

D R A F T

FOR DISCUSSION ONLY

NON-PARENTAL CHILD CUSTODY AND VISITATION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 14-15, 2016 Drafting Committee Meeting

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~~NON-PARENTAL CHILD CUSTODY AND VISITATION ACT~~

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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~~June 3~~

September 2, 2016

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NON-PARENTAL CHILD CUSTODY AND VISITATION ACT

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INTRODUCTORY NOTE TO THE DRAFTING COMMITTEE
FROM THE REPORTER

This draft includes preliminary “Comments” that, in final form, will be published with the act.

In addition, this draft includes “Reporter’s Notes.” These notes are intended to help guide our discussions, but generally will not be part of the final act.

This draft also used brackets in some sections. At this stage, the bracketed materials are not intended to be part of the final act. The brackets are intended to show alternative language, and the committee will decide which language to use. Some final drafts of uniform acts do utilize brackets to provide legislators with options for handling particular issues, but usually it is best when drafting uniform acts to not use brackets or to keep their use to a minimum.

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NON-PARENTAL CHILD CUSTODY AND VISITATION ACT

PREFATORY NOTE

~~[This is a partial draft of the Prefatory Note. The reporter will update commentary and data as the project proceeds.]~~

The Non-Parental Child Custody and Visitation Act provides procedures and factors for courts to apply when asked to grant custody or visitation to non-parents. The act seeks to balance, within constitutional restraints, the interests of children, parents, and non-parents with whom the children have a close relationship.

Continuation of a relationship between a child and a non-parent can be an important – and even vital – interest, both for the child and the non-parent. When deciding whether to grant relief to a non-parent, courts must, 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 suicide. In the six months after the father's death, the grandparents saw their grandchildren "on a regular basis." *Id.* at ~~Court struck down~~ 60. Then the mother informed the grandparents "that she wished to limit their visitation with her daughters to one short visit per month." *Id.* at 61. 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 Troxels [the grandparents] requested two weekends of overnight visitation per month and two weeks of visitation each summer. Granville [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 Troxel's "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 ~~grandparent visitation~~ case (along with two other consolidated cases) was appealed to the Washington Supreme Court, which held the statute was unconstitutional 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 appealed. The U.S. Supreme Court affirmed the Washington Supreme Court, although on narrower grounds. The court said the statute was "breathtakingly broad," 530 U.S. at 67, and the trial court's findings were "slender," *Id.* at 72. The Court struck down the statute, as applied, holding the trial court did not give sufficient deference to the decision of a fit parent to decide the amount of contact the children would have with grandparents. ~~The Supreme~~

1 ~~Court also stated the trial court’s “order was not founded on any special factors that might justify~~
2 ~~the State’s interference with [the mother’s] fundamental right to make decisions concerning the~~
3 ~~rearing of her two daughters.” *Id.* at 68.~~
4

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

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

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

21 *Id.* at 68–69.
22

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

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

33
34 **Reporter’s Note:** The following statistics and summary of the act will be updated as the
35 drafting proceeds.
36

37
38 The U.S. Census Bureau reports that the unmarried partner population “grew 41 percent
39 between 2000 and 2010, four times as fast as the overall household population.” U.S. Census
40 Bureau, “Households and Families: 2010” at p. 3 (C2010BR-14) (Apr. 2012), available at
41 <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.
42

43 Opposite-sex unmarried partner households increased by 40 percent since 2000; same-sex
44 households increased by 80 percent. *Id.* at p. 6.
45

46 In 2012, the Census Bureau reported that there were 73,817,000 children in United States

under age 18. Of that number, the breakdown for the children's living arrangements was:

- Living with both parents: 50,267,000
- Living with mother only: 17,991,000
- Living with father only: 2,924,000
- Living with neither parent: 2,634,000
- Of the children living with neither parent, 1,494,000 were living with grandparents.

U.S. Census Bureau, America's Families and Living Arrangements: 2012, Table C2, Household Relationship and Living Arrangements of Children Under 18 Years, by Age and Sex: 2012 available at <http://www.census.gov/hhes/families/data/cps2012.html>.

~~Key features~~ The main provisions of this act are:

- a right to seek custody or visitation for ~~three~~ three categories of persons: ~~(1)~~ (1) de facto parents, (2) persons who entered into an agreement with a parent before birth of a child to raise a child together, and (3) non-parents who have a substantial relationship with the child and who demonstrate that denial or custody or visitation would be as detriment to the child;
- a requirement that the pleadings be verified and specify the facts on which the request for custody or visitation is based;
- A requirement of notice to: (1) any parents whose parental rights have not been previously terminated; (2) any person having physical custody of, or visitation with, the child; and (3) the child, if the child has attained 12 years of age.
- a rebuttable presumption that the parent or de facto parent's decision about custody or visitation is in the best interests of the child;
- a burden of proof on the petitioner of clear and convincing evidence;
- protections for victims of domestic violence;
- a list of factors to guide the court's decision;
- a provision that a ~~petitioner~~ non-parent granted visitation may be ordered to pay the cost of facilitating visitation, including the cost of transportation; ~~and~~
- a provision that the act does not apply to children who are the subject of proceedings for guardianship, abuse, neglect, or dependency; and
- a provision that the rights and remedies of this act are not exclusive and do not preclude rights and remedies under laws of the state other than this act.

1 **NON-PARENTAL CHILD CUSTODY AND VISITATION ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Non-Parental Child
3 Custody and Visitation Act.

4 **SECTION 2. DEFINITIONS.** In this act:

5 (1) “Abandoned” means left without provision for reasonable and necessary
6 care or supervision.

7 (2) “Child” means an unemancipated individual who has not attained [18] years of age.

8 (2)(3) “Child abuse” means child abuse as defined in [cite to definition of “child abuse”
9 in law of this state other than this [act]].

10 (3)(4) “Custody” means physical custody, legal custody, or both. The term includes joint
11 custody or shared custody as defined by the law of this state other than this [act].

12 **Reporter’s Note:** If a final decision is made to delete references to “de facto parents” in
13 the act, the following section will be deleted. I assume the issue will be discussed at the
14 October 2016 Drafting Committee meeting. For now, I will continue to include the
15 definition in the draft. In addition, the definition of “parental responsibility” might not be
16 necessary if there are no separate provisions for de facto parents and persons who agree
17 to raise a child together.

18
19 (5)(4) “De facto parent” means an individual who:

20 (A) is not a legal parent under ~~another~~ law of this state ~~statute or in equity~~
21 ~~who~~ other than this [act];

22 (B) within the ~~last~~ two years; immediately before the filing of a petition under this
23 act has undertaken permanent, unequivocal, committed parental responsibility in the child’s life.
24 ~~Such a finding requires a determination by; and~~

25 (C) the court has found that:

26 ~~(A)~~ (i) the individual has resided with the child for a sufficient period of time
27 to form a bonded and dependent relationship with the child;

~~(B)~~ (ii) the individual has consistently engaged in ~~consistent~~ caretaking of the child;

~~(C)~~ (iii) the relationship between the individual and the child was supported by another parent of the child, and the individual and the other parent have accepted that relationship or behaved as though the individual is a parent of the child; ~~provided however,~~ except that if a parent has completely failed to exercise parental responsibility, the support of the parent who failed to exercise parental responsibility is not required; ~~and~~

~~(D)~~ (iv) the individual has accepted parental responsibility without expectation of financial compensation; ~~and,~~

~~(E) the continuing relationship between the individual and the child is in the best interests of the child.~~ (6)
~~(5)~~ “Detriment to the child” means adverse effect to the child’s physical or psychological well-being, including ~~the effects~~ an effect resulting from interruption of a substantial beneficial relationship with the child or removal of the child from a stable placement of a child with a non-parent or de facto parent.

~~(6)~~ (7) “Domestic violence” means domestic violence as defined in [cite to definition of “domestic violence” in law of this state other than this [act]].

~~(7)~~ (8) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

~~(8)~~ (9) “Legal custody” means the power to make important decisions regarding a child, including decisions regarding the child’s education, health care, and extracurricular activities.

~~(9)~~ (10) “Non-parent” means an individual other than a parent.

~~(10)~~ (11) “Parent” means a person recognized as a parent under law of this state other than this [act].

~~(11)~~ (12) “Parental responsibility” means exercising care and control of a child and making

1 decisions regarding the health, welfare, and other needs of the child.

2 (1213) “Parenting time” means parenting time as defined in [cite to definition of
3 “parenting time” in law of this state other than this [act]].

4 (1314) “Physical custody” means day-to-day care and supervision of a child.

5 (1415) “Record” means information that is inscribed on a tangible medium or that is
6 stored in an electronic or other medium and is retrievable in perceivable form.

7 (1516) “Sexual assault” means sexual assault as defined in [cite to definition of “sexual
8 assault” in law of this state other than this [act]].

9 (1617) “Stalking” means stalking as defined in [cite to definition of “stalking” in law of
10 this state other than this [act]].

11 (1718) “Visitation” means the right to spend time with a child, which may include
12 overnights.

13 Comment

14 **Reporter’s Note:** Commissioner Harry Tindall has suggested we add definitions of
15 “action” and “clear and convincing evidence.” With elimination of some provisions in
16 the act, the need to define “action” is less. I am inclined to leave the nuances of the
17 definition of “clear and convincing evidence” to existing state laws rather than adopt a
18 definition that may conflict slightly with other laws within a state that adopts this act.
19 The definitions that Commissioner Tindall proposes are:

- 20
- 21 ■ “‘Action’ includes an original suit, intervention, counter-claim and a
22 modification involving non-parent custody and visitation.”
- 23 ■ “‘Clear and convincing evidence’ means the measure or degree of proof that
24 will produce in the mind of the trier of fact a firm belief or conviction as to the
25 truth of the allegations sought to be established.”
- 26

27 Another option is to provide a sample definition of clear and convincing evidence in a
28 Comment to a section that uses the term.

30 Comment

31

32 The definition is “abandoned” is the same as used in the Uniform Child Custody
33 Jurisdiction and Enforcement Act, § 102(1) (1997).

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

8
9 In Family Law, the terms “custody” and “visitation” are flexible concepts. In most states,
10 there is not a fixed amount of time the child spends with a parent who has “custody” or
11 “visitation,” although some states utilize guidelines to specify the time the child spends with the
12 noncustodial parent. Nonetheless, a person with “custody” provides the child with a home or
13 primary home. The drafters anticipate that visitation granted to non-parents will be decided on
14 the facts of each case rather than by guidelines. The definition of “custody” includes joint
15 custody or shared custody as defined by other state law. Thus, under this act, courts have the
16 option of granting joint custody or shared custody (as well as sole custody).

17
18 The definition of “de facto parent” is based on Maine Rev. Stat. tit. 19-A, § 1891 (2015),
19 ~~which and is~~ also ~~is~~ similar to the definition in Delaware -- 13 Del. Code § 8-201(c) (2015). The
20 Delaware definition includes the element that the person seeking status as a de facto parent “has
21 acted in a parental role for a length of time sufficient to have established a bonded and dependent
22 relationship with the child that is parental in nature.” Some states set specific time periods
23 before a person may obtain custody as a de facto custodian – e.g., six months or more if the child
24 is under three years old, and one year or more if the child is three years of age or older. See, e.g.,
25 Ky. Rev. Stat. 403.270 (2012); S.C. Code § 63-15-60 (2012). At least eleven states allow a non-
26 parent to seek visitation if the child has lived with a person for a certain period of time, such as
27 six or 12 months.

28
29 The Washington Supreme Court in the case of *In re Parentage of L.B.*, 122 P.3d 161, 163
30 (Wash. 2005) held that the state’s “common law recognizes the status of de facto parents and
31 grants them standing to petition for a determination of the rights and responsibilities that
32 accompany legal parentage in this state.” To establish standing as a de facto parent, the
33 Washington Supreme Court adopted the following criteria:

- 34
35 (1) the natural or legal parent consented to and fostered the parent-like relationship,
36 (2) the petitioner and the child lived together in the same household,
37 (3) the petitioner assumed obligations of parenthood without expectation of financial
38 compensation, and
39 (4) the petitioner has been in a parental role for a length of time sufficient to have
40 established with the child a bonded, dependent relationship, parental in nature.

41
42 *Id.* at 176 (citations omitted).

43
44 The American Law Institute Principles of the Law of Family Dissolution § 2.03(1)(c)
45 (2002) defines a de facto parent as “an individual other than a legal parent or a parent by estoppel
46 who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for

1 reasons primarily other than financial compensation, and with the agreement of a legal parent to
2 form a parent-child relationship, or as a result of a complete failure or inability of any legal
3 parent to perform caretaking functions, (A) regularly performed a majority of the caretaking
4 functions for the child, or (B) regularly performed a share of caretaking functions at least as great
5 as that of the parent with whom the child primarily lived.”
6

7 Some of the phrasing in the definition of “de facto parent” also is drawn from the
8 American Law Institute’s Principles of the Law of Family Dissolution, § 2.03(1)(b) (2002). That
9 section provides, as one of the alternative definitions of “parent by estoppel”: “an individual
10 who, though not a legal parent, . . . (iii) lived with the child since the child’s birth, holding out
11 and accepting full and permanent responsibilities as parent, as part of a prior co-parenting
12 agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a
13 child together each with full parental rights and responsibilities, when the court finds that
14 recognition of the individual as a parent is in the child’s best interests.”
15

16 The definition of “detriment to the child” is based on Cal. Fam. Code § 3041(c) (2016) (a
17 section entitled “Custody award to nonparent; findings of court; hearing”). That section
18 provides: “As used in this section, ‘detriment to the child’ includes the harm of removal from a
19 stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his
20 or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for
21 care and affection, and who has assumed that role for a substantial period of time. A finding of
22 detriment does not require any finding of unfitness of the parents.”
23

24 The definitions of “electronic” and “record” are the definitions provided by the Uniform
25 Law Commission “Drafting Rules,” Rule 304 (2012).
26

27 The definition of “legal custody” is similar to the definition of “legal custody” in many
28 states. The definition of “legal custody” also is similar to the definition of “decision-making
29 authority” in the Uniform Deployed Parents Custody and Visitation Act (2012), which provides:
30 “the power to make important decisions regarding a child, including decisions regarding the
31 child’s education, religious training, health care, extracurricular activities, and travel.” “Legal
32 custody” might include the power to enroll a child in a religious school, but it normally should
33 not include selection of a child’s religion since most courts have held both parents have a right to
34 expose their child to his or her religious beliefs or lack of religious beliefs. *See, e.g., Felton v.*
35 *Felton*, 383 Mass. 232, 418 N.E.2d 606 (1981); *In re Marriage of Mentry*, 142 Cal. App 260,
36 190 Cal. Rptr. 843 (1983); *Hansen v. Hansen*, 404 N.W.2d 460 (N.D. 1987). Decisions about
37 travel are not included since persons with custody, as well as persons with visitation, generally
38 have a right to travel with the children, including on vacation. A person with “legal custody,”
39 however, generally would determine if the child were to travel on his own her own, such as for
40 an educational or athletic program.
41

42 The definition of “non-parent” is “an individual other than a parent.” The term includes,
43 but is not limited to, a child’s grandparents, great-grandparents, step-parents, and siblings. Other
44 persons could obtain relief under the act provided they meet the requirements of the act
45 (including clear and convincing evidence of substantial relationship with the child and detriment
46 to the child if custody or visitation was not granted).

1
2 The definition of “parent” is “a person recognized as a parent under law of this state other
3 than this [act].” The sources of the definition of “parent” may include the state’s parentage
4 statutes, divorce statutes, and case law. In most states, “parent” would include biological
5 parents, adoptive parents, and men who have acknowledged paternity (even though they are not
6 biologically related to the child). “Parent” also might include persons who agree to conceive a
7 child through assisted reproductive technology or by use of surrogates. Generally, a person
8 ceases to be a parent if his or her rights have been terminated. In addition, a man who donates
9 sperm or a woman who donates an egg usually are not considered to be parents.

10
11 The definition of “parental responsibility” is based, in part, on Del. Code Ann. tit. 13, §
12 1101(10) (2016), which provides: “‘Parental responsibilities’ means the care, support and control
13 of the child in a manner that provides for the child’s necessary physical needs, including
14 adequate food, clothing and shelter, and that also provides for the mental and emotional health
15 and development of such child.” Payment for the child’s food, clothing, shelter, and other
16 physical needs is not enough, by itself, to constitute exercise of parental responsibility.

17
18 The definition of “parenting time” is made with reference to law of the state other than
19 this act. The term is a comparatively modern term designed to supplement or replace the terms
20 “custody” and “visitation,” particularly in disputes between parents. The term is used to focus
21 on parenting of the child and allocation of time with the child rather than which parent has
22 “custody.” The Illinois definition of “parenting time” is: “the time during which a parent is
23 responsible for exercising caretaking functions and non-significant decision-making
24 responsibilities with respect to the child.” 750 Ill. Comp. Stat. 5/600(e) (2016).

25
26 The definition of “physical custody” is similar to the definition of “physical custody” in
27 the Uniform Child Custody Jurisdiction and Enforcement Act, § 102(14) (1997) (“the physical
28 care and supervision of a child”).

29
30 **SECTION 3. APPLICATION TO CHILD SUBJECT TO PROCEEDING**
31 **REGARDING GUARDIANSHIP, ABUSE, NEGLECT, OR DEPENDENCY.** This [act]
32 does not apply if the child is the subject of a proceeding under [cite to law of this state other than
33 this [act] regarding custody and visitation of children in proceedings related to guardianship of
34 the person, abuse, neglect, or dependency].

35 **Reporter’s Comment:** A commissioner suggested that cases that are subject to adoption
36 proceedings should not be covered by the act. I disagree with that approach since, under
37 our act, the adoption of a child by a relative, stepparent, or cohabitant does not
38 necessarily cut off the right of non-parents to continue or seek visitation or custody.

39
40 **Comment**
41

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

13
14 The Uniform Child Custody Jurisdiction and Enforcement (UCCJEA) applies to “child-
15 custody proceeding[s] . . . in which legal custody, physical custody, or visitation with respect to a
16 child is an issue.” UCCJEA, Section 104(4) (1997). The UCCJEA applies to guardianship
17 proceedings as well as proceedings under this act. Id. In the event there are simultaneous
18 proceedings under this act and under guardianship law, the UCCJEA (as well as state venue
19 laws) would determine which court has priority to exercise jurisdiction.

20 21 **SECTION 4. JURISDICTION.**

22 (a) Only a court that has jurisdiction under [cite to this state’s Uniform Child Custody
23 Jurisdiction and Enforcement Act] may determine custody or visitation under this [act-].

24 (b) Jurisdiction over an American Indian child is governed by the Indian Child Welfare
25 Act, 25 U.S.C. §§ 1901 et seq.

26 **Comment**

27 The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (1997) has
28 been adopted in 49 states. As of ~~February~~ **August** 2016, Massachusetts is the only state that has
29 not adopted the UCCJEA, although Massachusetts did adopt the Uniform Child Custody
30 Jurisdiction Act (UCCJA). The Uniform Law Commission has promulgated a 2013 version of
31 the UCCJEA (to cover international issues as well as domestic issues). As of February 2016, the
32 2013 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 ~~———— Jurisdiction over Native American children is governed by the Indian Child Welfare Act,~~
39 ~~25 U.S.C. §§ 1901 et seq. (2015).~~
40

Reporter's Note: At the Annual Meeting (and other meetings), there have been proposals to have separate provisions for non-parents seeking custody versus visitation. If we choose to follow that approach, I have drafted, below, a standing provision to reflect that. Subsection (a) draws on the standing provisions of several state statutes and include the main options that states have utilized. Some of the criteria overlap, and we may wish to trim the list. Note that some words or phrases are in brackets. We will need to decide whether the bracketed materials should be included in the draft. In addition, this draft includes, in brackets, status as a de facto parent as a basis for standing to seek custody and visitation – in part because the statutes of at least 12 states list status as a de facto parent (or in loco parentis) as a basis for standing. An alternate approach is to list the elements in the definition of de facto parent as a basis for standing, but not use the term. In addition, we may wish to discuss the interrelationship of de facto parents in this act with de facto parents in the Uniform Parentage Act (if the Uniform Parentage Act uses de facto parenthood as a basis for parentage).

SECTION 4. ~~INDIVIDUALS WHO MAY~~ 5. STANDING TO FILE A PETITION:

~~An individual may~~ **FOR CUSTODY AND VISITATION.**

~~(a) A non-parent has standing to file a petition if the individual claims that~~ for custody if:

~~he~~ (1) both parents are deceased;

(2) both parents are unfit or she have abandoned the child;

(3) the child is not living with either parent;

the non-parent has exercised [primary] care and control of a child and made decisions regarding

(4) the health, welfare, and other needs of the child [for a period of six or more months] during the year before the filing of the petition;

(5) [the non-parent has been a de facto parent; of the child during the year preceding the filing of the petition;] or

~~(6)~~ (6) other extraordinary circumstances exist. [Reporter's note: The Minnesota and New York statute use the adjective "extraordinary." Other adjectives used by states include "exceptional" (North Dakota) and "compelling" (South Carolina).]

(b) A non-parent has standing to file a petition for visitation if:

(1) the non-parent has exercised [primary] care and control of a child and made

1 decisions regarding the health, welfare, and other needs of the child [for a periods of six or more
2 months] during the year preceding the filing of the petition;

3 _____ (2) [the non-parent has been a de facto parent of the child during the year before
4 the filing of the petition;] or

5 _____ (3) a substantial relationship exists between the child and the ~~individual~~non-
6 parent, and ~~the denial of custody or~~ visitation to the ~~individual~~non-parent would be a detriment to
7 the child; or.

8 ~~(c) before the child's birth, the individual entered into an agreement in a record or orally~~
9 ~~with each parent of the child to accept full and permanent parental responsibility and to raise the~~
10 ~~child together, except that if a parent has completely failed to exercise parental responsibility, the~~
11 ~~consent of the parent who failed to exercise parental responsibility is not required.~~

12 (c) The court shall determine standing on the basis of pleadings and affidavits under
13 Section 6. The court may hold a hearing to determine disputed facts necessary for the issue of
14 standing.

15 **Legislative Note:** Courts in ~~approximately~~at least seven states have held that, as a matter of
16 state or federal constitutional law, that harm to the child without granting visitation must be
17 shown before visitation is granted to a non-parent. ~~See Weldon v. Ballow, No. 2140471, ___~~
18 ~~So.3d ___, 2015 WL 6618983, at 15 (Ala. Civ. App. Oct. 30, 2015), cert. denied sub nom. Ex~~
19 ~~parte Strange, No. 1150152, 2016 WL 281069 (Ala. Jan. 22, 2016); Crockett v. Pastore, 259~~
20 ~~Conn. 240, 789 A.2d 453 (2002); Sullivan v. Sapp, 866 So. 2d 28 (Fla. 2004); Doe v. Doe, 116~~
21 ~~Haw. 323, 172 P.3d 1067 (Haw. 2007); Blixt v. Blixt, 437 Mass. 649, 774 N.E.2d 1060 (2002);~~
22 ~~Moriarty v. Bradt, 177 N.J. 84, 827 A.2d 203 (2003); In re Parentage of C.A.M.A., 154 Wash. 2d~~
23 ~~52, 109 P.3d 405 (2005). Those states are: Alabama, Connecticut, Florida, Hawaii,~~
24 ~~Massachusetts, New Jersey, and Washington. In those states, legislative drafters may wish to~~
25 ~~substitute the word "harm" for "detriment" in subsection (b). Citations to court opinions in~~
26 ~~those states are in the Comment to this section.~~

27 Comment

28 Comment

29 The ~~designation~~requirement of ~~individuals who may file a petitions~~standing serves to

1 protect the interests of parents and filter out cases in which the petitioner does not have a
2 meritorious claim, while at the same time allowing the opportunity to preserve relationships
3 between children and ~~individuals other than non~~-parents with whom children have a particularly
4 close relationship. ~~The bases for standing correspond to the individuals who may file petitions~~
5 ~~under Section 6—9.~~

7 Subsection (c) regarding determining standing on the basis of pleadings and affidavits
8 while giving the court discretion to hold a hearing is similar to Maine Rev. Stat. tit. 19-A, §
9 1891(2)(C) (2016).

11 The following court opinions have held, as a matter of state or federal constitutional law,
12 that harm to the child without granting visitation must be shown before visitation is granted to a
13 non-parent: *Weldon v. Ballow*, No. 2140471, ___ So.3d ___, 2015 WL 6618983, at 15 (Ala. Civ.
14 App. Oct. 30, 2015), *cert. denied sub nom. Ex parte Strange*, No. 1150152, 2016 WL 281069
15 (Ala. Jan. 22, 2016); *Crockett v. Pastore*, 259 Conn. 240, 789 A.2d 453 (2002); *Sullivan v. Sapp*,
16 866 So. 2d 28 (Fla. 2004); *Doe v. Doe*, 116 Haw. 323, 172 P.3d 1067 (Haw. 2007); *Blixt v. Blixt*,
17 437 Mass. 649, 774 N.E.2d 1060 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003);
18 *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005).

20 SECTION 56. PLEADINGS.

21 (a) ~~In all pleadings~~ A petition under this [act] requesting custody or visitation, ~~the petition~~
22 ~~shall~~ must be verified and specify the facts ~~on~~ and bases upon which the request is based. The
23 facts and bases specified must include:

24 (1) the nature of the relationship between the petitioner and the child;

25 (2) if applicable, the nature of any agreement between the parties regarding care
26 for the child and contact with the child;

27 (3) attempts to obtain visitation or other contact with the child;

28 (4) the information required by [cite to Section 209 of this state's Uniform Child
29 Custody Jurisdiction and Enforcement Act]; ~~and~~

30 (5) ~~reasons~~ reason why a continuing relationship between the petitioner and the
31 child is in the best interests of the child. ~~—; and~~

32 (6) reason why denial of custody or visitation to the petitioner would be a
33 detriment to the child.

_____ (b) ~~If an agreement concerning care of the child or contact with the child is in writing,~~
~~a copy of the agreement shall be attached to the pleadings in which a petitioner requests.~~

Reporter's Note: If the Drafting Committee confirms the decision to drop status
as a de facto parent as a basis for relief. The following subsection [(c)] will be
deleted.

(c) In addition to the facts and bases for relief in subsection (a), a petition requesting
adjudication that the petitioner is a de facto parent, ~~the petition also shall~~ must describe:

(1) the period of time the petitioner has resided with the child;

(2) the caretaking the petitioner has provided the child;

(3) the degree to which the relationship between the petitioner and the child was
supported by another parent ~~or parents~~ of the child, and the degree to which the petitioner and the
other parent ~~or parents have~~ has accepted that relationship or behaved as though the individual is
a parent of the child; and

(4) the financial compensation, if any, the petitioner has accepted in exchange for
providing care for the child.

~~_____ (c) In pleadings in which a petitioner who is not a de facto parent requests custody or
visitation, the petition also shall describe why denial of custody or visitation to the petitioner
would be a detriment to the child.~~

~~_____ (d) In pleadings in which a petitioner claims that the petitioner entered into an agreement
with each parent of the child to accept full and permanent parental responsibility and to raise the
child together, the petition also shall state:~~

~~_____ (1) the date of the agreement;~~

~~_____ (2) the manner in which the agreement was made (by writing, oral statement, or
other means).~~ **Legislative Note:** Courts in at least seven states have held that, as a matter of
state or federal constitutional law, that harm to the child without granting visitation must be
shown before visitation is granted to a non-parent. Those states are: Alabama, Connecticut,

Florida, Hawaii, Massachusetts, New Jersey, and Washington. In those states, legislative drafters may wish to substitute the word “harm” for “detriment” in subsection (b). Citations to court opinions in those states are in the Comment to Section 5.

Comment

In the U.S. Supreme Court’s plurality opinion in *Troxel v. Granville*, 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* Kennedy, J. at 530 U.S. at 101. Requiring verified pleading and specificity in pleadings is intended to reduce actions that are not meritorious and facilitate disposition of non-meritorious cases by motions to dismiss or for summary judgment.

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

“(a) [Subject to [local law providing for the confidentiality of procedures, addresses, and other identifying information], in] [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; and

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

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

(c) If the declaration as to any of the items described in subsection (a)(1) through

(3) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(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.

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

~~SECTION 6. INITIAL PETITION BY DE FACTO PARENT.~~

~~(a)~~ **7. NOTICE.** ~~On~~ The court shall adjudicate an individual to be a de facto parent if the court finds by clear and convincing evidence that filing a petition under this [act] requesting custody or visitation, the petitioner ~~is a de facto parent.~~ shall give notice to:

~~(b) An individual adjudicated to be a de facto~~ 1) any parent whose parental rights has the same right to not been previously terminated;

(2) any person having physical custody, of, or visitation, or parenting time as a parent, as those rights are provided under law of this state other than this act. with, the child; and

Comment

(3) the child, if the child has attained 12 years of age.

Comment

~~“De facto parent” is defined in the definition section of this act [Section 2(4)]. As noted in the Comment to that section, a trend in the law is to grant rights by statute or case law to de facto parents to seek custody or visitation. States which provide that de facto parents (or persons who stood in loco parentis to the child) have standing to seek custody or visitation include: AZ, CT, DE, HA, IN, KY, MN, MT, PA, WA. A related concept is an individual may seek visitation (or custody) if the child has been residing with the individual for a certain period of time—e.g., CA, MI, NV, WI.~~

~~The right of de facto parents to seek custody or visitation applies to couples of the same sex or different sex, even though only one of the parties is related to the child by genetics, adoption, or other bases for parenthood recognized by the state.~~

1 ——— In this section (as well as in Sections 7, 8, and 9) the standards for being able to obtain
2 custody or visitation are the same within each section.

3
4 ——— **SECTION 7. INITIAL PETITION BY AN INDIVIDUAL WHO ENTERED INTO**
5 **AN AGREEMENT TO ACCEPT FULL AND PERMANENT PARENTAL**
6 **RESPONSIBILITY.**

7 (a) This section applies to an individual who is not a legal parent under another state
8 statute or in equity and who alleges he or she entered into an agreement before the child's birth
9 to accept full and permanent parental responsibility and to raise the child together.

10 (b) If the child has more than more than one parent, agreement of each parent is
11 necessary, except that if a parent has completely failed to exercise parental responsibility, the
12 agreement of that parent is not required.

13 (c) If a court determines by clear and convincing that an individual entered into a
14 agreement under this section, in a record or orally, that individual has the same right to custody,
15 visitation, or parenting time as a parent, as those rights are provided under law of this state other
16 than this act.

17 **Comment**

18 This section provides that an individual who has entered into an agreement with the parent “to
19 accept
20 _____ full and permanent parental responsibility and to raise the child together” “has the
21 same right to custody, visitation, or parenting time as a parent.” Agreements between parents
22 regarding custody of children have been held to be of “constitutional magnitude” and entitled to
23 presumptive enforcement. *In re Marriage of Coulter and Trinidad*, 2012 IL 113474, 364 Ill.
24 Dec. 59, 976 N.E.2d 337, 342 (enforcing an agreement between parents regarding future
25 relocation of the children). *See also Frazier v. Goudschaal*, 296 Kan. 730, 295 P.3d 542 (2013)
26 (enforcing a coparenting agreement between members of a same-sex couple); *Fawzy v. Fawzy*,
27 199 N.J. 456, 973 A.2d 347, 350 (2009) (enforcing parents’ agreement to arbitrate a custody
28 dispute).

29
30 There is overlap as well as differences between this section and Section 6 (regarding de
31 facto parents). The de facto parent section requires that the individual seeking status as a de
32 facto parent “has undertaken permanent, unequivocal, committed parental responsibility in the

child's life" and requires that the court make five findings. Both sections require agreement or consent of the parents for the individual to obtain custody or visitation under the act (except consent of a parent is not necessary under this section if a parent has completely failed to exercise parental responsibility). The de facto parent section focuses the quality and duration of the individual's relationship with the child. This section focuses on the existence of an agreement, and the agreement could be enforced soon after the child's birth even if the child and individual have not had a long-term relationship.

Elements of the notice provision are similar 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 Uniform Revised Guardianship and Protective Proceedings Act, §§ 202(d)(2), 205(a) (2017) requires notice to minors who have attained 12 years of age.

Reporter's Note: The following sections present alternatives for the substantive standards for granting a non-parent custody or visitation, including the standards for presumptions and burden of proof. Alternative A continues the prior draft's approach of applying the same three-part standard for granting custody and visitation. Alternative B has different standards for custody and visitation. (Section 5 regarding standing also provides different standards for custody and visitation.) The sections will be renumbered, depending on which alternative(s) are chosen.

Alternative A (Same standard for both custody and visitation)

SECTION ~~88A~~. INITIAL PETITION ~~BY NON-PARENT OF CHILD WHO IS NOT A DE FACTO PARENT~~ WHEN CHILD IS IN CUSTODY OF PARENT OR DE FACTO PARENT.

____ (a) This section applies to initial petitions for custody or visitation ~~filed~~ by a non-parent who is not a de facto parent when the child is in the custody of a parent or de facto parent.

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

____ (1) a substantial relationship exists between the child and non-parent;

1 (2) denial of custody or visitation to the non-parent is a detriment to the child; and

2 (3) custody or visitation to the non-parent is the best interests of the child.

3 (c) Proof of parental unfitness is not required to rebut the presumption described in
4 subsection (b).

5 **Reporter’s Note:** Cathy Sakimura, an observer from the National Center for
6 Lesbian Rights, has said the Center is “extremely concerned about the suggestion to treat
7 ‘de facto’ parents like all other nonparents.” See Cathy’s memo dated August 8, 2016.
8 One way to handle that issue, as Cathy notes, is to not require a showing of detriment if
9 the person petitioning for custody or visitation is a de facto parent. If we were to follow
10 that approach, a phrase could be added to subsection (b)(2), above, along the lines of
11 “provided, however, if the party petitioning for custody or visitation is a de facto parent,
12 detriment to the child need not be shown.” We also would need to specify that the
13 burden of proof to establish an individual’s status as a de facto parent is clear and
14 convincing evidence. Another work-around is to describe the circumstances in which a
15 detriment to the child would not have to be shown, but not use the term “de facto parent.”
16 (Close to one-half the states do use the term “de facto parent,” or related terms, such as
17 “in loco parentis” or “psychological parent.”

18
19 **Alternative B (Different standards, and two different sections, for custody and**
20 **visitation)**

21
22 **SECTION 8B. INITIAL PETITION FOR CUSTODY WHEN CHILD IN**
23 **CUSTODY OF PARENT.**

24 (a) This section applies to initial petitions for custody by a non-parent when the child is in
25 the custody of a parent.

26 (b) Parental custody is presumed to be in the best interests of the child. The presumption
27 is rebuttable. To rebut the presumption, the non-parent must establish by clear and convincing
28 evidence that:

29 (1) the parent is unfit or parental custody would be a [significant] detriment to the
30 child

31 [alternate phrasing for (1): “custody to the non-parent is necessary because custody with the
32 parent would significantly impair the child’s physical health or emotional development”];

1 (2) custody to the non-parent is the best interests of the child.

2 **Reporter's Note:** The list of circumstances that would justify granting custody to the
3 non-parent could include being a [primary] caretaker of the child or a de facto parent –
4 although the standard of “detriment to the child” could pick up those circumstances since
5 the definition of “detriment” includes “the effects resulting from interruption of a
6 substantial beneficial relationship with the child or removal of the child from a stable
7 placement of a child with a non-parent or de facto parent.” Although the first criteria of
8 subsection (b)(1), above, is parental unfitness, the criteria of “detriment to the child” does
9 not require a showing of unfitness. The phrase of “[significant] detriment to the child” is
10 based, in part, on Ariz. Rev. Stat. § 25-409(a)(2) (2016), which lists as a basis for
11 placement of a child with a third party establishing that “It would be significantly
12 detrimental to the child to remain or be placed in the care of either legal parent”
13

14 **SECTION 8C. INITIAL PETITION FOR VISITATION WHEN CHILD IN**
15 **CUSTODY OF PARENT.**

16 (a) This section applies to an initial petition for visitation by a non-parent when the child
17 is in the custody of a parent.

18 (b) A parent's decision about visitation is presumed to be in the best interests of the
19 child. The presumption is rebuttable. To rebut the presumption, the non-parent must establish
20 by clear and convincing evidence that:

21 (1) a substantial relationship exists between the child and ~~the~~ non-parent, ~~and~~;

22 (2) denial of ~~custody or~~ visitation to the non-parent is a detriment to the child;

23 and

24 (3) ~~custody or~~ visitation to the non-parent is the best interests of the child.

25 ~~(c) Proof of parental unfitness is not required to rebut the presumption described in~~
26 ~~subsection (b).~~

27 (c) Proof of parental unfitness is not required to rebut the presumption described in
28 subsection (b).

29 **[End of alternatives]**
30

Reporter’s Note: During the First Reading, some commissioners expressed hope that the standards for grandparent visitation could be more flexible, including allowing for visitation when the grandparents had not been given an opportunity by the parents to have a substantial relationship with the child. We can discuss that issue more, but I believe under *Troxel*, there are limits about how far we can go, particularly given the need to presume the parent’s decision is correct and the Court’s statement that “so 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.” 530 U.S. at 68-69. See also *Dorr v. Woodard*, 2016 ME 79, 140 A.3d 467 (Maine 2016), in which the Supreme Judicial Court of Maine affirmed dismissal of a paternal grandmother’s petition for visitation with her two-year-old granddaughter following death of the father. The court stated: “[D]espite the benefits to a child that could accompany a healthy and loving relationship with the child’s grandparents, it will be difficult for a grandparent to demonstrate a compelling state interest sufficient to infringe on a fit parent’s fundamental right when there is no threat of harm to the child. Such an intrusion in the context of a petition for court-ordered grandparent visitation will be court-enforced only when the grandparent demonstrates ‘urgent reasons’ for the intrusion.” 140 A.3d at 472 (citation omitted).

Legislative Note: Courts in ~~approximately~~ at least seven states have held that, as a matter of state or federal constitutional law, that harm to the child without granting visitation must be shown before visitation is granted to a non-parent. See ~~*Weldon v. Ballou*, No. 2140471, ___ So.3d ___, 2015 WL 6618983, at 15 (Ala. Civ. App. Oct. 30, 2015), cert. denied sub nom. *Ex parte Strange*, No. 1150152, 2016 WL 281069 (Ala. Jan. 22, 2016); *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 (Haw. 2007); *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1060 (2002); *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003); *In re Parentage of C.A.M.A.*, 154 Wash. 2d 52, 109 P.3d 405 (2005). Those states are: Alabama, Connecticut, Florida, Hawaii, Massachusetts, New Jersey, and Washington. In those states, legislative drafters may wish to substitute the word “harm” for “detriment” in subsection ~~(b)(1)~~.~~

[Insert applicable subsection, depending on which option is chosen]. Citations to court opinions in those states are in the Comment to Section 5.

Comment (Will be revised based on what alternatives are chosen)

This section governs requests for custody or visitation by a non-parent when the child is in the custody of a parent ~~or de facto parent.~~ Section 2(910) defines “non-parent” as “an individual other than a parent.” The most common non-parents seeking custody and visitation are a child’s grandparents, great-grandparents, step-parents, and siblings, although the definition allows others to seek custody or visitation if the requirements of the act are met.

The statutes of many states specify the circumstances in which visitation 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. The categories of persons who may seek

1 visitation and the broad description of circumstances in which visitation may be sought do not,
2 by themselves, provide a reliable indicator of whether non-parental visitation (or custody) should
3 be allowed. It is preferable to focus on the factors used to decide visitation or custody,
4 particularly the closeness of the relationship between the child and the non-parent.

5
6 The presumption and burden of proof in this section recognize the superior right of
7 parents to custody of their children in custody disputes with non-parents, and also provides that
8 the superior right or presumption can be overcome. The standard is similar to Pa. Stat. Ann. tit.
9 23, § 5327(b) (2015).

10
11 As stated in Black's Law Dictionary, "The Burden of proof includes both the burden of
12 persuasion and the burden of production." Black's Law Dictionary (7th ed. 1999).

13
14 The presumption and burden of proof is designed to meet the requirements of *Troxel v.*
15 *Granville*, 530 U.S. 57 (2000), in which the Supreme Court struck down Washington State's
16 third party visitation statute as applied. Justice O'Connor, in a plurality decision, said the
17 Washington statute "contains no requirement that a court accord the parent's decision any
18 presumption of validity or any weight whatsoever." *Id.* at 67. "The Superior Court's order was
19 not founded on any special factors that might justify the State's interference with Granville's
20 fundamental right to make decisions concerning the rearing of her two daughters." *Id.* at 68.

21
22 The Supreme Court in *Troxel* did not rule on the issue of whether the constitution
23 requires a showing of harm or potential harm. In her plurality opinion, Justice O'Connor said:

24
25 Because we rest our decision on the sweeping breadth of [Washington Code] §
26 26.10.160(3) and the application of that broad, unlimited power in this case, we
27 do not consider the primary constitutional question passed on by the Washington
28 Supreme Court—whether the Due Process Clause requires all nonparental
29 visitation statutes to include a showing of harm or potential harm to the child as a
30 condition precedent to granting visitation. We do not, and need not, define today
31 the precise scope of the parental due process right in the visitation context. In this
32 respect, we agree with Justice KENNEDY that the constitutionality of any
33 standard for awarding visitation turns on the specific manner in which that
34 standard is applied and that the constitutional protections in this area are best
35 "elaborated with care." *Post*, at 2079 (dissenting opinion). Because much state-
36 court adjudication in this context occurs on a case-by-case basis, we would be
37 hesitant to hold that specific nonparental visitation statutes violate the Due
38 Process Clause as a *per se* matter.

39
40 530 U.S. at 73.

41
42 In the years since *Troxel* was decided, state courts have generally held that a
43 grandparent's claim that the grandparent has a positive relationship with the grandchild is not
44 sufficient to justify an order of visitation over the objection of a parent. *See, e.g., Neal v. Dorr v.*
45 *Woodard*, 2016 ME 79, 140 A.3d 467 (Maine 2016); *Neal v. Lee*, 2000 Ok 90, 14 P.3d 547
46 (2000); *State Dept. of Social and Rehabilitative Services v. Paillet*, 16 P.3d 962 (2001); *Flynn v.*

1 *Henkel*, 227 Ill.2d 176, 880 N.E.2d 166 (2007). On the other hand, if the grandparent has a
2 substantial relationship with the grandchild – such as raising the child for a few years – that can
3 be the basis for granting visitation to the grandparent over the parents’ objection. *See, e.g.*,
4 *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000) (the grandparents had helped raise their
5 grandchildren for the first seven years of the oldest grandchild’s life and for lesser periods for the
6 younger grandchildren); *E.S. v. P.D.*, 8 N.Y.3d 150, 863 N.E.2d 100 (2007) (grandparents cared
7 for children while the mother was dying of cancer).

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 parental figures ~~probably~~ will not be
11 large. As courts sort through complex family structures, the number of persons acting in a
12 parental role is a factor that should be considered -- but without applying a fixed rule about how
13 many parental figures with rights to time with the child is too many. The focus needs to remain
14 on the best interests of the child.

15
16 **SECTION 9. INITIAL PETITION ~~BY NON-PARENT OF CHILD WHO IS NOT~~**
17 **~~A DE FACTO PARENT~~[FOR CUSTODY OR VISITATION] WHEN CHILD ~~IS NOT IN~~**
18 **~~CUSTODY OF PARENT~~ OR DE FACTO PARENT.**

19 (a) This section applies to an initial ~~petitions~~petition for custody or visitation filed by a
20 non-parent ~~who is not a de facto parent~~ when the child is not in the custody of a parent ~~or de~~
21 ~~facto parent.~~

22 (b) To obtain custody or visitation, the non-parent must establish by clear and convincing
23 evidence that:

24 (1) a substantial relationship exists between the child and the non-parent, and

25 (2) custody or visitation for the non-parent is in the best interests of the child.

26 (c) In an initial proceeding for custody of or visitation under this section with a child
27 between two or more non-parents, a presumption does not exist that custody or visitation should
28 be given to a particular non-parent.

29 **Comment**

30 ~~**Comment**~~

31 This section governs custody and visitation disputes when the child is not in the custody

1 of a parent [or de facto parent-]. The non-parent needs to demonstrate by clear and convincing
2 that a substantial relationship exists between the child and the non-parent and that custody or
3 visitation for the non-parent is in the best interests of the child. Unlike the standard in Section 8
4 regarding children in the custody of a parent, a non-parent filing a petition under this section
5 does not need to prove that denial of custody or visitation to the non-parent would result in a
6 detriment to the child. In cases in which the dispute does not involve a parent, the Supreme
7 Court's holding in Troxel regarding giving deference to a parent's decision does not apply. If the
8 petitioner does not prove his or her case by clear and convincing evidence, other laws – such as
9 guardianship laws – are available to decide custody and visitation issues. ~~In cases in which the~~
10 ~~dispute does not involve a parent, the Supreme Court's holding in Troxel regarding giving~~
11 ~~deference to a parent's decision does not apply.~~

12
13 Subsection (c) is similar to 23 Pa. Stat. and Cons. Stat. Ann. § 5327(c) (West 2016),
14 which provides: “In any action regarding the custody of the child between a nonparent and
15 another nonparent, there shall be no presumption that custody should be awarded to a particular
16 party.”

17
18 **SECTION 10. PRESUMPTION REGARDING DOMESTIC VIOLENCE, CHILD**
19 **ABUSE, SEXUAL ASSAULT, OR STALKING.**

20 ~~(a) There is a rebuttable presumption~~ (a) In this section, “committed an act,” refers to a
21 final adjudication by a court hearing a proceeding under this act or a final adjudication by court
22 in another civil or criminal proceeding that the designated offense occurred.

23 (b) It is presumed that it is not in the best interests of a child to grant custody or visitation
24 to a non-parent if the non-parent, or a person residing with the non-parent, has committed ~~an~~
25 ~~act~~ any of ~~domestic violence, child abuse, sexual assault, or stalking~~ the following acts against the
26 other parent, the child, the child's siblings, ~~or a child's custodial guardian.~~ For the purposes [or a
27 member of ~~this section,~~ the phrase, “committed an act,” refers to a final adjudication by a court
28 ~~hearing a proceeding under this act or an adjudication by court in another proceeding~~
29 ~~that~~ previous family of the ~~designated offense occurred.~~ non-parent's or a person residing with
30 the none-parent];

31 ~~(b) In actions involving a parent and a de facto parent, or a parent and an individual who~~
32 ~~entered into an agreement to accept full and permanent parental responsibility, the following~~

provisions apply: ~~[insert cite to laws of this state pertaining to presumptions in custody or parenting time disputes between parents involving domestic violence and similar offenses].~~

(1) domestic violence;

(2) child abuse;

(3) sexual assault; or

(4) stalking.

The presumption is rebuttable.

Reporter's Note: At the First Reading, when we were discussing the presumptions pertaining to domestic violence, a question was raised of whether a conviction of a drug offense by a person seeking custody or visitation [or a person residing with the petitioner] should give rise to a presumption against the person seeking custody or visitation. My inclination is to not use such a presumption. The negative impact of a drug offense on a child by a potential custodian or visitor, etc., would vary significantly with the severity of the offense and how recently the offense occurred. In addition, under Section 11(7) of this act, a court is directed to consider: "(7) the mental and physical health of the child and parties to the proceeding, including alcohol abuse and drug abuse by the child or parties to the proceeding; provided, however that the mental and physical health of the parties shall not be considered unless those factors relate to harm caused to the child." Most states do not apply presumptions in custody proceeding regarding abuse of drugs or alcohol, although Arizona does apply a rebuttable presumption against sole or joint decision-making for a parent who has abused drugs or alcohol or been convicted of enumerated offenses within 12 months of when the petition is filed. Ariz. Rev. Stat. § 25-403.04 (2016).

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 non-parent if the non-parent, or a person residing with the non-parent, has committed an act of domestic violence or related offenses. Domestic violence is defined by reference to state law. This section requires that there be a "final adjudication" that the offense occurred. Thus, a temporary order -- particularly one entered on an ex parte basis -- would not be considered a final adjudication for the purpose of applying a presumption against granting custody or visitation to a non-parent.

Reporter's Note: A commissioner at the First Reading commented that "stalking" is considered to be a type of "domestic violence" -- at least under many state laws. Thus, from that commissioner's view, "stalking" does not need to be specified separately.

SECTION 11. FACTORS CONSIDERED:

~~(a)~~ **REGARDING BEST INTERESTS AND CUSTODY OR VISITATION.** If a non-parent establishes that a substantial relationship exists between the child and the non-parent and that denial of custody or visitation to the non-parent is a detriment to the child, the court shall consider the following factors in determining the best interests of the child and whether to grant custody or visitation to a non-parent:

_____ (1) the nature, extent, and quality of the relationship between the child and the parent, including any periods of absence in the relationship;

_____ (2) the nature, extent, and quality of the relationship between the child and non-parent, ~~including specific parent-like activities undertaken by the non-parent~~ **and whether the non-parent has a kinship relationship with the child;**

_____ (3) the frequency and continuity of contact between the child and the non-parent, including the period of any disruption in the contact and the reasons for the disruption;

_____ (4) the views of the child, weighed in **the** light of the child's age and maturity;

_____ (5) the willingness and ability of the parent and non-parent to facilitate a positive relationship among the child, parties to the proceeding, and family members of the child, except that the court may not consider ~~this~~**the** willingness and ability if the parent or custodian of the child shows that: ~~(i)~~

_____ **(A)** the non-parent has engaged in domestic violence, child abuse, sexual assault, or stalking against the parent, child, child's siblings, or custodial guardian; ~~and~~ ~~(ii)~~

_____ **(B)** a continuing relationship with the non-parent will affect negatively the health or safety of the parent, child, child's siblings, or custodial guardian;

_____ (6) the child's adjustment to the child's current and proposed home, school, and

community;

_____ (7) the mental and physical health of the child and parties to the proceeding, including alcohol abuse and drug abuse by the child or parties to the proceeding; ~~provided,~~ ~~however~~except that the mental and physical health of the parties ~~shall~~may not be considered unless those factors relate to harm caused to the child;

_____ (8) a history of or threat of child abuse, child neglect, domestic violence, sexual assault, or stalking towards a parent, the child, child's siblings, or custodial guardian ~~(A) by a party or (B) by an individual with whom a party has kinship or a significant relationship;~~by:

(A) a party or

(B) an individual with whom a party has kinship or a significant relationship;

(9) the reasons for the parties' positions in the proceeding regarding custody ~~and~~or visitation;

_____ (10) an agreement among the parties regarding custody or visitation;

_____ (11) the applicable factors in [insert ~~cite to laws of this state pertaining factors considered in custody or parenting time disputes between parents~~].

_____ ~~(12) any other relevant factor affecting the best interests of the child.~~

_____ ~~(b) If an individual establishes that he or she is a de facto parent or that he or she is an individual who entered into an agreement to accept full and permanent parental responsibility, the court shall consider the factors in [insert ~~cite~~citation to laws of this state pertaining factors considered in custody or parenting time disputes between parents~~]; and

(12) any other relevant factor affecting the best interests of the child.

1 **Comment**

2 [~~Comment~~Comments will be inserted ~~—including~~ noting that: (1) the factors are to be
3 considered after it is established that a substantial relationship exists between the child and the
4 non-parent and that denial of custody or visitation to the non-parent is a detriment to the child;
5 and (2) 35 states list factors in their non-parental visitation statutes. There also will be comments
6 on the application of a few specific factors, including a statement that home-schooling does not
7 mean that a child has an adverse adjustment to school.]

8
9
10 **Reporter's Note:** It has been suggested that the standard for modification should
11 be a showing of substantial change of circumstances coupled with best interests of
12 the child – rather than our current standard of reference to state laws on disputes
13 between parents. I will present both options, and the Drafting Committee will
14 choose one, or a variation on them. Portions of Alternative B, including the
15 exceptions to the requirement of substantial change of circumstances, are based,
16 in part, on 750 Ill. Comp. Stat. 5/610.5 (2016).

17
18 **SECTION 12. PETITION TO MODIFY CUSTODY OR VISITATION.**

19 **Alternative A (current language with slight modification)**

20 _____ A petition to modify ~~a custody, visitation, or parenting time~~an order for custody or
21 visitation entered under this [act] shall be decided under [cite to the law of this state other than
22 this act for modification of a custody, visitation, or parenting time order applicable to a dispute
23 between parents].

24 **~~Comment~~**

25 **Alternative B (substantial change + best interests)**

26 _____ (a) A final custody or visitation order entered under this [act] may be modified on a
27 showing by a preponderance of the evidence that:

28 _____ (1) a change has occurred in the circumstances of the child or a person with rights
29 of custody or visitation with the child; and

30 _____ (2) the modification will serve the best interests of the child.

31 _____ (b) A final order for custody or visitation entered under this [act] may be modified

1 without a showing of changed circumstances if

2 _____ (1) the modification is in the best interests of the child, and

3 _____ (2) any of the following are proven:

4 _____ (A) the parties agreed to the modification;

5 _____ (B) the modification reflects the actual arrangement under which the child
6 has been receiving care, without objection of the parties, for the six months before the filing of
7 the petition for modification;

8 _____ (C) the modification is a minor modification of the final order; or

9 _____ (D) the modification is necessary because the court would not have

10 entered or approved the final order had the court been aware of the circumstances at the time the
11 order was entered.

12 **Comment (May be modified, depending on which option is utilized)**

13 This section makes reference to a state's existing law regarding modification of custody,
14 ~~or~~ visitation, ~~or parenting time~~ orders applicable to disputes between parents. In most states, that
15 standard is a showing of substantial change of circumstances coupled with a showing that
16 modification is in the best interests of the child (although a few states have different standards,
17 such as requiring a showing of endangerment if modification is sought within two years of a
18 prior order). See Jeff Atkinson, *Modern Child Custody Practice - Second Edition*, §§ 10.1 –
19 10.13 (LexisNexis 2015). Under this approach, a custody or visitation order in favor of a non-
20 parent generally would stay the same unless the substantial change of circumstances and best
21 interests of the child for modification of the order were shown.

22
23 **SECTION 13. TEMPORARY ~~ORDER~~ AND FINAL ORDERS.**

24 ~~_____ (a)~~ (a) On motion of a party or the court's own motion, and after opportunity for
25 hearing, the court may ~~enter an order under this act as~~ issue a temporary order or a final order.

26 Sections 1 through 11 and 14 through 24 apply to temporary orders as well as final orders.

27 _____ (b) ~~An~~ A temporary order entered under this section has no presumptive effect and is not
28 determinative when the court considers petitions for other orders under this [act].

Reporter's Note: Section 12 – which is not included in the statutory cross-reference in subsection (a) – deals with “Petition to Modify Custody or Visitation.”]

Comment

This section makes explicit that the court has the power to enter temporary, as well as ~~permanent, final~~ orders. ~~The details~~ Other provisions of ~~what must be shown~~ the act -- including the requirements for pleadings, burden of proof, presumptions, and factors considered – apply to ~~obtain a~~ the issuance of temporary ~~order is left~~ orders in addition to local practice — e.g., use of affidavits, need for hearing, elements of proof, although it is expected that the showing of at least a prima facie case would be required for entry of a temporary order final orders.

Subsection (b) is similar to Va. Code Ann. § 20-103(E) (West 2015), which provides: “An order entered pursuant to this section shall have no presumptive effect and shall not be determinative when adjudicating the underlying cause.”

~~— The factors listed in Section 11 apply to both temporary and permanent orders.~~

SECTION 14. EFFECT OF ADOPTION OF CHILD BY A RELATIVE ~~OR,~~ STEPPARENT [, OR COHABITANT]. The adoption of a child by a relative ~~or a~~ stepparent [, or cohabitant of the parent] does not preclude granting or continuing custody or visitation to an individual who is a non-parent.

Comment

As of 2013, the statutes of 24 states explicitly allow visitation for non-parents if the child has been adopted by a relative, including a stepparent. Jeff Atkinson, *Shifts in the Law Regarding Rights of Third Parties to Seek Visitation and Custody of Children*, 47 Fam. L. Q. 1, 20-23 (Spring 2013).

SECTION 15. APPOINTMENTS AND COURT SERVICES. To the extent available in other cases involving custody ~~and~~ or visitation of children, the court may do one or more of the following:

(1) appoint a child’s attorney, guardian ad litem, child’s representative, or similar personnel;

(2) order mediation, but a party who has been the victim of domestic violence by another party to the proceeding shall not be required to participate in mediation [unless the safety of the

party can be protected adequately during mediation];

Legislative Note: The brackets in subsection 2 should be removed and the phrase “unless the safety of the party can be protected adequately during mediation” should be included in the section in states that require mediation of custody and visitation cases, including cases in which there are allegations of domestic violence.

(3) order evaluations or home studies of the child, parent, [de facto parent,] or ~~petitioners~~non-parent who ~~are non-parents~~petitions for custody or visitation; and

(4) allocate payment among the parties to the proceeding of fees for the services listed in this section.

Comment

A variety of personnel and court services may assist the court in making decisions regarding non-parental 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 custody and visitation cases.

In subsection (2), the phrase “the safety of the party can be protected adequately” is based on the Uniform Collaborative Law Act, Section 15(c)(2) (2010). Among the protections that might be used would be “shuttle mediation,” in which the parties to mediation are not in the same room with each other and the mediator shuttles between rooms.

SECTION 16. COST OF FACILITATING VISITATION.

~~—— (a) An individual other than a de facto parent or person who entered into an agreement to accept full and permanent parental responsibility who is granted visitation under this [act]~~ A non-parent granted visitation may be ordered to pay the cost of facilitating visitation with the child, including the cost of transportation.

~~—— (b) The obligation to pay child support of a de facto parent or an individual who entered into an agreement to accept full and permanent parental responsibility is governed by law of this state other than this [act].~~

~~**Legislative Note:** If current state law does not impose an obligation to pay child support on de facto parents or individuals who entered into an agreement to accept full and permanent parental responsibility, legislatures may wish amend laws to provide such an obligation.~~

1 **Comment**

2 ~~—Individuals who are not de facto parents or persons who entered into an agreement to~~
3 ~~accept full and permanent parental responsibility~~ **Individuals** who receive visitation under this
4 act may, in the court’s discretion, be required to pay the cost of facilitating visitation. The cost
5 of facilitating visitation may include the cost of transportation. Those individuals, however, may
6 not be required to pay child support.
7

8 **SECTION 17. AUTHORITY TO SEEK SUPPORT FOR CHILD.** A non-parent
9 given custody of a child may petition for and receive money for the support of the child.
10

11 **Comment**

12
13 This section would permit a non-parent who receives custody of a child to obtain child
14 support from a parent or to apply for benefits from government or private programs to help a
15 child. This section is similar to Section 208(b) of the Revised Uniform Guardianship and
16 Protective Proceedings Act (2017), which provides: “A guardian may: (1) apply for and receive
17 money for the support of the protected minor otherwise payable to the protected minor’s parent,
18 guardian, or custodian under the terms of any statutory system of benefits or insurance or any
19 private contract, devise, trust, conservatorship, or custodianship.”
20

21 **SECTION 18. ATTORNEY FEES AND COSTS.** The court may allocate and order
22 payment of attorney fees, including interim fees, and costs among the parties to ~~the~~ a proceeding
23 ~~under this [act]; however,~~ except that a parent may not be ordered to pay the fees and costs of
24 another party unless the parent’s position is without merit.
25

26 **Comment**

27 Litigating issues of non-parental custody and visitation can be financially burdensome,
28 including to the parent. This section gives the court discretion to order payment of attorney fees
29 and costs. An award of such fees may deter non-meritorious cases.

30 **Reporter’s Note:** A commissioner commented that the standard regarding attorney fees
31 is unusual and that, from his view, a more discretionary standard for awarding attorney
32 fees may be preferable.
33

[SECTION ~~18~~19. FINDINGS OF FACT AND CONCLUSIONS OF LAW. When making a decision under this [act], the court shall make findings of fact and conclusions of law on the record in support of its decision.]

Legislative Note: This section ~~is placed in brackets because in some states, a~~should be omitted in a state where requirement (or lack of requirement) of making findings of fact is governed by court rule rather than ~~statute~~. by statute and in a state that requires findings of fact and conclusions of law in family law cases.

Comment

Requiring findings of fact 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 twenty states and the District of Columbia require the trial court to make findings of fact in custody cases. See Jeff Atkinson, *Modern Child Custody Practice - Second Edition*, § 12-45 (LexisNexis 2015).

~~SECTION 19. APPLICATION TO CHILDREN WHO ARE THE SUBJECT OF~~

~~PROCEEDINGS REGARDING GUARDIANSHIP, ABUSE, NEGLECT, OR~~

~~DEPENDENCY. This [act] does not apply if the child is the subject of a proceeding under [cite to law of this state other than this [act] regarding custody and visitation of children in proceedings related to guardianship of the person, abuse, neglect, or dependency].~~

Comment

~~This act does not provide for custody or visitation to non-parents for children who are the subject proceedings for guardianship of the person, abuse, neglect, or dependency. 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 guardianship, abuse, neglect, and dependency laws usually are in a different portion of the statutes than laws pertaining to divorce, parentage, and non-parental rights. The drafters of this act do not wish for this act to conflict with or interfere with the laws of guardianship, abuse, neglect, or dependency. When a child is no longer the subject of such proceedings, relief may be sought under this act. The provision in this section is similar to Or. Stat. § 109.119(9) (West 2015) (excluding application of a non-parental visitation statute from children who are the subject of dependency proceedings). See also Minn. Stat. Ann. § 257C.08(4) (West 2015) (excluding foster parents from coverage under the state's non-parental visitation law).~~

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

SECTION 20. OTHER RIGHTS AND REMEDIES. The rights and remedies of this [act] are not exclusive and do not preclude rights and remedies under laws of this state other than this [act], including the Uniform Deployed Parents Custody and Visitation Act [or other state law dealing with custody of and visitation with children of deployed parents].

Reporter’s Note: David Biklen urges more clarity regarding what other rights and remedies ~~under law of this state other than this [act].~~ we are referring to. If this act does not deal with the rights of de facto parents, we could consider placing in this section a provision that the act does not preclude rights and remedies pertaining to de facto parents.

Comment

The law regarding families is more dynamic than many areas of law. The drafters of this act do not wish to preclude the development of additional rights and remedies in this area, including rights and remedies dealing with children of deployed parents. [Citations will be inserted to Family Law cases in which courts denied equitable or common law relief because a statute granted rights to certain categories of individuals, but not other categories of individuals.]

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. TRANSITIONAL PROVISION. This [act] applies to all pending actions and proceedings commenced ~~prior to~~before its effective date with respect to issues on which a judgment has not been entered.

SECTION 23. REPEALS; CONFORMING AMENDMENTS.

(a)

(b)

1 (c)

2 **SECTION 24. EFFECTIVE DATE.** This [act] takes effect