

Good Afternoon Debra/Jeff,

Unfortunately I won't be able to attend the October meeting. I believe this meeting will be critical to the success of our act. I strongly suggest that you begin deliberations by articulating precisely what it is that this committee hopes to accomplish.

Shortly after the July meeting, I started playing with the annual meeting draft to address some of the concerns expressed on the floor, some of my own concerns and different approaches to the issue of non parental custody. The "highlights" (or "lowlights, if you don't like them) of this version are:

1. elimination of the term DeFacto Parent throughout, but retention of the concept and the favorable presumptions that arise once a party establishes that status
2. broad standing provision based only upon a substantial relationship with the child, and including familial relationships within the meaning of substantial relationship.
3. consolidation and reorganization of the act, in order to simplify; standardize terminology

This draft is not perfect, but hopefully will provide some food for thought. You may do with it as you see fit.

I must add a disclaimer however. I continue to have issues with my version of Office for Mac. This has caused me much angst and time with Microsoft and Apple for *several months*. Documents that I create look perfect on my screen, and often look fine when sent via email. However, sometimes formatting is lost and the recipient gets a garbled document. I don't see it on my end. If what you receive is unintelligible, I will try scanning and emailing. Saving as a PDF doesn't work. You can't imagine how frustrating this has been. I apologize in advance.

I urge the committee to remain focused on the child and recognize that many of the actions brought under this act will not have a parent as either petitioner or respondent or may involve a party who is a parent solely due to genetics.

Good luck.

Mary Devine

## NON-PARENTAL CHILD CUSTODY AND VISITATION ACT

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

### Child Focused Act

Preserve or create substitute parental-like relationships using the laws governing custody and visitation (i) when necessary because for e.g., parents are unable or unwilling to act or (ii) when feasible and practical and in the best interests of the child ( e.g., “good” grandparents) , consistent with constitutionally protected rights of fit parents to make decisions for their children

Grant broad standing but limit judicial authority to grant custody or visitation

Respect the rights of fit parents to make decisions regarding their children consistent with Troxell

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

(1) “Child” means an unemancipated individual who has not attained [18] years of age\*.

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The term does not include the subject of a proceeding under [cite to law of this state other than this [act] regarding custody and visitation of children in proceedings related to guardianship of the person, abuse, neglect, or dependency].

\*Need further discussion regarding application adult children, per request from the floor

(2) Child abuse” means child abuse as defined in [cite to definition of “child abuse” in law of this state other than this [act]].

(3) “Custody” means physical custody, legal custody, or both. The term includes joint custody or shared custody as defined by the law of this state other than this [act].

4. “Detriment to the child” means adverse effect to the child’s physical or psychological well-being, including the effects 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 or de facto parent.

(6) “Domestic violence” means domestic violence as defined in [cite to definition of “domestic violence” in law of this state other than this [act]].

(7) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

**Deleted: SECTION 19. APPLICATION TO CHILDREN WHO ARE THE SUBJECT OF PROCEEDINGS REGARDING GUARDIANSHIP, ABUSE, NEGLECT, OR DEPENDENCY.** This [act] does not apply if the child i

**Deleted:** (4) “De facto parent” means an individual who is not a legal parent under another state ¶ statute or in equity who within the last two years, has undertaken permanent, unequivocal, committed parental responsibility in the child’s life. Such a finding requires a determination by the court that: ¶ (A) the individual has resided with the child for a sufficient period of time to form a bonded and dependent relationship with the child; ¶ (B) the individual has engaged in consistent caretaking of the child; ¶ (C) the relationship between the individual and the child was supported by another parent of the child, and the individual and the other parent have accepted that relationship or behaved as though the individual is a parent of the child; provided however that if a parent has completely failed to exercise parental responsibility, the support of the parent who failed to exercise parental responsibility is not required; ¶ (D) the individual has accepted parental responsibility without expectation of financial compensation; and ¶ (E) the continuing relationship between the individual and the child is in the best interests of the child.

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

The only place where this term is used is in the definition of “custody.” Do we need it?

(9) “Non-parent” means an individual other than a parent, but does not include a person who is deemed to be a parent under Section 6 or Section 7.

(10) “Parent” means a person recognized as a parent under law of this state other than this [act]. [The term includes persons deemed by the court to be a parents under this act in accordance with Section 6 or Section 7] - Not sure we want to do this but raised here for consideration; need review of where and how we use the term.

Should we include any person recognized as parent under the law of the state in which they reside?

(11) “Parental responsibility” means exercising care and control of a child and making decisions regarding the health, welfare, and other needs of the child.

(12) “Parenting time” means parenting time as defined in [cite to definition of “parenting time” in law of this state other than this [act]].

(13) “Physical custody” means day-to-day care and supervision of a child.

Again this is only used in the definition of “custody”.

Suggest we change the definition : “Custody means physical and legal ( or court ordered) custody, or both, and includes joint custody or share custody as defined by the law of this state other than this act.

NOTE: Will need to check where some definitions are used and if better to state the rule in the section rather than include in definitions.

(14) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(15) “Sexual assault” means sexual assault as defined in [cite to definition of “sexual assault” in law of this state other than this [act]].

(16) “Stalking” means stalking as defined in [cite to definition of “stalking” in law of this state other than this [act]].

(17) “Visitation” means the [court ordered] right to spend time with a child, which may include overnights.

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**SECTION 3. JURISDICTION.** A court of this state having jurisdiction under [cite to this state’s Uniform Child Custody Jurisdiction and Enforcement Act] has jurisdiction to determine custody or visitation under this act.

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**SECTION 4. STANDING.** An individual may file a petition seeking custody or visitation under this act if the individual claims that:

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(a) a substantial relationship exists between the child and the individual; or

Deleted: (a) he or she is a de facto parent; ¶  
(b)

(b) the individual entered into an oral or written agreement prior to the birth of a child with a parent or the parents of the child to accept full and permanent parental responsibility and to raise the child together with the parents, and the denial of custody or visitation, or both, to the individual would be a detriment to the child, except that if a parent has completely failed to exercise parental responsibility, the consent of the parent who failed to exercise parental responsibility is not required.

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For purposes of this section, a substantial relationship may be established by specific allegations regarding the nature, extent and duration of the relationship between the petitioner and the child or an allegation of a close familial relationship between the petitioner and the child, including but not limited to that of a grandparent, sibling, aunt, uncle or cousin.

I’ve left part (b) in for now, with obvious changes including the addition of a detriment showing, but note that there is timing issue, in addition to the policy issue of whether we want to include parents by contract and if so, with what conditions. The timing issue is this: Consent of both parents is required prior to the birth of the child; in order for the exception to apply, the parent whose consent is not needed must have failed to exercise parental responsibility and it is impossible to exercise parental responsibility prior to the birth of the child. I suspect what was intended was to say even though one parent did not consent prior to birth, if after the birth that parent was completely uninvolved, the parties to the agreement are nonetheless bound.

With regard to the showing of detriment, I added that for further policy discussion. In my opinion it makes sense to add a detriment requirement for purposes of standing only to those persons who have no relationship (personal or familial) with the child. Detriment is an additional hurdle, and my preference is to limit the hurdles on standing. For that same reason I have deleted detriment from (a).

We need to flush out who and what situations (b) is trying to cover if we keep it in.

Part c addresses, albeit indirectly, the issue of grandparents and other family members who may have been prevented by one or both parents from establishing a relationship with a child. I don’t read Troxell to preclude a broad standing provision.

## SECTION 5. PLEADINGS: NOTICE.

(a) All pleadings filed in actions under this act requesting custody or visitation shall be verified and specify the facts on which the allegation is based. The initial pleading of a party must include:

(1) the nature, duration and extent of the relationship between the party and the child, including where applicable

(a) the period of time the party has resided with the child;

(b) the caretaking the party has provided the child;

(c) the degree to which the relationship between the party and the child was supported by a parent or the parents of the child, and the degree to which the party and the other parent or parents have accepted that relationship or behaved as though the individual is a parent of the child; and

(d) the financial compensation, if any, the party has accepted in exchange for providing care for the child.\*\*

\*\* a-d come from (5)(b), below. I've moved the substance and changed "petitioner" to "party" and "the other parent" to "a parent."

(2) if applicable, the specifics of any agreement between the parties regarding care for the child and contact with the child;

(3) whether and to what extent attempts have been made by the party to obtain visitation or other contact with the child;

(4) the information required by [cite to Section 209 of this state's Uniform Child Custody Jurisdiction and Enforcement Act]; and

(5) the reasons why or why not a continuing relationship between the and the child is in the best interests of the child and why or why not the denial of custody or visitation to the petitioner would be a detriment to the child.

(b) .

In pleadings in which a party claims to have entered into an agreement with [each] parent of the child to accept full and permanent parental responsibility and to raise the child together, the pleading also shall state:

(1) the date of the agreement;

(2) the manner in which the agreement was made (by writing, oral statement, or other means).

© Notice of the filing of a petition under this act shall be given:

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(1) the period of time the petitioner has resided with the child;

(2) the caretaking the petitioner has provided the child;

(3) the degree to which the relationship between the petitioner and the child was ¶ supported by another parent or parents of the child, and the degree to which the petitioner and the other parent or parents have accepted that relationship or behaved as though the individual is a parent of the child; and ¶

(4) the financial compensation, if any, the petitioner has accepted in exchange for providing care for the child.

Deleted: (c) In pleadings in which a petitioner who is not a de facto parent requests custody or 9 visitation, the petition also shall describe why denial of custody or visitation to the petitioner would be a detriment to the child. ¶ d)

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The type of notice and the persons who are to receive notice require further discussion. The committee seemed inclined to include such a provision based upon suggestions from the floor.

Should we include a provision specifically authorizing the court to order notice and joinder at any point in the proceeding.?

**SECTION 6. DETERMINATION THAT A PARTY HAS ACTED AS A PARENT; FINDINGS REQUIRED; EFFECT.** (a) If the court finds by clear and convincing evidence that, within the two years immediately preceeding the commencement of an action under this act, a non-parent has exercised care and control of a child and made decisions regarding the health, welfare and other needs of the child and further that

(A) the non parent has resided with the child for a sufficient period of time to form a bonded and dependent relationship with the child;

(B) the non-parent has engaged in consistent caretaking of the child;

(C) the relationship between the non-parent and the child was supported by at least one parent of the child, and the party and that parent have accepted that relationship or behaved as though the party is a parent of the child; and

(D) has accepted parental responsibility without expectation of direct financial compensation,

the court may find that the party

▼

OPTION A:

shall be deemed to be a parent for the purpose of determining custody or visitation under this act and applying the presumptions available under this act.

OR

OPTION B:

has the same right to custody, visitation, or parenting time as a parent, as those rights are provided under law of this state other than this act.

(a) A-D is derived from the previously used definition of DFP, but I have not included E which was the best interest finding. Since this is so closely connected to the ultimate determination the court is to make, I have always been uncomfortable with including it when the court is simply making a determination as to the status of a party.

Note: (a) C does not include the “exclusion” from the definition of a DFP for a parent who failed to exercise parental responsibility

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**Deleted:** the petitioner is a de facto parent.

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Suggest we discuss further whether in actions between DFP and parent there should be equality or whether it only makes sense in DFP v non parent.

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[ not sure what we want to do with this section, below; there was some talk about eliminating parents by contract altogether:

## SECTION 7. **DETERMINATION THAT A PARTY HAS AGREED TO ACCEPT FULL AND PERMANENT PARENTAL RESPONSIBILITY; EFFECT.**

(a) If the court determines by clear and convincing evidence that a party who is not a legal parent under the law of any state or in equity has entered into an agreement before the child's birth to accept full and permanent parental responsibility and to raise the child together with a parent of the child, that party shall be deemed to be a parent for the purpose of determining custody or visitation under this act and applying the presumptions available under this act.

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[(b) If the child has more than one parent, agreement of each parent is necessary, except that if a parent has completely failed to exercise parental responsibility, the agreement of that parent is not required.] Revisit?

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## SECTION 8. **PRESUMPTIONS IN CERTAIN ACTIONS BY NON-PARENTS.**

(a) In any action filed under this act in which a non-parent seeks custody or visitation from a parent or a person deemed to be a parent under Section 6 or Section 7, a rebuttable presumption exists that the decision of the parent or the person deemed to be a parent about custody and visitation is in the best interests of the child. To rebut the presumption, the non-parent must establish by clear and convincing evidence that:

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(b) In a proceeding under subsection (a),

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- (1) a substantial relationship exists between the child and the non-parent, and
- (2) denial of custody or visitation to the non-parent is a detriment to the child, and

- (3) custody or visitation to non-parent is the best interests of the child.

Proof of parental unfitness is not required to rebut the presumption described in this section.

Deleted: SECTION 9. INITIAL PETITION BY NON-PARENT OF CHILD WHO IS NOT A DE FACTO PARENT WHEN CHILD IS NOT IN CUSTODY OF PARENT OR DE FACTO PARENT. (a) This section applies to initial petitions for custody or visitation filed by a non-parent who is not a de facto parent when the child is not in the custody of a parent or de facto parent.

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(b) In actions between non parents in which none of the parties is a parent or person deemed to be a parent under Section 6 or Section 7, the party seeking

custody or visitation, must establish by clear and convincing evidence that:

- (1) a substantial relationship exists between the child and the party, and

(2) granting custody or visitation to that party is in the best interests of the child. I

© In actions between two or more non-parents, no presumptions shall arise in favor of any party.

**SECTION 9. PRESUMPTION REGARDING DOMESTIC VIOLENCE, CHILD ABUSE, SEXUAL ASSAULT, OR STALKING.**

In all actions under this act, a rebuttable presumption shall arise that it is not in the best interests of a child to grant custody or visitation to a party, if that party or a person residing with that party, has committed an act of domestic violence, child abuse, sexual assault, or stalking. For the purposes of this section, the phrase, “committed an act,” refers to a final adjudication by a court hearing a proceeding under this act or an adjudication by court in another proceeding that the designated offense occurred.

OR

In all actions, under this act, the following provisions apply: (insert cite to laws of this state pertaining to presumptions in custody or parenting time disputes between parents involving domestic violence and similar offenses.)

I would argue that once standing ( i.e., a substantial relationship) has been established and the court is considering whether to grant custody or visitation, whatever the rules are governing domestic abuse by a parent should similarly apply to any non-parent party. If a state does not have such a provision, the first option should be adopted.

**SECTION 10. EFFECT OF ADOPTION OF CHILD BY A RELATIVE OR STEPPARENT.** The adoption of a child by a relative or a stepparent does not preclude granting or continuing custody or visitation to a non-parent as provided in this act.

**SECTION 11. COURT ORDERS REGARDING APPOINTMENTS AND COURT SERVICES.** To the extent available in other cases involving custody and visitation of children,

What “other cases” are meant here? If its parent v parent, we should say so; if it’s adoption and/or guardianship we should say so

the court may enter any one or more of the following orders:

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

(2), for mediation, except that a party who has been the victim of domestic violence by another party to the proceeding shall not be required to participate in mediation [unless the safety of the party can be protected adequately during mediation];

(3), for evaluations or home studies of the child, parent, or any party to the proceeding; and

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(4) allocate payment among the parties to the proceeding of fees for the services ordered pursuant to this section.

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## **SECTION 12. COURT ORDERS REGARDING COST OF FACILITATING VISITATION.**

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(a) A party who is granted visitation under this [ act ] may be ordered to pay the cost of facilitating visitation with the child, including the cost of transportation.

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(b) The obligation of a parent or a person deemed to be a parent under Section 6 or 7 of this Act to pay child support is governed by law of this state other than this [act].

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In an action between 2 non-parents, could the court order support to be paid by one to the other?

**SECTION 17. COURT ORDERS FOR ATTORNEY FEES AND COSTS.** The court may allocate and order payment of attorney fees, including interim fees, and costs among the parties to the proceeding under this [act];

Deleted: however, a parent may not be ordered to pay the fees and costs of another party ¶

## **SECTION 13. ORDERS; EFFECT. i**

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Any order entered by the court in a proceeding brought under this Act may be either temporary or permanent and final. A temporary order shall have no presumptive effect and is not determinative when the court considers petitions for other orders under this [act].

Deleted: (a) On motion of a party or the court's own motion, and after opportunity for hearing, the court may enter an order under this act as a temporary order.

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(b) An order entered under this section has

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(b) The factors listed in Section 11 apply to both temporary and permanent orders.

## **SECTION 14 HOW COURT TO DETERMINE CUSTODY OR VISITATION; FACTORS CONSIDERED**

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When entering an order for custody or visitation under this act, whether the order is permanent or temporary, , the court shall consider whether denial of custody or visitation to the non-parent would be a detriment to the child and shall determine the best interests of the child

Deleted: a) If a non-parent establishes that a substantial relationship exists between the child and the non-parent and that denial of custody or visitation to the non-parent is a detriment to the child, the court shall consider the following factors in determining the best interests of the child and whether to grant custody or visitation to a non-parent

**OPTION A.** [ cite to state statute governing factors to consider in actions between parents regarding custody and visitation]

**OR**

**OPTION B**

using the following factors.

(1) the nature, extent, and quality of the relationship between the child and the party including any periods of absence in the relationship;

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(2) the nature, extent, and quality of the relationship between the child and the parties including specific parent-like activities undertaken by the non-parent;

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(3) the frequency and continuity of contact between the child and the non-parent, including the period of any disruption in the contact and the reasons for the disruption;

(4) the views of the child, weighed in light of the child's age and maturity;

(5) the willingness and ability of each party to facilitate a positive relationship among the child, parties to the proceeding, and family members of the child, except that the court may not consider this willingness and ability if a party shows that of the child shows that: (i) the other party has engaged in domestic violence, child abuse, sexual assault, or stalking against the parent, child, child's siblings, or custodial guardian, and (ii) a continuing relationship with the the other party will affect negatively the health or safety of the party, the child, child's siblings, or custodial guardian;

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

(7) the mental and physical health of the child and parties to the proceeding, including alcohol abuse and drug abuse by the child or parties to the proceeding; provided, however that the mental and physical health of the parties shall not be considered unless those factors relate to harm caused to the child;

(8) a history of or threat of child abuse, child neglect, domestic violence, sexual assault, or stalking towards a parent, the child, child's siblings, or custodial guardian (A) by a party or (B) by an individual with whom a party has kinship or a significant relationship;

(9) the reasons for the parties' positions in the proceeding regarding custody and

(10) an agreement among the parties regarding custody or visitation;

(11) the applicable factors in [insert cite to laws of this state pertaining to factors considered in custody or parenting time disputes between parents].

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

Deleted: (b) If an individual establishes that he or she is a de facto parent or that he or she is an ¶ individual who entered into an agreement to accept full and permanent parental responsibility, the court shall consider the factors in [insert cite to laws of this state pertaining factors considered in custody or parenting time disputes between parents].

**[SECTION 15. 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 on the record in support of its decision.]

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**SECTION 16. MODIFICATION OF CUSTODY OR VISITATION.** A petition to modify a custody, or visitation, order entered under this [act] shall be decided under [cite to the law of this state other than this act for modification of a custody, or visitation, in actions between parents].

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**SECTION 17. OTHER RIGHTS AND REMEDIES.** The rights and remedies of this [act] are not exclusive and do not preclude other rights and remedies under law of this state other than this [act].

**SECTION 18. 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 19. TRANSITIONAL PROVISION.** This [act] applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered.

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

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(a) . . . . (b) . . . . (c) . . . .

**SECTION 24. EFFECTIVE DATE.** This [act] takes effect . . . .