

To: Non-Parental Child Custody and Visitation Act Drafting Committee
From: Catherine J. Ross
Date: March 30, 2016
Re: Comments on draft to be discussed April 1-2

I am sorry I will not be able to join you in Chicago, but want to offer a few thoughts for your consideration at that meeting. My suggestions are offered in the hope of further improving what is already an excellent product, and to weigh in on some remaining decisions.

Before getting down to details, I want to join in the commendation I am sure Jeff will be receiving from the group for his terrific work as the Reporter, for his openness to suggestions throughout, and for the comprehensive and very helpful background memos circulated in the last week.

My references below are to pages in the redlined draft.

p. 3 I agree that non-parental is a better term than third party, and that it should be hyphenated if that is acceptable to the Commissioners. I also like "Non-Parental Rights." While I see the problem with "non-parental" (i.e., some will be de facto parents) I am not sure there is another term that works. "Equitable" is often used interchangeably with de facto by family court judges, and has particular meanings in various codes, including the ALL.

p. 5 -- (7) I would restore the original language defining legal custody.

p. 6 top of page Reporter's note. I agree with Jeff's comment about the need for breadth and flexibility, especially given all of the conditions that follow to be considered a potential custodian or visitor. I am concerned about adding "domestic partner" without more, as some might read that as an intentional omission of co-residents, an increasingly dominant group even among joint biological parents. What about co-residents or household members – to be limited by all that follows.

p. 6 (8) Note: I agree that "mental needs" is unnecessary and is covered by "emotional, developmental."

p. 7.

"physical custody" Caution is needed because day to day care may be offered by an employee in which case the parental role might be selecting and supervising that person. "Acting in a parental role" would need to specify without compensation. Of course this only affects a narrow group of families.

Most important: I would remove references to "court orders" here, and in the alternatives at the bottom of the page. Many (perhaps most) of these

arrangements are informal. If you want to reference a court order, I would say, for example, at the bottom of this page, alt. B (caps indicate suggested additions):

“the right to spend time with a child, ON A REGULAR BASIS, which may include overnights, WHETHER OR NOT PURSUANT TO A COURT ORDER.”
(incidentally, no comma after “which”).

pp. 10-11 I agree that Delaware provides a good model.

p. 14. I would urge using alternative B as it tracks keeps the focus on the relationship and the child’s needs. One small suggestion:

(1) the HISTORY AND NATURE OF the relationship between the petitioner and the child;

p. 25 Section 7, this is another place where it might be good to clarify “with or without a court order.”

p. 26 This one is substantively important.

Note: “complete failure of the parents to exercise parental responsibility.” It is important to tackle this head on, as the situation is remarkably common and shows up all the time with grandparent, other relative and even friends and neighbor caretakers, all too often (perhaps even most of the time) without a court order. These relationships are often essential to the child’s stability.

Perhaps one fix would be to revise the language on page 25 Sec. 7 (a) as follows:

If the child is not [~~delete~~ in the custody of] RESIDING WITH OR IN THE DAY-TO-DAY CARE of a parent (INCLUDING A [or] de facto parent), a non-parent....

This gets a little tricky, because some the non-parents in this position will qualify as de facto parents if they have been taking responsibility for a sufficiently substantial period of time. Perhaps in the parenthesis above add: a “de facto parent **OTHER THAN THE NON-PARENT PETITIONER.**”

There may be other ways to fix this that I have not come up with.

p. 27 last para: perhaps “household members” rather than “family members” though if you want to reach further perhaps “family members who reside in the household or who are a frequent presence in the household.”

p. 28

(4) “having regard” is a bit awkward. How about “WEIGHED IN LIGHT OF the child’s...

(5) no comma after facilitate

p. 29 I support adding the list of factors in the Note at the bottom of the page, and support Jeff’s recommendation on the next page that the group adopt alternative A, for the reasons he provides. The use of factors will also help focus judges, rein in personal biases, and facilitate review on appeal.

For the same reasons, I urge you to require findings of fact and conclusions of law (Section 16, page 36)

p. 37 Section 19.

Jeff is absolutely right about the dynamic changes in family law – I encourage the group to hold its ground here.

Once again, well done all – especially Jeff!

cjr