To: Drafting Committee for the Non-Parental Child Custody and Visitation Act (NPCCVA)
From: Nancy D. Polikoff (Observer), Professor of Law, American University Washington College of Law
Date: October 11, 2016
Re: Comments on the Draft NPCCVA before the committee on October 14-15, 2016

Thank you for the opportunity to present some feedback about the important work of this drafting committee. For the better part of the past three decades, I have written about the category of non-parents who, because of their functional parental relationship with a child, should be entitled to continue that relationship over the objection of the child's legal parent.[1] I was also closely involved in the drafting of the District of Columbia Safe and Stable Homes for Children and Youth Amendment Act of 2007[2] which created one custody/visitation standard for what we called *de facto* parents and another for all other third parties. I write now to urge this committee to recognize such a category of non-parents[3] and to permit those who meet the designated criteria to obtain custody or visitation rights without needing to show detriment/harm to the child.

Dispensing with the need to show detriment/harm in an individual case is the most critical component of any statute on this subject. The recognition of this category of nonparents acknowledges that, *by definition*, a child suffers detriment/harm when totally separated from such a person. Indeed that is the very reason for creating such a category. Requiring a showing of detriment/harm in an individual case can necessitate expert testimony which is expensive and can provoke an escalation of conflict, rather than an amicable settlement, between the parent and functional parent. It could also cause a functional parent to abandon a claim, thereby causing detriment to the child.

For those who have acted as parents with the consent of a legal parent, an individualized finding of harm/detriment is not constitutionally required under the Supreme Court's ruling in *Troxel v. Granville.* I wrote one of the early articles on the impact of *Troxel* on cases involving children raised by a same-sex couple, only one of whom was the child's legally recognized parent.[4] I argued that *Troxel* would not bar awards of custody or visitation under such circumstances. The 15 years since that article's publication have proven me right.

This year I set out, as I always do, to update the syllabus for my seminar on Children of LGBT Parents. I devote one class session to *Troxel* and to its impact on disputes involving one legal parent and one functional parent. With the overruling of cases in Maryland[5] and New York[6] in July and August of

[1] For my first article, see Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).
[2] Codified at D.C. Code §16-831.01 *et seq.*
[3] There are many options for naming those in this category. In this memo I rely primarily on the term "functional parent," but I would suggest the committee consider "*in loco parentis* parent" as well. Although states may use the term *in loco parentis* in other contexts, the definition section of the NPCCVA can say clearly that the stated definition applies only for purposes of the Act.
[4] Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 RUTGERS L. J. 825 (2001).
[5] *Conover v. Conover,* 141 A.3d 31 (Md. 2016), overruling *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008).

this year, the only case I could find mentioning *Troxel* as a reason to prevent custody/visitation rights by a functional parent was a case from the Illinois Supreme Court involving a heterosexual couple. In *In re Parentage of Scarlett Z.-D.,*[7] an unmarried heterosexual couple, Maria and Jim, planned for the adoption together of a 3 ½ year old child from Slovakia, Maria's home country. Maria alone completed the adoption in Slovakia. The couple did not marry and Jim never adopted the child in the United States. The Illinois Supreme Court summarized the following factual findings made by the trial court:

> The circuit court found that Maria, Jim, and Scarlett lived together "as an intact family unit as if they were bound legally." Maria and Jim gave Scarlett the hyphenated form of their last names. Jim was the "father figure" to Scarlett, who referred to Jim as "daddy." Jim's name appears in Scarlett's school records as Scarlett's father. Jim paid all family expenses and provided economic support for Scarlett. In June 2006, he established a $500,000 irrevocable trust for Scarlett. The court found that Scarlett "learned English and clearly came a long way over this time period under the watchful eyes and good parenting from both Jim and Maria."[8]

When the couple split up four years later, Maria denied Jim access to Scarlett. The Illinois Supreme Court rejected Jim's claims for custody or visitation on state law grounds, but the court gave a nod to *Troxel*, citing it three times for the general principle of a parent's constitutional right to make childrearing decisions.

Contrast that to the numerous state courts that have found no constitutional impediment, per *Troxel* or otherwise, to awarding custody or visitation rights to functional parents under a best interests of the child standard. From east to west, from north to south, in gay-friendly and gay-unfriendly states, courts have awarded custody or visitation to persons who, with the consent of a legal parent, function as a child's parent.[9] Most of these states adjudicate both custody and visitation disputes under the best interests of the child standard while some limit the functional parent's claim to visitation only.

Along those lines, I have a couple of comments about some of the notes in the current draft. The notes reflect the Reporter's deep understanding of this area of law. I offer what I hope he and the committee will consider a couple of friendly amendments. First, the summary of *Troxel* on the top of page 2 of the current draft (lines 2 and 3) reads that "The Court held the statute 'exceeded the bounds of the Due Process Clause.'" I would like to suggest rewriting that sentence to reflect two additional words used by the Supreme Court. That portion of *Troxel* reads that the statute "*as applied*, exceeded

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[6] *Brooke S.B. v. Elizabeth A.C.C.*, 2016 N.Y. LEXIS 2668 (2016), overruling *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991). In overruling *Alison D.*, the New York Court of Appeals also overruled the portion of the opinion in *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010), that had relied on both *Alison D.* and *Troxel.*

[7] 28 N.E.3d 776 (Ill. 2015).

[8] *Id*. at 782.

[9] A non-exhaustive list of such rulings includes *Bethany v. Jones,* 378 S.W.3d 731 (Ark. 2011); *Mullins v. Picklesimer* 317 S.W.3d 569 (Ky. 2010); *C.E.W. v. D.E.W.,* 845 A.2d 1146 (Me. 2004); *Kulstad v. Maniaci,* 220 P.3d 595 (Mont. 2009); *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

the bounds of the Due Process Clause."[10] I hope the committee will agree that the notes to the NPCCVA should not contribute to any misreading of *Troxel*; even with a statute as "breathtakingly broad" as the one at issue, the Court found it unconstitutional only as applied to the facts of that case.

I also find the Legislative Note to Section 5 of this draft of the Act (page 12, lines 4-9) to be a bit misleading. I recognize that the purpose of the note is to alert the reader that some states use the term "harm" rather than the term "detriment" in existing law. But the way the note currently reads, it contains a definitive statement that the listed states require that, as a matter of constitutional law, "harm to the child must be shown before visitation is granted to a non-parent."

I am not familiar with all the cases in the all the listed states, but I would like to mention three of the seven states on the list with which I am very familiar – New Jersey, Washington, and Massachusetts – and point out that the sentence above is inaccurate for those states when the dispute lies between a legal parent and a functional parent. None of those states requires proof of harm as a matter of constitutional law or state law. In all three states, a person meeting the standard for a *de facto* parent (Washington[11] and Massachusetts[12]) or a psychological parent (New Jersey[13]) can obtain custody or visitation rights using the best interests of the child standard.

While the phrasing of this note to Section 5 could be altered to simply say that some states use the term "harm" instead of the term "detriment," I wish to reinforce my larger point: that many states currently distinguish among nonparents based upon whether they have functioned as parents. I urge this committee to do so in the NPCCVA. If the Uniform Law Commission ultimately endorses an act that requires all nonparents to show detriment before custody or visitation can be ordered, it will be a step backward, potentially threatening years of victories for functional parent-child relationships in state courts.

Finally, I understand that the drafting committee is considering removing *de facto* parents from the NPCCVA, at least in part because the revisions to the Uniform Parentage Act may include criteria for finding someone a legal parent based on a functional definition, as both Delaware and Maine have done in recent legislation. I urge this committee to retain in this Act a category of those in functional parent-child relationships who are entitled to request visitation or custody without alleging harm. This committee might use a term different from the one under consideration by the drafting committee on revisions to the Uniform Parentage Act to minimize confusion.

The Uniform Laws Commission might have drafted one model statute encompassing both parentage and nonparental custody and visitation, but it is not doing so. Each drafting committee must therefore consider its Act as a stand-alone statute. Some states satisfied with their parentage laws may wish to address only nonparental visitation, and vice-versa.

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[10] 530 U.S. at 68 (emphasis added).
[11] *In re L.B.*, 122 P.3d 161 (Wash. 2005) (custody or visitation).
[12] *E.N.O. v. L.M.M.,* 711 N.E.2d 886 (Mass. 1999) (visitation only).
[13] *V.C. v. M.J.B.,* 748 A.2d 539 (N.J. 1999) (custody or visitation).

Consider this. No court has ever invalidated on constitutional grounds a state statute allowing a functional parent to petition for custody or visitation rights based on best interests of the child. States that have categorically denied such petitions have done so precisely because *there is no state statute allowing them.*[14] This committee has the opportunity to write such a statute. I sincerely hope it will do so.

[14] See e.g., *Mabry v. Mabry*, 2015 Mich. App. LEXIS 2491 (2015), *leave to appeal denied*, 2016 Mich. LEXIS 1610 (2016); *In re Hayden C. G.-J.,* 2013 Tenn. App. LEXIS 738 (2013); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007).