

CAN YOU CLARIFY? WHY THE NORTH DAKOTA LEGISLATURE SHOULD AMEND THE UNIFORM NONPARENT CUSTODY AND VISITATION ACT

ABSTRACT

Millions of children in America are raised by nonparents. This fact raises issues implicating parents' fundamental right to parent their children. Since the U.S. Supreme Court decided in *Troxel v. Granville* that a fit parent's wishes regarding nonparent visitation are constitutionally protected and must be given special weight, states have been navigating how to balance the interests of parents, nonparents, and children in visitation and custody disputes. In 2018, the Uniform Law Commission promulgated the Uniform Nonparent Custody and Visitation Act ("the Act"). The Act provides a legal framework that attempts to strike a balance among these interests. North Dakota is the only state to adopt the Act.

The Act recognizes two categories of nonparents with standing to seek custody and visitation rights: first, those who have provided consistent care to a child without expecting to be compensated; and second, those who have a substantial relationship with a child, the severing of which would cause the child harm. After establishing standing under the Act, a nonparent must prove that the visitation or custody sought is in the best interests of the child involved.

In accordance with *Troxel*, the Act presumes that parental decisions regarding the child's custody and visitation are in the child's best interest. In effect, the Act imposes a heavy burden upon third parties who attempt to gain child custody or visitation rights. This heavy burden has yet to be overcome in North Dakota since the Act's adoption in 2019.

While the Act provides a statutory framework for individuals seeking nonparent custody or visitation rights, there are multiple areas of the Act that provide no guidance to courts or individuals about how certain elements should be established or how certain factors should be weighed. The North Dakota Legislature is in the best position to address these questions by amending the Act to include guidance where necessary.

Considering North Dakota is the only state to adopt the Act, practitioners within the state should understand how the Act functions and how it differs from surrounding states' laws governing third-party custody and visitation. In addition, practitioners should recognize where the Act may be open to further interpretation and how the North Dakota Supreme Court has

addressed the Act to effectively represent parties seeking or defending against petitions for third-party visitation or custody rights.

- I. THIRD-PARTY CUSTODY AND VISITATION: WHAT IT IS AND WHY IT MATTERS.....469
- II. *TROXEL V. GRANVILLE*: THE STARTING POINT471
- III. OTHER STATES’ APPROACHES472
- IV. THE UNIFORM NONPARENT CUSTODY AND VISITATION ACT474
 - A. GENERALLY474
 - B. PARENTAL PRESUMPTION.....475
 - C. FRAMEWORK AND SUFFICIENCY OF PETITION476
 - D. ESTABLISHING STANDING UNDER THE ACT: EXPLAINED.....476
 - 1. *Consistent Caretaker*476
 - 2. *Substantial Relationship and Showing of Harm*478
 - E. THE BEST INTEREST REQUIREMENT.....479
 - F. NORTH DAKOTA: THE ACT’S SOLE ADOPTER.....480
- V. THE UNIFORM NONPARENT CUSTODY AND VISITATION ACT’S IMPACT IN NORTH DAKOTA.....480
 - A. NONPARENT CUSTODY AND VISITATION IN NORTH DAKOTA PRIOR TO THE ACT480
 - B. THE NORTH DAKOTA SUPREME COURT’S INTERPRETATION OF THE ACT482
- VI. THE NEED FOR LEGISLATIVE GUIDANCE.....484
- VII. WHAT NORTH DAKOTA PRACTITIONERS SHOULD KNOW486
- VIII. CONCLUSION.....488

I. THIRD-PARTY CUSTODY AND VISITATION: WHAT IT IS AND WHY IT MATTERS

Third-party¹ custody and visitation are rights awarded to nonparents that allow the nonparent to acquire custody of or visitation with a minor child.²

1. The terms “third party” and “nonparent” will be used interchangeably in this Note.
 2. Jaclyn Wishnia, *Third Party or Non-Parent Custody Rights*, LEGAL MATCH (Mar. 26, 2021) <https://www.legalmatch.com/law-library/article/third-party-custody-rights.html> [<https://perma.cc/3K46-7PZ9>].

States began enacting third-party visitation statutes as recently as the 1960s.³ By the 1990s, every state established grandparent visitation statutes, and some states began providing rights to third parties in addition to grandparents.⁴

Typical examples of third parties who seek visitation with or custody of children are stepparents, grandparents, aunts, uncles, and past significant others of a child's parent.⁵ Third-party visitation has proven to be vitally important for the psychological wellbeing of children, especially when a third party previously functioned as a parent to the child.⁶ In fact, studies show that ending a relationship between a child and a third party who previously functioned as the child's parent is likely to cause "emotional distress and possible substantial psychological harm" to the child.⁷ Further, grandparent involvement in children's lives has proved to be especially important for child development.⁸ Thus, the continuation of relationships between children and third-party caregivers is beneficial to children and contributes to them becoming "high-functioning members of society."⁹

Awards of third-party custody or visitation are difficult to achieve due to parents' fundamental right to parent their children.¹⁰ Additionally, courts

3. Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best Interests of the Child*, 13 GENDER & L. 615, 621 (2012).

4. *Id.* at 621-22.

5. *How Third Parties Impact Visitation and Custody*, KUPFERMAN & GOLDEN, <https://www.kgfamilylaw.com/how-third-parties-impact-visitation-and-custody/> [<https://perma.cc/CW3M-3RF2>] (last visited Feb. 4, 2023).

6. John A. Pappalardo et al., *We All Need Somebody to Lean on Using the Law to Nurture Our Children, Beginning with Third-Party Visitation*, 39 PACE L. REV. 569, 574 (2019).

7. *Id.* (quoting Solangel Maldonado, *When Father (or Mother) Doesn't Know Best Quasi-Parents and Parental Deference after Troxel v. Granville*, 88 IOWA L. REV. 865, 892 (2003)) ("Studies have shown there is a significant benefit that comes from continued contact with third parties functioning as parents, and, contrariwise, if this bond is terminated, children are likely to suffer 'emotional distress and possible substantial psychological harm.'").

8. See *Moriarty v. Bradt*, 827 A.2d 203, 210-11 (N.J. 2003) (quoting Chrystal C. Ramirez Barranti, *The Grandparent/Grandchild Relationship Family Resource in an Era of Voluntary Bonds*, 34 FAM. REL. 343, 346-47 (1985)) ("The emotional attachments between grandparents and grandchildren have been described as unique in that the relationship is exempt from the psycho-emotional intensity and responsibility that exists in parent/child relationships. The love, nurturance, and acceptance which grandchildren have found in the grandparent/grandchild relationship 'confers a natural form of social immunity on children that they cannot get from any other person or institution.' Commentators have suggested that, '[i]n the absence of a grandparent/grandchild relationship, children experience a deprivation of nurturance, support, and emotional security.' Indeed, . . . 'the complete emotional well-being of children requires that they have a direct, and not merely derived, link with their grandparents. . . . [W]hen an individual does not have intergenerational family relationships there is a resulting lack of cultural and historical sense of self.'") (internal citations omitted).

9. Pappalardo et al., *supra* note 6, at 574, 576 ("Thus, it is a proven theory that children who are able to form meaningful connections with those who love and care for them are more likely to become high-functioning members of society. . . . Although not considered traditional, relationships between non-parental caregivers and children can be considerably beneficial to children.").

10. See *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

must give special weight to a fit parent's decision regarding third-party visitation pursuant to U.S. Supreme Court precedent.¹¹ Courts generally agree that "special weight" involves presuming that a parent's decision regarding visitation between his or her child and a third party is in the child's best interest.¹² Thus, overcoming that presumption is a heavy burden for third parties who seek visitation or custody rights and do not have parental consent.

Despite this uphill battle for third-party custody and visitation rights, millions of children in the U.S. are raised by third parties. As of 2020, an estimated three million children reside in a home without either of their biological parents.¹³ Approximately fifty-five percent of those children reside in a home with at least one grandparent.¹⁴ In North Dakota, approximately 12,304 children live with relatives other than a parent.¹⁵

II. *TROXEL V. GRANVILLE*: THE STARTING POINT

In 2000, the U.S. Supreme Court addressed the issue of nonparent visitation, offering guidance to states as to the constitutionality of nonparent visitation statutes.¹⁶ In *Troxel v. Granville*, paternal grandparents sought visitation rights with their granddaughters under a Washington state statute after the death of their son, the children's father.¹⁷ The children's father lived with his parents from the time he separated from the children's mother until his death in 1993.¹⁸ Throughout those years, the children regularly spent weekends at the paternal grandparents' home during the father's visitation time.¹⁹ After the father's death, the children's mother began limiting visitation between the paternal grandparents and the children.²⁰

The grandparents sought visitation rights under a Washington state statute, which at that time provided: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when

11. *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality opinion).

12. Maldonado, *supra* note 7, at 870.

13. Paul Hemez & Chanell Washington, *Percentage and Number of Children Living with Two Parents Has Dropped Since 1968*, U.S. CENSUS BUREAU (Mar. 25, 2022), <https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html> [<https://perma.cc/DN8C-MVY7>].

14. *Id.*

15. Divya Saxena & Jane Strommen, *You and the Law in North Dakota The Rights of Grandparents and Stepparents*, THE ART OF GRANDPARENTING (NDSU Extension, Fargo, N.D.), Aug. 2022, at 1, <https://www.ndsu.edu/agriculture/sites/default/files/2022-08/fs1729.pdf> [<https://perma.cc/DN8C-MVY7>].

16. *See Troxel*, 530 U.S. at 60-61.

17. *Id.*

18. *Id.*

19. *Id.* at 60.

20. *Id.* at 60-61.

visitation may serve the best interest of the child whether or not there has been any change of circumstances.”²¹ The Court ultimately held that the statute was unconstitutional due to its “sweeping breadth.”²²

The Court articulated that fit parents are presumed to act in the best interest of their children.²³ Meaning, when parents adequately care for their children, “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.”²⁴ Accordingly, courts must give special weight to a fit parent’s decisions regarding his or her child’s best interests.²⁵

While *Troxel* provided guidance regarding parental rights in the context of nonparent visitation, the Court’s plurality opinion declined to decide whether a third party seeking visitation with a child must show that denial of visitation would harm the child.²⁶ The Court instead left this determination to be made by state courts using a case-by-case application of state law.²⁷ Accordingly, states are responsible for establishing standards that balance the rights of the parents, nonparents, and children involved in these disputes.

III. OTHER STATES’ APPROACHES

Since the *Troxel* decision in 2000, states have been instituting different standards for nonparent custody and visitation matters. While some states have adopted detailed statutory schemes, others have relied on state courts’ interpretation of single statutes to accommodate the parental rights announced in *Troxel*.²⁸ Each of the states surrounding North Dakota have established different approaches to the issue.

Minnesota’s statutory approach to third-party custody divides individuals eligible to seek nonparent custody into two groups: de facto custodians and interested third parties.²⁹ A de facto custodian is “an individual who has been the primary caretaker for a child who has, within the 24 months immediately preceding the filing of the petition, resided with the individual without a parent present and with a lack of demonstrated

21. *Id.* at 61 (quoting WASH. REV. CODE § 26.10.160(3) (1994)).

22. *Id.* at 73.

23. *Id.* at 68.

24. *Id.* at 68-69.

25. *Id.* at 69-70.

26. *Id.* at 73-74.

27. *Id.*

28. Compare MINN. STAT. ANN. § 257C.01 (West 2003), with S.D. CODIFIED LAWS § 25-5-29 (2002).

29. See § 257C.01.

consistent participation by a parent for [the statutory period].”³⁰ An interested third party is an individual who can prove:

- (i) [T]he parent has abandoned, neglected, or otherwise exhibited disregard for the child’s well-being to the extent that the child will be harmed by living with the parent; (ii) placement of the child with the individual takes priority over preserving the day-to-day parent-child relationship because of the presence of physical or emotional danger to the child, or both; or (iii) other extraordinary circumstances³¹

Minnesota courts define extraordinary circumstances as “circumstances of a grave and weighty nature, which encompasses situations when a child has been abused or neglected, as well as circumstances when the child has special needs.”³² An interested third party must also show that granting custody to the third party is in the best interest of the child and does not violate other statutes.³³

Montana’s statute allows for nonparent custody of a child when there is clear and convincing evidence that the child’s parent has acted contrary to the parent-child relationship, the nonparent has established a parent-child relationship with the child, and it is in the child’s best interest for the relationship with the nonparent to continue.³⁴ Nonparent visitation rights, on the other hand, may be awarded to a third party when it is in the child’s best interest.³⁵

In Montana, a grandparent’s right to contact a grandchild is afforded under a separate statute.³⁶ Under the grandparent contact statute, the court must first determine whether the parent objecting to grandparent visitation is a fit parent.³⁷ The court may award grandparent contact if it finds both that the objecting parent is unfit and that contact with the grandparent is in the

30. *Id.* at subdiv. 2(a).

31. *Id.* § 257C.03, subdiv. 7(a).

32. *See* *In re Custody of A.L.R.*, 830 N.W.2d 163, 170 (Minn. Ct. App. 2013).

33. § 257C.03, subdiv. 7(a)(2), (3).

34. MONT. CODE ANN. § 40-4-228(2) (West 2009); *see* § 40-4-211(6) (defining child-parent relationship as a relationship which: “(a) exists or did exist, in whole or in part, preceding the filing of an action under this section, in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education, and discipline; (b) continues or existed on a day-to-day basis through interaction, companionship, interplay, and mutuality that fulfill the child’s psychological needs for a parent as well as the child’s physical needs; and (c) meets or met the child’s need for continuity of care by providing permanency or stability in residence, schooling, and activities outside of the home”); § 40-4-212 (defining best interest factors).

35. *Id.* § 40-4-228(3).

36. *Id.* § 40-9-102 (2015). Notably, grandparents also have the right to seek custody or visitation with their grandchildren under another statute. *See id.* § 40-9-202 (2019).

37. *Id.* § 40-9-102(2).

child's best interest.³⁸ If the court finds the objecting parent to be fit, grandparent contact may be awarded under the statute only if the court determines the contact is in the child's best interest and finds that the presumption favoring the objecting parent's decision regarding contact is rebutted.³⁹

In South Dakota, any nonparent may seek custody or visitation with a child "with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship."⁴⁰ Notably, stepparents may not seek custody or visitation under this statute based solely on the fact that the stepparent was living with or married to the stepchild's parent.⁴¹ While parents are afforded the presumptive right to custody of their children, that presumption may be rebutted in several circumstances under South Dakota law.⁴²

Ultimately, each state surrounding North Dakota requires different standards to achieve an award of nonparent custody or visitation. Some state standards focus on relationship status, such as Montana's grandparent statute, while others focus on whether harm to the child can be established by the nonparent. These different standards may provide different results for nonparents seeking third-party custody or visitation, depending on which state has jurisdiction of the matter.

IV. THE UNIFORM NONPARENT CUSTODY AND VISITATION ACT

A. GENERALLY

In an effort to bring uniformity to state laws governing nonparent custody and visitation, the Uniform Law Commission ("ULC")⁴³

38. *Id.* § 40-9-102(3); *see also id.* § 40-4-212 (2009) (stating Montana's best interest factors).

39. *Id.* § 40-9-102(4); *see also* *Glueckert v. Glueckert*, 2015 MT 107, ¶ 14, 378 Mont. 507, 347 P.3d 1216.

40. S.D. CODIFIED LAWS § 25-5-29 (2002). *See* *Aguilar v. Aguilar*, 2016 SD 20, 877 N.W.2d 333, for an example of the court determining a nonparent was a "primary caretaker" and had rebutted presumptive parental rights.

41. *See* S.D. CODIFIED LAWS § 25-5-31 (2002).

42. *See id.* § 25-5-29 (2002) ("A parent's presumptive right to custody of his or her child may be rebutted by proof: (1) That the parent has abandoned or persistently neglected the child; (2) That the parent has forfeited or surrendered his or her parental rights over the child to any person other than the parent; (3) That the parent has abdicated his or her parental rights and responsibilities; or (4) That other extraordinary circumstances exist which, if custody is awarded to the parent, would result in serious detriment to the child.").

43. The ULC drafts uniform legislation to bring "clarity and stability to critical areas of statutory law." *About Us*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/aboutulc/overview> [https://perma.cc/5TVK-52E2] (last visited Feb. 4, 2023). The ULC's purpose is "to study and review the law of the states to determine which areas of law should be uniform." *Id.* The ULC has authority to draft proposed laws; however, it has no

promulgated the Uniform Nonparent Custody and Visitation Act (“the Act”) in 2018.⁴⁴ Heeding *Troxel*, the ULC intended for the Act to strike the appropriate balance among the rights of parents, children, and nonparents seeking visitation with or custody of minor children.⁴⁵

Under the Act, the court has the authority to grant third parties sole or joint custody of a child and may define the frequency and means of contact between the third party and the child involved.⁴⁶

The Act applies when there is a dispute between a parent and a nonparent regarding child custody or visitation.⁴⁷ Under the Act, a parent is defined as “an individual recognized as a parent under the law of this state other than this [Act].”⁴⁸ The definition of parent is dependent upon state law, but typically includes “biological parents, adoptive parents, presumed parents unless the presumption has been rebutted, and persons who have acknowledged parentage, even if they are not biologically related to the child.”⁴⁹ The Act defines a nonparent as “an individual other than a parent of the child. The term includes a grandparent, sibling, or stepparent of the child.”⁵⁰

B. PARENTAL PRESUMPTION

Troxel requires that courts give special weight to fit parents’ decisions regarding third-party visitation.⁵¹ In accordance with *Troxel*, the Act provides a presumption that parental decisions concerning third-party custody and visitation are in the best interest of the child involved.⁵² The Act includes this presumption to recognize the superior rights of parents.⁵³

To rebut the presumption that a parent is acting in the best interests of his or her child when making nonparent visitation and custody decisions, the nonparent must prove each element of his or her claim by clear and convincing evidence.⁵⁴ A nonparent is not required to prove that the child’s parent is unfit in order to gain custody or visitation rights under the Act.⁵⁵

authority to implement law. *Id.* To be effective within a jurisdiction, acts drafted by the ULC must be adopted by the respective state legislature. *Id.*

44. *Uniform Nonparent Custody and Visitation Act*, UNIFORM LAW COMMISSION 1, 1 (2018) [hereinafter UNCVA].

45. *Id.* at 4.

46. *Id.* at 6-7.

47. *Id.* at 2, 9.

48. *Id.* at 5.

49. *Id.* at 7.

50. *See id.* at 5; *see also* N.D. CENT. CODE ANN. § 14-09.4-01(7) (West 2019).

51. *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality opinion).

52. UNCVA, *supra* note 44, at 2.

53. *Id.* at 16.

54. *Id.*

55. *Id.*

Rather, the elements required to succeed in a nonparent custody or visitation claim under the Act are merely held to an elevated standard of proof in order to meet the “special weight” requirement of *Troxel*.⁵⁶

C. FRAMEWORK AND SUFFICIENCY OF PETITION

First, the Act requires a nonparent to have standing, which can be proven by demonstrating that the nonparent is a consistent caretaker of the child or has a substantial relationship with the child.⁵⁷ If the nonparent elects to prove he or she has a substantial relationship with the child, the nonparent must also prove that the court’s denial of the visitation or custody rights sought will cause the child harm.⁵⁸ If a nonparent proves to be part of either of these two categories, the nonparent has established standing and has thus pled a prima facie case.⁵⁹ If the nonparent is unable to establish he or she belongs to one of these two groups, the nonparent has failed to plead a prima facie case and the petition for nonparent custody or visitation rights must be dismissed by the court before the case proceeds to a hearing on the merits.⁶⁰

To succeed on a claim for nonparent visitation or custody rights, the nonparent must also prove the visitation or custody sought is in the best interest of the child involved.⁶¹ These steps are discussed in turn.

D. ESTABLISHING STANDING UNDER THE ACT: EXPLAINED

As noted, the first step to obtain third-party custody or visitation under the Act requires a third party to establish that he or she is part of a group recognized under the Act to have the right to seek custody or visitation of the child.⁶²

1. *Consistent Caretaker*

To be considered a “consistent caretaker” under the Act, a third party must prove five elements. First, the nonparent must prove he or she cared for the child “without expectation of compensation.”⁶³ Expectation of compensation may, for example, include paid nannies.⁶⁴

The second element requires that the child lived with the nonparent for at least twelve months, unless good cause is shown for the court to accept a

56. *Id.*

57. *See id.* at 10-11.

58. *Id.* at 12.

59. *Id.* at 20.

60. *Id.* at 20-21.

61. *Id.* at 10-11.

62. *Id.*

63. *Id.* at 12.

64. *Id.* at 6.

shorter period.⁶⁵ Those twelve months need not be consecutive to satisfy the Act.⁶⁶ Compelling reasons for shortening the twelve-month time period include “when a child is under 12 months of age and the petitioner has been living with the child since birth or shortly after” or when “the period of time is only slightly shorter than 12 months, such as 11.5 months, and all other requirements are met.”⁶⁷

The third element requires the nonparent to show he or she “regularly exercised care of the child.”⁶⁸ This element simply requires that the nonparent’s care of the child be regular instead of sporadic.⁶⁹ A nonparent may be considered a consistent caretaker under the Act even when the nonparent is not presently caring for the child; however, the nonparent’s care for the child must be in the recent past.⁷⁰ To determine whether too much time has elapsed since the nonparent cared for the child, the Act’s comments direct the court to consider factors like the child’s age and whether substantial contact has continued between the child and the nonparent.⁷¹

The fourth element requires the nonparent to show he or she “made day-to-day decisions regarding the child, solely, or in cooperation with an individual having physical custody of the child.”⁷² These day-to-day decisions may include the time the child wakes up or goes to bed and the food the child eats.⁷³ The court may also consider other decisions, such as educational and medical decisions.⁷⁴

The fifth element requires the nonparent to show he or she “established a bonded and dependent relationship with the child with the express or implied consent of a parent of the child, or without the consent of a parent if no parent has been able or willing to perform parenting functions.”⁷⁵ Here, bonded refers to the closeness of the relationship between the nonparent and the child, and dependent “refers to the degree to which the child relies upon, and is in need of, the nonparent.”⁷⁶

Accordingly, the nonparent has standing to seek visitation with or custody of the minor child if the nonparent is able to prove by clear and convincing evidence that: he or she is currently, or was in the recent past, a

65. *Id.* at 11.

66. *Id.* at 12.

67. *Id.*

68. *Id.* at 11.

69. *Id.* at 12 (The comments to the Act do not give guidance as to what qualifies as “regular” care or “sporadic” care.).

70. *Id.* at 13.

71. *Id.*

72. *Id.* at 11.

73. *Id.* at 12.

74. *Id.*

75. *Id.* at 11.

76. *Id.* at 12.

consistent caretaker of a child without expectation of compensation; he or she regularly exercised care of the child; he or she made day-to-day decisions regarding the child; and he or she had a bonded relationship with the child.⁷⁷ If the nonparent is unable to establish these requirements, he or she must prove to be part of the second category of individuals who have standing under the Act in order to establish a claim for nonparent custody or visitation rights.⁷⁸

2. *Substantial Relationship and Showing of Harm*

The second way a nonparent may establish standing to seek visitation or custody of a child under the Act is when the nonparent “[h]as a substantial relationship with the child and denial of custody or visitation would result in harm to the child.”⁷⁹ Thus, nonparents seeking to establish standing under this standard must prove two elements: (1) he or she has a substantial relationship with the child and (2) denying the nonparent’s request for visitation or custody will cause the child harm.⁸⁰

A substantial relationship between a nonparent and a child is generally “a relationship in which a significant bond exists between a child and a nonparent.”⁸¹ A substantial relationship with a child is proven when: “(1) the nonparent: (A) is an individual with a familial relationship with the child by blood or law; or (B) formed a relationship with the child without expectation of compensation; and (2) a significant emotional bond exists between the nonparent and the child.”⁸² Caselaw has further defined what constitutes a substantial relationship, generally finding that grandparents who raise children for years have a substantial relationship with those children but denying that a substantial relationship exists merely because grandparents have a positive relationship with grandchildren.⁸³

The standard for showing “harm to the child” varies depending upon whether the third party is seeking visitation or custody, considering third party custody intrudes further on parental rights than nonparent visitation.⁸⁴ Generally, to show harm to the child when seeking custody, a third party “must show that custody for the nonparent is necessary to prevent harm to the child from the parent having custody.”⁸⁵ In comparison, “a nonparent

77. *See id.* at 11.

78. *Id.*

79. *Id.*

80. *Id.* at 11.

81. *Id.* at 13.

82. *Id.* at 11.

83. *Id.* at 15.

84. *See id.* at 14-15; *see also* McAllister v. McAllister, 2010 ND 40, ¶ 23, 779 N.W.2d 652, 660.

85. UNCVA, *supra* note 44, at 15.

seeking visitation will need to show that continued contact with the nonparent through visitation is necessary to prevent harm from loss of that relationship.”⁸⁶

In sum, to assert standing under the second category of the Act, a nonparent must show a substantial relationship with the child exists and provide evidence that denial of the request for visitation or custody would harm the child.

E. THE BEST INTEREST REQUIREMENT

After proving standing to seek custody or visitation under the Act by establishing oneself as part of a qualified group of individuals, a nonparent must next prove that the custody or visitation he or she seeks is in the best interests of the child involved.⁸⁷ Under the Act, the best interests of the child are determined by consideration of seven factors:

- (1) the nature and extent of the relationship between the child and the parent;
- (2) the nature and extent of the relationship between the child and the nonparent;
- (3) the views of the child, taking into account the age and maturity of the child;
- (4) past or present conduct by a party, or individual living with a party, which poses a risk to the physical, emotional, or psychological well-being of the child;
- (5) the likely impact of the requested order on the relationship between the child and the parent;
- (6) the applicable factors [under state statute]; and
- (7) any other factor affecting the best interest of the child.⁸⁸

The court must evaluate these seven best interest factors enumerated in the Act in addition to the best interest factors prescribed by applicable state statute.⁸⁹

86. *Id.*

87. *Id.* at 11.

88. *Id.* at 23. *See, e.g.*, N.D. CENT. CODE ANN. § 14-09-06.2 (West 2019) (stating North Dakota’s best interest factors).

89. *See UNCVA, supra* note 44, at 23. Notably, the North Dakota Supreme Court has yet to address the best interest factors under the Act since the court has found the first prong of the Act to be dispositive in each case brought before it. *See Muchow v. Kohler*, 2021 ND 209, 966 N.W.2d 910; *Sailer v. Sailer*, 2022 ND 151, 978 N.W.2d 699.

F. NORTH DAKOTA: THE ACT'S SOLE ADOPTER

In 2019, the State of North Dakota adopted the Act and repealed the existing statute, which only provided for the establishment of grandparent visitation rights.⁹⁰ The Act was adopted by the North Dakota state legislature with little debate or amendment.⁹¹ Since North Dakota's enactment in 2019, no other state has adopted the Act.⁹²

V. THE UNIFORM NONPARENT CUSTODY AND VISITATION ACT'S IMPACT IN NORTH DAKOTA

A. NONPARENT CUSTODY AND VISITATION IN NORTH DAKOTA PRIOR TO THE ACT

Between *Troxel* in 2000 and North Dakota's adoption of the Act in 2019, North Dakota statutory law only allowed grandparents and great-grandparents standing to seek visitation with their grandchildren.⁹³ State statute during that period provided that “[t]he grandparents and great-grandparents of an unmarried minor child may be granted reasonable visitation rights to the child by the district court upon a finding that visitation would be in the best interests of the child and would not interfere with the parent-child relationship.”⁹⁴ The best interests of the child were determined based on statutory factors,⁹⁵ while interference with the parent-child relationship needed to be supported by evidence.⁹⁶

Besides the grandparent visitation statute, North Dakota had no statute governing nonparent custody or visitation prior to the adoption of the Act in 2019.⁹⁷ Thus, the North Dakota Supreme Court established significant

90. S.B. 2051, 66th Leg. Assemb., Reg. Sess. (N.D. 2019); *see also* N.D. CENT. CODE ANN. ch. 14-09.4.

91. *See* S.B. 2051.

92. *See Nonparent Custody and Visitation Act*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=e33c7569-9eb3-48ef-b998-cb2e558fa2de> [https://perma.cc/W6HD-QM2Z] (last visited Feb. 4, 2023).

93. *Grandparent Visitation Addressed by North Dakota Supreme Court*, FREMSTAD LAW, <https://www.fremstadlaw.com/grandparent-visitation-addressed-north-dakota-supreme-court/#:~:text=North%20Dakota%20law%20allows%20for,Section%2014%2D09%2D06.2> [https://perma.cc/FTL3-JJ6B] (last visited Feb. 4, 2023).

94. *Kulbacki v. Michael*, 2014 ND 83, ¶ 7, 845 N.W.2d 625, 629 (quoting N.D. CENT. CODE ANN. § 14-09-05.1(1) (West 2009)).

95. *See* N.D. CENT. CODE ANN. § 14-09-06.2 (West 2019).

96. *See* *R.F. v. M.M.*, 2010 ND 195, ¶ 26, 789 N.W.2d 723, 730 (affirming a district court's determination of no interference with the parent-child relationship because no evidence provided).

97. *See* *McAllister v. McAllister*, 2010 ND 40, ¶ 31, 779 N.W.2d 652, 662 (Crothers, J. concurring in result) (“The North Dakota Legislature has addressed only a small part of this issue by providing for grandparent and great-grandparent visitation of an unmarried minor and for temporary custody pending adoption by the grandparent or an aunt or uncle. The remainder of the

precedent on the matter.⁹⁸ The court recognized parents' superior constitutional right to parent their children but noted that the right was not absolute.⁹⁹

Under the North Dakota Supreme Court's precedent between *Troxel* in 2000 and the Act in 2019, exceptional circumstances might require a child to be placed in the custody of a nonparent if it was in the child's best interest and prevented the child from experiencing serious harm or detriment.¹⁰⁰ The court did not go so far as to define exactly what "exceptional circumstances" required, but it noted that the typical case upholding nonparent custody rights involved a child who had been in the physical custody of a nonparent for a significant period of time such that the nonparent was considered the child's psychological parent.¹⁰¹ Thus, status as a psychological parent or evidence of an established relationship between the nonparent and the child qualified as exceptional circumstances under the court's prior precedent.¹⁰²

However, status as a psychological parent alone was not enough to establish a right to nonparent custody.¹⁰³ The district court also had to find that the grant of nonparent custody to the psychological parent was in the child's best interest and prevented serious harm or detriment to the child.¹⁰⁴ If those additional standards were met, the district court could award a nonparent both decision-making responsibility and primary residential responsibility.¹⁰⁵

Awards of nonparent visitation rights were made using the same standard for nonparent custody awards; however, grants of nonparent visitation did not necessitate the same showing of serious harm or detriment to the child that grants of nonparent custody required.¹⁰⁶ This is because nonparent visitation rights were considered less of an intrusion on parental rights compared to nonparent custody rights.¹⁰⁷ Thus, the main concern with regard to nonparent visitation was that it be in the best interests of the child.¹⁰⁸

law regulating non-parent custody and non-grandparent visitation has been established by judicial decision.") (citations omitted).

98. *See id.*

99. *Id.* ¶ 14.

100. *Id.*

101. *Id.* The court defined a psychological parent as "[a] person who provides a child's daily care and who, thereby, develops a close bond and personal relationship with the child becomes the psychological parent to whom the child turns for love, guidance, and security." *Id.* ¶ 15 (quoting *Hamers v. Guttormson*, 2000 ND 93, ¶ 5, 610 N.W.2d 758, 760).

102. *See McAllister*, 2010 ND 40, ¶ 18, 779 N.W.2d 652, 659; *see also* *Quirk v. Swanson*, 368 N.W.2d 557, 560 (N.D. 1985).

103. *McAllister*, 2010 ND 40, ¶ 15, 779 N.W.2d 652, 659.

104. *Id.*

105. *Id.* ¶ 22.

106. *Id.* ¶¶ 22-23.

107. *See id.*

108. *See id.* ¶ 21.

B. THE NORTH DAKOTA SUPREME COURT'S INTERPRETATION OF THE ACT

Since North Dakota adopted the Act in 2019, the North Dakota Supreme Court has heard two cases on the matter.¹⁰⁹ In 2021, the court heard *Muchow v. Kohler* in which paternal grandparents sought visitation rights with their grandchildren under the Act after their son, who had previously been awarded primary residential responsibility of the children, passed away.¹¹⁰ The children went to the exclusive care of their mother after their father passed.¹¹¹ The judicial referee and district court found that the paternal grandparents did not prove a significant bond existed between themselves and the children which would result in harm to the children if the petition for visitation was denied.¹¹² The district court also found that the children's mother was acting in their best interests by denying the grandparents visitation rights, and it was her decision whether to allow the grandparents visitation.¹¹³

The North Dakota Supreme Court agreed with the district court, finding the grandparents had the burden to prove by clear and convincing evidence that a substantial relationship with the children existed, that denial of visitation would cause the children harm, and that visitation is in the best interest of the children.¹¹⁴ The court found the element of harm to the children, defined as “a significant adverse effect on a child's physical, emotional, or psychological well-being,” to be dispositive.¹¹⁵

While the official comments of the Act do not require a mental health practitioner to testify that the denial of visitation would result in harm to the children, the grandparents in *Muchow* still bore the burden of presenting clear and convincing evidence that proved the children would suffer harm if visitation was denied.¹¹⁶ While both grandparents testified that they believed the children would be harmed if they were denied visitation rights, the district court found the grandparents failed to show precisely how the children's well-being would be significantly adversely affected if the petition for visitation was denied.¹¹⁷ Ultimately, the North Dakota Supreme Court determined the district court's findings were not clearly erroneous and affirmed the judgment of the district court.¹¹⁸

109. See *Muchow v. Kohler*, 2021 ND 209, 966 N.W.2d 910; *Sailer v. Sailer*, 2022 ND 151, 978 N.W.2d 699.

110. *Muchow*, 2021 ND 209, ¶¶ 2-3, 966 N.W.2d 910, 910.

111. *Id.* ¶ 2.

112. *Id.* ¶ 3.

113. *Id.*

114. *Id.* ¶¶ 7-8.

115. *Id.* ¶ 7 (quoting N.D. CENT CODE ANN. §14-09.4-01(5) (West 2019)).

116. *Id.* ¶ 8.

117. *Id.* ¶ 11.

118. *Id.* ¶¶ 12-13.

In 2022, the North Dakota Supreme Court had its next opportunity to address the Act in *Sailer v. Sailer*.¹¹⁹ There, grandparents sought the right to visitation with their grandchildren under the Act.¹²⁰ After the children witnessed an altercation between their parents and grandparents, the children's mother largely eliminated contact between the children and the grandparents.¹²¹ The grandparents subsequently petitioned for visitation rights, which the mother opposed.¹²² The district court dismissed the petition for visitation, finding the grandparents had not plead a prima facie case showing a significant relationship between the grandparents and the children or that the denial of an award of visitation would cause harm to the children.¹²³ The North Dakota Supreme Court affirmed.¹²⁴

In *Sailer*, the North Dakota Supreme Court established that the standard of review for failure to plead a prima facie case for nonparent visitation is de novo.¹²⁵ The grandparents merely claimed they were consistent caregivers of the children since they periodically cared for the children's needs.¹²⁶ The court held the grandparents were not consistent caregivers of the children because they failed to present sufficient evidence that the children lived with them for a period of "not less than twelve months, or good cause to accept a shorter period."¹²⁷ Thus, because the court determined the grandparents were not consistent caregivers, they had to prove that they had a significant relationship with the children and the children would suffer harm if the grandparents' petition for visitation was denied.¹²⁸

The district court determined that the grandparents did not prove they had a significant relationship with the child nor that the children would be harmed by denial of the grandparents' petition.¹²⁹ These findings were supported by the fact that there was no evidence showing the children were harmed during the period in which visitation between the grandparents and the children had largely ceased.¹³⁰

The North Dakota Supreme Court did not address the substantial relationship factor but instead found the element of harm to the children

119. 2022 ND 151, 978 N.W.2d 699.

120. *Id.* ¶ 4.

121. *See id.* ¶ 3.

122. *Id.* ¶ 4.

123. *Id.*

124. *Id.* ¶ 1.

125. *Id.* ¶ 5.

126. *Id.*

127. *Id.* ¶ 9.

128. *Id.* ¶ 10.

129. *Id.*

130. *Id.*

dispositive.¹³¹ Because the grandparents did not provide evidence to show harm to the children, they failed to plead a prima facie case for nonparent visitation under the Act.¹³² Thus, the court affirmed the district court's dismissal of the petition.¹³³

VI. THE NEED FOR LEGISLATIVE GUIDANCE

Passing the Act changed the standard in North Dakota for nonparent custody and visitation disputes.¹³⁴ In the four years since its enactment, no third party has successfully earned child custody or visitation rights under the Act.¹³⁵ This may suggest that the Act's standard is exceptionally high or that the Act does not provide individuals with clarity as to how a claim for nonparent custody and visitation rights is established. Either way, it begs the question of whether the Act achieves what the *Troxel* Court intended.

The Act affords standing to two groups of individuals.¹³⁶ The first group, consistent caregivers, must satisfy five elements to prove standing.¹³⁷ This presents a high bar, which many individuals will not have the opportunity to meet if the child does not live with the nonparent for an extended period of time.¹³⁸ Thus, many individuals will only be eligible to seek nonparent custody or visitation as part of the second group of individuals who have standing under the Act.

The standard for the second group with standing under the Act is much less clear. These individuals must prove both a substantial relationship with the child and that denial of custody or visitation rights would cause the child harm.¹³⁹ A substantial relationship requires the nonparent to have (1) "a familial relationship with the child by blood or law; or (2) [have f]ormed a relationship with the child without expectation of compensation; and [prove a] significant emotional bond exists between the nonparent and the child."¹⁴⁰

"[A] significant emotional bond" is not defined in the Act's comments, and the North Dakota Supreme Court has not yet defined this standard. Thus, there is a lack of guidance on how a nonparent might establish a "significant emotional bond" between themselves and a child by clear and convincing evidence. Proving a "significant emotional bond" is part of the prima facie

131. *Id.* ¶ 11.

132. *Id.*

133. *Id.* ¶ 12.

134. *See supra* Section IV.

135. *See Muchow v. Kohler*, 2021 ND 209, 966 N.W.2d 910; *see also Sailer*, 2022 ND 151, 978 N.W.2d 699.

136. *See* N.D. CENT. CODE ANN. § 14-09.4-03(1) (West 2019).

137. *See id.* at (2); *see also* discussion *supra* Section IV.D.1.

138. *See* discussion *supra* Section IV.D.1.

139. *See* § 14-09.4-03(1)(a)(2).

140. *See id.* at (3).

case required under the Act's second category of standing for a nonparent's petition to avoid dismissal by the court.¹⁴¹ Accordingly, a nonparent must prove a "significant emotional bond" exists to be eligible for a hearing on the matter of nonparent custody or visitation.¹⁴² The Act provides no guidance to petitioners or the court regarding how clear and convincing evidence of a significant emotional bond between a child and a nonparent is to be shown.

In addition to establishing standing, nonparents must prove that the visitation or custody sought is in the best interest of the child involved.¹⁴³ The Act includes seven best interest factors, one of which requires the analysis of the best interest factors in Section 14-09-06.2.¹⁴⁴ Accordingly, many of the best interest factors included in the Act are also required under North Dakota statute for other child custody matters; however, some factors in the Act do not overlap with the factors required by state statute.¹⁴⁵

For instance, the Act requires analysis of "[t]he likely impact of the requested order on the relationship between the child and the parent."¹⁴⁶ Quite obviously, any grant of third-party custody or visitation will impact the parent-child relationship. However, the Act provides no guidance as to what a court should consider under this factor.¹⁴⁷ Arguably, this factor could require the court to consider that the right to parent one's child is to be given "special weight" under *Troxel*,¹⁴⁸ or that the right to parent is considered a fundamental right.¹⁴⁹ On the other hand, these considerations led to the heightened standard of proof for a claim under the Act, so the legislature may not have intended for dual consideration of these special parental protections. Ultimately, the district court must decipher what the Act requires without general guidance as to what facts to consider under each best interest factor and the appropriate weight to give each factor.

While the North Dakota Supreme Court may further interpret the Act as issues are presented to it, this process is gradual. The court might address only one issue at a time, whereas the legislature can amend the Act to provide standards and guidance for petitioners and the courts all at once. The state legislature might consider adding subdivisions to the statute defining the terms and standards that are currently unclear. Ultimately, the courts and individuals seeking nonparent custody or visitation would benefit from additional guidance from the legislature.

141. See discussion *supra* Section IV.C.

142. See discussion *supra* Section IV.C.

143. See § 14-09.4-03(1)(b) (West 2019).

144. See *id.* § 14-09.4-11; § 14-09-06.2.

145. Compare § 14-09.4-11, with § 14-09.06.2.

146. *Id.* § 14-09.4-11(5).

147. See UNCVA, *supra* note 44, at Comment.

148. See *Troxel v. Granville*, 530 U.S. 57, 69-70 (2000) (plurality opinion).

149. See *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

VII. WHAT NORTH DAKOTA PRACTITIONERS SHOULD KNOW

Because the Act has only been adopted in North Dakota, the nonparent visitation and custody statutes in surrounding states differ.¹⁵⁰ Practitioners licensed in multiple jurisdictions should be aware of the differences in the law across state lines, such as the fact that Minnesota's statutory approach revolves around parental unfitness, while North Dakota's approach does not require a finding of parental unfitness.¹⁵¹ North Dakota practitioners should also be mindful of how the requirements for establishing nonparent custody and visitation rights under the Act differ from North Dakota's prior grandparent statute and caselaw.¹⁵²

The North Dakota Supreme Court's decision in *Muchow* suggests that individuals seeking to establish standing under the "substantial relationship" prong of the Act should be prepared to present evidence of harm to the child through an expert witness.¹⁵³ While the North Dakota Supreme Court in *Muchow* specifically noted that the Act does not require an expert witness to testify to the element of harm to the children, it upheld the district court's finding that the grandparent's testimony was not sufficient to show "clear and convincing evidence that denial of visitation would result in harm to the children."¹⁵⁴ Thus, while an expert witness is not required by the Act's comments or North Dakota precedent to prove that visitation or custody is necessary to prevent harm to the child by clear and convincing evidence, practitioners would be prudent to prepare clients for the potential of needing expert testimony when attempting to satisfy the Act's "showing of harm" standard.

Further, practitioners might consider the canons of statutory interpretation the North Dakota Supreme Court will likely use to clarify ambiguous or undefined standards in the Act.¹⁵⁵ Uniform laws in North Dakota are to be construed "as to effectuate its general purpose to make uniform the law of those states which enact it."¹⁵⁶ However, this provides no assistance to courts since North Dakota is the only state to adopt the Act. Courts may consider the legislative intent of the statute,¹⁵⁷ but that intent is difficult to determine since there was little discussion by the legislature

150. See discussion *supra* Section IV.C.

151. See discussion *supra* Section III.

152. See discussion *supra* Section III.

153. *Muchow v. Kohler*, 2021 ND 209, ¶ 8, 11, 966 N.W.2d 910, 911-12.

154. *Id.*

155. See N.D. CENT. CODE ANN. ch. 1-02.

156. *Id.* § 1-02-13 (West 1943); see also *Nonparent Custody and Visitation Act*, *supra* note 92.

157. N.D. CENT. CODE ANN. § 1-02-38 (West 1967).

regarding the adoption of the Act.¹⁵⁸ Thus, again, the North Dakota state legislature is in the best position to provide clarity for the Act's standards.

While awaiting clarity from the North Dakota Supreme Court or the legislature, practitioners might look to precedent interpreting North Dakota's prior nonparent visitation and custody standard for guidance. For instance, how a nonparent proves a "significant emotional bond" with a child is not addressed by the Act or current caselaw. However, the North Dakota Supreme Court previously defined a psychological parent as "[a] person who provides a child's daily care and who, thereby, *develops a close bond* and personal relationship with the child [and] becomes the psychological parent to whom the child turns for love, guidance, and security."¹⁵⁹ Perhaps the court will rely on its past definition of "psychological parent" to resolve the uncertainty surrounding what constitutes a "significant emotional bond."

Additionally, practitioners should know that the Act enumerates its own best interest factors, which are in addition to those required under the North Dakota statute.¹⁶⁰ The North Dakota Supreme Court has not addressed the best interest factors under the Act, as neither case presented thus far met the burden of establishing standing.¹⁶¹ Thus, whether any interpretation will be required for the Act's best interest factors is unclear.

For example, the Act requires the district court to consider "the likely impact of the requested order on the relationship between the child and the parent."¹⁶² The Act provides no guidance as to what the district court should consider when weighing this best interest factor. However, the North Dakota Supreme Court's precedent prior to the Act established what constitutes "interfer[ence] with the parent-child relationship."¹⁶³ Thus, practitioners might consider prior cases establishing when interference with the parent-child relationship occurs to anticipate what facts the court might consider under best interest factors of the Act, such as "the likely impact of the requested order on the relationship between the child and the parent."¹⁶⁴

While these inferences are speculative, practitioners might use prior caselaw and canons of statutory interpretation to anticipate how the North Dakota Supreme Court will interpret ambiguous and undefined standards of the Act in future cases. Ultimately, the vagueness of the Act provides

158. See S.B. 2051, 66th Leg. Assemb., Reg. Sess. (N.D. 2019).

159. *McAllister v. McAllister*, 2010 ND 40, ¶ 15, 779 N.W.2d 652, 658 (quoting *Hamers v. Guttormson*, 2000 ND 93, ¶ 5, 610 N.W.2d 758, 760) (emphasis added).

160. See *supra* Section IV.E.

161. See *Muchow v. Kohler*, 2021 ND 209, 966 N.W.2d 910; see also *Sailer v. Sailer*, 2022 ND 151, 978 N.W.2d 699.

162. See UNCVA, *supra* note 44, at 23.

163. See *R.F. v. M.M.*, 2010 ND 195, ¶ 25, 789 N.W.2d 723, 729 (affirming a district court's determination that there was no interference with the parent-child relationship).

164. UNCVA, *supra* note 44, at 23.

opportunities for effective advocacy on the behalf of nonparents seeking custody and visitation rights in North Dakota.

VIII. CONCLUSION

Troxel v. Granville established that “special weight” should be afforded to parental decisions regarding third-party visitation and custody.¹⁶⁵ Since that declaration, states have been tasked with determining exactly how to provide for conflict among parents’ fundamental right to parent their children, the best interests of children, and the wishes of nonparents seeking custody or visitation.

In 2018, the Uniform Law Commission promulgated the Uniform Nonparent Custody and Visitation Act to help states strike the appropriate balance among these competing interests.¹⁶⁶ In 2019, North Dakota became the first and only state to adopt the Act.¹⁶⁷ The North Dakota Supreme Court has interpreted the Act only twice since its enactment.¹⁶⁸ To date, no third party has been successful in receiving the right to child custody or visitation under the Act.¹⁶⁹

Questions remain as to how portions of the Act might be interpreted, such as what constitutes a “significant emotional bond” and how to analyze the Act’s best interest factors.¹⁷⁰ The North Dakota Legislature is in the best position to address these questions by amending the state statute to offer guidance to practitioners and courts on how to establish and analyze these factors. Meanwhile, practitioners should be mindful of the ways in which the Act changed the substantive law involving nonparents’ rights to child custody and visitation and should know what areas of the Act are still open to interpretation.

*AnneMarie Studer**

165. *See* 530 U.S. 57, 70 (2000) (plurality opinion).

166. *See Nonparent Custody and Visitation Act, supra* note 92.

167. *See id.*

168. *See Muchow v. Kohler*, 2021 ND 209, 966 N.W.2d 910; *see also Sailer v. Sailer*, 2022 ND 151, 978 N.W.2d 699.

169. *See Muchow*, 2021 ND 209, 966 N.W.2d 910; *see also Sailer*, 2022 ND 151, 978 N.W.2d 699.

170. *See* discussion *supra* Section VI.

* 2024 J.D. Candidate at the University of North Dakota School of Law. Thank you to the North Dakota Law Review Board of Editors and its Members for their assistance in preparing this note for publication. A special thank you to my husband, Mike, for supporting and encouraging me in all my endeavors.