29 (2) the petitioner and the child lived together in the same household,
- 30 (3) the petitioner assumed obligations of parenthood without expectation of financial  
31 compensation, and
- 32 (4) the petitioner has been in a parental role for a length of time sufficient to have  
33 established with the child a bonded, dependent relationship, parental in nature.  
34

35 *Id.* at 176 (citations omitted).  
36

37 The American Law Institute Principles of the Law of Family Dissolution § 2.03(1)(c)  
38 (2002) defines a de facto parent as “an individual other than a legal parent or a parent by estoppel  
39 who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for  
40 reasons primarily other than financial compensation, and with the agreement of a legal parent to  
41 form a parent-child relationship, or as a result of a complete failure or inability of any legal  
42 parent to perform caretaking functions, (A) regularly performed a majority of the caretaking  
43 functions for the child, or (B) regularly performed a share of caretaking functions at least as great  
44 as that of the parent with whom the child primarily lived.”  
45

1                   **Reporter’s Note regarding definition of “De facto parent of the child”**  
2

3                   At the last Drafting Committee meeting, we decided to move the definition of “de facto  
4 parent” to the section on “Standing.” However, since the term is now used in more than one  
5 section, the definition should remain in the “Definitions” section. [End “Reporter’s Note”]  
6

7                   In Family Law, the terms “custody” and “visitation” are flexible concepts. In most states,  
8 there is not a fixed amount of time the child spends with a parent who has “custody” or  
9 “visitation,” although some states utilize guidelines to specify the time the child spends with the  
10 noncustodial parent. Nonetheless, a person with “custody” provides the child with a home or  
11 primary home. The drafters anticipate that visitation granted to non-parents will be decided on  
12 the facts of each case rather than by guidelines.  
13

14                   The definition of “legal custody” is “the power to make important decisions regarding a  
15 child, including decisions regarding the child’s education, health care, and extracurricular  
16 activities.” The list is non-exclusive, but it does not explicitly include religious training, since  
17 most courts have held both parents have a right to expose their child to his or her religious beliefs  
18 (or lack of religious beliefs). *See, e.g., Felton v. Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981);  
19 *In re Marriage of Mentry*, 142 Cal. App 260, 190 Cal. Rptr. 843 (1983); *Hansen v. Hansen*, 404  
20 N.W.2d 460 (N.D. 1987).  
21

22                   The definition of “Detriment to the child” is based, in part, on Cal. Fam. Code  
23 § 3041(c) (2012) (a section entitled “Custody award to nonparent; findings of court; hearing”).  
24

25                   The definition of “parent” is “a person defined as a parent under the law of this state.”  
26 The sources of the definition of “parent” may include the state’s parentage statutes, divorce  
27 statutes, and case law. In most states, “parent” would include biological parents, adoptive  
28 parents, and men who have acknowledged paternity (even though they are not biologically  
29 related to the child). “Parent” also might include persons who agree to conceive a child through  
30 assisted reproductive technology or by use of surrogates. Generally, a person ceases to be a  
31 parent if his or her rights have been terminated. In addition, a man who donates sperm or a  
32 woman who donates an egg usually are not considered to be parents.  
33

34                   The definition of “parental responsibility” is based on 13 Del. Code § 1101(10) (2015).  
35 Payment for the child’s food, clothing, shelter, and other physical needs is not enough, by itself,  
36 to constitute exercise of parental responsibility.  
37

38                   **Reporter’s Note about definition of “parent” and other terms**  
39

40                   The Drafting Committee has been directed not to modify the Uniform Parentage Act  
41 (UPA) (2002) regarding the definition of “parent.” The UPA – which has been enacted in nine  
42 states – provides the following provisions regarding the definition of “parent”:  
43

44                   § 102(13) provides: ““Parent” means an individual who has established a parent-child  
45 relationship under Section 201.”  
46

1 § 201 regarding “Establishment of Parent-Child Relationship,” provides:

- 2
- 3 (a) The mother-child relationship is established between a woman and a child by:
- 4 (1) the woman’s having given birth to the child [, except as otherwise
- 5 provided in [Article] 8];
- 6 (2) an adjudication of the woman’s maternity; [or]
- 7 (3) adoption of the child by the woman [; or
- 8 (4) an adjudication confirming the woman as a parent of a child born to a
- 9 gestational mother if the agreement was validated under [Article] 8 or is
- 10 enforceable under other law].
- 11 (b) The father-child relationship is established between a man and a child by:
- 12 (1) an un rebutted presumption of the man’s paternity of the child under
- 13 Section 204;
- 14 (2) an effective acknowledgment of paternity by the man under [Article] 3,
- 15 unless the acknowledgment has been rescinded or successfully challenged;
- 16 (3) an adjudication of the man’s paternity;
- 17 (4) adoption of the child by the man; [or]
- 18 (5) the man’s having consented to assisted reproduction by a woman under
- 19 [Article] 7 which resulted in the birth of the child [; or
- 20 (6) an adjudication confirming the man as a parent of a child born to a
- 21 gestational mother if the agreement was validated under [Article] 8 or is
- 22 enforceable under other law].
- 23

24 Delaware amended the state’s Uniform Parentage Act to add to the list of bases for

25 establishing a parent-child relationship “[a] determination by the court that the woman [or the

26 man] is a de facto parent of the child.” Del. Code tit. 13, § 8-201 (2015).

27

28 The earlier version of the Uniform Parentage Act, § 1 Act (1973) – which was adopted in

29 14 states and portions of it adopted in other states – provides: “As used in this Act, ‘parent and

30 child relationship’ means the legal relationship existing between a child and his natural or

31 adoptive parents incident to which the law confers or imposes rights, privileges, duties, and

32 obligations. It includes the mother and child relationship and the father and child relationship.”

33

34 The Drafting Committee discussed using the term, and having a definition of, “legal

35 parent.” If the definition of “parent” is “a person defined as a parent under the law of this state,”

36 we probably do not need the term “legal parent.”

37

38 For the committee’s reference, here are related definitions and commentary from other

39 uniform acts and from Black’s Law Dictionary:

40

41 The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), § 2(14)

42 (1997) provides: “Physical custody” means the physical care and supervision of a child.”

43

44 The Uniform Deployed Parents Custody and Visitation Act (UDPCVA), § 102 (2012)

45 provides the following definitions:

46

1 (2) “Caretaking authority” means the right to live with and care for a child on a day-to-  
2 day basis. The term includes physical custody, parenting time, right to access, and  
3 visitation.  
4

5 (5) “Custodial responsibility” includes all powers and duties relating to caretaking  
6 authority and decision-making authority for a child. The term includes physical custody,  
7 legal custody, parenting time, right to access, visitation, and authority to grant limited  
8 contact with a child.  
9

10 (6) “Decision-making authority” means the power to make important decisions regarding  
11 a child, including decisions regarding the child’s education, religious training, health  
12 care, extracurricular activities, and travel. The term does not include the power to make  
13 decisions that necessarily accompany a grant of caretaking authority.  
14

15 A Comment to the definition section of the UDPCVA states:  
16

17 “The UDPCVA establishes one umbrella term, “custodial responsibility,” for all issues  
18 relating to custody, including the responsibility often referred to in other state custody  
19 law as physical custody, visitation, and legal custody. The Act also establishes three sub-  
20 categories of custodial responsibility that can be transferred to others during deployment:  
21 “caretaking authority,” “decision-making authority,” and “limited contact.” The  
22 terminology used for each of these sub-categories is original to the UDPCVA. The term  
23 “caretaking authority” is meant to encompass the authority to live with, spend time with,  
24 or visit with a child. States often use a number of terms that fall within this definition,  
25 including “primary physical custody,” “secondary physical custody,” “visitation,” and  
26 “possessory conservatorship.” All these are meant to be subsumed under the term  
27 “caretaking authority.”  
28

29 In contrast, the term “decision-making authority” means the authority to make decisions  
30 about a child’s life beyond the authority that ordinarily accompanies a transfer of  
31 caretaking authority under state custody law. This term is meant to encompass the  
32 authority referred to in many states as “legal custody,” including the authority reasonably  
33 necessary to make decisions such as the ability to enroll the child in a local school, to  
34 deal with health care, to participate in religious training, and to allow the child to engage  
35 in extracurricular activities and travel.  
36

37 Finally, the term “limited contact” refers to a form of visitation with the child given to  
38 nonparents on the request of a deployed service member. This type of visitation allows  
39 the service member to sustain his or her relationship with the child through designating  
40 either a family member or other person with whom the child has a close relationship to  
41 spend time with the child during the service member’s absence. The limited contact  
42 definition allows the possibility that it may be granted to minors as well as adults. Thus a  
43 minor half-sibling or step-sibling of the child could be granted limited contact during a  
44 service member’s deployment. This type of contact with the child is a more limited form  
45 of visitation than courts usually grant to parents or grandparents outside the deployment  
46 context.”

1 Black's Law Dictionary (10th ed. 2014) provides definitions of the following terms:

2  
3 “Physical custody” – “The right to have the child live with the person awarded custody  
4 by the court.”

5  
6 “Visitation” – “A relative’s, esp. a noncustodial parent’s, period of access to a child.  
7 Also termed parental access; access; parenting time; residential time.”

8  
9 **SECTION 3. PLEADINGS.** A petition for custody or visitation shall be verified and  
10 specify the factual basis on which relief is sought, including the nature the relationship between  
11 the petitioner and the child.

### 12 **Comment**

13 In the Court’s plurality opinion, Justice O’Connor stated: “As Justice KENNEDY  
14 recognizes, the burden of litigating a domestic relations proceeding can itself be ‘so disruptive of  
15 the parent-child relationship that the constitutional right of a custodial parent to make certain  
16 basic determinations for the child’s welfare becomes implicated.” 530 U.S. at 75, *quoting*  
17 Kennedy, J. at 530 U.S. at 101. Requiring verified pleading and specificity in pleadings is  
18 intended to reduce actions that are not meritorious and facilitate disposition of non-meritorious  
19 cases by motions to dismiss or for summary judgment.

20  
21 **SECTION 4. JURISDICTION.** A petition seeking non-parental custody or visitation  
22 may be filed only in a court that has jurisdiction under [insert citation to the Uniform Child  
23 Custody Jurisdiction and Enforcement Act].

### 24 **Comment**

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

31  
32 If at the time a petition is filed under this act, an action is already pending regarding the  
33 same child, the petition should be filed as part of the pending action (assuming the pending  
34 action is filed in compliance with the UCCJEA).

35  
36 Jurisdiction over Native American children is governed by the Indian Child Welfare Act,  
37 25 U.S.C. §§ 1901 et seq. (2015).

1           **SECTION 5. PERSONS WHO MAY BRING ACTION [STANDING].**

2           [A non-parent may bring an action for [may seek] custody or visitation]

3           [A non-parent has standing to seek custody or visitation] if:

4           (1) before the child’s birth, the non-parent entered into a written [or oral] agreement with  
5 the child’s parent or parents, if the child has more than one parent, to accept full and permanent  
6 responsibilities as a parent and to raise the child together;

7           (2) the non-parent has served as a de facto parent of the child;

8           (3) both parents are deceased, incapacitated, [or unfit], or there has been a complete  
9 failure of the parents to exercise parental responsibility [and a substantial relationship exists  
10 between the child and the non-parent]; or

11          (4) denial of custody or visitation to the non-parent would be a detriment to the child, and  
12 a substantial relationship exists between the child and the non-parent.

13                                                           **Comment**

14           The requirement of a standing [The designation of persons who may bring an action]  
15 serves to protect the interests of parents and filter out cases in which the non-parent does not  
16 have a meritorious claim, while at the same time allowing the opportunity to preserve  
17 relationships between children and non-parents within whom the children have a particularly  
18 close relationship. Many states provide that a non-parent has standing if that person has served  
19 as a de facto parent (or stood in loco parentis) to the child – e.g., AZ, CT, DE, HA, IN, KY, MN,  
20 MT, PA, WA. A related concept is that the child has been residing with the person seeking  
21 custody – e.g., CA, MI, NV, WI. In Illinois, a non-parent has standing if the child is not in  
22 custody of a parent.  
23

24           The act provides four alternative bases for standing. The first basis for standing – an  
25 agreement to prior to the child’s birth for the non-parent to accept responsibilities as a parent –  
26 applies to couples of the same sex or different sex who agree to raise a child together, even  
27 though only one of the parties is related to the child by genetics, adoption, or other bases for  
28 parenthood recognized by the state. Some of the phrasing in this subsection is drawn from the  
29 American Law Institute’s Principles of the Law of Family Dissolution, § 2.03(1)(b) (2002). That  
30 section provides, as one of the alternative definitions of “parent by estoppel”: “an individual  
31 who, though not a legal parent, . . . (iii) lived with the child since the child’s birth, holding out  
32 and accepting full and permanent responsibilities as parent, as part of a prior co-parenting  
33 agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a

1 child together each with full parental rights and responsibilities, when the court finds that  
2 recognition of the individual as a parent is in the child’s best interests.”

3  
4 Regarding the second basis for standing – service as a de facto parent – if a state’s law  
5 already provides that a de facto parent is a “parent,” then that existing law gives the de facto  
6 parent standing, and this act would not apply.

7  
8 *[A comment is likely to be inserted about third basis of standing – “both parents are*  
9 *deceased, incapacitated, [or unfit], or there has been a complete failure of the parents to*  
10 *exercise parental responsibility [and a substantial relationship exists between the child and the*  
11 *non-parent.”]*

12  
13 The fourth basis for standing provides that a non-parent party has standing to seek  
14 custody or visitation if “denial of custody or visitation to the non-parent would be a detriment to  
15 the child, and a substantial relationship exists between the child and the non-parent.” That  
16 criteria is designed to reflect the holding of the U.S. Supreme Court in *Troxel v. Granville*, 530  
17 (2000), in which the Court struck down Washington State’s third party visitation statute as  
18 applied. Justice O’Connor, in a plurality decision, said “The Superior Court’s order was not  
19 founded on any special factors that might justify the State’s interference with Granville’s  
20 fundamental right to make decisions concerning the rearing of her two daughters.” *Id.* at 68.

21  
22 The statutes of many states specify categories of persons who may seek visitation. E.g.,  
23 grandparents, great-grandparents, stepparents, siblings, or persons who have raised the child for a  
24 certain period of time. In addition, many states specify the circumstances in which visitation  
25 may be sought – circumstances which often involve some disruption of the family – e.g.,  
26 divorce, separation, death of a parent, or a child born out of wedlock. These categories of  
27 persons who may seek visitation and the broad description of circumstances in which visitation  
28 may be sought do not, by themselves, provide a reliable indicator of whether non-parental  
29 visitation (or custody) should be allowed. It is preferable to focus on the factors used to decide  
30 visitation or custody, particularly the closeness of the relationship between the child and the non-  
31 parent.

32  
33 This act does not set a maximum number of persons who may obtain rights of custody or  
34 visitation. In most cases, the number of actively involved parental figures probably will not be  
35 large. As courts sort through complex family structures, the number of persons acting in a  
36 parental role is a factor that should be considered -- but without applying a fixed rule about how  
37 many parental figures with rights to time with the child is too many. The focus needs to remain  
38 on the best interests of the child.

### 40 **Reporter’s Note**

#### 42 *Additional comments and other options regarding standing:*

43  
44 1. This section has been retitled “Persons who may bring action,” which reflects the  
45 preference of several members of the Drafting Committee. The prior title of the section --  
46 “Standing” -- is in brackets in the event members of the Drafting Committee wish to discuss the



1 issue of title further.

2  
3 2. Regarding the nature of agreement to raise a child together:

- 4  
5 – Should oral agreements be sufficient (as well as written agreements)?  
6 – Could an agreement be shown by conduct?  
7 – Should there be a requirement of heightened burden of proof in this section, such  
8 as clear and convincing evidence (there already is such a burden in Section 6)?  
9 – Should there be any requirement about when the agreement must take place – e.g.,  
10 before conception, before birth, before the child is of a certain age?  
11

12 3. Should there be a time-limit within which a non-parent seeking rights by  
13 agreement must exercise that right – e.g., a certain number of months or years from the time the  
14 non-parent has not been living with or visiting with the child? (The length and duration of the  
15 relationship between child and non-parent are factors in granting relief – See Section 8.)  
16

17 4. Note that under Section 5(1), conferring standing by agreement requires  
18 agreement of all parents. Thus, for example, if a married couple had a child, and the couple  
19 divorced, one parent could not use this provision to confer parental rights to seek custody or  
20 visitation to a new spouse or partner over the objection of the other parent. If the act provides  
21 standing for de facto parents, that might be a separate basis for conferring standing to the non-  
22 parent, although the definition of de facto parent, as currently drafted, also requires “the support  
23 and consent of the child’s parent or parents to foster the formation and establishment of a parent-  
24 like relationship between the child and the de facto parent.”  
25

26 5. Regarding consent required for to raise a child together or to attain status as de  
27 facto parent, the following issue was raised at the first Drafting Committee meeting: How to  
28 handle a case in which one parent leaves before the child’s birth or during the child’s infancy;  
29 the remaining parent has a new partner (perhaps a stepparent); and the parent and new partner  
30 agree to raise the child together? Is consent required from the departed parent in order for the  
31 new partner to become a de facto parent or a parent by agreement?  
32

33 6. Should the act utilize the term “de facto parent”? “De facto parent” (or “in loco  
34 parentis” is a useful concept, reflecting a trend in case law and statutory law of several states.  
35 Inclusion of the term in this act does not revise the Uniform Parentage Act, although use of the  
36 term will expand the rights of certain persons to seek custody and visitation.  
37

38 7. There is overlap between the provision of “agreement to accept full and  
39 permanent responsibilities as a parent and to raise the child together” and the “de facto parent”  
40 provision. Both, as drafted, require agreement or consent of the parents. The “agreement”  
41 provisions focuses on the existence of an agreement, and presumably could be enforced soon  
42 after the child’s birth even if the child and non-parent have not had a long-term relationship. The  
43 “de facto provision” focuses more on the quality and duration of the relationship between the  
44 child and the non-parent. The definition of “de facto parent” provides the de facto parent “. . .  
45 (ii) has exercised parental responsibility for the child; and (iii) has acted in a parental role for a  
46 length of time sufficient to have established a bonded and dependent relationship with the child

1 that is parental in nature”).

2  
3 8. Note that an enforceable agreement to raise a child together could be viewed as an  
4 alternative to (or a bypass of) adoption laws – at least for the purpose of custody and visitation.  
5 Presumably this act – which focuses on custody and visitation – will not modify other areas of  
6 law, such as Probate Law and rights to compensation for personal injury.  
7

8 9. A prior draft of the third basis for standing [regarding both parents being deceased  
9 or incapacitated] also required that “a substantial relationship exists between the child and the  
10 non-parent.” Perhaps it is better to leave out that requirement in order to allow for cases in  
11 which the parents are deceased or incapacitated; the child needs to be placed somewhere; and the  
12 non-parent seems to be good candidate for custody, even if the non-parent’s relationship with the  
13 child is not currently substantial.  
14

15 10. An interesting issue related to this section (or another section): How to handle  
16 cases in which the non-parent’s level of relationship with the children varies. For example,  
17 assume the grandparents helped raise a child who is now 10 years old and have a very close  
18 relationship with that child. The parents have a second child, who is one year old at the time the  
19 grandparents seek visitation. The grandparents have a moderate relationship with the second  
20 child, but never raised the child on a day-to-day basis. If the grandparent can meet the criteria  
21 for visitation with the first child, should they also be able to obtain visitation with the second  
22 child, or should they be prevented from doing so?  
23

24 11. Another issue: What if non-parents (e.g., grandparents) sought to have substantial  
25 relationship with child, but were not able to because parent(s) unreasonably blocked the  
26 relationship? To what degree does *Troxel* permit fit parents to be arbitrary in their decisions?  
27

28 12. Should non-parent visitation be allowed to continue following adoption of a child  
29 by a relative? (Many state laws so provide.)  
30

31 13. A broad issue for consideration by the Drafting Committee will be the  
32 impact of the U.S. Supreme Court decision on same-sex marriage (*Obergefell v. Hodges*). [The  
33 ULC has recently established a study committee that will follow developments at the Supreme  
34 Court and make recommendations as to whether the Uniform Parentage Act or other ULC acts  
35 should be revised in light of the Supreme Court decision.] [End “Reporter’s Note”]  
36

## 37 **SECTION 6. PRESUMPTIONS AND BURDEN OF PROOF IN INITIAL**

38 **ACTIONS.** In initial actions for custody or visitation:

39 (a) Agreement to raise a child together. A non-parent found by [a preponderance of the  
40 evidence] [clear and convincing evidence] to have entered into a written [or oral] agreement  
41 under Section 5(1) before the child’s birth has the same right as the parent to obtain custody and

1 visitation.

2 (b) Initial action for custody between parent and non-parent. In other actions for custody  
3 of a child between a parent and a non-parent, there is a rebuttable presumption that parental  
4 custody is in the best interests of the child. The non-parent seeking custody must rebut the  
5 presumption by [clear and convincing evidence] [a preponderance of the evidence] that custody  
6 with the non-parent is in the best interests of the child and that custody with the parent would be  
7 a detriment to the child. Proof of parental unfitness is not required to rebut the presumption.

8 (c) Initial action for custody between two or more non-parents. In an initial action for  
9 custody of a child between two or more non-parents, there is no presumption that custody should  
10 be given to a particular party. The burden of persuasion to show the best interests of the child is  
11 by [a preponderance of the evidence] [clear and convincing evidence]. If an action for custody  
12 between two or more non-parents is brought under law of this state other than this act, the other  
13 law applies.

14 (d) Initial action for visitation when child in custody of parent or non-parent under  
15 agreement to raise child together. In an initial action regarding visitation when the child is in the  
16 custody of a parent or a non-parent who has been found to have entered into a written [or oral]  
17 agreement Section 5(1)to raise a child together, there is a rebuttable presumption that the  
18 custodian’s decision about visitation is in the best interests of the child. To rebut the  
19 presumption, the non-parent seeking visitation must establish by [clear and convincing evidence]  
20 [a preponderance of the evidence] (i) that absence of visitation will be a detriment to the child [or  
21 that special factors exist to justify the visitation—*probably delete this bracketed phrase*] and (ii)  
22 that the visitation will be in the best interests of the child.

23 *[Reporter’s query to the Drafting Committee: Did the Committee wish to include de facto*  
24 *parents in this section so that the categories of persons entitled to a presumption in favor of their*

1 *decisions will include: (1) parents, (2) non-parents who have been found to have entered into a*  
2 *valid written [or oral] agreement to raise a child together under Section 5(1), and (3) de facto*  
3 *parents? If so, subsection (e) also will need to be revised.]*  
4

5 (e) Initial action for visitation when child in custody of non-parent with no agreement to  
6 raise a child together. In an initial action regarding visitation with a child when the child is in the  
7 custody of a non-parent with whom there is not an agreement to raise the child together, the court  
8 must allow visitation by a non-parent if the party seeking visitation establishes by [a  
9 preponderance of the evidence] [clear and convincing evidence] that visitation is in the best  
10 interests of the child.

### 11 **Comment**

12 This section governs initial actions by non-parents for custody and visitation.  
13 Modification of orders is governed by Section 7.  
14

15 Subparagraph (a) provides that a non-parent who has entered into a valid written [or oral]  
16 agreement with a child’s parent(s) to raise a child together have the same rights to obtain custody  
17 and visitation as the parent. Agreements between parents regarding custody of children have  
18 been held to be of “constitutional magnitude” and entitled to presumptive enforcement. *In re*  
19 *Marriage of Coulter and Trinidad*, 2012 IL 113474, 364 Ill. Dec. 59, 976 N.E.2d 337, 342  
20 (enforcing an agreement between parents regarding future relocation of the children). *See also*  
21 *Frazier v. Goudschaal*, 296 Kan. 730, 295 P.3d 542 (2013) (enforcing a coparenting agreement  
22 between members of a same-sex couple); *Fawzy v. Fawzy*, 199 N.J. 456, 973 A.2d 347, 350  
23 (2009) (enforcing parents’ agreement to arbitrate a custody dispute).  
24

25 The presumption and burden of proof in subparagraph (b) recognize the superior right of  
26 parents to custody of their children in custody disputes with non-parents, and also provides that  
27 the superior right or presumption can be overcome. The standard in subparagraph (b) is similar  
28 to Pa. Stat. Ann. tit. 23, § 5327(b) (2015).  
29

30 The presumption and burden of proof in the first two sentences of subparagraph (c),  
31 regarding custody disputes between non-parents, is based on Pa. Stat. tit. 23, § 5327(c) (2015).  
32 The third sentence of subparagraph (b) provides: “If an action for custody between two or more  
33 third parties is brought under a law other than this act, the other law shall govern.” Thus, if a  
34 state has law governing custody of children who are in foster care, the foster care law of that  
35 state would govern. If an action is brought under a state’s guardianship laws, the guardianship  
36 laws would control.  
37

38 The presumption and burden of proof in subparagraph (d), regarding visitation disputes  
39 between a parent and a non-parent, applies the standard in *Troxel v. Granville*, 530 U.S. 57

1 (2000), in which the Supreme Court struck down Washington State’s third party visitation statute  
2 as applied. Justice O’Connor, in a plurality decision, said the Washington statute “contains no  
3 requirement that a court accord the parent’s decision any presumption of validity or any weight  
4 whatsoever.” *Id.* at 67, 120 S.Ct. at 2061. “The Superior Court’s order was not founded on any  
5 special factors that might justify the State’s interference with Granville’s fundamental right to  
6 make decisions concerning the rearing of her two daughters.” *Id.* at 68, 120 S.Ct. at 2061.  
7

8 In the years since *Troxel* was decided, state courts have generally held that a  
9 grandparent’s claim that they have a positive relationship with their grandchild is not sufficient  
10 to justify an order of visitation over the objection of a parent. *See, e.g., Neal v. Lee*, 2000 Ok 90,  
11 14 P.3d 547 (2000); *State Dept. of Social and Rehabilitative Services v. Paillet*, 16 P.3d 962  
12 (2001); *Flynn v. Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if the  
13 grandparent has a substantial relationship with the grandchild – such as raising the child for a  
14 few years – that can be the basis for granting visitation to the grandparent over the parents’  
15 objection. *See, e.g., Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents had helped  
16 raise their grandchildren for the first seven years of the oldest grandchild’s life and for lesser  
17 periods for the younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007)  
18 (grandparents cared for children while the mother was dying of cancer).  
19

20 Subparagraph (e) governs initial actions for visitation when child in custody of non-  
21 parent with no agreement to raise a child together. Since the dispute does not involve a parent,  
22 the Supreme Court’s holding in *Troxel* regarding giving deference to a parent’s decision does not  
23 apply, and visitation may be granted if it is in the best interests of the child to do so.  
24

25 As stated in Black’s Law Dictionary, “The Buren of proof includes both the burden of  
26 persuasion and the burden of production.” Black’s Law Dictionary (7<sup>th</sup> ed. 1999).  
27

### 28 **Reporter’s Note**

29  
30 *Additional question and comment (applicable to this section and other sections):* In  
31 order for relief to be granted (custody or visitation), should a showing of harm be required?  
32 [The U.S. Supreme Court in *Troxel* did not require that, although some states have required a  
33 showing of harm – e.g., Connecticut, Illinois, and Washington.  
34

35 David Biklen, a member of the Drafting Committee and a member of the Style  
36 Committee has given an informal suggestion to provide a separate section number for each of the  
37 five bases for standing. This draft places the five bases in a single section and gives  
38 subparagraphs for each of the bases for standing. We may wish to discuss this issue, although  
39 ultimate resolution of the issue is likely to be determined by the Style Committee.  
40

41 **SECTION 7. MODIFICATION.** Custody and visitation orders entered under this act  
42 may be modified by application of [insert citation to the state’s law regarding modification of  
43 custody and visitation orders applicable to disputes between parents].

1 **Comment**

2 This section makes reference to a state’s existing law regarding modification of custody  
3 and visitation orders applicable to disputes between parents. In most states, that standard is a  
4 showing of substantial change of circumstances coupled with a showing that modification is in  
5 the best interests of the child (although a few states have different standards, such as requiring a  
6 showing of endangerment if modification is sought within two years of a prior order). See Jeff  
7 Atkinson, *Modern Child Custody Practice - Second Edition*, §§ 10.1 – 10.13 (LexisNexis 2014).  
8 Under this approach, a custody or visitation order in favor of a non-parent generally would stay  
9 the same unless the substantial change of circumstances and best interests of the child were  
10 shown.

11 **SECTION 8. FACTORS CONSIDERED.**

12 **Alternative A**

13  
14 When determining whether to grant custody or visitation under this act, the court must  
15 consider the best interests of the child and:

- 16 (1) the quality of relationship between the child and the parent and between the child and  
17 non-parent, including whether the non-parent has served as a de facto parent of the child;  
18 (2) the frequency and continuity of contact between the child and the non-parent;  
19 (3) the views of the child, having regard to the child’s age and maturity;  
20 (4) the willingness of the parent and non-parents to facilitate, as appropriate, a positive  
21 relationship among the child, the parties to the proceedings, and family members of the child;  
22 (5) the child’s adjustment to the child’s current and proposed home, school, and  
23 community;  
24 (6) the mental and physical health of all individuals involved;  
25 (7) a history of or threat of domestic violence, child abuse, or child neglect;  
26 (8) the reasons for the parties’ positions regarding custody and visitation;  
27 [(9) an agreement between the parties regarding custody or visitation;] and  
28 (10) any other relevant factor affecting the best interests of the child.

1 **Alternative B**

2 When making any determination under this act, the court must consider the factors  
3 specified in \_\_\_\_\_ [insert citation to the state’s factors used for deciding custody disputes  
4 between parents].

5 **End of alternatives**

6 **Reporter’s Comment**

7 I suggest the Drafting Committee adopt the first alternative (listing specific factors to be  
8 considered). There are at least two reasons for this approach. First, when states enacted third  
9 party visitation statutes, 36 states listed specific factors for consideration – thus reflecting a  
10 preference by legislatures for use of specific factors rather than just a cross-reference to another  
11 portion of the state’s Family Law statutes. Second, when a state lists factors to be considered in  
12 disputes between parents, the factors often are phrased in terms of the parents’ conduct or  
13 relationship with the child – rather than a more generic factor that would be equally applicable to  
14 disputes between two parents versus a parent and a non-parent (or two or more non-parents).

15  
16 One additional factor the Drafted Committee discussed was an agreement between the  
17 parties. Some members of the committee believed the factor could be useful and could help  
18 resolve disputes. Others were concerned agreements could be coerced and that circumstances  
19 may change between the time of the agreement and the time at which enforcement of the  
20 agreement is sought. It also was noted that if the parties come to court with an agreement  
21 regarding custody or visitation, many (or most) states would treat the agreement as  
22 presumptively valid.

23  
24 Some members of the Drafting Committee proposed use of language in the introduction  
25 to this section along the lines of “factors such as” or “factors, including.” I believe the final  
26 factor (“any other relevant factor affecting the best interests of the child”) provides flexibility.  
27 The language, of course, can be reworked if the committee wishes.

28  
29 As the drafting process proceeds, official “comments” will be included regarding the  
30 “Factors Considered.” The comments will note the number of states that have listed factors in  
31 the state’s non-parental visitation (and custody) statutes. The comments also may address  
32 specific factors. [End Reporter’s Comment]

33  
34 **SECTION 9. TEMPORARY ORDER.** [On motion of a party and] after hearing and  
35 establishment of a prima facie case, the court may enter a temporary order while the action is  
36 pending.

1 **Comment**

2 This section makes explicit that the court has the power to enter temporary, as well as  
3 permanent, orders. The factors listed in Section 8 apply to both temporary and permanent orders.  
4

5 **SECTION 10. APPOINTMENTS AND COURT SERVICES.** To the extent available  
6 in other cases involving custody and visitation of children, the court may do one or more of the  
7 following:

8 (1) appoint a child’s attorney, guardian ad litem, child’s representative, or similar  
9 personnel;

10 (2) order mediation, but a party who has been the victim of domestic violence by another  
11 party to the proceedings, shall not be required to participate in mediation;

12 **[Reporter’s note:** The Drafting Committee discussed bracketing a portion of subsection (2) or  
13 including additional language in the subsection – perhaps to allow for mediation in jurisdictions  
14 that have appropriate protections for victims of domestic violence – e.g., shuttle mediation in  
15 which the parties do not have direct contact with each other.] [End Reporter’s Note]  
16

17 (3) order evaluations or home studies; and

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

19 **Comment**

20 A variety of personnel and court services may assist the court in making decisions  
21 regarding non-parental 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 custody and visitation cases.  
24

25 **SECTION 11. CHILD SUPPORT.** The court may order a party receiving visitation  
26 under this act to pay child support and the cost of providing transportation in connection with  
27 visitation.

28 **Comment**

29 The court has discretion to order a party receiving visitation to pay child support or the  
30 cost of providing transportation in connection with visitation. Factors in setting child support, if  
31 any, would include the resources of the parties, the needs of the child, and the cost of



1 transportation. The state’s presumptive guidelines for child support paid by a non-custodial  
2 parent to the custodial parent would not apply to this determination.  
3

4 **Reporter’s Note**  
5

6 The Drafting Committee began discussion of child support issues, but did not reach final  
7 conclusions. Several members of the committee seemed to agree on two propositions: (1) if a  
8 person is regarded as a parent under state law, then the state’s child support guidelines would  
9 apply (and this act would not apply); (2) for most non-parents, the state’s child support  
10 guidelines should not apply . . . although there was some support for applying child support  
11 guidelines to persons who were found to have entered into an agreement to raise a child together.  
12 [End Reporter’s Note]  
13

14 **SECTION 12. ATTORNEY FEES AND COSTS.** The court may allocate payment of  
15 attorney fees, including interim fees, and costs.  
16

17 **Comment**

18 Litigating issues of non-parental custody and visitation can be financially burdensome,  
19 including to the parent. This section gives the court discretion to order payment of attorney fees  
20 and costs. An award of such fees may deter non-meritorious cases.  
21

22 **Reporter’s Note**

23 When the ABA Section of Family Law drafted a third party custody and visitation act, it  
24 adopted a similar provision regarding attorney fees and costs and added the phrase “as equity  
25 may require.” Another possible addition to the provision is that fees and costs may be ordered  
26 “to a prevailing party.” [End Reporter’s Note]  
27

28 **SECTION 13. FINDINGS OF FACT AND CONCLUSIONS OF LAW.** When  
29 making a decision under this act, the court [on request of a party] shall make findings of fact and  
30 conclusions of law in support of its decision.  
31

32 **Comment**

33 Requiring findings of fact has several benefits. The fact-finding process structures the  
34 court’s review so that the court is less likely to overlook important facts or apply bias in reaching  
35 its decision. Careful fact-finding by the trial court also facilitates appellate review and may  
36 assist the parties in accepting the decision. At least twenty states and the District of Columbia  
37 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).

1           **[SECTION 14. PRIORITY ON CALENDAR.** A case arising under this act must be  
2 given priority on the calendar and handled expeditiously.]

3                                           **Comment**

4           The phrase “must be given priority on the calendar and handled expeditiously” is the  
5 same phrase used in the Uniform Child Custody Jurisdiction and Enforcement Act, § 107 (1997).  
6

7                                           **Reporter’s Note**

8           John Sebert commented: “Folks representing the judicial system, such as the National  
9 Center for State Courts, often object to this type of provision, and I expect they would do so  
10 here. Having a priority provision in an act that governs determining jurisdiction is one thing;  
11 putting it in this act is very different.”  
12

13           Several members of the Drafting Committee noted that it is common for states to give  
14 “priority” to many types of proceedings, and, as a result, such provisions have little effect.  
15

16           **SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In  
17 applying and construing this uniform act, consideration must be given to the need to promote  
18 uniformity of the law with respect to its subject matter among states that enact it.

19           **SECTION 16. TRANSITIONAL PROVISION.** A petition or other request for relief  
20 regarding a non-parent’s request for custody and visitation which was commenced before the  
21 effective date of this act is governed by the statutes in effect at the time the petition or other  
22 request was made.

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

24           (a) . . . .

25           (b) . . . .

26           (c) . . . .

27           **SECTION 18. EFFECTIVE DATE.** This [act] takes effect . . . .