

DRAFT
FOR DISCUSSION ONLY

NONPARENTAL CHILD CUSTODY AND VISITATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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~~June 13~~September 21, 2017

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NONPARENTAL CHILD CUSTODY AND VISITATION ACT

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PREFATORY NOTE

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

Continuation of a relationship between a child and a nonparent can be an important – and even vital – interest, both for the child and the nonparent. When deciding whether to grant relief to a nonparent, 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 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~~Troxels "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 "breathhtakingly 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 U.S. 390 (1923) (holding unconstitutional a Nebraska law prohibiting teaching any subject in a

language other than English). The Court held the statute “as applied, exceeded the bounds of the Due Process Clause.” 530 U.S. at 68.

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

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

Id. at 68–69.

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

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

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

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

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

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

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

The main provisions of this act are:

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

1 **NONPARENTAL CHILD CUSTODY AND VISITATION ACT**

2 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Nonparental Child
3 Custody and Visitation Act.

4 **SECTION 102. DEFINITIONS.** In this act:

5 (1) ~~—(1)—~~“Child” means an unemancipated individual who ~~has not attained~~is less than
6 [18] years of age.

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

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

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

14 (4) “Consistent caretaker” means an individual who:
15 (A) has consistently exercised care and control of a child; and ~~has~~
16 (B) regarding the welfare of the child, exercised care or made decisions solely or
17 in cooperation with a parent or other custodian ~~regarding the welfare of the child.~~

18 (5) “Custody” means physical custody, legal custody, or both, as well as joint custody or
19 shared custody ~~as defined by~~under the law of this state other than this [act].

20 (6) “Detriment to a child” means adverse effect to a child’s physical or psychological
21 well-being.

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

24 (8) “Individual” means a natural person of any age.
25

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

(10) “Nonparent” means an individual other than ~~a parent~~the parent of a child who is the subject of a proceeding under this [act]. The term includes a grandparent.

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

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

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

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

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

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

(17) “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.

(18) “Substantial relationship” means a familial or other relationship in which a significant emotional bond exists between a nonparent and a child.

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

Comment

The definition of “child” is the same as that used in the Uniform Deployed Parents

1 Custody and Visitation Act, § 102(3)(A) (2012). The age of majority in most states is 18,
2 although some states set the age of majority at graduation from high school, and a few states set
3 the age higher than 18. This act does not include in the definition of “child” adult children who
4 are the subject of a court order concerning custodial responsibility, such as individuals with a
5 developmental disability. Rights to custody of visitation with adult children would be
6 determined under the state’s guardianship laws.
7

8 In Family Law, the terms “custody” and “visitation” are flexible concepts. In most states,
9 there is not a fixed amount of time the child spends with a parent who has “custody” or
10 “visitation,” although some states utilize guidelines to specify the time the child spends with the
11 noncustodial parent. Nonetheless, a person with “custody” provides the child with a home or
12 primary home. The drafters anticipate that visitation granted to nonparents will be decided on
13 the facts of each case rather than by guidelines. The definition of “custody” includes joint
14 custody or shared custody as defined by other state law. Thus, under this act, courts have the
15 option of granting joint custody or shared custody (as well as sole custody). A guardian of the
16 person of the child would be considered to have “custody.”
17

18 The definition of “detriment to the child” is based on Cal. Fam. Code § 3041(c) (2016) (a
19 section entitled “Custody award to nonparent; findings of court; hearing”). That section
20 provides: “As used in this section, ‘detriment to the child’ includes the harm of removal from a
21 stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his
22 or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for
23 care and affection, and who has assumed that role for a substantial period of time. A finding of
24 detriment does not require any finding of unfitness of the parents.” *See also* D.C. Code § 16-
25 831.07 (2017) (providing among the bases for granting a third party custody is a finding by
26 clear-and-convincing evidence “[t]hat that custody with a parent is or would be detrimental to the
27 physical or emotional well-being of the child”). **Reporter’s Note: Here, or elsewhere, I will**
28 **add cites to more cases and statutes using the term “detriment.”**
29

30 The definitions of “person” and “state” are the definitions provided by the Uniform Law
31 Commission “Drafting Rules,” Rule 305 & 306 (2012).
32

33 The definition of “legal custody” is similar to the definition of “legal custody” in many
34 states. The definition of “legal custody” also is similar to the definition of “decision-making
35 authority” in the Uniform Deployed Parents Custody and Visitation Act (2012), which provides:
36 “the power to make important decisions regarding a child, including decisions regarding the
37 child’s education, religious training, health care, extracurricular activities, and travel.” “Legal
38 custody” might include the power to enroll a child in a religious school, but it normally should
39 not include selection of a child’s religion since most courts have held both parents have a right to
40 expose their child to his or her religious beliefs or lack of religious beliefs. *See, e.g., Felton v.*
41 *Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981); *In re Marriage of Mentry*, 142 Cal. App 260,
42 190 Cal. Rptr. 843 (1983); *Hansen v. Hansen*, 404 N.W.2d 460 (N.D. 1987). Decisions about
43 travel are not included since persons with custody, as well as persons with visitation, generally
44 have a right to travel with the children, including on vacation. A person with “legal custody,”
45 however, generally would determine if the child were to travel on his own her own, such as for
46 an educational or athletic program.

1 The definition of “nonparent” is “an individual other than a parent. The term includes
2 grandparents.” Other persons could obtain relief under the act provided they meet the
3 requirements of the act (including clear~~and~~convincing evidence of substantial relationship with
4 the child and detriment to the child if custody or visitation was not granted).

5
6 The definition of “parent” is “a person recognized as a parent under law of this state other
7 than this [act].” The sources of the definition of “parent” may include the state’s parentage
8 statutes, divorce statutes, and case law. In most states, “parent” would include biological
9 parents, adoptive parents, and men who have acknowledged paternity (even though they are not
10 biologically related to the child). “Parent” also might include persons who agree to conceive a
11 child through assisted reproductive technology or by use of surrogates. Generally, a person
12 ceases to be a parent if his or her rights have been terminated. In addition, a man who donates
13 sperm or a woman who donates an egg usually are not considered to be parents.

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

24
25 The definition of “physical custody” is similar to the definition of “physical custody” in
26 the Uniform Child Custody Jurisdiction and Enforcement Act, § 102(14) (1997) (“the physical
27 care and supervision of a child”).

28
29 The definition of “substantial relationship” is drawn, in part, from Minn. Stat. Ann. §
30 518E.301 (West 2016), which provides: “‘close and substantial relationship’ means a
31 relationship in which a significant bond exists between a child and a nonparent.”

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

43 44 **SECTION 103. SCOPE.**

45 (a) This act governs a proceeding in which a nonparent seeks custody of or visitation with

1 a child over the objection of a parent.

2 (b) This [act] does not limit a parent from requesting custody of or visitation with the
3 child of a parent under law of this state other than this [act].

4 (c) This [act] does not apply:

5 (1) to a proceeding between nonparents, ~~or;~~

6 ~~_____ (2) _____~~ [(2) to a proceeding brought by an individual whose parental rights
7 have been terminated;]

8 ~~_____~~ [(3) to an Indian child, to the extent that a proceeding concerning the child is
9 governed by the Indian Child Welfare Act, 25 U.S.C. Sections 1901 through 1923;]

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

13 ~~(d) The Indian Child Welfare Act, 25 U.S.C. Sections 1901 through 1923, governs~~

14 ~~_____~~ [(5) The right of a former foster parent to seek custody ~~and of or~~ visitation ~~rights of a~~
15 ~~nonparent of an Indian with a child as defined in that act.]~~

16 **Comment**

17
18 **Comment (will be revised, depending on decisions of Drafting Committee)**

19 This act does not provide for custody or visitation to nonparents for children who are the
20 subject proceedings for guardianship of the person, abuse, neglect, or dependency. Such laws
21 and related regulations have their own provisions regarding where a child will be placed and who
22 may have contact with the child. The guardianship, abuse, neglect, and dependency laws usually
23 are in a different portion of the statutes than laws pertaining to divorce, parentage, and
24 nonparental rights. The drafters of this act do not wish for this act to conflict with or interfere
25 with the laws of guardianship, abuse, neglect, or dependency. When a child is no longer the
26 subject of such proceedings, relief may be sought under this act. The provision in this section is
27 similar to Or. Stat. § 109.119(9) (West 2015) (excluding application of a nonparental visitation
28 statute from children who are the subject of dependency proceedings). *See also* Minn. Stat. Ann.
29 § 257C.08(4) (West 2015) (excluding foster parents from coverage under the state's nonparental
30 visitation law).

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

7 This act, ~~as well as the Uniform Child Custody Jurisdiction and Enforcement Act, §~~
8 ~~104(a) (1997), do not~~ does not apply to an Indian child to the extent the child is
9 covered by the Indian Child Welfare Act, 25 U.S.C. Section 1901 through 1923.

10
11 **Reporter’s Note:** Regarding the following section (Section 104) on “Effect of
12 Adoption of a Child,” we have had three suggestions or comments: (1) define
13 “cohabitant;” (2) we do not need subsection (c); and (3) in adoption proceedings,
14 give notice to nonparents who have rights of visitation under the act. [The third
15 suggestion seems like good policy, but probably beyond the scope of our act.]
16

17 **SECTION 104. EFFECT OF ADOPTION OF CHILD.**

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

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

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

24 **Comment**

25 As of 2013, the statutes of 24 states explicitly allow visitation for nonparents if the child
26 has been adopted by a relative, including a stepparent. Jeff Atkinson, *Shifts in the Law*
27 *Regarding Rights of Third Parties to Seek Visitation and Custody of Children*, 47 Fam. L. Q. 1,
28 20-23 (Spring 2013).
29

30 **SECTION 105. JURISDICTION.**

31 (a) Subject to Section 103(d), a proceeding under this [act] must be commenced in the
32 court having jurisdiction to determine custody or visitation under [cite to this state’s Uniform
33 Child Custody Jurisdiction and Enforcement Act].

34 **Comment**

1 The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has
2 been adopted in 49 states. As of May 2017, Massachusetts is the only state that has not adopted
3 the UCCJEA, although Massachusetts did adopt the Uniform Child Custody Jurisdiction Act
4 (UCCJA). The Uniform Law Commission has promulgated a 2013 version of the UCCJEA (to
5 cover international issues as well as domestic issues). As of May 2017, the 2013 UCCJEA has
6 not been adopted in any states.

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

10
11 **Reporter’s Note Regarding “Compensation”:** Regarding the following section
12 on “Standing,” during the reading at the Annual Meeting, we received multiple
13 comments on the issue of “compensation” to persons caring for the child. One of
14 the concerns was that making payments to a family member who is caring for a
15 child should not preclude the family from being able to seek visitation or custody.
16 Here are some options for dealing with the issue (some options can be used
17 together):

- 18
19 1. Instead of using the phrase “without expectation of financial compensation,”
20 use the ALI language of “for reasons primarily other than financial
21 compensation.” [ALI’s Principles of the Law of Family Dissolution,
22 § 2.03(1)(c) (2002) (definition of “de facto parent”)]
- 23
24 2. Define “compensation.” The definition could be along the lines of
25 “‘Compensation’ means wages or other remuneration in exchange for care of
26 the child. ‘Compensation’ does not include reimbursement of expenses for
27 care of a child such as payment for food, clothing, shelter, and medical
28 expenses.’”
- 29
30 3. Have the “compensation” provision apply only to persons who are not family
31 members. [This option may meet the concern of some commissioners, but
32 would not deal with the situation where a parent leaves the child in the care of
33 a friend for a long period of time and gives that person money for the child’s
34 food, clothing, etc. (but does not give that person wages).]
- 35
36 4. Have the “compensation” provision also apply to persons who seek custody or
37 visitation based on a substantial relationship (as well as status as a “consistent
38 caretaker.”) If we use this option, Section 106(a)(2) would provide: “has a
39 substantial relationship with the child that was formed for reasons primarily
40 other than compensation and denial of custody or visitation would result in
41 [detriment] to the child.
- 42
43 5. Keep the current language and provide more explanation in the Comments
44 that the language is already in use in many states and that “compensation”
45 does not include payments to a caretaker for the child’s expenses.
46

I favor options 1, 2, and 4.

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

SECTION 106. STANDING.

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

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

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

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

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

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

Legislative Note: ~~A state may wish to substitute the term “harm” for “detriment” in paragraph~~

1 ~~(a)(2)~~ If a court in ~~those states~~ the state has held, as a matter of constitutional law, that harm to a
2 child without granting visitation must be shown before visitation is granted to a nonparent, the
3 state may need to substitute the term “harm” for “detriment” in subsection (a)(2).
4

5 **Reporter’s Note:** A question has been raised regarding whether we need the
6 Legislative Notes in this Section and in Sections 107 & 112 regarding use of the
7 term “harm” versus “detriment.” For further discussion of the issue, see the
8 memos from Cathy Sakimura and me.
9

10 Comment

11 The requirement of standing serves to protect the interests of parents and filter out cases
12 in which the petitioner does not have a meritorious claim, while at the same time allowing the
13 opportunity to preserve relationships between a child and nonparent with whom the child has a
14 particularly close relationship.
15

16 To reduce the burden of litigation, a parent may be able to expedite disposition of a case
17 by using a motion to dismiss or for summary judgment to challenge whether the nonparent has
18 standing to pursue the action. Alternatively, the parent may challenge whether the facts alleged
19 by the nonparent are sufficient to warrant a trial on the merits.
20

21 In the U.S. Supreme Court’s plurality opinion in *Troxel v. Granville*, Justice O’Connor
22 stated: “As Justice KENNEDY recognizes, the burden of litigating a domestic relations
23 proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right
24 of a custodial parent to make certain basic determinations for the child’s welfare becomes
25 implicated.’” 530 U.S. at 75, *quoting* Kennedy, J. at 530 U.S. at 101. *See also D.P. v. G.J.P.*,
26 146 A.3d 204, 213 (Pa. 2016) (stating that bifurcating proceedings with determination of
27 standing before the merits “serves an important screening function in terms of protecting parental
28 rights”); *Rideout v. Riendeau*, 2000 ME 198, ¶ 30, 761 A.2d 291, 302 (stating that determination
29 of standing before full litigation of the claim “provides protection against the expense, stress, and
30 pain of litigation”).
31

32 The statutes of many states specify the circumstances in which visitation by a nonparent
33 may be sought – circumstances which often involve some disruption of the family – e.g.,
34 divorce, separation, death of a parent, or a child born outside of marriage. Such broad
35 descriptions of circumstances in which visitation may be sought do not, by themselves, provide a
36 reliable indicator of whether nonparental visitation (or custody) should be allowed. *See Dorr v.*
37 *Woodard*, 140 A.3d 467, 472 (Me. 2016) (holding death of a parent without other compelling
38 reasons was not sufficient reason to confer standing); *D.P. v. G.J.P.*, 146 A.3d 204 (Pa. 2016)
39 (holding that separation of the parents for six months was not a sufficient basis to allow
40 grandparents to seek visitation). It is preferable to focus on the factors used to decide visitation
41 or custody, particularly the closeness of the relationship between the child and the nonparent.
42

43 The following state supreme court opinions have held, as a matter of state or federal
44 constitutional law, that harm to the child without granting visitation must be shown before
45 visitation is granted to a 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 1052 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert. denied*, 540 U.S. 1177 (2004); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005).

SECTION 107. [PETITION-]L

(a) A nonparent who [petitions] for custody or visitation under this [act] shall verify the [petition] under penalty of perjury and state facts sufficient to show standing under Section 106, including:

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

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

(3) information about any financial compensation provided to the nonparent in exchange for caretaking of the child;

(4) a description of any attempts by the nonparent to obtain custody, visitation, or other contact with the child;

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

(6) the reason why a continuing relationship between the nonparent and the child is in the best interest of the child, applying the factors in Section 113;

(7) the reason why denial of custody or visitation to the nonparent would result in [detriment] to the child if the nonparent is claiming a substantial relationship with the child; and

(8) the relief sought.

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

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

Comment

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

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

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

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

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

(c) If the declaration as to any of the items described in subsection (a)(1) through

(3) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

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

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

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

SECTION 108. NOTICE. On commencement of a proceeding under this [act], the nonparent shall give notice to:

(1) a parent whose parental rights to the child have not been previously terminated;

(2) any person having custody of or visitation with the child; and

(3) the child, if the child is at least 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 109. APPOINTMENT; COURT SERVICES. To the extent available in ~~other proceedings~~another proceeding to determine custody or visitation under law of this state other than this [act], the court may make an order:

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

(2) requiring mediation or other form of alternative dispute resolution between the parties to the proceeding, but a party who has been the victim of domestic violence, sexual assault, or stalking by another party to the proceeding may not be required to participate in alternative dispute resolution [unless the court can make an order adequately protecting during alternative dispute resolution the safety of the party who was victim of domestic violence, sexual assault, or stalking];

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

(4) allocating payment between the parties to the proceeding of fees for the services ordered under paragraphs (1), (2), and (3).

Legislative Note: *The brackets in paragraph (2) should be removed and the phrase “unless the court can make an order adequately protecting during alternative dispute resolution the safety of the party who was victim of domestic violence, sexual assault, or stalking” should be included in the section in a state that requires mediation of custody and visitation cases, including a case involving an allegation of domestic violence. If a state does not require mediation in those circumstances, delete the phrase and the brackets.*

Comment

A variety of personnel and court services may assist the court in making decisions regarding nonparental 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 make 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.

SECTION 110. EMERGENCY ORDER. On finding that the child or a party is in danger of imminent harm, the court may expedite a proceeding under this [act] and may issue an

1 emergency order.

2 **Comment**

3
4 This section makes explicit that the court has the power to enter an emergency order, as
5 well as final orders. Generally, other provisions of the act -- including the requirements for
6 pleadings, burden of proof, presumptions, and factors considered – should apply to the issuance
7 of emergency orders in addition to final orders.
8

9 **SECTION 111. PARENTAL PRESUMPTION.**

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

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

17 **Comment**

18 The presumption and burden of proof contained in this section recognize the superior
19 right of parents to custody of their children in custody disputes with nonparents, and also provide
20 that the superior right or presumption can be overcome.

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

29 The Colorado Supreme Court has held that the burden of proof in a grandparent visitation
30 case is clear~~-and-~~convincing evidence – even though the state’s grandparent visitation statute did
31 not explicitly require that. In *In re Adoption of C.A.*, 137 P.3d 318, 328 (Col. 2006), the court
32 held under principles of Due Process, “The grandparent bears the ultimate burden of proving by
33 clear and convincing evidence that the parental determination is not in the child’s best interest
34 and the visitation schedule grandparent seeks is in the child’s best interest.” *See also Polasek v.*
35 *Omura*, 2006 MT 103, ¶ 15, 332 Mont. 157, 162, 136 P.3d 519, 523 (2006) (holding that “clear

1 and convincing evidence” is required); *Jones v. Jones*, 2005 PA Super 337, ¶ 12, 884 A.2d 915,
2 918 (2005), *appeal denied* (Pa. 2006) (holding that “convincing reasons” are required).

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

13 As stated in Black’s Law Dictionary, “The Burden of proof includes both the burden of
14 persuasion and the burden of production.” Black’s Law Dictionary (7th10th ed. 19992014).

15
16 Reporter’s note: The bracketed phrase in subsection (a) of the following section
17 (Section 112) [i.e., the phrase “who has standing under this [act]”] is included in
18 response to a comment at the Annual Meeting. In subsection (a)(1)(A), we also
19 have the issue regarding the 6-month rule as was discussed in Section 106 on
20 “Standing.”
21

22 **SECTION 112. ELEMENTS OF ~~AN~~ ACTION FOR CUSTODY AND**
23 **VISITATION.**

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

26 (1) the nonparent has acted as a consistent caretaker of the child without
27 expectation of financial compensation and:

28 (A) has resided with the child for six or more consecutive months
29 ,[immediately before the commencement of a child-custody proceeding], or for a child less than
30 six months of age, since the birth of the child, excluding each period of temporary absence;

31 (B) a parent of the child explicitly or tacitly accepted the development of a
32 bonded and dependent relationship between the child and the nonparent; and

33 (C) granting custody or visitation to the nonparent is in the best interest of

1 the child; or

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

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

13
14 [(b) A court may grant visitation to a nonparent who commenced a proceeding seeking
15 custody-.]

16 [(c) A court may grant custody to a nonparent who commenced a proceeding seeking
17 visitation.]

18 **Reporter’s Note:** At the Annual Meeting, a commissioner expressed hope that
19 the act would provide a more flexible standard for grandparents to seek visitation,
20 including in cases in which the parents have not permitted a substantial
21 relationship to form between the child and grandparent. We can continue to
22 discuss that issue as well as the limits placed by *Troxel* and the cases that have
23 followed *Troxel*.

24
25 **Legislative Note:** A state may wish to substitute the term “harm” for “detriment” in paragraph
26 (a)(2) if a court in those statesIf a court in the state has held, as a matter of constitutional law,
27 that harm to a child without granting visitation must be shown before visitation is granted to a
28 nonparent-, the state may need to substitute the term “harm” for “detriment” in subsection
29 (a)(2).

30 31 Comment

32 This section provides two bases for a nonparent to obtain custody or visitation.

33
34 The first basis [which is in subsection (a)(1)] is that the nonparent has been a “consistent
35 caretaker of the child without expectation of financial compensation.” Such a finding includes
36 three enumerated elements. The first element (regarding the length of time the nonparent resided
37 with the child) has a timeframe similar to the time frame in the definition of “home state” of a

1 child under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), § 102(7)
2 (1997).

3
4 The second element of “consistent caretaker” -- acceptance by at least one parent of a
5 “bonded and dependent relationship between the child and the nonparent” – is one of the
6 elements utilized in the definition of “de facto parent” in the Revised Uniform Parentage Act
7 (RUPA), § 204 (2017). The term “bonded” refers to the closeness of the relationship. The term
8 “dependent” refers to the degree to which the child relies upon, and is in need of, the nonparent.

9
10 The third element is that granting custody or visitation to the nonparent is in the best
11 interest of the child. A showing that denial of custody or visitation would result in a detriment to
12 the child is not required.

13
14 The “consistent caretaker” provision of this act has some similarities to definition of “de
15 facto parent” under the RUPA, but the “consistent caretaker” provision is more flexible. Unlike
16 the RUPA, the “consistent caretaker” provision does not require that the individual seeking
17 custody or visitation hold the child out as his or her own. In addition, the “consistent caretaker”
18 provision does not require that the individual has undertaken “full and permanent responsibilities
19 of a parent.”

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

28
29 The showing of best interest under both bases is relevant not only to whether custody or
30 visitation should be granted to a nonparent, but also to the amount of time the child should be
31 with the nonparent.

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

35
36 Because we rest our decision on the sweeping breadth of [Washington Code] §
37 26.10.160(3) and the application of that broad, unlimited power in this case, we
38 do not consider the primary constitutional question passed on by the Washington
39 Supreme Court—whether the Due Process Clause requires all nonparental
40 visitation statutes to include a showing of harm or potential harm to the child as a
41 condition precedent to granting visitation. We do not, and need not, define today
42 the precise scope of the parental due process right in the visitation context. In this
43 respect, we agree with Justice KENNEDY that the constitutionality of any
44 standard for awarding visitation turns on the specific manner in which that
45 standard is applied and that the constitutional protections in this area are best
46 “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 In the years since *Troxel* was decided, state courts have generally held that a
8 grandparent's claim that the grandparent has a positive relationship with the grandchild is not
9 sufficient to justify an order of visitation over the objection of a parent. *See, e.g., Dorr v.*
10 *Woodard*, 2016 ME 79, 140 A.3d 467 (Maine 2016); *Neal v. Lee*, 2000 Ok 90, 14 P.3d 547
11 (2000); *State Dept. of Social and Rehabilitative Services v. Paillet*, 16 P.3d 962 (2001); *Flynn v.*
12 *Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if the grandparent has a
13 substantial relationship with the grandchild – such as raising the child for a few years – that can
14 be the basis for granting visitation to the grandparent over the parents' objection. *See, e.g.,*
15 *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents had helped raise their
16 grandchildren for the first seven years of the oldest grandchild's life and for lesser periods for the
17 younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007) (grandparents cared
18 for children while the mother was dying of cancer).
19

20 In addition, in *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert. denied*, 540
21 U.S. 1177 (2004), the New Jersey Supreme Court reinstated a trial court's grant of visitation to
22 maternal grandparents after the mother's death "where the children have a very extensive
23 relationship with the grandparents [, including] years where they were seeing the grandparents
24 every other weekend." 827 A.2d at 224. In this case, there was "a very bad relationship"
25 between the father and the grandparents, and the father believed the grandparents were "evil."
26 *Id.* at 225. The trial court found the grandparents were appropriate, acted in good faith, and were
27 an important link to the mother's side of the family. The visitation was: "(1) monthly visitation
28 alternating between a five-hour day visit one month and a visit with two overnights the next
29 month and (2) one extended visitation period in July or August. The court specifically noted that
30 the reason it ordered that visitation was its reliance on the grandparents' expert who opined that
31 such visitation was 'to protect the children from the harm that would befall them if they were
32 alienated from their grandparents.'" *Id.* at 208.
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 persons with a valid claim for custody
36 or visitation will not be large. As courts sort through complex family structures, the number of
37 persons with potential claims for custody or visitation is a factor that should be considered -- but
38 without applying a fixed rule about how many persons with rights to time with the child is too
39 many. The focus needs to remain on the best interest of the child.
40

41 This act governs disputes between nonparents and parents. See Section 103. Disputes
42 between two or more nonparents (when parents are not part of the proceeding) are governed by
43 other laws, such as guardianship laws.
44

45 Regarding the Legislative Note and the wording of subsection (a)(2), sevensix states
46 require a showing of "harm" (rather than "detriment") before visitation can be granted to a

1 nonparent. The states are listed in the Comment to Section 106.

2
3 **SECTION 113. BEST INTEREST OF CHILD.** The court shall consider the
4 following factors to determine whether a grant of custody or visitation to a nonparent would be
5 in the best interest of the child:

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

8 (2) the nature, extent, and quality of the relationship between the child and nonparent,
9 including specific caretaking activity by the nonparent and whether the nonparent has a family
10 relationship with the child;

11 (3) the views of the child, considering the age and maturity of the child;

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

14 (A) a party;

15 (B) the child;

16 (C) ~~siblings~~ a sibling of the child;

17 (D) a parent or guardian of the child; or

18 (E) an individual residing with a party or with whom the party previously resided;

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

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

23 **Comment**

24 The nonparental visitation statutes of most states, as they existed in 2017, list factors a
25 court should consider (other than best interest of the child). This section reflects factors that

1 have been used by the states.

2
3 **Reporter's Note:** For the following section regarding the domestic violence
4 presumption, it has been suggested that the presumption apply if any of the
5 designated acts were committed – without regard to the person against whom the
6 act was committed. [The same issue applies to fourth factor in the Best Interest
7 section (Section 113). If we follow that approach, the bracketed words in
8 subsection (a) would be deleted. At the Annual Meeting, a question was raised
9 about the level of proof required to overcome the presumption – preponderance of
10 evidence or clear-and-convincing evidence?
11 It also has been suggested that the state be given the option of utilizing the
12 presumptions in the state's current law for domestic violence and related offenses.
13 Thus, if a state has presumptions and criteria for rebuttal of presumptions for
14 domestic violence in custody and visitation disputes between parents, those laws
15 would be applied to nonparents seeking custody or visitation. This option is
16 reflected in Alternative B.
17

18 **SECTION 114. PRESUMPTION REGARDING DOMESTIC VIOLENCE, CHILD**
19 **ABUSE, CHILD NEGLECT, SEXUAL ASSAULT, OR STALKING.**

20 **Alternative A**

21 (a) It is presumed that it is not in the best interest of a child to grant custody or visitation
22 to a nonparent if the nonparent, or an individual residing with the nonparent, has committed any
23 of the following acts [against a party, the child, siblings of the child, a parent or guardian of the
24 child, or an individual residing with a party or with whom the party previously resided~~÷~~]:

25 (1) domestic violence;

26 (2) child abuse;

27 (3) child neglect;

28 (4) sexual assault; or

29 (5) stalking.

30 (b) A ~~The~~ nonparent may rebut the presumption established in subsection (a) by proving
31 that granting custody or visitation to the nonparent will not endanger the child and that it is in the
32 best interest of the child to grant custody or visitation.

Alternative B

[If a state prefers to use current state law for domestic violence and related offenses, insert that standard here. Thus, for example, a state’s presumptions and criteria for rebuttal of presumptions for domestic violence between parents in custody and visitation disputes would apply to nonparents seeking custody or visitation.]

Legislative Note: *The act presents two options for dealing with presumptions related to domestic violence and related offenses. Alternative A presents criteria for a presumption and rebuttal of the presumption. Alternative B provides that a state may adapt its current laws applicable to domestic violence and related offenses in custody disputes between parents to custody and visitation disputes between parents and nonparents.]*

Comment

This section provides protection to victims or potential victims of domestic violence by providing a rebuttable presumption that custody or visitation should not be granted to a nonparent if the nonparent, or an individual residing with the nonparent, has committed an act of domestic violence or related offenses. Domestic violence is defined by reference to state law.

SECTION 115. ~~PETITION TO MODIFY~~MODIFICATION OF CUSTODY OR VISITATION. ~~Modification of~~If a court decides to modify an order for custody or visitation entered under this [act~~+~~], the modification must be ~~decided~~ under [cite to the law of this state other than this [act~~+~~]] governing modification of a custody~~;~~[,] [or] visitation~~;~~[,] [or parenting time] order entered in a dispute between parents~~;~~].

Comment

This section makes reference to a state’s existing law regarding modification of custody, visitation, or parenting time 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 interest 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). Under this approach, a custody or visitation order in favor of a nonparent generally would continue unless the substantial change of circumstances and best interest of the child for modification of the order were shown.

[SECTION 116. 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: A state should omit this section ~~should be omitted in a state where if the~~ requirement or lack of requirement of making findings of fact is governed by court rule rather than by statute and ~~if~~ a state ~~that~~ requires findings of fact and conclusions of law in all cases involving family law.

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 2016).

SECTION 117. COST OF FACILITATING VISITATION. In a proceeding under this [act], a court may order a nonparent granted visitation to pay the cost of facilitating visitation with the child, including the cost of transportation.

Reporter's Note: Regarding Section 117, our Style Liaison asks, "Does this include attorney's fees – i.e., to get child back from visitation if delay occurs?" Should we deal with that issue in Comments and state that an order for attorney's fees is governed by Section 119?

Comment

Individuals who receive visitation under this act may, in the court's discretion, be required to pay the cost of facilitating visitation. The cost of facilitating visitation may include the cost of transportation. An obligation, if any, for a nonparent to pay child support is governed by law other than this act.

SECTION 118. AUTHORITY OF NONPARENT TO SEEK SUPPORT FOR CHILD. The authority of a nonparent given custody under this [act] to [petition] for and receive support of the child is governed by law other than this [act].

Comment

A nonparent granted custody of a child may wish to obtain child support from a parent or apply for benefits from government or private programs to help a child. The nonparent's right to seek support or apply for benefits is governed by law other than this act. Section 208(b) of the Revised Uniform Guardianship and Protective Proceedings Act (2017) contains a similar

~~provisions~~provision. That 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 119. ATTORNEY’S FEES AND COSTS. In a proceeding under this [act], the court may allocate and order payment of attorney’s 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 asserted a position without merit in the proceeding].

Comment

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

SECTION 120. OTHER RIGHT OR REMEDY. A right or remedy under this [act] is not exclusive and does not preclude an additional right and remedy under law of this state other than this [act], including [cite to the Uniform Deployed Parents Custody and Visitation Act] [or] [other state law dealing with custody of and visitation with a child of a deployed parent].

Comment

The law regarding families is more dynamic than many areas of law. The drafters of this act do not wish to preclude the development of additional rights and remedies in this area, including rights and remedies dealing with children of deployed parents.

SECTION 121. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 122. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or

1 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
2 U.S.C. Section 7003(b-1).

3 **SECTION 123. TRANSITIONAL PROVISION.** This [act] applies to a proceeding
4 commenced before, on, or after [the effective date of this [act]] for a [petition] for custody or
5 visitation by a nonparent of a child on which a judgment has not been issued.

6 **[SECTION 124. SEVERABILITY.** If any provision of this [act] or its application to
7 any person or circumstance is held invalid, the invalidity does not affect other provisions or
8 applications of this [act] which can be given effect without the invalid provision or application,
9 and to this end the provisions of this [act] are severable.]

10 ***Legislative Note:** Include this section only if this state lacks a general severability statute or a*
11 *decision by the highest court of this state stating a general rule of severability.*
12

13 **SECTION 125. REPEALS; CONFORMING AMENDMENTS.**

14 (a)

15 (b)

16 (c)

17 ***Legislative Note:** When adopting this act, a state should repeal: (1) existing general statutes, if*
18 *any, regarding visitation for a grandparent, stepparent, sibling, and other nonparent, and (2)*
19 *statutes, if any, regarding a custody dispute between a nonparent and a parent.*
20

21 *A state should not repeal: (1) the Uniform Deployed Parents Custody and Visitation Act or*
22 *other state law dealing with custody of and visitation with a child of a deployed parent; (2) laws*
23 *regarding guardianship of a minor; (3) laws regarding a child in custody of the state, including*
24 *a child in foster care; and (4) laws providing specific rights for a de facto parent.*
25

26 **SECTION 126. EFFECTIVE DATE.** This [act] takes effect

1 **APPENDIX – USE OF SEPARATE STANDARDS FOR CUSTODY AND VISITATION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 ■ Unfitness of parent

11 ■ Death of parents

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

13 ■ Neglect of child

14 ■ Abuse of child

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

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

18 ■ Child resided with nonparent for certain period of time

19 ■ Other exceptional circumstances

20 ■ Clear-and-convincing evidence