To: Drafting Committee for the Non-Parental Child Custody and Visitation Act
From: Shannon Minter and Emily Haan, National Center for Lesbian Rights (Observer)
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RE: The Need to Protect Third Parties Who Play a Parent-Like Role in a Child's Life

We understand that the drafters of the Uniform Parentage Act (UPA) are considering recommending that states recognize *de facto* parents as full legal parents—a recommendation we support and that would be consistent with emerging judicial and legislative trends. We also understand that, especially in light of that development, concerns about whether to similarly recognize *de facto* parents in the Non-Parental Child Custody and Visitation Act (NCCVA) have arisen. We share some of those concerns, particularly with regard to the potential confusion that might result by treating *de facto* parents simultaneously as legal parents under the UPA and as nonparents under the NCCVA. At the same time, it is important to acknowledge—as the overwhelming majority of state courts to consider the issue have done—the well-established category of third parties who play a parent-like role in a child's life and whose substantial relationships with those children warrant greater protection than that afforded to other third parties. This memo is intended to assist in our discussions about how the Act can best track this strong judicial consensus and appropriately protect those important, parent-like third party relationships without creating a potentially confusing conflict with the inclusion of *de facto* parents in the UPA.[1]

I. PERSONS WHO PLAY A PARENT-LIKE ROLE IN A CHIILD'S LIFE ARE GENERALLY TREATED DIFFERENTLY THAN OTHER THIRD PARTIES

The overwhelming majority of state courts that have considered the issue strongly protect children's relationships with third parties who, with the consent or acquiescence of a child's legal parent, have assumed a parent-like role for a significant period of time and who, as a result, have formed a substantial relationship with the child. Even if the UPA includes *de facto* parents, there remains a critical need for the NCCVA to maintain the well-established existing protection for third parties who have functioned as a child's parent—including recognizing an exception to the detriment standard applied to other third parties.

Currently, most states recognize that not all third parties are similarly situated and that courts should be able to determine, based on a best interest standard, whether to grant visitation or custody to a person who has played an especially significant, parent-like role in a child's life and who, as a result, has formed a substantial bond with the child. Even if all such persons were recognized as full legal parents under the contemplated

[1] Because protection of these parent-like relationships is more important than the precise terminology used, we are not recommending the use of any particular terminology to describe persons who have played a parent-like role in a child's life. As noted below, the case law uses a variety of terms, including person *in loco parentis*, psychological parent, equitable parent, parent by estoppel, and functional parent.

changes to the UPA, the NCCVA would still need to recognize parent-like caregivers for the practical reason that some states may adopt the NCCVA (or look to it for guidance in drafting or construing similar state laws) without also adopting the UPA. States are not obliged to adopt both Acts or even to consider them in tandem, and the piecemeal nature of state legislative often leads state legislatures to consider revisions to parentage and visitation statutes in isolation from each other, As a result, taking the radical step of abandoning the longstanding distinction between parent-like caregivers and other third parties, based on an assumption or hope that at least some of those persons will now be treated as full legal parents under the UPA, would have the perverse result of leaving children's relationships with such persons entirely unprotected in states that adopt only the new NCCVA or only part of the new UPA. Such a result would be harmful in itself and would also undermine the credibility of the uniform law reform process.

It is appropriate to take the interaction between the two Acts into account; however, each must be able to stand on its own, and, in particular, the possible inclusion of *de facto* parents in the UPA should not be presumed to justify a radical narrowing of this Act to exclude any consideration of the unique circumstances of nonparents who—unlike the great majority of other third parties—have assumed substantial parental responsibilities for a child. There will always be persons who fall outside of the legal definition of a parent, but who have played a parental role in a child's life. The law must take account of those persons.

In sum, regardless of whether *de facto* parents are included in the UPA, imposing a single, categorical standard requiring all third parties to show detriment in order to seek visitation or custody, with no exception for persons who have functioned as parents, would be harmful to children and leave them vulnerable to losing important bonded relationships. As recently as this past July, the Maryland Court of Appeals recognized this in *Conover v. Conover*. No. 21-C-13-046273, 2016 WL 5462631 (Md. July 7, 2016). The *Conover* court held that third parties who have assumed parental responsibility for a child for a significant period of time do not have to show detriment like other third parties. *Id* at *18. The court noted that this holding "fortif[ies] the best interests standard by allowing judicial consideration of the benefits a child gains when there is consistency in the child's close, nurturing relationships." *Id.* The court overruled its earlier decision in *Janice M. v. Margaret K.*, 404 Md. 661 (2008), in which the Court had refused to recognize any distinctions among third parties and held that even those who have functioned as parents must "show parental unfitness or exceptional circumstances" to seek visitation or custody. *Conover*, 2016 WL 5462631 at *4. The court recognized that its prior decision was grossly out of step with the national trend and put children at risk of serious harms by failing to protect their stability and bonded relationships with parent-like caregivers.

As the New Jersey Supreme Court similarly recognized sixteen years ago in *V.C. v. M.J.B.*, protecting the rights of third parties who play a parent-like role is a "recognition

that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them." 748 A.2d 539, 550(N.J. 2000). The law should—and does in most states—protect that interest by permitting the well-established category of parent-like third parties to seek visitation or custody under a best interest standard.

Especially in light of the large body of state case law recognizing this category of parent-like third parties and permitting state courts to award visitation or custody to such persons based on a best interests standard, it would be anomalous—and a significant step backward—for the NCCVA to turn a blind eye to the distinction between caregivers who have assumed substantial, parent-like responsibilities and other third parties. Such a monolithic approach would disregard the diversity of contemporary families and have a destabilizing impact on many children, as well as putting the Act out-of-step with the strong consensus of most family law scholars and state courts.

II. THERE IS A STRONG MAJORITY CONSENSUS THAT THIRD PARTIES WHO HAVE PLAYED A PARENT-LIKE ROLE FOR A SIGNIFICANT PERIOD OF TIME MAY SEEK VISITATION OR CUSTODY WITOUT SHOWING DETRIMENT

The great majority of states to consider whether a third party who plays a parent-like role in a child's life should have standing to seek custody or visitation have readily answered that question in the affirmative. *See, e.g., In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435 (Wis. 1995); *In re Parentage of L.B.*, 122 P.3d at 176; *V.C. v. M.J.B.*, 748 A.2d at 551-52; *Rubano v. DiCenzo*, 759 A.2d 959, 974-75 (R.I. 2000); *Middleton v. Johnson*, 633 S.E.2d 162, 168 (S.C. 2006); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 & n.6 (Mass. 1999); *T.B. v. L.R.M.*, 786 A.2d 913, 914, 917 (Pa. 2001); *Bethany v. Jones*, 2011 Ark. 67 (Ark. 2011); *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007); *Logan v. Logan*, 730 So.2d 1124 (Miss. 1998); *Kulstad v. Maniaci*, 352 Mont. 513 (2009); *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008); *McAllister v. McAllister*, 779 N.W.2d (N.D. 2010).

As these courts have noted, trial courts are well-equipped to determine when a person has played a truly parental role in a child's life and to distinguish such cases from other situations. *See*, *e.g*., *Argenio v. Fenton,* 703 A.2d 1042 (Pa.Super.1997) (denying in loco parentis standing to a grandparent who cared for a child daily, but who did not play a parental role in the child's life). Under a variety of doctrinal labels and doctrines, including that of a person *in loco parentis*,[2] the protection afforded to such relationships

[2] *See In re Parentage of A.B.,* 837 N.E.2d 965 (Ind.2005); *T.B. v. L.R.M.,* 567 Pa. 222, 786 A.2d 913 (2001) (recognizing the status of *in loco parentis); V.C. v. M.J.B.,* 163 N.J. 200, 748 A.2d 539 (2000) (recognizing the status of "psychological parent"); *In re T.L.,* 1996 WL 393521 (Mo.Cir. May 7, 1996) (adopting the doctrine of "equitable parent"); *In re Custody of H.S.H.-K.,* 193 Wis.2d 649, 533 N.W.2d 419 (1995) (permitting a person in a "parent-like" relationship with the child to petition for visitation); *Carter v. Brodrick,* 644 P.2d 850 (Alaska 1982) (permitting a non-parent with status of a psychological parent or *in loco parentis* to petition for custody).

is deeply rooted in our family law tradition. *See, e.g*., *In re Application of Allen,* 139 Wash. 130, 130–31, 245 P. 919 (1926) (awarding custody to aunt and uncle who had raised a child for eight years); *T.B. v. L.R.M.,* 567 Pa. 222, 234, 786 A.2d 913, 920 (2001) (noting that in loco parentis standing is "a well-established common law doctrine). Its wisdom has been confirmed by contemporary social science, which recognizes the enormous benefit to children of maintaining parent-like bonds and the serious harms that typically result when such bonds are severed. *See, e.g.*, *In re E.L.M.C.*,100 P.3d 546, 557-561 (Colo. App. 2004) (discussing case law and social science literature showing that the formation of parent-child bond is not limited to biological or legal parents and that children are harmed by the severance of such bonds). Some of the specific factual situations in which this distinction arises may be new, such as the rise in the number of children raised in same-sex relationships. However, the goal of protecting children's established family bonds is not new, and the law should continue to permit courts to exercise that traditional role.

In light of this significant body of judicial experience and case law, fears that courts will be unable to apply this well-established exception to the detriment standard for third-party visitation and custody claims are not well-founded. Across the country, courts can and do protect children's relationships with persons who have functioned as a child's parent, readily distinguishing such persons from more conventional third parties. As discussed in more detail in our August 8 memo, courts have been making these determinations for many years. We are not aware of any cases where a person was found to have standing to seek custody or visitation as a parent-like figure where that person was not playing a deeply committed parental role in the child's life.

III. PROTECTING CHILDREN'S RELATIONSHIPS WITH PARENT-LIKE CAREGIVERS IS SUPPORTED BY *TROXEL V. GRANVILLE*

As every single state court to consider the issue has concluded, and as family law scholars overwhelmingly agree, permitting persons who have functioned as a child's parent for a significant period of time and who have a substantial bond with the child to obtain visitation or custody under a best interests standard is not only consistent with, but supported by, *Troxel v. Granville.* 530 U.S. 57 (2000). In *Troxel*, the Court invalidated a statute providing that "[a]ny person may petition the court visitation rights at any time," and that "[t]he court may order visitation rights for any person when visitation may serve the best interest of the child." 530 U.S. at 61. The Supreme Court, in a plurality opinion, held that the statute was unconstitutional because it was "breathtakingly broad" and imposed literally no limitations whatsoever on third party standing to seek visitation under a best interest standard. While the case generated multiple opinions, seven of the nine justices indicated that permitting a court to award visitation or custody under a best interest standard to a person with a substantial parent-like relationship to the child would not pose a constitutional problem. *See id.* at 85 (Stevens, J., dissenting); *id*. at 77 (Souter, J., concurring); *id.* at 98-99, 100-101

(Kennedy, J., dissenting); *id.* at 73-74 (plurality decision of four justices noting that the statute was unconstitutional only because it provided no limits on who could bring such a claim).

Courts that have considered the implications of *Troxel* in cases involving parent-like third parties, like the Maryland high court in *Conover*, have concluded that *Troxel* does not bar courts from recognizing and protecting these relationships. "As many courts immediately recognized, *Troxel* did not denote the end of third party visitation." *Conover*, 2016 WL 5462631 at *10. Rather, "numerous courts have declined to treat *Troxel* as a bar to recognizing *de facto* parenthood or other designations used to describe third parties who have assumed a parental role." *Id*. at *11. As the court noted, "no case has interpreted *Troxel* as inconsistent with parental status for nonbiological parents except Maryland." *Id*. at *12 (reversing that prior ruling and recognizing that a person who has functioned as a child's parent for a significant period of time has standing to seek visitation or custody based on the best interest standard).

In sum, there is no legitimate basis for concern that *Troxel* would create a bar to permitting parent-like third parties to seek visitation or custody under a best interest standard. As a constitutional matter, it is beyond serious question that states may recognize and protect such relationships—as most states do. Nothing in *Troxel* suggests otherwise, and in fact seven of the nine justices expressly endorsed the validity of applying a best interest standard to visitation or custody claims by a person with a substantial parent-like relationship to a child. Moreover, as Justice Kennedy noted, our constitutional tradition has long recognized that the existence of such bonded, parent-like relationships reliably "serves to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare." *Troxel* at 98, Kennedy, J. (dissenting) (citing a number of Supreme Court cases protecting a child's relationship with "a third party . . . acting in a caregiving role over a significant period of time").

IV. CONCLUSION

Protecting parent-like relationships with children is a well-established part of our nation's family law. Eliminating that longstanding protection would work a dramatic change in the current legal landscape, to the detriment of many children. Even if *de facto* parents are included as legal parents in the new UPA, the UPA and the NCCVA are independent and need not be adopted together. Some states may adopt the latter without adopting the former, which would have the perverse result—if this Act does not protect parent-like bonds—of leaving even children's longstanding, deeply bonded relationships with no protections at all. Moreover, even where *de facto* parents are given full legal recognition as parents, there will always be a need for flexibility for protection of parent-like relationships that may fall outside the legal definition of a parent, but that warrant recognition.

Because so many states already protect parent-like relationships and, in many cases, have done so for a long time, there is a considerable body of case law addressing visitation and custody claims by this special type of third party. In practice, courts have amply demonstrated their ability to appropriately identify and protect these parent-like caregivers. Indeed, the factors used by courts to make such determinations are remarkably similar across states and have provided remarkably similar results. No scholars or others have identified significant patterns of troubling decisions or other evidence that the factors considered by courts are failing to provide sufficiently clear, objective guidance that is reliably identifying persons who have true, parent-like bonds with children.

Protecting such bonds is deeply rooted both in our common law and in our constitutional tradition. Far from running afoul of the Supreme Court's case law on parental rights, protecting *de facto* parent-child bonds is fully consistent with that case law and has been a common theme in many of the Court's seminal cases, from the protected aunt-child relationship in *Prince v. Massachusetts*, 321 U.S. 158 (1944), to the express statements approving protection of such bonds by seven of the nine justices in *Troxel.*

For all of these reasons, we support the continued recognition of standing to seek visitation and custody by those who play a parent-like role in a child's life in the NCCVA, under a best interest standard, even if *de facto* parents are included as legal parents in the UPA.