Memorandum

To: Jeff Atkinson, Reporter, Drafting Committee, Non-Parental Rights to Child Custody and Visitation Act

From: Jeffrey A. Parness, Professor Emeritus, Northern Illinois University College of Law

Re: Draft for Discussion on November 20-21, 2015

Date: November 17, 2015

I write regarding the discussion draft to be discussed later this week. I appreciate the opportunity for input and the easy access to Committee materials which have been made available to all with an interest in your very important work. My thoughts are tentative and only very general to this point. I look forward to commenting on your further work, and stand prepared to help in any way I can.

You should know my comments are mostly grounded in the law review and bar journal articles I have written in the past few years. These writings encompass both American state parentage laws, chiefly in childcare (i.e., custody, visitation and parental responsibility allocation) settings, and American state third party childcare laws, most significantly in grandparent and stepparent settings. These writings, if you are interested, are available via links from the NIU College of Law website or directly from SSRN or from me.

Most importantly, perhaps, I have difficulty with the draft when it blurs the distinction between parent and non-parent, as with its recognition that a de facto parent is a non-parent, [§ 5(2)], as well as its recognition that a non-parent may have an agreement in which the non-parent accepts "full and permanent responsibilities as a parent," [§ 5(1)]. I understand the Committee has been directed not to veer from the UPA (2002) definition of parent. I think the word "parent" should simply be "a person defined as a parent under the law of this state." This definition would then encompass the varying parentage forms and nomenclatures underlying divergent American state laws, without differentiating

between statutory and common law definitions; without differentiating between parentage definitions that have or do not have, e.g., a two year residence; and, without differentiating between the names utilized to encompass nonbiological, nonadoptive and nonmarital parents, including presumed parents, equitable parents, de facto parents, and parents by estoppel. "Parent" would then be distinguished from "non-parent" in the Act, though each could have some childcare opportunities via court order.

As well, I have difficulties with the note on "de facto parent" [under §2, at page 6]. The note says:

> The definition of "parent" is "a person defined as a parent under the law of this state . . . In most states "parent" would include biological parents, adoptive parents and men who have acknowledged paternity (even though they are not biologically related to the child) . . . Generally, a person ceases to be a parent if his or her rights have been terminated. In addition, a man who donates sperm or a woman who donates an egg usually are not considered to be parents.

My difficulties include a failure to distinguish expressly between state legal parentage for childcare and for other purposes, including child support duties and heirship recoveries. Parentage under state law varies intrastate by context as it does interstate in similar contexts.

Another difficulty with the note is that many states do not recognize childcare parentage in unwed biological fathers of children born of sex to either married or unmarried women. Those states do recognize paternity opportunity interests which may prompt legal parentage, as they must under Lehr v. Robertson, 463 U.S. 248 (1983), at least outside of adultery, which may be treated differently under Michael H. v. Gerald D., 491 U.S. 110 (1989).

Also, I am concerned about the Act's approach to agreements prompting the standing of non-parents to seek court-ordered childcare. First, I believe the comments/notes should reference the Uniform Premarital and Marital Agreements Act which expressly recognizes agreements on "custodial responsibility" which, while nonbinding on courts, will provide guidance to judges. I have written in support of some such agreements benefiting non-parents (like stepparents and grandparents).

"Parentage Prenups and Midnups," 31 Georgia State University Law Review 343 (2015). Second, I think there are important decisions in the current case law that differentiate not only between written and oral agreements, but also between agreements that are and are not incorporated into court orders. These decisions merit some mention.

Finally, I remain uncertain about the possibility of an Act that lumps together all nonparents seeking childcare orders. For example, stepparents and grandparents are, at time, treated differently under law. Stepparents are more likely than grandparents to have had opportunities to adopt. Many, many more grandparents than stepparents have biological ties to children in whom they have childcare interests. Even if the Act remains geared to all non-parents, some mention of the occasional differentiation between varying forms of non-parents seems worthy of note.