

DRAFT
FOR DISCUSSION ONLY

NONPARENTAL CHILD CUSTODY AND VISITATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

REDLINE COMPARISON DRAFT

With Prefatory Note, Reporter's Notes, and Comments

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ON UNIFORM STATE LAWS

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September 21, 2017
February 1, 2018

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NONPARENTAL CHILD CUSTODY AND VISITATION ACT

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1 **NONPARENTAL CHILD CUSTODY AND VISITATION ACT**

2 **PREFATORY NOTE**

3 The Nonparental Child Custody and Visitation Act ~~provides procedures and factors~~
4 ~~for addresses issues raised when~~ courts ~~to apply when are~~ asked to grant custody or visitation to
5 nonparents. The act seeks to balance, within constitutional restraints, the interests of children,
6 parents, and nonparents with whom the children have a close relationship.
7

8 In 2016, the United States Census Bureau reported that there were 73,745,000 children in
9 United States under age 18. Of that number, the breakdown for the children’s living
10 arrangements was:

- 11
- 12 · Living with both parents: 50,679,000
- 13 · Living with mother only: 17,223,000
- 14 · Living with father only: 3,006,000
- 15 · Living with neither parent: 2,836,000
- 16 · Of the children living with neither parent, 1,556,000 were living with grandparents.
- 17

18 U.S. Census Bureau, America’s Families and Living Arrangements: 2016, Table C2, Household
19 Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2016
20 available at <https://www.census.gov/hhes/families/data/cps2016C.html>

21

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

26

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

29

30 The main provisions of this act address the legal issues raised by the growing number of
31 children who have substantial relationship with nonparents. The act does the following:

- 32
- 33 • recognizes a right to seek custody or visitation for two categories of individuals who
34 acted without compensation: (1) nonparents who have acted as consistent caretakers of a
35 child, and (2) other nonparents who have a substantial relationship with a child and who
36 demonstrate that denial of custody or visitation would be detrimental to the child;
- 37 • requires that the pleadings be verified and specify the facts on which the request for
38 custody or visitation is based;
- 39 • requires that the nonparents establish standing in order to maintain a suit for custody or
40 visitation;
- 41 • requires that notice be provided to: (1) any parent of the child; (2) any person having
42 custody of the child; (3) any attorney, guardian ad litem, or similar representative for the
43 child; and (4) any individual having court-ordered visitation with the child;
- 44 • provides a rebuttable presumption that the parent’s decision about custody or visitation is

1 in the best interest of the child;

- 2 • imposes a burden of proof on the nonparent of clear-and-convincing evidence in order to
- 3 to obtain relief;
- 4 • provides protections for victims of domestic violence;
- 5 • provides a list of factors to guide the court’s decision regarding the child’s best interest;
- 6 • provides that a nonparent granted visitation may be ordered to pay the cost of facilitating
- 7 visitation, including the cost of transportation; and
- 8 • provides that the rights and remedies of this act are not exclusive and do not preclude
- 9 additional rights and remedies under laws of the state other than this act.

10 The act does not apply to a proceeding between two or more nonparents unless a parent is
11 party, nor does the act apply to children who are the subject of proceedings for abuse,
12 neglect, or dependency. The degree to which this act applies to children who are the subject of a
13 guardianship depends on the guardianship law of the state. While the act does not contain a
14 provision regarding payment of attorney fees, such a provision may be included.

15
16 Continuation of a relationship between a child and a nonparent can be an important – and
17 even vital – interest, both for the child and the nonparent. When deciding whether to grant relief
18 to a nonparent, courts must, of course, consider the rights of parents. The U.S. Supreme Court
19 has recognized a right of a fit parent to make decisions regarding the rearing of his or her child.
20 *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

21
22 In *Troxel*, the paternal grandparents sought visitation with their grandchildren following
23 the father’s suicide. ~~In the six months after the father’s death, the~~ The children had never resided
24 with the grandparents saw, but rather had visited with them regularly throughout their
25 grandchildren “on a regular basis.” *Id.* at 60. ~~Then~~ lives. When the mother ~~informed the~~ did not
26 provide the amount of visitation the grandparents “that she wished to limit their visitation with
27 her daughters to one short visit per month.” *Id.* at 61. ~~There~~ requested, the grandparents filed an
28 action under Washington State’s nonparental visitation statute, Wash. Rev. Code § 26.10.160(3)
29 (1994), which provided: “Any person may petition the court for visitation rights at any time
30 including, but not limited to, custody proceedings.”

31
32 “At trial, the ~~Troxels [the grandparents]~~ requested two weekends of overnight sought
33 visitation per month and two weeks of visitation each summer. Granville [the, including
34 overnights. The mother] “did not oppose visitation altogether, but instead asked the court to
35 order one day of visitation per month with no overnight stay.” 530 U.S. at 61. The trial court
36 gave the grandparents visitation of “one weekend per month, one week during the summer, and
37 four hours on both of the petitioning grandparents’ birthdays.” *Id.* at 62. The trial court’s
38 findings in support of the judgment were that the Troxels [the grandparents] “are part of a large,
39 central, loving family, all located in this area, and the [Troxels] can provide opportunities for the
40 children in the areas of cousins and music.” *Id.* at 72.

41
42 The case (along with two other consolidated cases) was appealed to the Washington
43 Supreme Court, which held the statute was unconstitutional on its face and that visitation to
44 grandparents over objection of a parent should not be granted absent a showing of harm to the
45 child. *In re Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21, 23 (1998).

1
2 The grandparents appealed. The U.S. Supreme Court affirmed the Washington Supreme
3 Court, although on narrower grounds. ~~The court said~~In her plurality opinion, Justice O’Connor
4 stated that the statute was “breathtakingly broad,” 530 U.S. at 67, and the trial court’s findings
5 were “slender,” *Id.* at 72. The Court struck down the statute, as applied, holding the trial court
6 did not give sufficient deference to the decision of a fit parent to decide the amount of contact the
7 children would have with the grandparents.

8
9 ~~—The Court said~~According to Justice O’Connor’s opinion, “The liberty interest at issue in
10 this case—the interest of parents in the care, custody, and control of their children—is perhaps
11 the oldest of the fundamental liberty interests recognized by this Court.” *Id.* at 65, *citing*, among
12 other cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional a Nebraska law
13 prohibiting teaching any subject in a language other than English). The Court held the statute
14 “as applied, exceeded the bounds of the Due Process Clause.” 530 U.S. at 68.

15
16 The Superior Court’s order was not founded on any special factors that might justify the
17 State’s interference with Granville’s fundamental right to make decisions concerning the
18 rearing of her two daughters.~~---~~

19
20 [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will
21 normally be no reason for the State to inject itself into the private realm of the family to
22 further question the ability of that parent to make the best decisions concerning the
23 rearing of that parent’s children.

24
25 *Id.* at 68--69.

26
27 The ~~Court said~~plurality reasoned that because its decision was based on the “sweeping
28 breadth” of the statute and the application of the statute in this case, the Court did not need to
29 “consider the primary constitutional question passed on by the Washington Supreme Court—
30 whether the Due Process Clause requires all nonparental visitation statutes to include a showing
31 of harm or potential harm to the child as a condition precedent to granting visitation.” *Id.* at 73.

32
33 Justice O’Connor observed in her plurality ~~option~~opinion in *Troxel*: “The demographic
34 changes of the past century make it difficult to speak of an average American family. The
35 composition of families varies greatly from household to household.” *Id.* at 63.

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

40
41 ~~—Opposite-sex unmarried partner households increased by 40 percent since 2000; same-sex~~
42 ~~households increased by 80 percent. *Id.* at p. 6.~~

43
44 ~~—In 2016, the Census Bureau reported that there were 73,745,000 children in United States~~
45 ~~under age 18. Of that number, the breakdown for the children’s living arrangements was:~~

~~Living with both parents: 50,679,000~~
~~Living with mother only: 17,223,000~~
~~Living with father only: 3,006,000~~
~~Living with neither parent: 2,836,000~~
~~Of the children living with neither parent, 1,556,000 were living with grandparents.~~

~~U.S. Census Bureau, America's Families and Living Arrangements: 2016, Table C2, Household Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2016 available at <https://www.census.gov/hhes/families/data/cps2016C.html>~~

~~The main provisions of this act are:~~

- ~~• a right to seek custody or visitation for two categories of individuals: (1) nonparents who have acted as a consistent caretaker of the child without expectation of financial compensation, and (2) other nonparents who have a substantial relationship with the child and who demonstrate that denial of custody or visitation would be a detriment to the child;~~
- ~~• a provision that the act does not apply to a proceeding between two or more nonparents, nor does the act apply to children who are the subject of proceedings for guardianship, abuse, neglect, or dependency;~~
- ~~• a requirement that the pleadings be verified and specify the facts on which the request for custody or visitation is based;~~
- ~~• a requirement that nonparents must establish standing in order to maintain a suit for custody or visitation;~~
- ~~• a requirement of notice to: (1) any parents whose parental rights have not been previously terminated; (2) any person having physical custody of, or visitation with, the child; and (3) the child who is at least 12 years of age;~~
- ~~• a rebuttable presumption that the parent's decision about custody or visitation is in the best interest of the child;~~
- ~~• a burden of proof on the petitioner of clear and convincing evidence;~~
- ~~• protections for victims of domestic violence;~~
- ~~• a list of factors to guide the court's decision;~~
- ~~• a provision that a nonparent granted visitation may be ordered to pay the cost of facilitating visitation, including the cost of transportation; and~~
- ~~• a provision that the rights and remedies of this act are not exclusive and do not preclude additional rights and remedies under laws of the state other than this act.~~

1 **NONPARENTAL CHILD CUSTODY AND VISITATION ACT**

2 **SECTION 1011. SHORT TITLE.** This [act] may be cited as the Nonparental Child
3 Custody and Visitation Act.

4 **SECTION 1022. DEFINITIONS.** In this [act]:

5 (1) “Child” means an unemancipated individual who is less than [18] years of age.

6 ~~**Reporter’s Note:** The word “civil” was inserted in the definition of “child abuse,”~~
7 ~~below, at the suggestion of our Style Liaison, Deborah Behr. She notes that we used~~
8 ~~“civil” in the definition of “Domestic violence.”~~

9
10 (2) “Child abuse” means child abuse as defined in [~~either~~insert reference to definition of
11 ~~“child abuse” in civil law of this in other~~ state ~~other than this [act]]-law].~~

12 (3) “Child neglect” means child neglect as defined in [~~either~~insert reference to definition of
13 ~~“child neglect” in civil law of this in other~~ state ~~other than this [act]]-law].~~

14 (4) “Compensation” means wages or other remuneration in exchange for care of the
15 child. The term does not include reimbursement of expenses for care of the child, such as
16 payment for food, clothing, and medical expenses.

17 (5) “Consistent caretaker” means an individual who:

18 ~~(A) has, without expectation of compensation: lived with the child for a~~
19 significant period of time, ordinarily not less than 12 months; consistently exercised care
20 ~~and control~~ of a child; ~~and~~

21 ~~—— (B) regarding the welfare of the child, exercised care or made decisions~~ regarding
22 the child solely or in cooperation with a parent or other custodian; ~~or as a result a complete~~
23 failure or inability of any legal parent to perform parenting functions; and established a bonded
24 and dependent relationship with the child with the explicit or tacit support of a parent of the
25 child.

1 (56) “Custody” means physical custody, legal custody, or both, ~~as well as~~. The term
2 includes joint custody or shared custody under ~~the~~ law of this state other than this [act].

3 (67) “Detriment to a child” means adverse effect ~~to~~ on a child’s physical, emotional, or
4 psychological ~~well-being~~ wellbeing.

5 (78) “Domestic violence” means domestic violence as defined in ~~[cite in~~ [insert reference
6 to definition ~~of “domestic violence” in civil law of this~~ other state] ~~]. law~~].

7 (89) “Individual” means a natural person of any age.

8 (910) “Legal custody” means the power to make important decisions regarding a child,
9 including a decision regarding the child’s education, health care, and ~~extra-curricular~~ scheduled
10 activity.

11 (1011) “Nonparent” means an individual other than ~~the~~ a parent of a child who is the
12 subject of a proceeding under this [act]. The term includes a grandparent, sibling, and stepparent.

13 (1112) “Parent” means an individual recognized as a parent under law of this state other
14 than this [act].

15 ~~— (12) “Parenting time” means parenting time as defined in [cite to definition of “parenting~~
16 ~~time” in law of this state.]~~

17 (13) “Person” means an individual, estate, business or nonprofit entity, public
18 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
19 entity.

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

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

23 ~~— (16) “Sexual assault” means sexual assault as defined in [cite~~ insert reference to definition
24 ~~of “sexual assault” in law of this~~ in other state] ~~]. law~~].

1 (1617) “Stalking” means stalking as defined in ~~either~~insert reference to definition of
2 ~~“stalking” in civil law of this~~in other state~~}. law~~].

3 (1718) “State” means a state of the United States, the District of Columbia, Puerto Rico,
4 the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction
5 of the United States. The term includes a federally recognized Indian tribe.

6 (18)~~19~~ “Substantial relationship” means a familial or other relationship formed without
7 expectation of compensation in which a significant emotional bond exists between a nonparent
8 and a child.

9 (1920) “Visitation” means the right to spend time with a child, including an overnight.

10
11 **Comment**
12

13 The definition of “child” is the same as that used in the Uniform Deployed Parents
14 Custody and Visitation Act, § 102(3)(A) (2012). The age of majority in most states is 18 years
15 of age, although some states set the age of majority at graduation from high school, and a few
16 states set the age higher than 18: years of age. This act does not include in the definition of
17 “child” adult children who are the subject of a court order concerning custodial responsibility,
18 such as individuals with a developmental disability. Rights to custody of visitation with adult
19 children would be determined under the state’s guardianship laws or other applicable law.

20
21 The terms “child abuse,” “child neglect,” “domestic violence,” “sexual assault,” and
22 “stalking” are defined by reference to existing state law in order to promote consistency of
23 definitions within a state. The laws to which reference is made can be civil law, criminal law, or
24 both.

25
26 The term “consistent caretaker” is further described in the comment to Section 11.
27

28 In Family Law, the terms “custody” and “visitation” are flexible concepts. In most states,
29 there is not a fixed amount of time the child spends with a parent who has “custody” or
30 “visitation,” although some states utilize guidelines to specify the time the child spends with the
31 noncustodial parent. Nonetheless, a person with “custody” provides the child with a home or
32 primary home. The drafters anticipate that visitation granted to nonparents will be decided on
33 the facts of each case rather than by guidelines. The definition of “custody” includes joint
34 custody or shared custody as defined by other state law. Thus, under this act, courts have the
35 option of granting joint custody or shared custody ~~(as well as sole custody). A guardian of the~~
36 ~~person of the child would be considered to have “custody.”~~, as well as sole custody. Although
37 many states utilize the term “parenting time” to describe the time a child spends with each

1 parent, the terms “custody” and “visitation” are still commonly used, and are appropriate, to
2 describe the time a child spends with a nonparent. “Visitation” may include contact by telephone
3 or other electronic means as well as in-person contact.

4
5 ~~The definition of~~ State statutes that use the term “detriment” or “detrimental” in connection
6 with the right of nonparents to seek custody or visitation include: Ariz. Stat. the child” is based
7 on § 25-409(a)(2) (2017); Cal. Fam. Code § 3041(c) (2016) (a section entitled “Custody award to
8 nonparent; findings of court; hearing”). That section 2017); and D.C. Code § 16-831.07 (2017).
9 The California provision provides: “As used in this section, ‘detriment to the child’ includes the
10 harm of removal from a stable placement of a child with a person who has assumed, on a day-to-
11 day basis, the role of his or her parent, fulfilling both the child’s physical needs and the child’s
12 psychological needs for care and affection, and who has assumed that role for a substantial
13 period of time. A finding of detriment does not require any finding of unfitness of the parents.”
14 ~~See also D.C. Code § 16-831.07 (2017) (providing among the bases for granting a third party~~
15 ~~custody is a finding by clear and convincing evidence “[t]hat that custody with a parent is or~~
16 ~~would be detrimental to the physical or emotional well-being of the child”).~~ **Reporter’s Note:**
17 ~~Here, or elsewhere, I will add cites to more cases and statutes using the term “detriment.”~~

18
19 The definitions of “person,” “record,” and “state” are the definitions provided by the
20 Uniform Law Commission “Drafting Rules,” ~~Rule~~Rules 304, 305 & 306 (2012).

21
22 The definition of “legal custody” is similar to the definition of ~~“legal custody”~~that term in
23 many states. The definition of “legal custody” also is similar to the definition of “decision-
24 making authority” in the Uniform Deployed Parents Custody and Visitation Act (2012), which
25 provides: “the power to make important decisions regarding a child, including decisions
26 regarding the child’s education, religious training, health care, extracurricular activities, and
27 travel.” “Legal custody” might include the power to enroll a child in a religious school, but it
28 normally should not include selection of a child’s religion since most courts have held both
29 parents have a right to expose their child to his or her religious beliefs or lack of religious beliefs.
30 *See, e.g., Felton v. Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981); *In re Marriage of Mentry*,
31 142 Cal. App 260, 190 Cal. Rptr. 843 (1983); *Hansen v. Hansen*, 404 N.W.2d 460 (N.D. 1987).
32 Decisions about travel are not included since persons with custody, as well as persons with
33 visitation, generally have a right to travel with the children, including on vacation. A person
34 with “legal custody,” however, generally would determine if the child were to travel on his
35 ~~own~~or her own, such as for an educational or athletic program.

36
37 The definition of “nonparent” is “an individual other than ~~at~~the parent, of a child who is
38 the subject of a proceeding under this [act]. The term includes a grandparent, sibling, and
39 stepparent.” ~~Persons other than grandparents.”~~ ~~Other persons could, siblings, and stepparents~~
40 ~~can~~ obtain relief custody or visitation under the act ~~provided if~~ they meet the requirements of the
41 act ~~(,~~ including clear-and-convincing evidence of status as a “consistent caretaker” or a
42 “substantial relationship” with ~~the child and detriment to the~~a child if custody or visitation was
43 not granted).

44
45 The definition of “parent” is “a person recognized as a parent under law of this state other
46 than this [act].” The sources of the definition of “parent” may include the state’s parentage

1 statutes, divorce statutes, and case law. In most states, “parent” would include biological
2 parents, adoptive parents, and men who have acknowledged paternity ~~(, even though they are not~~
3 ~~biologically related to the child);~~ “Parent” also might include ~~persons~~ a person who ~~agree~~ agrees
4 to conceive a child through assisted reproductive technology or by use of ~~surrogates~~ a surrogate.
5 Generally, ~~a person~~ an individual ceases to be a parent if ~~his or her~~ the individual’s rights have
6 been terminated. In addition, a man who donates sperm or a woman who donates an egg usually
7 are not considered to be ~~parents~~ a parent under the law of this state other than this act.

8
9 ~~—————The definition of “parenting time” is made with reference to law of the state other than~~
10 ~~this act. The term is a comparatively modern term designed to supplement or replace the terms~~
11 ~~“custody” and “visitation,” particularly in disputes between parents. The term is generally used~~
12 ~~to focus attention on parenting of the child and allocation of time with the child rather than~~
13 ~~which parent has “custody.” The term does not apply to nonparents since they are not parents.~~
14 ~~The Illinois definition of “parenting time” is: “the time during which a parent is responsible for~~
15 ~~exercising caretaking functions and non-significant decision-making responsibilities with respect~~
16 ~~to the child.” 750 Ill. Comp. Stat. 5/600(e) (2016). If a state does not use the term “parenting~~
17 ~~time,” the definition of “parenting time” could be omitted.~~

18
19 The definition of “physical custody” is similar to the definition of “physical custody” in
20 the Uniform Child Custody Jurisdiction and Enforcement Act, § 102(14) (1997) (“the physical
21 care and supervision of a child”).

22
23 The definition of “substantial relationship” is drawn, in part, from Minn. Stat. Ann.
24 § 518E.301 (West 2016), which provides: ““close and substantial relationship” means a
25 relationship in which a significant bond exists between a child and a nonparent.”

26
27 **Reporter’s Note:** ~~Bracketed language in the following section on “Scope”~~
28 ~~(Section 103) identifies decisions the committee should make regarding the~~
29 ~~application of the act to: (1) persons whose parental rights have been terminated;~~
30 ~~(2) children who are the subject of guardianship proceedings; (3) former foster~~
31 ~~parents; and (4) Indian children. Regarding children who are the subject of~~
32 ~~guardianship proceedings, it has been suggested that if a state’s guardianship law~~
33 ~~allows a court to grant visitation to a nonparent, this act would not apply; but if a~~
34 ~~state’s guardianship law does not give a court powered to grant visitation to a~~
35 ~~nonparent, this act would apply and the reference to “guardianship of the person”~~
36 ~~would be deleted from subsection (c)(3).~~

37 38 **SECTION 1033. SCOPE.**

39 ~~—————(a) This act governs~~ (a) Except as provided in subsection (b), this [act] applies to a
40 proceeding in which a nonparent seeks custody of or visitation with a child ~~over the objection of~~
41 ~~a parent.~~

42 (b) This [act] does not ~~limit a parent from requesting custody of or visitation with the~~

1 ~~child of a parent under law of this state other than this [act].~~

2 ~~—— (e) This [act] does not apply:~~

3 (1) to a proceeding between nonparents;

4 ~~——— {(2) to a , unless a parent is a party to the proceeding brought by an individual~~
5 ~~whose parental rights have been terminated;};~~

6 ~~——— {(3) (2) to a child-custody proceeding that pertains to an Indian child as~~
7 ~~defined in the Indian Child Welfare Act, 25 U.S.C. Section 1903, to the extent that athe~~
8 ~~proceeding concerning the child is governed by the Indian Child Welfare Act, 25 U.S.C. Sections~~
9 ~~1901 through 1923;};~~

10 (4) ~~when the~~ (3) to a child who is the subject of aan ongoing proceeding under [cite
11 to law of this state other than this [act] regarding ~~custody and visitation related to~~ [guardianship
12 of a person~~},,]~~ child abuse, child neglect, or dependency of a child]; ~~{or}~~

13 ~~{(5) The right~~ (4) to a claim of a ~~former foster parent to seek nonparent seeking~~
14 ~~custody of or visitation with a child-}~~

15 ~~—— Comment (will be revised, depending based on decisions of Drafting Committee)the~~
16 ~~nonparent having served as a foster parent.~~

17 (c) Relief under this [act] is not available during the effective period of a custody or
18 visitation arrangement entered under [cite to this state’s Uniform Deployed Parents Custody and
19 Visitation Act] [or] [other law of this state dealing with custody and visitation with a child of a
20 deployed parent].

21 *Legislative Note: The phrase “guardianship of the person” in subsection (b)(3) is in brackets to*
22 *give the enacting state an option to include the phrase, in the list of proceedings that are*
23 *excluded from coverage under the act. It is recommended that if a state’s guardianship law*
24 *allows a court to grant visitation to a nonparent, then the proceedings involving guardianship of*
25 *the person of a child would be included in the list of proceedings not covered by this act.*
26 *However, if the guardianship law of the state does not provide for a court to grant visitation*

1 with a child to a nonparent, then the phrase “guardianship of the person” should not be
2 included in subsection (b)(3) to allow court to order visitation of a child who is the subject of a
3 guardianship proceeding.

4 5 Comment

6
7 The scope provision in Section 3(a) encompasses disputes between a nonparent and a
8 parent regarding custody or visitation, including a determination of whether the nonparent has
9 standing. The provision also covers proceedings in which the nonparent and parent seek to enter
10 an agreed order regarding custody or visitation.

11
12 Section 3(b)(2) is based on the Indian Child Welfare Act provision of the Uniform Child
13 Custody Jurisdiction and Enforcement Act (UCCJEA), Section 104(a).

14
15 This act does not provide for custody or visitation to nonparents for children who are the
16 subject of ongoing proceedings for ~~guardianship of the person~~, abuse, neglect, ~~or~~ dependency-
17 [or guardianship of the person]. Such laws and related regulations have their own provisions
18 regarding where a child will be placed and who may have contact with the child. The
19 ~~guardianship~~, abuse, neglect, ~~and~~ dependency [and guardianship] laws usually are in a different
20 ~~portion~~ provision of the statutes than laws pertaining to divorce, parentage, and nonparental
21 rights. The ~~drafters of this act do state does~~ not wish for this act to conflict with or interfere with
22 the laws of ~~guardianship, the state regarding~~ abuse, neglect, ~~or~~ dependency- [or guardianship].
23 When a child is no longer the subject of such proceedings, relief may be sought under this act.
24 The provision in this section is similar to Or. Stat. § 109.119(9) (West 2015) (excluding
25 application of a nonparental visitation statute from children who are the subject of dependency
26 proceedings). *See also Cf.* Minn. Stat. Ann. § 257C.08(4) (West 2015) (excluding foster parents
27 from coverage under the state’s nonparental visitation law).

28
29 The Uniform Child Custody Jurisdiction and Enforcement (UCCJEA) applies to “child-
30 custody proceeding[s] . . . in which legal custody, physical custody, or visitation with respect to a
31 child is an issue.” UCCJEA, Section 104(4) (1997). The UCCJEA applies to guardianship
32 proceedings as well as proceedings under this act. *Id.* ~~In the event~~ If there are simultaneous
33 proceedings under this act and under guardianship law, the UCCJEA (as well as law of the state
34 on venue laws) would determine which court has priority to exercise jurisdiction.

35 ~~This act does not apply to an Indian child to the extent the child is covered by the Indian~~
36 ~~Child Welfare Act, 25 U.S.C. Section 1901 through 1923.~~

37
38 ~~**Reporter’s Note:**—Regarding the following section (Section 104) on “Effect of~~
39 ~~Adoption of a Child,” we have had three suggestions or comments: (1) define~~
40 ~~“cohabitant;” (2) we do not need subsection (c); and (3) in adoption proceedings,~~
41 ~~give notice to nonparents who have rights of visitation under the act. [The third~~
42 ~~suggestion seems like good policy, but probably beyond the scope of our act.]~~

43 44 ~~SECTION 1044. EFFECT OF ADOPTION OF CHILD.~~

45 ~~—[(a) In this section, “cohabitant” means an individual residing with a parent.]~~

1 ~~—— (b) Adoption of a child by a relative, stepparent, or cohabitant of a parent of a child does not~~
2 ~~preclude a court from granting visitation of the child to a nonparent under this [act].~~

3 ~~(c) If a child is adopted by a relative, stepparent, or cohabitant of a parent of the child, an~~
4 ~~order of visitation to a nonparent made under this [act] remains valid and is not changed by the~~
5 ~~adoption.~~

6 **Comment**

7 ~~—— As of 2013, the statutes of 24 states explicitly allow visitation for nonparents if the child~~
8 ~~has been adopted by a relative, including a stepparent. Jeff Atkinson, *Shifts in the Law*~~
9 ~~*Regarding Rights of Third Parties to Seek Visitation and Custody of Children*, 47 ~~Fam. L. Q.~~ 1,~~
10 ~~20-23 (Spring 2013).~~

11
12 ~~—— **SECTION 105.** JURISDICTION.~~

13 ~~—— (a) Subject to Section ~~103(d)(3)(b)(2)~~, a proceeding under this [act] must be commenced in~~
14 ~~the court having jurisdiction to determine custody or visitation under [cite to this state’s Uniform~~
15 ~~Child Custody Jurisdiction and Enforcement Act].~~

16 **Comment**

17 The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has
18 been adopted in 49 states. As of ~~May 2017~~January 2018, Massachusetts is the only state that has
19 not adopted the UCCJEA, although Massachusetts did adopt the Uniform Child Custody
20 Jurisdiction Act (UCCJA). The Uniform Law Commission has promulgated a 2013 version of
21 the UCCJEA (to cover international issues as well as domestic issues). As of ~~May 2017~~January
22 2018, the 2013 UCCJEA has not been adopted in any states.

23
24 If at the time a petition is filed under this act, an action is already pending regarding the
25 same child, the petition should be filed as part of the pending action (assuming the pending
26 action is filed in compliance with the UCCJEA).

27
28 **Reporter’s Note Regarding “Compensation”:** Regarding the following section
29 on “Standing,” during the reading at the Annual Meeting, we received multiple
30 comments on the issue of “compensation” to persons caring for the child. One of
31 the concerns was that making payments to a family member who is caring for a
32 child should not preclude the family from being able to seek visitation or custody.
33 Here are some options for dealing with the issue (some options can be used
34 together):

35
36 1. Instead of using the phrase “without expectation of financial compensation,”

1 use the ALI language of “for reasons primarily other than financial
2 compensation.” [ALI’s Principles of the Law of Family Dissolution,
3 § 2.03(1)(c) (2002) (definition of “de facto parent”)]
4

5 ~~2. Define “compensation.” The definition could be along the lines of
6 “‘Compensation’ means wages or other remuneration in exchange for care of
7 the child. ‘Compensation’ does not include reimbursement of expenses for
8 care of a child such as payment for food, clothing, shelter, and medical
9 expenses.”~~

10
11 ~~3. Have the “compensation” provision apply only to persons who are not family
12 members. [This option may meet the concern of some commissioners, but
13 would not deal with the situation where a parent leaves the child in the care of
14 a friend for a long period of time and gives that person money for the child’s
15 food, clothing, etc. (but does not give that person wages).]~~

16
17 ~~4. Have the “compensation” provision also apply to persons who seek custody or
18 visitation based on a substantial relationship (as well as status as a “consistent
19 caretaker.”) If we use this option, Section 106(a)(2) would provide: “has a
20 substantial relationship with the child that was formed for reasons primarily
21 other than compensation and denial of custody or visitation would result in
22 [detriment] to the child.~~

23
24 ~~5. Keep the current language and provide more explanation in the Comments
25 that the language is already in use in many states and that “compensation”
26 does not include payments to a caretaker for the child’s expenses.~~

27
28 I favor options 1, 2, and 4.
29

30 **Reporter’s Note regarding UCCJEA language in description of “consistent
31 caretaker”:** Regarding the description of “consistent caretaker,” some
32 commissioners favored tracking the UCCJEA language on the issue of the time
33 the caretaker resided with the child—i.e., having he six consecutive month period
34 be “immediately before the commencement of a child custody proceeding.” At
35 an earlier Drafting Committee meeting, that issue was discussed, and there was a
36 desire to provide some flexibility regarding the six-month period—e.g., if
37 grandparents cared for a child for a few years; agreed to return the child to the
38 parent on a trial basis; and nine months, later decided the child was not doing well
39 with the parent and sought custody again.
40

41 **SECTION 1065. STANDING.**

42 (a) A nonparent has standing under this [act] to ~~file a [petition] for~~seek custody or
43 visitation ~~of~~with a child if the nonparent:

1 (1) has acted as a consistent caretaker of the child ~~without expectation of~~
2 ~~financial compensation and:~~

3 ~~_____ (A) has resided with the child for six or more consecutive months~~
4 ~~[immediately before the commencement of a child custody proceeding], or for a child less than~~
5 ~~six months of age, since the birth of the child, excluding each period of temporary absence; and~~

6 ~~_____ (B) a parent of the child explicitly or tacitly accepted the development of a~~
7 ~~bonded and dependent relationship between the child and the nonparent; or~~

8 ~~_____ (2) has a substantial relationship with the child and denial of custody or visitation~~
9 ~~would result in [detriment] to the child.~~

10 ~~_____ as specified in Section 11(b) The court shall determine standing of a nonparent in a~~
11 ~~proceeding under this [act] based on a [petition] under Section 107. The court may hold a~~
12 ~~hearing to determine disputed facts material to the issue of standing. If the court holds a hearing,~~
13 ~~the hearing must be held on an expedited basis.); or~~

14 ~~**Legislative Note:** If _____ (2) has a court in substantial relationship with the state has~~
15 ~~held, child as a matter specified in Section 12(b), and denial of constitutional law, that harm to a~~
16 ~~child without granting custody or visitation must be shown before visitation would result in [harm]~~
17 ~~[detriment] to the child.~~

18 ~~_____ (b) [Unless the court finds that a hearing is granted to necessary, the] [The] court shall~~
19 ~~determine based on the [petition] under Section 6 whether a nonparent, the state may need to~~
20 ~~substitute the term “harm” for “detriment” in _____ has stated facts sufficient to satisfy the~~
21 ~~requirements subsection (a)(2).~~

22
23 **Reporter’s Note:** A question has been raised regarding whether we need the
24 Legislative Notes in this Section and in Sections 107 & 112 regarding use of the
25 term “harm” versus “detriment.” For further discussion of the issue, see the
26 memos from Cathy Sakimura and me.

1
2 (c) An individual whose parental rights concerning a child have been terminated does not
3 have standing under this [act] to seek custody of or visitation with the child.

4 **Comment**

5 The requirement of standing serves to protect the interests of parents and filter out cases
6 in which the petitioner does not have a meritorious claim, while at the same time allowing the
7 opportunity to preserve relationships between a child and nonparent with whom the child has a
8 ~~particularly close~~substantial relationship.

9
10 To reduce the burden of litigation, a parent may be able to expedite disposition of a case
11 by using a motion to dismiss or for summary judgment to challenge whether the nonparent has
12 standing to pursue the action. ~~Alternatively, the parent may challenge whether the facts alleged~~
13 ~~by the nonparent are sufficient to warrant a trial on the merits.~~The language of subsection (b) is
14 based on The Uniform Parentage Act (2017), Section 609(c)(3).

15
16 In the U.S. Supreme Court’s plurality opinion in *Troxel v. Granville*, Justice O’Connor
17 stated: “As Justice KENNEDY recognizes, the burden of litigating a domestic relations
18 proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right
19 of a custodial parent to make certain basic determinations for the child’s welfare becomes
20 implicated.” 530 U.S. at 75, *quoting* Kennedy, J. at 530 U.S. at 101. *See also D.P. v. G.J.P.*,
21 146 A.3d 204, 213 (Pa. 2016) (stating that bifurcating proceedings with determination of
22 standing before the merits “serves an important screening function in terms of protecting parental
23 rights”); *Rideout v. Riendeau*, 2000 ME 198, ¶ 30, 761 A.2d 291, 302 (stating that determination
24 of standing before full litigation of the claim “provides protection against the expense, stress, and
25 pain of litigation”).

26
27 The statutes of many states specify the circumstances in which visitation by a nonparent
28 may be sought – circumstances which often involve some disruption of the family – e.g.,
29 divorce, separation, death of a parent, or a child born outside of marriage. Such broad
30 descriptions of circumstances in which visitation may be sought do not, by themselves, provide a
31 reliable indicator of whether nonparental visitation (or custody) should be allowed. *See Dorr v.*
32 *Woodard*, 140 A.3d 467, 472 (Me. 2016) (holding death of a parent without other compelling
33 reasons was not sufficient reason to confer standing); *D.P. v. G.J.P.*, 146 A.3d 204 (Pa. 2016)
34 (holding that separation of the parents for six months was not a sufficient basis to allow
35 grandparents to seek visitation). It is preferable to focus on the factors used to decide visitation
36 or custody, particularly the closeness of the relationship between the child and the nonparent.
37

~~1 The following state supreme court opinions have held, as a matter of state or federal
2 constitutional law, that harm to the child without granting visitation must be shown before
3 visitation is granted to a grandparent. *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d 453
4 (2002); *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004); *Doc v. Doc*, 116 Haw. 323, 172 P.3d 1067
5 (Haw. 2007); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052 (2002); *Moriarty v. Bradt*, 177
6 N.J. 84, 827 A.2d 203 (2003), cert. denied, 540 U.S. 1177 (2004); *In re Parentage of C.A.M.A.*,
7 154 Wash. 2d 52, 109 P.3d 405 (2005).~~

8 SECTION ~~107-6~~. VERIFIED [PETITION].

9 (a) A nonparent who ~~files a~~ petition files a petition for custody or visitation under this [act]
10 shall verify the [petition] under penalty of perjury and state facts sufficient to show standing
11 under Section ~~1065~~, including:

12 (1) the duration and nature of the relationship between the nonparent and ~~the~~ a
13 child, including the period, if any, the nonparent lived with the child and the caretaking provided
14 for the child by the nonparent;

15 (2) the content of any agreement between the parties to the proceeding regarding
16 caretaking for the child and custody, visitation, or other contact with the child;

17 (3) facts showing the willingness of a parent to permit the nonparent to have
18 custody, visitation, or other contact with the child;

19 (4) information about any ~~financial~~ compensation or expectation of compensation
20 provided to the nonparent in exchange for caretaking of the child;

21 ~~(45)~~ a description of ~~any attempts~~ a previous attempt by the nonparent to obtain
22 custody, visitation, or other contact with the child;

23 ~~(56)~~ the information required by [cite to Section 209 of this state's Uniform Child

1 Custody Jurisdiction and Enforcement Act];

2 ~~(67) the reason why a continuing relationship between~~basis for the nonparent and
3 allegation that the ~~child requested custody or visitation~~ is in the best interest of the child,
4 applying the factors in Section ~~11314~~;

5 ~~_____ (7) the reason why _____ (8) if the nonparent claims standing under Section~~
6 5(a)(2), the basis for the allegation that denial of custody or visitation to the nonparent would
7 result in [harm] [detriment] to the child ~~if the nonparent is claiming a substantial relationship~~
8 ~~with the child~~; and

9 (89) the relief sought.

10 (b) If an agreement described in subsection (a)(2) is in writing a record, the nonparent
11 must attach a copy of the agreement to the [petition].

12 *~~Legislative Note: If a court in the state has held, as a matter of constitutional law, that harm to~~*
13 *~~a child without granting visitation must be shown before visitation is granted to a nonparent, the~~*
14 *~~state may need to substitute the term “harm” for “detriment” in subsection (a)(7).~~*

16 Comment

17
18 Requiring verified pleading and specificity in pleadings is intended to reduce actions that
19 are not meritorious and facilitate disposition of non-meritorious cases by motions to dismiss or
20 for summary judgment.

21
22 Regarding subsection (a)(5), the description of any previous attempt to obtain custody,
23 visitation, or other contact with the child should include oral requests as well as written requests.

24
25 Among the facts required in the pleading is the information required by Section 209 of
26 the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) – a section entitled
27 “Information to be Submitted to the Court.” The section provides:

28
29 “(a) [Subject to [local law providing for the confidentiality of procedures,
30 addresses, and other identifying information], in] [In] a child-custody proceeding, each
31 party, in its first pleading or in an attached affidavit, shall give information, if reasonably
32 ascertainable, under oath as to the child’s present address or whereabouts, the places
33 where the child has lived during the last five years, and the names and present addresses
34 of the persons with whom the child has lived during that period. The pleading or affidavit
35 must state whether the party:

1
2 (1) has participated, as a party or witness or in any other capacity, in any other
3 proceeding concerning the custody of or visitation with the child and, if so,
4 identify the court, the case number, and the date of the child-custody
5 determination, if any;
6

7 (2) knows of any proceeding that could affect the current proceeding, including
8 proceedings for enforcement and proceedings relating to domestic violence,
9 protective orders, termination of parental rights, and adoptions and, if so, identify
10 the court, the case number, and the nature of the proceeding; and
11

12 (3) knows the names and addresses of any person not a party to the proceeding
13 who has physical custody of the child or claims rights of legal custody or physical
14 custody of, or visitation with, the child and, if so, the names and addresses of
15 those persons.
16

17 (b) If the information required by subsection (a) is not furnished, the court, upon
18 motion of a party or its own motion, may stay the proceeding until the information is
19 furnished.
20

21 (c) If the declaration as to any of the items described in subsection (a)(1) through
22 (3) is in the affirmative, the declarant shall give additional information under oath as
23 required by the court. The court may examine the parties under oath as to details of the
24 information furnished and other matters pertinent to the court's jurisdiction and the
25 disposition of the case.
26

27 (d) Each party has a continuing duty to inform the court of any proceeding in this
28 or any other State that could affect the current proceeding.
29

30 [(e) If a party alleges in an affidavit or a pleading under oath that the health,
31 safety, or liberty of a party or child would be jeopardized by disclosure of identifying
32 information, the information must be sealed and may not be disclosed to the other party
33 or the public unless the court orders the disclosure to be made after a hearing in which the
34 court takes into consideration the health, safety, or liberty of the party or child and
35 determines that the disclosure is in the interest of justice.]”
36

37 ~~Regarding the Legislative Note and the wording of subsection (a)(7), six states require a showing~~
38 ~~of “harm” (rather than “detriment”) before visitation can be granted to a grandparent. The states~~
39 ~~are listed in the **Comment** to Section 106.~~
40

41 **SECTION 1087. NOTICE.** On commencement of a proceeding under this [act], the
42 nonparent shall give notice to all of the following persons:

43 (1) each parent ~~whose parental rights to~~ of the child ~~have not been previously~~

1 ~~terminated;~~who is the subject of the proceeding;

2 (2) any person having custody of ~~or~~the child;

3 (3) any individual having court-ordered visitation with the child; and

4 ~~—— (3) the child, if~~(4) any attorney, guardian ad litem, or similar representative for the child
5 ~~is at least 12 years of age.~~

6 **Comment**

7
8 Elements of the notice provision are similar the notice provision of the Uniform Child
9 Custody Jurisdiction and Enforcement Act, § 205(a) (1997) (“Before a child-custody
10 determination is made under this [Act], notice and an opportunity to be heard . . . must be given
11 to all persons entitled to notice under the law of this State as in child custody proceedings
12 between residents of this State, any parent whose parental rights have not been previously
13 terminated, and any person having physical custody of the child”). ~~The Uniform Revised~~
14 ~~Guardianship and Protective Proceedings Act, §§ 202(d)(2), 205(a) (2017) requires notice to~~
15 ~~minors who have attained 12 years of age.~~

16 17 **SECTION ~~1098~~. APPOINTMENT; INTERVIEW OF CHILD; COURT**

18 **SERVICES.** To the extent ~~available~~authorized by law of this state other than this [act] in
19 ~~another~~a proceeding to determine custody or visitation~~under law of this state other than this~~
20 ~~[act],~~ the court may make an order:

21 (1) ~~appointing~~appoint an attorney, guardian ad litem, or similar representative,~~or similar~~
22 ~~personnel~~ for a child;

23 (2) interview the child by the court;

24 ~~(2) requiring~~3) require mediation or other form of alternative dispute resolution between
25 the parties to the proceeding, but a party who has been the victim of domestic violence, sexual
26 assault, or stalking by another party to the proceeding may not be required to participate in
27 alternative dispute resolution [unless ~~the court can make an order adequately protecting during~~
28 ~~alternative dispute resolution the safety of the party who was victim of domestic violence, sexual~~
29 ~~assault, or stalking~~reasonable procedures are in place to protect the party from a risk of harm,

1 harassment, or intimidation];

2 ~~(3) ordering~~4) order an evaluation, investigation, or ~~home study~~other assessment of the
3 child’s circumstances and the effect of the requested custody or visitation on the best interest of
4 the child, parent, or nonparent; and

5 ~~(4) allocating~~5) allocate payment between the parties to the proceeding of ~~fees~~a fee for
6 ~~the services~~a service ordered under ~~paragraphs (1), (2), and (3)~~this section.

7 **Legislative Note:** *The brackets in ~~paragraph (2)~~subsection (3) should be removed and the phrase*
8 *“~~unless the court can make an order adequately protecting during alternative dispute resolution~~*
9 *~~the safety of~~reasonable procedures are in place to protect the party ~~who was victim of domestic~~*
10 *~~violence, sexual assault~~from risk of harm, harassment, or ~~stalking~~intimidation” should be*
11 *included in the section in a state that requires mediation of custody and visitation cases,*
12 *including a case involving an allegation of domestic violence. If a state does not require*
13 *mediation in those circumstances, delete the phrase and the brackets.*

14
15 **Comment**

16 A variety of personnel and court services may assist the court in making decisions
17 regarding nonparental custody and visitation. This act does not mandate the creation of new
18 services in jurisdictions where no similar services exist, but the act does make such services
19 available if the services already are utilized in other custody and visitation cases. The evaluations
20 referenced in in subsection (4) include mental health evaluations and evaluations of parenting
21 skills.

22
23 In subsection (~~2~~3), the phrase ~~“[unless the court can make an order adequately~~
24 ~~protecting during mediation the safety of] reasonable procedures are in place to protect~~ the party
25 ~~who was victim of domestic violence~~from risk of harm, harassment, or intimidation” is ~~similar to~~
26 ~~a phrase in the same as used in the Family Law Arbitration Act, § 12 (2016). the Uniform~~
27 ~~Collaborative Law Act, Section 15(e)(2) (2010).~~ Among the protections that might be used would
28 be “shuttle mediation,” in which the parties to mediation are not in the same room with each
29 other and the mediator shuttles between rooms.

30
31 **SECTION ~~1109~~. EMERGENCY ORDER.** On finding that ~~the~~ child who is the
32 subject of a proceeding under this [act] or a party to a proceeding under this [act] is in danger of
33 imminent harm, the court may expedite ~~at~~the proceeding ~~under this [act]~~ and may issue an
34 emergency order.

35 **Comment**

1 Comment

2
3 This section makes explicit that the court has the power to enter an emergency order, as
4 well ~~asa~~ final ~~orders~~order. Generally, other provisions of the act -- including the requirements
5 for pleadings, burden of proof, presumptions, and factors considered – should apply to the
6 issuance of an emergency ~~orders~~order in addition to a final ~~orders~~order.
7

8 **SECTION ~~111. PARENTAL-10. PRESUMPTION: FOR PARENTAL DECISION.~~**

9 (a) ~~A decision of the parent of a child who is the subject of a~~ In an original proceeding
10 under this [act], a decision by a parent about a request for custody or visitation by a nonparent is
11 presumed to be in the best interest of the child. ~~The presumption applies in an original~~
12 ~~proceeding under this [act] brought by a nonparent against a parent and continues to apply unless~~
13 ~~the presumption is rebutted.~~

14 (b) A nonparent has the burden to rebut the presumption ~~in~~under subsection (a) by
15 producing clear-and-convincing evidence of the elements ~~set forth under Section 112.~~in Sections
16 11 or 12. Proof of unfitness of ~~the~~a parent is not required to rebut the presumption in subsection
17 (a).

18 Comment

19 ~~Comment~~

20 The presumption and burden of proof contained in this section recognize the superior
21 right of parents to custody of their children in custody disputes with nonparents; ~~and also~~
22 ~~provide~~provides that the superior right or presumption can be overcome.

23 The presumption and burden of proof ~~is~~are designed to meet the requirements of *Troxel*
24 *v. Granville*, 530 U.S. 57 (2000), in which the Supreme Court struck down Washington State’s
25 third party visitation statute as applied. Justice O’Connor, in a plurality decision, said the
26 Washington statute “contains no requirement that a court accord the parent’s decision any
27 presumption of validity or any weight whatsoever.” *Id.* at 67. “The Superior Court’s order was
28 not founded on any special factors that might justify the State’s interference with Granville’s
29 fundamental right to make decisions concerning the rearing of her two daughters.” *Id.* at 68.
30

31 The Colorado Supreme Court has held that the burden of proof in a grandparent visitation
32 case is clear-and-convincing evidence – even though the state’s grandparent visitation statute did
33 not explicitly require that. In *In re Adoption of C.A.*, 137 P.3d 318, 328 (Col. 2006), the court
34 held under principles of Due Process, “The grandparent bears the ultimate burden of proving by

1 clear and convincing evidence that the parental determination is not in the child’s best interest
2 and the visitation schedule grandparent seeks is in the child’s best interest.” *See also Polasek v.*
3 *Omura*, 2006 MT 103, ¶ 15, 332 Mont. 157, 162, 136 P.3d 519, 523 (2006) (holding that “clear
4 and convincing evidence” is required); *Jones v. Jones*, 2005 PA Super 337, ¶ 12, 884 A.2d 915,
5 918 (2005), *appeal denied* (Pa. 2006) (holding that “convincing reasons” are required).

6
7 The nonparent visitation or custody statutes of 22 states and the District of Columbia (as
8 of 2017) specify that clear-and-convincing evidence is the burden of proof for all or part of the
9 statutes. Ala. Code § 31-3-4.2; Ct. Gen. Stat. § 46b-59(b); D.C. Code § 16-831.03(b); Ga. Code §
10 19-7-3(c); Idaho Code § 32-1704(6); Ind. Code 31-17-2-8.5(a); Iowa Code § 600C.1; Kan. Rev.
11 Stat. §§ 403.270 & 403.280; Maine Rev. Stat. tit. 19-A, § 1891(3); Mich. Comp. Laws §
12 722.25(1); Minn. Stat. 257C.03; Mont. Code § 40-4-228(2); Nev. Rev. Stat. § 125C.050(4); N.H.
13 Rev. Stat. 461-A:6(II); Neb. Stat. § 43-1802(2); 43 Okla. Stat. 109.109.4; Or. Stat. § 109.119;
14 Pa. Stat. Ann. tit. 23, § 5327(b) (2015); R.I. Gen. Laws § 15-5-24.3(a)(2)(v); S.C. Code § 63-15-
15 60; Utah Code § 30-5a-103(2); Va. Code § 20-124.2(B); W.Va. Code § 48-10-702(b).

16 As stated in Black’s Law Dictionary, “The Burden of proof includes both the burden of
17 persuasion and the burden of production.” Black’s Law Dictionary (10th ed. 2014).

18
19 ~~**Reporter’s note:** The bracketed phrase in subsection (a) of the following section~~
20 ~~(Section 112) [i.e., the phrase “who has standing under this [act]”] is included in~~
21 ~~response to a comment at the Annual Meeting. In subsection (a)(1)(A), we also~~
22 ~~have the issue regarding the 6-month rule as was discussed in Section 106 on~~
23 ~~“Standing.”~~

24
25 ~~_____ If a child’s parents disagree about a nonparent’s request for custody or visitation~~
26 ~~**with a child, the court should consider each parent’s wishes in determining whether the**~~
27 ~~**nonparent has rebutted the presumption established by this Section. See *In re Marriage of***~~
28 ~~***Friedman*, 397 P.3d 1063, 1068 (Ariz. Ct. App. 2017).**~~

29
30 ~~**SECTION 112-11. ELEMENTS OF ACTION FOR CUSTODY AND**~~
31 ~~**VISITATION. CONSISTENT CARETAKER.**~~

32 (a) A court may grant custody or visitation under this [act] to a nonparent ~~[who has~~
33 ~~standing under this [act]]~~ if the nonparent proves by clear-and-convincing evidence that:

34 (1) the nonparent ~~has acted as is~~ a consistent caretaker of the child ~~without~~
35 ~~expectation of financial compensation and:~~

36 ~~_____ (A) has resided with the child for six or more consecutive months~~
37 ~~[immediately before the commencement who is the subject of a child-custody proceeding], or for~~

1 a child less than six months of age, since the birth of the child, excluding each period of
2 temporary absence; under this [act]; and

3 ~~_____ (B) a parent of the child explicitly or tacitly accepted the development of a
4 bonded and dependent relationship between the child and the nonparent; and~~

5 ~~_____ (C _____) (2) granting custody or visitation to the nonparent is in the
6 best interest of the child; ~~or~~~~

7 ~~_____ (2) the nonparent has a substantial relationship with the child, denial of custody or
8 visitation would result in [detriment] to the child, and granting custody or visitation to the
9 nonparent is in the best interest of the child.~~

10 **Reporter's Note:** The following two sections have been suggested. [The first
11 one seems like a reasonable option—giving the court power to grant visitation to
12 a nonparent who sought custody. The second section below [(c)] could be more
13 problematic since the remedy is more intrusive of the parent's rights, and the
14 parent may not have received adequate notice to mount a defense regarding the
15 potential remedy of granting custody to a nonparent. In addition, a nonparent
16 seeking visitation may not want more than visitation and may not be in a position
17 to handle the obligations of full custody.]
18

19 ~~[(b) A court may grant visitation to a nonparent who commenced a proceeding seeking
20 custody.]~~

21 ~~_____ [(c) A court may grant custody to a nonparent who commenced a proceeding seeking
22 visitation.]~~

23 **Reporter's Note:** At the Annual Meeting, a commissioner expressed ~~hoped~~determine that
24 the act would provide a more flexible standard for grandparents to seek visitation, including in
25 cases in which the parents have not permitted a substantial relationship to form between the child
26 and grandparent. We can continue to discuss that issue as well as the limits placed by *Troxel* and
27 the cases that have followed *Troxel*. a nonparent is a consistent caretaker under this [act] if the
28 nonparent without expectation of compensation:

1 (1) lived with the child for a significant period, ordinarily not less than 12
2 months;
3 (2) consistently exercised care of a child;
4 (3) made decisions regarding the child solely or in cooperation with a parent or
5 other custodian or as a result a complete failure or inability of any legal parent to perform
6 parenting functions; and
7 (4) established a bonded and dependent relationship with the child with the
8 explicit or tacit support of a parent of the child.

9 Comment

10
11 *Legislative Note: If a court in the state has held, as a matter of constitutional law, that harm to*
12 *a child without granting visitation must be shown before visitation is granted to a nonparent, the*
13 *state may need to substitute the term “harm” for “detriment” in subsection (a)(2).*
14

15 Comment

16 ~~This section provides~~ Sections 111 and 112 provide two bases for a nonparent to obtain
17 custody or visitation.
18

19 The first basis ~~[which is in subsection (a)(1)]~~ (Section 111) is that the nonparent ~~has~~
20 ~~been~~ is a “consistent caretaker” of ~~the~~ a child. The second basis (Section 112) requires a
21 “substantial relationship” with the child.
22

23 The “consistent caretaker” provision of Section 111 has four enumerated elements in
24 addition to a provision that the caretaking be “without expectation of financial compensation.”
25 ~~Such a finding includes three enumerated elements. The first element (regarding the length of~~
26 ~~time the nonparent resided with the child) has a timeframe similar to the time frame in the~~
27 ~~definition of “home state” of a child under the Uniform Child Custody Jurisdiction and~~
28 ~~Enforcement Act (UCCJEA), § 102(7) (1997).~~

29
30 ~~—The second element of “consistent caretaker”—acceptance by at least one parent of a~~
31 ~~“bonded and dependent relationship between the child and the nonparent”—is one of the~~ The
32 elements utilized in ~~are drawn from principles developed by the American Law Institute (a more~~
33 ~~specific cite will be inserted) and~~ the definition of “de facto parent” in the Revised ~~Uniform~~
34 ~~Parentage Act (RUPAUPA), § 204 (2017).~~ ~~The~~
35

36 Regarding the fourth element, the term “bonded” refers to the closeness of the
37 relationship. The term “dependent” refers to the degree to which the child relies upon, and is in

1 need of, the nonparent.

2
3 ~~_____ The third element is that granting custody or visitation to the nonparent is in the best~~
4 ~~interest of the child. A nonparent’s status as a consistent caretaker is phrased in the present~~
5 ~~tense (“the nonparent is a consistent caretaker”). The four enumerated elements are phrased in~~
6 ~~the past tense (“lived,” “exercised,” “made,” “established.” Thus, if a nonparent was a caretaker~~
7 ~~of a child in the recent past, but the child is no longer living with the nonparent (such as because~~
8 ~~the child is back with the parent), the nonparent could still claim status as a consistent caretaker.~~
9 ~~Such an approach gives the act flexibility and does not force the nonparent to immediately seek~~
10 ~~relief upon return of the child to a parent. If the child has not lived with the nonparent for a~~
11 ~~significant period of time, the nonparent would lose status as a consistent caretaker, but still~~
12 ~~might be able to seek relief under Section 12 (“substantial relationship”).~~

13
14 _____ A showing that denial of custody or visitation would result in a detriment to the child is
15 not required— ~~because severance of a bonded and dependent relationship between a child and a~~
16 ~~nonparent is implicitly detrimental to the child.~~

17
18 The “consistent caretaker” provision of this act has some similarities to definition of “de
19 facto parent” under the RUPAUPA, but the “consistent caretaker” provision is more flexible.
20 Unlike the RUPAUPA, the “consistent caretaker” provision does not require that the individual
21 seeking custody or visitation hold the child out as his or her own. In addition, the “consistent
22 caretaker” provision does not require that the individual has undertaken “full and permanent
23 responsibilities of a parent.” Moreover, an individual who fits the definition of “consistent
24 caretaker” is entitled to request custody and visitation under this act, but is not entitled to other
25 rights associated with parentage.

26
27 _____ In the years since *Troxel* was decided, state courts have generally held that a
28 grandparent’s claim that the grandparent has a positive relationship with the grandchild is not
29 sufficient to justify an order of visitation over the objection of a parent. *See, e.g., Dorr v.*
30 *Woodard*, 2016 ME 79, 140 A.3d 467 (Maine 2016); *Neal v. Lee*, 2000 Ok 90, 14 P.3d 547
31 (2000); *State Dept. of Social and Rehabilitative Services v. Paillet*, 16 P.3d 962 (2001); *Flynn v.*
32 *Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if the grandparent has raised
33 a child for a few years – that can be the basis for granting visitation to the grandparent over the
34 parents’ objection. *See, e.g., Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents
35 had helped raise their grandchildren for the first seven years of the oldest grandchild’s life and
36 for lesser periods for the younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100
37 (2007) (grandparents cared for children while the mother was dying of cancer).

1
2 SECTION 12. ELEMENTS OF ACTION FOR NONPARENT WHO HAS
3 SUBSTANTIAL RELATIONSHIP WITH CHILD.

4 (a) In this section, a “substantial relationship” means a familial or other relationship
5 formed without expectation of compensation in which a significant emotional bond exists
6 between a nonparent and child.

7 (b) A court may grant custody or visitation under this [act] if the nonparent proves by
8 clear-and-convincing evidence that:

9 (1) the nonparent has a substantial relationship with the child;

10 (2) denial of custody or visitation would result in [harm] [detriment] to the child;

11 and

12 (3) granting custody or visitation to the nonparent is in the best interest of the
13 child.

14
15 Comment
16

17 The second basis for a nonparent to obtain custody or visitation under this act ~~which is in~~
18 ~~subsection (a)(2)~~ requires a showing of three elements: (1) “a substantial relationship with the
19 child;” (2) “denial of custody or visitation would result in ~~detriment~~ to the child,” and (3)
20 “granting custody or visitation to the nonparent is in the best interest of the child.” Under this
21 basis, the focus is on “substantial relationship” and the “detriment to the child” ~~without~~if the
22 relationship is severed. “Consistent caretaking” is not required. ~~Subsection (a)(2)~~This section
23 could be used by grandparents, siblings, stepparents or others who have a very close relationship
24 with the child, but may not have acted as a “consistent caretaker.”
25

26 The showing of best interest under ~~both bases~~this section and Section 111 is relevant not
27 only to whether custody or visitation should be granted to a nonparent, but also to the amount of
28 time the child should be with the nonparent.
29

30 The Supreme Court in *Troxel* did not rule on the issue of whether the constitution
31 requires a showing of harm or potential harm. In her plurality opinion, Justice O’Connor said:
32

33 Because we rest our decision on the sweeping breadth of [Washington Code] §
34 26.10.160(3) and the application of that broad, unlimited power in this case, we

1 do not consider the primary constitutional question passed on by the Washington
2 Supreme Court—whether the Due Process Clause requires all nonparental
3 visitation statutes to include a showing of harm or potential harm to the child as a
4 condition precedent to granting visitation. We do not, and need not, define today
5 the precise scope of the parental due process right in the visitation context. In this
6 respect, we agree with Justice KENNEDY that the constitutionality of any
7 standard for awarding visitation turns on the specific manner in which that
8 standard is applied and that the constitutional protections in this area are best
9 “elaborated with care.” *Post*, at 2079 (dissenting opinion). Because much state-
10 court adjudication in this context occurs on a case-by-case basis, we would be
11 hesitant to hold that specific nonparental visitation statutes violate the Due
12 Process Clause as a *per se* matter.
13

14 530 U.S. at 73.
15

16 Six state supreme courts have held, as a matter of state or federal constitutional law, that
17 harm to the child without granting visitation must be shown before visitation is granted to a
18 grandparent. *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d 453 (2002); *Sullivan v. Sapp*, 866
19 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d 1067 (Haw. 2007); *Blixt v. Blixt*, 437
20 Mass. 649, 774 N.E.2d 1052 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert.*
21 *denied*, 540 U.S. 1177 (2004); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405
22 (2005). — In the years since *Troxel* was decided, state courts have generally held that a
23 grandparent’s claim that the grandparent has a positive relationship with the grandchild is not
24 sufficient to justify an order of visitation over the objection of a parent. See, e.g., *Dorr v.*
25 *Woodard*, 2016 ME 79, 140 A.3d 467 (Maine 2016); *Neal v. Lee*, 2000 Ok 90, 14 P.3d 547
26 (2000); *State Dept. of Social and Rehabilitative Services v. Paillet*, 16 P.3d 962 (2001); *Flynn v.*
27 *Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). — On the other hand, if the grandparent has a
28 substantial relationship with the grandchild—such as raising the child for a few years—that can
29 be the basis for granting visitation to the grandparent over the parents’ objection. See, e.g.,
30 *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents had helped raise their
31 grandchildren for the first seven years of the oldest grandchild’s life and for lesser periods for the
32 younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007) (grandparents cared
33 for children while the mother was dying of cancer).
34

35 These cases did not involve grandparents who had acted as consistent caretakers.
36

37 In addition, as of 2017, statutes in nine states require proof of “harm,” “detriment,” or
38 similar proof before visitation is granted to a nonparent. See Ala. Code § 30-3-4.2 (2017)
39 (harm); Ark. Code § 9-13-103(e) (2017) (harm); Conn. Gen. Stat. § 46b-59(b) (2017) (harm);
40 Ga. Code § 19-7-3(c)(1) (harm); 750 Ill. Comp. Stat.5/602.9(b)(3) (2017)(harm); Mich. Stat. §
41 722.27b(4)(b) (2017) (harm); Tenn. Stat. § 36-3-306(b)(1) (2017) (harm); Tex. Fam. In addition,
42 in *Moriarty v.* Code § 153.432(c) (2017) (significantly impair the child’s physical health or
43 emotional well-being); and Utah Code § 30-5a-103(2)(f) (2017) (detriment). Connecticut has
44 both case law and statute requiring “harm.”
45

1 Courts have recognized that a grant of custody is a greater intrusion on parental rights
2 than a grant of visitation. See e.g., *McAllister v. McAllister*, 2010 ND 40, ¶ 23, 779 N.W.2d 652,
3 660. In claims for either custody or visitation, a nonparent with a substantial relationship with
4 the child must show harm, but the focus of the evidence will vary. In general, a nonparent
5 seeking custody must show that a change in the child's custody is necessary to prevent
6 [detriment] [harm] to the child, while a nonparent seeking visitation will need to show that
7 continued contact with the nonparent through visitation is necessary to prevent [detriment]
8 [harm]. See, e.g., *Fish v. Fish*, 285 Conn. 24, 47 – 48, 939 A.2d 1040, 1054 (2008).
9

10 An example of a substantial relationship between the child and nonparents that resulted in
11 an order of visitation for nonparents is *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), cert.
12 denied, 540 U.S. 1177 (2004), the). The New Jersey Supreme Court reinstated a trial court's
13 grant of visitation to maternal grandparents after the mother's death "where the children have a
14 very extensive relationship with the grandparents [, including] years where they were seeing the
15 grandparents every other weekend." 827 A.2d at 224. In this case, there was "a very bad
16 relationship" between the father and the grandparents, and the father believed the grandparents
17 were "evil." *Id.* at 225. The trial court found the grandparents were appropriate, acted in good
18 faith, and were an important link to the mother's side of the family. The visitation was: "(1)
19 monthly visitation alternating between a five-hour day visit one month and a visit with two
20 overnights the next month and (2) one extended visitation period in July or August. The court
21 specifically noted that the reason it ordered that visitation was its reliance on the grandparents'
22 expert who opined that such visitation was 'to protect the children from the harm that would
23 befall them if they were alienated from their grandparents.'" *Id.* at 208.
24

25 This act does not set a maximum number of persons who may obtain rights of custody or
26 visitation. In most cases, the number of actively involved persons with a valid claim for custody
27 or visitation will not be large. As courts sort through complex family structures, the number of
28 persons with potential claims for custody or visitation is a factor that should be considered -- but
29 without applying a fixed rule about how many persons with rights to time with the child is too
30 many. The focus needs to remain on the best interest of the child.
31

32 This act governs disputes between nonparents and parents. See Section 103. Disputes
33 between two or more nonparents (when parents are not ~~part of a party to~~ the proceeding) are
34 governed by other ~~laws~~law, such as guardianship ~~laws~~law.
35

36 SECTION 13. GRANT OF CUSTODY OR VISITATION.

37
38 (a) In a proceeding seeking custody by a nonparent seeks custody, the court may grant:

39 (1) sole or primary custody to the nonparent;

40 (2) joint or shared custody to the nonparent and a parent or other party; or

41 (3) visitation to the nonparent.

1 (b) In a proceeding seeking visitation by a nonparent seeks visitation, the court may grant
2 visitation, but may not grant custody, unless notice was given under Sections 6 and 7 that
3 custody was sought and other requirements of this [act] are met.

4 Comment

5 ~~Regarding the Legislative Note and the wording of subsection (a)(2), six states require a~~
6 ~~showing of “harm” (rather than “detriment”) before visitation can be granted to a nonparent. The~~
7 ~~states are listed in the~~

8 This section gives flexibility to the court when granting custody to a nonparent. Custody
9 can be sole, joint, or shared. If a nonparent sought custody, the court can decline to grant custody
10 but can still grant visitation to the nonparent. In such circumstances, granting visitation can be
11 viewed as a lesser included remedy of the request for custody. If, however, the nonparent sought
12 visitation, the court cannot grant the nonparent custody unless the nonparent gave proper notice
13 and proof regarding the request for custody.

14 ~~Comment to Section 106.~~

15 **SECTION 11314. BEST INTEREST OF CHILD.** ~~The court shall consider the~~
16 ~~following factors to determine~~In determining whether ~~a grant of~~granting custody or visitation to
17 a nonparent ~~would be~~is in the best interest of ~~the~~a child, the court shall consider:

18 (1) the nature, and extent, ~~and quality~~ of the relationship between the child and parent,
19 ~~including any period of temporary absence;~~

20 (2) the nature, and extent, ~~and quality~~ of the relationship between the child and nonparent,
21 ~~including specific caretaking activity by the nonparent and whether the nonparent has a family~~
22 ~~relationship with the child; —;~~

23 (3) the views of the child, ~~considering~~taking into account the age and maturity of the
24 child;

25 (4) ~~a history or threat by any individual of domestic violence, child abuse, child neglect,~~
26 ~~sexual assault, or stalking towards any of the following:~~

27 (A) a party;

28 (B) the child;

1 ~~(C) a sibling of the child;~~

2 ~~(D) a parent or guardian of the child; or~~

3 ~~(E) an individual residing with past or present conduct by a party or individual living with whom~~
4 ~~the a party previously resided; which poses a risk to the physical, emotional, or psychological~~
5 ~~well-being of the child;~~

6 (5) the applicable factors in [insert citation to law of this state other than this [act]
7 pertaining to factors considered in custody, [parenting time,] or visitation disputes between
8 parents]; and

9 (6) any other ~~relevant~~ factor affecting the best interest of the child.

10 *Legislative Note: The term “parenting time” used in subsection 5 refers to the law of a state*
11 *other than this act regarding the amount of time a child spends with each parent. For allocation*
12 *of time between parents, approximately half of the states utilize the term “parenting time” (or*
13 *similar term) rather than “custody” and “visitation.”*

14 15 **Comment**

16 The nonparental visitation statutes of most states, as they existed in 2017, list factors a
17 court should consider (other than best interest of the child). This section reflects factors that
18 have been used by the states. The second factor – “the nature and extent of the relationship
19 between the child and nonparent” – may include consideration of whether there is a family
20 relationship between the child and the nonparent.

21
22 ~~**Reporter’s Note:** For the following section regarding the domestic violence~~
23 ~~presumption, it has been suggested that the presumption apply if any of the~~
24 ~~designated acts were committed—without regard to the person against whom the~~
25 ~~act was committed. [The same issue applies to fourth factor in the Best Interest~~
26 ~~section (Section 113). If we follow that approach, the bracketed words in~~
27 ~~subsection (a) would be deleted. At the Annual Meeting, a question was raised~~
28 ~~about the level of proof required to overcome the presumption—preponderance of~~
29 ~~evidence or clear and convincing evidence?~~

30 ~~It also has been suggested that the state be given the option of utilizing the~~
31 ~~presumptions in the state’s current law for domestic violence and related offenses.~~
32 ~~Thus, if a state has presumptions and criteria for rebuttal of presumptions for~~
33 ~~domestic violence in custody and visitation disputes between parents, those laws~~
34 ~~would be applied to nonparents seeking custody or visitation. This option is~~
35 ~~reflected in Alternative B.~~

1 _____
2 SECTION 11415. PRESUMPTION REGARDING ~~DOMESTIC VIOLENCE,~~
3 CHILD ABUSE, CHILD NEGLECT, ~~DOMESTIC VIOLENCE,~~ SEXUAL ASSAULT, OR
4 STALKING.

5 **Alternative A**

6 ~~(a) It is presumed that it~~ (a) In a proceeding under this [act], the court shall presume that
7 granting custody or visitation to a nonparent is not in the best interest of a child ~~to grant custody~~
8 ~~or visitation to a nonparent if if the court finds that~~ the nonparent, or an individual ~~residing~~ living
9 with the nonparent, has committed any of the following ~~acts [against a party, the child, siblings~~
10 ~~of the child, a parent or guardian of the child, or an individual residing with a party or with~~
11 ~~whom the party previously resided]:~~

12 (1) ~~domestic violence~~ child abuse;

13 (2) ~~child abuse;~~

14 ~~(3) child neglect;~~

15 ~~(3) domestic violence;~~

16 (4) sexual assault; ~~or~~

17 (5) ~~stalking;~~ or

18 ~~(6) another comparable offense.~~

19 (b) A finding that an offense specified in subsection (a) was committed must be based on:

20 (1) evidence of a judgment of conviction; or

21 (2) proof sufficient to establish by a preponderance of the evidence that the act
22 was committed.

23 (c) A nonparent may rebut the presumption established in subsection (a) by proving by
24 clear-and-convincing evidence that granting custody or visitation to the nonparent will not

1 endanger the ~~child and that it is in the best interest~~ health, safety, or welfare of the child ~~to grant~~
2 ~~custody or visitation who is the subject of a proceeding under this [act]~~

3 **Alternative B**

4 ~~_____ [If a state prefers~~ **Legislative Note:** ~~As an alternative to use current~~ Section 15, a state
5 may wish to amend existing state law for domestic violence and related offenses, insert that
6 standard here. Thus, for example, concerning presumptions and rebuttal of presumptions
7 applicable to a state's dispute between parents. The same types of ~~presumptions and criteria for~~
8 ~~rebuttal of presumptions for domestic violence between parents in custody and visitation~~
9 ~~disputes would apply to nonparents seeking custody or visitation.]~~
10 ~~**Legislative Note:** The act presents two options for dealing with presumptions related to~~
11 ~~domestic violence and related offenses. Alternative A presents criteria for a presumption and~~
12 ~~rebuttal of the presumption. Alternative B provides that a state may adapt its current laws~~
13 ~~applicable to domestic violence and related offenses in custody disputes between parents to~~
14 ~~custody and visitation disputes between parents and nonparents.]~~

16 **Comment**

17 This section provides protection to victims or potential victims of domestic violence by
18 providing a rebuttable presumption that custody or visitation should not be granted to a
19 nonparent if the nonparent, or an individual residing with the nonparent, has committed an act of
20 domestic violence or related offenses. Domestic violence is defined by reference to state law ~~;~~
21 (civil law, criminal law, or both).

22
23 The Legislative Note gives drafters the option of adapting existing state law concerning
24 presumptions and rebuttal of presumption applicable to disputes between parents to disputes
25 between nonparents and parents. Such state laws may provide an alternate list of offenses that
26 give rise to presumptions and different procedures for utilizing the presumptions and rebutting
27 the presumptions.

29 **SECTION ~~115~~16. MODIFICATION OF CUSTODY OR VISITATION. ~~If~~**

30 ~~_____ (a) On [motion], the court decides to may~~ modify a final order for ~~of~~ custody or
31 visitation entered under this [act].] on a showing by a preponderance of the evidence that:

32 _____ (1) a substantial and continuing change in circumstance has occurred relevant to
33 the custody or visitation of the child who is the subject of the order; and

34 _____ (2) modification must be in the best interest of the child.

35 _____ (b) Except as otherwise provided in subsection (c), if a nonparent who has obtained an

1 order of visitation moves to modify the order to an order of custody under [cite to the law of this
2 state other than this [act], the nonparent must rebut the presumption under Section 10 as in an
3 original proceeding.

4 (c) On agreement of the parties, the court may modify an order of custody or visitation,
5 unless the court finds that the agreement is not in the best interest of the child who is the subject
6 of the order.

7 **Comment** governing

8 This section reflects the standard for modification of a custody[,] [or] visitation[,] [or
9 parenting time] order entered in a dispute between parents].

10 custody **Comment**

11 ~~————This section makes reference to a state’s existing law regarding modification of custody,~~
12 ~~visitation, or parenting time orders applicable to disputes between parents. In visitation that is~~
13 ~~applied in most states, that standard is:~~ a showing of substantial and continuing change of
14 ~~circumstances~~ circumstance, coupled with a showing that modification is in the best interest of
15 the child ~~(although a few states have different standards, such as requiring a showing of~~
16 ~~endangerment if modification is sought within two years of a prior order).~~ Under this approach,
17 a custody or visitation order in favor of a nonparent generally would continue unless the
18 substantial change of ~~circumstances~~ circumstance and best interest of the child for modification
19 of the order were shown. In addition, the section provides that presumption in favor of parents
20 applies if the nonparent is seeking to modify an order of visitation to an order of custody.

21
22 **[SECTION 11617. FINDINGS OF FACT AND CONCLUSIONS OF LAW.** When

23 making a decision under this [act], after an evidentiary hearing, the court shall make findings of
24 fact and conclusions of law on the record in support of its decision.]

25 **Legislative Note:** *A state should omit this section if the requirement or lack of requirement of*
26 *making findings of fact and conclusions of law is governed by court rule rather than ~~by~~ statute*
27 *~~and if a or the~~ state requires findings of fact and conclusions of law in all cases proceedings*
28 *involving family law.*

1 **Comment**

2 Requiring findings of fact and conclusions of law has several benefits. The fact-finding
3 process structures the court’s review so that the court is less likely to overlook important facts or
4 apply bias in reaching its decision. Careful fact-finding by the trial court also facilitates
5 appellate review and may assist the parties in accepting the decision. At least ~~twenty~~20 states
6 and the District of Columbia require the trial court to make findings of fact in custody cases. See
7 ~~Jeff Atkinson, *Modern Child Custody Practice—Second Edition*, § 12-45 (LexisNexis 2016).~~

8
9 **SECTION 18. EFFECT OF ADOPTION OF CHILD.** If a child is adopted by a
10 relative of the child or stepparent of the child, an order of custody or visitation to a nonparent
11 under this [act] remains valid and is not changed by the adoption, unless modified by order of the
12 court.

13 **Comment**

14 117As of 2017, state laws regarding visitation by nonparents have dealt with the effect of
15 a child’s adoption in different ways, including: (1) providing that the visitation order survives
16 adoption by a relative; (2) providing that nonparents can seek visitation following adoption by a
17 relative; and (3) providing that the visitation provision does not apply if the child is adopted by a
18 nonrelative.

19
20 **SECTION 19. COST OF FACILITATING VISITATION.** ~~In a proceeding under~~
21 ~~this [act], a~~ The court may order a nonparent granted visitation to pay issue an order allocating
22 responsibility between the parties for payment of the cost under this [act] of facilitating visitation
23 with ~~the~~ a child, including the cost of transportation.

24 **Reporter’s Note:** ~~Regarding Section 117, our Style Liaison asks, “Does this~~
25 ~~include attorney’s fees—i.e., to get child back from visitation if delay occurs?”~~
26 ~~Should we deal with that issue in Comments and state that an order for attorney’s~~
27 ~~fees is governed by Section 119?~~

28 **Comment**

29
30 ~~Individuals who receive visitation under this act may, in the court’s discretion, be~~
31 ~~required~~ This section directs a court to pay the cost allocate responsibility for paying costs of
32 facilitating visitation. ~~The cost of facilitating visitation may include, including~~ the cost of
33 transportation. An obligation, if any, for Cost of transportation could include an escort for a
34 child. In most cases in which a nonparent to pay child support is governed by law other than this
35 act exercising visitation, the nonparent would pay the associated costs.

1 act do not wish to preclude the development of additional rights and remedies in this area,
2 including rights and remedies dealing with children of deployed parents.

3
4 **SECTION ~~12122~~. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

5 applying and construing this uniform act, consideration must be given to the need to promote
6 uniformity of the law with respect to its subject matter among states that enact it.

7 **SECTION ~~12223~~. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
8 AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the
9 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
10 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
11 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
12 U.S.C. Section 7003(b).

13 **SECTION ~~12324~~. TRANSITIONAL PROVISION.** This [act] applies to a proceeding
14 commenced before, on, or after [the effective date of this [act]] for a [petition] for custody or
15 visitation by a nonparent of a child on which a judgment has not been issued.

16 **[SECTION ~~12425~~. SEVERABILITY.** If any provision of this [act] or its application to
17 any person or circumstance is held invalid, the invalidity does not affect other provisions or
18 applications of this [act] which can be given effect without the invalid provision or application,
19 and to this end the provisions of this [act] are severable.]

20 *Legislative Note: Include this section only if this state lacks a general severability statute or a*
21 *decision by the highest court of this state stating a general rule of severability.*
22

23 **SECTION ~~12526~~. REPEALS; CONFORMING AMENDMENTS.**

24 (a)

25 (b)

26 (c)

1 **Legislative Note:** When ~~adopting~~enacting this act, a state should repeal: (1) existing general
2 statutes, if any, regarding visitation for a grandparent, stepparent, sibling, and other nonparent;
3 and (2) statutes, if any, regarding a custody dispute between a nonparent and a parent.

4
5 A state should not repeal: (1) the state's Uniform Deployed Parents Custody and Visitation Act
6 or other state law dealing with custody of and visitation with a child of a deployed parent; (2)
7 ~~laws~~law regarding guardianship of a minor; (3) ~~laws~~law regarding a child in custody of the
8 state, including a child in foster care; ~~and/or~~ (4) ~~laws~~law providing specific rights and remedies
9 for a de facto parent.

10
11 **SECTION ~~12627~~. EFFECTIVE DATE.** This [act] takes effect

1 ~~APPENDIX—USE OF SEPARATE STANDARDS FOR CUSTODY AND VISITATION~~

2 ~~**Reporter’s Note:** The issue of having separate standards for nonparents seeking~~
3 ~~custody vs. visitation has been discussed at multiple Drafting Committee~~
4 ~~meetings. The committee decided to have the same standard for both types relief.~~
5 ~~The issue was raised again at the 2017 Annual Meeting. For the committee’s~~
6 ~~reference, I include below sections from the October 2016 Drafting Committee~~
7 ~~meeting, which presented an option of separate standards.~~

8
9 ~~Alternative B (Different standards, and two different sections, for custody and visitation)~~

10 ~~SECTION 8B. INITIAL PETITION FOR CUSTODY WHEN CHILD IN~~
11 ~~CUSTODY OF PARENT.~~

12 ~~(a) This section applies to initial petitions for custody by a non-parent when the child is in~~
13 ~~the custody of a parent.~~

14 ~~(b) Parental custody is presumed to be in the best interests of the child. The presumption~~
15 ~~is rebuttable. To rebut the presumption, the non-parent must establish by clear and convincing~~
16 ~~evidence that:~~

17 ~~——(1) the parent is unfit or parental custody would be a [significant] detriment to the~~
18 ~~child [alternate phrasing for (1): “custody to the non-parent is necessary because custody with~~
19 ~~the parent would significantly impair the child’s physical health or emotional development”];~~

20 ~~(2) custody to the non-parent is the best interest of the child.~~

21 ~~SECTION 8C. INITIAL PETITION FOR VISITATION WHEN CHILD IN~~
22 ~~CUSTODY OF PARENT.~~

23 ~~(a) This section applies to an initial petition for visitation by a non-parent when the child~~
24 ~~is in the custody of a parent.~~

25 ~~(b) A parent’s decision about visitation is presumed to be in the best interest of the child.~~
26 ~~The presumption is rebuttable. To rebut the presumption, the non-parent must establish by clear-~~
27 ~~and convincing evidence that:~~

1 ~~——(1) a substantial relationship exists between the child and non-parent;~~

2 ~~——(2) denial of visitation to the non-parent is a detriment to the child; and~~

3 ~~——(3) visitation to the non-parent is the best interest of the child.~~

4 ~~(e) Proof of parental unfitness is not required to rebut the presumption described in~~
5 ~~subparagraph (b).~~

6 **~~Additional Note Regarding Bases for Granting Custody to Nonparents~~**

7 ~~By case law and statute, the following have served as bases for granting custody to~~
8 ~~nonparents. There is overlap between standards, and standards vary somewhat from state to~~
9 ~~state:~~

10 ~~■ Unfitness of parent~~

11 ~~■ Death of parents~~

12 ~~■ Abandonment of child (or parent is missing, or child not in custody of parent)~~

13 ~~■ Neglect of child~~

14 ~~■ Abuse of child~~

15 ~~■ Harm or detriment to child (physical or emotional) if child is in custody of parent~~

16 ~~■ Party seeking custody has acted as de facto parent (or in loco parentis or otherwise~~
17 ~~assumed the role of a parent)~~

18 ~~■ Child resided with nonparent for certain period of time~~

19 ~~■ Other exceptional circumstances~~

20 ~~Clear and convincing evidence~~