

## MEMORANDUM

**TO:** Drafting Committee for the Non-Parental Child Custody and Visitation Act

**FROM:** Jeff Atkinson, Reporter

**DATE:** March 28, 2016

**RE:** Comments received on April 2016 draft

I have received advance comments on the April 2016 Meeting Draft from David Biklen, Mary Devine, Courtney Joslin, Sylvia Randolph, and Harry Tindall.

I will present the comments in approximate chronological order relative to section in the draft about which the comments are made.

– Prefatory Note or other Comments

- Perhaps elaborate more of the rationale of *Troxel* and the arguments for constitutionality of the act

– Global Comment

- The Act uses both the “individual” and the “petitioner.” I wonder if it might be better to choose one and use it consistently throughout the Act. I suggest replacing the references to “petitioner” with “individual.”

– Section 1 (Definitions)

– De facto parent (Comments from several participants)

- I recommend the following edits to the definition of “de facto parent.” I believe that the edits to the first line are consistent with our prior conversations. I have also included two additional questions/comments below the suggested line edits:

“De facto parent” means an individual who is not a legal parent under another statute or in equity who: [use “individual” instead of

“petitioner “ in definition]

- Using "petitioner" in the definition of de facto parent is inconsistent with the use of the term De Facto Parent in section 6 to describe a defendant in the action. I would suggest going back to "individual."
- Sub A, at the top of Page 4 is unclear to me.  
By "completely undertaken" do you really mean "exercised", or is "completely" unnecessary and you simply mean he/she has tried to do the acts specified? It's also not clear if the word "permanent" is intended to mean uninterrupted actions on the part of the defacto parent, or whether the de facto's intent that the parental responsibility be permanent would be enough.

Also I note that lines 16 and 17, as currently written would allow someone who has accepted compensation to claim status as a de facto parent so long as the compensation was unexpected. Was that the intent, or did you mean that the person could not have accepted or expected to receive compensation?

- Suggest moving the “two year” and perhaps the “significant period of time” portions of the definition of “de facto parent “to the substantive section on the rights of “de facto parent.”
  - At some point, we previously discussed the possibility of adding a heightened pleading requirement for people relying on an oral argument. I’m just flagging that for consideration.
  - Given that some states already recognize “de facto parents” in equity, I wonder if we might want to include a note in the Comment suggesting that states that already recognize de facto parents in equity should consider using a different term in this statutory scheme. We might want to include some suggestions, including, for example, “parents by estoppel.”
- Definition of “Non-parent”
- I would recommend against including “domestic partner” in the definition. First, the term has different meanings in different jurisdictions. Second, in some jurisdictions, “domestic partners” have the same parental rights as a spouse. In such jurisdictions, domestic partners often will be legal parents. Accordingly, I think it could be confusing and it could

potentially problems to include “domestic partners” here in the list of potential nonparents.

- Non-parent should be broad, as you’ve drafted, but I think the list is unnecessary. Suggest: any adult individual other than a de facto parent

– Definition of “Parental responsibility”

- Suggest for Parental Responsibility: means the authority to exercise care and control of a child and make decisions to provide for the health and welfare and other needs of the child.

– Definition of “Physical custody”

- I would recommend against adding: “pursuant to a court order.” Many people exercise physical custody of children without having a court order.

– Section 3

If the group decides to go with Alternative B, subsection 4 will have to be redrafted a bit, so that the showing of detriment is not required if the action is filed by a de facto parent. (It should not be required at the pleading stage for de facto parents, because it is not required at the merits stage). A suggested edit is included below.

(4) if the action is filed by a nonparent who is not alleging that he or she is a de facto parent, the detriment to the child if the custody or visitation requested by the petitioner is not granted;

Section 5

- Two things:
  - For consistency sake, I recommend replacing “petitioner” with “individual.”

-- I just want to register my support for Jeff's decision to keep the phrase "initial petition" and to add the phrase "petition to modify."

-- I find the notion of parentage by agreement to be completely objectionable and should not find its way into this act.

## Section 6

— I recommend the following edits to this Section.

### SECTION 6. INITIAL PETITION BY NON-PARENT WHO IS NOT A DE FACTO PARENT OF CHILD IN CUSTODY OF PARENT OR DE FACTO PARENT.

(a) This section applies to initial petitions by a non-parent who is not a de facto parent.

(b) If a child is in the custody of a parent or de facto parent, a non-parent requesting custody or visitation may file an initial petition with the court for custody of or visitation with the child if the non-parent demonstrates: (1) a substantial relationship exists between the child and the non-parent, and (2) the denial of custody or visitation to the non-parent would be a detriment to the child.

(c) In a proceeding under subsection (b), a rebuttable presumption exists that the parent's or de facto parent's decision about custody and visitation is in the best interests of the child. To rebut the presumption, the non-parent ~~petitioner~~ must establish by clear and convincing evidence that: . . .  
(Using "non-parent" instead of "petitioner")

-- It seems that a custody action by a non-parent should be by a preponderance of the evidence in that the parent is being replaced as the primary caretaker. As for visitation, I think clear and convincing is appropriate.

## Section 7

I recommend the following edits to Section 7. I also wonder whether existing subsection (b) (renumbered subsection (c) below) can be struck. I highlighted the relevant subsection below.

### SECTION 7. INITIAL PETITION BY NON-PARENT WHO IS NOT A DE FACTO PARENT OF CHILD NOT IN CUSTODY OF PARENT OR DE FACTO PARENT.

(a) This section applies to initial petitions by a non-parent who is not a de facto parent.

(b) If the child is not in the custody of a parent or de facto parent, a non-parent requesting custody or visitation may file an initial petition with the court for custody of or visitation with the child if the non-parent demonstrates a substantial relationship exists between the child and the non-parent.

(c) [formerly (b)] In an initial proceeding for custody of or visitation with a child between two or more petitioners who are non-parents, a presumption does not exist that custody or visitation should be given to the petitioner.

(d) To obtain custody or visitation, the non-parent must establish by clear and convincing evidence that custody or visitation for the non-parent is in the best interests of the child.

## Section 8 (Domestic Violence)

- Does this Section apply to de facto parents?
- Sections 16, 17 & 19 (dealing with Findings, Priority on Court Calendar, and Other Rights and Remedies)
  - Delete section 16, 17, and 19. These are mostly feel-good provisions with little real impact. Most states already have these provisions in case or statutory law or court rule. In CT for example, a case cannot be appealed unless the court make findings and conclusions and the appellate court will send back if not done.

- Section 19 (Other Rights and Remedies)
  - Section 19 will be the source of much scheming and lawyers will make a mockery of the act. Please omit. . . . (Alternatively,) the section should be limited to case law arising after passage of the act.
- Suggestions for additional sections to the act
  - Here are some suggestions for the next draft of the Non-Parental Rights to Child Custody and Visitation Act:
  - Section \_\_\_\_\_. This act is subject to the jurisdictional requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (cite state statutory codification).
  - Section \_\_\_\_\_. This act does not create, enlarge, or diminish parental rights or duties under other law of this state. [verbatim text from Uniform Parentage Act Sec. 103; Illinois Parentage Act, 750 ILCS 46, and the Washington Parentage Act 26.26.201; the new Maine Parentage Act contains identical language Sec. 1833 ]
  - Section \_\_\_\_\_. This act does not govern the determination of parentage. [The determination of parentage is determined by the Parentage Act Sec. 103 and 750 ILCS 46 and identical language in Washington Parentage Act 26.26.201; the new Maine Parentage Act contains identical language Sec. 1833] Note: This is intended to place all definitions of parents in one act. For enactment purposes in those states wishing to recognize de facto parents, I would suggest a legislative note providing an amendment to that states parentage laws along with suggested text. The Maine Parentage Act has an excellent definition of a de facto parent.
  - Section \_\_\_\_\_. This act is subject to the Deployed Parents Custody and Visitation Act (cite state statutory codification or other similar laws for deployed parents).
  - Section \_\_\_\_\_. This act does not alter custody, visitation, and termination of parental rights as provided under other law of this state.
  - Section \_\_\_\_\_. This act is remedial in nature and is intended to provide relief to a non-parent seeking custody or visitation with a child. If any part of this act is

determined to be unconstitutional, it is to be limited to the issue decided and does not affect the remaining provisions of this act.

- Section\_\_\_\_. This act does not alter the law of this state regarding state intervention for a protection of a child and any related foster parent placement.
- Section\_\_\_\_. This act does not affect the adoption of a child either by an agency or by a stepparent.
- Section\_\_\_\_. This act is subject to the Interstate Compact on Placement of Children (cite state statutory codification).