

D R A F T  
FOR DISCUSSION ONLY

# **NON-PARENTAL CHILD CUSTODY AND VISITATION ACT**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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March 24-25, 2017 Drafting Committee Meeting

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February 28, 2017

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# 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.

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1                                   **NON-PARENTAL CHILD CUSTODY AND VISITATION ACT**

2                                   **PREFATORY NOTE**

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

7  
8               Continuation of a relationship between a child and a non-parent can be an important –  
9 and even vital – interest, both for the child and the non-parent. When deciding whether to grant  
10 relief to a non-parent, courts must, of course, consider the rights of parents. The U.S. Supreme  
11 Court has recognized a right of a fit parent to make decisions regarding the rearing of his or her  
12 child. *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

13  
14              In *Troxel*, the paternal grandparents sought visitation with their grandchildren following  
15 the father’s suicide. In the six months after the father’s death, the grandparents saw their  
16 grandchildren “on a regular basis.” *Id.* at 60. Then the mother informed the grandparents “that  
17 she wished to limit their visitation with her daughters to one short visit per month.” *Id.* at 61.  
18 The grandparents filed an action under Washington State’s non-parental visitation statute, Wash.  
19 Rev. Code § 26.10.160(3) (1994), which provided: “Any person may petition the court for  
20 visitation rights at any time including, but not limited to, custody proceedings.”

21  
22              “At trial, the Troxels [the grandparents] requested two weekends of overnight visitation  
23 per month and two weeks of visitation each summer. Granville [the mother] did not oppose  
24 visitation altogether, but instead asked the court to order one day of visitation per month with no  
25 overnight stay.” 530 U.S. at 61. The trial court gave the grandparents visitation of “one  
26 weekend per month, one week during the summer, and four hours on both of the petitioning  
27 grandparents’ birthdays.” *Id.* at 62. The trial court’s findings in support of the judgment were  
28 that the Troxel’s “are part of a large, central, loving family, all located in this area, and the  
29 [Troxels] can provide opportunities for the children in the areas of cousins and music.” *Id.* at 72.

30  
31              The case (along with two other consolidated cases) was appealed to the Washington  
32 Supreme Court, which held the statute was unconstitutional and that visitation to grandparents  
33 over objection of a parent should not be granted absent a showing of harm to the child. *In re*  
34 *Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21, 23 (1998).

35  
36              The grandparents appealed. The U.S. Supreme Court affirmed the Washington Supreme  
37 Court, although on narrower grounds. The court said the statute was “breathhtakingly broad,” 530  
38 U.S. at 67, and the trial court’s findings were “slender,” *Id.* at 72. The Court struck down the  
39 statute, as applied, holding the trial court did not give sufficient deference to the decision of a fit  
40 parent to decide the amount of contact the children would have with grandparents.

41  
42              The Court said, “The liberty interest at issue in this case—the interest of parents in the  
43 care, custody, and control of their children—is perhaps the oldest of the fundamental liberty  
44 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 option 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 The U.S. Census Bureau reports that the unmarried partner population “grew 41 percent  
27 between 2000 and 2010, four times as fast as the overall household population.” U.S. Census  
28 Bureau, “Households and Families: 2010” at p. 3 (C2010BR-14) (Apr. 2012), available at  
29 <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

30  
31 Opposite-sex unmarried partner households increased by 40 percent since 2000; same-sex  
32 households increased by 80 percent. *Id.* at p. 6.

33  
34 In 2016, the Census Bureau reported that there were 73,745,000 children in United States  
35 under age 18. Of that number, the breakdown for the children’s living arrangements was:

- 36  
37 · Living with both parents: 50,679,000  
38 · Living with mother only: 17,223,000  
39 · Living with father only: 3,006,000  
40 · Living with neither parent: 2,836,000  
41 · Of the children living with neither parent, 1,556,000 were living with grandparents.

42  
43 U.S. Census Bureau, America’s Families and Living Arrangements: 2016, Table C2, Household  
44 Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2016  
45 available at <https://www.census.gov/hhes/families/data/cps2016C.html>

1       The main provisions of this act are:  
2

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



1                   **NON-PARENTAL CHILD CUSTODY AND VISITATION ACT**

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

8  
9           **SECTION 1. SHORT TITLE.** This [act] may be cited as the Non-Parental Child  
10   Custody and Visitation Act.

11           **SECTION 2. DEFINITIONS.** In this act:

12           (1) “Child” means an unemancipated individual who has not attained [18] years of age.

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

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

17           (4) “Custodian” means an individual with right of custody of a child.

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

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

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

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

27           (9) “Legal custody” means the power to make important decisions regarding a child,

1 including decisions regarding the child’s education, health care, and extracurricular activities.

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

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

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

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

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

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

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

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

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

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

22 (20) “Substantial relationship” means a relationship in which a significant emotional  
23 bond exists between the non-parent and the child in light of the frequency of contact between the  
24 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, including any overnights.

### Comment

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

The definitions of “electronic,” “person,” “record,” and “state” are the definitions provided by the Uniform Law Commission “Drafting Rules,” Rule 304 – 306 (2012).

The definition of “legal custody” is similar to the definition of “legal custody” in many states. The definition of “legal custody” also is similar to the definition of “decision-making authority” in the Uniform Deployed Parents Custody and Visitation Act (2012), which provides: “the power to make important decisions regarding a child, including decisions regarding the child’s education, religious training, health care, extracurricular activities, and travel.” “Legal custody” might include the power to enroll a child in a religious school, but it normally should not include selection of a child’s religion since most courts have held both parents have a right to expose their child to his or her religious beliefs or lack of religious beliefs. *See, e.g., Felton v.*

1 *Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981); *In re Marriage of Mentry*, 142 Cal. App 260,  
2 190 Cal. Rptr. 843 (1983); *Hansen v. Hansen*, 404 N.W.2d 460 (N.D. 1987). Decisions about  
3 travel are not included since persons with custody, as well as persons with visitation, generally  
4 have a right to travel with the children, including on vacation. A person with “legal custody,”  
5 however, generally would determine if the child were to travel on his own her own, such as for  
6 an educational or athletic program.

7  
8 The definition of “non-parent” is “an individual other than a parent.” The term includes,  
9 but is not limited to, a child’s grandparents, great-grandparents, step-parents, and siblings. Other  
10 persons could obtain relief under the act provided they meet the requirements of the act  
11 (including [clear and convincing evidence] of substantial relationship with the child and  
12 detriment to the child if custody or visitation was not granted).

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

22  
23 The definition of “parental responsibility” is based, in part, on Del. Code Ann. tit. 13, §  
24 1101(10) (2016), which provides: “‘Parental responsibilities’ means the care, support and control  
25 of the child in a manner that provides for the child’s necessary physical needs, including  
26 adequate food, clothing and shelter, and that also provides for the mental and emotional health  
27 and development of such child.” Payment for the child’s food, clothing, shelter, and other  
28 physical needs is not enough, by itself, to constitute exercise of parental responsibility.

29  
30 The definition of “parenting time” is made with reference to law of the state other than  
31 this act. The term is a comparatively modern term designed to supplement or replace the terms  
32 “custody” and “visitation,” particularly in disputes between parents. The term is generally used  
33 to focus on parenting of the child and allocation of time with the child rather than which parent  
34 has “custody.” The term does not apply to non-parents since they are not parents. The Illinois  
35 definition of “parenting time” is: “the time during which a parent is responsible for exercising  
36 caretaking functions and non-significant decision-making responsibilities with respect to the  
37 child.” 750 Ill. Comp. Stat. 5/600(e) (2016). If a state does not use the term “parenting time,” the  
38 definition of “parenting time” could be omitted.

39  
40 The definition of “physical custody” is similar to the definition of “physical custody” in  
41 the Uniform Child Custody Jurisdiction and Enforcement Act, § 102(14) (1997) (“the physical  
42 care and supervision of a child”).

43  
44 The definition of “substantial relationship” is drawn, in part, from Minn. Stat. Ann. §  
45 518E.301 (West 2016), which provides: “‘close and substantial relationship’ means a  
46 relationship in which a significant bond exists between a child and a nonparent.”

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

### SECTION 3. APPLICABILITY [TO CHILD SUBJECT TO PROCEEDING]

**REGARDING GUARDIANSHIP, ABUSE, NEGLECT, OR DEPENDENCY].** This [act] does not apply if the child is the subject of a proceeding under [cite to law of this state other than this [act] regarding custody and visitation of a child in a proceeding related to guardianship of the person, abuse, neglect, or dependency].

### Comment

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

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

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

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

## SECTION 4. JURISDICTION.

(a) Subject to subsection (b), a court only has jurisdiction to determine custody or

visitation under this [act] if the court has jurisdiction under [cite to this state's Uniform Child Custody Jurisdiction and Enforcement Act].

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

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

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

### **Comment**

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has been adopted in 49 states. As of December 2016, Massachusetts is the only state that has not adopted the UCCJEA, although Massachusetts did adopt the Uniform Child Custody Jurisdiction Act (UCCJA). The Uniform Law Commission has promulgated a 2013 version of the UCCJEA (to cover international issues as well as domestic issues). As of December 2016, the 2013 UCCJEA has not been adopted in any states.

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

The Uniform Child Custody Jurisdiction and Enforcement Act, § 104(a) (1997), as well as this act, do not apply to Indian children who are covered by the Indian Child Welfare Act, 25 U.S.C. Section 1901 through 1923.

### **SECTION 5. STANDING.**

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

(1) the non-parent meets the criteria in Section 9(c)(1) through (4); or

(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.

(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

1 or visitation under this [act].

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

4 (d) The court shall determine standing of a non-parent in a proceeding under this [act]  
5 based a pleading under Section 6. The court may hold a hearing to determine standing.

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

### 13 Comment

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

18  
19 Subsection (c) is designed to preclude a spouse of a parent who is living with the parent  
20 or a cohabitant of a parent from litigating or relitigating an issue could be handled by litigation  
21 between the parents. If the spouse of a parent or former cohabitant of a parent is no longer living  
22 with the parent, the spouse or former cohabitant could file a petition under this act (assuming  
23 other requirements of the act are met)  
24

25 Subsection (d) regarding determining standing on the basis of pleadings while giving the  
26 court discretion to hold a hearing is similar to Maine Rev. Stat. tit. 19-A, § 1891(2)(C) (2016),  
27 which provides: “The court shall determine on the basis of the pleadings and affidavits under  
28 paragraphs A and B whether the person seeking to be adjudicated a de facto parent has presented  
29 prima facie evidence of the requirements set forth in subsection 3. The court may in its sole  
30 discretion, if necessary and on an expedited basis, hold a hearing to determine disputed facts that  
31 are necessary and material to the issue of standing.”  
32

33 The following court opinions have held, as a matter of state or federal constitutional law,  
34 that harm to the child without granting visitation must be shown before visitation is granted to a  
35 grandparent. *Weldon v. Ballow*, No. 2140471, \_\_\_ So.3d \_\_\_, 2015 WL 6618983, at 15 (Ala.  
36 Civ. App. Oct. 30, 2015), *cert. denied sub nom. Ex parte Strange*, No. 1150152, 2016 WL  
37 281069 (Ala. Jan. 22, 2016); *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d 453 (2002); *Sullivan*  
38 *v. Sapp*, 866 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d 1067 (Haw. 2007); *Blixt*  
39 *v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203  
40 (2003); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005).

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

5  
6       **SECTION 6. [PETITION].**

7           (a) A non-parent requesting custody or visitation under this [act] of a child shall file a  
8       [petition] with a court. A [petitioner] under this subsection shall verify the [petition] under oath.

9           (b) The [petition] filed under subsection (a) must include:

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

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

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

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

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

21               (6) reason why a continuing relationship between the [petitioner] and the child is  
22       in the best interests of the child;

23               (7) the reason why denial of custody or visitation to the [petitioner] would be a  
24       [detriment] to the child; and

25               (8) the relief sought.

26           (c) If an agreement described in subsection (b)(2) is in writing, the [petitioner] must



1 attach a copy of the agreement to the [petition].

2 **Legislative Note:** This section uses the terms “petition” and “petitioner.” If a state uses  
3 different terminology (e.g., “complaint” and “plaintiff,” those terms may be substituted.  
4

5 **Legislative Note:** In certain states, legislative drafters may wish to substitute the term “harm”  
6 for “detriment” in subsection (a). Courts in those states have held, as a matter of constitutional  
7 law, that harm to a child without granting visitation must be shown before visitation is granted  
8 to a grandparent. The legislative drafters should review the law in the states other than this act.  
9 The comment to Section 5 cites cases from seven states that held harm must be shown.  
10 [Those states are: Alabama, Connecticut, Florida, Hawaii, Massachusetts, New Jersey, and  
11 Washington.]  
12

### 13 Comment 14

15 In the U.S. Supreme Court’s plurality opinion in *Troxel v. Granville*, Justice O’Connor  
16 stated: “As Justice KENNEDY recognizes, the burden of litigating a domestic relations  
17 proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right  
18 of a custodial parent to make certain basic determinations for the child’s welfare becomes  
19 implicated.” 530 U.S. at 75, *quoting* Kennedy, J. at 530 U.S. at 101. Requiring verified pleading  
20 and specificity in pleadings is intended to reduce actions that are not meritorious and facilitate  
21 disposition of non-meritorious cases by motions to dismiss or for summary judgment.  
22

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

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

35 (1) has participated, as a party or witness or in any other capacity, in any other  
36 proceeding concerning the custody of or visitation with the child and, if so,  
37 identify the court, the case number, and the date of the child-custody  
38 determination, if any;  
39

40 (2) knows of any proceeding that could affect the current proceeding, including  
41 proceedings for enforcement and proceedings relating to domestic violence,  
42 protective orders, termination of parental rights, and adoptions and, if so, identify  
43 the court, the case number, and the nature of the proceeding; and  
44

45 (3) knows the names and addresses of any person not a party to the proceeding

1 who has physical custody of the child or claims rights of legal custody or physical  
2 custody of, or visitation with, the child and, if so, the names and addresses of  
3 those persons.  
4

5 (b) If the information required by subsection (a) is not furnished, the court, upon  
6 motion of a party or its own motion, may stay the proceeding until the information is  
7 furnished.  
8

9 (c) If the declaration as to any of the items described in subsection (a)(1) through  
10 (3) is in the affirmative, the declarant shall give additional information under oath as  
11 required by the court. The court may examine the parties under oath as to details of the  
12 information furnished and other matters pertinent to the court's jurisdiction and the  
13 disposition of the case.  
14

15 (d) Each party has a continuing duty to inform the court of any proceeding in this  
16 or any other State that could affect the current proceeding.  
17

18 [(e) If a party alleges in an affidavit or a pleading under oath that the health,  
19 safety, or liberty of a party or child would be jeopardized by disclosure of identifying  
20 information, the information must be sealed and may not be disclosed to the other party  
21 or the public unless the court orders the disclosure to be made after a hearing in which the  
22 court takes into consideration the health, safety, or liberty of the party or child and  
23 determines that the disclosure is in the interest of justice.]”  
24

25 **SECTION 7. NOTICE.** On filing a [petition] under Section 6, the [petitioner] shall

26 give notice to:

27 (1) a parent whose parental rights to the child have not been previously terminated under  
28 law of this state other than this [act] or of another state;

29 (2) a person having custody of or visitation of the child; and

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

### 31 **Comment**

32

33 Elements of the notice provision are similar the notice provision of the Uniform Child  
34 Custody Jurisdiction and Enforcement Act, § 205(a) (1997) (“Before a child-custody  
35 determination is made under this [Act], notice and an opportunity to be heard . . . must be given  
36 to all persons entitled to notice under the law of this State as in child custody proceedings  
37 between residents of this State, any parent whose parental rights have not been previously  
38 terminated, and any person having physical custody of the child”). The Uniform Revised  
39 Guardianship and Protective Proceedings Act, §§ 202(d)(2), 205(a) (2017) requires notice to  
40 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.

1           **SECTION 9. [ORIGINAL PROCEEDING BETWEEN NON-PARENT AND**  
2 **PARENT] [CUSTODY OR VISITATION WHEN CHILD IN CUSTODY OF**  
3 **PARENT.]**

4                           **Alternative A**

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

10                          **Alternative B**

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

13                          **End of Alternatives**

14           (b) In a proceeding described in subsection (a), a parent's decision about the request for  
15 custody or visitation by the non-parent is presumed to be correct and in the best interests of the  
16 child.

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

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

23                       (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.

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

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

(2) denial of the petition under Section 6 is a [significant] [detriment] to the child; [supplemental or alternative language might include “or other special factors exist”], and

(3) granting the petition under Section 6 is in the best interests of the child.

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

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

**Legislative Note:** In certain states, legislative drafters may wish to substitute the term “harm” for “detriment” in subsection (a). Courts in those states have held, as a matter of constitutional law, that harm to a child without granting visitation must be shown before visitation is granted to a grandparent. The legislative drafters should review the law in the states other than this act.

1 *The comment to Section 5 cites cases from seven states that held harm must be shown.*  
2 *[Those states are: Alabama, Connecticut, Florida, Hawaii, Massachusetts, New Jersey, and*  
3 *Washington.]*  
4

5 **Reporter's Notes (on multiple topics concerning Section 9)**

6 **Meaning of custody.** Regarding the second alternative for subsection (a) and the phrase  
7 "in the custody of a parent," under our current draft, "'custody' means physical custody,  
8 legal custody, or both." See Section 2(5).  
9

10 **Time periods.** Regarding the time periods of subsection (c)(1), any specific time period  
11 is somewhat artificial, and a fixed six-month period won't deal with a case in which a  
12 non-parent (e.g., a grandparent) cared for a child from or near birth until the child is five  
13 months old.)  
14

15 **Same standards for custody and visitation:** Some prior drafts contained separate  
16 subsections for custody and visitation. This draft does not since, at the October 2016  
17 Drafting Committee meeting, the committee seemed to favor applying the same standard  
18 (or very similar standard) for both custody and visitation.  
19

20 **"Significant detriment":** The phrase of "[significant] detriment to the child" is based, in  
21 part, on Ariz. Rev. Stat. § 25-409(a)(2) (2016), which lists as a basis for placement of a  
22 child with a third party establishing that "It would be significantly detrimental to the child  
23 to remain or be placed in the care of either legal parent . . . ."  
24

25 **Clear and convincing evidence.** If the committee decides to use clear and convincing  
26 evidence, the committee also needs to decide if that burden applies to all elements of  
27 proof, or just some elements of proof. It also is possible (although not recommended) to  
28 have the burden of proof vary with relief sought – e.g., clear and convincing evidence to  
29 obtain custody and preponderance of the evidence to obtain visitation. I have prepared a  
30 separate memo that describes how clear and convincing evidence is used in non-parental  
31 visitation statutes.  
32

33 **Flexibility of standard – including desires to make it easier for grandparents to**  
34 **obtain visitation.** During the First Reading in July 2016, some commissioners expressed  
35 hope that the standards for grandparent visitation could be more flexible, including  
36 allowing for visitation when the grandparents had not been given an opportunity by the  
37 parents to have a substantial relationship with the child. We can discuss that issue more,  
38 but I believe under *Troxel*, there are limits about how far we can go, particularly given  
39 the need to presume the parent's decision is correct and the Court's statement that "so  
40 long as a parent adequately cares for his or her children (i.e., is fit), there will normally be  
41 no reason for the State to inject itself into the private realm of the family to further  
42 question the ability of that parent to make the best decisions concerning the rearing of  
43 that parent's children." 530 U.S. at 68-69. Similarly, in *Dorr v. Woodard*, 2016 ME 79,  
44 140 A.3d 467 (Maine 2016), the Supreme Judicial Court of Maine affirmed dismissed a  
45 paternal grandmother's petition for visitation with her two-year-old granddaughter

1 following death of the father. The court stated: “[D]espite the benefits to a child that  
2 could accompany a healthy and loving relationship with the child’s grandparents, it will  
3 be difficult for a grandparent to demonstrate a compelling state interest sufficient to  
4 infringe on a fit parent’s fundamental right when there is no threat of harm to the child.  
5 Such an intrusion in the context of a petition for court-ordered grandparent visitation will  
6 be court-enforced only when the grandparent demonstrates ‘urgent reasons’ for the  
7 intrusion.” 140 A.3d at 472 (citation omitted).  
8

9 **Number of persons who may have rights of custody and visitation.** The comment to  
10 this section states: “This act does not set a maximum number of persons who may obtain  
11 rights of custody or visitation. In most cases, the number of actively involved parental  
12 figures (or persons granted custody or visitation) will not be large. As courts sort through  
13 complex family structures, the number of persons acting in a parental role is a factor that  
14 should be considered -- but without applying a fixed rule about how many parental  
15 figures with rights to time with the child is too many. The focus needs to remain on the  
16 best interests of the child.”  
17

18 **Comment** *(will be revised slights based on what alternative to the title is chosen)*

19 This section governs requests for custody or visitation by a non-parent when the child is  
20 in the custody of a parent. Section 2(8) defines “non-parent” as “an individual other than a  
21 parent.” The most common non-parents seeking custody and visitation are a child’s  
22 grandparents, great-grandparents, step-parents, and siblings, although the definition allows others  
23 to seek custody or visitation if the requirements of the act are met.  
24

25 The statutes of many states specify the circumstances in which visitation may be sought –  
26 circumstances which often involve some disruption of the family – e.g., divorce, separation,  
27 death of a parent, or a child born outside of marriage. The categories of persons who may seek  
28 visitation and the broad description of circumstances in which visitation may be sought do not,  
29 by themselves, provide a reliable indicator of whether non-parental visitation (or custody) should  
30 be allowed. It is preferable to focus on the factors used to decide visitation or custody,  
31 particularly the closeness of the relationship between the child and the non-parent.  
32

33 The presumption and burden of proof in this section recognize the superior right of  
34 parents to custody of their children in custody disputes with non-parents, and also provide that  
35 the superior right or presumption can be overcome. The standard is similar to Pa. Stat. Ann. tit.  
36 23, § 5327(b) (2015).  
37

38 As stated in Black’s Law Dictionary, “The Burden of proof includes both the burden of  
39 persuasion and the burden of production.” Black’s Law Dictionary (7<sup>th</sup> ed. 1999).  
40

41 The presumption and burden of proof is designed to meet the requirements of *Troxel v.*  
42 *Granville*, 530 U.S. 57 (2000), in which the Supreme Court struck down Washington State’s  
43 third party visitation statute as applied. Justice O’Connor, in a plurality decision, said the  
44 Washington statute “contains no requirement that a court accord the parent’s decision any  
45 presumption of validity or any weight whatsoever.” *Id.* at 67. “The Superior Court’s order was

1 not founded on any special factors that might justify the State’s interference with Granville’s  
2 fundamental right to make decisions concerning the rearing of her two daughters.” *Id.* at 68.

3  
4 The Supreme Court in *Troxel* did not rule on the issue of whether the constitution  
5 requires a showing of harm or potential harm. In her plurality opinion, Justice O’Connor said:

6  
7 Because we rest our decision on the sweeping breadth of [Washington Code] §  
8 26.10.160(3) and the application of that broad, unlimited power in this case, we  
9 do not consider the primary constitutional question passed on by the Washington  
10 Supreme Court—whether the Due Process Clause requires all nonparental  
11 visitation statutes to include a showing of harm or potential harm to the child as a  
12 condition precedent to granting visitation. We do not, and need not, define today  
13 the precise scope of the parental due process right in the visitation context. In this  
14 respect, we agree with Justice KENNEDY that the constitutionality of any  
15 standard for awarding visitation turns on the specific manner in which that  
16 standard is applied and that the constitutional protections in this area are best  
17 “elaborated with care.” *Post*, at 2079 (dissenting opinion). Because much state-  
18 court adjudication in this context occurs on a case-by-case basis, we would be  
19 hesitant to hold that specific nonparental visitation statutes violate the Due  
20 Process Clause as a *per se* matter.

21  
22 530 U.S. at 73.

23  
24 Subsection (c) allows a non-parent to obtain custody or visitation if the non-parent has  
25 acted in a parental role for the child and the court finds that the non-parent has met five elements  
26 of proof. The elements include a bonded and dependent relationship with the child and  
27 consistent caretaking of the child, but do not require a showing of detriment to the child if  
28 custody or visitation is not granted.

29  
30 The description of such a non-parent is based on the definition of “de facto parent” in  
31 Maine Rev. Stat. tit. 19-A, § 1891 (2015), and is also similar to the definition of “de facto  
32 parent” in Delaware -- 13 Del. Code § 8-201(c) (2015). The Non-Parental Child Custody and  
33 Visitation Act, however, does not use the term “de facto parent.”

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

- 39  
40 (1) the natural or legal parent consented to and fostered the parent-like relationship,  
41 (2) the petitioner and the child lived together in the same household,  
42 (3) the petitioner assumed obligations of parenthood without expectation of financial  
43 compensation, and  
44 (4) the petitioner has been in a parental role for a length of time sufficient to have  
45 established with the child a bonded, dependent relationship, parental in nature.  
46



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

2  
3 The American Law Institute Principles of the Law of Family Dissolution § 2.03(1)(c)  
4 (2002) defines a de facto parent as “an individual other than a legal parent or a parent by estoppel  
5 who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for  
6 reasons primarily other than financial compensation, and with the agreement of a legal parent to  
7 form a parent-child relationship, or as a result of a complete failure or inability of any legal  
8 parent to perform caretaking functions, (A) regularly performed a majority of the caretaking  
9 functions for the child, or (B) regularly performed a share of caretaking functions at least as great  
10 as that of the parent with whom the child primarily lived.”

11  
12 Some of the phrasing in subsection (c) also is drawn from the American Law Institute’s  
13 Principles of the Law of Family Dissolution, § 2.03(1)(b) (2002). That section provides, as one  
14 of the alternative definitions of “parent by estoppel:” “an individual who, though not a legal  
15 parent, . . . (iii) lived with the child since the child’s birth, holding out and accepting full and  
16 permanent responsibilities as parent, as part of a prior co-parenting agreement with the child’s  
17 legal parent (or, if there are two legal parents, both parents) to raise a child together each with  
18 full parental rights and responsibilities, when the court finds that recognition of the individual as  
19 a parent is in the child’s best interests.”

20  
21 Some states set specific time periods that the child needs to have lived with a person  
22 before that person may obtain custody as a de facto custodian – e.g., six months or more if the  
23 child is under three years old, and one year or more if the child is three years of age or older.  
24 See, e.g., Ky. Rev. Stat. 403.270 (2012); S.C. Code § 63-15-60 (2012). In addition, at least  
25 eleven states allow a non-parent to seek visitation if the child has lived with a person for a certain  
26 period of time, such as six or 12 months.

27  
28 Subsection (d) allows non-parents other than those described in subsection (c) to obtain  
29 custody or visitation if they can show: (1) a substantial relationship with the child; (2) detriment  
30 to the child if relief is not granted; and (3) the relief requested is in the best interests of the child.  
31 Subsection (d) could be used by grandparents, siblings or others who have a very close  
32 relationship with the child, but may not have acted in a parental role.

33  
34 The showing of best interests required in this section is relevant not only to whether  
35 custody or visitation should be granted to a non-parent, but also to the amount of time the child  
36 should be with the non-parent.

37  
38 In the years since *Troxel* was decided, state courts have generally held that a  
39 grandparent’s claim that the grandparent has a positive relationship with the grandchild is not  
40 sufficient to justify an order of visitation over the objection of a parent. See, e.g., *Dorr v.*  
41 *Woodard*, 2016 ME 79, 140 A.3d 467 (Maine 2016); *Neal v. Lee*, 2000 Ok 90, 14 P.3d 547  
42 (2000); *State Dept. of Social and Rehabilitative Services v. Paillet*, 16 P.3d 962 (2001); *Flynn v.*  
43 *Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if the grandparent has a  
44 substantial relationship with the grandchild – such as raising the child for a few years – that can  
45 be the basis for granting visitation to the grandparent over the parents’ objection. See, e.g.,  
46 *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents had helped raise their

1 grandchildren for the first seven years of the oldest grandchild's life and for lesser periods for the  
2 younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007) (grandparents cared  
3 for children while the mother was dying of cancer).

4  
5 This act does not set a maximum number of persons who may obtain rights of custody or  
6 visitation. In most cases, the number of actively involved parental figures (or persons granted  
7 custody or visitation) will not be large. As courts sort through complex family structures, the  
8 number of persons acting in a parental role is a factor that should be considered -- but without  
9 applying a fixed rule about how many parental figures with rights to time with the child is too  
10 many. The focus needs to remain on the best interests of the child.

11  
12 **SECTION 10. PRESUMPTION REGARDING DOMESTIC VIOLENCE, CHILD**  
13 **ABUSE, SEXUAL ASSAULT, OR STALKING.**

14 (a) Under this [act], it is presumed that it is not in the best interests of a child to grant  
15 custody or visitation of a child to a non-parent if the non-parent, or an individual residing with  
16 the non-parent, has committed any of the following conduct against the other parent of the child,  
17 the child, siblings of the child, custodial guardian [, a member of the previous family of the non-  
18 parent, or an individual residing with the non-parent of the child]:

19 (1) domestic violence;

20 (2) child abuse;

21 (3) child neglect

22 (4) sexual assault; or

23 (5) stalking.

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

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

29 (1) a criminal charge regarding the conduct is still pending before a [trial] court of

1 this state or another jurisdiction; or

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

#### 4 **Reporter's Note**

5  
6 **Final adjudication / charge still pending.** Subparagraph (c) deals with the issue  
7 of “final adjudication” that we discussed at the October Drafting Committee meeting.  
8 [The new phrasing regarding a charge still pending is at the suggestion of our style  
9 liaison.] Our main goal at the October 2016 Drafting Committee meeting was to not have  
10 an adverse presumption regarding domestic violence arise from a temporary order,  
11 including orders that may have been issued on an ex parte basis. Our style liaison asks,  
12 “Does ‘pending’ or ‘final adjudication’ include any decision on appeal that could take  
13 many years to resolve?”  
14

15 **Drug offenses.** At the First Reading, when we were discussing the presumptions  
16 pertaining to domestic violence, a question was raised of whether a conviction of a drug  
17 offense by an individual seeking custody or visitation [or by an individual residing with  
18 the petitioner] should give rise to a presumption against the person seeking custody or  
19 visitation. My inclination is to not use such a presumption. The negative impact of a  
20 drug offense on a child by a potential custodian or visitor, etc., would vary significantly  
21 with the severity of the offense and how recently the offense occurred. In addition, under  
22 Section 11(7) of this act, a court is directed to consider: “the mental and physical health  
23 of the child and parties to the proceeding, including alcohol abuse and drug abuse by the  
24 child or parties to the proceeding; provided, however that the mental and physical health  
25 of the parties shall not be considered unless those factors relate to harm caused to the  
26 child.” Most states do not apply presumptions in custody proceeding regarding abuse of  
27 drugs or alcohol, although Arizona does apply a rebuttable presumption against sole or  
28 joint decision-making for a parent who has abused drugs or alcohol or been convicted of  
29 enumerated offenses within 12 months of when the petition is filed. Ariz. Rev. Stat. §  
30 25-403.04 (2016).  
31

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

#### 36 **Comment**

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

1 entered on an ex parte basis -- would not be considered a final adjudication for the purpose of  
2 applying a presumption against granting custody or visitation to a non-parent.  
3

4 **SECTION 11. BEST INTERESTS OF CHILD.** If a non-parent of a child establishes  
5 that a substantial relationship exists between the child and the non-parent and denial of custody  
6 of or visitation with the child to the non-parent is a detriment to the child, the court shall consider  
7 the following to determine the best interests of the child and whether to grant the petition for  
8 custody or visitation to a non-parent:

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

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

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

17 (4) the views of the child, considering the age and maturity of the child;

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

22 (A) the non-parent has engaged in domestic violence, child abuse, sexual assault,  
23 or stalking against the parent, child, siblings of the child, custodial guardian [, a member of the  
24 previous family of the non-parent, or an individual residing with the non-parent of the child; and

25 (B) a continuing relationship with the non-parent will affect negatively the health

1 or safety of the parent, child, child's siblings, or custodial guardian;

2 (6) the adjustment of the child to the current and proposed home, school, and community  
3 of the child;

4 (7) the mental and physical health of the child and parties to the proceeding, including  
5 alcohol and substance abuse by the child or parties; however, the mental and physical health of  
6 the parties may not be considered unless harm to the child was caused;

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

10 (A) a party; or

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

13 (9) the reason for the position of the parties in the proceeding under this [act] regarding  
14 custody or visitation of the child;

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

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

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

## 20 **Comment**

21 The non-parental visitation statutes of most states, as they existed in 2017, list factors a  
22 court should consider (other than best interests of the child). This section reflects the main  
23 factors that have been used by the states. Under this act, the factors are considered after it is  
24 established that a substantial relationship exists between the child and the non-parent and that  
25 denial of custody or visitation to the non-parent is a detriment to the child.  
26

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.

**SECTION 12. PETITION TO MODIFY CUSTODY OR VISITATION.** If a petition is filed to modify an order for custody or visitation entered under this [act], the court shall 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

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 ORDER.**

(a) On motion of a party or motion of the court, [and after opportunity for hearing], the court may issue a temporary order. Sections 1 through 11 and 14 through 23 apply to temporary orders issued under this [section].

(b) A temporary order issued under this section has no presumptive effect and is not determinative when the court considers a petition for 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:** At the October 2016 Drafting Committee meeting, the committee seemed inclined to remove the phrase “and after opportunity for hearing” from subsection (a) – 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

1 issue final orders? (I do not think so. I believe the provisions of Section 9 regarding the  
2 court's power to grant petitions for custody or visitation carry the strong implication that  
3 final orders can be issued.)  
4

#### 5 **Comment**

6

7 This section makes explicit that the court has the power to enter temporary, as well as  
8 final orders. Other provisions of the act -- including the requirements for pleadings, burden of  
9 proof, presumptions, and factors considered -- apply to the issuance of temporary orders in  
10 addition to final orders.  
11

12 Subsection (b) is similar to Va. Code Ann. § 20-103(E) (West 2015), which provides:  
13 "An order entered pursuant to this section shall have no presumptive effect and shall not be  
14 determinative when adjudicating the underlying cause."  
15

#### 16 **SECTION 14. ADOPTION OF CHILD BY CERTAIN INDIVIDUALS.**

17 (a) If a child is adopted by a relative, stepparent, or cohabitant of a parent to the child, a  
18 current order issued under this [act] of custody or visitation to a non-parent is not changed by the  
19 adoption.  
20

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

#### 23 **Comment**

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

29 **SECTION 15. COST OF FACILITATING VISITATION.** In a proceeding under  
30 this [act], a court may order a non-parent granted visitation to pay the cost of facilitating  
31 visitation with the child, including the cost of transportation.  
32

#### 33 **Comment**

34 Individuals who receive visitation under this act may, in the court's discretion, be  
35 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 non-parent to pay child support is  
governed by law other than this act.

1           **SECTION 16. AUTHORITY OF NON-PARENT TO SEEK SUPPORT FOR**

2   **CHILD.** The authority of a non-parent given custody of a child under this [act] to petition for  
3   and receive support of the child is governed by law other than this [act].

4                                   **Comment**  
5

6           A non-parent granted custody of a child may wish to obtain child support from a parent  
7   or apply for benefits from government or private programs to help a child. The non-parents right  
8   to seek support or apply for benefits is governed by law other than this act. Section 208(b) of the  
9   Revised Uniform Guardianship and Protective Proceedings Act (2017) contains a similar  
10   provisions. That section provides: “A guardian may: (1) apply for and receive money for the  
11   support of the protected minor otherwise payable to the protected minor’s parent, guardian, or  
12   custodian under the terms of any statutory system of benefits or insurance or any private  
13   contract, devise, trust, conservatorship, or custodianship.”  
14

15           **SECTION 17. ATTORNEY FEES AND COSTS.** In a proceeding under this [act], the  
16   court may allocate and order payment of attorney fees, including interim fees, and costs among  
17   the parties to a proceeding, except that a parent may not be ordered to pay the fees and costs of  
18   another party unless the parent’s asserted a position in the proceeding without merit.

19                                   **Comment**

20           Litigating issues of non-parental custody and visitation can be financially burdensome,  
21   including to the parent. This section gives the court discretion to order payment of attorney fees  
22   and costs. An award of such fees may deter non-meritorious cases.  
23

24           **Reporter’s Note:** A commissioner commented that the standard regarding attorney fees  
25   is unusual and that, from his view, a more discretionary standard for awarding attorney  
26   fees may be preferable.  
27

28           **[SECTION 18. FINDINGS OF FACT AND CONCLUSIONS OF LAW.** When  
29   making a decision under this [act], the court shall make findings of fact and conclusions of law  
30   on the record in support of its decision.]

31   ***Legislative Note:** This section should be omitted in a state where requirement or lack of*  
32   *requirement of making findings of fact is governed by court rule rather than by statute and in a*  
33   *state that requires findings of fact and conclusions of law cases involving family law.*  
34



1 **Comment**

2 Requiring findings of fact has several benefits. The fact-finding process structures the  
3 court's review so that the court is less likely to overlook important facts or apply bias in reaching  
4 its decision. Careful fact-finding by the trial court also facilitates appellate review and may  
5 assist the parties in accepting the decision. At least twenty states and the District of Columbia  
6 require the trial court to make findings of fact in custody cases. See Jeff Atkinson, *Modern Child*  
7 *Custody Practice - Second Edition*, § 12-45 (LexisNexis 2015).  
8

9 **SECTION 19. OTHER RIGHT AND REMEDY.** A right and remedy under this [act]  
10 is not exclusive and does not preclude an additional right and remedy under law of this state  
11 other than this [act] [, including the Uniform Deployed Parents Custody and Visitation Act [or  
12 other state law dealing with custody of and visitation with children of deployed parents]].

13 **Reporter's Note:** Our liaison, Deborah Behr, suggests that the reference to "the  
14 Uniform Deployed Parents Custody and Visitation Act [or other state law dealing with  
15 custody of and visitation with children of deployed parents]" be moved to the Comment.  
16 I think the reference is important enough – and the issue will arise often enough – that the  
17 reference should stay in the text.  
18

19 David Biklen urges more clarity regarding what other rights and remedies we are  
20 referring to. I agree that we need more clarity in text or in Comment. For example, if  
21 this act does not deal with the rights of de facto parents, we could consider placing in this  
22 section a provision that the act does not preclude rights and remedies pertaining to de  
23 facto parents.  
24

25 Two points of comparison for the language of this section: Section 5 of the Uniform  
26 Premarital and Marital Agreement Act (2012) provides: "Principles of Law and Equity:"  
27 "Unless displaced by a provision of this [act], principles of law and equity supplement  
28 this [act]." D.C. Code § 16-831.13 (2017) is entitled "Other actions for custody not  
29 abolished, diminished, or preempted." It provides: "Nothing in this chapter shall be  
30 construed to limit the ability of any person to seek custody of a child under any other  
31 statutory, common law, or equitable cause of action or to preempt any authority of the  
32 court to hear and adjudicate custody claims under the court's common law or equitable  
33 jurisdiction."  
34

35 To facilitate discussion of the issue of "Other Right and Remedy" and of "Repeals," I  
36 will summarize what I believe we are trying to do.  
37

38 Upon enactment of this act, states **would repeal:**

- 39 ■ existing (general) state statutes regarding visitation for grandparents,  
40 stepparents, siblings, and other non-parents;  
41

- statutes, if any, regarding custody disputes between a non-parent and a parent

#### States **would not repeal**

- the Uniform Deployed Parents Custody and Visitation Act or other state law dealing with custody of and visitation with children of deployed parents
- state laws regarding guardianship of a minor
- laws governing custody of children in disputes between two or more non-parents (as opposed to between a parent and a non-parent) (Thus, a dispute over custody of a child following the death or incapacity of both parents will be governed by other law – unless we choose to change the scope of the act)
- state laws regarding a child in custody of the state, including children in foster care
- existing special protections for de facto parents. (Such protections may be in parentage statutes, family law statutes, and case law. The current draft of the act does not use the term “de facto parent,” although Section 9(c) gives added rights to individuals who have acted in a role similar to that of a 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. [Citations will be inserted to Family Law cases in which courts denied equitable or common law relief because a statute granted rights to certain categories of individuals, but not other categories of individuals.]

**SECTION 20. 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 21. 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

1 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize  
2 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.  
3 Section 7003(b).

4 **SECTION 22. TRANSITIONAL PROVISION.** This [act] applies to an action  
5 pending and a proceeding commenced before effective date of this [act] with respect to an issue  
6 on custody or visitation of a non-parent of a child on which a judgment has not been issued.

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

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

12 (a) . . . .

13 (b) . . . .

14 (c) . . . .

15 **Reporter’s Note:** After we discuss Section 19 regarding “Other Right and  
16 Remedy” and the related issue of “Repeals,” I plan to draft a Legislative Note to  
17 this section giving guidance on what should and should not be repealed.  
18

19 **SECTION 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.”