

UNIFORM NONPARENT CUSTODY AND VISITATION ACT

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ON UNIFORM STATE LAWS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM NONPARENT CUSTODY AND VISITATION ACT

PREFATORY NOTE

The Uniform Nonparent Custody and Visitation Act addresses issues raised when courts are asked to grant custody or visitation to nonparents. The act seeks to balance, within constitutional restraints, the interests of children, parents, and nonparents with whom the children have a close relationship.

Demographics indicate that many children in the United States live with nonparents. In a case before the U.S. Supreme Court (discussed later in the Prefatory Note), Justice O'Connor observed: "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." *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

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

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

U.S. Census Bureau, America's Families and Living Arrangements: 2016, Table C2, Household Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2016. Generally, close and beneficial relationships exist between nonparents and children who have lived together when the nonparent has cared for the child, giving rise to a need to preserve that relationship over a parent's objection in some situations. These types of close relationships also may develop between nonparents and children who, while never residing together, have had substantial and meaningful contact.

The vital role of nonparents in children's lives has been accentuated by the opioid epidemic. With 2.1 million adults experiencing opioid addiction in this country, many relatives have stepped forward to care for children because of their parents' addictions. See Jennifer Egan, *Children of the Opioid Epidemic*, New York Times Magazine (May 9, 2018). The legal status of such relative caregivers remains in limbo in many situations.

The provisions of this act address the legal issues raised by the growing number of children who have a substantial relationship with individuals other than their legal parents. The act does the following:

- recognizes a right to seek custody or visitation for two categories of individuals:
 - (1) nonparents who have acted as consistent caretakers of a child without expectation of compensation, and
 - (2) other nonparents who have a substantial relationship with the child

and who demonstrate that denial of custody or visitation would result in harm to the child; a nonparent who is not a relative of the child and who is seeking custody or visitation on the basis of a substantial relationship must have formed that relationship without expectation of compensation (Section 4);

- provides a rebuttable presumption that the parent’s decision about custody or visitation is in the best interest of the child and imposes a burden of proof on the nonparent of clear-and-convincing evidence in order to obtain relief (Section 5);
- requires that the pleadings be verified and specify the facts on which the request for custody or visitation is based (Section 7);
- requires the court to determine on the basis of the pleadings whether the nonparent has pleaded a prima facie case for relief (Section 8);
- requires that notice be provided to: (1) any parent of the child; (2) any person having custody of the child; (3) any individual having court-ordered visitation with the child; and (4) any attorney, guardian ad litem, or similar representative for the child (Section 9);
- provides a list of factors to guide the court’s decision regarding the child’s best interest (Section 12);
- provides protections for victims of child abuse, child neglect, domestic violence, sexual assault, or stalking (Section 13);
- provides that the court may order a party to pay the cost of facilitating visitation, including the cost of transportation (Section 18); and
- provides under a bracketed optional provision that the rights and remedies of this act are not exclusive and do not preclude recognition of an equitable right or remedy for a de facto parent under law of the state other than this act (Section 20).

The act does not apply to a proceeding between two or more nonparents unless a parent is a party, nor does the act apply to children who are the subject of proceedings for abuse, neglect, or dependency. In addition, under an optional (bracketed) provision, a nonparent may not maintain a proceeding under this act solely on the basis of having served as a foster parent. The degree to which this act applies to children who are the subject of a guardianship depends on the guardianship law of the state.

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

In *Troxel*, the paternal grandparents sought visitation with their grandchildren following the father’s death. The children had never resided with the grandparents but had visited with them regularly throughout their lives. When the mother did not provide the amount of visitation the grandparents requested, the grandparents filed an action under Washington State’s nonparental visitation statute, Wash. Rev. Code § 26.10.160(3) (1994), which provided: “Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings.”

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

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

The grandparents successfully petitioned for certiorari. The U.S. Supreme Court affirmed the Washington Supreme Court, although on narrower grounds. In her plurality opinion, Justice O’Connor stated that the statute was “breathtakingly broad,” 530 U.S. at 67, and the trial court’s findings were “slender,” *Id.* at 72. The plurality concluded that the statute, as applied, did not give sufficient deference to the decision of a fit parent to decide the amount of contact the children would have with the grandparents.

According to Justice O’Connor’s opinion, “The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Id.* at 65, *citing*, among other cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional a Nebraska law prohibiting teaching any subject in a language other than English). In the plurality’s view, the statute “as applied, exceeded the bounds of the Due Process Clause.” 530 U.S. at 68.

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

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

Id. at 68–69.

The plurality reasoned that because its decision was based on the “sweeping breadth” of the statute and the application of the statute in this case, the Court did not need to “consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.” *Id.* at 73. For discussion of state law on the issue of harm, see the comment to Section 4 regarding “Substantial relationship and the showing of harm.”

This act balances the right of a child to maintain contact with a nonparent with whom the child has developed a bonded relationship (other than a paid child-care provider) and the rights of a parent. The statutes of many states specify the circumstances in which visitation by a nonparent 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. Such broad descriptions of circumstances in which visitation may be sought do not, by themselves, provide a reliable indicator of whether nonparental visitation (or custody) should be allowed. *See Dorr v. Woodard*, 140 A.3d 467, 472 (Me. 2016) (holding death of a parent without other compelling reasons was not sufficient reason to confer standing); *D.P. v. G.J.P.*, 146 A.3d 204 (Pa. 2016) (holding that separation of the parents for six months was not a sufficient basis to allow grandparents to seek visitation). The criteria of this act, in contrast, focus on the factors used to decide whether visitation or custody should be granted, particularly the closeness of the relationship between the child and the nonparent. At the same time, the act provides protections for parents, such as imposing a heightened burden of proof (clear and convincing evidence) upon the nonparent and requiring a nonparent to overcome a presumption that a parent’s decision about custody and visitation is in the child’s best interest.

UNIFORM NONPARENT CUSTODY AND VISITATION ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Nonparent Custody and Visitation Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) “Child” means an unemancipated individual who is less than [18] years of age.

(2) “Compensation” means wages or other remuneration paid in exchange for care of a child. The term does not include reimbursement of expenses for care of the child, including payment for food, clothing, and medical expenses.

(3) “Consistent caretaker” means a nonparent who meets the requirements of Section 4(b).

(4) “Custody” means physical custody, legal custody, or both. The term includes joint custody or shared custody.

(5) “Harm to a child” means significant adverse effect on a child’s physical, emotional, or psychological well-being.

(6) “Legal custody” means the right to make significant decisions regarding a child, including decisions regarding a child’s education, health care, and scheduled activity.

(7) “Nonparent” means an individual other than a parent of the child. The term includes a grandparent, sibling, or stepparent of the child.

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

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

(10) “Physical custody” means living with a child and exercising day-to-day care of the child.

(11) “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.

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

(13) “Substantial relationship with the child” means a relationship between a nonparent and child which meets the requirements of Section 4(c).

(14) “Visitation” means the right to spend time, which may include an overnight stay, with a child who is living with another person.

Comment

The definition of “child” is similar to the first portion of the definition of “child” in the Uniform Deployed Parents Custody and Visitation Act, § 102(3)(A) (2012). The age of majority in most states is 18 years of age, although some states set the age of majority at graduation from high school, and a few states set the age higher than 18 years of age. Unlike the Deployed Parents Custody and Visitation Act, 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 individuals with a developmental disability. Rights to custody of or visitation with adult children would be determined under the state’s guardianship laws or other applicable law.

The term “compensation” is used in Sections 4 and 7. Section 4(b) provides that if a nonparent seeks custody or visitation on the basis of being a “consistent caretaker,” the relationship needs to have been formed “without expectation of compensation.” Similarly, under Section 4(c) a nonparent who does not have a familial relationship with the child who seeks custody or visitation on the basis of a “substantial relationship” with the child needs to have formed that relationship “without expectation of compensation.” Thus, under Section 4, a paid nanny who does not have a familial relationship with the child would not be able to seek custody or visitation. However, an individual who has both a familial and a substantial relationship with a child may seek custody or visitation even if the individual cared for the child with an expectation of compensation. Section 7(b)(5) requires that compensation arrangements be disclosed in the pleadings.

In family law, the terms “custody” and “visitation” are flexible concepts and in many states are being replaced with terms such as “legal decisionmaking,” “parenting time,” and other phrases. 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. (In the case of joint custody with equal time-sharing, neither home may be primary compared to the other home.) The act was drafted with the anticipation that visitation granted to nonparents will be decided on the facts of each case rather than by guidelines. The definition of “custody” includes joint custody (sometimes referred to as shared custody). Thus, under this act, courts have the option of granting joint custody, as well as sole custody. Although many states utilize the term “parenting time” to describe the time a child spends with each parent, the terms “custody” and “visitation” are still commonly used, and are appropriate, to describe the time a child spends with a nonparent. “Visitation” is defined as: “the right to spend time, which may include an overnight, with a child who is living with another person.” For example, a nonparent may be granted the right to spend a defined period of time per month with a child who lives primarily with a legal parent or lives with parents who share custody. Visitation may include contact by telephone or other electronic means as well as in-person contact.

“Harm to a child” can be physical, emotional, or psychological and must result in a “significant adverse effect.” Testimony from a mental health professional, while not required, can be helpful to show the effect. Section 5(b) provides that when rebutting the presumption in favor of a parent’s decision, “[p]roof of unfitness of a parent is not required.”

The definition of “legal custody” is similar to the definition of that term 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.” As noted regarding the definition of “custody,” “legal custody” may be sole or joint. “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. Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981); *In re Marriage of Mentry*, 142 Cal. App 260, 190 Cal. Rptr. 843 (1983); *Hansen v. Hansen*, 404 N.W.2d 460 (N.D. 1987).

The definition of “nonparent” is “an individual other than the parent of a child. The term includes a grandparent, sibling, and stepparent of the child”, as well as other relatives and nonrelatives. All nonparents—whether or not related to the child—must meet the requirements of the act, including clear-and-convincing evidence of status as a “consistent caretaker” or having developed a “substantial relationship” with a child.

The definition of “parent” is “an individual recognized as a parent under law of this state other than this [act].” The sources of the definition of “parent” may include the state’s parentage statutes, divorce statutes, and case law. In most states, “parent” would include biological parents, adoptive parents, presumed parents unless the presumption has been rebutted, and persons who have acknowledged parentage, even if they are not biologically related to the child.

The definitions of “person,” “record,” and “state” are the definitions provided by the Uniform Law Commission “Drafting Rules,” Rules 304, 305 & 306 (2012).

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

For discussion of “visitation,” see the entry on “custody” and “visitation.”

SECTION 3. SCOPE.

(a) Except as otherwise provided in subsection (b), this [act] applies to a proceeding in which a nonparent seeks custody or visitation.

(b) This [act] does not apply to a proceeding:

(1) between nonparents, unless a parent is a party to the proceeding;

(2) pertaining to custody of or visitation with an Indian child as defined in the Indian Child Welfare Act of 1978, 25 U.S.C. Section 1903(4)[, as amended], to the extent the proceeding is governed by the Indian Child Welfare Act of 1978, 25 U.S.C. Sections 1901 through 1963[, as amended]; and

(3) pertaining to a child who is the subject of an ongoing proceeding in any state regarding[:

(A) guardianship of the person; or]

[(B)] an allegation by a government entity that the child is abused, neglected, dependent, or otherwise in need of care.

[(c) A nonparent may not maintain a proceeding under this [act] for custody of or visitation with a child solely because the nonparent served as a foster parent of the child.]

(d) An individual whose parental rights concerning a child have been terminated may not maintain a proceeding under this [act] concerning the child.

(e) Relief under this [act] is not available during the period of a custody or visitation order [entered under the [cite to this state’s Uniform Deployed Parents Custody and Visitation

Act] or other order] dealing with custody of or visitation with a child of a deployed parent. A custody or visitation order entered before a parent was deployed remains in effect unless modified by the court.

Legislative Note: *In subsection (b)(3), the phrase “guardianship of the person” is in brackets to give the enacting state an option to include the phrase in the list of proceedings that are excluded from coverage under this act. If a state’s guardianship law allows a court to order visitation to a nonparent, the proceeding involving guardianship of the person of a child should be included in the list of proceedings not covered by this act. If the guardianship law of the state does not provide for visitation with a child who is the subject of a guardianship, the phrase “guardianship of the person” should not be included in subsection (b)(3).*

Subsection (c) is in brackets to give the enacting state the option of not including this provision if state law recognizes the right of a former foster parent to seek custody or visitation with a child.

In a state in which the constitution or other law does not permit the phrase “as amended” when federal statutes are incorporated into state law, the phrase should be deleted in subsection (b)(2).

Comment

The scope provisions in subsections (a) and (b)(1) encompass disputes between a nonparent and a parent regarding custody or visitation. Subsection (a) also covers proceedings in which the nonparent and parent seek to enter an agreed order regarding custody or visitation.

Subsection (b)(2) is based on the Indian Child Welfare Act provision of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Section 104(a).

Subsection (b)(3) provides the act does not apply to a child who is the subject of an ongoing proceeding for abuse, neglect, dependency [or guardianship of the person]. 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 abuse, neglect, dependency [and guardianship] laws usually are in a different section of statutory compilations than laws pertaining to divorce, parentage, and nonparental rights. This act should not conflict or interfere with the laws of the state regarding abuse, neglect, dependency [or guardianship]. When a child is no longer the subject of such proceedings, relief may be sought under this act. This provision is similar to Or. Stat. § 109.119(9) (West 2015) (excluding application of a nonparental visitation statute from children who are the subject of dependency proceedings). *Cf.* Minn. Stat. Ann. § 257C.08(4) (West 2015) (excluding foster parents from coverage under the state’s nonparental visitation law).

Subsection (c), which is bracketed, is an optional provision. If a state wishes to exclude coverage of the act to nonparents whose claim for custody or visitation is based solely on that

individual's service as a foster parent, the brackets should be removed and the section included. Under this approach, if the individual has an alternate basis for seeking relief, such as a preexisting substantial relationship with the child, that individual could still seek custody or visitation under the act. For example, if a child is removed from the parent's home and is placed with the child's aunt and uncle with whom the child had a preexisting substantial relationship, that substantial relationship could serve as a basis for obtaining custody or visitation (after the foster placement has concluded).

Under the law as it existed in 2018, states differed on the issue of visitation rights for foster parents. Some states exclude them from coverage in nonparent visitation statutes. *See*, statutes from Oregon and Minnesota. Texas allows foster parents to seek visitation. Tex. Fam. Code Ann. § 102.003(a) (West 2018) provides: "An original suit may be filed at any time by: . . . (12) a person who is the foster parent of a child placed by the Department of Family and Protective Services in the person's home for at least 12 months ending not more than 90 days preceding the date of the filing of the petition." *See also In re B.J.*, 242 P.3d 1128 (Colo. 2010) (stating the court had power to grant visitation to former foster parents, subject to application of a presumption in favor of the parent's decision).

Subsection (d) provides: "An individual whose parental rights concerning a child have been terminated may not maintain a proceeding under this [act] as to that child." If state law other than this act allows a parent whose rights have been terminated to regain parental rights, this act does not preclude using the other law. *See, e.g.*, 750 Ill. Comp. Stat. 50/14.5 (allowing a former parent whose rights have been terminated to petition for adoption if the child is still a ward of the court).

Subsection (e) is designed to avoid conflicts between orders entered regarding deployed parents and orders entered under this act, although this act also provides that an order entered before a parent was deployed remains in effect unless modified by court order. In subsection (e), the bracketed term "deployed" should be interpreted consistently with how the term is used in other state statutes dealing with custody of or visitation with a child of a deployed parent. If a state does not have state statutes on the subject, the state should consider enacting a definition similar to the definition in the Uniform Deployed Parents Custody and Visitation Act.

The Uniform Child Custody Jurisdiction and Enforcement Act (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.* If there are simultaneous proceedings under this act and under guardianship law, the UCCJEA (as well as law of the state regarding venue) would determine which court has priority to exercise jurisdiction.

SECTION 4. REQUIREMENTS FOR ORDER OF CUSTODY OR VISITATION.

(a) A court may order custody or visitation to a nonparent if the nonparent proves that:

(1) the nonparent:

(A) is a consistent caretaker; or

(B) has a substantial relationship with the child and the denial of custody or visitation would result in harm to the child; and

(2) an order of custody or visitation to the nonparent is in the best interest of the child.

(b) A nonparent is a consistent caretaker if the nonparent without expectation of compensation:

(1) lived with the child for not less than 12 months, unless the court finds good cause to accept a shorter period;

(2) regularly exercised care of the child;

(3) made day-to-day decisions regarding the child solely or in cooperation with an individual having physical custody of the child; and

(4) established a bonded and dependent relationship with the child with the express or implied consent of a parent of the child, or without the consent of a parent if no parent has been able or willing to perform parenting functions.

(c) A nonparent has a substantial relationship with the child if:

(1) the nonparent:

(A) is an individual with a familial relationship with the child by blood or law; or

(B) formed a relationship with the child without expectation of compensation; and

(2) a significant emotional bond exists between the nonparent and the child.

Comment

1. *Summary of bases for relief*

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

The first basis [described in subsection (b)] is that the nonparent is a “consistent caretaker” of a child. The second basis [described in subsection (c)] requires that a “substantial relationship” has developed between the nonparent and the child and denial of custody or visitation would result in harm to the child.

Both bases require the nonparent to prove that ordering custody or visitation to the nonparent is in the best interest of the child. The showing of best interest is relevant not only to whether custody or visitation should be granted to a nonparent, but also to the amount of time the child should be with the nonparent.

2. *Consistent caretaker*

The “consistent caretaker” provision has four enumerated elements in addition to a provision that the four enumerated elements occur “without expectation of compensation.” The elements are drawn from the American Law Institute Principles of the Law of Family Dissolution, § 2.03(1)(c) (2002); *Restatement on Children and the Law*, §§ 1.80 – 1.82 (Council Draft No. 3, dated Sept. 4, 2018); and the definition of “de facto parent” in the Uniform Parentage Act (UPA), § 609 (2017). *See also In re Custody of H.S.H.-K.*, 193 Wis. 2d 649, 694, 533 N.W.2d 419, 435 (1995) (a seminal case giving rights to persons who establish “a parent-like relationship with the child”).

Regarding the first element, in subsection (b)(1), the 12-month period during which the nonparent lived with the child need not be consecutive months. Examples of compelling reasons for shortening this period are: when a child is under 12 months of age and the petitioner has been living with the child since birth or shortly after, or the period of time is only slightly shorter than 12 months, such as 11.5 months, and all other requirements are met.

The second element requires that the nonparent exercise care of the child “regularly” (rather than sporadically).

The third element regarding making day-to-day decisions refers to minor decisions such as the time the child gets up and goes to bed and what food the child will eat. The decisions may include (but do not have to include) more major decisions, such as whether the child should have a medical procedure or enroll in a particular school.

Regarding the fourth element, the term “bonded” refers to the closeness of the relationship. The term “dependent” refers to the degree to which the child relies upon, and is in need of, the nonparent.

A nonparent's status as a consistent caretaker is phrased in the present tense ("the nonparent is a consistent caretaker"). The four enumerated elements are phrased in the past tense ("lived," "exercised," "made," "established"). Thus, if a nonparent was a caretaker of a child in the recent past, but the child is no longer living with the nonparent (such as because the child is back with the parent), the nonparent could still claim status as a consistent caretaker. Such an approach gives the act flexibility and does not force the nonparent to immediately seek relief after the nonparent has stopped living with the child or because the relationship between the parent and nonparent ended. If the child has not lived with the nonparent for a significant period of time, on the other hand, the nonparent would lose status as a consistent caretaker, but still might be able to seek relief under subsection (c) ("substantial relationship"). Determining whether too much time has elapsed before the nonparent sought relief will depend on multiple factors, including the child's age and whether significant contact between the nonparent and child has continued.

A showing that denial of custody or visitation would result in harm to the child is not required for a consistent caretaker because severance of a bonded and dependent relationship between a child and the consistent caretaker is presumptively harmful to the child.

The "consistent caretaker" provision of this act has similarities to the definition of "de facto parent" under the Uniform Parentage Act (2017), but the "consistent caretaker" provision is more flexible. Unlike the Uniform Parentage Act, the "consistent caretaker" provision does not require that the individual seeking custody or visitation hold the child out as his or her own. Compare Section 609 of the Uniform Parentage Act (2017). In addition, the "consistent caretaker" provision does not require that the individual has undertaken "full and permanent responsibilities of a parent." Moreover, an individual who fits the definition of "consistent caretaker" is entitled to request custody and visitation under this act, but is not entitled to other rights associated with parentage.

3. Substantial relationship and showing of harm

The second basis for a nonparent to obtain custody or visitation under this act requires a showing of a familial or other relationship in which "a significant emotional bond exists between the nonparent and child [and] denial of custody or visitation would result in harm to the child." "Consistent caretaking" is not required. If a grandparent or other relative received compensation for caring for the child, that would not preclude the grandparent or other relative from seeking custody or visitation. If a nonparent who is not a relative seeks custody or visitation, the nonparent's relationship with the child must have been formed without expectation of compensation. Subsection (c) could be used by grandparents, siblings, stepparents, or others who may not have acted as a "consistent caretaker" but can demonstrate a very close relationship with the child.

The definition of "substantial relationship with the child" is drawn, in part, from Minn. Stat. Ann. § 518E.301 (West 2016), which provides: "'close and substantial relationship' means a relationship in which a significant bond exists between a child and a nonparent."

At least 10 state supreme courts have held, as a matter of state or federal constitutional law, that harm to the child if visitation is denied must be shown before visitation may be granted to a grandparent. *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d 453 (2002); *Sullivan v. Sapp*, 866 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d 1067 (2007); *In re Marriage of Howard*, 661 N.W.2d 183, 191 (Iowa 2003); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert. denied*, 540 U.S. 1177 (2004); *Craig v. Craig*, 253 P.3d 57, 64 (Okla. 2011); *Smallwood v. Mann*, 205 S.W.3d 358 (Tenn. 2006); *Jones v. Jones*, 359 P.3d 603, 612 (Utah 2015); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005). These cases did not involve nonparents who had acted as consistent caretakers. Some courts have rejected a universal requirement of showing harm. *See Hiller v. Fausey*, 588 Pa. 342, 365–66, 904 A.2d 875, 890 (2006) (holding “that requiring grandparents to demonstrate that the denial of visitation would result in harm in every [case under the Pennsylvania statute] would set the bar too high” and is not required under the statute); *Walker v. Blair*, 382 S.W.3d 862, 872 (Ky. 2012) (“showing harm to the child is not the only way that a grandparent can rebut the presumption in favor of the child’s parents”).

In addition, as of 2017, statutes in nine states require proof of “harm,” “detriment,” or similar proof before visitation is granted to a nonparent. *See* Ala. Code § 30-3-4.2 (2017) (harm); Ark. Code § 9-13-103(e) (2017) (harm); Conn. Gen. Stat. § 46b-59(b) (2017) (harm); Ga. Code § 19-7-3(c)(1) (harm); 750 Ill. Comp. Stat. 5/602.9(b)(3) (2017) (harm); Mich. Stat. § 722.27b(4)(b) (2017) (harm); Tenn. Stat. § 36-3-306(b)(1) (2017) (harm); Tex. Fam. Code § 153.432(c) (2017) (significantly impair the child’s physical health or emotional well-being); and Utah Code § 30-5a-103(2)(f) (2017) (detriment). Connecticut has both case law and statute requiring “harm.” (Citations above).

The U.S. Supreme Court in *Troxel* did not opine 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. . . . Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.

530 U.S. at 73.

4. Case law

Courts have recognized that a grant of custody is a greater intrusion on parental rights than a grant of visitation. *See, e.g., McAllister v. McAllister*, 2010 ND 40, ¶ 23, 779 N.W.2d 652, 660. In claims for either custody or visitation, a nonparent with a substantial relationship with the child must show harm, but the focus of the evidence will vary. In general, a nonparent

seeking custody of a child in that circumstance must show that custody for the nonparent is necessary to prevent harm to the child from the parent having custody, while a nonparent seeking visitation will need to show that continued contact with the nonparent through visitation is necessary to prevent harm from loss of that relationship. *See, e.g., Fish v. Fish*, 285 Conn. 24, 47–48, 939 A.2d 1040, 1054 (2008). In contrast, a nonparent who is a consistent caretaker and seeks custody (or continued custody) of the child will need to prove that custody in the nonparent is in the child’s best interests. In all situations, proof by clear and convincing evidence is required.

In the years since *Troxel* was decided, state courts have generally held that a grandparent’s claim that the grandparent has a positive relationship with the grandchild is not sufficient in itself to justify an order of visitation over the objection of a parent. *See, e.g., Dorr v. Woodard*, 2016 ME 79, 140 A.3d 467 (2016); *Neal v. Lee*, 2000 Ok 90, 14 P.3d 547 (2000); *State Dept. of Social & Rehabilitative Servs v. Paillet*, 270 Kan. 646, 16 P.3d 962 (2001); *Flynn v. Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if the grandparent has raised a child for a few years, that can be the basis for granting visitation to the grandparent over the parents’ objection. *See, e.g., Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents had helped raise their grandchildren for the first seven years of the oldest grandchild’s life and for lesser periods for the younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007) (grandparents cared for children while the mother was dying of cancer).

An example of a substantial relationship between the child and nonparents that resulted in an order of visitation for the nonparents is *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert. denied*, 540 U.S. 1177 (2004). The New Jersey Supreme Court reinstated a trial court’s grant of visitation to maternal grandparents after the mother’s death “where the children [had] a very extensive relationship with the grandparents [, including] years where they were seeing the grandparents every other weekend.” 827 A.2d at 224. In that case, there was “a very bad relationship” between the father and the grandparents, and the father believed the grandparents were “evil.” *Id.* at 225. The trial court found the grandparents were appropriate, acted in good faith, and were an important link to the mother’s side of the family. The visitation ordered was: “(1) monthly visitation alternating between a five-hour day visit one month and a visit with two overnights the next month and (2) one extended visitation period in July or August. The court specifically noted that the reason it ordered visitation was its reliance on the grandparents’ expert who opined that such visitation was ‘to protect the children from the harm that would befall them if they were alienated from their grandparents.’” *Id.* at 208.

Another example of a “substantial relationship” case in which a nonparent was granted visitation is *Hiller v. Fausey*, 588 Pa. 342, 344–45, 904 A.2d 875, 877 (2006). In *Hiller*, the court said: “Prior to Mother’s death, Child had frequent contact with Grandmother, especially during the last two years of his mother’s illness, when they saw each other on an almost daily basis. Grandmother often transported Child to and from school and cared for him when Mother attended doctors’ appointments or was too ill to provide care. Further, Grandmother took on the task of preparing Child for Mother’s death. The trial court found credible the testimony that Child and Grandmother enjoyed spending time together, showed a great deal of affection toward one another, and shared a very close relationship.” The Pennsylvania Supreme Court affirmed

visitation [referred to in Pennsylvania as ‘partial custody’] of one weekend per month and one week each summer.

Examples of cases in which a nonparent was able to obtain custody (or guardianship) of a child over opposition of a parent include the following fact pattern: the child had been living with a parent and a half-sibling for a substantial period of time; the other parent was minimally involved in the child’s life; the custodial parent died; the noncustodial parent wanted custody of the child; the child wanted to remain with the half-sibling, who by then was an adult. *See In re Guardianship of Nicholas P.*, 27 A.3d 653 (N.H. 2011) (affirming guardianship for the half-sibling); *In Interest of Child B.B.O.*, 277 P.3d 818 (Colo. 2012) (holding the half-sibling had standing to seek “primary allocation of parental responsibilities”).

5. *Number of persons who may seek custody or visitation*

This act does not set a maximum number of nonparents who may obtain rights of custody or visitation. In most cases, however, the number of actively involved persons with a valid claim for custody or visitation will be small. As courts sort through complex family structures, the number of persons with potential claims for custody or visitation is a factor that should be considered—but without applying a fixed rule about how many persons with rights to time with the child is too many. The focus needs to remain on the best interest of the child.

SECTION 5. PRESUMPTION FOR PARENTAL DECISION.

(a) In an initial proceeding under this [act], a decision by a parent regarding a request for custody or visitation by a nonparent is presumed to be in the best interest of the child.

(b) Subject to Section 15, a nonparent has the burden to rebut the presumption under subsection (a) by clear-and-convincing evidence of the facts required by Section 4(a). Proof of unfitness of a parent is not required to rebut the presumption under subsection (a).

Comment

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

The presumption and burden of proof are designed to meet the requirements of *Troxel*. In her plurality opinion, Justice O’Connor emphasized that the Washington statute “contains no requirement that a court accord the parent’s decision any presumption of validity or any weight whatsoever.” 530 U.S. 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.

Subsection (a) does not restrict the bases on which a parent makes a decision regarding a request for custody or visitation by a nonparent. Section 12(7) lists among the factors the court shall consider in determining whether an order of custody or visitation to a nonparent is in the best interest of the child: “any other factor affecting the best interest of the child.” One such “other factor” would be the basis for the parent’s decision.

The Colorado Supreme Court has held that the burden of proof in a grandparent visitation case is clear-and-convincing evidence—even though the state’s grandparent visitation statute did not explicitly require it. In *In re Adoption of C.A.*, 137 P.3d 318, 328 (Colo. 2006), the court held under principles of Due Process that “[t]he grandparent bears the ultimate burden of proving by clear and convincing evidence that the parental determination is not in the child’s best interest and the visitation schedule grandparent seeks is in the child’s best interest.” See also *Walker v. Blair*, 382 S.W.3d 862, 871 (Ky. 2012); *Polasek v. Omura*, 2006 MT 103, ¶ 15, 332 Mont. 157, 162, 136 P.3d 519, 523 (2006); *Jones v. Jones*, 2005 PA Super 337, ¶ 12, 884 A.2d 915, 918 (2005), *appeal denied* (Pa. 2006) (holding that “convincing reasons” are required).

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

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 (10th ed. 2014).

If a child’s parents disagree about a nonparent’s request for custody of or visitation with a child, the court should consider each parent’s wishes in determining whether the nonparent has rebutted the presumption established by this Section. In *In re Marriage of Friedman & Roels*, 244 Ariz. 111, 418 P.3d 884, 886 (2018), the court held that “when two legal parents disagree about whether visitation is in their child’s best interests, both parents’ opinions are entitled to special weight.” The court further clarified that “under those circumstances, neither parent is entitled to a presumption in his or her favor and the parents’ conflicting opinions must give way to the court’s finding on whether visitation is in the child’s best interests.” *Id.*

The term “initial” in subsection (a) is the same as used in the Uniform Child Custody Jurisdiction and Enforcement Act, Section 201(a) (1997) (“initial child-custody determination”), and the term should have the same meaning in this act as in the UCCJEA.

SECTION 6. COMMENCEMENT OF PROCEEDING; JURISDICTION. A

nonparent may commence a proceeding by filing a [petition] under Section 7 in the court having jurisdiction to determine custody or visitation under the [Uniform Child Custody Jurisdiction and

Enforcement Act].

Legislative Note: *As of 2018, 51 jurisdictions have enacted the Uniform Child Custody Jurisdiction and Enforcement Act. Massachusetts has enacted the Uniform Child Custody Jurisdiction Act. In those jurisdictions, the applicable statute should be identified. If a jurisdiction has not enacted either statute, the jurisdiction should cite its standard for determining the court having jurisdiction.*

Comment

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has been adopted in 49 states. As of September 2018, Massachusetts is the only state that has not adopted the UCCJEA, although Massachusetts did adopt the Uniform Child Custody Jurisdiction Act (UCCJA).

If at the time a petition is filed under this act, an action for custody or visitation 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).

SECTION 7. VERIFIED [PETITION].

(a) A nonparent shall verify a [petition] for custody or visitation under penalty of perjury and allege facts showing that the nonparent:

(1) meets the requirements of a consistent caretaker of the child; or

(2) has a substantial relationship with the child and denial of custody or visitation

would result in harm to the child.

(b) A [petition] under subsection (a) must state the relief sought and allege specific facts showing:

(1) the duration and nature of the relationship between the nonparent and the child, including the period, if any, the nonparent lived with the child and the care provided;

(2) the content of any agreement between the parties to the proceeding regarding care of the child and custody of or visitation or other contact with the child;

(3) a description of any previous attempt by the nonparent to obtain custody of or visitation or other contact with the child;

(4) the extent to which the parent is willing to permit the nonparent to have custody of or visitation or other contact with the child;

(5) information about compensation or expectation of compensation provided to the nonparent in exchange for care of the child;

(6) information required to establish the jurisdiction of the court under the [Uniform Child Custody Jurisdiction and Enforcement Act];

(7) the reason the requested custody or visitation is in the best interest of the child, applying the factors in Section 12; and

(8) if the nonparent alleges a substantial relationship with the child, the reason denial of custody or visitation to the nonparent would result in harm to the child.

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

***Legislative Note:** As of 2018, 51 jurisdictions have enacted the Uniform Child Custody Jurisdiction and Enforcement Act. Massachusetts has enacted the Uniform Child Custody Jurisdiction Act. In those jurisdictions, the applicable statute should be identified. If a jurisdiction has not enacted either statute, the jurisdiction should cite its standard for determining the court having jurisdiction.*

Comment

Requiring verified pleading and specificity in pleadings is intended to reduce actions that are not meritorious and facilitate disposition of nonmeritorious cases by motions to dismiss or for summary judgment.

Regarding subsection (b)(3), the description of any previous attempt to obtain custody, visitation, or other contact with the child should include oral requests as well as written requests.

Among the facts required in the pleading is the information required to establish jurisdiction by Section 209 of the Uniform Child Custody Jurisdiction and Enforcement Act—a section titled “Information to be Submitted to the Court.” The section provides, in part:

“(a) [Subject to [local law providing for the confidentiality of procedures, addresses, and other identifying information], in] a child-custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably

ascertainable, under oath as to the child's present address or whereabouts, the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

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

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

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

If a child will receive financial benefits as a result of being in the custody of a nonparent, the nonparent may wish to specify those benefits in the petition. Such benefits might include Social Security benefits and health insurance.

SECTION 8. SUFFICIENCY OF [PETITION].

(a) The court shall determine based on the [petition] under Section 7 whether the nonparent has pleaded a prima facie case that the nonparent:

(1) is a consistent caretaker; or

(2) has a substantial relationship with the child and denial of custody or visitation

would result in harm to the child.

(b) If the court determines under subsection (a) that the nonparent has not pleaded a prima facie case, the court shall dismiss the [petition].

Comment

Requiring the court to determine whether a nonparent has pled a prima facie case protects the interests of parents and filters out cases in which the petitioner does not have a meritorious claim, while at the same time allowing the opportunity to preserve close and significant relationships between a child and nonparent.

To reduce the burden of litigation, a parent may be able to expedite disposition of a case by using a motion to dismiss or for summary judgment.

In her plurality opinion in *Troxel*, Justice O'Connor stated: "As Justice KENNEDY recognizes, the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated.'" 530 U.S. at 75, *quoting id.* at 101 (Kennedy, J., dissenting). *See also D.P. v. G.J.P.*, 636 Pa. 574, 590, 146 A.3d 204, 213 (2016) (stating that bifurcating proceedings with determination of standing before the merits "serves an important screening function in terms of protecting parental rights"); *Rideout v. Riendeau*, 2000 ME 198, ¶ 30, 761 A.2d 291, 302 (stating that determination of standing before full litigation of the claim "provides protection against the expense, stress, and pain of litigation").

SECTION 9. NOTICE. On commencement of a proceeding, the nonparent shall give notice to each:

- (1) parent of the child who is the subject of the proceeding;
- (2) person having custody of the child;
- (3) individual having court-ordered visitation with the child; and
- (4) attorney, guardian ad litem, or similar representative appointed for the child.

Comment

Elements of the notice provision are similar to the notice provision of the Uniform Child Custody Jurisdiction and Enforcement Act, § 205(a) (1997) ("Before a child-custody determination is made under this [Act], notice and an opportunity to be heard . . . must be given to all persons entitled to notice under the law of this State as in child custody proceedings between residents of this State, any parent whose parental rights have not been previously terminated, and any person having physical custody of the child"). The methods by which notice is given are governed by state and local rules. The term "person" is used in paragraph (2) because a government unit or other institution may have "custody" of a child. The term "individual" is used in paragraph (3) because only a natural person (an "individual") may have visitation with a child. Notice must be given only to individuals with "court-ordered" visitation, since determining the identity of individuals who might visit a child without a court order would be difficult if not impossible.

SECTION 10. APPOINTMENT; INTERVIEW OF CHILD; COURT SERVICES.

In the manner and to the extent authorized by law of this state in a family law proceeding other than under this [act], the court may:

- (1) appoint an attorney, guardian ad litem, or similar representative for the child;
- (2) interview the child;
- (3) require the parties to participate in mediation or another form of alternative dispute resolution, but a party who has been the victim of domestic violence, sexual assault, stalking, or other crime against the individual by another party to the proceeding may not be required to participate[unless reasonable procedures are in place to protect the party from a risk of harm, harassment, or intimidation];
- (4) order an evaluation, investigation, or other assessment of the child’s circumstances and the effect on the child of ordering or denying the requested custody or visitation or modifying a custody or visitation order; and
- (5) allocate payment between the parties of a fee for a service ordered under this section.

Legislative Note: *The brackets in paragraph (3) should be removed and the phrase “unless reasonable procedures are in place to protect the party from a risk of harm, harassment, or intimidation” should be included in the paragraph in a state that requires mediation of custody and visitation cases, including a case involving an allegation of domestic violence. If a state does not require mediation in those circumstances, delete the phrase and the brackets.*

Comment

A variety of personnel and court services may assist the court in making decisions regarding nonparental custody and visitation. This act does not mandate the creation of new services in jurisdictions where no similar services exist, but the act does make such services available if the services already are utilized in other family law proceedings.

Regarding paragraph (1), the court has the power to appoint a representative for a child, such as an attorney, a guardian ad litem, or a similar representative.

The evaluations referenced in subsection (4) include mental health evaluations and evaluations of parenting skills.

In paragraph (3), the phrase “[unless] reasonable procedures are in place to protect the party from risk of harm, harassment, or intimidation” is the same as used in the Uniform Family Law Arbitration Act, § 12(b)(3) (2016). Among the protections that might be used is “shuttle mediation,” in which the parties to mediation are not in the same room with each other and the mediator shuttles between rooms.

SECTION 11. EMERGENCY ORDER. On finding that a party or a child who is the subject of a proceeding is in danger of imminent harm, the court may expedite the proceeding and issue an emergency order.

Comment

This section makes explicit that the court has the power to enter an emergency order, as well as a final order. Generally, other provisions of the act—including the requirements for pleadings, burden of proof, presumptions, and factors considered—should apply to the issuance of an emergency order in addition to a final order.

SECTION 12. BEST INTEREST OF CHILD. In determining whether an order of custody or visitation to a nonparent is in the best interest of a child, the court shall consider:

- (1) the nature and extent of the relationship between the child and the parent;
- (2) the nature and extent of the relationship between the child and the nonparent;
- (3) the views of the child, taking into account the age and maturity of the child;
- (4) past or present conduct by a party, or individual living with a party, which poses a risk to the physical, emotional, or psychological well-being of the child;
- (5) the likely impact of the requested order on the relationship between the child and the parent;
- (6) the applicable factors in [cite to this state’s law other than this [act] pertaining to factors considered in custody or visitation disputes between parents]; and
- (7) any other factor affecting the best interest of the child.

Legislative Note: *The applicable factors in paragraph (6) include factors used to decide “parenting time” or a similar term used in the state’s statutes.*

Comment

The nonparent visitation statutes of most states, as they existed in 2017, list factors a court should consider (other than best interest of the child). This section reflects factors that have been used by the states. The second factor—the nature and extent of the relationship between the child and nonparent—may include consideration of whether there is a family

relationship between the child and the nonparent.

[SECTION 13. PRESUMPTION ARISING FROM CHILD ABUSE, CHILD NEGLECT, DOMESTIC VIOLENCE, SEXUAL ASSAULT, OR STALKING.

(a) The court shall presume that ordering custody or visitation to a nonparent is not in the best interest of the child if the court finds that the nonparent, or an individual living with the nonparent, has committed child abuse, child neglect, domestic violence, sexual assault, stalking, or comparable conduct in violation of law of this state or another state.

(b) A finding that conduct specified in subsection (a) occurred must be based on:

(1) evidence of a conviction in a criminal proceeding or final judgment in a civil proceeding; or

(2) proof by a preponderance of the evidence.

(c) A nonparent may rebut the presumption under subsection (a) by proving by clear-and-convincing evidence that ordering custody or visitation to the nonparent will not endanger the health, safety, or welfare of the child.]

***Legislative Note:** This section provides a presumption against granting custody or visitation to a nonparent if the nonparent or a person living with the nonparent has committed child abuse, child neglect, domestic violence, sexual assault, stalking, or comparable conduct. This goal can be accomplished by enacting Section 13 or amending existing state law concerning presumptions and rebuttal of presumptions applicable to a dispute between parents. The same types of presumptions and criteria for rebuttal of presumptions would apply to a nonparent seeking custody or visitation.*

Comment

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

In disputes between parents, approximately half the states apply a rebuttable presumption against granting joint physical custody or legal custody to a parent who perpetrated domestic violence. National Council of Juvenile and Family Court Judges, Rebuttable Presumption States

(2013), available online at: <http://www.ncjfcj.org/sites/default/files/chart-rebuttle-presumption.pdf>.

The Legislative Note gives drafters the option of adapting existing state law concerning presumptions and rebuttal of presumptions applicable to disputes between parents to disputes between nonparents and parents. Such state laws may provide an alternate list of offenses that give rise to presumptions, provide procedures for utilizing the presumptions, and establish criteria for rebutting the presumptions.

SECTION 14. ORDER OF CUSTODY OR VISITATION.

(a) If a nonparent seeks custody, the court may order:

- (1) sole or primary custody to the nonparent;
- (2) [joint custody] to the nonparent and a parent or other party; or
- (3) visitation to the nonparent.

(b) If a nonparent seeks visitation only, the court may not order custody to the nonparent seeking visitation.

Legislative Note: If state law uses an alternative term, such as shared custody, for joint custody, the alternative term should be used in subsection (a)(2).

Comment

This section specifies the types of orders a court can enter based on the relief sought. A nonparent who only seeks custody may be granted visitation since that is less of an intrusion on parental rights than is custody. While evidence in a specific case may not be sufficient to prove that a nonparent should be granted custody, it may nevertheless be sufficient to prove that an award of visitation is appropriate. However, a nonparent who seeks only visitation may not be granted custody since that would be a greater intrusion on parental rights which should not be granted without proper notice and proof.

Joint custody is among the options for custody arrangements involving nonparents. *See, e.g., Darby v. Combs*, 229 So. 3d 108 (Miss. 2017) (joint custody given to the child's maternal great-grandparents and paternal grandmother when both parents unfit); *McCormic v. Rider*, 27 So. 3d 277, 279 (La. 2010) (a "tripartite custody arrangement" between the grandmother, who had adopted the child, but was no longer able to care for the child by herself, and the former parents who had consented to the adoption a few years earlier).

SECTION 15. MODIFICATION OF CUSTODY OR VISITATION.

(a) On [motion], and subject to subsections (c) and (d), the court may modify a final

custody or visitation order under Section 14 on a showing by a preponderance of the evidence that:

(1) a [substantial and continuing] change in circumstance has occurred relevant to the custody of or visitation with the child; and

(2) modification is in the best interest of the child.

(b) Except as otherwise provided in subsections (c) and (d), if a nonparent has rebutted the presumption under Section 5 in an initial proceeding, the presumption remains rebutted.

(c) If a [motion] is filed to modify an order of visitation under this [act] to obtain an order of custody, the nonparent must rebut the presumption under Section 5.

(d) On agreement of the parties, the court may modify a custody or visitation order, unless the court finds that the agreement is not in the best interest of the child.

Legislative Note: *In subsection (a)(1), a state should use the terms in state law governing modification of custody or parenting time in proceedings between parents.*

Comment

Subsection (a) reflects the standard for modification of custody or visitation that is applied in most states: a showing of substantial and continuing change of circumstance, coupled with a showing that modification is in the best interest of the child. Under this approach, a custody or visitation order in favor of a nonparent generally would continue unless the party seeking modification established that a substantial change of circumstance had occurred since the order was entered and that the requested modification was in the best interest of the child.

Under subsection (b), if a nonparent obtained an order of visitation and later wishes to modify the order of visitation (such as a change in visitation schedule), the nonparent does not need to rebut the presumption in favor of the parent in the modification proceeding since the presumption already was rebutted in the earlier proceeding. The nonparent only needs to show the modification is in the best interest of the child. If, however, a nonparent who obtained an order of visitation wishes to obtain an order of custody, subsection (c) requires the nonparent to rebut the presumption under Section 5 since the order of custody would be a significantly greater intrusion on the parent's interest than the order of visitation. In addition, if a nonparent unsuccessfully sought visitation or custody, and the nonparent later sought custody or visitation again, the nonparent would still have to overcome the presumption under Section 5.

Among the changes in circumstance in which a parent might be able to modify an order of custody originally entered in favor of a nonparent would be when a parent had successfully completed a drug rehabilitation program and sought to have the child returned to parental custody. In that event, the parent would have the burden of proof, including showing that it is in the best interest of the child to make the modification.

[SECTION 16. FINDINGS OF FACT AND CONCLUSIONS OF LAW. When issuing a final order of custody or visitation, the court shall make findings of fact and conclusions of law on the record in support of its decision or, if the [petition] is dismissed under Section 8, state the reasons for the dismissal.]

Legislative Note: A state should omit this section if the requirement or lack of requirement to make findings of fact and conclusions of law is governed by court rule rather than statute or the state requires findings of fact and conclusions of law in all proceedings involving family law.

Comment

Requiring findings of fact and conclusions of law has several benefits. The fact-finding process structures the court's review so that the court is less likely to overlook important facts or apply bias in reaching its decision. Careful fact-finding by the trial court also facilitates appellate review and may assist the parties in accepting the decision. At least 20 states and the District of Columbia require the trial court to make findings of fact in custody cases.

SECTION 17. EFFECT OF ADOPTION OF CHILD BY STEPPARENT OR OTHER RELATIVE. If a child is adopted by a stepparent or other relative of the child, an order of custody or visitation to a nonparent remains in effect and is not changed by the adoption unless modified, after notice to all parties to the custody or visitation proceeding, by the court that entered the order or the court that granted the adoption.

Comment

As of 2017, state laws regarding visitation by nonparents have dealt with the effect of a child's adoption in different ways, including: (1) providing that the visitation order survives adoption by a relative; (2) providing that nonparents can seek visitation following adoption by a relative; and (3) providing that the visitation provision does not apply if the child is adopted by a nonrelative. While an adoption decree would generally supersede any prior custody orders, this section protects a nonparent's right to visit a child after an adoption by a relative unless the visitation order is modified.

SECTION 18. EXPENSE OF FACILITATING VISITATION. The court may issue an order allocating responsibility between the parties for payment of the expense of facilitating visitation, including the expense of transportation.

Comment

This section permits a court to allocate responsibility for paying costs of facilitating visitation, including the cost of transportation. Cost of transportation could include an escort for a child. In most cases in which a nonparent is exercising visitation, the nonparent would pay the associated costs.

SECTION 19. LAW GOVERNING CHILD SUPPORT. The authority of a court to award child support payable to or by a nonparent is governed by law of this state other than this [act].

Comment

A nonparent granted custody of a child may wish to obtain child support from a parent or apply for benefits from government or private programs to help a child. Conversely, a nonparent may face a request for child support. Both the nonparent's right to seek support or apply for benefits, and the nonparent's potential liability for support are governed by law other than this act.

[SECTION 20. EQUITABLE RIGHT OR REMEDY. This [act] does not preclude the recognition of an equitable right or remedy for [a de facto parent] under law of this state other than this [act].]

Legislative Note: If state law treats a de facto parent as a nonparent, but recognizes on equitable grounds greater rights for the de facto parent than those established by this act, the state should enact this section.

If state law refers to "psychological parent" or an individual acting "in loco parentis" rather than "de facto parent," the alternative term should be substituted.

Comment

The law regarding families is more dynamic than many areas of law. This act is not intended to preclude the development of additional equitable rights and remedies in this area or to nullify previously recognized equitable rights.

The Uniform Parentage Act (2017) recognizes legal parentage for an individual who meets the criteria for “de facto parent.” The definition of “de facto parent” under equitable principles may be different from the definition in the Uniform Parentage Act.

SECTION 21. 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 22. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

SECTION 23. TRANSITIONAL PROVISION. This [act] applies to a proceeding:

(1) commenced before [the effective date of this [act]] in which a final order has not been entered; and

(2) commenced on or after [the effective date of this [act]].

[SECTION 24. SEVERABILITY. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

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

SECTION 25. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

(c)

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

When enacting this act, a state should not repeal: (1) the state's Uniform Deployed Parents Custody and Visitation Act or other state statute dealing with custody of and visitation with a child of a deployed parent; (2) a statute regarding guardianship of a minor; (3) a statute regarding a child in custody of the state, including a child in foster care; or (4) a statute providing a de facto parent with the rights of a legal parent.

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