

D R A F T  
FOR DISCUSSION ONLY

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

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAW

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April 28 – May 1, 2016 Committee on Style Meeting

*With Prefatory Note and Comments*

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April 19, 2016

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

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## PREFATORY NOTE

*[This is a partial draft of the Prefatory Note. The reporter will update commentary and data as the project proceeds.]*

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

Continuation of a relationship between a child and a non-parent can be an important – and even vital – interest, both for the child and the non-parent. When deciding whether to grant relief to a non-parent, courts must, of course, consider the rights of parents. The U.S. Supreme Court has recognized a right of a fit parent to make decisions regarding the rearing of his or her child. *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000). In *Troxel*, the Court struck down Washington State’s grandparent visitation 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 Supreme Court also stated the trial court’s “order was not founded on any special factors that might justify the State’s interference with [the mother’s] fundamental right to make decisions concerning the rearing of her two daughters.” *Id.* at 68.

Justice Connor observed in her plurality option 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 2012, the Census Bureau reported that there were 73,817,000 children in United States under age 18. Of that number, the breakdown for the children’s living arrangements was:

- Living with both parents: 50,267,000
- Living with mother only: 17,991,000
- Living with father only: 2,924,000
- Living with neither parent: 2,634,000
- Of the children living with neither parent, 1,494,000 were living with grandparents.

U.S. Census Bureau, America’s Families and Living Arrangements: 2012, Table C2, Household Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2012 available at <http://www.census.gov/hhes/families/data/cps2012.html>.

1 Key features of this act are:  
2

- 3 • a right to seek custody or visitation for three categories of persons: (1) de facto parents,  
4 (2) persons who entered into an agreement with a parent before birth of a child to raise a  
5 child together, and (3) non-parents who have a substantial relationship with the child and  
6 who demonstrate that denial or custody or 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 rebuttable presumption that the parent or de facto parent's decision about custody or  
10 visitation is in the best interests of the child;
- 11 • a burden of proof on the petitioner of clear and convincing evidence;
- 12 • protections for victims of domestic violence;
- 13 • a list of factors to guide the court's decision;
- 14 • a provision that a petitioner granted visitation may be ordered to pay the cost of  
15 facilitating visitation, including the cost of transportation; and
- 16 • a provision that the act does not apply to children who are the subject of proceedings for  
17 guardianship, abuse, neglect, or dependency.  
18

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

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

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

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

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

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

10          (4) “De facto parent” means an individual who is not a legal parent under another state  
11 statute or in equity who within the last two years, has undertaken permanent, unequivocal,  
12 committed parental responsibility in the child’s life. Such a finding requires a determination by  
13 the court that:

14               (A) the individual has resided with the child for a sufficient period of time to form  
15 a bonded and dependent relationship with the child;

16               (B) the individual has engaged in consistent caretaking of the child;

17               (C) the relationship between the individual and the child was supported by  
18 another parent of the child, and the individual and the other parent have accepted that  
19 relationship or behaved as though the individual is a parent of the child; provided however that if  
20 a parent has completely failed to exercise parental responsibility, the support of the parent who  
21 failed to exercise parental responsibility is not required;

22               (D) the individual has accepted parental responsibility without expectation of  
23 financial compensation; and

(E) the continuing relationship between the individual and the child is in the best interests of the child.

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

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

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

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

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

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

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

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

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

(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 law of this state other than this [act]].

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

### Comment

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

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

The definition of “de facto parent” is based on Maine Rev. Stat. tit. 19-A, § 1891 (2015), which also is similar to the definition in Delaware -- 13 Del. Code § 8-201(c) (2015). The Delaware definition includes the element that the person seeking status as a de facto parent “has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.” Some states set specific time periods before a person may obtain custody as a de facto custodian – e.g., six months or more if the child is under three years old, and one year or more if the child is three years of age or older. See, e.g., Ky. Rev. Stat. 403.270 (2012); S.C. Code § 63-15-60 (2012). At least eleven states allow a non-parent to seek visitation if the child has lived with a person for a certain period of time, such as six or 12 months.

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

- (1) the natural or legal parent consented to and fostered the parent-like relationship,
- (2) the petitioner and the child lived together in the same household,

- 1 (3) the petitioner assumed obligations of parenthood without expectation of financial  
2 compensation, and  
3 (4) the petitioner has been in a parental role for a length of time sufficient to have  
4 established with the child a bonded, dependent relationship, parental in nature.  
5

6 *Id.* at 176 (citations omitted).  
7

8 The American Law Institute Principles of the Law of Family Dissolution § 2.03(1)(c)  
9 (2002) defines a de facto parent as “an individual other than a legal parent or a parent by estoppel  
10 who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for  
11 reasons primarily other than financial compensation, and with the agreement of a legal parent to  
12 form a parent-child relationship, or as a result of a complete failure or inability of any legal  
13 parent to perform caretaking functions, (A) regularly performed a majority of the caretaking  
14 functions for the child, or (B) regularly performed a share of caretaking functions at least as great  
15 as that of the parent with whom the child primarily lived.”  
16

17 Some of the phrasing in the definition of “de facto parent” also is drawn from the  
18 American Law Institute’s Principles of the Law of Family Dissolution, § 2.03(1)(b) (2002). That  
19 section provides, as one of the alternative definitions of “parent by estoppel”: “an individual  
20 who, though not a legal parent, . . . (iii) lived with the child since the child’s birth, holding out  
21 and accepting full and permanent responsibilities as parent, as part of a prior co-parenting  
22 agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a  
23 child together each with full parental rights and responsibilities, when the court finds that  
24 recognition of the individual as a parent is in the child’s best interests.”  
25

26 The definition of “detriment to the child” is based on Cal. Fam. Code § 3041(c) (2016) (a  
27 section entitled “Custody award to nonparent; findings of court; hearing”). That section  
28 provides: “As used in this section, ‘detriment to the child’ includes the harm of removal from a  
29 stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his  
30 or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for  
31 care and affection, and who has assumed that role for a substantial period of time. A finding of  
32 detriment does not require any finding of unfitness of the parents.”  
33

34 The definitions of “electronic” and “record” are the definitions provided by the Uniform  
35 Law Commission “Drafting Rules,” Rule 304 (2012).  
36

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

1 travel are not included since persons with custody, as well as persons with visitation, generally  
2 have a right to travel with the children, including on vacation. A person with “legal custody,”  
3 however, generally would determine if the child were to travel on his own her own, such as for  
4 an educational or athletic program.

5  
6 The definition of “non-parent” is “an individual other than a parent.” The term includes,  
7 but is not limited to, a child’s grandparents, great-grandparents, step-parents, and siblings. Other  
8 persons could obtain relief under the act provided they meet the requirements of the act  
9 (including clear and convincing evidence of substantial relationship with the child and detriment  
10 to the child if custody or visitation was not granted).

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

20  
21 The definition of “parental responsibility” is based, in part, on Del. Code Ann. tit. 13, §  
22 1101(10) (2016), which provides: “‘Parental responsibilities’ means the care, support and control  
23 of the child in a manner that provides for the child’s necessary physical needs, including  
24 adequate food, clothing and shelter, and that also provides for the mental and emotional health  
25 and development of such child.” Payment for the child’s food, clothing, shelter, and other  
26 physical needs is not enough, by itself, to constitute exercise of parental responsibility.

27  
28 The definition of “parenting time” is made with reference to law of the state other than  
29 this act. The term is a comparatively modern term designed to supplement or replace the terms  
30 “custody” and “visitation,” particularly in disputes between parents. The term is used to focus  
31 on parenting of the child and allocation of time with the child rather than which parent has  
32 “custody.” The Illinois definition of “parenting time” is: “the time during which a parent is  
33 responsible for exercising caretaking functions and non-significant decision-making  
34 responsibilities with respect to the child.” 750 Ill. Comp. Stat. 5/600(e) (2016).

35  
36 **SECTION 3. JURISDICTION.** Only a court that has jurisdiction under [cite to this  
37 state’s Uniform Child Custody Jurisdiction and Enforcement Act] may determine custody or  
38 visitation under this act.

### 39 **Comment**

40 The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has  
41 been adopted in 49 states. As of February 2016, Massachusetts is the only state that has not  
42 adopted the UCCJEA, although Massachusetts did adopt the Uniform Child Custody Jurisdiction

1 Act (UCCJA). The Uniform Law Commission has promulgated a 2013 version of the UCCJEA  
2 (to cover international issues as well as domestic issues). As of February 2016, the 2013  
3 UCCJEA has not been adopted in any states.

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

8  
9 Jurisdiction over Native American children is governed by the Indian Child Welfare Act,  
10 25 U.S.C. §§ 1901 et seq. (2015).

11  
12 **SECTION 4. INDIVIDUALS WHO MAY FILE A PETITION.** An individual may  
13 file a petition if the individual claims that:

14 (a) he or she is a de facto parent;

15 (b) a substantial relationship exists between the child and the individual, and the denial of  
16 custody or visitation to the individual would be a detriment to the child; or

17 (c) before the child's birth, the individual entered into an agreement in a record or orally  
18 with each parent of the child to accept full and permanent parental responsibility and to raise the  
19 child together, except that if a parent has completely failed to exercise parental responsibility, the  
20 consent of the parent who failed to exercise parental responsibility is not required.

21 **Legislative Note:** Courts in approximately seven states have held that, as a matter of state or  
22 federal constitutional law, harm to the child without granting visitation must be shown before  
23 visitation is granted to a non-parent. See *Weldon v. Ballow*, No. 2140471, \_\_\_ So.3d \_\_\_, 2015  
24 WL 6618983, at 15 (Ala. Civ. App. Oct. 30, 2015), cert. denied sub nom. *Ex parte Strange*, No.  
25 1150152, 2016 WL 281069 (Ala. Jan. 22, 2016); *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d  
26 453 (2002); *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d  
27 1067 (Haw. 2007); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1060 (2002); *Moriarty v. Bradt*,  
28 177 N.J. 84, 827 A.2d 203 (2003); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405  
29 (2005). In those states, legislative drafters may wish to substitute the word "harm" for  
30 "detriment" in subsection (b).

#### 31 32 **Comment**

33 The designation of individuals who may file a petitions serves to protect the interests of  
34 parents and filter out cases in which the petitioner does not have a meritorious claim, while at the  
35 same time allowing the opportunity to preserve relationships between children and individuals  
36 other than parents with whom children have a particularly close relationship. The bases for

standing correspond to the individuals who may file petitions under Section 6 – 9.

## **SECTION 5. PLEADINGS.**

(a) In all pleadings under this act requesting custody or visitation, the petition shall be verified and specify the facts on which the request is based. The facts must include:

(1) the nature the relationship between the petitioner and the child;

(2) if applicable, the nature of any agreement between the parties regarding care for the child and contact with the child;

(3) attempts to obtain visitation or other contact with the child;

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

(5) reasons why a continuing relationship between the petitioner and the child is in the best interests of the child.

(b) In pleadings in which a petitioner requests adjudication that the petitioner is a de facto parent, the petition also shall describe:

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

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

(3) the degree to which the relationship between the petitioner and the child was supported by another parent or parents of the child, and the degree to which the petitioner and the other parent or parents have accepted that relationship or behaved as though the individual is a parent of the child; and

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

(c) In pleadings in which a petitioner who is not a de facto parent requests custody or

1 visitation, the petition also shall describe why denial of custody or visitation to the petitioner  
2 would be a detriment to the child.

3 (d) In pleadings in which a petitioner claims that the petitioner entered into an agreement  
4 with each parent of the child to accept full and permanent parental responsibility and to raise the  
5 child together, the petition also shall state:

6 (1) the date of the agreement;

7 (2) the manner in which the agreement was made (by writing, oral statement, or  
8 other means).

### 9 **Comment**

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

17  
18 Among the facts required in the pleading is the information required by Section 209 of  
19 the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) – a section entitled  
20 "Information to be Submitted to the Court." The section provides:

21  
22 "(a) [Subject to [local law providing for the confidentiality of procedures,  
23 addresses, and other identifying information], in] [In] a child-custody proceeding, each  
24 party, in its first pleading or in an attached affidavit, shall give information, if reasonably  
25 ascertainable, under oath as to the child's present address or whereabouts, the places  
26 where the child has lived during the last five years, and the names and present addresses  
27 of the persons with whom the child has lived during that period. The pleading or affidavit  
28 must state whether the party:

29  
30 (1) has participated, as a party or witness or in any other capacity, in any other  
31 proceeding concerning the custody of or visitation with the child and, if so,  
32 identify the court, the case number, and the date of the child-custody  
33 determination, if any;

34  
35 (2) knows of any proceeding that could affect the current proceeding, including  
36 proceedings for enforcement and proceedings relating to domestic violence,  
37 protective orders, termination of parental rights, and adoptions and, if so, identify

1 the court, the case number, and the nature of the proceeding; and

2  
3 (3) knows the names and addresses of any person not a party to the proceeding  
4 who has physical custody of the child or claims rights of legal custody or physical  
5 custody of, or visitation with, the child and, if so, the names and addresses of  
6 those persons.

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

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

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

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

27  
28 **SECTION 6. INITIAL PETITION BY DE FACTO PARENT.**

29 (a) The court shall adjudicate an individual to be a de facto parent if the court finds by  
30 clear and convincing evidence that the petitioner is a de facto parent.

31 (b) An individual adjudicated to be a de facto parent has the same right to custody,  
32 visitation, or parenting time as a parent, as those rights are provided under law of this state other  
33 than this act.

34 **Comment**

35 “De facto parent” is defined in the definition section of this act [Section 2(4)]. As noted  
36 in the Comment to that section, a trend in the law is to grant rights by statute or case law to de  
37 facto parents to seek custody or visitation. States which provide that de facto parents (or persons  
38 who stood in loco parentis to the child) have standing to seek custody or visitation include: AZ,  
39 CT, DE, HA, IN, KY, MN, MT, PA, WA. A related concept is an individual may seek visitation

(or custody) if the child has been residing with the individual for a certain period of time – e.g., CA, MI, NV, WI.

The right of de facto parents to seek custody or visitation applies to couples of the same sex or different sex, even though only one of the parties is related to the child by genetics, adoption, or other bases for parenthood recognized by the state.

In this section (as well as in Sections 7, 8, and 9) the standards for being able to obtain custody or visitation are the same within each section.

## **SECTION 7. INITIAL PETITION BY AN INDIVIDUAL WHO ENTERED INTO AN AGREEMENT TO ACCEPT FULL AND PERMANENT PARENTAL RESPONSIBILITY.**

(a) This section applies to an individual who is not a legal parent under another state statute or in equity and who alleges he or she entered into an agreement before the child's birth to accept full and permanent parental responsibility and to raise the child together.

(b) If the child has more than more than one parent, agreement of each parent is necessary, except that if a parent has completely failed to exercise parental responsibility, the agreement of that parent is not required.

(c) If a court determines by clear and convincing that an individual entered into a agreement under this section, in a record or orally, that individual has the same right to custody, visitation, or parenting time as a parent, as those rights are provided under law of this state other than this act.

### **Comment**

This section provides that an individual who has entered into an agreement with the parent "to accept full and permanent parental responsibility and to raise the child together" "has the same right to custody, visitation, or parenting time as a parent." Agreements between parents regarding custody of children have been held to be of "constitutional magnitude" and entitled to presumptive enforcement. *In re Marriage of Coulter and Trinidad*, 2012 IL 113474, 364 Ill. Dec. 59, 976 N.E.2d 337, 342 (enforcing an agreement between parents regarding future relocation of the children). *See also Frazier v. Goudschaal*, 296 Kan. 730, 295 P.3d 542 (2013) (enforcing a coparenting agreement between members of a same-sex couple); *Fawzy v. Fawzy*,



1 199 N.J. 456, 973 A.2d 347, 350 (2009) (enforcing parents’ agreement to arbitrate a custody  
2 dispute).

3  
4 There is overlap as well as differences between this section and Section 6 (regarding de  
5 facto parents). The de facto parent section requires that the individual seeking status as a de  
6 facto parent “has undertaken permanent, unequivocal, committed parental responsibility in the  
7 child’s life” and requires that the court make five findings. Both sections require agreement or  
8 consent of the parents for the individual to obtain custody or visitation under the act (except  
9 consent of a parent is not necessary under this section if a parent has completely failed to  
10 exercise parental responsibility). The de facto parent section focuses the quality and duration of  
11 the individual’s relationship with the child. This section focuses on the existence of an  
12 agreement, and the agreement could be enforced soon after the child’s birth even if the child and  
13 individual have not had a long-term relationship.

14  
15 **SECTION 8. INITIAL PETITION BY NON-PARENT OF CHILD WHO IS NOT**  
16 **A DE FACTO PARENT WHEN CHILD IS IN CUSTODY OF PARENT OR DE FACTO**  
17 **PARENT.**

18 (a) This section applies to initial petitions for custody or visitation filed by a non-parent  
19 who is not a de facto parent when the child is in the custody of a parent or de facto parent.

20 (b) In a proceeding under subsection (a), a rebuttable presumption exists that the parent’s  
21 or de facto parent’s decision about custody and visitation is in the best interests of the child. To  
22 rebut the presumption, the non-parent must establish by clear and convincing evidence that:

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

24 (2) denial of custody or visitation to the non-parent is a detriment to the child, and

25 (3) custody or visitation to non-parent is the best interests of the child.

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

28 **Legislative Note:** Courts in approximately seven states have held that, as a matter of state or  
29 federal constitutional law, harm to the child without granting visitation must be shown before  
30 visitation is granted to a non-parent. See *Weldon v. Ballow*, No. 2140471, \_\_\_ So.3d \_\_\_, 2015  
31 WL 6618983, at 15 (Ala. Civ. App. Oct. 30, 2015), cert. denied sub nom. *Ex parte Strange*, No.  
32 1150152, 2016 WL 281069 (Ala. Jan. 22, 2016); *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d  
33 453 (2002); *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d

1067 (*Haw.* 2007); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1060 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005). In those states, legislative drafters may wish to substitute the word “harm” for “detriment” in subsection (b)(1).

## Comment

This section governs requests for custody or visitation by a non-parent when the child is in the custody of a parent or de facto parent. Section 2(9) defines “non-parent” as “an individual other than a parent.” The most common non-parents seeking custody and visitation are a child’s grandparents, great-grandparents, step-parents, and siblings, although the definition allows others to seek custody or visitation if the requirements of the act are met.

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

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

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

The presumption and burden of proof is designed to meet the requirements of *Troxel v. Granville*, 530 U.S. 57 (2000), in which the Supreme Court struck down Washington State’s third party visitation statute as applied. Justice O’Connor, in a plurality decision, said the Washington statute “contains no requirement that a court accord the parent’s decision any presumption of validity or any weight whatsoever.” *Id.* at 67. “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.” *Id.* at 68.

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

Because we rest our decision on the sweeping breadth of [Washington Code] § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not 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. We do not, and need not, define today

1 the precise scope of the parental due process right in the visitation context. In this  
2 respect, we agree with Justice KENNEDY that the constitutionality of any  
3 standard for awarding visitation turns on the specific manner in which that  
4 standard is applied and that the constitutional protections in this area are best  
5 “elaborated with care.” *Post*, at 2079 (dissenting opinion). Because much state-  
6 court adjudication in this context occurs on a case-by-case basis, we would be  
7 hesitant to hold that specific nonparental visitation statutes violate the Due  
8 Process Clause as a *per se* matter.

9  
10 530 U.S. at 73.

11  
12 In the years since *Troxel* was decided, state courts have generally held that a  
13 grandparent’s claim that the grandparent has a positive relationship with the grandchild is not  
14 sufficient to justify an order of visitation over the objection of a parent. *See, e.g., Neal v. Lee*,  
15 2000 Ok 90, 14 P.3d 547 (2000); *State Dept. of Social and Rehabilitative Services v. Paillet*, 16  
16 P.3d 962 (2001); *Flynn v. Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if  
17 the grandparent has a substantial relationship with the grandchild – such as raising the child for a  
18 few years – that can be the basis for granting visitation to the grandparent over the parents’  
19 objection. *See, e.g., Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents had helped  
20 raise their grandchildren for the first seven years of the oldest grandchild’s life and for lesser  
21 periods for the younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007)  
22 (grandparents cared for children while the mother was dying of cancer).

23  
24 This act does not set a maximum number of persons who may obtain rights of custody or  
25 visitation. In most cases, the number of actively involved parental figures probably will not be  
26 large. As courts sort through complex family structures, the number of persons acting in a  
27 parental role is a factor that should be considered -- but without applying a fixed rule about how  
28 many parental figures with rights to time with the child is too many. The focus needs to remain  
29 on the best interests of the child.

30  
31 **SECTION 9. INITIAL PETITION BY NON-PARENT OF CHILD WHO IS NOT**  
32 **A DE FACTO PARENT WHEN CHILD IS NOT IN CUSTODY OF PARENT OR DE**  
33 **FACTO PARENT.**

34 (a) This section applies to initial petitions for custody or visitation filed by a non-parent  
35 who is not a de facto parent when the child is not in the custody of a parent or de facto parent.

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

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

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

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

5 **Comment**

6 This section governs custody and visitation disputes when the child is not in the custody  
7 of a parent or de facto parent. The non-parent needs to demonstrate by clear and convincing that  
8 a substantial relationship exists between the child and the non-parent and that custody or  
9 visitation for the non-parent is in the best interests of the child. If the petitioner does not prove  
10 his or her case by clear and convincing evidence, other laws – such as guardianship laws – are  
11 available to decide custody and visitation issues. In cases in which the dispute does not involve a  
12 parent, the Supreme Court’s holding in *Troxel* regarding giving deference to a parent’s decision  
13 does not apply.

14  
15 Subsection (c) is similar to 23 Pa. Stat. and Cons. Stat. Ann. § 5327(c) (West 2016),  
16 which provides: “In any action regarding the custody of the child between a nonparent and  
17 another nonparent, there shall be no presumption that custody should be awarded to a particular  
18 party.”

19  
20 **SECTION 10. PRESUMPTION REGARDING DOMESTIC VIOLENCE, CHILD**  
21 **ABUSE, SEXUAL ASSAULT, OR STALKING.**

22 (a) There is a rebuttable presumption that it is not in the best interests of a child to grant  
23 custody or visitation to a non-parent if the non-parent, or a person residing with the non-parent,  
24 has committed an act of domestic violence, child abuse, sexual assault, or stalking against the  
25 other parent, the child, the child’s siblings, or a child’s custodial guardian. For the purposes of  
26 this section, the phrase, “committed an act,” refers to a final adjudication by a court hearing a  
27 proceeding under this act or an adjudication by court in another proceeding that the designated  
28 offense occurred.

29 (b) In actions involving a parent and a de facto parent, or a parent and an individual who  
30 entered into an agreement to accept full and permanent parental responsibility, the following

provisions apply: [insert cite to laws of this state pertaining to presumptions in custody or parenting time disputes between parents involving domestic violence and similar offenses].

### **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 non-parent if the non-parent, or a person residing with the non-parent, has committed an act of domestic violence or related offenses. Domestic violence is defined by reference to state law. This section requires that there be a “final adjudication” that the offense occurred. Thus, a temporary order – particularly one entered on an ex parte basis -- would not be considered a final adjudication for the purpose of applying a presumption against granting custody or visitation to a non-parent.

## **SECTION 11. FACTORS CONSIDERED.**

(a) If a non-parent establishes that a substantial relationship exists between the child and the non-parent and that denial of custody or visitation to the non-parent is a detriment to the child, the court shall consider the following factors in determining the best interests of the child and whether to grant custody or visitation to a non-parent:

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

(2) the nature, extent, and quality of the relationship between the child and non-parent, including specific parent-like activities undertaken by the non-parent;

(3) the frequency and continuity of contact between the child and the non-parent, including the period of any disruption in the contact and the reasons for the disruption;

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

(5) the willingness and ability of the parent and non-parent to facilitate a positive relationship among the child, parties to the proceeding, and family members of the child, except that the court may not consider this willingness and ability if the parent or custodian of the child shows that: (i) the non-parent has engaged in domestic violence, child abuse, sexual assault, or

1 stalking against the parent, child, child's siblings, or custodial guardian, and (ii) a continuing  
2 relationship with the non-parent will affect negatively the health or safety of the parent, child,  
3 child's siblings, or custodial guardian;

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

6 (7) the mental and physical health of the child and parties to the proceeding,  
7 including alcohol abuse and drug abuse by the child or parties to the proceeding; provided,  
8 however that the mental and physical health of the parties shall not be considered unless those  
9 factors relate to harm caused to the child;

10 (8) a history of or threat of child abuse, child neglect, domestic violence, sexual  
11 assault, or stalking towards a parent, the child, child's siblings, or custodial guardian (A) by a  
12 party or (B) by an individual with whom a party has kinship or a significant relationship;

13 (9) the reasons for the parties' positions in the proceeding regarding custody and  
14 visitation;

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

16 (11) the applicable factors in [insert cite to laws of this state pertaining factors  
17 considered in custody or parenting time disputes between parents].

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

19 (b) If an individual establishes that he or she is a de facto parent or that he or she is an  
20 individual who entered into an agreement to accept full and permanent parental responsibility,  
21 the court shall consider the factors in [insert cite to laws of this state pertaining factors  
22 considered in custody or parenting time disputes between parents].

1 **Comment**

2 [Comment will be inserted – including noting that 35 states list factors in their non-  
3 parental visitation statutes.]  
4

5 **SECTION 12. PETITION TO MODIFY CUSTODY OR VISITATION.** A petition  
6 to modify a custody, visitation, or parenting time order entered under this [act] shall be decided  
7 under [cite to the law of this state other than this act for modification of a custody, visitation, or  
8 parenting time order applicable to a dispute between parents].

9 **Comment**

10 This section makes reference to a state’s existing law regarding modification of custody,  
11 visitation, or parenting time orders applicable to disputes between parents. In most states, that  
12 standard is a showing of substantial change of circumstances coupled with a showing that  
13 modification is in the best interests of the child (although a few states have different standards,  
14 such as requiring a showing of endangerment if modification is sought within two years of a  
15 prior order). See Jeff Atkinson, *Modern Child Custody Practice - Second Edition*, §§ 10.1 –  
16 10.13 (LexisNexis 2015). Under this approach, a custody or visitation order in favor of a non-  
17 parent generally would stay the same unless the substantial change of circumstances and best  
18 interests of the child for modification of the order were shown.  
19

20 **SECTION 13. TEMPORARY ORDER.**

21 (a) On motion of a party or the court’s own motion, and after opportunity for hearing, the  
22 court may enter an order under this act as a temporary order.

23 (b) An order entered under this section has no presumptive effect and is not determinative  
24 when the court considers petitions for other orders under this [act].

25 **Comment**

26 This section makes explicit that the court has the power to enter temporary, as well as  
27 permanent, orders. The details of what must be shown to obtain a temporary order is left to local  
28 practice – e.g., use of affidavits, need for hearing, elements of proof, although it is expected that  
29 the showing of at least a prima facie case would be required for entry of a temporary order.  
30

31 Subsection (b) is similar to Va. Code Ann. § 20-103(E) (West 2015), which provides:  
32 “An order entered pursuant to this section shall have no presumptive effect and shall not be  
33 determinative when adjudicating the underlying cause.”  
34

1 The factors listed in Section 11 apply to both temporary and permanent orders.

2  
3 **SECTION 14. EFFECT OF ADOPTION OF CHILD BY A RELATIVE OR**

4 **STEPPARENT.** The adoption of a child by a relative or a stepparent does not preclude granting  
5 or continuing custody or visitation to an individual who is a non-parent.

6 **Comment**

7 As of 2013, the statutes of 24 states explicitly allow visitation for non-parents if the child  
8 has been adopted by a relative, including a stepparent. Jeff Atkinson, *Shifts in the Law*  
9 *Regarding Rights of Third Parties to Seek Visitation and Custody of Children*, 47 Fam. L. Q. 1,  
10 20-23 (Spring 2013).

11  
12 **SECTION 15. APPOINTMENTS AND COURT SERVICES.** To the extent available  
13 in other cases involving custody and visitation of children, the court may do one or more of the  
14 following:

15 (1) appoint a child's attorney, guardian ad litem, child's representative, or similar  
16 personnel;

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

20 **Legislative Note:** *The brackets in subsection 2 should be removed and the phrase "unless the*  
21 *safety of the party can be protected adequately during mediation" should be included in the*  
22 *section in states that require mediation of custody and visitation cases, including cases in which*  
23 *there are allegations of domestic violence.*

24  
25 (3) order evaluations or home studies of the child, parent, de facto parent, or petitioners  
26 who are non-parents; and

27 (4) allocate payment among the parties to the proceeding of fees for the services listed in  
28 this section.



1 **Comment**

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

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

12 **SECTION 16. COST OF FACILITATING VISITATION.**

13 (a) An individual other than a de facto parent or person who entered into an agreement to  
14 accept full and permanent parental responsibility who is granted visitation under this [act] may  
15 be ordered to pay the cost of facilitating visitation with the child, including the cost of  
16 transportation.

17 (b) The obligation to pay child support of a de facto parent or an individual who entered  
18 into an agreement to accept full and permanent parental responsibility is governed by law of this  
19 state other than this [act].

20 ***Legislative Note:*** *If current state law does not impose an obligation to pay child support on de*  
21 *facto parents or individuals who entered into an agreement to accept full and permanent*  
22 *parental responsibility, legislatures may wish amend laws to provide such an obligation.*  
23

24 **Comment**

25 Individuals who are not de facto parents or persons who entered into an agreement to  
26 accept full and permanent parental responsibility who receive visitation under this act may, in the  
27 court’s discretion, be required to pay the cost of facilitating visitation. The cost of facilitating  
28 visitation may include the cost of transportation. Those individuals, however, may not be  
29 required to pay child support.  
30

31 **SECTION 17. ATTORNEY FEES AND COSTS.** The court may allocate and order  
32 payment of attorney fees, including interim fees, and costs among the parties to the proceeding  
33 under this [act]; however, a parent may not be ordered to pay the fees and costs of another party

1 unless the parent's position is without merit.

2 **Comment**

3 Litigating issues of non-parental custody and visitation can be financially burdensome,  
4 including to the parent. This section gives the court discretion to order payment of attorney fees  
5 and costs. An award of such fees may deter non-meritorious cases.  
6

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

10 ***Legislative Note:** This section is placed in brackets because in some states, a requirement (or*  
11 *lack of requirement) of making findings of fact is governed by court rule rather than statute.*  
12

13 **Comment**

14 Requiring findings of fact has several benefits. The fact-finding process structures the  
15 court's review so that the court is less likely to overlook important facts or apply bias in reaching  
16 its decision. Careful fact-finding by the trial court also facilitates appellate review and may  
17 assist the parties in accepting the decision. At least twenty states and the District of Columbia  
18 require the trial court to make findings of fact in custody cases. See Jeff Atkinson, *Modern Child*  
19 *Custody Practice - Second Edition*, § 12-45 (LexisNexis 2015).  
20

21 **SECTION 19. APPLICATION TO CHILDREN WHO ARE THE SUBJECT OF**  
22 **PROCEEDINGS REGARDING GUARDIANSHIP, ABUSE, NEGLECT, OR**  
23 **DEPENDENCY.** This [act] does not apply if the child is the subject of a proceeding under [cite  
24 to law of this state other than this [act] regarding custody and visitation of children in  
25 proceedings related to guardianship of the person, abuse, neglect, or dependency].

26 **Comment**

27  
28 This act does not provide for custody or visitation to non-parents for children who are the  
29 subject proceedings for guardianship of the person, abuse, neglect, or dependency. Such laws  
30 and related regulations have their own provisions regarding where a child will be placed and who  
31 may have contact with the child. The guardianship, abuse, neglect, and dependency laws usually  
32 are in a different portion of the statutes than laws pertaining to divorce, parentage, and non-  
33 parental rights. The drafters of this act do not wish for this act to conflict with or interfere with  
34 the laws of guardianship, abuse, neglect, or dependency. When a child is no longer the subject  
35 of such proceedings, relief may be sought under this act. The provision in this section is similar

1 to Or. Stat. § 109.119(9) (West 2015) (excluding application of a non-parental visitation statute  
2 from children who are the subject of dependency proceedings). *See also* Minn. Stat. Ann. §  
3 257C.08(4) (West 2015) (excluding foster parents from coverage under the state’s non-parental  
4 visitation law).

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

12  
13 **SECTION 20. OTHER RIGHTS AND REMEDIES.** The rights and remedies of this  
14 [act] are not exclusive and do not preclude other rights and remedies under law of this state other  
15 than this [act].

#### 16 **Comment**

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

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

26 **SECTION 22. TRANSITIONAL PROVISION.** This [act] applies to all pending  
27 actions and proceedings commenced prior to its effective date with respect to issues on which a  
28 judgment has not been entered.

#### 29 **SECTION 23. REPEALS; CONFORMING AMENDMENTS.**

30 (a) . . . .

31 (b) . . . .

32 (c) . . . .

1           **SECTION 24. EFFECTIVE DATE.** This [act] takes effect . . . .