

To: UNCCVA Drafting Committee  
From: Cathy Sakimura and Courtney Joslin, Observers  
Re: October 2017 Drafting Meeting

As usual, we want to start by thanking Jeff and Debra and the whole drafting committee for their hard work. This is a difficult project. We greatly admire and appreciate everyone's commitment to this project and their perseverance.

Unfortunately, Courtney will be unable to attend next week's in person meeting. That being the case, we wanted to pass along a few thoughts in anticipation of the meeting.

#### **(1) Section 103**

We have a concern with the final clause of the current version of Section 103, which provides that the act "governs a proceeding in which a nonparent seeks custody of or visitation with a child over the objection of a parent." Section 103(a) (emphasis added).

Here is the concern: In some cases involving a parent and a nonparent, the parties are in agreement that the nonparent should have contact with the child. (They might have gotten to this agreement themselves, or through the assistance of counsel or mediation.) Even though the parties have come to a meeting of the minds (and, therefore, there is no (longer a) dispute between the parent and the nonparent), the parties may want to obtain a court order of custody or visitation. Getting a court order provides the parties with certainty and security and ensures that the rights of nonparent will be protected in the future.

Under the current draft of the Act, a court could conclude that it was without authority to grant an order in such cases because the order was not being requested "over the objection of a parent."

We suspect this language was not added with the intention of preventing the court from issuing orders in such cases. If that is correct, we request that the committee consider striking the phrase, or replacing the existing text of Section 103(a) with something along the lines of the following: "This act governs a proceeding for child custody or visitation involving [or "between"] a legal parent and a nonparent."

#### **(2) "Immediately Prior to the Commencement of the Proceeding"**

There is a suggestion to add language from the UCCJEA to Section 106 and 112. Specifically, there is a suggestion to amend Section 106 to provide that to have standing and to prevail on the merits, the consistent caretaker must have "resided with the child for six or more consecutive months immediately before the commencement of a child-child proceeding." We are writing to strongly urge that the Committee not include that new language.

Here is the concern: It is not uncommon in this kind of situations for the parties to come to some kind of informal custody and visitation arrangement immediately after the break down of the family unit. If things are working out relatively well, the nonparent often wants to

avoid litigation and take what they've been offered because they often are legally vulnerable. And, then, unfortunately, sometimes these informal arrangements later break down.

If this new language were to be added, in such situations, the consistent caretaker may not have resided with the child for six or more consecutive months immediately before the commencement of the litigation. In this way, the effect of adding that language is to essentially require parties to sue as soon as the relationship breaks down. If they delay for any reason, they may forever lose their rights to do so. We think this is a rule could unnecessarily escalate what are already hard family break down situations. In this way, the new language may have the likely unintended effect of discouraging informal agreements and escalating conflict and litigiousness.

If the concern is where people have unreasonably waited too long to see court involvement, maybe a more effective way at getting at that issue is to address it more directly. For example, in the pleading provision, the parties could be required to discuss why they waited to sue, if that is the case, and there could be a provision that allows a court to dismiss an action if a party unreasonably failed to protect their rights under the provision.

### **(3) *Troxel* and harm**

We wanted to reiterate the sentiment further detailed in Cathy's Sept. 1, 2017 memo urging the deletion of the Legislative Notes in Sections 106, 107, and 112 and cutting back on the discussion of *Troxel* elsewhere in the draft.