

## MEMORANDUM

**TO:** Drafting Committee, Nonparental Child Custody and Visitation Act

**FROM:** Deborah Lehrmann, Chair, Drafting Committee; Barbara Atwood, Vice Chair;  
Jeff Atkinson, Reporter

**DATE:** January 31, 2018

**RE:** Status Report and Explanation of Current Draft

Hello, friends, and happy new year! The Nonparental Child Custody and Visitation Act Drafting Committee met October 13 & 14, 2017. At the request of ULC leadership, a small group had a follow-up meeting in Chicago on December 8 & 9, 2017, to resolve technical issues and further refine the draft. That group consisted of Debra Lehrmann, Chair; Barbara Atwood, Vice-Chair; Bill Barrett, Division Chair; Commissioners Mark Cutrona, Craig Stowers, and Eric Weeks; Jeff Atkinson, Reporter; Liza Karsai, ULC Executive Director; and Lindsay Beaver, ULC legislative counsel.

We hope that we can devote the final meeting of the drafting committee (March 9-10, 2018) to polishing the draft for presentation at the ULC 2018 Annual Meeting. Leadership has urged us to narrow the issues we will be discussing at the drafting committee meeting. With that goal in mind, we are scheduling a conference call of the full drafting committee before our in-person meeting in March to address the remaining questions that need committee resolution.

Below is a list of revisions to the draft based on the October drafting committee meeting and the small-group meeting in December. Those issues that need full committee input are marked with an asterisk. Of course, any aspect of the draft is always open to discussion, but we hope we can come to a consensus on all remaining policy choices in the draft during the conference call.

1. **Section 2. Definitions.** The current draft includes the key terminology, “consistent caretaker” and “substantial relationship” in the Definitions section and also in the Elements sections (Section 11 and Section 12). These concepts are at the core of the act, so it makes sense to include them in both places, Style permitting.
2. **Section 2(4). Compensation.** Addressing an issue raised on the floor of the 2017 Annual Meeting, a family member who is a consistent caretaker of a child can seek custody or visitation, even if the family member is reimbursed (including by a parent) for expenses incurred in caring for the child, such as food, clothing, and medical expenses. Section 2(4) defines “compensation” as “wages or other remuneration in

exchange for care of the child. ‘Compensation’ does not include reimbursement of expenses for care of the child, such as payment for food, clothing, and medical expenses.”

3. **Section 2(5) Consistent caretaker.** The definition of “consistent caretaker” in the current draft is revised from the previous draft to lengthen the typical duration of co-residence with the child (from six months to 12 months) and also to build flexibility into the standard (“ordinarily”). In the current draft, a consistent caretaker is an individual who “without expectation of compensation (i) lived with the child for a significant period of time, ordinarily not less than 12 months; (ii) consistently exercised care of the child; (iii) made decisions regarding the child solely or in cooperation with a parent or other custodian or as a result of a complete failure or inability of any legal parent to perform parenting functions; and (iv) established a bonded and dependent relationship with the child with the explicit or tacit support of a parent of the child.” This language, incidentally, roughly parallels the approach taken by the ALI in its current draft of the Restatement of Children and the Law, although the ALI uses a duration of “ordinarily not less than two years.” See § 2.80, Preliminary Draft No. 4.
4. **\*Section 2(6). Detriment/Harm.** The full committee needs to decide whether to continue to use the term “detriment” or to substitute the term “harm” for the standard required to be met when a nonparent has a substantial relationship with a child. The draft has been using the term “detriment” to mean “adverse effect on a child’s physical, emotional, or psychological well-being.” A sizable minority of states use the term “harm,” and an argument has been made that the draft should use that terminology. An updated research memo on this subject by Jeff is attached. The substantive operation of detriment or harm is referenced in Section 6 (Verified Petition) and Section 12 (Elements of Action for Nonparent Who has Substantial Relationship with Child).
5. **Section 3. Scope.** Under the current draft, the act will not apply to a proceeding between nonparents, unless a parent is a party. If there is a dispute between two or more nonparents and a parent is not a party, the state’s guardianship law or other state law would govern the dispute. In addition, the act will not apply to a former foster parent who seeks custody or visitation *if the individual’s relationship with the child arose from the foster placement*. The general exclusion of foster parents is necessary in order to avoid conflict with state law regulating foster parents’ contact with children after the foster relationship has ended. The qualifying language was added to ensure that the act would not exclude a foster parent who had a pre-existing relationship with the child, such as a grandparent.
6. **\*Section 5(b). Standing.** Section 5(b) now provides: “[Unless the court finds that a hearing is necessary, the] [The] court shall determine, based on the pleadings under Section 6, whether the nonparent has alleged facts sufficient to satisfy the requirements of subsection (a).” The full committee needs to decide whether to

- include the bracketed clause. The bracketed clause recognizes that a hearing may sometimes be necessary if, for example, the initial pleading is challenged for failure to state a claim. The overall goal of the subsection, however, is to avoid the need for preliminary hearings on the merits.
7. **Section 5(c). Standing.** Under the current draft, an individual whose parental rights have been terminated does not have standing to seek custody or visitation under the act. The exclusion is necessary to avoid interfering with a state's child welfare regulatory scheme. Although the full committee was of mixed views on this question, we believe a majority favors the exclusion.
  8. **Section 7(4). Notice.** Notice to a child is not required unless an attorney, GAL, or similar representative has been appointed.
  9. **Section 10. Parental Presumption.** Subsection (a) has been reworded and shortened to make clear that the presumption applies in an original proceeding. Section 16 addresses the application of the presumption in the context of a modification petition.
  10. **Sections 11 and 12. Elements.** These two sections are the core of the Act. Again, with respect to Section 12, the full committee needs to decide whether to continue to use the term "detriment" or whether to substitute the word "harm."
  11. **Section 13. Grant of Custody or Visitation.** This new section clarifies the options that a court has when a nonparent seeks custody and the more limited options when a nonparent seeks visitation. A court may grant visitation to a nonparent who originally sought custody, but the court may not grant custody to a parent who originally sought visitation unless notice of seeking custody is given and other requirements of the act are met.
  12. **Section 14. Best Interest of Child.** A factor when considering the best interest of the child is a history of or threat of domestic violence, child abuse, and related offenses. An earlier draft required that the offenses be considered only when directed against certain categories of individuals, but the current draft does not contain that limitation.
  13. **\* Section 15. Presumption regarding Domestic Violence, Child Abuse, Child Neglect, Sexual Assault, or Stalking.** As written, the current draft imposes a presumption against a nonparent who has committed any of the listed offenses. Regarding presumptions against individuals who engaged in acts of domestic violence and related offenses, a Legislative Note gives states the option of incorporating relevant presumptions in current state law pertaining to disputes between parents. An earlier draft included both nonparents and parents under Section

15, but we narrowed the presumption to nonparents because of a concern about competing presumptions. The asymmetry of the current draft, however, may leave children with incomplete protection. The full committee should decide whether an offense committed by a parent should trigger a negative presumption, or whether we should continue to apply the presumption only against nonparents.

14. **Section 16. Modification.** Under the current draft, a court may modify orders for custody or visitation upon a showing of substantial and continuing change of circumstances and best interest of the child (or agreement of the parties unless the court finds that the agreement is not in the best interest of the child). The burden of proof is on the party seeking modification, but the section also provides: “If a nonparent who has obtained an order of visitation seeks to modify the order to obtain custody of the child, the nonparent must rebut the presumption under Section 10 as in an original proceeding.”
15. **Section 18. Effect of Adoption of Child.** If a child is adopted by a stepparent or other relative, an order of visitation in favor of a nonparent remains valid, unless a court orders otherwise. This section has been revised to eliminate reference to adoption by a “cohabitant.”
16. **Section 20. Authority of Nonparent to Receive Support for the Child.** The current draft does not take a position on the application of a state’s child support law to nonparental custody or visitation. “The authority of a court to award child support payable to a nonparent given custody under this [act] is governed by law other than this [act].”
17. The current draft no longer has a provision regarding attorney fees. While the full committee had mixed views on this question, omitting the provision seems advisable since the allocation of fees between a parent and nonparent implicates concerns that are different from an allocation between parents. The Prefatory Note states that an attorney fee provision may be included if desired.