

DRAFT
FOR DISCUSSION ONLY

NON-PARENTAL CHILD CUSTODY AND VISITATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

~~October 14-15, 2016~~

March 24-25, 2017 Drafting Committee Meeting

REDLINE COMPARISON DRAFT

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ON UNIFORM STATE LAWS

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~~September 2, 2016~~ February 28, 2017

DRAFTING COMMITTEE ON NON-PARENTAL CHILD CUSTODY AND VISITATION ACT

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

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

BARBARA A. ATWOOD, University of Arizona, James E. Rogers School of Law, 1201 E.
Speedway Blvd., P.O. Box 210176, Tucson, AZ 85721-0176

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

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

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

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

GAIL HAGERTY, Burleigh County Court House, P.O. Box 1013, 514 E. Thayer Ave., Bismark,
ND 58502-1013

JAMIE PEDERSEN, 43rd Legislative District, 235 John A. Cherberg Bldg., P.O. Box 40643,
Olympia, WA 98504-0643

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

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

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

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

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

JEFF J. ATKINSON, DePaul ~~University~~College of Law, 3514 Riverside Dr., Wilmette, IL
60091, *Reporter*

EX OFFICIO

RICHARD CASSIDY, 100 Main St., P.O. Box 1124, Burlington, VT ~~05402~~05401, *President*

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

AMERICAN BAR ASSOCIATION ADVISORS

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

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

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

EXECUTIVE DIRECTOR

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

Copies of this act may be obtained from:

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

NON-PARENTAL CHILD CUSTODY AND VISITATION ACT

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INTRODUCTORY NOTE TO THE DRAFTING COMMITTEE FROM THE REPORTER

This draft includes preliminary “Comments” that, in final form, will be published with the act.

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

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

Jeff Atkinson
Reporter
Email: Jeff Atkinson747@gmail.com

NON-PARENTAL CHILD CUSTODY AND VISITATION ACT

PREFATORY NOTE

The Non-Parental Child Custody and Visitation Act provides procedures and factors for courts to apply when asked to grant custody or visitation to non-parents. The act seeks to balance, within constitutional restraints, the interests of children, parents, and non-parents with whom the children have a close relationship.

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

In *Troxel*, the paternal grandparents sought visitation with their grandchildren following the father's suicide. In the six months after the father's death, the grandparents saw their grandchildren "on a regular basis." *Id.* at 60. Then the mother informed the grandparents "that she wished to limit their visitation with her daughters to one short visit per month." *Id.* at 61. The grandparents filed an action under Washington State's ~~nonparental~~non-parental visitation statute, Wash. Rev. Code § 26.10.160(3) (1994), which provided: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings."

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

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

The grandparents appealed. The U.S. Supreme Court affirmed the Washington Supreme Court, although on narrower grounds. The court said the statute was "breathtakingly broad," 530 U.S. at 67, and the trial court's findings were "slender," *Id.* at 72. The Court struck down the statute, as applied, holding the trial court did not give sufficient deference to the decision of a fit parent to decide the amount of contact the children would have with grandparents.

The Court said, "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65, *citing*, among other cases, *Meyer v. Nebraska*, 262

1 U.S. 390 (1923) (holding unconstitutional a Nebraska law prohibiting teaching any subject in a
2 language other than English). The Court held the statute “as applied, exceeded the bounds of the
3 Due Process Clause.” 530 U.S. at 68.

4
5 The Superior Court’s order was not founded on any special factors that might justify the
6 State’s interference with Granville’s fundamental right to make decisions concerning the
7 rearing of her two daughters. . . .

8
9 [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will
10 normally be no reason for the State to inject itself into the private realm of the family to
11 further question the ability of that parent to make the best decisions concerning the
12 rearing of that parent’s children.

13
14 *Id.* at 68–69.

15
16 The Court said that because its decision was based on the “sweeping breadth” of the
17 statute and the application of the statute in this case, the Court did not need to “consider the
18 primary constitutional question passed on by the Washington Supreme Court—whether the Due
19 Process Clause requires all nonparental visitation statutes to include a showing of harm or
20 potential harm to the child as a condition precedent to granting visitation.” *Id.* at 73.

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

25
26
27 **Reporter’s Note:** ~~The following statistics and summary of the act will be updated as the~~
28 ~~drafting proceeds.~~

29
30
31 The U.S. Census Bureau reports that the unmarried partner population “grew 41 percent
32 between 2000 and 2010, four times as fast as the overall household population.” U.S. Census
33 Bureau, “Households and Families: 2010” at p. 3 (C2010BR-14) (Apr. 2012), available at
34 <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

35
36 Opposite-sex unmarried partner households increased by 40 percent since 2000; same-sex
37 households increased by 80 percent. *Id.* at p. 6.

38
39 In ~~2012~~2016, the Census Bureau reported that there were 73,~~817,745~~,000 children in
40 United States under age 18. Of that number, the breakdown for the children’s living
41 arrangements was:

- 42
43 · Living with both parents: 50,~~267,679~~,000
44 · Living with mother only: 17,~~991,223~~,000
45 · Living with father only: 2,9243,006,000
46 · Living with neither parent: 2,~~634,836~~,000

1 Of the children living with neither parent, 1,494,556,000 were living with grandparents.

2
3 U.S. Census Bureau, America's Families and Living Arrangements: ~~2012~~2016, Table C2,
4 Household Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex:
5 ~~2012~~2016 available at <https://www.census.gov/hhes/families/data/cps2016C.html>
6

7 The main provisions of this act are:
8

- 9 • a right to seek custody or visitation for ~~two~~ categories of persons: ~~{(1) de facto non-~~
10 ~~parents, (2) persons~~ who ~~entered into an agreement with~~ have acted in a role similar to
11 ~~that of a parent before birth of a child to raise a child together,~~ and ~~(3) (2) other~~ non-
12 parents who have a substantial relationship with the child and who demonstrate that
13 denial or custody or visitation would be as detriment to the child;
14 • a requirement that the pleadings be verified and specify the facts on which the request for
15 custody or visitation is based;
16 • A requirement of notice to: (1) any parents whose parental rights have not been
17 previously terminated; (2) any person having physical custody of, or visitation with, the
18 child; and (3) the child, if the child has attained 12 years of age.
19 • a rebuttable presumption that the ~~parent or de facto~~ parent's decision about custody or
20 visitation is in the best interests of the child;
21 • a burden of proof on the petitioner of ~~[clear and convincing evidence;]~~ [preponderance of
22 evidence];
23 • protections for victims of domestic violence;
24 • a list of factors to guide the court's decision;
25 • a provision that a non-parent granted visitation may be ordered to pay the cost of
26 facilitating visitation, including the cost of transportation;
27 • a provision that the act does not apply to children who are the subject of proceedings for
28 guardianship, abuse, neglect, or dependency; and
29 • a provision that the rights and remedies of this act are not exclusive and do not preclude
30 additional rights and remedies under laws of the state other than this act.
31

NON-PARENTAL CHILD CUSTODY AND VISITATION ACT

Reporter's Note: The Drafting Committee's Style Liaison, Deborah Behr, has indicated that the Style Committee is not likely to approve use of a hyphen in "Non-Parental." Another ULC Act – the Deployed Parents Custody and Visitation Act (2012), as well as statutes in California, Nevada, Pennsylvania, and Washington, do not use a hyphen for "nonparental." The committee (and I) have preferred use of a hyphen, believing it makes the word easier to understand and read.

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

SECTION 2. DEFINITIONS. In this act:

~~———— (1) "Abandoned" means left without provision for reasonable and necessary care or supervision.~~

~~(2)~~ (1) "Child" means an unemancipated individual who has not attained [18] years of age.

~~(3)~~ (2) "Child abuse" means child abuse as defined in [cite to definition of "child abuse" in law of this state other than this [act]].

~~(3) "Child neglect" means child neglect as defined in [cite to definition of "child neglect" in law of this state other than this [act]].~~

~~(4) "Custodian" means an individual with right of custody of a child.~~

~~(4)~~ (5) "Custody" means physical custody, legal custody, or both. The term includes joint custody or shared custody as defined by the law of this state other than this [act].

Reporter's Note: If a final decision is made to delete references to "de facto parents" in the act, the following section will be deleted. I assume the issue will be discussed at the October 2016 Drafting Committee meeting. For now, I will continue to include the definition in the draft. In addition, the definition of "parental responsibility" might not be necessary if there are no separate provisions for de facto parents and persons who agree to raise a child together.

~~———— (5) "De facto parent" means an individual who:~~

~~———— (A) is not a legal parent under law of this state other than this [act];~~

~~_____ (B) within the two years immediately before the filing of a petition under this act
has undertaken permanent, unequivocal, committed parental responsibility in the child’s life; and
_____ (C) the court has found that:
_____ (i) the individual has resided with the child for a sufficient period of time
to form a bonded and dependent relationship with the child;
_____ (ii) the individual has consistently engaged in caretaking of the child;
_____ (iii) the relationship between the individual and the child was supported by
another parent of the child, and the individual and the other parent have accepted that
relationship or behaved as though the individual is a parent of the child, except that if a parent
has completely failed to exercise parental responsibility, the support of the parent who failed to
exercise parental responsibility is not required; and
_____ (iv) the individual has accepted parental responsibility without expectation
of financial compensation. _____~~

(6) “Detriment to the child” means adverse effect to the child’s physical or psychological well-being, including an effect resulting from interruption of a substantial beneficial relationship with the child or removal of the child from a stable placement ~~of a child with a non-parent or de facto parent..~~

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

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

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

(10) “Non-parent” means an individual other than a parent.

(11) “Parent” means ~~a person~~an individual recognized as a parent under law of this state other than this [act].

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

~~(13)~~ “Parenting time” means parenting time as defined in [cite to definition of “parenting time” in law of this state other than this [act]~~].~~]

~~(14)~~ “Person” ~~(14) means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity.~~

~~(15)~~ “Physical custody” means day-to-day care and supervision of a child.

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

~~(16)~~ “Sexual assault” means sexual assault as defined in [cite to definition of “sexual assault” in law of this state other than this [act]].

~~(17)~~ “Stalking” means stalking as defined in [cite to definition of “stalking” in law of this state other than this [act]].

~~(18)~~ “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes a federally recognized Indian tribe.

~~(19)~~ “Substantial relationship” means a relationship in which a significant emotional bond exists between the non-parent and the child in light of the frequency of contact between the non-parent and the child, the caretaking responsibilities exercised by the non-parent, and the likely impact on the child if the relationship were to end.

(21) “Visitation” means the right to spend time with a child, ~~which may include~~ including any overnights.

Reporter’s Note: ~~Commissioner Harry Tindall has suggested we add definitions of “action” and “clear and convincing evidence.” With elimination of some provisions in the act, the need to define “action” is less. I am inclined to leave the nuances of the definition of “clear and convincing evidence” to existing state laws rather than adopt a definition that may conflict slightly with other laws within a state that adopts this act. The definitions that Commissioner Tindall proposes are:~~

- ~~“‘Action’ includes an original suit, intervention, counter claim and a modification involving non-parent custody and visitation.”~~
- ~~“‘Clear and convincing evidence’ means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.”~~

~~Another option is to provide a sample definition of clear and convincing evidence in a Comment to a section that uses the term.~~

Comment

The definition ~~is “abandoned of “child”~~ is the same as that ~~used in the Uniform Child Custody Jurisdiction and Enforcement Act, § 102(1) (1997).~~

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

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

~~The definition of “de facto parent” is based on Maine Rev. Stat. tit. 19-A, § 1891 (2015), and is also similar to the definition in Delaware—13 Del. Code § 8-201(c) (2015). The Delaware definition includes the element that the person seeking status as a de facto parent “has acted in a~~

1 parental role for a length of time sufficient to have established a bonded and dependent
2 relationship with the child that is parental in nature.” Some states set specific time periods
3 before a person may obtain custody as a de facto custodian — e.g., six months or more if the child
4 is under three years old, and one year or more if the child is three years of age or older. See, e.g.,
5 Ky. Rev. Stat. 403.270 (2012); S.C. Code § 63-15-60 (2012). At least eleven states allow a non-
6 parent to seek visitation if the child has lived with a person for a certain period of time, such as
7 six or 12 months.

8
9 ~~The Washington Supreme Court in the case of *In re Parentage of L.B.*, 122 P.3d 161, 163~~
10 ~~(Wash. 2005) held that the state’s “common law recognizes the status of de facto parents and~~
11 ~~grants them standing to petition for a determination of the rights and responsibilities that~~
12 ~~accompany legal parentage in this state.” To establish standing as a de facto parent, the~~
13 ~~Washington Supreme Court adopted the following criteria:~~

- 14
15 ~~(1) the natural or legal parent consented to and fostered the parent-like relationship,~~
16 ~~(2) the petitioner and the child lived together in the same household,~~
17 ~~(3) the petitioner assumed obligations of parenthood without expectation of financial~~
18 ~~compensation, and~~
19 ~~(4) the petitioner has been in a parental role for a length of time sufficient to have~~
20 ~~—— established with the child a bonded, dependent relationship, parental in nature.~~

21
22 ~~*Id.* at 176 (citations omitted).~~

23 ~~The American Law Institute Principles of the Law of Family Dissolution § 2.03(1)(c)~~
24 ~~(2002) defines a de facto parent as “an individual other than a legal parent or a parent by estoppel~~
25 ~~who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for~~
26 ~~reasons primarily other than financial compensation, and with the agreement of a legal parent to~~
27 ~~form a parent-child relationship, or as a result of a complete failure or inability of any legal~~
28 ~~parent to perform caretaking functions, (A) regularly performed a majority of the caretaking~~
29 ~~functions for the child, or (B) regularly performed a share of caretaking functions at least as great~~
30 ~~as that of the parent with whom the child primarily lived.”~~

31
32 ~~Some of the phrasing in the definition of “de facto parent” also is drawn from the~~
33 ~~American Law Institute’s Principles of the Law of Family Dissolution, § 2.03(1)(b) (2002). That~~
34 ~~section provides, as one of the alternative definitions of “parent by estoppel”: “an individual~~
35 ~~who, though not a legal parent, . . . (iii) lived with the child since the child’s birth, holding out~~
36 ~~and accepting full and permanent responsibilities as parent, as part of a prior co-parenting~~
37 ~~agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a~~
38 ~~child together each with full parental rights and responsibilities, when the court finds that~~
39 ~~recognition of the individual as a parent is in the child’s best interests.”~~

40
41 The definition of “detriment to the child” is based on Cal. Fam. Code § 3041(c) (2016) (a
42 section entitled “Custody award to nonparent; findings of court; hearing”). That section
43 provides: “As used in this section, ‘detriment to the child’ includes the harm of removal from a
44 stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his
45 or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for
46 care and affection, and who has assumed that role for a substantial period of time. A finding of

1 detriment does not require any finding of unfitness of the parents.” See also D.C. Code § 16-
2 831.07 (2017) (providing among the bases for granting a third party custody is a finding by clear
3 and convincing evidence “[t]hat that custody with a parent is or would be detrimental to the
4 physical or emotional well-being of the child”).

5
6 The definitions of “electronic²,” “person,” “record,” and “~~record~~state” are the definitions
7 provided by the Uniform Law Commission “Drafting Rules,” Rule 304 – 306 (2012).
8

9 The definition of “legal custody” is similar to the definition of “legal custody” in many
10 states. The definition of “legal custody” also is similar to the definition of “decision-making
11 authority” in the Uniform Deployed Parents Custody and Visitation Act (2012), which provides:
12 “the power to make important decisions regarding a child, including decisions regarding the
13 child’s education, religious training, health care, extracurricular activities, and travel.” “Legal
14 custody” might include the power to enroll a child in a religious school, but it normally should
15 not include selection of a child’s religion since most courts have held both parents have a right to
16 expose their child to his or her religious beliefs or lack of religious beliefs. *See, e.g., Felton v.*
17 *Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981); *In re Marriage of Mentry*, 142 Cal. App 260,
18 190 Cal. Rptr. 843 (1983); *Hansen v. Hansen*, 404 N.W.2d 460 (N.D. 1987). Decisions about
19 travel are not included since persons with custody, as well as persons with visitation, generally
20 have a right to travel with the children, including on vacation. A person with “legal custody,”
21 however, generally would determine if the child were to travel on his own her own, such as for
22 an educational or athletic program.
23

24 The definition of “non-parent” is “an individual other than a parent.” The term includes,
25 but is not limited to, a child’s grandparents, great-grandparents, step-parents, and siblings. Other
26 persons could obtain relief under the act provided they meet the requirements of the act
27 (including [clear and convincing evidence] of substantial relationship with the child and
28 detriment to the child if custody or visitation was not granted).
29

30 The definition of “parent” is “a person recognized as a parent under law of this state other
31 than this [act].” The sources of the definition of “parent” may include the state’s parentage
32 statutes, divorce statutes, and case law. In most states, “parent” would include biological
33 parents, adoptive parents, and men who have acknowledged paternity (even though they are not
34 biologically related to the child). “Parent” also might include persons who agree to conceive a
35 child through assisted reproductive technology or by use of surrogates. Generally, a person
36 ceases to be a parent if his or her rights have been terminated. In addition, a man who donates
37 sperm or a woman who donates an egg usually are not considered to be parents.
38

39 The definition of “parental responsibility” is based, in part, on Del. Code Ann. tit. 13, §
40 1101(10) (2016), which provides: “‘Parental responsibilities’ means the care, support and control
41 of the child in a manner that provides for the child’s necessary physical needs, including
42 adequate food, clothing and shelter, and that also provides for the mental and emotional health
43 and development of such child.” Payment for the child’s food, clothing, shelter, and other
44 physical needs is not enough, by itself, to constitute exercise of parental responsibility.
45

46 The definition of “parenting time” is made with reference to law of the state other than

1 this act. The term is a comparatively modern term designed to supplement or replace the terms
2 “custody” and “visitation,” particularly in disputes between parents. The term is generally used
3 to focus on parenting of the child and allocation of time with the child rather than which parent
4 has “custody.” The term does not apply to non-parents since they are not parents. The Illinois
5 definition of “parenting time” is: “the time during which a parent is responsible for exercising
6 caretaking functions and non-significant decision-making responsibilities with respect to the
7 child.” 750 Ill. Comp. Stat. 5/600(e) (2016). If a state does not use the term “parenting time,” the
8 definition of “parenting time” could be omitted.

9
10 The definition of “physical custody” is similar to the definition of “physical custody” in
11 the Uniform Child Custody Jurisdiction and Enforcement Act, § 102(14) (1997) (“the physical
12 care and supervision of a child”).

13
14 The definition of “substantial relationship” is drawn, in part, from Minn. Stat. Ann. §
15 518E.301 (West 2016), which provides: “‘close and substantial relationship’ means a
16 relationship in which a significant bond exists between a child and a nonparent.”

17 **Reporter’s Note:** For Section 3, our style liaison prefers a single word –
18 “Applicability.” I prefer the longer section title (below) since it tells the reader the
19 subject matter of the section.

20
21 **SECTION 3. APPLICATION-APPLICABILITY [TO CHILD SUBJECT TO**
22 **PROCEEDING REGARDING GUARDIANSHIP, ABUSE, NEGLECT, OR**

23 **DEPENDENCY].** This [act] does not apply if the child is the subject of a proceeding under
24 [cite to law of this state other than this [act] regarding custody and visitation of ~~children~~ a child in
25 ~~proceedings~~ a proceeding related to guardianship of the person, abuse, neglect, or dependency].

26 ~~**Reporter’s Comment:** A commissioner suggested that cases that are subject to adoption~~
27 ~~proceedings should not be covered by the act. I disagree with that approach since, under~~
28 ~~our act, the adoption of a child by a relative, stepparent, or cohabitant does not~~
29 ~~necessarily cut off the right of non-parents to continue or seek visitation or custody.~~

30
31 **Comment**

32
33 This act does not provide for custody or visitation to non-parents for children who are the
34 subject proceedings for guardianship of the person, abuse, neglect, or dependency. Such laws
35 and related regulations have their own provisions regarding where a child will be placed and who
36 may have contact with the child. The guardianship, abuse, neglect, and dependency laws usually
37 are in a different portion of the statutes than laws pertaining to divorce, parentage, and non-
38 parental rights. The drafters of this act do not wish for this act to conflict with or interfere with
39 the laws of guardianship, abuse, neglect, or dependency. When a child is no longer the subject
40 of such proceedings, relief may be sought under this act. The provision in this section is similar
41 to Or. Stat. § 109.119(9) (West 2015) (excluding application of a non-parental visitation statute

1 from children who are the subject of dependency proceedings). *See also* Minn. Stat. Ann. §
2 257C.08(4) (West 2015) (excluding foster parents from coverage under the state’s non-parental
3 visitation law).

4
5 The Uniform Child Custody Jurisdiction and Enforcement (UCCJEA) applies to “child-
6 custody proceeding[s] . . . in which legal custody, physical custody, or visitation with respect to a
7 child is an issue.” UCCJEA, Section 104(4) (1997). The UCCJEA applies to guardianship
8 proceedings as well as proceedings under this act. *Id.* In the event there are simultaneous
9 proceedings under this act and under guardianship law, the UCCJEA (as well as state venue
10 laws) would determine which court has priority to exercise jurisdiction.

11
12 **Reporter’s Comment:** If the committee decides that the act should not cover disputes
13 between two or more non-parents, that will be noted in the Comment to this section, as
14 well as in the section on standing.

15
16 **Reporter’s Note:** The following section on “Jurisdiction” reflects a rewrite by our style
17 liaison. (The substance of the section is the same.)

18 19 **SECTION 4. JURISDICTION.**

20 ~~—— (a) Only a court that~~ (a) Subject to subsection (b), a court only has jurisdiction to
21 determine custody or visitation under this [act] if the court has jurisdiction under [cite to this
22 state’s Uniform Child Custody Jurisdiction and Enforcement Act] ~~may determine custody or~~
23 ~~visitation under this [act].—~~.

24 (b) The court does not have jurisdiction under this [act] to determine custody or visitation
25 if:

26 (1) Jurisdiction over the proceeding pertains to an American Indian child as
27 defined in the Indian Child Welfare Act, 25 U.S.C. Section 1901 through 1923; and

28 (2) the proceeding is governed by the Indian Child Welfare Act, 25 U.S.C.
29 §§Section 1901 et seq. through 1923.

30 **Comment**

31 The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has
32 been adopted in 49 states. As of ~~August~~December 2016, Massachusetts is the only state that has
33 not adopted the UCCJEA, although Massachusetts did adopt the Uniform Child Custody
34 Jurisdiction Act (UCCJA). The Uniform Law Commission has promulgated a 2013 version of

1 the UCCJEA (to cover international issues as well as domestic issues). As of ~~February~~December
2 2016, the 2013 UCCJEA has not been adopted in any states.

3
4 If at the time a petition is filed under this act, an action is already pending regarding the
5 same child, the petition should be filed as part of the pending action (assuming the pending
6 action is filed in compliance with the UCCJEA).

7
8
9 ~~**Reporter's Note:** At the Annual Meeting (and other meetings), there have been~~
10 ~~proposals to have separate provisions for non-parents seeking custody versus visitation.~~
11 ~~If we choose to follow that approach, I have drafted, below, a standing provision to~~
12 ~~reflect that. Subsection (a) draws on the standing provisions of several state statutes and~~
13 ~~include the main options that states have utilized. Some of the criteria overlap, and we~~
14 ~~may wish to trim the list. Note that some words or phrases are in brackets. We will need~~
15 ~~to decide whether the bracketed materials should be included in the draft. In addition,~~
16 ~~this draft includes, in brackets, status as a de facto parent as a basis for standing to seek~~
17 ~~custody and visitation—in part because the statutes of at least 12 states list status as a de~~
18 ~~facto parent (or in loco parentis) as a basis for standing. An alternate approach is to list~~
19 ~~the elements in the definition of de facto parent as a basis for standing, but not use the~~
20 ~~term. In addition, we may wish to discuss the interrelationship of de facto parents in this~~
21 ~~act with de facto parents in the Uniform Parentage Act (if the Uniform Parentage Act~~
22 ~~uses de facto parenthood as a basis for parentage).~~

23
24 ~~SECTION 5. STANDING TO FILE A PETITION FOR CUSTODY AND~~
25 ~~VISITATION.~~The Uniform Child Custody Jurisdiction and Enforcement Act, § 104(a) (1997),
26 as well as this act, do not apply to Indian children who are covered by the Indian Child Welfare
27 Act, 25 U.S.C. Section 1901 through 1923.

28 29 SECTION 5. STANDING.

30 (a) A non-parent has standing to file a petition for custody ~~if:~~or visitation of a child if:

31 (1) ~~both parents are deceased;~~

32 ~~_____ (2) both parents are unfit or have abandoned the child;~~

33 ~~_____ (3) the child is not living with either parent;~~

34 the non-parent ~~has exercised [primary] care and control of a child and made decisions regarding—~~

35 ~~_____ (4) the health, welfare, and other needs of the child [for a period of six or more~~
36 ~~months] during the year before the filing of the petition;~~

37 ~~_____ (5) [the non-parent has been a de facto parent of the child during the year~~

preceeding the filing of the petition;] or

————— (6) other extraordinary circumstances exist. **[Reporter’s note: The Minnesota and New York statute use the adjective “extraordinary.” Other adjectives used by states include “exceptional” (North Dakota) and “compelling” (South Carolina).]**

————— (b) A non-parent has standing to file a petition for visitation if:

————— (meets the criteria in Section 9(c)(1) ~~the non-parent has exercised~~ [primary] care and control of a child and made decisions regarding the health, welfare, and other needs of the child [for a periods of six or more months] during the year preceeding the filing of the petition; through (4); or

————— (2) [the non-parent has been a de facto parent of the child during the year before the filing of the petition;] or

————— (3) (2) a substantial relationship exists between the child and the non-parent, and denial of custody or visitation to the non-parent would be a [detriment] to the child.

~~(e)~~ (b) A parent whose parental rights to the child have been terminated under law of this state other than this [act] or of another state does not have standing to file a petition for custody or visitation under this [act].

————— (c) A spouse of a parent of the child who is living with the parent, or a cohabitant of a parent, does not have standing to file a petition for custody or visitation under this [act].

(d) The court shall determine standing ~~on the basis of pleadings and affidavits~~ a non-parent in a proceeding under this [act] based a pleading under Section 6. The court may hold a hearing to determine ~~disputed facts necessary for the issue of~~ standing.

Legislative Note: *In certain states, legislative drafters may wish to substitute the term “harm” for “detriment” in subsection (a). Courts in at least seven those states have held that, as a matter of state or federal constitutional law, that harm to the child without granting visitation must be shown before visitation is granted to a non-parent, grandparent. The legislative drafters should*

review the law in the states other than this act. The comment to this section cites cases from seven states that held harm must be shown.
[Those states are: Alabama, Connecticut, Florida, Hawaii, Massachusetts, New Jersey, and Washington. In those states, legislative drafters may wish to substitute the word “harm” for “detriment” in subsection (b). Citations to court opinions in those states are in the Comment to this section.]

Comment

The requirement of standing serves to protect the interests of parents and filter out cases in which the petitioner does not have a meritorious claim, while at the same time allowing the opportunity to preserve relationships between children and non-parents with whom children have a particularly close relationship.

Subsection (c) is designed to preclude a spouse of a parent who is living with the parent or a cohabitant of a parent from litigating or relitigating an issue could be handled by litigation between the parents. If the spouse of a parent or former cohabitant of a parent is no longer living with the parent, the spouse or former cohabitant could file a petition under this act (assuming other requirements of the act are met)

Subsection (d) regarding determining standing on the basis of pleadings and affidavits while giving the court discretion to hold a hearing is similar to Maine Rev. Stat. tit. 19-A, § 1891(2)(C) (2016), which provides: “The court shall determine on the basis of the pleadings and affidavits under paragraphs A and B whether the person seeking to be adjudicated a de facto parent has presented prima facie evidence of the requirements set forth in subsection 3. The court may in its sole discretion, if necessary and on an expedited basis, hold a hearing to determine disputed facts that are necessary and material to the issue of standing.”

The following court opinions have held, as a matter of state or federal constitutional law, that harm to the child without granting visitation must be shown before visitation is granted to a ~~non-parent; grandparent~~. *Weldon v. Ballow*, No. 2140471, ___ So.3d ___, 2015 WL 6618983, at 15 (Ala. Civ. App. Oct. 30, 2015), *cert. denied sub nom. Ex parte Strange*, No. 1150152, 2016 WL 281069 (Ala. Jan. 22, 2016); *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d 453 (2002); *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d 1067 (Haw. 2007); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1060 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005).

Reporter’s Note: Regarding Section 6(a) (below), our style liaison states: “I put ‘oath’ to start discussion. Should it be sworn under oath to the facts, etc.[?]” I assume the Drafting Committee wants pleading to be verified in some fashion – but we do not necessarily want to require use of a notary.

SECTION 6. PLEADINGS.[PETITION].

(a) A ~~petition under this [act]~~ non-parent requesting custody or visitation ~~must be verified~~
~~and specify the facts and bases upon which the request is based.~~ under this [act] of a child shall

1 file a [petition] with a court. A [petitioner] under this subsection shall verify the [petition] under
2 oath.

3 (b) The facts and bases specified [petition] filed under subsection (a) must include:

4 (1) the duration and nature of the relationship between the [petitioner] and the
5 child, including the period of time, if any, the [petitioner] resided with the child and the
6 caretaking provided for child by the petitioner;

7 (2) ~~if applicable,~~ the nature of any agreement between the parties regarding
8 ~~care~~ caretaking for the child and custody, visitation, or other contact with the child;

9 (3) information about financial compensation, if any, provided to the [petitioner]
10 for caretaking of the child;

11 (4) a description of any attempts by the [petitioner] to obtain custody, visitation or
12 other contact with the child;

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

15 (56) reason why a continuing relationship between the [petitioner] and the child is
16 in the best interests of the child; ~~and~~

17 (67) the reason why denial of custody or visitation to the [petitioner] would be a
18 [detriment] to the child.—; and

19 ~~——(b)~~ (8) the relief sought.

20 (c) If an agreement concerning care of the child or contact with the child described in
21 subsection (b)(2) is in writing, the [petitioner] must attach a copy of the agreement ~~shall be~~
22 ~~attached~~ to the pleadings. [petition].

23 **Reporter's Legislative Note:** ~~If This section uses the Drafting Committee~~
24 ~~confirms the decision to drop status as a de facto parent as a basis for relief. The~~

following subsection [(c)] will be deleted.

(c) In addition to the facts and bases for relief in subsection (a), a terms “petition requesting adjudication that the” and “petitioner is a de facto parent must describe:

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

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

_____ (3) the degree to which the relationship between the petitioner,” If a state uses different terminology (e.g., “complaint” and the child was supported by another parent of the child, and the degree to which the petitioner and the other parent has accepted that relationship or behaved as though the individual is a parent of the child; and “plaintiff,” those terms may be substituted.

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

Legislative Note: In certain states, legislative drafters may wish to substitute the term “harm” for “detriment” in subsection (a). Courts in at least seven those states have held that, as a matter of state or federal constitutional law, that harm to the child without granting visitation must be shown before visitation is granted to a non-parent-grandparent. The legislative drafters should review the law in the states other than this act. The comment to Section 5 cites cases from seven states that held harm must be shown.

[Those states are: Alabama, Connecticut, Florida, Hawaii, Massachusetts, New Jersey, and Washington. In those states, legislative drafters may wish to substitute the word “harm” for “detriment” in subsection (b). Citations to court opinions in those states are in the.]

Comment to Section 5.

Comment

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

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

“(a) [Subject to [local law providing for the confidentiality of procedures, addresses, and other identifying information], in] [In] a child-custody proceeding, each

1 party, in its first pleading or in an attached affidavit, shall give information, if reasonably
2 ascertainable, under oath as to the child's present address or whereabouts, the places
3 where the child has lived during the last five years, and the names and present addresses
4 of the persons with whom the child has lived during that period. The pleading or affidavit
5 must state whether the party:

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

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

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

21
22 (b) If the information required by subsection (a) is not furnished, the court, upon
23 motion of a party or its own motion, may stay the proceeding until the information is
24 furnished.

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

31
32 (d) Each party has a continuing duty to inform the court of any proceeding in this
33 or any other State that could affect the current proceeding.

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

41
42 **SECTION 7. NOTICE.** On filing a [petition] under ~~this [act] requesting custody or~~
43 ~~visitation~~ Section 6, the [petitioner] shall give notice to:

44 (1) ~~any~~ parent whose parental rights ~~has to the child have~~ not been previously terminated

under law of this state other than this [act] or of another state;

(2) ~~anya~~ person having ~~physical~~ custody of, or visitation ~~with, of~~ the child; and

(3) the child, if the child has attained 12 years of age.

Comment

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

SECTION 8. APPOINTMENT; COURT SERVICES. To the extent available to determine custody or visitation of a child under law of this state other than this [act], the court may issue an order in a proceeding under this [act]:

(1) appointing an attorney, guardian ad litem, representative, or similar personnel for the child;

(2) requiring mediation between the parties to the proceeding, but a party who has been the victim of domestic violence by another party to the proceeding may not be required to participate in mediation [unless the court can issue an order adequately protecting during mediation the safety of the party who was victim of domestic violence];

(3) ordering an evaluation or home study of the child, parent, or [petitioner]; and

(4) allocating payment between the parties to the proceeding of fees for the services ordered under paragraphs (1) through (3) listed in this section.

Legislative Note: The brackets in paragraph 2 should be removed and the phrase “unless the court can issue an order adequately protecting during mediation the safety of the party who was victim of domestic violence” should be included in the section in states that require mediation of custody and visitation cases, including cases in which there are allegations of domestic violence.

Legislative Note: Paragraph 3 of this section uses the term “petitioner.” If a state uses

different terminology (e.g., “plaintiff,”) that term may be substituted.

Comment

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

In subsection (2), the phrase “unless the court can issue an order adequately protecting during mediation the safety of the party who was victim of domestic violence” is similar to a phrase in the Uniform Collaborative Law Act, Section 15(c)(2) (2010). Among the protections that might be used would be “shuttle mediation,” in which the parties to mediation are not in the same room with each other and the mediator shuttles between rooms.

Reporter’s Note: ~~The following sections present alternatives for the substantive standards for granting a non-parent custody or visitation, including the standards for presumptions and burden of proof. Alternative A continues the prior draft’s approach of applying the same three-part standard for granting custody and visitation. Alternative B has different standards for custody and visitation. (Section 5 regarding standing also provides different standards for custody and visitation.) The sections will be renumbered, depending on which alternative(s) are chosen.~~

SECTION 9. [ORIGINAL PROCEEDING BETWEEN NON-PARENT AND PARENT]

[CUSTODY OR VISITATION WHEN CHILD IN CUSTODY OF

PARENT.]

Alternative A ~~(Same standard for both custody and visitation)~~

~~**SECTION 8A. INITIAL PETITION WHEN CHILD IN CUSTODY OF PARENT.**~~

~~—— (a) [This section applies to initial petitions: (i) an original proceeding under this [act] for custody or visitation between a non-parent and a parent of the child and (ii) other proceedings under this [act] between a non-parent and a parent in which a court did not find that the presumption of correctness of the previous decision by a parent on the custody or visitation request of the non-parent had been overcome.]~~

Alternative B

(a) [This section applies to a petition under Section 6 for custody or visitation by a non-
parent when the child is in the custody of a parent..]

End of Alternatives

_____ (b) ~~A~~ In a proceeding described in subsection (a), a parent's decision about the request for custody or visitation by the non-parent is presumed to be correct and in the best interests of the child. ~~The presumption is rebuttable. To rebut the presumption, a non-parent must establish by clear and convincing evidence that:~~

(c) A non-parent may rebut the presumption under subsection (b) that the parent's decision is correct by meeting the standards set out in this subsection. The court may grant the petition for custody or visitation by the non-parent if the court finds by [clear and convincing evidence] [a preponderance of the evidence] that: _____

(1) the non-parent has resided with the child for [a period sufficient to form a
bonded and dependent relationship with the child] [six or more months];

(2) the non-parent consistently has engaged in caretaking of the child;

(3) a parent or custodian of the child supported the relationship between the non-parent and the child, and the non-parent and parent or custodian accepted the relationship; however, if the parent or custodian has [completely] failed to exercise parental responsibility for the child, the support and acceptance of the parent or custodian described in this paragraph is not required;

(4) the non-parent has accepted parental responsibility without expectation of
financial compensation; and

_____ (5) granting custody or visitation to the [petitioner] under Section 6 is in the best
interests of the child.

1 (d) If a non-parent other than a non-parent whose relationship with the child meets the
2 standards in subsection (c) requests custody or visitation of the child, court may grant custody or
3 visitation if the court finds by [clear and convincing evidence] [a preponderance of the evidence]
4 that:

5 _____ (1) a substantial relationship exists between the child and non-parent;
6 (2) denial of ~~custody or visitation to the non-parent~~petition under Section 6 is a
7 [significant] [detriment] to the child;~~and~~

8 [supplemental or alternative language might include “or other special factors exist”], and

9 _____ (3) ~~custody or visitation to granting the non-parent~~petition under Section 6 is in
10 the best interests of the child.

11 ~~(e) Proof of parental~~ (e) A [petitioner] under Section 6 is not required to prove the ~~unfitness is~~
12 ~~not required of a parent of the child~~ to rebut the presumption described in subsection (b).

13 **Legislative Note:** Paragraph a [of Alternative (b)] and paragraph (e) use the term “petitioner”
14 and paragraph (e) uses the term “petitioner.” If a state uses different terminology (e.g.,
15 “complaint)” or “plaintiff,” those terms may be substituted.

16
17 **Legislative Note:** In certain states, legislative drafters may wish to substitute the term “harm”
18 for “detriment” in subsection (a). Courts in those states have held, as a matter of constitutional
19 law, that harm to a child without granting visitation must be shown before visitation is granted
20 to a grandparent. The legislative drafters should review the law in the states other than this act.
21 The comment to Section 5 cites cases from seven states that held harm must be shown.
22 [Those states are: Alabama, Connecticut, Florida, Hawaii, Massachusetts, New Jersey, and
23 Washington.]

24 25 **Reporter’s Notes (on multiple topics concerning Section 9)**

26 **Meaning of custody.** Regarding the second alternative for subsection (a) and the phrase
27 “in the custody of a parent,” under our current draft, “‘custody’ means physical custody,
28 legal custody, or both.” See Section 2(5).

29
30 **Time periods.** Regarding the time periods of subsection (c)(1), any specific time period
31 is somewhat artificial, and a fixed six-month period won’t deal with a case in which a
32 non-parent (e.g., a grandparent) cared for a child from or near birth until the child is five
33 months old.)

Same standards for custody and visitation: Some prior drafts contained separate subsections for custody and visitation. This draft does not since, at the October 2016 Drafting Committee meeting, the committee seemed to favor applying the same standard (or very similar standard) for both custody and visitation.

“Significant detriment”: The phrase of “[significant] detriment to the child” is based, in part, on Ariz. Rev. Stat. § 25-409(a)(2) (2016), which lists as a basis for placement of a child with a third party establishing that “It would be significantly detrimental to the child to remain or be placed in the care of either legal parent”

~~Reporter’s Note:~~ ~~Cathy Sakimura, an observer from the National Center for Lesbian Rights, has said the Center is “extremely concerned about the suggestion to treat ‘de facto’ parents like all other nonparents.” See Cathy’s memo dated August 8, 2016. One way to handle that issue, as Cathy notes, is to not require a showing of detriment if the person petitioning for custody or visitation is a de facto parent. If we were to follow that approach, a phrase could be added to subsection (b)(2), above, along the lines of “provided, however, if the party petitioning for custody or visitation is a de facto parent, detriment to the child need not be shown.” We also would need to specify that the burden of proof to establish an individual’s status as a de facto parent is clear and convincing evidence. Another work-around is to describe the circumstances in which a detriment to the child would not have to be shown, but not use the term “de facto parent.” (Close to one-half the states do use the term “de facto parent,” or related terms, such as “in loco parentis” or “psychological parent.”~~

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

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

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

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

~~———— (1) the parent is unfit or parental custody would be a [significant] detriment to the child~~

~~[alternate phrasing for (1): “custody to the non-parent is necessary because custody with the parent would significantly impair the child’s physical health or emotional development”];~~

~~—————(2) custody to the non-parent is the best interests of the child.~~

Reporter’s Note: ~~The list of circumstances that would justify granting custody to the non-parent could include being a [primary] caretaker of the child or a de facto parent—although the standard of “detriment to the child” could pick up those circumstances since the definition of “detriment” includes “the effects resulting from interruption of a substantial beneficial relationship with the child or removal of the child from a stable placement of a child with a non-parent or de facto parent.” Although the first criteria of subsection (b)(1), above, is parental unfitness, the criteria of “detriment to the child” does not require a showing of unfitness. The phrase of “[significant] detriment to the child” is based, in part, on Ariz. Rev. Stat. § 25-409(a)(2) (2016), which lists as a basis for placement of a child with a third party establishing that “It would be significantly detrimental to the child to remain or be placed in the care of either legal parent”~~

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

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

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

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

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

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

~~—————(c) Proof of parental unfitness is not required to rebut the presumption described in subsection (b).~~

[End of alternatives]

Reporter’s Note: Clear and convincing evidence. If the committee decides to use clear and convincing evidence, the committee also needs to decide if that burden applies

1 to all elements of proof, or just some elements of proof. It also is possible (although not
2 recommended) to have the burden of proof vary with relief sought – e.g., clear and
3 convincing evidence to obtain custody and preponderance of the evidence to obtain
4 visitation. I have prepared a separate memo that describes how clear and convincing
5 evidence is used in non-parental visitation statutes.

6
7 **Flexibility of standard – including desires to make it easier for grandparents to**
8 **obtain visitation.** During the First Reading in July 2016, some commissioners expressed
9 hope that the standards for grandparent visitation could be more flexible, including
10 allowing for visitation when the grandparents had not been given an opportunity by the
11 parents to have a substantial relationship with the child. We can discuss that issue more,
12 but I believe under *Troxel*, there are limits about how far we can go, particularly given
13 the need to presume the parent’s decision is correct and the Court’s statement that “so
14 long as a parent adequately cares for his or her children (i.e., is fit), there will normally be
15 no reason for the State to inject itself into the private realm of the family to further
16 question the ability of that parent to make the best decisions concerning the rearing of
17 that parent’s children.” 530 U.S. at 68-69. Similarly, in ~~See also~~ *Dorr v. Woodard*, 2016
18 ME 79, 140 A.3d 467 (Maine 2016), ~~in which~~ the Supreme Judicial Court of Maine
19 affirmed ~~dismissal of~~ dismissed a paternal grandmother’s petition for visitation with her
20 two-year-old granddaughter following death of the father. The court stated: “[D]espite
21 the benefits to a child that could accompany a healthy and loving relationship with the
22 child’s grandparents, it will be difficult for a grandparent to demonstrate a compelling
23 state interest sufficient to infringe on a fit parent’s fundamental right when there is no
24 threat of harm to the child. Such an intrusion in the context of a petition for court-ordered
25 grandparent visitation will be court-enforced only when the grandparent demonstrates
26 ‘urgent reasons’ for the intrusion.” 140 A.3d at 472 (citation omitted).
27

28 ~~*Legislative Note: Courts in at least seven states have held that, as a matter of state or*~~
29 ~~*federal constitutional law, that harm to the child without granting visitation must be*~~
30 ~~*shown before visitation is granted to a non-parent. Those states are: Alabama,*~~
31 ~~*Connecticut, Florida, Hawaii, Massachusetts, New Jersey, and Washington. In those*~~
32 ~~*states, legislative drafters may wish to substitute the word “harm” for “detriment” in*~~
33 ~~*subsection _____ [Insert applicable subsection, depending on which option is chosen].*~~
34 ~~*Citations to court opinions in those states are in the*~~ **Number of persons who may have**
35 **rights of custody and visitation.** The comment to this section states: “This act does not
36 set a maximum number of persons who may obtain rights of custody or visitation. In
37 most cases, the number of actively involved parental figures (or persons granted custody
38 or visitation) will not be large. As courts sort through complex family structures, the
39 number of persons acting in a parental role is a factor that should be considered -- but
40 without applying a fixed rule about how many parental figures with rights to time with
41 the child is too many. The focus needs to remain on the best interests of the child.”
42

43 **Comment (will ~~Comment~~ to Section 5-**
44

45 ~~**Comment (Will be revised slights based on what ~~alternatives are~~ alternative to the title is**~~

1 *chosen*)

2 This section governs requests for custody or visitation by a non-parent when the child is
3 in the custody of a parent. Section 2(108) defines “non-parent” as “an individual other than a
4 parent.” The most common non-parents seeking custody and visitation are a child’s
5 grandparents, great-grandparents, step-parents, and siblings, although the definition allows others
6 to seek custody or visitation if the requirements of the act are met.
7

8 The statutes of many states specify the circumstances in which visitation may be sought –
9 circumstances which often involve some disruption of the family – e.g., divorce, separation,
10 death of a parent, or a child born outside of marriage. The categories of persons who may seek
11 visitation and the broad description of circumstances in which visitation may be sought do not,
12 by themselves, provide a reliable indicator of whether non-parental visitation (or custody) should
13 be allowed. It is preferable to focus on the factors used to decide visitation or custody,
14 particularly the closeness of the relationship between the child and the non-parent.
15

16 The presumption and burden of proof in this section recognize the superior right of
17 parents to custody of their children in custody disputes with non-parents, and also
18 ~~provides~~provide that the superior right or presumption can be overcome. The standard is similar
19 to Pa. Stat. Ann. tit. 23, § 5327(b) (2015).
20

21 As stated in Black’s Law Dictionary, “The Burden of proof includes both the burden of
22 persuasion and the burden of production.” Black’s Law Dictionary (7th ed. 1999).
23

24 The presumption and burden of proof is designed to meet the requirements of *Troxel v.*
25 *Granville*, 530 U.S. 57 (2000), in which the Supreme Court struck down Washington State’s
26 third party visitation statute as applied. Justice O’Connor, in a plurality decision, said the
27 Washington statute “contains no requirement that a court accord the parent’s decision any
28 presumption of validity or any weight whatsoever.” *Id.* at 67. “The Superior Court’s order was
29 not founded on any special factors that might justify the State’s interference with Granville’s
30 fundamental right to make decisions concerning the rearing of her two daughters.” *Id.* at 68.
31

32 The Supreme Court in *Troxel* did not rule on the issue of whether the constitution
33 requires a showing of harm or potential harm. In her plurality opinion, Justice O’Connor said:
34

35 Because we rest our decision on the sweeping breadth of [Washington Code] §
36 26.10.160(3) and the application of that broad, unlimited power in this case, we
37 do not consider the primary constitutional question passed on by the Washington
38 Supreme Court—whether the Due Process Clause requires all nonparental
39 visitation statutes to include a showing of harm or potential harm to the child as a
40 condition precedent to granting visitation. We do not, and need not, define today
41 the precise scope of the parental due process right in the visitation context. In this
42 respect, we agree with Justice KENNEDY that the constitutionality of any
43 standard for awarding visitation turns on the specific manner in which that
44 standard is applied and that the constitutional protections in this area are best
45 “elaborated with care.” *Post*, at 2079 (dissenting opinion). Because much state-

1 court adjudication in this context occurs on a case-by-case basis, we would be
2 hesitant to hold that specific nonparental visitation statutes violate the Due
3 Process Clause as a *per se* matter.
4

5 530 U.S. at 73.
6

7 Subsection (c) allows a non-parent to obtain custody or visitation if the non-parent has
8 acted in a parental role for the child and the court finds that the non-parent has met five elements
9 of proof. The elements include a bonded and dependent relationship with the child and
10 consistent caretaking of the child, but do not require a showing of detriment to the child if
11 custody or visitation is not granted.
12

13 The description of such a non-parent is based on the definition of “de facto parent” in
14 Maine Rev. Stat. tit. 19-A, § 1891 (2015), and is also similar to the definition of “de facto
15 parent” in Delaware -- 13 Del. Code § 8-201(c) (2015). The Non-Parental Child Custody and
16 Visitation Act, however, does not use the term “de facto parent.”
17

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

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

30 *Id.* at 176 (citations omitted). Accord, *H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wis. 1995).
31

32 The American Law Institute Principles of the Law of Family Dissolution § 2.03(1)(c)
33 (2002) defines a de facto parent as “an individual other than a legal parent or a parent by estoppel
34 who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for
35 reasons primarily other than financial compensation, and with the agreement of a legal parent to
36 form a parent-child relationship, or as a result of a complete failure or inability of any legal
37 parent to perform caretaking functions, (A) regularly performed a majority of the caretaking
38 functions for the child, or (B) regularly performed a share of caretaking functions at least as great
39 as that of the parent with whom the child primarily lived.”
40

41 Some of the phrasing in subsection (c) also is drawn from the American Law Institute’s
42 Principles of the Law of Family Dissolution, § 2.03(1)(b) (2002). That section provides, as one
43 of the alternative definitions of “parent by estoppel:” “an individual who, though not a legal
44 parent, . . . (iii) lived with the child since the child’s birth, holding out and accepting full and
45 permanent responsibilities as parent, as part of a prior co-parenting agreement with the child’s
46 legal parent (or, if there are two legal parents, both parents) to raise a child together each with

1 full parental rights and responsibilities, when the court finds that recognition of the individual as
2 a parent is in the child's best interests."

3
4 Some states set specific time periods that the child needs to have lived with a person
5 before that person may obtain custody as a de facto custodian – e.g., six months or more if the
6 child is under three years old, and one year or more if the child is three years of age or older.
7 See, e.g., Ky. Rev. Stat. 403.270 (2012); S.C. Code § 63-15-60 (2012). In addition, at least
8 eleven states allow a non-parent to seek visitation if the child has lived with a person for a certain
9 period of time, such as six or 12 months.

10
11 Subsection (d) allows non-parents other than those described in subsection (c) to obtain
12 custody or visitation if they can show: (1) a substantial relationship with the child; (2) detriment
13 to the child if relief is not granted; and (3) the relief requested is in the best interests of the child.
14 Subsection (d) could be used by grandparents, siblings or others who have a very close
15 relationship with the child, but may not have acted in a parental role.

16
17 The showing of best interests required in this section is relevant not only to whether
18 custody or visitation should be granted to a non-parent, but also to the amount of time the child
19 should be with the non-parent.

20
21 In the years since *Troxel* was decided, state courts have generally held that a
22 grandparent's claim that the grandparent has a positive relationship with the grandchild is not
23 sufficient to justify an order of visitation over the objection of a parent. *See, e.g., Dorr v.*
24 *Woodard*, 2016 ME 79, 140 A.3d 467 (Maine 2016); *Neal v. Lee*, 2000 Ok 90, 14 P.3d 547
25 (2000); *State Dept. of Social and Rehabilitative Services v. Paillet*, 16 P.3d 962 (2001); *Flynn v.*
26 *Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if the grandparent has a
27 substantial relationship with the grandchild – such as raising the child for a few years – that can
28 be the basis for granting visitation to the grandparent over the parents' objection. *See, e.g.,*
29 *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents had helped raise their
30 grandchildren for the first seven years of the oldest grandchild's life and for lesser periods for the
31 younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007) (grandparents cared
32 for children while the mother was dying of cancer).

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

40
41 ~~SECTION 9. INITIAL PETITION [FOR CUSTODY OR VISITATION] WHEN~~
42 ~~CHILD NOT IN CUSTODY OF PARENT.~~

43 ~~(a) This section applies to an initial petition for custody or visitation filed by a non-parent~~

1 ~~when the child is not in the custody of a parent.~~

2 ~~(b) To obtain custody or visitation, the non-parent must establish by clear and convincing~~
3 ~~evidence that:~~

4 ~~(1) a substantial relationship exists between the child and the non-parent, and~~

5 ~~(2) custody or visitation for the non-parent is in the best interests of the child.~~

6 ~~(c) In an initial proceeding for custody of or visitation under this section with a child~~
7 ~~between two or more non-parents, a presumption does not exist that custody or visitation should~~
8 ~~be given to a particular non-parent.~~

9 **Comment**

10 ~~This section governs custody and visitation disputes when the child is not in the custody~~
11 ~~of a parent [or de facto parent]. The non-parent needs to demonstrate by clear and convincing~~
12 ~~that a substantial relationship exists between the child and the non-parent and that custody or~~
13 ~~visitation for the non-parent is in the best interests of the child. Unlike the standard in Section 8~~
14 ~~regarding children in the custody of a parent, a non-parent filing a petition under this section~~
15 ~~does not need to prove that denial of custody or visitation to the non-parent would result in a~~
16 ~~detriment to the child. In cases in which the dispute does not involve a parent, the Supreme~~
17 ~~Court's holding in Troxel regarding giving deference to a parent's decision does not apply. If the~~
18 ~~petitioner does not prove his or her case by clear and convincing evidence, other laws—such as~~
19 ~~guardianship laws—are available to decide custody and visitation issues.~~

20 ~~Subsection (c) is similar to 23 Pa. Stat. and Cons. Stat. Ann. § 5327(e) (West 2016),~~
21 ~~which provides: “In any action regarding the custody of the child between a nonparent and~~
22 ~~another nonparent, there shall be no presumption that custody should be awarded to a particular~~
23 ~~party.”~~**SECTION 10. PRESUMPTION REGARDING DOMESTIC VIOLENCE, CHILD**

24 **ABUSE, SEXUAL ASSAULT, OR STALKING.**

25 ~~(a) In~~Under ~~this section, “committed an [act],” refers to a final adjudication by a court~~
26 ~~hearing a proceeding under this act or a final adjudication by court in another civil or criminal~~
27 ~~proceeding that the designated offense occurred.~~

28 ~~(b) It~~, it ~~is presumed that it is not in the best interests of a child to grant custody or~~

1 visitation of a child to a non-parent if the non-parent, or ~~a person~~ an individual residing with the
2 non-parent, has committed any of the following ~~aets~~ conduct against the other parent of the child,
3 the child, ~~the child's siblings~~, ~~a child's~~ of the child, custodial guardian ~~for~~, a member of the
4 previous family of the non-~~parent's~~ parent, or ~~a person~~ an individual residing with the ~~non~~ non-
5 parent of the child]:

6 (1) domestic violence;

7 (2) child abuse;

8 (3) child neglect

9 (4) sexual assault; or

10 (45) stalking.

11 ~~The presumption is rebuttable.~~

12 (b) The presumption established in subsection (a) is rebuttable by showing that the
13 petitioner and persons residing with the petitioner do not pose a danger to the child and that it is
14 in the best interests of the child to grant custody or visitation.

15 (c) To establish the presumption described in subsection (a), the court may not consider
16 the non-parent, or person residing with the non-parent, to have committed the conduct if:

17 (1) a criminal charge regarding the conduct is still pending before a [trial] court of
18 this state or another jurisdiction; or

19 (2) the allegation regarding the conduct is still pending before a [trial] court in a
20 civil proceeding under this [act], another law of this state, or law of another jurisdiction.

21 **Reporter's Note:**

22
23 **Final adjudication / charge still pending.** Subparagraph (c) deals with the issue
24 of "final adjudication" that we discussed at the October Drafting Committee meeting.
25 [The new phrasing regarding a charge still pending is at the suggestion of our style
26 liaison.] Our main goal at the October 2016 Drafting Committee meeting was to not have

1 an adverse presumption regarding domestic violence arise from a temporary order,
2 including orders that may have been issued on an ex parte basis. Our style liaison asks,
3 “Does ‘pending’ or ‘final adjudication’ include any decision on appeal that could take
4 many years to resolve?”

5
6 **Drug offenses.** At the First Reading, when we were discussing the presumptions
7 pertaining to domestic violence, a question was raised of whether a conviction of a drug
8 offense by ~~a person~~ an individual seeking custody or visitation [or ~~a person~~ by an
9 individual residing with the petitioner] should give rise to a presumption against the
10 person seeking custody or visitation. My inclination is to not use such a presumption.
11 The negative impact of a drug offense on a child by a potential custodian or visitor, etc.,
12 would vary significantly with the severity of the offense and how recently the offense
13 occurred. In addition, under Section 11(7) of this act, a court is directed to consider: ~~“(7)~~
14 ~~“the mental and physical health of the child and parties to the proceeding, including~~
15 ~~alcohol abuse and drug abuse by the child or parties to the proceeding; provided, however~~
16 ~~that the mental and physical health of the parties shall not be considered unless those~~
17 ~~factors relate to harm caused to the child.”~~ Most states do not apply presumptions in
18 custody proceeding regarding abuse of drugs or alcohol, although Arizona does apply a
19 rebuttable presumption against sole or joint decision-making for a parent who has abused
20 drugs or alcohol or been convicted of enumerated offenses within 12 months of when the
21 petition is filed. Ariz. Rev. Stat. § 25-403.04 (2016).

22 **Stalking.** ~~Comment~~

23
24 ~~This section provides protection to victims or potential victims of domestic violence by~~
25 ~~providing a rebuttable presumption that custody or visitation should not be granted to a non-~~
26 ~~parent if the non-parent, or a person residing with the non-parent, has committed an act of~~
27 ~~domestic violence or related offenses. Domestic violence is defined by reference to state law.~~
28 ~~This section requires that there be a “final adjudication” that the offense occurred. Thus, a~~
29 ~~temporary order -- particularly one entered on an ex parte basis -- would not be considered a~~
30 ~~final adjudication for the purpose of applying a presumption against granting custody or~~
31 ~~visitation to a non-parent.~~

32
33 **Reporter’s Note:** A commissioner at the First Reading commented that “stalking” is
34 considered to be a type of “domestic violence” – at least under many state laws. Thus,
35 from that commissioner’s view, “stalking” does not need to be specified separately.

36 **Comment**

37
38 This section provides protection to victims or potential victims of domestic violence by
39 providing a rebuttable presumption that custody or visitation should not be granted to a non-
40 parent if the non-parent, or an individual residing with the non-parent, has committed an act of
41 domestic violence or related offenses. Domestic violence is defined by reference to state law.
42 This section provides that the presumption does not apply the action involving a charge of
43 domestic violence is still pending in a trial court. Thus, a temporary order -- particularly one
44 entered on an ex parte basis -- would not be considered a final adjudication for the purpose of

applying a presumption against granting custody or visitation to a non-parent.

SECTION 11. ~~FACTORS CONSIDERED REGARDING BEST INTERESTS AND~~

~~CUSTODY OR VISITATION OF CHILD.~~ If a non-parent of a child establishes that a substantial relationship exists between the child and the non-parent and ~~that~~ denial of custody of or visitation with the child to the non-parent is a detriment to the child, the court shall consider the following ~~factors in determining to determine~~ the best interests of the child and whether to grant the petition for custody or visitation to a non-parent:

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

(2) the nature, extent, and quality of the relationship between the child and non-parent, including specific ~~parent-like~~caretaking activities undertaken by the non-parent and whether the non-parent has a kinship [family?] relationship with the child;

(3) the frequency and continuity of custody, visitation, or other contact between the child and the non-parent, including any the period of ~~any~~ disruption in the contact and the ~~reasons~~reason for the disruption;

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

(5) the willingness and ability of the parent and non-parent to facilitate a positive relationship among the child, parties to the proceeding, and family members of the child, except that the court may not consider the willingness and ability if the parent or custodian of the child shows that:

(A) the non-parent has engaged in domestic violence, child abuse, sexual assault, or stalking against the parent, child, ~~child's siblings, or~~ of the child, custodial guardian [, a

member of the previous family of the non-parent, or an individual residing with the non-parent of the child; and

(B) a continuing relationship with the non-parent will affect negatively the health or safety of the parent, child, child's siblings, or custodial guardian;

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

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

(8) a history of or threat of domestic violence, child abuse, child neglect, ~~domestic violence~~, sexual assault, or stalking towards a parent, the child, ~~child's~~ siblings, ~~or~~ of the child, custodial guardian [, a member of the previous family of the non-parent, or an individual residing with the non-parent of the child] by:

(A) a party; or

(B) an individual with whom a party has kinship [family?] or a significant relationship;

(9) the ~~reasons~~ reason for the ~~parties' positions~~ position of the parties in the proceeding under this [act] regarding custody or visitation; of the child;

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

(11) the applicable factors in [insert citation to laws of this state other than this [act] pertaining to factors considered in custody ~~or~~, parenting time, or visitation disputes between parents]; and

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

Comment

~~The non-parental visitation statutes of most states, as they existed in 2017, list factors a court should consider (other than best interests of the child). This section reflects the main factors that have been used by the states. Under this act, —[Comments will be inserted noting that: (1) the factors are to be the factors are considered after it is established that a substantial relationship exists between the child and the non-parent and that denial of custody or visitation to the non-parent is a detriment to the child; and (2) 35 states list factors in their non-parental visitation statutes. There also will be comments on the application of a few specific factors, including a statement that home schooling does not mean that a child has an adverse adjustment to school.].~~

~~**Reporter’s Note:** It has been suggested that the standard for modification should be a showing of substantial change of circumstances coupled with best interests of the child—rather than our current standard of reference to state laws on disputes between parents. I will present both options, and the Drafting Committee will choose one, or a variation on them. Portions of Alternative B, including the exceptions to the requirement of substantial change of circumstances, are based, in part, on 750 Ill. Comp. Stat. 5/610.5 (2016). Regarding the sixth factor (“the adjustment of the child to the current and proposed home, school, and community of the child”), the fact that a child is or will be home-schooled, does not, by itself, create a positive or negative presumption regarding the child’s adjustment.~~

~~Stat. 5/610.5 (2016).~~

SECTION 12. PETITION TO MODIFY CUSTODY OR VISITATION.

~~Alternative A (current language with slight modification)~~

~~—If a petition is filed to modify an order for custody or visitation entered under this [act], the court shall be decided decide whether to modify under [cite to the law of this state other than this [act] for modification of a custody, visitation, or parenting time order applicable to a dispute between parents].~~

Comment

~~Alternative B (substantial change + best interests)~~

~~———— (a) A final custody or visitation order entered under this [act] may be modified on a showing by a preponderance of the evidence that:~~

~~———— (1) a change has occurred in the circumstances of the child or a person with rights of custody or visitation with the child; and~~

~~———— (2) the modification will serve the best interests of the child.~~

~~———— (b) A final order for custody or visitation entered under this [act] may be modified without a showing of changed circumstances if~~

~~———— (1) the modification is in the best interests of the child, and~~

~~———— (2) any of the following are proven:~~

~~———— (A) the parties agreed to the modification;~~

~~———— (B) the modification reflects the actual arrangement under which the child has been receiving care, without objection of the parties, for the six months before the filing of the petition for modification;~~

~~———— (C) the modification is a minor modification of the final order; or~~

~~———— (D) the modification is necessary because the court would not have entered or approved the final order had the court been aware of the circumstances at the time the order was entered. ———~~

~~Comment (May be modified, depending on which option is utilized)~~

This section makes reference to a state’s existing law regarding modification of custody or visitation orders applicable to disputes between parents. In most states, that standard is a showing of substantial change of circumstances coupled with a showing that modification is in the best interests of the child (although a few states have different standards, such as requiring a showing of endangerment if modification is sought within two years of a prior order). See Jeff Atkinson, *Modern Child Custody Practice - Second Edition*, §§ 10.1 – 10.13 (LexisNexis 2015). Under this approach, a custody or visitation order in favor of a non-parent generally would stay the same unless the substantial change of circumstances and best interests of the child for

modification of the order were shown.

[SECTION 13. TEMPORARY ~~AND FINAL ORDERS~~ORDER.]

(a) On motion of a party or ~~the court's own~~ motion, of the court, [and after opportunity for hearing;], the court may issue a temporary order ~~or a final order.~~ Sections 1 through 11 and 14 through ~~24-23~~ apply to temporary orders ~~as well as final orders issued under this [section].~~

(b) A temporary order ~~entered~~issued under this section has no presumptive effect and is not determinative when the court considers ~~petitions~~a petition for ~~other orders~~another order under this [act].]

Legislative Note: *If temporary orders are governed in a state exclusively by court rule, the state should delete this section.*

Reporter's Note: ~~Section 12—which is not included in the statutory cross-reference in~~At the October 2016 Drafting Committee meeting, the committee seemed inclined to remove the phrase “and after opportunity for hearing” from subsection (a) – deals with “Petition to Modify Custody or Visitation.”]leaving the issue of the need for hearing to local practice.

A question for the committee: Do we need an explicit provision authorizing a court to issue final orders? (I do not think so. I believe the provisions of Section 9 regarding the court's power to grant petitions for custody or visitation carry the strong implication that final orders can be issued.)

Comment

This section makes explicit that the court has the power to enter temporary, as well as final orders. Other provisions of the act -- including the requirements for pleadings, burden of proof, presumptions, and factors considered -- apply to the issuance of temporary orders in addition to final orders.

Subsection (b) is similar to Va. Code Ann. § 20-103(E) (West 2015), which provides: “An order entered pursuant to this section shall have no presumptive effect and shall not be determinative when adjudicating the underlying cause.”

~~**STEPPARENT[, OR COHABITANT].** The adoption of a child by a relative, stepparent[, or cohabitant of the parent] does not preclude granting or continuing custody or visitation to an individual who is a non-parent.~~**ADOPTION OF CHILD BY CERTAIN INDIVIDUALS.**

(b) Even if a child is adopted by a relative, stepparent, or cohabitant of a parent to the child, the court may grant a petition under Section 6 to a non-parent of the child.

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

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

36

1 ~~—— (3) order evaluations or home studies of the child, parent, [de facto parent,] or non-parent~~
2 ~~who petitions for custody or visitation; and~~
3 ~~—— (4) allocate payment among the parties to the proceeding of fees for the services listed in~~
4 ~~this section.~~

5 **Comment**

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

10
11 ~~—— In subsection (2), the phrase “the safety of the party can be protected adequately” is based~~
12 ~~on the Uniform Collaborative Law Act, Section 15(c)(2) (2010). Among the protections that might~~
13 ~~be used would be “shuttle mediation,” in which the parties to mediation are not in the same room~~
14 ~~with each other and the mediator shuttles between rooms.~~

15
16 ~~——~~ **SECTION 16. COST OF FACILITATING VISITATION.** ~~A~~In a proceeding under
17 this [act], a court may order a non-parent granted visitation ~~may be ordered~~ to pay the cost of
18 facilitating visitation with the child, including the cost of transportation.

19 **Comment**

20 Individuals who receive visitation under this act may, in the court’s discretion, be
21 required to pay the cost of facilitating visitation. The cost of facilitating visitation may include
22 the cost of transportation. ~~Those individuals, however, may not be required~~An obligation, if any,
23 for a non-parent to pay child support: is governed by law other than this act.

24 **SECTION 17.16. AUTHORITY OF NON-PARENT TO SEEK SUPPORT FOR**
25 **CHILD.** ~~A~~The authority of a non-parent given custody of a child ~~may under this [act] to~~ petition
26 for and receive ~~money for the~~ support of the child: is governed by law other than this [act].

27 **Comment**

28
29 ~~This section would permit a~~A non-parent ~~who receives granted~~ custody of a child may
30 wish to obtain child support from a parent or ~~to~~ apply for benefits from government or private
31 programs to help a child. ~~This section is similar to~~The non-parents right to seek support or apply
32 for benefits is governed by law other than this act. Section 208(b) of the Revised Uniform
33 Guardianship and Protective Proceedings Act (2017), ~~which~~ contains a similar provisions. That
34 section provides: “A guardian may: (1) apply for and receive money for the support of the

protected minor otherwise payable to the protected minor's parent, guardian, or custodian under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship."

SECTION 1817. ATTORNEY FEES AND COSTS. ~~The~~In a proceeding under this [act], the court may allocate and order payment of attorney fees, including interim fees, and costs among the parties to a proceeding, except that a parent may not be ordered to pay the fees and costs of another party unless the parent's asserted a position ~~is in the proceeding~~ without merit.

Comment

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

Reporter's Note: A commissioner commented that the standard regarding attorney fees is unusual and that, from his view, a more discretionary standard for awarding attorney fees may be preferable.

[SECTION 1918. FINDINGS OF FACT AND CONCLUSIONS OF LAW. When making a decision under this [act], the court shall make findings of fact and conclusions of law on the record in support of its decision.]

Legislative Note: *This section should be omitted in a state where requirement (or lack of requirement) of making findings of fact is governed by court rule rather than by statute and in a state that requires findings of fact and conclusions of law ~~in cases involving family law cases.~~*

Comment

Requiring findings of fact has several benefits. The fact-finding process structures the court's review so that the court is less likely to overlook important facts or apply bias in reaching its decision. Careful fact-finding by the trial court also facilitates appellate review and may assist the parties in accepting the decision. At least twenty states and the District of Columbia require the trial court to make findings of fact in custody cases. See Jeff Atkinson, *Modern Child Custody Practice - Second Edition*, § 12-45 (LexisNexis 2015).

SECTION 2019. OTHER ~~RIGHTS~~RIGHT AND ~~REMEDIES~~REMEDY. ~~A The~~ ~~rights~~right and ~~remedies of~~remedy under this [act] ~~are~~is not exclusive and ~~does~~ not preclude ~~rights~~an additional right and ~~remedies~~remedy under ~~laws~~law of this state other than this [act].

1 including the Uniform Deployed Parents Custody and Visitation Act [or other state law dealing
2 with custody of and visitation with children of deployed parents~~+~~]].

3 **Reporter's Note:** Our liaison, Deborah Behr, suggests that the reference to “the
4 Uniform Deployed Parents Custody and Visitation Act [or other state law dealing with
5 custody of and visitation with children of deployed parents]” be moved to the Comment.
6 I think the reference is important enough – and the issue will arise often enough – that the
7 reference should stay in the text.

8
9 David Biklen urges more clarity regarding what other rights and remedies we are
10 referring to. I agree that we need more clarity in text or in Comment. For example, if
11 this act does not deal with the rights of de facto parents, we could consider placing in this
12 section a provision that the act does not preclude rights and remedies pertaining to de
13 facto parents.

14
15 Two points of comparison for the language of this section: Section 5 of the Uniform
16 Premarital and Marital Agreement Act (2012) provides: “Principles of Law and Equity:”
17 “Unless displaced by a provision of this [act], principles of law and equity supplement
18 this [act].” D.C. Code § 16-831.13 (2017) is entitled “Other actions for custody not
19 abolished, diminished, or preempted.” It provides: “Nothing in this chapter shall be
20 construed to limit the ability of any person to seek custody of a child under any other
21 statutory, common law, or equitable cause of action or to preempt any authority of the
22 court to hear and adjudicate custody claims under the court's common law or equitable
23 jurisdiction.”

24
25 To facilitate discussion of the issue of “Other Right and Remedy” and of “Repeals,” I
26 will summarize what I believe we are trying to do.

27
28 Upon enactment of this act, states **would repeal:**

- 29
30 ■ existing (general) state statutes regarding visitation for grandparents,
31 stepparents, siblings, and other non-parents;
32 ■ statutes, if any, regarding custody disputes between a non-parent and a
33 parent

34
35 States **would not repeal**

- 36
37 ■ the Uniform Deployed Parents Custody and Visitation Act or other state
38 law dealing with custody of and visitation with children of deployed
39 parents
40
41 ■ state laws regarding guardianship of a minor
42
43 ■ laws governing custody of children in disputes between two or more non-
44 parents (as opposed to between a parent and a non-parent) (Thus, a dispute

1 over custody of a child following the death or incapacity of both parents
2 will be governed by other law – unless we choose to change the scope of
3 the act)

4
5 ■ state laws regarding a child in custody of the state, including children in
6 foster care

7
8 ■ existing special protections for de facto parents. (Such protections may be
9 in parentage statutes, family law statutes, and case law. The current draft
10 of the act does not use the term “de facto parent,” although Section 9(c)
11 gives added rights to individuals who have acted in a role similar to that of
12 a parent.)

13 14 **Comment**

15 The law regarding families is more dynamic than many areas of law. The drafters of this
16 act do not wish to preclude the development of additional rights and remedies in this area,
17 including rights and remedies dealing with children of deployed parents. [Citations will be
18 inserted to Family Law cases in which courts denied equitable or common law relief because a
19 statute granted rights to certain categories of individuals, but not other categories of individuals.]
20

21 **SECTION 21. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
22 applying and construing this uniform act, consideration must be given to the need to promote
23 uniformity of the law with respect to its subject matter among states that enact it.

24 **SECTION 21. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
25 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
26 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
27 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
28 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
29 Section 7003(b).

30 **SECTION 22. TRANSITIONAL PROVISION.** This [act] applies to ~~all~~an action
31 pending ~~actions~~ and ~~proceedings~~a proceeding commenced before ~~its~~ effective date of this [act]
32 with respect to ~~issues~~an issue on custody or visitation of a non-parent of a child on which a
33 judgment has not been ~~entered~~issued.

1 ~~SECTION 23.~~**SECTION 23. SEVERABILITY.** If any provision of this [act] or
2 its application to any person or circumstance is held invalid, the invalidity does not affect other
3 provisions or applications of this [act] which can be given effect without the invalid provision or
4 application, and to this end the provisions of this [act] are severable.]

5 **SECTION 24. REPEALS; CONFORMING AMENDMENTS.**

6 (a)

7 (b)

8 (c)

9 **Reporter's Note:** After we discuss Section 19 regarding “Other Right and
10 Remedy” and the related issue of “Repeals,” I plan to draft a Legislative Note to
11 this section giving guidance on what should and should not be repealed.
12

13 **SECTION ~~24~~25. EFFECTIVE DATE.** This [act] takes effect

APPENDIX – REGARDING DISPUTES BETWEEN TWO OR MORE NON-PARENTS

Reporter’s Note: At the October 2016 Drafting Committee meeting, the committee tentatively decided to not have the act cover disputes between non-parents – e.g., cases involving two or non-parents seeking custody or visitation following the death or incapacity of the parents. The committee also agreed to revisit the issue at a later meeting. Some on the committee believed the issue could be better handled by guardianship laws. Below is the section in the October 2016 Draft that dealt with this issue. (This draft of the section has been slightly modified to incorporate suggestions from our style liaison.) If the committee decides to have the act cover disputes between non-parents, an issue that may need to be dealt with is: Should there be a statutory presumption in favor of a parent’s preferences regarding custody or visitation. For example, if a parent is not able to care for a child because of health reasons or the parent’s incarceration, should the court presume the parent’s preferences should be followed – and what should be the burden of proof to overcome the presumption?

SECTION . INITIAL PETITION [FOR CUSTODY OR VISITATION] WHEN CHILD NOT IN CUSTODY OF PARENT.

(a) This section applies to an initial petition for custody or visitation filed by a non-parent of a child in which the child is not in the [physical] custody of a parent of the child.

(b) To obtain custody or visitation under this [act], the non-parent must file a petition under Section 6 and establish by clear and convincing evidence that:

(1) a substantial relationship exists between the child and the non-parent of the child, and

(2) custody or visitation for the non-parent is in the best interests of the child, using the standards set out in Section 11, as applicable.

(c) In an initial proceeding for custody or visitation under this section between two or more non-parents of a child, a presumption does not exist that custody or visitation should be given to a particular non-parent of the child.

Comment

This section governs custody and visitation disputes when the child is not in the custody of a parent. The non-parent needs to demonstrate by clear and convincing that a substantial relationship exists between the child and the non-parent and that custody or visitation for the

1 non-parent is in the best interests of the child. Unlike the standard in Section 9 regarding
2 children in the custody of a parent, a non-parent filing a petition under this section does not need
3 to prove that denial of custody or visitation to the non-parent would result in a detriment to the
4 child. In cases in which the dispute does not involve a parent, the Supreme Court’s holding in
5 Troxel regarding giving deference to a parent’s decision does not apply. If the petitioner does
6 not prove his or her case by clear and convincing evidence, other laws – such as guardianship
7 laws – are available to decide custody and visitation issues.

8
9 Subsection (c) is similar to 23 Pa. Stat. and Cons. Stat. Ann. § 5327(c) (West 2016),
10 which provides: “In any action regarding the custody of the child between a nonparent and
11 another nonparent, there shall be no presumption that custody should be awarded to a particular
12 party.”