

D R A F T

FOR DISCUSSION ONLY

**NONPARENTAL CHILD CUSTODY
AND VISITATION ACT**

**[TENTATIVE NEW NAME:
NONPARENT CUSTODY AND VISITATION ACT]**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

Draft for March 9-10, 2018 Drafting Committee Meeting

With Prefatory Note, Reporter's Notes, and Comments

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February 26, 2018

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NONPARENTAL CHILD CUSTODY AND VISITATION ACT

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1 **NONPARENTAL CHILD CUSTODY AND VISITATION ACT**

2 **PREFATORY NOTE**

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

7
8 In 2016, the United States Census Bureau reported that there were 73,745,000 children in
9 United States under age 18. Of that number, the breakdown for the children’s living
10 arrangements was:

- 11
- 12 · Living with both parents: 50,679,000
- 13 · Living with mother only: 17,223,000
- 14 · Living with father only: 3,006,000
- 15 · Living with neither parent: 2,836,000
- 16 · Of the children living with neither parent, 1,556,000 were living with grandparents.

17
18 U.S. Census Bureau, *America’s Families and Living Arrangements: 2016, Table C2, Household*
19 *Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2016*
20 available at <https://www.census.gov/hhes/families/data/cps2016C.html>

21
22 The U.S. Census Bureau reports that the unmarried partner population “grew 41 percent
23 between 2000 and 2010, four times as fast as the overall household population.” U.S. Census
24 Bureau, “Households and Families: 2010” at p. 3 (C2010BR-14) (Apr. 2012), available at
25 <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

26
27 Opposite-sex unmarried partner households increased by 40 percent since 2000; same-sex
28 households increased by 80 percent. *Id.* at p. 6.

29
30 The main provisions of this act address the legal issues raised by the growing number of
31 children who have substantial relationship with nonparents. The act does the following:

- 32
- 33 • recognizes a right to seek custody or visitation for two categories of individuals who
34 acted without compensation: (1) nonparents who have acted as consistent caretakers of a
35 child, and (2) other nonparents who have a substantial relationship with a child and who
36 demonstrate that denial of custody or visitation would be detrimental to the child;
- 37 • requires that the pleadings be verified and specify the facts on which the request for
38 custody or visitation is based;
- 39 • requires that the nonparents establish standing in order to maintain a suit for custody or
40 visitation;
- 41 • requires that notice be provided to: (1) any parent of the child; (2) any person having
42 custody of the child; (3) any attorney, guardian ad litem, or similar representative for the
43 child; and (4) any individual having court-ordered visitation with the child;
- 44 • provides a rebuttable presumption that the parent’s decision about custody or visitation is

1 in the best interest of the child;

- 2 • imposes a burden of proof on the nonparent of clear-and-convincing evidence in order to
- 3 to obtain relief;
- 4 • provides protections for victims of domestic violence;
- 5 • provides a list of factors to guide the court’s decision regarding the child’s best interest;
- 6 • provides that a nonparent granted visitation may be ordered to pay the cost of facilitating
- 7 visitation, including the cost of transportation; and
- 8 • provides that the rights and remedies of this act are not exclusive and do not preclude
- 9 additional rights and remedies under laws of the state other than this act.

10 The act does not apply to a proceeding between two or more nonparents unless a parent is
11 party, nor does the act apply to children who are the subject of proceedings for abuse,
12 neglect, or dependency. The degree to which this act applies to children who are the subject of a
13 guardianship depends on the guardianship law of the state. While the act does not contain a
14 provision regarding payment of attorney fees, such a provision may be included.

15
16 Continuation of a relationship between a child and a nonparent can be an important – and
17 even vital – interest, both for the child and the nonparent. When deciding whether to grant relief
18 to a nonparent, courts must, of course, consider the rights of parents. The U.S. Supreme Court
19 has recognized a right of a fit parent to make decisions regarding the rearing of his or her child.
20 *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000).

21
22 In *Troxel*, the paternal grandparents sought visitation with their grandchildren following
23 the father’s suicide. The children had never resided with the grandparents, but rather had visited
24 with them regularly throughout their lives. When the mother did not provide the amount of
25 visitation the grandparents requested, the grandparents filed an action under Washington State’s
26 nonparental visitation statute, Wash. Rev. Code § 26.10.160(3) (1994), which provided: “Any
27 person may petition the court for visitation rights at any time including, but not limited to,
28 custody proceedings.”

29
30 At trial, the grandparents sought visitation, including overnights. The mother “did not
31 oppose visitation altogether, but instead asked the court to order one day of visitation per month
32 with no overnight stay.” 530 U.S. at 61. The trial court gave the grandparents visitation of “one
33 weekend per month, one week during the summer, and four hours on both of the petitioning
34 grandparents’ birthdays.” *Id.* at 62. The trial court’s findings in support of the judgment were
35 that the Troxels [the grandparents] “are part of a large, central, loving family, all located in this
36 area, and the [Troxels] can provide opportunities for the children in the areas of cousins and
37 music.” *Id.* at 72.

38
39 The case (along with two other consolidated cases) was appealed to the Washington
40 Supreme Court, which held the statute was unconstitutional on its face and that visitation to
41 grandparents over objection of a parent should not be granted absent a showing of harm to the
42 child. *In re Custody of Smith*, 137 Wash. 2d 1, 969 P.2d 21, 23 (1998).

43
44 The grandparents appealed. The U.S. Supreme Court affirmed the Washington Supreme
45 Court, although on narrower grounds. In her plurality opinion, Justice O’Connor stated that the

1 statute was “breathtakingly broad,” 530 U.S. at 67, and the trial court’s findings were “slender,”
2 *Id.* at 72. The Court struck down the statute, as applied, holding the trial court did not give
3 sufficient deference to the decision of a fit parent to decide the amount of contact the children
4 would have with the grandparents.

5
6 According to Justice O’Connor’s opinion, “The liberty interest at issue in this case—the
7 interest of parents in the care, custody, and control of their children—is perhaps the oldest of the
8 fundamental liberty interests recognized by this Court.” *Id.* at 65, *citing*, among other cases,
9 *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding unconstitutional a Nebraska law prohibiting
10 teaching any subject in a language other than English). The Court held the statute “as applied,
11 exceeded the bounds of the Due Process Clause.” 530 U.S. at 68.

12
13 The Superior Court’s order was not founded on any special factors that might justify the
14 State’s interference with Granville’s fundamental right to make decisions concerning the
15 rearing of her two daughters.

16
17 [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will
18 normally be no reason for the State to inject itself into the private realm of the family to
19 further question the ability of that parent to make the best decisions concerning the
20 rearing of that parent’s children.

21
22 *Id.* at 68 – 69.

23
24 The plurality reasoned that because its decision was based on the “sweeping breadth” of
25 the statute and the application of the statute in this case, the Court did not need to “consider the
26 primary constitutional question passed on by the Washington Supreme Court—whether the Due
27 Process Clause requires all nonparental visitation statutes to include a showing of harm or
28 potential harm to the child as a condition precedent to granting visitation.” *Id.* at 73.

29
30 Justice O’Connor observed in her plurality opinion in *Troxel*: “The demographic changes
31 of the past century make it difficult to speak of an average American family. The composition of
32 families varies greatly from household to household.” *Id.* at 63.

1 **NONPARENTAL CHILD CUSTODY AND VISITATION ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Nonparent Custody and
3 Visitation Act. [IF THE COMMITTEE AND THE CONFERENCE AGREE TO THIS NAME
4 CHANGE]

5 **SECTION 2. DEFINITIONS.** In this [act]:

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

7 (2) “Child abuse” means child abuse as defined in [insert reference to definition in other
8 state law].

9 (3) “Child neglect” means child neglect as defined in [insert reference to definition in
10 other state law].

11 (4) “Compensation” means wages or other remuneration in exchange for care of the
12 child. The term does not include reimbursement of expenses for care of the child, such as
13 payment for food, clothing, and medical expenses.

14 (5) “Consistent caretaker” means an individual who, without expectation of
15 compensation: lived with the child for a significant period of time, ordinarily not less than 12
16 months; consistently exercised care of a child; made decisions regarding the child solely or in
17 cooperation with a parent or other custodian or as a result a complete failure or inability of any
18 legal parent to perform parenting functions; and established a bonded and dependent relationship
19 with the child with the explicit or tacit support of a parent of the child.

20 (6) “Custody” means physical custody, legal custody, or both. The term includes joint
21 custody or shared custody under law of this state other than this [act].

22 (7) “[Detriment] [Harm] to a child” means [significant] adverse effect on a child’s
23 physical, emotional, or psychological wellbeing.

24 (8) “Domestic violence” means domestic violence as defined in in [insert reference to

1 definition in other state law].

2 (9) “Individual” means a natural person of any age.

3 (10) “Legal custody” means the power to make important decisions regarding a child,
4 including a decision regarding the child’s education, health care, and scheduled activity.

5 (11) “Nonparent” means an individual other than a parent of a child who is the subject of
6 a proceeding under this [act]. The term includes a grandparent, sibling, and stepparent.

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

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

12 (14) “Physical custody” means day-to-day care and supervision of a child.

13 (15) “Record” means information that is inscribed on a tangible medium or that is stored
14 in an electronic or other medium and is retrievable in perceivable form.

15 (16) “Sexual assault” means sexual assault as defined in [insert reference to definition in
16 other state law].

17 (17) “Stalking” means stalking as defined in [insert reference to definition in other state
18 law].

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

22 (19) “Substantial relationship” means a familial or other relationship formed without
23 expectation of compensation in which a significant emotional bond exists between a nonparent
24 and a child.

1 (20) “Visitation” means the right to spend time with a child, including an overnight.

2 **Comment**

3
4 The definition of “child” is the same as that used in the Uniform Deployed Parents
5 Custody and Visitation Act, § 102(3)(A) (2012). The age of majority in most states is 18 years
6 of age, although some states set the age of majority at graduation from high school, and a few
7 states set the age higher than 18 years of age. This act does not include in the definition of
8 “child” adult children who are the subject of a court order concerning custodial responsibility,
9 such as individuals with a developmental disability. Rights to custody of visitation with adult
10 children would be determined under the state’s guardianship laws or other applicable law.

11
12 The terms “child abuse,” “child neglect,” “domestic violence,” “sexual assault,” and
13 “stalking” are defined by reference to existing state law in order to promote consistency of
14 definitions within a state. The laws to which reference is made can be civil law, criminal law, or
15 both.

16
17 The term “consistent caretaker” is further described in the comment to Section 11.

18
19 In Family Law, the terms “custody” and “visitation” are flexible concepts. In most states,
20 there is not a fixed amount of time the child spends with a parent who has “custody” or
21 “visitation,” although some states utilize guidelines to specify the time the child spends with the
22 noncustodial parent. Nonetheless, a person with “custody” provides the child with a home or
23 primary home. The drafters anticipate that visitation granted to nonparents will be decided on
24 the facts of each case rather than by guidelines. The definition of “custody” includes joint
25 custody or shared custody as defined by other state law. Thus, under this act, courts have the
26 option of granting joint custody or shared custody, as well as sole custody. Although many
27 states utilize the term “parenting time” to describe the time a child spends with each parent, the
28 terms “custody” and “visitation” are still commonly used, and are appropriate, to describe the
29 time a child spends with a nonparent. “Visitation” may include contact by telephone or other
30 electronic means as well as in-person contact.

31
32 State statutes that use the term “detriment” or “detrimental” in connection with the right
33 of nonparents to seek custody or visitation include: Ariz. Stat. § 25-409(a)(2) (2017); Cal. Fam.
34 Code § 3041(c) (2017); and D.C. Code § 16-831.07 (2017). The California provision provides:
35 “As used in this section, ‘detriment to the child’ includes the harm of removal from a stable
36 placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her
37 parent, fulfilling both the child’s physical needs and the child’s psychological needs for care and
38 affection, and who has assumed that role for a substantial period of time. A finding of detriment
39 does not require any finding of unfitness of the parents.”

40
41 The definitions of “person,” “record,” and “state” are the definitions provided by the
42 Uniform Law Commission “Drafting Rules,” Rules 304, 305 & 306 (2012).

43
44 The definition of “legal custody” is similar to the definition of that term in many states.
45 The definition of “legal custody” also is similar to the definition of “decision-making authority”

1 in the Uniform Deployed Parents Custody and Visitation Act (2012), which provides: “the
2 power to make important decisions regarding a child, including decisions regarding the child’s
3 education, religious training, health care, extracurricular activities, and travel.” “Legal custody”
4 might include the power to enroll a child in a religious school, but it normally should not include
5 selection of a child’s religion since most courts have held both parents have a right to expose
6 their child to his or her religious beliefs or lack of religious beliefs. *See, e.g., Felton v. Felton*,
7 383 Mass. 232, 418 N.E.2d 606 (1981); *In re Marriage of Mentry*, 142 Cal. App 260, 190 Cal.
8 Rptr. 843 (1983); *Hansen v. Hansen*, 404 N.W.2d 460 (N.D. 1987). Decisions about travel are
9 not included since persons with custody, as well as persons with visitation, generally have a right
10 to travel with the children, including on vacation. A person with “legal custody,” however,
11 generally would determine if the child were to travel on his or her own, such as for an
12 educational or athletic program.

13
14 The definition of “nonparent” is “an individual other than the parent of a child who is the
15 subject of a proceeding under this [act]. The term includes a grandparent, sibling, and
16 stepparent.” Persons other than grandparents, siblings, and stepparents can obtain custody or
17 visitation under the act if they meet the requirements of the act, including clear-and-convincing
18 evidence of status as a “consistent caretaker” or a “substantial relationship” with a child.

19
20 The definition of “parent” is “a person recognized as a parent under law of this state other
21 than this [act].” The sources of the definition of “parent” may include the state’s parentage
22 statutes, divorce statutes, and case law. In most states, “parent” would include biological
23 parents, adoptive parents, and men who have acknowledged paternity, even though they are not
24 biologically related to the child. “Parent” also might include a person who agrees to conceive a
25 child through assisted reproductive technology or by use of a surrogate. Generally, an individual
26 ceases to be a parent if the individual’s rights have been terminated. In addition, a man who
27 donates sperm or a woman who donates an egg usually are not considered to be a parent under
28 the law of this state other than this act.

29
30 The definition of “physical custody” is similar to the definition of “physical custody” in
31 the Uniform Child Custody Jurisdiction and Enforcement Act, § 102(14) (1997) (“the physical
32 care and supervision of a child”).

33
34 The definition of “substantial relationship” is drawn, in part, from Minn. Stat. Ann.
35 § 518E.301 (West 2016), which provides: “‘close and substantial relationship’ means a
36 relationship in which a significant bond exists between a child and a nonparent.”

37
38 **SECTION 3. SCOPE.**

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

41 (b) This [act] does not apply:

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

3 (2) to a child-custody proceeding that pertains to an Indian child as defined in the
4 Indian Child Welfare Act, 25 U.S.C. Section 1903, to the extent that the proceeding is governed
5 by the Indian Child Welfare Act;

6 (3) to a child who is the subject of [an ongoing proceeding regarding guardianship
7 of a person or] an ongoing proceeding initiated by the state pursuant to [insert reference to other
8 state law pertaining to child abuse, child neglect, or dependency of a child]; or

9 (4) to a claim of a nonparent seeking custody of or visitation with a child based on
10 the nonparent having served as a foster parent.

11 (c) Relief under this [act] is not available during the effective period of a custody or
12 visitation arrangement entered under [cite to this state’s Uniform Deployed Parents Custody and
13 Visitation Act] [or] [other law of this state dealing with custody and visitation with a child of a
14 deployed parent].

15 **Legislative Note:** *The phrase “guardianship of the person” in subsection (b)(3) is in brackets to*
16 *give the enacting state an option to include the phrase in the list of proceedings that are*
17 *excluded from coverage under the act. It is recommended that if a state’s guardianship law*
18 *allows a court to order visitation to a nonparent, then the proceedings involving guardianship of*
19 *the person of a child would be included in the list of proceedings not covered by this act.*
20 *However, if the guardianship law of the state does not provide for a court to order visitation with*
21 *a child to a nonparent, then the phrase “guardianship of the person” should not be included in*
22 *subsection (b)(3) to allow court to order visitation of a child who is the subject of a guardianship*
23 *proceeding.*

24 **Comment**

25
26
27 The scope provision in Section 3(a) encompasses disputes between a nonparent and a
28 parent regarding custody or visitation, including a determination of whether the nonparent has
29 standing. The provision also covers proceedings in which the nonparent and parent seek to enter
30 an agreed order regarding custody or visitation.

31
32 Section 3(b)(2) is based on the Indian Child Welfare Act provision of the Uniform Child

1 Custody Jurisdiction and Enforcement Act (UCCJEA), Section 104(a).

2
3 This act does not provide for custody or visitation to nonparents for children who are the
4 subject of ongoing proceedings for abuse, neglect, dependency [or guardianship of the person].
5 Such laws and related regulations have their own provisions regarding where a child will be
6 placed and who may have contact with the child. The abuse, neglect, dependency [and
7 guardianship] laws usually are in a different provision of the statutes than laws pertaining to
8 divorce, parentage, and nonparental rights. The state does not wish for this act to conflict with or
9 interfere with the laws of the state regarding abuse, neglect, dependency [or guardianship].
10 When a child is no longer the subject of such proceedings, relief may be sought under this act.
11 The provision in this section is similar to Or. Stat. § 109.119(9) (West 2015) (excluding
12 application of a nonparental visitation statute from children who are the subject of dependency
13 proceedings). *Cf.* Minn. Stat. Ann. § 257C.08(4) (West 2015) (excluding foster parents from
14 coverage under the state’s nonparental visitation law).

15
16 The Uniform Child Custody Jurisdiction and Enforcement (UCCJEA) applies to “child-
17 custody proceeding[s] . . . in which legal custody, physical custody, or visitation with respect to a
18 child is an issue.” UCCJEA, Section 104(4) (1997). The UCCJEA applies to guardianship
19 proceedings as well as proceedings under this act. *Id.* If there are simultaneous proceedings
20 under this act and under guardianship law, the UCCJEA (as well as law of the state on venue)
21 would determine which court has priority to exercise jurisdiction.

22
23 **SECTION 4. JURISDICTION.** Subject to Section 3(b)(2), a proceeding under this
24 [act] must be commenced in the court having jurisdiction to determine custody or visitation
25 under [cite to this state’s Uniform Child Custody Jurisdiction and Enforcement Act].

26 **Comment**

27 The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has
28 been adopted in 49 states. As of January 2018, Massachusetts is the only state that has not
29 adopted the UCCJEA, although Massachusetts did adopt the Uniform Child Custody Jurisdiction
30 Act (UCCJA). The Uniform Law Commission has promulgated a 2013 version of the UCCJEA
31 (to cover international issues as well as domestic issues). As of January 2018, the 2013
32 UCCJEA has not been adopted in any states.

33
34 If at the time a petition is filed under this act, an action is already pending regarding the
35 same child, the petition should be filed as part of the pending action (assuming the pending
36 action is filed in compliance with the UCCJEA).

37
38 **SECTION 5. STANDING.**

39 (a) A nonparent has standing under this [act] to seek custody or visitation with a child if
40 the nonparent:

- 1 (1) has acted as a consistent caretaker of the child as specified in Section 11(a); or
2 (2) has a substantial relationship with the child as specified in Section 11(b).

3 [(b) [Unless the court finds that a hearing is necessary, the] [The] court shall determine
4 based on the [petition] under Section 6 whether a nonparent has stated facts sufficient to satisfy
5 the requirements subsection (a).]

6 (c) An individual whose parental rights concerning a child have been terminated does not
7 have standing under this [act] to seek custody of or visitation with the child.

8 **Comment**

9 The requirement of standing serves to protect the interests of parents and filter out cases
10 in which the petitioner does not have a meritorious claim, while at the same time allowing the
11 opportunity to preserve relationships between a child and nonparent with whom the child has a
12 substantial relationship.

13
14 To reduce the burden of litigation, a parent may be able to expedite disposition of a case
15 by using a motion to dismiss or for summary judgment to challenge whether the nonparent has
16 standing to pursue the action. The language of subsection (b) is based on The Uniform
17 Parentage Act (2017), Section 609(c)(3).

18
19 In the U.S. Supreme Court’s plurality opinion in *Troxel v. Granville*, Justice O’Connor
20 stated: “As Justice KENNEDY recognizes, the burden of litigating a domestic relations
21 proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right
22 of a custodial parent to make certain basic determinations for the child’s welfare becomes
23 implicated.” 530 U.S. at 75, quoting Kennedy, J. at 530 U.S. at 101. See also *D.P. v. G.J.P.*,
24 146 A.3d 204, 213 (Pa. 2016) (stating that bifurcating proceedings with determination of
25 standing before the merits “serves an important screening function in terms of protecting parental
26 rights”); *Rideout v. Riendeau*, 2000 ME 198, ¶ 30, 761 A.2d 291, 302 (stating that determination
27 of standing before full litigation of the claim “provides protection against the expense, stress, and
28 pain of litigation”).

29
30 The statutes of many states specify the circumstances in which visitation by a nonparent
31 may be sought – circumstances which often involve some disruption of the family – e.g.,
32 divorce, separation, death of a parent, or a child born outside of marriage. Such broad
33 descriptions of circumstances in which visitation may be sought do not, by themselves, provide a
34 reliable indicator of whether nonparental visitation (or custody) should be allowed. See *Dorr v.*
35 *Woodard*, 140 A.3d 467, 472 (Me. 2016) (holding death of a parent without other compelling
36 reasons was not sufficient reason to confer standing); *D.P. v. G.J.P.*, 146 A.3d 204 (Pa. 2016)
37 (holding that separation of the parents for six months was not a sufficient basis to allow
38 grandparents to seek visitation). It is preferable to focus on the factors used to decide visitation

1 or custody, particularly the closeness of the relationship between the child and the nonparent.

2
3 **SECTION 6. VERIFIED [PETITION].**

4 (a) A nonparent who files a [petition] for custody or visitation under this [act] shall
5 verify the [petition] under penalty of perjury and state facts sufficient to show standing under
6 Section 5, including:

7 (1) the duration and nature of the relationship between the nonparent and a child,
8 including the period, if any, the nonparent lived with the child and the caretaking provided for
9 the child by the nonparent;

10 (2) the content of any agreement between the parties to the proceeding regarding
11 caretaking for the child and custody, visitation, or other contact with the child;

12 (3) facts showing the willingness of a parent to permit the nonparent to have
13 custody, visitation, or other contact with the child;

14 (4) information about any compensation or expectation of compensation provided
15 to the nonparent in exchange for caretaking of the child;

16 (5) a description of a previous attempt by the nonparent to obtain custody,
17 visitation, or other contact with the child;

18 (6) the information required by [cite to Section 209 of this state's Uniform Child
19 Custody Jurisdiction and Enforcement Act];

20 (7) the basis for the allegation that the requested custody or visitation is in the best
21 interest of the child, applying the factors in Section 14;

22 (8) if the nonparent claims standing under Section 5(a)(2), the basis for the
23 allegation that denial of custody or visitation to the nonparent would result in [harm to the child]
24 [detriment to the child] [[significant] adverse effect on physical, emotional, or psychological

1 wellbeing of the child]; and

2 (9) the relief sought.

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

5 **Comment**

6
7 Requiring verified pleading and specificity in pleadings is intended to reduce actions that
8 are not meritorious and facilitate disposition of non-meritorious cases by motions to dismiss or
9 for summary judgment.

10
11 Regarding subsection (a)(5), the description of any previous attempt to obtain custody,
12 visitation, or other contact with the child should include oral requests as well as written requests.

13
14 Among the facts required in the pleading is the information required by Section 209 of
15 the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) – a section entitled
16 “Information to be Submitted to the Court.” The section provides:

17
18 “(a) [Subject to [local law providing for the confidentiality of procedures,
19 addresses, and other identifying information], in] [In] a child-custody proceeding, each
20 party, in its first pleading or in an attached affidavit, shall give information, if reasonably
21 ascertainable, under oath as to the child’s present address or whereabouts, the places
22 where the child has lived during the last five years, and the names and present addresses
23 of the persons with whom the child has lived during that period. The pleading or affidavit
24 must state whether the party:

25
26 (1) has participated, as a party or witness or in any other capacity, in any other
27 proceeding concerning the custody of or visitation with the child and, if so,
28 identify the court, the case number, and the date of the child-custody
29 determination, if any;

30
31 (2) knows of any proceeding that could affect the current proceeding, including
32 proceedings for enforcement and proceedings relating to domestic violence,
33 protective orders, termination of parental rights, and adoptions and, if so, identify
34 the court, the case number, and the nature of the proceeding; and

35
36 (3) knows the names and addresses of any person not a party to the proceeding
37 who has physical custody of the child or claims rights of legal custody or physical
38 custody of, or visitation with, the child and, if so, the names and addresses of
39 those persons.

40
41 (b) If the information required by subsection (a) is not furnished, the court, upon
42 motion of a party or its own motion, may stay the proceeding until the information is

1 furnished.

2
3 (c) If the declaration as to any of the items described in subsection (a)(1) through
4 (3) is in the affirmative, the declarant shall give additional information under oath as
5 required by the court. The court may examine the parties under oath as to details of the
6 information furnished and other matters pertinent to the court's jurisdiction and the
7 disposition of the case.

8
9 (d) Each party has a continuing duty to inform the court of any proceeding in this
10 or any other State that could affect the current proceeding.

11
12 [(e) If a party alleges in an affidavit or a pleading under oath that the health,
13 safety, or liberty of a party or child would be jeopardized by disclosure of identifying
14 information, the information must be sealed and may not be disclosed to the other party
15 or the public unless the court orders the disclosure to be made after a hearing in which the
16 court takes into consideration the health, safety, or liberty of the party or child and
17 determines that the disclosure is in the interest of justice.]”

18
19 **SECTION 7. NOTICE.** On commencement of a proceeding under this [act], the
20 nonparent shall give notice to all of the following persons:

21 (1) each parent of the child who is the subject of the proceeding;

22 (2) any person having custody of the child;

23 (3) any individual having court-ordered visitation with the child; and

24 (4) any attorney, guardian ad litem, or similar representative appointed for the child.

25 **Comment**

26
27 Elements of the notice provision are similar the notice provision of the Uniform Child
28 Custody Jurisdiction and Enforcement Act, § 205(a) (1997) (“Before a child-custody
29 determination is made under this [Act], notice and an opportunity to be heard . . . must be given
30 to all persons entitled to notice under the law of this State as in child custody proceedings
31 between residents of this State, any parent whose parental rights have not been previously
32 terminated, and any person having physical custody of the child”).

33
34 **SECTION 8. APPOINTMENT; INTERVIEW OF CHILD; COURT SERVICES.**

35 In a proceeding to determine custody or visitation, the court may, to the extent authorized by law
36 of this state other than this [act]:

37 (1) appoint an attorney, guardian ad litem, or similar representative for a child;

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

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

16
17

Comment

18 A variety of personnel and court services may assist the court in making decisions
19 regarding nonparental custody and visitation. This act does not mandate the creation of new
20 services in jurisdictions where no similar services exist, but the act does make such services
21 available if the services already are utilized in other custody and visitation cases. The evaluations
22 referenced in in subsection (4) include mental health evaluations and evaluations of parenting
23 skills.

24

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

30

31 **SECTION 9. EMERGENCY ORDER.** On finding that a child who is the subject of a
32 proceeding under this [act] or a party to a proceeding under this [act] is in danger of imminent
33 harm, the court may expedite the proceeding and may issue an emergency order.

1 **Comment**

2
3 This section makes explicit that the court has the power to enter an emergency order, as
4 well a final order. Generally, other provisions of the act -- including the requirements for
5 pleadings, burden of proof, presumptions, and factors considered – should apply to the issuance
6 of an emergency order in addition to a final order.
7

8 **SECTION 10. PRESUMPTION FOR PARENTAL DECISION.**

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

11 (b) A nonparent has the burden to rebut the presumption under subsection (a) by
12 producing clear-and-convincing evidence of the elements as set out in Section 11. Proof of
13 unfitness of a parent is not required to rebut the presumption in subsection (a).

14 (c) Except as provided in subsection (d), if a nonparent rebuts the presumption under
15 subsection (a) in an original proceeding under this [act], the presumption remains rebutted for
16 further proceedings under this [act].

17 (d) If a nonparent who has been granted an order of visitation requests an order of
18 custody, the nonparent must rebut the presumption under subsection (a) as in an original
19 proceeding.

20 **Comment**

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

24 The presumption and burden of proof are designed to meet the requirements of *Troxel v.*
25 *Granville*, 530 U.S. 57 (2000), in which the Supreme Court struck down Washington State’s
26 third party visitation statute as applied. Justice O’Connor, in a plurality decision, said the
27 Washington statute “contains no requirement that a court accord the parent’s decision any
28 presumption of validity or any weight whatsoever.” *Id.* at 67. “The Superior Court’s order was
29 not founded on any special factors that might justify the State’s interference with Granville’s
30 fundamental right to make decisions concerning the rearing of her two daughters.” *Id.* at 68.
31

32 The Colorado Supreme Court has held that the burden of proof in a grandparent visitation

1 case is clear-and-convincing evidence – even though the state’s grandparent visitation statute did
2 not explicitly require that. In *In re Adoption of C.A.*, 137 P.3d 318, 328 (Col. 2006), the court
3 held under principles of Due Process, “The grandparent bears the ultimate burden of proving by
4 clear and convincing evidence that the parental determination is not in the child’s best interest
5 and the visitation schedule grandparent seeks is in the child’s best interest.” See also *Polasek v.*
6 *Omura*, 2006 MT 103, ¶ 15, 332 Mont. 157, 162, 136 P.3d 519, 523 (2006) (holding that “clear
7 and convincing evidence” is required); *Jones v. Jones*, 2005 PA Super 337, ¶ 12, 884 A.2d 915,
8 918 (2005), *appeal denied* (Pa. 2006) (holding that “convincing reasons” are required).

9
10 The nonparent visitation or custody statutes of 22 states and the District of Columbia (as
11 of 2017) specify that clear-and-convincing evidence is the burden of proof for all or part of the
12 statutes. Ala. Code § 31-3-4.2; Ct. Gen. Stat. § 46b-59(b); D.C. Code § 16-831.03(b); Ga. Code §
13 19-7-3(c); Idaho Code § 32-1704(6); Ind. Code 31-17-2-8.5(a); Iowa Code § 600C.1; Kan. Rev.
14 Stat. §§ 403.270 & 403.280; Maine Rev. Stat. tit. 19-A, § 1891(3); Mich. Comp. Laws §
15 722.25(1); Minn. Stat. 257C.03; Mont. Code § 40-4-228(2); Nev. Rev. Stat. § 125C.050(4); N.H.
16 Rev. Stat. 461-A:6(II); Neb. Stat. § 43-1802(2); 43 Okla. Stat. 109.109.4; Or. Stat. § 109.119;
17 Pa. Stat. Ann. tit. 23, § 5327(b) (2015); R.I. Gen. Laws § 15-5-24.3(a)(2)(v); S.C. Code § 63-15-
18 60; Utah Code § 30-5a-103(2); Va. Code § 20-124.2(B); W.Va. Code § 48-10-702(b).

19 As stated in Black’s Law Dictionary, “The Burden of proof includes both the burden of
20 persuasion and the burden of production.” Black’s Law Dictionary (10th ed. 2014).

21
22 If a child’s parents disagree about a nonparent’s request for custody or visitation
23 with a child, the court should consider each parent’s wishes in determining whether the
24 nonparent has rebutted the presumption established by this Section. See *In re Marriage of*
25 *Friedman*, 397 P.3d 1063, 1068 (Ariz. Ct. App. 2017).

26
27 **SECTION 11. ELEMENTS OF ACTION.**

28 (a) A court may order custody or visitation under this [act] for a nonparent if the
29 nonparent proves by clear-and-convincing evidence that the nonparent is a consistent caretaker
30 under subsection (b) or has a substantial relationship under subsection (c) and that an order for
31 custody or visitation to the nonparent is in the best interest of the child.

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

34 (1) lived with the child for a significant period, ordinarily not less than 12
35 months;

36 (2) consistently exercised care of a child;

1 (3) made decisions regarding the child solely or in cooperation with a parent or
2 other custodian or as a result of a complete failure or inability of any legal parent to perform
3 parenting functions; and

4 (4) established a bonded and dependent relationship with the child with the
5 explicit or tacit support of a parent of the child.

6 (c) A nonparent has a substantial relationship with a child if the nonparent has a familial
7 or other relationship formed without expectation of compensation in which: (i) a significant
8 emotional bond exists between the nonparent and child, and (ii) denial of custody or visitation
9 would result in [harm to the child] [detriment to the child] [[significant] adverse effect on
10 physical, emotional, or psychological wellbeing of the child].

11 **Comment**

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

13
14 The first basis (described in subsection (b)) is that the nonparent is a “consistent
15 caretaker” of a child. The second basis (described in subsection (c)) requires a “substantial
16 relationship” with the child.

17
18 Both bases require the nonparent to prove that ordering custody or visitation for the
19 nonparent is in the best interest of the child. The showing of best interest is relevant not only to
20 whether custody or visitation should be granted to a nonparent, but also to the amount of time the
21 child should be with the nonparent.

22
23 The “consistent caretaker” provision has four enumerated elements in addition to a
24 provision that the caretaking be “without expectation of financial compensation.” The elements
25 are drawn from principles developed by the American Law Institute (*a more specific cite will be*
26 *inserted*) and the definition of “de facto parent” in Uniform Parentage Act (UPA), § 204 (2017).

27
28 Regarding the fourth element, the term “bonded” refers to the closeness of the
29 relationship. The term “dependent” refers to the degree to which the child relies upon, and is in
30 need of, the nonparent.

31
32 A nonparent’s status as a consistent caretaker is phrased in the present tense (“the
33 nonparent is a consistent caretaker”). The four enumerated elements are phrased in the past tense
34 (“lived,” “exercised,” “made,” “established”). Thus, if a nonparent was a caretaker of a child in
35 the recent past, but the child is no longer living with the nonparent (such as because the child is

1 back with the parent), the nonparent could still claim status as a consistent caretaker. Such an
2 approach gives the act flexibility and does not force the nonparent to immediately seek relief
3 upon return of the child to a parent. If the child has not lived with the nonparent for a significant
4 period of time, the nonparent would lose status as a consistent caretaker, but still might be able to
5 seek relief under the subsection (b) (“substantial relationship”).
6

7 A showing that denial of custody or visitation would result in a detriment to the child is
8 not required for a consistent caretaker because severance of a bonded and dependent relationship
9 between a child and a nonparent is implicitly detrimental to the child.
10

11 The “consistent caretaker” provision of this act has some similarities to definition of “de
12 facto parent” under the UPA, but the “consistent caretaker” provision is more flexible. Unlike
13 the UPA, the “consistent caretaker” provision does not require that the individual seeking
14 custody or visitation hold the child out as his or her own. In addition, the “consistent caretaker”
15 provision does not require that the individual has undertaken “full and permanent responsibilities
16 of a parent.” Moreover, an individual who fits the definition of “consistent caretaker” is entitled
17 to request custody and visitation under this act, but is not entitled to other rights associated with
18 parentage.
19

20 In the years since *Troxel* was decided, state courts have generally held that a
21 grandparent’s claim that the grandparent has a positive relationship with the grandchild is not
22 sufficient to justify an order of visitation over the objection of a parent. *See, e.g., Dorr v.*
23 *Woodard*, 2016 ME 79, 140 A.3d 467 (Maine 2016); *Neal v. Lee*, 2000 Ok 90, 14 P.3d 547
24 (2000); *State Dept. of Social and Rehabilitative Services v. Paillet*, 16 P.3d 962 (2001); *Flynn v.*
25 *Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if the grandparent has raised
26 a child for a few years – that can be the basis for granting visitation to the grandparent over the
27 parents’ objection. *See, e.g., Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents
28 had helped raise their grandchildren for the first seven years of the oldest grandchild’s life and
29 for lesser periods for the younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100
30 (2007) (grandparents cared for children while the mother was dying of cancer).
31

32 The second basis for a nonparent to obtain custody or visitation under this act requires a
33 showing of a familial or other relationship formed without expectation of compensation in which
34 “(i) a significant emotional bond exists between a nonparent and child, and (ii) denial of custody
35 or visitation would result in [harm] [detriment] [adverse effect on the physical, emotional, or
36 psychological wellbeing of the child].” “Consistent caretaking” is not required. This section
37 could be used by grandparents, siblings, stepparents or others who have a very close relationship
38 with the child, but may not have acted as a “consistent caretaker.”
39

40 The Supreme Court in *Troxel* did not rule on the issue of whether the constitution
41 requires a showing of harm or potential harm. In her plurality opinion, Justice O’Connor said:
42

43 Because we rest our decision on the sweeping breadth of [Washington Code] §
44 26.10.160(3) and the application of that broad, unlimited power in this case, we
45 do not consider the primary constitutional question passed on by the Washington
46 Supreme Court—whether the Due Process Clause requires all nonparental

1 visitation statutes to include a showing of harm or potential harm to the child as a
2 condition precedent to granting visitation. We do not, and need not, define today
3 the precise scope of the parental due process right in the visitation context. In this
4 respect, we agree with Justice KENNEDY that the constitutionality of any
5 standard for awarding visitation turns on the specific manner in which that
6 standard is applied and that the constitutional protections in this area are best
7 “elaborated with care.” *Post*, at 2079 (dissenting opinion). Because much state-
8 court adjudication in this context occurs on a case-by-case basis, we would be
9 hesitant to hold that specific nonparental visitation statutes violate the Due
10 Process Clause as a *per se* matter.

11
12 530 U.S. at 73.

13
14 Six state supreme courts have held, as a matter of state or federal constitutional law, that
15 harm to the child without granting visitation must be shown before visitation is granted to a
16 grandparent. *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d 453 (2002); *Sullivan v. Sapp*, 866
17 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d 1067 (Haw. 2007); *Blixt v. Blixt*, 437
18 Mass. 649, 774 N.E.2d 1052 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert.*
19 *denied*, 540 U.S. 1177 (2004); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405
20 (2005). These cases did not involve grandparents who had acted as consistent caretakers.

21
22 In addition, as of 2017, statutes in nine states require proof of “harm,” “detriment,” or
23 similar proof before visitation is granted to a nonparent. See Ala. Code § 30-3-4.2 (2017)
24 (harm); Ark. Code § 9-13-103(e) (2017) (harm); Conn. Gen. Stat. § 46b-59(b) (2017) (harm);
25 Ga. Code § 19-7-3(c)(1) (harm); 750 Ill. Comp. Stat.5/602.9(b)(3) (2017)(harm); Mich. Stat. §
26 722.27b(4)(b) (2017) (harm); Tenn. Stat. § 36-3-306(b)(1) (2017) (harm); Tex. Fam. Code §
27 153.432(c) (2017) (significantly impair the child’s physical health or emotional well-being); and
28 Utah Code § 30-5a-103(2)(f) (2017) (detriment). Connecticut has both case law and statute
29 requiring “harm.”

30
31 Courts have recognized that a grant of custody is a greater intrusion on parental rights
32 than a grant of visitation. See *e.g.*, *McAllister v. McAllister*, 2010 ND 40, ¶ 23, 779 N.W.2d 652,
33 660. In claims for either custody or visitation, a nonparent with a substantial relationship with
34 the child must show harm, but the focus of the evidence will vary. In general, a nonparent
35 seeking custody must show that a change in the child’s custody is necessary to prevent
36 [detriment] [harm] to the child, while a nonparent seeking visitation will need to show that
37 continued contact with the nonparent through visitation is necessary to prevent [detriment]
38 [harm]. See, *e.g.*, *Fish v. Fish*, 285 Conn. 24, 47 – 48, 939 A.2d 1040, 1054 (2008).

39
40 An example of a substantial relationship between the child and nonparents that resulted in
41 an order of visitation for nonparents is *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003), *cert.*
42 *denied*, 540 U.S. 1177 (2004). The New Jersey Supreme Court reinstated a trial court’s grant of
43 visitation to maternal grandparents after the mother’s death “where the children have a very
44 extensive relationship with the grandparents [, including] years where they were seeing the
45 grandparents every other weekend.” 827 A.2d at 224. In this case, there was “a very bad
46 relationship” between the father and the grandparents, and the father believed the grandparents

1 were “evil.” *Id.* at 225. The trial court found the grandparents were appropriate, acted in good
2 faith, and were an important link to the mother’s side of the family. The visitation was: “(1)
3 monthly visitation alternating between a five-hour day visit one month and a visit with two
4 overnights the next month and (2) one extended visitation period in July or August. The court
5 specifically noted that the reason it ordered that visitation was its reliance on the grandparents’
6 expert who opined that such visitation was ‘to protect the children from the harm that would
7 befall them if they were alienated from their grandparents.’” *Id.* at 208.

8
9 This act does not set a maximum number of persons who may obtain rights of custody or
10 visitation. In most cases, the number of actively involved persons with a valid claim for custody
11 or visitation will not be large. As courts sort through complex family structures, the number of
12 persons with potential claims for custody or visitation is a factor that should be considered -- but
13 without applying a fixed rule about how many persons with rights to time with the child is too
14 many. The focus needs to remain on the best interest of the child.

15
16 This act governs disputes between nonparents and parents. See Section 103. Disputes
17 between two or more nonparents (when parents are not a party to the proceeding) are governed
18 by other law, such as guardianship law.

19
20 **SECTION 12. AGREEMENT OF THE PARTIES.** In a proceeding under this [act],
21 if all parties present to the court an agreement in a record that provides custody or visitation for
22 the nonparent, the court shall approve the agreement, unless the court finds that the agreement is
23 contrary to the best interest of the child.

24 **SECTION 13. GRANT OF CUSTODY OR VISITATION.**

25 (a) In a proceeding in which a nonparent seeks custody, the court may order:

- 26 (1) sole or primary custody to the nonparent;
27 (2) joint or shared custody to the nonparent and a parent or other party; or
28 (3) visitation to the nonparent.

29 (b) In a proceeding in which a nonparent seeks visitation, the court may order visitation,
30 but may not order custody, unless custody is requested in a verified pleading under Section 6,
31 notice is given under Section 7, and the presumption under Section 10 is rebutted.

1 **Comment**

2
3 This section gives flexibility to the court when granting custody to a nonparent. Custody
4 can be sole, joint, or shared. If a nonparent sought custody, the court can decline to grant custody
5 but can still grant visitation to the nonparent. In such circumstances, granting visitation can be
6 viewed as a lesser included remedy of the request for custody. If, however, the nonparent sought
7 visitation, the court cannot grant the nonparent custody unless the nonparent gave proper notice
8 and proof regarding the request for custody.
9

10 **SECTION 14. BEST INTEREST OF CHILD.** In determining whether an order of
11 custody or visitation to a nonparent is in the best interest of a child, the court shall consider:

- 12 (1) the nature and extent of the relationship between the child and parent;
- 13 (2) the nature and extent of the relationship between the child and nonparent;
- 14 (3) the views of the child, considering the age and maturity of the child;
- 15 (4) past or present conduct by a party or individual living with a party which poses a risk
16 to the physical, emotional, or psychological well-being of the child;
- 17 (5) the applicable factors in [insert citation to law of this state other than this [act]
18 pertaining to factors considered in custody, [parenting time,] or visitation disputes between
19 parents]; and
- 20 (6) any other factor affecting the best interest of the child.

21 **Legislative Note:** *The term “parenting time” used in subsection 5 refers to the law of a state*
22 *other than this act regarding the amount of time a child spends with each parent. For allocation*
23 *of time between parents, approximately half of the states utilize the term “parenting time” (or*
24 *similar term) rather than “custody” and “visitation.”*
25

26 **Comment**

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

1 **[SECTION 15. PRESUMPTION REGARDING, CHILD ABUSE, CHILD**
2 **NEGLECT, DOMESTIC VIOLENCE, SEXUAL ASSAULT, OR STALKING.**

3 (a) In a proceeding under this [act], the court shall presume that granting custody or
4 visitation to a nonparent is not in the best interest of a child if the court finds that the nonparent,
5 or an individual living with the nonparent, has committed any of the following:

- 6 (1) child abuse;
- 7 (2) child neglect;
- 8 (3) domestic violence;
- 9 (4) sexual assault;
- 10 (5) stalking; or
- 11 (6) another comparable offense.

12 (b) A finding that an offense specified in subsection (a) was committed must be based on:

- 13 (1) evidence of a judgment of conviction; or
- 14 (2) proof sufficient to establish by a preponderance of the evidence that the act
15 was committed.

16 (c) A nonparent may rebut the presumption established in subsection (a) by proving by
17 clear-and-convincing evidence that granting custody or visitation to the nonparent will not
18 endanger the health, safety, or welfare of the child who is the subject of a proceeding under this
19 [act]

20 ***Legislative Note:*** *As an alternative to Section 15, a state may wish to amend existing state law*
21 *concerning presumptions and rebuttal of presumptions applicable to a dispute between parents.*
22 *The same types of presumptions and criteria for rebuttal of presumptions would apply to*
23 *nonparents seeking custody or visitation.*

1 **Comment**

2 This section provides protection to victims or potential victims of domestic violence by
3 providing a rebuttable presumption that custody or visitation should not be granted to a
4 nonparent if the nonparent, or an individual residing with the nonparent, has committed an act of
5 domestic violence or related offenses. Domestic violence is defined by reference to state law
6 (civil law, criminal law, or both).
7

8 The Legislative Note gives drafters the option of adapting existing state law concerning
9 presumptions and rebuttal of presumption applicable to disputes between parents to disputes
10 between nonparents and parents. Such state laws may provide an alternate list of offenses that
11 give rise to presumptions and different procedures for utilizing the presumptions and rebutting
12 the presumptions.
13

14 **SECTION 16. MODIFICATION OF CUSTODY OR VISITATION.**

15 (a) On [motion], the court may modify a final order of custody or visitation under this
16 [act] on a showing by a preponderance of the evidence that:

17 (1) a substantial and continuing change in circumstance has occurred relevant to
18 the custody or visitation of the child who is the subject of the order; and

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

20 (b) Except as otherwise provided in subsection (c), if a suit is filed to modify an order of
21 visitation to obtain an order of custody under this [act], the nonparent must rebut the presumption
22 as provided under Section 10.

23 (c) On agreement of the parties, the court may modify an order of custody or visitation,
24 unless the court finds that the agreement is not in the best interest of the child who is the subject
25 of the order.

1 **Comment**

2 This section reflects the standard for modification of custody or visitation that is applied
3 in most states: a showing of substantial and continuing change of circumstance, coupled with a
4 showing that modification is in the best interest of the child. Under this approach, a custody or
5 visitation order in favor of a nonparent generally would continue unless the substantial change of
6 circumstance and best interest of the child for modification of the order were shown. In addition,
7 the section provides that presumption in favor of parents applies if the nonparent is seeking to
8 modify an order of visitation to an order of custody.
9

10 **[SECTION 17. FINDINGS OF FACT AND CONCLUSIONS OF LAW.** When

11 making a decision under this [act], the court, after an evidentiary hearing, shall make findings of
12 fact and conclusions of law on the record in support of its decision.]

13 *Legislative Note:* A state should omit this section if the requirement or lack of requirement of
14 making findings of fact and conclusions of law is governed by court rule rather than statute or
15 the state requires findings of fact and conclusions of law in all proceedings involving family law.
16

17 **Comment**

18 Requiring findings of fact and conclusions of law has several benefits. The fact-finding
19 process structures the court’s review so that the court is less likely to overlook important facts or
20 apply bias in reaching its decision. Careful fact-finding by the trial court also facilitates
21 appellate review and may assist the parties in accepting the decision. At least 20 states and the
22 District of Columbia require the trial court to make findings of fact in custody cases.
23

24 **SECTION 18. EFFECT OF ADOPTION OF CHILD.** If a child is adopted by a

25 relative of the child or stepparent of the child, an order of custody or visitation to a nonparent
26 under this [act] remains valid and is not changed by the adoption, unless modified by order of the
27 court.

28 **Comment**

29 As of 2017, state laws regarding visitation by nonparents have dealt with the effect of a
30 child’s adoption in different ways, including: (1) providing that the visitation order survives
31 adoption by a relative; (2) providing that nonparents can seek visitation following adoption by a
32 relative; and (3) providing that the visitation provision does not apply if the child is adopted by a
33 nonrelative.

1 **SECTION 23. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
2 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
3 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
4 modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
5 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
6 Section 7003(b).

7 **SECTION 24. TRANSITIONAL PROVISION.** This [act] applies to a proceeding
8 commenced before, on, or after [the effective date of this [act]] for a [petition] for custody or
9 visitation by a nonparent of a child on which a final order has not been issued.

10 **[SECTION 25. SEVERABILITY.** If any provision of this [act] or its application to any
11 person or circumstance is held invalid, the invalidity does not affect other provisions or
12 applications of this [act] which can be given effect without the invalid provision or application,
13 and to this end the provisions of this [act] are severable.]

14 *Legislative Note: Include this section only if this state lacks a general severability statute or a*
15 *decision by the highest court of this state stating a general rule of severability.*
16

17 **SECTION 26. REPEALS; CONFORMING AMENDMENTS.**

18 (a)

19 (b)

20 (c)

21 *Legislative Note: When enacting this act, a state should repeal: (1) existing general statutes, if*
22 *any, regarding visitation for a grandparent, stepparent, sibling, and other nonparent; and (2)*
23 *statutes, if any, regarding a custody dispute between a nonparent and a parent.*
24

25 *A state should not repeal: (1) the state's Uniform Deployed Parents Custody and Visitation Act*
26 *or other state law dealing with custody of and visitation with a child of a deployed parent; (2)*
27 *law regarding guardianship of a minor; (3) law regarding a child in custody of the state,*
28 *including a child in foster care; or (4) law providing specific rights and remedies for a de facto*
29 *parent.*

1 **SECTION 27. EFFECTIVE DATE.** This [act] takes effect