

1-1-2014

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Jeffrey A. Parness  
r0100837@mail.niu.edu

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### Original Citation

Jeffrey A. Parness, Survey of Illinois Law: Stepparent Childcare, 38 S. Ill. U. L.J. 575 (2014).

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# SURVEY OF ILLINOIS LAW: STEPPARENT CHILDCARE

JEFFREY A. PARNES\*

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## I. INTRODUCTION

In *Troxel v. Granville*, in 2000,<sup>1</sup> four United States (U.S.) Supreme Court justices determined that the “liberty interests of parents in the care, custody, and control of their children” (herein childcare interests) generally foreclose states from compelling grandparent visitation over parental objections.<sup>2</sup> Yet the four recognized that “special factors” might justify judicial interference as long as a parent’s contrary wishes were accorded “at least some special weight.”<sup>3</sup> The plurality, and one concurring justice, reserved the question of whether any “nonparental” visitation order must

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- \* Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College, J.D., The University of Chicago. Thanks to Amanda Beveroth for her research assistance. All errors are mine.
1. *Troxel v. Granville*, 530 U.S. 57 (2000). These liberty interests had earlier commanded a majority support on the U.S. Supreme Court. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
  2. *Troxel*, 530 U.S. at 65 (“perhaps the oldest of the fundamental liberty interests recognized by this Court”) and at 68 (“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”) (J. O’Connor, joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer) [hereinafter plurality opinion]. On analyzing plurality opinions, *see* Donald Leo Bach, *The Rapanos Rap: Grappling With Plurality Decisions*, 81 U.S.L.W. 468 (2012).
  3. *Troxel*, 530 U.S. at 70 (plurality opinion) (“if a fit parent’s decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent’s own determination”). One “special weight” case is *In re H.A.*, 2013 WL 6576528 (Ohio App. 2d 2013) (rejecting mother’s objections to maternal grandmother’s visitation as objections only founded on mother’s soured relationship with her own mother).

“include a showing of harm or potential harm to the child.”<sup>4</sup> The concurring justice did hint, however, that at least some nonparental visitation could be based solely on a preexisting “substantial relationship” between a child and a nonparent and on “the State’s particular best interests standard.”<sup>5</sup>

A dissenter, not unlike the concurring justice, observed that a best interests standard might be constitutional where the nonparent acted “in a caregiving role over a significant period of time,”<sup>6</sup> hinting that such a nonparent might even be afforded “de facto” parent status.<sup>7</sup> A second dissenter noted the possibility of both “gradations” of nonparents<sup>8</sup> and carefully crafted state law definitions of parents.<sup>9</sup> A third dissenter observed nonparents seeking visitation must be distinguished by whether there is a “presence or absence of some embodiment of family.”<sup>10</sup>

So, parental objections to nonparental childcare (including parenting time, visitation and custody<sup>11</sup>) are not always dispositive.<sup>12</sup> Yet because the U.S. Supreme Court has said little about nonparent childcare since *Troxel*,

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4. *Troxel*, 530 U.S. at 73 (plurality opinion) (“we do not consider . . . whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting [nonparent] visitation”). *See also id.* at 77 (“there is no need to decide whether harm is required”) (J. Souter, concurring in the judgment).
  5. *Id.* at 76-77 (while not every nonparent should be capable of securing visitation upon demonstrating a child’s best interests, perhaps a nonparent who establishes “that he or she has a substantial relationship with the child” should be able to petition if the state chooses) (J. Souter).
  6. *Id.* at 98-99 (“Cases are sure to arise . . . in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto . . . . In the design and elaboration of their visitation laws, States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances.”) (Kennedy, J., dissenting).
  7. *Id.* at 100-01 (“a fit parent’s right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a de facto parent may be another”) (Kennedy, J.).
  8. *Id.* at 92-93 (“Judicial vindications of ‘parental rights’ . . . requires . . . judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents.”) (Scalia, J., dissenting).
  9. *Id.* at 92-93 (“Judicial vindication of ‘parental rights’ . . . requires . . . a judicially crafted definition of parents”) (Scalia, J.).
  10. *Id.* at 88 (Stevens J.).
  11. Childcare herein encompasses court-recognized (as per agreement or judicial determination in the absence of agreement) care, custody and/or control of children within the liberty interests of parents under *Troxel*, 530 U.S. at 65, whether or not court recognition of childcare is on behalf of parents or nonparents. Beyond current American state statutory authorizations for court-recognized custody, visitation and/or parenting time, see AMERICAN LAW INSTITUTE, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, § 2.03 (adopted May 16, 2000) (defining a “parenting plan” as allocating “custodial responsibility and decisionmaking responsibility on behalf of a child,” which include “caretaking functions” and the broader “parenting functions”) [hereinafter “*ALI Principles*”].
  12. Comparably, one parent’s objection to placement for adoption is not always dispositive when the other parent agrees and placement clearly and convincingly serves the child’s best interests. *See, e.g., In re C.L.O.*, 41 A.3d 502 (D.C. 2012).

there is much uncertainty.<sup>13</sup> While some state legislatures have extensively refined their grandparent visitation statutes,<sup>14</sup> many have not fully addressed the childcare interests of other nonparents,<sup>15</sup> like stepparents. Without statutes, judges are left to resolve the import of a “caregiving role over a significant period of time” by a nonparent. Some state legislatures and courts since *Troxel* have recognized parental child caretaking interests in nonbiological and nonadoptive caretakers<sup>16</sup> by deeming them parents sometime after birth through such doctrines<sup>17</sup> as de facto parent,<sup>18</sup> in loco

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13. One distinguished commentator described *Troxel* this way:

*Troxel* did more to confuse than clarify the law in the area of grandparents’ rights laws. On the one hand, the case can be read broadly as reaffirming that parents have a fundamental right to control the upbringing of their children and as providing a basis for invalidating orders for grandparent visitation over the objection of fit parents. On the other hand, *Troxel* can be read as a very narrow decision that involved a particularly broad law applied in a situation where the parent was fit and regular grandparent visitation still occurred. The absence of a majority opinion makes it even more difficult to assess the impact of the decision other than the certainty that it will lead to challenges to grandparents’ rights law throughout the country. *See e.g., Troxel*, 530 U.S. 57.

14. The Illinois judicial and legislative response to *Troxel* is described in Michael A. Goldberg, *Over the River and Through the Woods—Again: The New Illinois Grandparent Visitation Act*, 29 S. ILL. U. L.J. 403 (2005) (reviewing other American state responses to *Troxel*). Grandparent visitation statutes are listed in Robyn L. Ginsberg, *Grandparents’ Visitation Rights: The Constitutionality of New York’s Domestic Relations Law Section 72 After Troxel v. Granville*, 65 ALB. L. REV. 205, 205 n.2 (2001), while the post-*Troxel* state cases on the constitutionality of such statutes are reviewed in Sonya C. Garza, *The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927 (2009). It should be noted that some grandparent childcare statutes may only apply to certain, and thus not all, grandparents. *See, e.g., MICH. COMP. LAWS* 722.27b(5) (2012) (grandparenting time sought by one whose child/the parent is deceased or has had parental rights terminated), applied in *Porter v. Hill*, 836 N.W.2d 247 (Mich. App. 2013) (urging statutory amendment so that parental rights termination did not arise due to abuse or neglect).
15. *See, e.g., Solangel Maldonado, When Father (or Mother) Doesn’t Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865 (2003) [hereinafter “Maldonado”].
16. Parentage for grandparents and other relatives arises, in part, because of the 2008 federal Fostering Connections Act, 42 U.S.C. 671(a)(29) (2012) (within 30 days of removal of child from parental custody, state must exercise “due diligence to identify and provide notice to all adult grandparents and other relatives” and explain options involving kinship guardianship). *See, e.g., UTAH CODE* 78A-6-307(7), 18(c) (2012) (when a child removed from parental custody, preference for placement of the child shall be given to “a relative of the child”). *See also* Judith T. Younger, *Families Now: What We Don’t Know Is Hurting Us*, 40 HOFSTRA L. REV. 719, 722, 733 (2012) (“glaring need for reliable data” on “what is really happening in intimate relationships”).
17. *See, e.g., Maldonado, supra*, note 15 at 893-97 (demonstrating how *Troxel* allows visitation/custody petitions by certain nonparents). At times, these doctrines could be used where the nonparents have no intimate, unitary or quasimarital familial relationships with one or both parents, but where there are quasiparent relationships with the children with for whom they seek custody or visitation. *See, e.g., E.C. v. J.V.*, 202 Cal. App. 4th 1076, 136 Cal. Rptr. 3d 339 (Cal. App.3d 2012).
18. *See, e.g., In re Custody of B.M.H.*, 315 P.3d 470, 472 (Wash. 2013) (common law de facto parentage claim was available to former stepparent where the child had only one existing fit parent as the biological father died during the pregnancy; court noted that a similar claim was made available in an earlier case to a former same sex female partner of a birth mother); KY. REV. STAT. 403.270 (statutory “de facto custodian”). Some grandparents can achieve de facto parent status under statute. *See, e.g., Guardianship of Vaughan*, 207 Cal. App. 4th 1055, 1070 (Cal. App. 3d 2012) (grandparents

parentis,<sup>19</sup> equitable parent,<sup>20</sup> equitable estoppel,<sup>21</sup> and “psychological parent.”<sup>22</sup> Others have not.<sup>23</sup>

In Illinois, the “liberty interests of parents” are reflected in the “superior rights doctrine,” which holds, as elsewhere,<sup>24</sup> that parents have superior rights regarding the care of their children.<sup>25</sup> This doctrine is incorporated into some Illinois statutes, as when childcare may be afforded to a nonparent

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are de facto parents where, pursuant to CAL. FAMILY CODE 3041(c), they provide “a stable placement” of their grandchild by “fulfilling both the child’s physical needs and . . . psychological needs . . . for a substantial period of time,” even where the parent has not been found unfit or to have abandoned the child).

19. *See, e.g., In re Smith*, 97 So. 3d 43, 48 (Miss. 2012) (in loco parentis status, with possible visitation or custody rights, can be accorded maternal grandparents only where there is “a clear showing of abandonment, desertion or unfitness on the part of the parent”). *But see, Strauss v. Tushman*, 216 P.3d 370, 373 (Utah App. 2009) (former stepfather’s in loco parent status ends with divorce and mother’s objection to continued contact); *Rohmiller v. Hart*, 811 N.W.2d 585, 593-4 (Minn. 2012) (a maternal aunt could assume in loco parentis status, though not proven here).
20. *See, e.g., Lipnevicius v. Lipnevicius*, 2012 WL 3318584 (Mich. App. 2012) (equitable parent doctrine, adopted in *Atkinson v. Atkinson*, 408 N.E.2d 516 (Mich. App. 1987), cannot be used by former husband of child’s mother where his marital presumption of paternity was earlier rebutted and where the natural father had been judicially declared the father under law).
21. *See, e.g., Juanita A. v. Kenneth N.*, 930 N.E.2d 214, 217 (N.Y. 2010) (“putative father could assert equitable estoppel defense when sued by natural mother for child support if mother acquiesced in the development of a close relationship between the child and another father figure and when the disruption of that relationship would be detrimental to the child’s interests”); *In re Elizabeth S.*, 94 A.D. 3d 606 (N.Y. App. 1st 2012) (in certain circumstances, including “operative parent-child relationship,” equitable estoppel can bar a man from denying paternity of a nonmarital child with whom he has no genetic ties).
22. *See, e.g., In re M.W.*, 292 P.3d 1158, 1161 (Colo. App. 2012) (construing COLO. STAT. 14-10-123(1) allowing the pursuit of an allocation of parental responsibilities for a child in one who had physical care of the child for six months or more and who pursues within six months of the termination of such care).
23. *See, e.g., In re I.E.*, 997 N.E.2d 358, 362 (Ind. App. 2013) (statutory authorization for third party, or nonparent, visitation only for stepparents or grandparents; foster parent visitation authority should arise, if at all, in legislative, not judicial forum). At times, common law rulings are made even though legislation is preferred. *See, e.g., K.E.M. v. P.C.S.*, 38 A.3d 798, 811 (Pa. 2012) (J. Melvin, concurring) (affirming “the continuing viability of the (paternity by) estoppel doctrine in Pennsylvania common law” though believing “the General Assembly should consider the creation of relevant legislation”).
24. *See, e.g., Smith v. Smith*, 97 So.2d 43, 46 (Miss. 2012) (“natural-parent presumption or preference”); *Shorty v. Scott*, 535 P.2d 1341, 1344 (N.M. 1975) (“parental preference doctrine”); *In re Guardianship of Reena D.*, 163 N.H. 107, 111 (N.H. 2011) (“fit parents are presumed to act in the best interest of their children,” adopting the *Troxel* plurality’s ruling; joining a majority of jurisdictions, court finds the presumption applies in a proceeding to terminate a guardianship by consent as there is no necessary waiver of parental interests with such a guardianship). Once there has been a judicial determination of custody in a nonparent, the parent can no longer rely on the superior rights doctrine to regain custody. *See, e.g., R.W. v. D.S.*, 85 So.3d 1005 (Ala. Civ. App. 2011) (parent must then show custody modification materially promotes the child’s best interests).
25. *See, e.g., In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 15 (citing *In re R.L.S.*, 218 Ill.2d 428, 434, 844 N.E.2d 22 (2006)). Before *Troxel*, parental rights to childrear in Illinois, when challenged by nonparents, seemingly were less superior. *See, e.g., Cebrzynski v. Cebrzynski*, 63 Ill.App.3d 66, 379 N.E.2d 713 (1st Dist. 1978) (as both stepmother and natural mother were fit parents after father’s death, joint and mutual custody in both mothers, with actual physical custody to stepmother alone and with visitation rights to natural mother).

“only if” the child “is not in the physical custody” of a parent<sup>26</sup> and as when “reasonable visitation privileges” may only be afforded a stepparent who has lived with the child for at least five years.<sup>27</sup>

The Illinois superior rights doctrine was employed in 2012 to deny childcare opportunities to a former stepfather over maternal objection in the case of *In re Marriage of Mancine*.<sup>28</sup> There, the stepfather allegedly assumed, with the mother, “a caregiving role over a significant period of time.”<sup>29</sup> There was an explicit rejection of a de facto parent doctrine.<sup>30</sup>

In reviewing *Troxel*, *Mancine*, and other American state approaches, this article will focus on former stepparent childcare opportunities over parental objection in Illinois.<sup>31</sup> It will urge broader opportunities be recognized,<sup>32</sup> especially where there is but one parent under law. Preferably expansion would come via new special statutes on stepparents. Expansion could also come via new general statutes expanding the definitions of legal parenthood or of nonparents eligible to seek childcare. Without imminent General Assembly action, it will urge incremental common law expansions of stepparent childcare opportunities.

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26. 750 ILL. COMP. STAT. 5/601(b)(2).

27. 750 ILL. COMP. STAT. 5/607(b)(1.5) (if “the child is at least 12 years old” and has lived with the parent and stepparent for at least 5 years).

28. *Mancine*, 2012 IL App (1st) 111138, ¶ 15. A recent comparable case (though the opposite sex couple never married and the child was adopted by the mother in Slovakia), relying on *Mancine*, is *In re Scarlett Z.-D.*, 975 N.E.2d 755, 764 (Ill. App. 2d 2012) (“We agree with the reasoning and the holding of *Mancine*.”). An earlier comparable case involving a lesbian relationship and a child born of artificial insemination is *In re C.B.L.*, 723 N.E.2d 316 (Ill. App. 1st 1999).

29. *Troxel v. Granville*, 530 U.S. 57, 98-99 (2000) (Kennedy, J.).

30. *Mancine*, 2012 IL App (1st) 111138, ¶¶ 15-23. *See also id.* at ¶ 39 (“we note the Illinois Supreme Court has specifically held that no liberty interest exists with respect to a child’s psychological attachment to a nonbiological parent,” citing *In re Marriage of Simmons*, 355 Ill. App. 3d 942, 956 (1st Dist. 2005), which itself cited *In re Petition of Kirchner*, 469 N.E.2d 324 (Ill. 1995)).

31. Herein a stepparent generally refers only to one in or formerly in a state-recognized relationship (e.g., marriage, civil union, or domestic partnership) with a parent of a child born before the relationship with whom the stepparent has no genetic ties, thus excluding a present or earlier cohabitant with a parent. *Compare Surles v. Mayer*, 48 Va. App. 146 (2006) (mother’s former boyfriend treated like a “former stepparent” under the statute on child visitation standing, Virginia Code 20-124.1). A stepparent could also be one in a relationship with a parent at the time a child is born, whose presumed parentage (due to presumed genetic ties) has been disestablished but who continues to live with the parent and child. *See, e.g., In re Marriage of Purcell*, 355 Ill. App. 3d 851 (4th Dist. 2005).

32. The paper will explore stepparent childcare for children whether or not born of sex. In Illinois, for children born of assisted reproduction, there are both general statutory provisions, 750 ILL. COMP. STAT. 40/1 et seq., and special provisions governing surrogacy agreements, 750 ILL. COMP. STAT. 47/1 et seq. Only for children born of sex has the U.S. Supreme Court recognized automatic parental status/childrearing rights in most childbearing mothers and paternity opportunity interests in most copulating fathers (where adulterous men may, in an American state’s discretion, not have such interests should the mothers and their husbands wish to childcare together). *See, e.g., Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, 130. This examination encompasses children born of sex to married people and civil unionized people, as well as to cohabitating couples and other single people.

## II. PARENTAL CHILDCARE RIGHTS AND THEIR LIMITS UNDER *TROXEL*

Brad Troxel committed suicide in May 1993, leaving behind two daughters whose mother, Tommie Granville, had separated from Brad in June 1991.<sup>33</sup> Upon separation, Tommie retained residential custody.<sup>34</sup> Before his death, Brad lived in the home of his parents, Gary and Jennifer Troxel, where he regularly brought the girls for weekend visits.<sup>35</sup> At first, Jennifer and Gary continued to see their grandchildren on a regular basis after Brad's death, but in October 1993, Tommie limited their visitation to one short visit per month.<sup>36</sup>

Gary and Jennifer then petitioned for additional visits<sup>37</sup> under a Washington statute that arose due to the "changing realities of the American family."<sup>38</sup> The trial court ordered the grandparents have visitation one weekend per month, one week during the summer, and four hours on both of the grandparents' birthdays.<sup>39</sup>

The trial court found authority for the visits in a statute which declared "any person may petition the court for visitation rights at any time" and "the court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been a change of circumstances."<sup>40</sup> The trial judge made (what the *Troxel* plurality called) "slender findings"<sup>41</sup> in concluding that grandparent visitation was in the children's best interests.

The appellate court reversed on nonconstitutional grounds, holding the grandparents lacked statutory standing.<sup>42</sup> The Washington high court affirmed on different grounds,<sup>43</sup> focusing on the failure of the statute to require a showing of harm to the child to justify a nonparent visitation order over parental objection, as well as on the broad statutory authorization of "any person" at "any time" to petition for visitation rights subject only to a

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33 *Troxel*, 530 U.S. at 60.

34. *Id.*

35. *Id.*

36. *Id.* at 60-61.

37. *Id.* at 61.

38. *Id.* at 64 ("Persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing," especially in single parent households).

39. *Id.* at 61. The grandparents had sought two weekends of overnight visits while Tommie proposed one day of visitation a month with no overnight stays. *Id.*

40. *Id.*; See also *id.* at 73 (WASH. REV. CODE 26.10.160(3)).

41. *Troxel*, 530 U.S. at 72 (In fact, the Superior Court made only two formal findings in support of its visitation order. First, the Troxels are part of a large, central, loving family, all located in the area, and the Troxels can provide "opportunities for the children in the areas of cousins and music." Second, the children would be benefitted from spending quality time with the Troxels, provided that that time is balanced with the children's nuclear family).

42. *Id.* at 62 (under Wash. Rev. Code 26.10.160(3), no standing unless a custody action was pending).

43. *Id.*

best-interests-of-the-child standard. Each rationale was said to make the statute facially inconsistent with the federal constitution.<sup>44</sup>

In a challenge in the U.S. Supreme Court by Tommie on substantive due process grounds involving her liberty interests as a parent,<sup>45</sup> the *Troxel* plurality described parental liberty interests as “perhaps the oldest of the fundamental liberty interests.”<sup>46</sup> Supporting precedents involved the rights of parents “to direct the upbringing” of their children,<sup>47</sup> to “establish a home and bring up children,”<sup>48</sup> and to maintain “broad . . . authority over minor children.”<sup>49</sup>

Six U.S. Supreme Court justices agreed that the Washington statute was unconstitutional. Justice O’Connor, for four justices, found the Washington statute unconstitutional as applied.<sup>50</sup> Justices Souter and Thomas found facial invalidity in separate concurring opinions.<sup>51</sup>

Washington’s third-party visitation statute was problematic because it effectively permitted any third party to petition a court to review any parent’s decision concerning child visitation under a best interests standard.<sup>52</sup> The *Troxel* plurality held the “breathhtakingly broad” statute was unconstitutional because it failed to presume that fit parents act in the best interests of their children, or to give any deference to parental decisions.<sup>53</sup> A judicial determination of a child’s best interest cannot warrant court-ordered visitation when the law accords no “special weight” to parental decisions since the federal constitution embodies “a presumption that fit parents act in the best interests of their children.”<sup>54</sup> The *Troxel* plurality hinted that nonparent visitation orders over parental objections would be constitutional when “special weight” is accorded parental wishes.<sup>55</sup> The *Troxel* plurality

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44. *Id.*

45. *Id.* at 65.

46. *Id.* at 65.

47. *Id.* at 65 (quoting, *Pierce v. Society of Sisters*, 268 U.S. 150, 534-535 (1925)).

48. *Id.* at 65 (quoting, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

49. *Id.* at 66 (quoting, *Parham v. J.R.*, 442 U.S. 589, 602 (1979)). *See also* *Elwell v. Byers*, 699 F.3d 1208, 1217 (10th Cir. 2012) (hold that preadoptive foster parents have federal constitutional liberty interests in children, though these interests are not as strong as the liberty interests of biological parents).

50. *Id.* at 75.

51. *Id.* at 79-80 (Souter, J., concurring); *Id.* at 80 (Thomas, J., concurring).

52. *Id.* at 67.

53. *Id.* at 67. The need for both a presumption and some deference has been read as required by *Troxel* in grandparent visitation cases. *See, e.g.*, *Ex parte E.R.G.*, 73 So.3d 634 (Ala. 2011).

54. *Id.* at 67-68. The constitutional presumption that parents act in the best interest of their children was important to the *Troxel* plurality because the Troxels did not allege, and no court found, that Tommie was an unfit parent. *Id.* at 68.

55. *Id.* at 69. In New Hampshire, “special weight” means a nonparent must show, to obtain court-ordered childcare, by “clear and convincing evidence” that such an order is the child’s best interests, meaning it promotes the child’s “essential physical and safety needs,” with adverse consequences to the child’s psychological well-being if there is no order. *In re Reena D.*, 35 A.3d 509, 514 (N.H. 2011).



rejected judicial interference with parents any time there was “mere disagreement” regarding a child’s best interest.<sup>56</sup> The plurality did not expressly find, as did the Washington high court, that a showing of harm or potential harm was necessary in order to sustain nonparent visitation.<sup>57</sup>

In concurring, Justice Souter focused only on what the plurality characterized as a “breathhtakingly broad” statute,<sup>58</sup> which Souter described as authorizing “any person” at “any time” to “petition for and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard.”<sup>59</sup> He chose to “say no more,”<sup>60</sup> thus not commenting upon the constitutionality of more narrowly drawn statutes or upon any necessary “special weight” or “presumption.”<sup>61</sup>

In concurring, Justice Thomas simply noted that the “State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing any fit parent’s decision regarding visitation with third parties.”<sup>62</sup>

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56. *Troxel*, 530 U.S. at 67-68. *See also id.* at 72 (dispute involves “nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children’s best interest”). *See also Santosky v. Kramer*, 455 U.S. 745, 753, (1982) (“The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or lost temporary custody of their child to the State.”).

57. *Troxel*, 530 U.S. at 73, 77. Today, harm or potential harm is often, but not always, required. *See, e.g., Dandurand v. Pitej*, 2013 IL. App. (1st) 123598-U, ¶¶ 28-30 (reviewing standard on “harm”); *Hernandez v. Hernandez*, 265 P.3d 495 (Idaho 2011) (grandparents could seek custody though no threshold showing of parental unfitness); South Dakota Compiled Laws 25-5-29(4) and 25-5-30 (“serious detriment to child” can prompt nonparent custody or visitation, where assessment factors include “unjustifiable absence of parental custody;” “bonded relationship” between child and nonparent; “substantial enhancement of the child’s well-being” while under nonparent’s care; and “degree of stability and security in the child’s future with the parent”), construed in *Feist v. Lemieux-Feist*, 793 N.W.2d 57 (S.D. 2010) (third-party custody or visitation need not be preceded by explicit finding of parental unfitness) and *Beach v. Coisman*, 2012 S.D. 31 (similar); and *Bowen v. Bowen*, 2012 Ark. App. 403 (Ark. 2012) (grandparents seeking visitation must show likelihood of harm to child if visits are denied).

When harm or potential harm is required, there is sometimes disagreement on whether the burden of proof is preponderance, *Hollis v. Miller*, 2012 WL 5853824 (Mich. App. 2012), or clear and convincing evidence. *Id.* (Gleicher, J. concurring). At times, future substantial harm resulting from no grandparent visits is statutorily presumed. *See, e.g., TENN. CODE 36-6-306(b)(4)* (“rebuttable presumption of substantial harm to the child based upon the cessation of the relationship between the child and grandparent” when the child’s parent is deceased and the grandparent seeking visitation is the parent of the deceased parent). And, at times, a requirement of future substantial harm may be found in state constitutional law. *See, e.g., Hawk v. Hawk*, 855 S.W.3d 573 (Tenn. 1993) and *Brooks v. Parkerson*, 454 S.E.2d 769, 774 (Ga. 1995).

58. *Troxel*, 530 U.S. at 67.

59. *Id.* at 76 (employing the Washington Supreme Court view).

60. *Id.* at 75.

61. *Id.* at 77 (“there is no need to decide whether harm is required or to consider the precise scope of the parent’s right or its necessary protections”).

62. *Id.* at 80.

The three dissenters each filed separate opinions. Justice Stevens deemed that it “would have been . . . wiser to deny certiorari.”<sup>63</sup> As to the statute, he found its terms were “unconstrued” by the state high court so that a remand was in order.<sup>64</sup> He noted there was no “basis for holding that the statute is invalid in all its applications,”<sup>65</sup> observing that it would survive a facial challenge if it had a “plainly legitimate sweep.”<sup>66</sup>

In dissent, Justice Scalia, while recognizing an “unenumerated right” of “parents to direct the upbringing of their children”<sup>67</sup> had been previously protected by substantive due process,<sup>68</sup> nevertheless opined that any additional limits on this right are best determined “in legislative chambers or in electoral campaigns” and not in courts.<sup>69</sup> He warned that extending further opportunities for “judicial vindication” of parental rights<sup>70</sup> would require the Court to formulate “a judicially crafted definition of parents,”<sup>71</sup> “judicially approved assessments of ‘harm to the child;’”<sup>72</sup> and “judicially defined gradations of other persons” (grandparents, extended family members, adoptive family members in an adoption later found to be invalid, long term guardians, etc.) who have childcare claims against parental wishes.<sup>73</sup> He had no desire for a “new regime of judicially prescribed, and federally prescribed, family law.”<sup>74</sup>

In dissent, Justice Kennedy thought the case should be remanded for consideration of whether, and to what extent, child visits with nonparents (or just grandparents) might be ordered over parental objections because the visits served the children’s best interests, as well as whether child harm “is

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63. *Id.* at 80.

64. *Id.* at 84-85. The Washington statute was similar to a Connecticut statute, which has been construed in line with *Troxel*. See, e.g., *DiGiovanna v. St. George*, 12 A.3d 900, 907-908 (Conn. 2011) (recognizing that in *Roth v. Weston*, 789 A.2d 431 (Conn. 2002), the court “substituted the parent-like relationship and substantial harm elements for the statutory elements of ‘any person’ and ‘best interest of the child,’ respectively, as a judicial gloss to remedy the constitutionally infirm language”).

65. *Id.* at 85.

66. *Id.* at 85 (citing, *Washington v. Glucksberg*, 521 U.S. 702, 739-40 and n. 7 (1997) (Stevens, J. concurring in judgment)).

67. *Id.* at 91 (right is among both the “unalienable rights” recognized in the Declaration of Independence and the other rights retained by the people per the Ninth Amendment).

68. *Id.* at 92 (but two of the three precedents originated in “an era rich in substantive due process holdings that have since been repudiated”).

69. *Id.* at 91-92 (while it is “entirely compatible with the commitment to representative democracy to argue, in legislative chambers or in electoral campaigns” about parental childrearing authority, it is wrong for judges, via “unenumerated” constitutional right analysis, “to deny legal effect to laws that . . . infringe”).

70. *Id.* at 92.

71. *Id.* at 92-93.

72. *Id.* at 93.

73. *Id.* at 93.

74. *Id.* at 92-93.

required in every instance.”<sup>75</sup> Justice Kennedy opined that a “harm to the child standard” is not always required by the federal constitution when nonparent visits are ordered,<sup>76</sup> given that “the conventional nuclear family . . . is simply not the structure or prevailing condition in many households.”<sup>77</sup> He recognized there may be “a substantial number of cases” where a “third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto,”<sup>78</sup> suggesting such a third party might be deemed a “de facto” parent.<sup>79</sup>

*Troxel* clearly guides new parent as well as nonparent child caretaking over the objection of biological or adoptive parents. Since *Troxel*, the U.S. Supreme Court has not spoken. State statutes and common law rulings vary on new parent and nonparent child caretaking. Many state laws now recognize expanded opportunities for childcare standing because of earlier childcare actions, especially when a child has only one legal parent.

### III. AMERICAN STATE LAWS LIMITING PARENTAL CHILDCARE RIGHTS

#### A. General Laws

##### 1. *Second Parent Laws*

Parentage for children with one parent<sup>80</sup> is often extended to another with no actual or presumed biological ties and with no formal adoption.<sup>81</sup> At times, extensions come via precedents, as in Wisconsin where there can be a

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75. *Id.* at 94.

76. *Id.* at 101-02.

77. *Id.* at 98.

78. *Id.* at 98. *See also id.* at 100-01 (“In short, a fit parent’s right vis-a-vis a complete stranger is one thing: her right vis-a-vis another parent or a de facto parent may be another.”).

79. *Id.* at 100-01.

80. The paper will not examine settings where state laws recognize the possibility of three or more child caretaking parents at any one time. *See, e.g.*, CAL. FAM. CODE 7601(b) and 7612(c) (“detriment to the child” standard employed in considering possible third parent).

81. Herein the other noted state statutes and precedents on parentage and nonparent childcare are assumed to meet the *Troxel* standards on losses or diminishments of superior parental rights, whatever those standards may be. Some non-Illinois laws do seem of questionable validity. *Consider, e.g.*, GA. CODE 19-7-1(b.1) (in disputes over custody between parents and, *e.g.*, grandparents, aunts or siblings, “parental power may be lost” if a court, exercising “sound discretion and taking into consideration all the circumstances . . . determines” such losses serve the children’s best interest, though there is “a rebuttable presumption” favoring parental custody). On the dangers posed to superior parental rights by emerging de facto parent laws (especially as applied to stepparents); *See also In re Custody of B.M.H.*, 315 P.3d 470, ¶¶ 56-83 (Wash. 2013) (Madsen, C.J., concurring/dissenting).

“psychological parent” or “second parent.”<sup>82</sup> But often there are statutes, a preferred approach for those, like Justice Scalia, concerned about inappropriate judicial lawmaking.

Some state statutes recognize new child caretaking interests in new parents or in nonparents that are dependent upon the biological or adoptive parent’s consent as well as upon earlier childrearing.<sup>83</sup> Here, similar terms, like *de facto* parent, can have different meanings from state to state. For example, in Delaware, a *de facto* parent can be judicially recognized for one who had “a parent-like relationship” with “the support and consent of the child’s parent,” who exercised “parental responsibility,” and who “acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.”<sup>84</sup> But in the District of Columbia, one might seek “third-party custody” as a “*de facto* parent” if one lived with the child since birth or lived in the same household with the child for at least 10 of the 12 months preceding the filing of one’s custody request, with parental “agreement.”<sup>85</sup>

There are also statutes on parentage presumptions. While traditionally these presumptions were founded on the possibility of natural ties in the husband married to the birth mother, today they are not always dependent upon possible ties or marriage.<sup>86</sup> Some establish a minimum time period of childcare. For example, in Missouri a man “shall be presumed to be the natural father of a child if . . . He is obligated to support the child pursuant to

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82. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (consent, parent-like relationship, financial support, and “bonded, dependent relationship parental in nature”); *In re Custody of B.M.H.*, at ¶ 29 (Wash. 2013) (adopting the H.S.H.-K. analysis, common law “*de facto* parent” is one who lived with child; established a bonded dependent relationship with child with established parent’s consent and aid; and assumed parental obligations without expectation of financial compensation; here *de facto* parent was the former stepfather, employed to deem a mother’s former same sex partner to be a *de facto* parent in *In re Custody of A.F.J.*, 314 P.3d 373 (Wash. 2013) (former partner was also a foster parent)).

83. Seemingly, where the biological or adoptive parent has had parental rights terminated, the necessary consent will be lacking. *See, e.g.*, *L.N.S. v. S.W.S.*, 842 N.W.2d 680 (Iowa Ct. App. 2013) (paternal grandmother’s visitation interests ended when her son’s/father’s childcare interests ended).

84. 13 DEL. CODE 8-201(a)(4)(mother), 8-201(b)(6) (father) and 8-201(c) (the three factors to attain “*de facto* parent status”). “*De Facto*” parents are on equal footing with biological or adoptive parents. *See, e.g.*, *Smith v. Guest*, 16 A.3d 920 (Del. 2011). *But see In re Bancroft*, 19 A.3d 730 (Del. Fam. 2010) (finding statute overbroad and violative fit mother’s and father’s due process rights as relates to the mother’s boyfriend seeking to be a third parent).

85. DIST. OF COL. CODE 16-831.01 and 831.03.

86. *See, e.g.*, COL. STAT. 19-4-105(d) (while child is a minor, a man is the presumed natural father if he “receives the child into his home” and “openly holds out the child as his natural child”); CAL. FAM. CODE 7611(d) (similar), read to include same sex female partners in *S.Y. v. S.B.*, 134 Cal. Rptr. 3d 1 (Cal. App. 3d 2011); *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012) (Uniform Parentage Act presumption that man is natural father of minor he holds out openly as his own also applies to adoptive mother’s former same sex partner). *See also* IND. STAT. 31-14-7-2(a) (similar on receipt into home and hold out, but with the need for the child’s mother’s consent).

a written voluntary promise.”<sup>87</sup> In Minnesota, a man is “presumed to be the biological father of a child if . . . while the child is under the age of majority, he receives the child into his home and openly holds out the child as his biological child.”<sup>88</sup> In Indiana, there is a comparable “rebuttable presumption,” but it must include “the consent of the child’s mother”<sup>89</sup> and a positive genetic test.<sup>90</sup> In Alabama, a statute requires “a significant parental relationship with the child” involving emotional and financial support.<sup>91</sup> In Wyoming, a man “is presumed to be the father of a child if . . . for the first two (2) years of the child’s life, he resided in the same household with the child and openly held out the child as his own.”<sup>92</sup>

Where natural ties are statutorily presumed, the lack of ties will not necessarily result in a rebuttal of the presumption.<sup>93</sup> Where statutory presumptions explicitly address only presumed paternity, they typically are also applied in neutral ways so that women can also become presumed parents by meeting the statutory standards.<sup>94</sup>

## 2. *Nonparent Childcare Laws*

American state laws also recognize that certain parental acts, not amounting to abuse, neglect or abandonment, can diminish superior parental rights by prompting nonparent childcare standing. Often, nonparents are described as taking on parental duties. These laws are often comparable to other American laws recognizing second parent status. For example, a South

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87. MO. CODE 210.822. This obligation seemingly can arise without “court order,” as such an order is another way the obligation prompting a presumption can arise. *Id.* Where two conflicting presumptions arise via conduct in Missouri, the controlling presumption is the one “founded on the weightier considerations of policy and logic.” MO. CODE 210.822.2. Comparably, there is a presumption in Kansas where a man “notoriously or in writing recognizes paternity,” which need not involve a voluntary paternity acknowledgement. KAN. STAT. 38-1114(a)(4).

88. MINN. STAT. 257.55(d). Where two presumptions arise via conduct in Minnesota, the controlling presumption is the one “founded on the weightier considerations of policy and logic.” MINN. STAT. 257.55(2). Similar are the presumptions arising under MONT. CODE 40-6-105(d) and COLO. STAT. 19-14-105(1)(d).

89. IND. CODE 31-14-7-2.

90. IND. CODE 31-14-7-2(b) (the “rebuttable presumption” does “not establish the man’s paternity;” paternity may only be established via 31-14-2-1, which requires positive genetic test under (3) in the absence of a marriage or attempted marriage).

91. ALAB. CODE 26-17-204(a)(5).

92. WY. STAT. 14-2-504(a)(v). Similar is TEX. FAM. CODE 160.204(a)(5) and 13 DEL. CODE 8-204(a)(5).

93. *See, e.g.,* Alisha C. v. Jeremy C., 808 N.W.2d 875, 884-885 (Neb. 2012) (former husband, under NEB. STAT. 43-1412.01, may set aside earlier divorce court finding of presumed marital paternity, but only if in the child’s best interests, there was no adoption, and the husband did not acknowledge paternity while “knowing he was not the father”).

94. *See, e.g.,* Frazier v. Goudschaal, 295 P.3d 542 (Ks. 2013) (second mother is a presumed parent as she “notoriously” recognized a child born to her partner via assisted reproduction; co-parenting pact signed before birth recognizing second mother as a “de facto parent” ) and *In re* A.R.L., 2013 COA 170, ¶ 20.

Dakota statute allows “any person other than the parent of a child to intervene or petition a court . . . for custody or visitation of any 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.”<sup>95</sup> In South Dakota, a parent’s “presumptive right to custody” is diminished when there is abandonment or persistent neglect; forfeiture or surrender of parental rights to a nonparent; abdication of “parental rights and responsibilities;” or, “extraordinary circumstances” where parental custody “would result in serious detriment to the child.”<sup>96</sup> In Kentucky, a “de facto custodian” of a child can seek custody if he or she was “the primary caregiver” and “financial supporter,” resided with the child for at least six months, and the child is under three.<sup>97</sup> In Colorado, there is nonparent standing to seek an allocation of parental responsibilities when the nonparent “has had the physical care of a child for a period of six months or more.”<sup>98</sup> In New Mexico, when “neither parent is able . . . to provide appropriate care,” a child may be “raised by . . . kinship caregivers,” who include an adult with a significant bond to the child and who cares for the child “consistent with the duties and responsibilities of a parent.”<sup>99</sup> And in Wisconsin, “a person who has maintained a relationship similar to a parent-child relationship with the child” may secure “reasonable visitation rights . . . if the court determines that visitation is in the best interests of the child.”<sup>100</sup>

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95. S. DAK. CODIFIED LAWS 25-5-29 (2012). Thus, not all de facto parents can qualify as de facto custodians with standing to seek childcare orders. *See, e.g., Truman v. Lillard*, 404 S.W.3d 86 (Ky. App. 2012) (former same-sex partner of woman who adopted her niece was not a de facto custodian, and failed to show a waiver of superior parental right to custody).
96. S. DAK. CODIFIED LAWS 25-5-29(1) to (4). The statute was applied to permit visitation favoring a man with no biological or adoptive ties. *Clough v. Nez*, 759 N.W.2d 297 (S.D. 2008). *See also* S. DAK. CODIFIED LAWS 25-5-33 (parent can be ordered to pay child support to nonparent having “custodial rights”).
97. KY. REV. STAT. 403.270 (residence for at least one year is required if the child is older than three). Thus, not all de facto parents can qualify as de facto custodians with standing to seek childcare. *See, e.g., Truman*, 404 S.W.3d at 3d (former same-sex partner of woman who adopted her niece was not a de facto custodian and failed to show a waiver of superior parental right to custody) and *Spreacker v. Vaughn*, 397 S.W.3d 419 (Ky. App. 2012) (paternal great aunt is de facto custodian). There are similar laws in Indiana, *K.S. v. B.W.*, 954 N.E.2d 1050 (Ind. App. 2011) (employing IND. CODE 31-9-2-35.5) and Minnesota, MINN. STAT. 257c.03(2) (“de facto custodian”). The phrase “de facto custodian,” and similar phrases, can also be used in other settings. *See, e.g., In re Jesse C.*, 2012 WL 5902301 (Cal. App. 3d 2012) (de facto parent is one who cares for child during dependency proceeding; de facto parent status is lost when dependency is terminated).
98. COLO. REV. STAT. 14-10-123(1)(c). *See, e.g., In re B.B.O.*, 277 P.3d 818 (Colo. 2012) (half-sister has standing); *In re D.T.*, 292 P.3d 120 (Col. App. II 2012) (mother’s friend did not gain standing as she “served more of a grandmotherly role, rather than a parental role” and as mother never ceded her parental rights).
99. NEW MEX. STAT. 40-10B-3(A) and (C), applied in *Stanley J. v. Cliff L.*, 319 P.3d 662 (N.M. App. 2013).
100. WIS. STAT. 767.43(1), applied in *In re Marriage of Vanderheiden*, 838 N.W.2d 865 (Wis. App. 2013) (visitation for former stepfather).

Besides statutes, there are case precedents recognizing nonparent childcare standing. For example, in Ohio there can be no “shared parenting” contracts between parents and nonparents.<sup>101</sup> However, “a parent may voluntarily share with a nonparent the care, custody, and control of his or her child through a valid shared–custody agreement,” which may create for a nonparent “an agreement for permanent shared legal custody of the parent’s child” or an agreement for temporary shared legal custody, as when the agreement is revocable by the parent.<sup>102</sup> In Minnesota, under certain conditions there is a common law right to visitation over parental objection for a former family member, like an aunt who stood “in loco parentis” with the child.<sup>103</sup> And in New York, a grandparent has standing to seek visitation with a grandchild over parental objection when “conditions exist which equity would see fit to intervene.”<sup>104</sup>

## B. Special Stepparent Childcare Laws

Elsewhere, there are special childcare laws<sup>105</sup> applicable just to stepparents (both present and former).<sup>106</sup> In a Tennessee divorce, “a stepparent to a minor child born to the other party . . . may be granted reasonable visitation rights . . . upon a finding that such visitation rights

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101. *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002).

102. *In re Mullen*, 953 N.E.2d 302, 306 (Ohio 2011). Custody in the nonparent is only allowed under an agreement when the Juvenile Court deems the nonparent suitable and the shared custody is in the best interests of the child. *Bonfield*, 780 N.E.2d at ¶¶ 48, 50. *See also In re LaPiana*, 2010 WL 3042394 (Ohio App. 8th 2010) (former lesbian partner secures visitation with two children born of assisted reproduction, where there was a written agreement to raise jointly the first child and other evidence of intent to share custody of both children).

103. *Rohmiller*, 811 N.W.2d at 593. (“under the common law in Minnesota, a finding of in loco parentis status has been essential to the granting of visitation to non-parents over the objection of a fit parent”). *See also In re V.D.W.*, 2013 WL 6231797 (Miss. App. 2013) (in post-divorce proceeding, mother’s ex-husband stood in loco parentis to her child, where child had been conceived before the marriage but born during the marriage). At times, attaining “in loco parentis” status seemingly elevates nonparent to parental status. *See, e.g., Daniel v. Spivey*, 386 S.W.3d 424, 429 (Ark. 2012) (precedents include stepparent and same sex partner of parent).

104. *In re Van Norstrand*, 925 N.Y.S.2d 229, 230 (N.Y. Sup. App. 3d 2011) (citing Domestic Relations Law §72[1]). *See also, In re Victoria*, 56 A.3d 338 (Md. App. 2012) (sibling visitations can be ordered over parental objections only when standards for grandparent visits have been met).

105. Beside special childcare laws, for stepparents there can also be other special laws. *Consider, e.g., S. DAK. CODIFIED LAWS 25-7-8* (“A stepparent shall maintain his spouse’s children born prior to their marriage and is responsible as a parent for their support and education suitable to his circumstances, but such responsibility shall not absolve the natural or adoptive parents of the children from any obligation of support.”).

106. Many urge laws on present and former stepparent childcare be written by state legislators. *See, e.g., Cynthia Grant Bowman, The Legal Relationship Between Cohabitants and Their Partners’ Children*, 13 THEORETICAL INQUIRIES IN LAW 127, 151 (2012) (“Like Professor Bartlett, I do not think we can simply rely on judges to make extralegal decisions to rescue children in deserving cases, nor do I think that it would be good for the legitimacy of our system of family law. Instead, any new standards should be established by statute, to prevent, insofar as possible, inconsistent and unpredictable judicial decisions in this area.”).

would be in the best interests of the minor child and that such stepparent is actually providing or contributing towards the support of such child.”<sup>107</sup> In California, “reasonable visitation to a stepparent” is permitted if in “the best interest of the minor child.”<sup>108</sup> In Wisconsin, a stepparent (as well as a grandparent and others) can petition for “reasonable visitation rights” if a court determines that visitation is in the child’s best interests and if there is a preexisting “relationship similar to a parent-child relationship with the child.”<sup>109</sup> In Oregon, during a dissolution proceeding a stepparent can obtain custody or visitation by proving “a child-parent relationship exists,” the presumption that the parent acts in the child’s best interest has been “rebutted by a preponderance of the evidence,” and the child’s “best interest” will be served.<sup>110</sup> If a stepparent only proves “an ongoing personal relationship” with the child, the parental presumption must be rebutted by “clear and convincing evidence.”<sup>111</sup> In Utah, a former “stepparent”<sup>112</sup> can pursue child custody or visitation in a divorce or “other proceeding”<sup>113</sup> through showing by “clear and convincing evidence” that, *inter alia*, the stepparent “intentionally assumed the role and obligations of a parent;” formed “an emotional bond and created a parent-child type relationship;” contributed to the “child’s wellbeing;” and showed the parent is “absent” or has “abused or neglected the child.”<sup>114</sup> In Delaware, “upon the death or disability of the custodial or primary placement parent,” a stepparent who resided with the deceased or disabled parent can request custody even if “there is a surviving natural parent.”<sup>115</sup> And in Virginia, a former stepparent with a “legitimate interest”<sup>116</sup> can secure custody of or visitation with a child upon a “showing by clear and convincing evidence that the best interest of the child would be served thereby.”<sup>117</sup>

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107. TENN. CODE 36-6-303 (seemingly of questionable facial validity under Troxel without any showings as to, e.g., parental acts or child detriment).

108. Cal. Fam. Code 3101.

109. WIS. STAT. 767.43(1). There are other special guidelines for grandparents who petition. *See, e.g.*, WIS. STAT. 767.43(3)(no earlier adoption of child and the child is a nonmarital child whose parents never married).

110. OR. REV. STAT. 109.119(3)(a). “Child-parent relationship” means a relationship, within the past 6 months, that “fulfilled the child’s psychological needs for a parent as well as the child’s physical needs.” OREGON REV. STAT. 109.119(10)(a).

111. OR. REV. STAT. 109.119(3)(b). An “ongoing personal relationship” means “a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality.” Oregon Rev. Stat. 109.119(10)(e).

112. UTAH CODE 30-5a-102(2)(e).

113. UTAH CODE 30-5a-103(4).

114. UTAH CODE 30-5a-103(2).

115. 13 DEL. CODE 733.

116. VIR. CODE 20-124.1.

117. VIR. CODE 20-124.2. *See, e.g.*, *Brown v. Burch*, 519 S.E.2d 403, 412 (Va. App. 1999) (over mother’s objection, “clear and convincing evidence of special and unique circumstances” justify joint custody order favoring father and former stepfather, with the latter “retaining physical custody of the boy”).



#### IV. CURRENT ILLINOIS STEPPARENT CHILDCARE OPPORTUNITIES

Stepparent childcare standing in Illinois is guided today by both statutes and precedents that afford limited chances for serving the best interests of children without infringing upon superior parental rights. The Illinois statute on former stepparent childcare orders over an existing parent's objection requires the child be at least twelve years old; a marriage of at least five years; and, a custodial parent unable to "perform the duties of a parent to the child."<sup>118</sup>

Beyond the stepparent statute there is very limited Illinois precedent supporting stepparent childcare. One case recognizes a former stepparent's contractual right to childrear over parental objection via the equitable estoppel doctrine, at least where there is harm to the child; an earlier agreement by the parent to allow a former stepparent an opportunity for child visitation; reasonable reliance by the former stepparent on the agreement; and, a detrimental "change" to the former stepparent's position as a result of the agreement.<sup>119</sup> Another case recognized a widowed stepparent can seek a guardianship of a stepchild, the deceased spouse's natural child, over the other natural parent's objection if the stepparent demonstrates, by a preponderance of the evidence, that the living parent is unwilling or unable

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Beside special statutes, there are some common law rights regarding childcare for some former stepparents. *See, e.g.,* Bethany v. Jones, 2011 Ark. 67 (Ark. 2011) (former lesbian partner obtains child visitation order; court relies on *Robinson v. Ford-Robinson*, 208 S.W. 3d 140 (2005), where stepmother was able to seek visitation with stepson over father's objection as long as visitation was in the child's "best interest," deemed the "polestar consideration").

Special stepparent childcare laws, of course, may be coupled with special stepparent adoption laws. *See, e.g.,* LA. CHILDREN'S CODE ART. 1252(A) (no need for even limited home studies in some stepparent adoptions) and MONT. CODE 42-4-302(1)(a) (stepparent has lived with child and a parent with legal and physical custody for past sixty days).

118. 750 ILL. COMP. STAT. 5/601 (c) (A), (B) and (C). Other requirements for stepparent childcare in Illinois include, inter alia, 5 year residence of the parent and stepparent, the child's desire to live with the stepparent, and the child's best interests. 750 ILL. COMP. STAT. 5/601(B), (E) and (F). Where the stepparent was married to a parent who had custody and died, the stepparent may be able to obtain guardianship of the child's person and estate, over the other parent's objection. 755 ILL. COMP. STAT. 5/11-5(a) (rebuttable presumption of childcare by surviving parent), applied in *In re A.W.*, 2013 IL App. (5th) 130104 (sufficient allegations on presumption's rebuttal so that a hearing was required).

119. *Engelkens*, 821 N.E.2d at 806. Equitable estoppel is more readily available when the agreement becomes part of a court order, as in *Schlam*, 648 N.E.2d at 348. Comparably, where there was an earlier consent decree allowing grandparent visits, continued visits over parental objection can be ordered, though "changed circumstances" can end all visits. *See, e.g., In re M.M.D.*, 213 Ill.2d 105, 108-09 (2004) (consolidated cases involving maternal grandparents seeking guardianship of deceased daughter's child with unwed biological father wherein parties earlier agreed to consent order awarding permanent custody to father and recognizing for the grandparents "specific and detailed visitation rights, telephone access to the child, information about the child's education and medical care, and authorization to speak with child's teachers, school personnel, counselors and physicians").

“to make and carryout day-to-day childcare decisions concerning the minor.”<sup>120</sup>

The significant limits on Illinois stepparent childcare are illustrated by the Appellate Court case of *In re Mancine*. There, the court recognized that legal parenthood of children born of sex is contextual;<sup>121</sup> that there is as yet little common law on legal parenthood; that legal parentage may not track actual parenting; that sometimes a child’s best interests should not be considered in determining childcare standing; and, that there are limited exceptions in Illinois to superior parental interests “in the care, custody, and control of their children.”<sup>122</sup>

In *Mancine*, a marriage dissolution proceeding,<sup>123</sup> both the husband, Nicholas Gansner, and his wife, Miki Loveland Mancine, sought custody of a minor, William, born in August 2008. William had been adopted by Miki in Wisconsin in March 2009, before her marriage to Nicholas in May 2009, though a preadoption wedding had been contemplated.<sup>124</sup> By the time she met Nicholas, Miki already had another adopted child, Elizabeth, who previously lived with Miki and her ex-husband John Mancine.<sup>125</sup> In

120. *In re A.W.*, 2013 IL App (5th) 130104, ¶¶ 12-14 (employing 755 ILL. COMP. STAT. 5/11-5 (b)).

121. For children born of assisted reproduction, legal parentage can also be contextual. *See, e.g.*, Kristine S. Knaplund, 45 U. MICH. J. L. REF. 899 (2012) (describing differences between Uniform Probate and Uniform Parentage Acts).

122. *Troxel v. Granville*, 530 U.S. 57, 65 (2002) (plurality opinion).

123. While the facts important to the court’s opinion were generally undisputed, many other facts were contested but never subject to evidentiary hearing(s) in the trial court. Some of these disputed facts, gleaned from the Appellate Court briefs, will be reviewed herein as they are relevant to the preferred alternative approaches.

124. *In re Marriage of Mancine*, 2012 IL App. (1st), ¶¶ 3-4 (“Miki and Nicholas decided they would marry in approximately June or July of 2008 . . . William [the child involved in the custody dispute] was born on August 5, 2008 . . . Nicholas and Miki became formally engaged in December 2008”).

The Appellate Court’s factual account is derived chiefly from trial court pleadings and affidavits on which there was no trial, but little party disagreement. The Appellate Court briefs reveal, however, other facts disputed by the parties’, which evidently were unimportant to the Court’s resolution. For example, Miki and Nicholas disagreed on why Nicholas got a vasectomy. Compare Brief of Respondent-Appellant (8-12-11), at 2 (believing Miki that he “would be William’s father forever,” Nicholas got a vasectomy) [hereinafter Appellant Brief] with Response Brief of Petitioner-Appellee (10-14-11), at 13-14 (urging the vasectomy was prompted because Nicholas “did not want to pass on his genetic material for his mental illness (depression, et. cetera),” while noting the vasectomy was not mentioned in Nicholas’s trial court pleadings or his affidavit) [hereinafter Appellee Brief]. The parties also disagreed on whether Miki engaged in “pathological extramarital sexual behavior” and prostitution during her marriage to Nicholas. Compare Appellant Brief, at 22 to Appellee Brief, at 11-12 (“smear campaign” which is “repugnant”).

The briefs also reveal additional factual assertions which seem undisputed, but outside the Appellate Court opinion. *See, e.g.*, Appellant Brief, at 5 (Nicholas and Miki had their first date in the Spring of 2008, a few days before Miki and John Mancine officially divorced; even then, Nicholas knew of soon-to-be William’s adoption, and of Elizabeth) and at 6-7 (Nicholas and Miki accompanied William’s birth mother to the hospital and “were with her in the delivery room”).

125. *Mancine*, 2012 IL App. (1st), ¶ 3 (when Miki and Nicholas began dating in the Spring of 2008, Elizabeth—Miki’s adopted daughter—was a one-year-old and Miki was separated from her then-husband, John Mancine; Miki and Nicholas had at one time planned to marry in June or July of 2008).

Wisconsin, an unmarried couple cannot simultaneously adopt a child, but a single woman can adopt.<sup>126</sup> Within a month of William's birth, Nicholas and Miki "had moved in" together and "Nicholas was co-parenting William."<sup>127</sup>

An adoption agent advised Nicholas that he could adopt William as a stepparent after the marriage.<sup>128</sup> William's birth certificate did reflect Nicholas's last name though Nicholas married Miki in Wisconsin about two months after William's adoption was finalized.<sup>129</sup> Nicholas had moved in with Miki at least nine months before the wedding and was co-parenting at their home.<sup>130</sup> Nicholas was named by Miki in prospective adoption papers (though evidently not in a court proceeding) as the child's "sole guardian" about three months before the wedding.<sup>131</sup> As well, Nicholas and Miki were named as "parents" on William's baptism record about seven months before the wedding.<sup>132</sup>

About a month after the wedding, the adoption agency said it would support a stepparent adoption.<sup>133</sup> About a year later, the agency told Nicholas he was free to file his petition for stepparent adoption<sup>134</sup> at a time when yet a third child, Henry, was soon to be adopted.<sup>135</sup> At that time, Nicholas primarily cared for all the children in the household since only Miki was working.<sup>136</sup> When Nicholas began working, he continued his childcare.<sup>137</sup> According to Nicholas, Miki held the couple and all the children out as a family unit, using the last name of Gansner.<sup>138</sup>

Miki sought a divorce about 15 months into the marriage, after the entire family moved to Illinois to be closer to Miki's parents.<sup>139</sup> Miki challenged Nicholas's standing to seek custody of William as William had

126. *Id.* at ¶ 3 (citing WIS. STAT. § 48.82 (2008)).

127. *Id.* at ¶ 4.

128. *Id.* at ¶ 3.

129. *Id.* at ¶¶ 4-5 (William, the adopted child, was born in August, 2008; his adoption by Miki was finalized in Wisconsin on March 4, 2009; and Miki and Nicholas were married in May, 2009).

130. *Id.* at ¶ 4 (William was born in August, 2008 and was living with Miki and Nicholas in a single home by early September, 2008).

131. *Id.* at ¶¶ 4-5 (adoption agent's report of February 27, 2009 "noted that Miki named Nicholas as the sole guardian of William and any future child she has, and named her parents as alternate guardians").

132. *Id.* (the baptism occurred in November, 2008, and the wedding occurred in May, 2009).

133. *Id.* at ¶ 5.

134. *Id.* at ¶ 5 (an August, 2010 email to Nicholas).

135. *Id.* at ¶ 6.

136. *Id.* at ¶ 7 (by then, in September, 2009, a third adopted child, Henry was in the household which had been moved to Chicago).

137. *Id.* at ¶ 8.

138. *Id.* at ¶ 8 ("According to Nicholas, Miki always held out William as Nicholas' child and held herself, Nicholas, Elizabeth, William, and Henry as "the Gansner family"). Two months after seeking to divorce Nicholas, Miki petitioned to change William's last name to Mancine, her first husband's last name. Appellant's Petition for Leave to Appeal, at 1 n.1 [hereinafter Appellant Petition].

139. *Id.* at ¶ 9 (dissolution sought on September 24, 2010).

never been adopted by Nicholas.<sup>140</sup> Because the family had lived in Illinois for more than six months, both the trial<sup>141</sup> and appellate<sup>142</sup> courts employed Illinois law<sup>143</sup> and found a lack of standing in Nicholas. The courts rejected “equitable parent,” “equitable estoppel” (barring Miki from challenging Nicholas’ standing), “equitable adoption,” and *parens patriae* arguments.<sup>144</sup>

The Appellate Court noted that, by statute, Nicholas, as a nonparent, could only seek custody if William was not in the “physical custody” of Miki.<sup>145</sup> It hinted (though not strongly) that Nicholas may have had standing to seek visitation (as compared to custody).<sup>146</sup> However, an uncited Illinois statute says “reasonable visitation privileges” may be granted to a stepparent

140. *Id.* at ¶ 11.

141. *Id.* at ¶ 11 (trial court dismissed because “Nicholas lacked standing”).

142. *Id.* at ¶ 12 (“Nicholas’[s] arguments are not well[-]grounded”).

143. The Illinois courts employed Illinois, and not Wisconsin laws, seemingly because William’s “home state” was Illinois. *See, e.g.*, 750 ILL. COMP. STAT. 36/102(7) (“state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of the child custody proceeding”). Had Wisconsin law been applied, the outcome may have differed. *See, e.g.*, *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 641-2 (Wis. 2004) (while precluding the use of “the equitable parent doctrine,” court allows “equitable estoppel” to “address those instance where unfairness in a proceeding would harm children and adults, absent the intervention of the court’s equitable powers”); *Hendrick v. Hendrick*, 765 N.W.2d 865, 868 (Wis. 2009) (“the focus of a proceeding to determine a child’s paternity is whether the ‘best interests’ of the child would be served thereby”). *But see, In re Christian R.H.*, 794 N.W.2d 230, 233-34 n. 7 (Wisc. Ct. App. 2010) (while there is common law authority to order child “visitation,” there is no nonstatutory authority to confer “parental rights”). Had William been formally adopted by Nicholas under Wisconsin law, the *Mancine* court would likely have deferred to Wisconsin adoption law. *See, e.g.*, 750 ILL. COMP. STAT. 45/27 (full faith and credit to paternity establishments in other states when done “through voluntary acknowledgment, tests to determine inherited characteristics, or judicial or administrative processes”). *See also, Port v. Cowan*, 426 Md. 435 (Md. 2012) (under doctrine of comity, Maryland allows same sex couple wed in a civil ceremony in California to divorce in Maryland though a same sex marriage was not then allowed in Maryland, where same sex marriage was also not explicitly deemed by the Maryland legislature as void or unenforceable). On when “home state” law may not be applied (e.g., so that a *Mancine* court would apply Wisconsin common law rulings). *See Castro v. Castro*, 818 N.W.2d 753 (N.D. 2012).

144. Neither the trial nor appellate court examined whether the trial judge had some other, independent authority to order “a child’s best interest” inquiry during the custody dispute between Miki and Nicholas. *See, e.g., In re Joshua S.*, 2012 IL App. 2d 120197 (invalidating a criminal case plea agreement where the State promised not to seek parental rights termination; court ruled: “A trial court, if convinced that it is in a child’s best interest, can order the State to prosecute a petition for termination of parental rights against the State’s wishes without violating the separation-of-powers doctrine.”)

145. *Mancine*, 2012 IL App. (1st), ¶ 17 (citing 750 ILL. COMP. STAT. 5/601(b)(2)). *See also In re T.W.*, 851 N.E.2d 881 (Ill. App. 5th 2006). Illinois is not alone in its focus on “physical custody.” *See, e.g., In re B.B.O.*, 277 P.3d 318 (Col. 2012) (parental consent to nonparent childcaring is unnecessary where child is not in parent’s physical custody and nonparent has cared for child for at least six months).

146. *Mancine*, 2012 IL App. (1st), ¶ 18 (recognizing there are “exceptions where a nonparty may be awarded custody or visitation;” Koelle, cited by Nicholas, was distinguished as there the deceived father “sought only visitation privileges”). *See also id.* at ¶ 20 (distinguishing another case cited by Nicholas, *In re Marriage of Roberts*, 271 Ill. App. 3d 972 (4th Dist. 1995), because in that case there was a presumption of paternity in the man seeking child custody due to marriage at the time of birth).

only if “the child is at least 12 years old” and the stepparent has lived with the parent and stepparent for at least 5 years.<sup>147</sup> The court did not address any common law stepparent visitation rights going beyond any statutes that might confer childcare standing to Nicholas.<sup>148</sup>

As to equitable estoppel,<sup>149</sup> the appeals court found no misrepresentation or concealment of a material fact, as Nicholas always knew that “formal adoption was necessary.”<sup>150</sup> It suggested Nicholas slept on his rights.<sup>151</sup> Nicholas’ vasectomy, prompted by Miki’s treatment of him as a father, did not help him in his quest for custody, as reliance on Miki’s

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147. 750 ILL. COMP. STAT. 5/607(b)(1.5). See also CAL. FAM. CODE 3101(a), (c), (d)(2)(in a marriage dissolution proceeding a stepparent may obtain “reasonable visitation” if “in the best interest of the minor child” and not in conflict with the custody or visitation rights of a birth parent not a party to the dissolution proceeding).

148. There are statutory provisions on “reasonable visitation rights” for “Grandparents, great-grandparents and siblings of a minor child, who is one year or older,” where “there is an unreasonable denial of visitation by a parent” and perhaps parental objection. 750 ILL. COMP. STAT. 5/607(a), (a-3); (a-5)(1)(A-15). See, e.g., *Pruitt v. Pruitt*, 2013 IL App (1st) 130032. See also *Dumiak v. Kinzer–Somerville*, 2013 IL App (2d) 130336, ¶ 19 (reading grandparent standing to seek childcare as requiring child not be in parent’s physical custody, per 750 ILL. COMP. STAT. 5/601(b)(2)); *In re R.L.S.*, 844 N.E.2d at 34 (grandparents who petition for guardianship of grandchild need not show lack of physical custody in parent; but to prevail, they must show each parent is unfit).

There are also statutory provisions allowing guardians to seek visitation where natural parents desire to end the guardianships and nonparent visits. See, e.g., *In re T.P.S.*, 2011 IL App (5th) 100617, 352 Ill. Dec. 590, 954 N.E.2d 673 (former same-sex female partner had standing; even with material change of circumstances, as with breakup of same sex couple, earlier-appointed guardian—who had secured a natural parent’s consent—could continue visitation if it served the best interests of the minor, citing 755 ILL. COMP. STAT. 5/11-14.1(b)).

149. *Mancine*, 2012 IL App. (1st), ¶¶ 25-29. Parenthood by equitable estoppel differs from equitable parenthood because only with the former may one, here Nicholas, choose to block the attempt by another, here Miki, to deny one’s (here Nicholas’) parenthood. Seemingly, with equitable parentage, one may not choose to avoid parenthood one had earlier embraced. See, e.g., *In re Mallett*, 37 A.3d 333, 336 (N.H. 2012) (distinguishing the two equitable concepts in discussing the limited opportunity for a common law marriage). Equitable estoppel may also bar one who petitions for a parentage order from seeking such an order. See, e.g., *In re Felix O.*, 89 A.D.3d 1089 (N.Y. Sup. App.2d 2011) (alleged natural father barred from attacking marital paternity presumption for mother’s husband, as paternity case filed 5 years after birth) and *In re Starla D. v. Jeremy E.*, 95 A.D.3d 1065 (N.Y. Supp. App. 3d 2012) (alleged biological father may equitably estop mother’s pursuit of paternity order when she acquiesced in development of a close relationship between child and another father figure where the disruption of that relationship would be detrimental to child’s interests; no estoppel here as no “recognized and operative parent-child relationship” in another man). See also TEX. EST. CODE 1002.004 (West 2014) (for guardianship proceedings, “child” includes one “adopted by a parent under a statutory procedure or by acts of estoppel”). Similar is TEX. PROB. CODE 601(3) (West 2014).

150. *Mancine*, 2012 IL App. (1st), ¶ 27.

151. *Id.* at ¶ 29 (upon noting that Nicholas never petitioned to adopt William, the court quoted *Bell v. Louisville & Nashville, R.R. Co.*, 106 Ill.2d 135, 146, 478 N.E.2d 384 (1985) [which cited *Flannery v. Flannery*, 320 Ill. App. 421, 432, 51 N.E.2d 349 (4th Dist. 1943), where the court said: “Equity aids the vigilant and not those who sleep on their rights.”]).

statements were irrelevant since her statements were not false or misleading.<sup>152</sup>

As to equitable adoption, the court found the theory was unavailable in Illinois custody cases.<sup>153</sup> Yet the court observed that the theory is available in intestate succession cases if there had been a “contract to adopt.”<sup>154</sup> In these cases, a child would benefit financially regardless of the level of earlier childrearing, but there would be no childcare issues. The Illinois Supreme Court has since asked the Appellate Court in *Mancine* to reconsider its finding in light of the recent Supreme Court intestate succession case, *DeHart v. DeHart*,<sup>155</sup> which allowed intestate heirship to one whom the decedent had intended to adopt.<sup>156</sup>

As to *parens patriae*, there was no statutory provision generally allowing a nonparent to seek custody even if in the child’s best interests.<sup>157</sup> According to the appeals court any such a provision would create tensions with the “superior rights doctrine.”<sup>158</sup>

Finally, as to leaving William “fatherless,” the court observed that “no liberty interest exists with respect to a child’s psychological attachment to a non-biological parent.”<sup>159</sup> Evidently, there was also no comparable common

152. *Mancine*, 2012 IL App. (1st), ¶ 25. Had Miki treated Nicholas as a father in some agreed court order, then Nicholas may have acquired parental standing. *In re Marriage of Schlam*, 271 Ill. App. 3d 788, 648 N.E.2d 345 (Ill. App. 1995) (mother’s earlier agreement, during divorce, to joint parenting estopped her from challenging former husband’s visitation interests years later, though ex-husband was not a presumed father as he married the mother 6 years after the birth of the child) and *In re M.M.D.*, 213 Ill. 2d 105, 117, 820 N.E.2d 392, 401 (Ill. 2004) (father’s earlier agreement on grandparent visitation incorporated into a court order was enforceable even when based on a statute later declared unconstitutional; father could seek court modification of visitation order). The *Mancine* court incidentally observed that even if reliance on Miki’s misrepresentations or concealments were relevant, any reliance “was not reasonable.” *Mancine*, 2012 IL App. (1st), ¶ 29.

153. *Id.* at ¶¶ 31-34.

154. *Id.* at ¶¶ 32-34 (the courts are more sympathetic to equitable adoption in intestate succession cases, as here the children benefit and there is no infringement on superior parental rights). By contrast, where intended parents sue for wrongful death of children not formally adopted, but for whom there were contracts to adopt, such intended parents are not the next of kin under the wrongful death statute. *Id.* at ¶ 33.

155. *DeHart v. DeHart*, 2013 IL 114137 (in intestate succession setting there can be both a contract to adopt and an equitable adoption claim by one who was neither born to nor formally adopted by the decedent). At times state statutes are explicit regarding monetary recoveries by those reared by nonparent decedents. *See, e.g.*, ARK. CODE 16-62-102(d)(3) (West 2013) (beneficiaries of wrongful death actions include those to whom the deceased stood in loco parentis at any time during the life of the deceased), applied in *Zulpo v. Blann*, 2013 Ark. App. 750.

156. *Mancine v. Gansner*, 372 Ill. Dec. 462, 992 N.E.2d 1 (Ill. 2013). In addition, reconsideration was ordered for a second case, *In re Scarlett Z.D.*, 2012 IL App (2d) 120226, *appeal denied judgment vacated.*, 372 Ill. Dec. 464, 992 N.E.2d 3 (Ill. 2013), wherein an unwed father had sought and was denied childcare opportunities.

157. *Mancine*, 2012 IL App. (1st), ¶ 37.

158. *Id.* at ¶ 15 (also saying that no precedent cited allows “extraordinary” judicial power to confer standing on one in a custody case who “is not legally” the parent of the child).

159. *Id.* at ¶ 39 (citing *In re Marriage of Simmons*, 355 Ill. App. 3d, 942, 956, 825 N.E. 2d 303 (2005), which cited *In re Petition of Kirchner*, 164 Ill. 2d 468, 500, 649 N.E. 2d 324 (1995); in these two

law attachment interest held by either William or Nicholas.<sup>160</sup> Recognition of parent-like attachments, to serve children's as well as societal and nonparents' interests, could come by statute. In the trial court, the circuit judge in *Mancine* lamented over the lack of statutory authority, saying "our evolving social structure has created nontraditional relationships" that demand "a comprehensive legislative solution."<sup>161</sup>

#### V. NEW ILLINOIS STEPPARENT CHILDCARE OPPORTUNITIES

New Illinois statutes should expressly expand opportunities for second parenthood for certain former stepparents<sup>162</sup> as well as for greater judicial discretion to recognize nonparent childcare standing for other former stepparents.<sup>163</sup> Until then, childcare decisions generally will be left to

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cases the lack of a "liberty interest" was found regarding "a child's psychological attachment to a non-biological parent," including a transsexual male who undertook an "invalid same-sex marriage" to a woman who later bore "an artificially inseminated child," *Simmons*, 355 Ill. App. 3d at 945, 955-956, and an adoptive parent who child reared under a private adoption that was later deemed invalid, *Kirchner*, 164 Ill.2d at 472-474). *But see*, *Lofton v. Secretary of DCFS*, 358 F.3d 804, 814 (11th Cir. 2004) (a liberty interest could arise where state law "created a 'justifiable expectation' of family unit permanency," as with a foster parent, or a legal guardian, or perhaps a common law parent).

160. *See Simmons v. Simmons*, 486 N.W.2d 788 (Minn. Ct. App. 1992) (former stepparent, with no statutory right to visitation because he had not lived with the child for two years, could urge a common law right to visitation if in loco parentis to the child).
161. Transcript of Proceedings Before Judge Nancy Katz in *Mancine v. Gansner*, Case No. 10D9394 (March 14, 2011), at p. 14. Judge Katz also observed that it was an "unfortunate situation" that Nicholas lacked standing to seek custody under the Illinois Marriage and Dissolution of Marriage Act. *Id.* at 14-15. Further, she "would love nothing better than to determine what is in William's best interests" regarding Nicholas' parenting in this "heart breaking case." *Id.* at 5.
162. *See, e.g.*, Stephen N. Peskind, *Who's Your Daddy? An Analysis of Illinois' Law of Parentage and the Meaning of Parenthood*, 35 LOY. U. CHI. L.J. 811 (2004) (parentage opportunities for non-biological and non-adoptive parents in Illinois should be grounded in new statutory provisions generally prioritizing children's best interests). Peskind's argument not fully embraced herein, in part, because of its difficulties under *Lehr v. Robertson*, as described in Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (and Other Parenthood) After Lehr and Michael H.*, 43 U. TOL. L. REV. 225 (2012) (federal constitutional paternity opportunity interests in unwed fathers who sire children via sex with unwed mothers) [hereinafter "Parness and Townsend"] and because of the current need under the Illinois superior rights doctrine that consents to childrear (express or implicit) by both natural or adoptive parents usually be judicially recognized. *See, e.g.*, *In re Marriage of Engelkens*, 821 N.E.2d 799 (Ill. App. 3d 2004) (child's best interests cannot override a biological father's decision to discontinue reasonable visitation privileges for former stepmother notwithstanding his earlier agreement to allow such visits where the former stepmother did not detrimentally alter her position in reliance on the agreement); *In re Coulter*, 2012 IL 113474 (joint parenting agreements on relocation differ when they are and are not incorporated into court orders).
163. For an argument that Illinois common law should recognize childcare interests in non-biological and non-adoptive child caretakers whose same sex couple relationships are dissolving, see Desiree Sierens, *Protecting the Parent-Child Relationship: The Need for Illinois Courts to Extend Standing to Non-Biological Parents in Regard to Visitation Proceedings*, 25 N. ILL. U. L. REV. 483 (2005).

“natural or adoptive parents”<sup>164</sup> regardless of their earlier accessions to stepparent childcare and regardless of the best interests of their children.<sup>165</sup> Floodgates will not open if Illinois lawmakers proceed cautiously.<sup>166</sup>

#### A. Pending Proposals

Recognizing the need for childcare reforms, the Illinois General Assembly created a study committee, resulting in recent proposed Illinois Parentage Acts [hereinafter the original 2013 proposal is Proposed Parentage Act<sup>167</sup>] and proposed Illinois Marriage and Dissolution of Marriage Acts [hereinafter the original 2013 proposal is Proposed MDM Act<sup>168</sup>]. The

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164. 750 ILL. COMP. STAT. 45/2 (Illinois Parentage Act of 1984). While certainty seemingly is promoted, it comes at the expense of children’s and adults lived experiences and legitimate expectations, creating a new class of illegitimate children. Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER, SOC. POL’Y & L. 623, 662-67 (2012).

165. *See, e.g.*, T.M.H. v. D.M.T., 79 So.2d 787 (Fla. App. 5th 2011), a case involving possible future childrearing by a woman who provided her ova to her lesbian partner so both women could childrear; a concurring opinion declared:

I write . . . to highlight the unfortunate absence of an important consideration that should inform our decision in cases such as this. Yes, I know, as did the able trial judge, that the best interests of the child is ordinarily not the test to be applied . . . I think we need to find a way to redirect our focus in cases of this kind so that best interests becomes part of the decisional matrix. Surely we have to make room for that factor in the crucible. Exploring the parental rights of one litigant or the other should not be the end of our deliberations. In the final analysis, we still ought to come to grips with what is best for the child. Here, having two parents is better than one. *Id.* at 804-05.

166. Miki argued in *Mancine* that any recognition of Nicholas’ childcare interests in William “would open the floodgates” to any ex-boyfriend or to “virtually anyone” who cared for William. Appellee’s Answer to Petition for Leave to Appeal, at 4 [hereinafter Appellee Answer]. Similar concerns have been judicially expressed where adequate limits have nevertheless been found. *See, e.g.*, Chatterjee v. King, 280 P.3d 283 (N.M. 2012) (Bosson, J., specially concurring) (“I agree with the outcome reached by the majority, but on narrower grounds. I write out of concern that this Opinion might be interpreted to expand the population of presumed parents in a manner that would shake settled expectations of custody rights and child support responsibilities.”). But, as the forenoted non-Illinois American state statutes illustrate, floodgates can be controlled. Open adoption contracts could also subject to floodgate concerns. But as Professor Brian Bix observes: “Gradually, courts and legislatures have moved toward making these arrangements enforceable. As of May 2011, 26 states and the District of Columbia have statutes authorizing the enforcement of such agreements.” “Agreements in Family Law,” posted at SSRN, abstract id 2125343, at p. 15 (March 1, 2012) (such agreements are usually “conditional on judicial approval and subject to judicial modification”).

167. The Illinois Family Law Study Committee’s work led to HB 6191, 97th Illinois General Assembly (introduced 5-31-12), which includes a Proposed Illinois Parentage Act of 2012. H.B. 6191, 97th Gen Assemb., Reg. Sess. (Ill. 2012). The 2013 Proposed Illinois Parentage Act (as originally introduced on 2-1-13) appears in HB 1243, 98th General Assembly. H.B. 1243, 97th Gen Assemb., Reg. Sess. (Ill. 2013).

168. The Illinois Family Law Study Committee’s work led to HB 6192, 97th Illinois General Assembly (introduced 5-31-12), which included proposed changes to a variety of Illinois statutes governing family matters, including the Marriage and Dissolution of Marriage Act, the Alienation of Affections Act, and the Domestic Violence Act. H.B. 6192, 97th Gen Assemb., Reg. Sess. (Ill. 2012). The major proposed changes are described in Adam W. Lasker, *Is family-law overhaul on the way?*, 100



proposals must be read together as they cover different childcare interests. For example, the marital presumptions establishing parentage are found in the Proposed Parentage Act,<sup>169</sup> while the Proposed MDM recognizes legal parentage for certain unwed parents.<sup>170</sup> The proposals, at times, however, do speak to similar settings.<sup>171</sup> Unfortunately, the proposals insufficiently address many of the stepparent childcare issues raised by *Mancine* as they do not speak directly to equitable adoption<sup>172</sup> or to the current stepparent childcare statute. Generally, the Proposed Parentage Act would not allow a former stepparent to be a presumed parent<sup>173</sup> and the Proposed MDM Act would not allow a former stepparent<sup>174</sup> to be eligible for “an allocation of parenting time” if the relationship between the parent and stepparent ended.<sup>175</sup>

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ILL. B.J. 458, 458-59 (2012). The 2013 Proposed Illinois Marriage and Dissolution of Marriage Act (as originally introduced on 1-9-13) appears in SB 0010, 98th General Assembly. S.B. 10, 98th Gen. Assemb., Reg. Sess. (2013).

169. *See, e.g.*, Proposed Parentage Act, at §204(a)(1) (man presumed a parent of a child if “he and the mother . . . are married to each other or are in a state-recognized civil union and the child is born . . . during the marriage or civil union, except as provided by the Gestational Surrogacy Act or Article 7 of this Act” (Child of Assisted Reproduction)).
170. *See, e.g.*, Proposed MDM, at 750 ILL. COMP. STAT. 5/600 (“Equitable parent” includes “a person who, though not a legal parent of a child . . . lived with the child for at least 2 years” while believing to be “the child’s biological parent”).
171. *Compare, e.g.*, Proposed Parentage Act, at § 204(a)(5) (“man is presumed to be a parent of a child if . . . for the first two years of the child’s life, he resided in a household with the child and openly held out the child as his own during that time”) with Proposed MDM, at 750 ILL. COMP. STAT. 5/600 (“Equitable parent” includes “a person who, though not a legal parent of the child . . . lived with the child since the child’s birth or for at least 2 years, and held himself out as the child’s parent while accepting parental responsibilities, under an agreement with the child’s legal parent (or, if there are 2 legal parents, both parents) to rear the child together, each with allocated parental rights and responsibilities, provided that a court finds that recognition of the person as a parent is in the child’s best interests”).
172. The Proposed MDM Act does speak to equitable parenthood, but it would not include Nicholas as he had not lived with Miki and William for two years before his divorce. S.B. 10, 98th Gen. Assemb., Reg. Sess. (2013).
173. S.B. 10, 98th Gen. Assemb., Reg. Sess. (2013).
174. *See id.* Nicholas and Miki began cohabitating in September 2008 and Miki sought marriage dissolution in August 2010. As well, Elizabeth already had two legal parents—Miki and John Mancine. *Compare* MONT. CODE 40-4-221 and 40-4-211(6) (upon death of “a parent,” a nonparent who had established with the child a child-parent relationship can seek “a parenting plan hearing”) and COLO. STAT. 14-10-123(1)(c) (nonparent can seek “allocation of parental responsibilities” if nonparent “has had the physical care of a child” for more than 182 days, as long as action is commenced within 182 days “after termination of such physical care”).
175. Proposed MDM Act, at 750 ILL. COMP. STAT. 5/601.2(b)(3), with parenting time defined in 750 ILL. COMP. STAT. 5/600. Allocations of parental time, however, involve less significant childcare opportunities than allocations of parental responsibilities. *See* Proposed MDM Act, at 750 ILL. COMP. STAT. 600 (parental responsibilities include both “parenting time” and “significant decision-making responsibilities with respect to a child”).

As compared to parenting “responsibilities” or “time,” in Ohio noncustodial family members, including grandparents and other relatives, may seek “reasonable companionship or visitation rights” when a related custodial parent dies, OHIO REV. CODE 31-9.11, as long as *Troxel* limits are met, *Oliver v. Feldner*, 149 Ohio App.3d 114, 776 N.E.2d 499 (Ohio App. 7th 2002) (*Troxel* limits

Currently, the parents of children born of sex<sup>176</sup> having superior rights generally include biological and adoptive parents.<sup>177</sup> Biological parents in Illinois now include men whose natural ties are statutorily presumed, though lacking in reality. Men whose wives bear children born of sex are presumed natural parents.<sup>178</sup> Seemingly, there is no presumption (at least statutory) for a man married to a mother during her pregnancy, but unmarried either at the time of conception or birth.<sup>179</sup> Where natural ties in the husband are known to be lacking at birth, or are shown to be lacking thereafter, this presumption can nevertheless continue, at times even when the real natural father,<sup>180</sup> the

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- not met) and *In re K.P.R.*, 197 Ohio App.3d 193, 966 N.E.2d 952 (Ohio App. 12th 2011) (*Troxel* limits may have been met, where “relative” of deceased mother was a stepfather who was awarded visitation, in a setting where the custodial biological father objected but had earlier waived nonjurisdictional arguments regarding the visits).
176. *See, e.g.*, 750 ILL. COMP. STAT. 45/2 (under Illinois Parentage Act of 1984, “parent and child relationship” includes child and “natural or adoptive parents”). The same general approach has been employed elsewhere, albeit with dissent. *See, e.g.*, *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (differing views on the approach, earlier approved in *Matter of Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991)). Biological and adoptive children have not always been comparably treated. *See, e.g.*, *Anderson v. BNY Mellon*, 463 Mass. 299 (2012) (before 1958, adopted children were generally excluded from many instruments addressing inheritance).
177. Parentage for children not born of sex presents different questions. *Consider, e.g.*, 750 ILL. COMP. STAT. 47/1 et seq. (Gestational Surrogacy Act) (children born to surrogates may be parented by gametes contributors, 47/20(b)(1)) and 750 ILL. COMP. STAT. 40/3 (semen donor is treated as natural father of a child conceived via artificial insemination and born to his wife). Childcare issues for stepparents typically involve children born of sex so the main focus herein will be on these children.
178. *See, e.g.*, 750 ILL. COMP. STAT. 45/5(a)(1) (“A man is presumed to be the natural father of a child if . . . he and the child’s natural mother are or have been married to each other . . . and the child is born or conceived during such marriage”).
179. *Compare* MO. STAT. 210.8221.(1) (“born during marriage”); CAL. FAM. CODE 7540 (“child of a wife cohabiting with her husband”).
180. An alleged real natural father can bring an “action to determine the existence of the father and child relationship, whether or not such a relationship is presumed.” 750 ILL. COMP. STAT. 45/7(a). Under statute, such an action by the alleged “natural parent” shall only “be barred if brought later than 2 years after the child reaches the age of majority.” 750 ILL. COMP. STAT. 45/8(a)(1). Yet the Illinois Supreme Court has suggested that an alleged natural father who comes in “ten years later,” saying “I want a cotton swab, I’m the dad,” would likely lose. *In re Parentage of John M.*, 817 N.E.2d 500, 510 (Ill. 2004). In so suggesting, it urged law reformers seeking greater clarification go to the General Assembly. *Id.* at 511. *See also In re Marriage of Slayton*, 685 N.E.2d 1038 (Ill. App. 4th 1997) (real natural father waived objection to ex-husband’s request for visitation under suspect federal constitutional standard) [hereinafter *In re Slayton*]. *Slowinski v. Sweeney*, 64 So.3d 128 (Fla. App. 1st 2011) (alleged biological father has no statutory standing to bring paternity suit where marriage and family is intact) and *Evans v. Wilson*, 856 A.2d 679 (Md. 2004) (similar to Florida’s approach).

wife,<sup>181</sup> or the husband<sup>182</sup> objects.<sup>183</sup> There are, for example, statutory standing requirements and time limits for objections.<sup>184</sup> The marital

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181. The wife, “the natural mother” under 750 ILL. COMP. STAT. 45/7(b) can seek solely to rebut a marital paternity presumption, under 750 ILL. COMP. STAT. 45/(a)(1) and (2), but only within “2 years after the petitioner obtains knowledge of relevant facts,” 750 ILL. COMP. STAT. 45/8(a)(3). *See also In re Slayton*, 292 Ill. App. 3d at 385 (waiver of chance to rebut as objection raised only at end of custody hearing). Rebuttal perhaps may be sought indirectly, however, in an action by the mother which seeks to determine, on behalf of her child, an alleged natural father’s paternity, which itself can be brought up to 2 years after the child reaches the age of majority, 750 ILL. COMP. STAT. 45/8(a)(1). Compare Louisiana Civil Code 185-193 (while husband residing with wife may “disavow paternity” within a year of when he “learns or should have learned of the birth,” wife may disavow only when she seeks to establish her new husband is the father); *Clark v. Evans*, 254 P.3d 672 (Okla. 2011) (former wife estopped from rebutting marital presumption seven years after divorce); and *In re Custody of D.T.R.*, 796 N.W.2d 509 (Minn. 2011) (wife can appeal loss by biological father of paternity action to husband with a marital presumption, even where the biological father does not appeal, as she is “an aggrieved party”).

182. A husband, a presumed natural father under 750 ILL. COMP. STAT. 45/5(a)(1), can seek solely to rebut the presumption, under 750 ILL. COMP. STAT. 45/7(b), but only within “2 years after petitioner obtains knowledge of relevant facts,” 750 ILL. COMP. STAT. 45/8(a)(3). *See also In re Marriage of Roberts*, 271 Ill. App.3d 972, 981 (husband, who was not biological father, can seek custody when he petitions for marriage dissolution as long as marital presumption had not been rebutted earlier). Compare UTAH CODE 7-45g-607(1) (man presumed to be father under marital presumption, Utah Code 78-45g-204(1)(a), may challenge “at any time prior to filing an action for divorce”); Louisiana Code Art. 189 (action by husband for disavowal of marital paternity presumption, under Art. 184, usually “is subject to a liberative prescription of one year”); and MINN. STAT. 257.57(b) (to declare “nonexistence” of marital paternity presumption, husband may not sue “later than three years after the child’s birth”).

In Illinois, while a husband has two years to seek rebuttal of the marital presumption, his wife has twenty years to sue the natural father in a paternity action even when the husband objects because he may lose his parental status in the paternity action. *In re G.M.*, 2012 IL App (2d) 110370.

183. It seems unclear whether the marital presumption of parentage continues when only a nonparent, like a grandparent, objects. *See, e.g., In re A.K.*, 620 N.E.2d 572 (Ill. App. 4th 1993) (great-grandmother objects to childcare interests asserted by presumed, but not natural, father in child abuse proceeding; two justices recognize voice from presumed father as consistent “with any ability he might have to adopt.” *Id.* at 989. While a third justice dissents, finding the state is required to prove the presumed father unfit in order to obtain an order designating the child as a ward. *Id.* at 990). *See also Ex Parte S.P.*, 72 So.3d 1250 (Ala. Civ. App. 2011) (maternal grandmother lacked standing to disestablish paternity in deceased daughter’s husband).

184. In Illinois, the statutory requirements vary by who petitions to rebut the presumption. *See, e.g.,* 750 ILL. COMP. STAT. 7(b) and (b-5) (action to declare nonexistence of parent and child relationship may be brought “by the child, the natural mother, or a man presumed to be the father”; such an action may also be brought “subsequent to an adjudication of paternity in any judgment by the man adjudicated to be the father” pursuant to certain statutory presumptions if DNA tests show he is not the natural father). Compare, COLO. STAT. 19-4-107(b) (for “declaring the nonexistence of the father and child relationship presumed” due to marriage or attempted marriage, an action must be “brought within a reasonable time after obtaining relevant facts but in no event later than five years after the child’s birth;” for a similar declaration involving a presumption due to receipt into home and openly holding out the child as one’s own, due to a paternity acknowledgement or due to genetic tests, there are no comparable time limits); COLO. STAT. 19-4-105(c) (special factors, involving “fraud, duress or mistake of material fact,” are necessary in challenging certain paternity acknowledgements); TENN. STAT. 36-2-30(b)(2)(A) (if mother and husband were married and living together at the time of conception and “have remained together . . . through the date a petition to establish parentage is filed,” and if mother and husband swear the “husband is the father,” “any action seeking to establish parentage must be brought within twelve (12) months of the birth of the

presumption operates in Illinois, though not elsewhere, even where the husbands are sterile, or living and sleeping apart from their wives.<sup>185</sup> Presumed parentage for a husband can continue elsewhere even when the biological father timely seeks to childcare.<sup>186</sup>

The Proposed Parentage Act in Illinois not only generally maintains the current marital paternity presumptions,<sup>187</sup> but also extends presumptions to settings outside of marriage. The proposal, for example, recognizes “parentage” in a man who is presumed to have natural ties if “for the first 2 years of the child’s life,” the man resided “in a household with the child and openly held out the child as his own during that time.”<sup>188</sup> But this presumption would not cover Nicholas Gansner as he “had moved in” with Miki only within a month of William’s birth.<sup>189</sup> This proposal, with its two year residency requirement, contains a more limited presumption than has

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child;” husband and wife are “estopped to deny paternity in any future action” if they so swear); *and* WASH. CODE 26.26.530 (with certain exceptions, actions to rebut marital paternity presumptions, 26.26.116, must be “commenced not later than two years after the birth of the child” by “a presumed father, the mother, or another individual”).

Elsewhere, there are also common law doctrines limiting attempts to disestablish statutory presumptions of parentage. *See, e.g., K.E.M. v. P.C.S.*, 23 A.2d at 1050 (paternity by estoppel can bar a mother’s husband from denying paternity of a marital child where the child’s best interests are served, perhaps even if there has been no deceit, in an action by the mother against the biological father for child support).

185. *Compare, e.g.,* 750 ILL. COMP. STAT. 45/2 (paternity presumption where man is or was married to natural mother when a child born of sex was conceived or delivered) *with* CAL. FAM. CODE 7540 (“the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage”).
186. *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110, 120 (conclusive marital paternity presumption promotes “family integrity and privacy”). However, it remains unclear whether the U.S. Supreme Court will rule that all biological fathers have no “federal constitutional parental prerogatives” when their children are born into intact marriages. *Parness & Townsend, supra* note 162, at 237-38.
187. The proposal does limit, significantly, the current presumption by covering children born “during” marriage, but not children “conceived” during marriage. *Compare* Proposed Parentage Act, at §204(a)(1) (man is presumed a parent if a child born to the mother “during” a marriage or civil union) to 750 ILL. COMP. STAT. 45/5(a)(1) (man is presumed a “natural father” if married to the natural mother when “child is conceived or born”).
188. Proposed Parentage Act, at 750 ILL. COMP. STAT. 204(a)(5). Holding out to be something one is not, and acquiring the status one falsely claims, is not unique to parentage. *See, e.g.,* Small v. McMaster, 352 S.W.3d 280, 282 (Tex. App.-Houston 14th 2011) (Texas statute recognizing “informal” marriage requires a couple to present “to others that they were married”).

There is no “first 2 years” rule in Minnesota or Alabama. *See* MINN. STAT. 257C.08(4) (minor who resided with a person for 2 years may be subject to a reasonable visitation order, if the person established “emotional ties creating a parent and child relationship,” if visitation served the child’s best interests, and if such visitation “would not interfere with the relationship between the custodial parent and the child”.); ALA. CODE 26-17-204(a)(6) (man receives child into his home, openly holds out child as his natural child, and “establishes a significant parental relationship”).

189. *In re* Marriage of Mancine, 2012 IL App. (1st) 111138, ¶ 4. There was no indication in the Appellate or Supreme Court briefs of allegations that William resided in any way with Nicholas before Nicholas and Miki moved in together.

been undertaken elsewhere, as specific habitation periods are sometimes unnecessary or more limited.<sup>190</sup>

There are also no current or proposed statutory presumptions in Illinois establishing parentage for men, with or without natural ties, whose girlfriends bear children, even where cohabitation began before birth and continued thereafter; there was an agreement on dual parentage; and the couple lived in a unitary family unit.<sup>191</sup> Further, as there is no common law marriage in Illinois, there is not much chance for presumed common law parentage.<sup>192</sup>

190. *See, e.g.*, CAL. FAM. CODE 7611 (d) (receipt of child in home and openly holding out child as her/his natural child), applied in *L.M. v. M.G.*, 145 Cal. App. 4th 133 (Cal. Ct. App. 4th 2012) (former lesbian partner is presumed parent of child adopted by her ex-partner during their cohabitation—though there was no registered domestic partnership); *In re Bryan D.*, 199 Cal. App. 4th 127 (Cal. Ct. App. 2d 2011) (recognizing grandmother may be presumed parent under Section 7611(d)); N.M. Stat. 40-11-5 (A)(4) (paternity presumption of “natural” fatherhood for a man who “openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child”), applied to a woman in *Chatterjee*, at 287-88; ALA. CODE 26-17-204 (a)(5) (paternity presumption outside of marriage when man receives child into his home, openly holds child out as his own, and establishes a significant parental relationship), applied in *Ex parte T.J.*, 89 So.3d 744 (Ala. 2012) (non-biological father of a child could be presumed father under this section); and MONT. CODE 40-4-211(4)(b) and (6) (“parenting plan” can be pursued by a nonparent with a “child-parent relationship”).

Extending such parentage to a woman is more problematic for children born of sex, as the natural mother acquires parental rights simply by giving birth. *See, e.g., In re D.S.*, 207 Cal. App. 4th 1088 (Cal. Ct. App. 4th 2012) (stepmother who received a child to her home, Cal. Family Code 7611(d), nevertheless is not a presumed mother where natural mother objects though child had been living with natural father; stepmother must seek to adopt to attain parenthood status where natural mother “abandoned her parental rights and responsibilities”).

*See also* KY. STAT. 403.270 (1)(a) and (b) (“de facto custodian” is a primary caregiver and financial supporter of a child who resided with the child for more than 6 months if the child is under 3; such custodian has “the same standing in custody matters that is given to each parent”). Incidentally, in Kentucky, even when nonparents have not established de facto custodian status, they can pursue custody notwithstanding the superior right of parents by presenting “clear and convincing” evidence of parental unfitness or waiver of superior rights. *Mullins v. Picklesimer*, 317 S.W. 3d 569, 578 (Ky. Ct. App. 2010). De facto custodians were found in, e.g., *Ramsey v. Ramsey*, 2012 WL 3047210 (Ky. Ct. App. 2012) (maternal grandparents deemed de facto custodians over their daughter’s [the natural mother’s] objection) and *Ball v. Tatum*, 373 S.W.3d 458 (Ky. App. 2012) (maternal grandparents deemed primary residential custodians over mother’s objection).

191. Seemingly, such statutory presumptions are available to state legislators wishing to protect “unitary” families under the reasoning of federal constitutional cases like *Michael H.*, 491 U.S. at 123. This availability, while not yet generally seized by states, is discussed in *Parness & Townsend, supra note 162*, at 233-42. Another area of possible presumptions involves children born to unwed mothers as a result of artificial insemination consented to by their intimate partners. In Illinois, such consents do not prompt parental rights. 750 ILL. COMP. STAT. 40/2 and 3 (consents available only to husbands). Yet another possible presumption involves a surrogacy contract between a woman who will bear a child and an unwed couple who will secure custody and raise the child upon birth. In Illinois, such surrogacy contracts can be valid if the statutory requirements on consent and the like are met. 750 ILL. COMP. STAT. 47/1 et seq. (Gestational Surrogacy Act, especially Sections 10 and 20(b)). Outside of Illinois, such surrogacy pacts can be “void and unenforceable as contrary to public policy.” *See, e.g., MICH. COMP. LAWS 722.855.*

192. *See, e.g., Ayala v. Fox*, 564 N.E.2d 920 (Ill. App. 2d 1990). *Compare, IOWA CODE 252A.3* (“A child or children born of parents who held or hold themselves out as husband and wife by virtue of a common law marriage are deemed the legitimate child or children of both parents.”); *Small*, 352

As for adoption, under *Mancine* the superior parental rights involving children born of sex seemingly arise only when there are formal adoptions.<sup>193</sup> Intent or agreement to adopt, or parental allowance of childcare by others, if not undertaken under the statutory adoption scheme, are mainly irrelevant in later childcare disputes between parents and (soon-to-be) former stepparents.

While the *Mancine* court rejected any use by Nicholas of an “equitable adoption” doctrine,<sup>194</sup> the court did recognize the theory of “contract to adopt” is available in other settings where there has been no formal adoption.<sup>195</sup> In the appellate decision in *Mancine*, two high court cases were distinguished. In each, the property of intended adopters, who died intestate and who had contracted with the birth parents to adopt, was available to the intended adoptees as child heirs.<sup>196</sup> As well, while the *Mancine* court said no “contract to adopt” could establish the intended adopters as parents with standing to sue for the wrongful deaths of the intended adoptees,<sup>197</sup> it did not say that intended adoptees who could prove a “contract to adopt” could not pursue wrongful death claims involving intended adopters.<sup>198</sup> So, informal

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S.W.3d at 282 (applying TEX. FAM. CODE 2.401(a), which court describes as recognizing an “informal or common-law marriage”); and *Clark Sand Co., Inc. v. Kelly*, 60 So.3d 149, 157 (Ala. 2011) (elements of a common law marriage do not necessarily include “ceremony or particular words,” citing *Boxwell v. Boswell*, 497 So.2d 479, 480 (Ala. 1986)). Even where there was common law marriage, there need not be common law parentage (i.e., no parentage without biological ties or formal adoption per statute).

There is also no statute in Illinois recognizing a marriage which is not solemnized as legal and valid. *See also* UTAH CODE 30-1-4.5 (man and woman have a contract and hold themselves out as husband and wife).

193. Superior parental rights for children not born of sex may arise without marital presumptions or adoptions. *See, e.g.*, 750 ILL. COMP. STAT. 47/25 (in certain settings, gestational surrogacy contracts are enforceable).
194. *In re Marriage of Mancine*, 2012 IL App. (1st) 111138, ¶¶ 31-34.
195. The *Mancine* court also concluded the contract to adopt theory was unavailable to Nicholas “because here there was no contract to adopt.” *Id.* at ¶ 32. This conclusion was not explained and is contradicted by Nicholas’ allegations as to his arrangements with Miki about his adoption of William after the marriage. *Id.*
196. *Id.* at ¶ 32 (*Monahan v. Monahan*, 14 Ill.2d 449, 453 (1958) (oral contract must be proven by “clear and convincing” evidence; though intended adopters were advised their intended son could be provided for by will [as no formal adoption was possible given the son’s age—incidentally, bad legal advice], the absence of any will did not estop the intended son)); and *id.* at ¶ 32 (*Dixon Nat. Bank of Dixon v. Neal*, 5 Ill.2d 328, 335 (1955) (agreement to adopt established “clearly and positively”)).
197. *Id.* at ¶ 33 (*In re Estate of Edwards*, 106 Ill.App.3d 635 (2nd Dist. 1982) (intended adopters were not “next of kin” under statute)).
198. *Id.* at ¶¶ 33-34 (citing *Edwards*, 106 Ill.App.3d 635). While the *Edward’s* court said “the wrongful death statute . . . is to be strictly construed,” it recognized both that the ‘contract to adopt’ theory could be applied in the intestate cases where intended adoptees sought to recover and that an intended adoptee, or at least his/her biological parent who orally contracts for adoption, can sue to obtain “enforcement of contract rights.” *Edwards*, 106 Ill. App.3d at 638. *See also In re Marriage of Mancine*, 2012 IL App. (1st) 111138, ¶ 33 (“oral contract to adopt merely permits the enforcement of contract rights,” presumably by the intended adoptees, and “does not create a parent-child relationship or afford all of the legal consequences of a statutory adoption,” presumably to the intended adopters).

adoption contracts can lead to parentage only for those people who die where any intended children benefit financially.<sup>199</sup> For now, contracts to adopt cannot, in the absence of formal adoption, lead to childcare opportunities for willing, able and living intended parents, meaning that any intended adopted children do not have the chance to benefit via childcare. Here the superior rights of biological or adoptive parents are secured, though these parents may have invited nonparents to childrear and though the intended parents, the children, and others (like intended siblings), are often significantly harmed by the terminations of “established familial or family-like bonds.”<sup>200</sup> This may change after the *Mancine* remand hearings are concluded. But even a sympathetic expansion of the contract to adopt theory from the intestate succession decision in *DeHart* will not help many stepparents. The suggested contract guidelines in *DeHart* are quite rigorous so that their use in childcare cases would exclude many loving stepparents who had little or no reason to speak of adoption, as when a stepparent’s spouse with a child in the household dies suddenly when there was no earlier reason to discuss possible adoption (because, e.g., possible later child support from a heretofore absent second parent may not wish to be extinguished).

Interestingly, by contrast, the superior parental rights of birth mothers via assisted reproduction are already waivable via nonadoption contracts in Illinois. Nonadoption prebirth contracts with willing, nongenetic, intended married parents in assisted reproduction settings prompt parental waivers by birthmothers, characterized as surrogates.<sup>201</sup>

## B. Preferable Approaches

### 1. *New Unconditional Stepparent Childcare Interests*

How might stepparent childcare standing be expanded in Illinois? There could be statutory adaptations of other American state laws on de facto, presumed, or comparable parentage expanding childcare standing for former stepparents (and other nonparents alike). There could be extensions of

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199. On the need to recognize greater financial benefits for the children of unmarried parents and of stepparents, even without contracts to adopt, see Cynthia Grant Bowman, *The New Illegitimacy: Children of Cohabiting Couples and Stepchildren*, 20 LOY. J. GENDER, SOC. POL’Y & L. 437 (2012) (discussing inheritance, government benefits, and standing to bring a number of tort claims).

200. *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J.) (also suggesting children may have “fundamental liberty interests” in “preserving” such bonds).

201. 750 ILL. COMP. STAT. 45/2.5. See also 750 ILL. COMP. STAT. 40/3(a) (only a husband who consents will be “treated in law if he were the natural father of a child” conceived when his wife was “inseminated artificially with semen donated by a man not her husband”). Such non-genetic consenting parents may also need to include lesbians whose partners [in and outside of state-recognized relationships like marriage and civil unions] deliver children from assisted reproduction where the lesbians consented. See, e.g., *Shineovich v. Shineovich*, 214 P.3d 29, 39-40 (Or. Ct. App. 2009) (equal protection denial due to sexual orientation).

precedents on contract to adopt, as the Supreme Court has suggested in remanding *Mancine*, so that former stepparents (and other nonparents) can become parents with superior rights. There could also be an expansion of the current Illinois stepparent childcare statute that would extend the opportunities for continuing stepparent/stepchild relationships post-dissolution, or after the single parent's death, in order to serve the best interests of the children.<sup>202</sup>

As well, there could be new recognitions of stepparents as parents via private formal family relations contracts, including pacts expressly or implicitly allowed by statutes on premarriage, midmarriage and marriage separation pacts. Thus, via premarital agreements, single parents (i.e., where a child has one parent) might be permitted to agree, subject to some judicial oversight, that their future spouses, and thus their children's future stepparents, become eligible to be second parents after some time and under certain conditions, assuring childcare interests for responsible stepparents and continuing loving childcare and child support for the children.<sup>203</sup>

Further, in the absence of express or implicit statutory recognition, there could be expanded parentage or childcare standing for stepparents and quasi stepparents via common law recognitions of unwritten family relations contracts, including pacts between those who are not formally wed, domestically partnered, or unionized.<sup>204</sup> Expanding upon high court

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202. Grandparent childcare opportunities are also significantly limited in Illinois, though they need not be if *Troxel* is read not to require a showing of harm. 750 ILL. COMP. STAT. 5/607(a-5)(3) (grandparent visitation order only where grandparent shows parent's objections "are harmful to the child's mental, physical, or emotional health"), applied in *Flynn v. Henkel*, 880 N.E.2d 166 (Ill. 2007) and *In re Anaya R.*, 2012 IL App (1st) 121101. Grandparent childcare differs from stepparent childcare in that only in the former will certain grandparents (i.e., parents of custodial parent of grandchild) remain in the child's family and only in the later will there often have been child caretakers acting like, and recognized in the community and by the children, as parents, or at least quasiparents.

203. The Illinois Uniform Premarital Agreement Act, 750 ILL. COMP. STAT. 10/4(8), recognizes premarital pacts can cover "personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." At least some parental waivers of superior rights, as by stepparent adoptions, are not violative of the public policy and do not constitute crimes. Premarital pacts, however, cannot adversely affect the "right of a child to support." 750 ILL. COMP. STAT. 10/4(b). While the Uniform Premarital and Marital Agreements Act, as of July, 2012, initially addresses only contracts involving "rights or obligations arising between spouses because of their marital status," § 2(4), it later states that "a term . . . which defines the rights or duties of the parties regarding custodial responsibility [defined to include "legal custody, parenting time, access, visitation or other custodial right of duty"] is not binding on the court," thus suggesting custodial responsibility pacts can be binding with judicial approval, § 10(a) and (c). The Comment to § 10 recognizes a court might consider a custodial responsibility pact "by way of guidance." *See also In re Marriage of Neuchterlein*, 225 Ill. App. 3d, 1, 7, 587 N.E.2d 21, 25 (Ill. App. 4th 1992) (premarital agreement to raise children born into marriage as Lutherans is not always enforceable, but the agreement may be considered "as a factor" in the "custody decision").

204. *See, e.g., Smith v. Carr*, 2012 WL 3962904 (C.D. Cal. 2012) (exploring childcare pacts between the unwed in light of *Marvin v. Marvin*, 18 Cal. 3d 660 (1976), while recognizing a written agreement for partner support might be enforceable as long as it is not premised on meretricious consideration);



precedent enforcing common law contracts on child support between unmarried opposite sex couples involving child support for children born of artificial insemination,<sup>205</sup> an Illinois Appellate Court, in its second ruling in the *T.P.S.* case in October 2012, recognized common contract law and promissory estoppel claims involving possible childcare, as well as support, on behalf of a former same-sex female partner whose one-time mate conceived and bore a child via artificial insemination.<sup>206</sup> Earlier decisions rejecting common law contract to adopt, and similar theories, were distinguished as not involving births by artificial insemination.<sup>207</sup> While in *T.P.S.* there may not have been a formal adoption by the nonbirth mother because she and her mate were told that adoption was not legally possible,<sup>208</sup> the lack of an opportunity to adopt, or the mistaken belief that there was no opportunity to adopt, need not be dispositive. While the *Mancine* appeals court chided Nicholas for sleeping on his adoption opportunity, his lack of parentage or nonparent childcare standing may well have come at great expense to William's best interests.

Beside adaptations of other state laws on de facto parents and stepparents, and beside newly recognized family relations contracts, guardianship appointments by courts<sup>209</sup> could be more broadly available to

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Custody of H.S.H.-K., 533 N.W.2d 419, 434 (Wis. 1995) (“we conclude that public policy considerations do not prohibit a court from relying on its equitable powers to grant visitation apart from sec. 767.245 on the basis of a co-parenting agreement between a biological parent and another when visitation is in a child’s best interest”). See also Christian R.H., 794 N.W.2d 230, 233-34 n.7 (while there is common law authority to order child “visitation,” there is no non-statutory authority to confer “parental rights”).

In Illinois already, when certain children are not born of sex, but of assisted reproduction, certain parents can contract under statute to become parents though they have no biological ties. See, e.g., 750 ILL. COMP. STAT. 40/3(a) (upon consent husband of artificially inseminated wife will often be “treated in law as if he were the natural father of a child thereby conceived” even if he was not the semen donor) and 750 ILL. COMP. STAT. 47/20(b) (two people can become parents under an agreement governed by the Gestational Surrogacy Act if one contributes “at least one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term”).

205. *In re Parentage of M.J.*, 203 Ill.2d 526, 541, 787 N.E.2d 144, 152 (2003).

206. *In re T.P.S.*, 2012 IL App (5th) 120176.

207. *Id.* at ¶ 11. Outside of Illinois comparable contracts involving children not born of sex are also validated at times under common law principles. See, e.g., *S.N. v. M.B.*, 935 N.E.2d 463 (Ohio Ct. App. 2010) (common law guidelines on enforceable surrogacy contracts). At other times common law contracts are unenforceable. See, e.g., *Family Law—Unmarried Couples—Massachusetts Supreme Judicial Court Holds That A Former Domestic Partner Need Not Fulfill Promises to Support A Child Born After the Relationship Has Dissolved*. - *T.F. v. B.L.*, 813 N.E.2d 118 HARV. L. REV. 1039 (2005) (noting the tensions between *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004) (no support obligation for nonbirth mother for child born of artificial insemination arising from implied contract between same-sex female couple); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (“de facto” parenthood recognized in same-sex partner who sought child visitation).

208. *T.P.S.*, 2012 IL App (5th) 120176, Brief of Amicus Curiae National Association of Social Workers and Its Illinois Chapter in Support of Petitioner-Appellant Catherine D.W. (the non-birth mother), June 4, 2012, at 4.

209. Court-appointed guardians thus differ from folks like Nicholas whose girlfriends/wives name them as sole guardians in adoption papers when adoption petitions are pending. See *In re Marriage of*

establish childcare standing for stepparents. In its initial ruling in the *T.P.S.* case, a lesbian partner, who had been appointed guardian of each of the two children born to her then mate, was allowed to seek continuation of the guardianships under the Illinois Probate Act once the two women ended their relationship.<sup>210</sup> The birth mother's earlier consents to guardianship overcame the presumptions of superior parental rights,<sup>211</sup> giving her former partner "a cognizable interest" in the children's welfare.<sup>212</sup> To end the guardianship, the court held the birth mother would need to show by a preponderance of the evidence "a material change in the circumstances," unless the guardian "establishes, by clear and convincing evidence that termination of the guardianship would not be in the best interests" of the child.<sup>213</sup>

Therefore, guardianships, whether through new statutes or case precedents utilizing "implied" probate authority,<sup>214</sup> could lead to childcare standing for stepparents. Such orders would always need to serve the basic goal of the Probate Code, the promotion of the best interests of the ward.<sup>215</sup> The opportunities for nonparents to be designated child guardians, if not parents, and thereafter obtain judicially-authorized childcare over parental objections, have already been increased in Illinois.<sup>216</sup> Today, even without parental consent, a guardian may be appointed for a minor where there is no living parent "who is willing and able to make and carry-out day-to-day childcare decisions concerning the minor" or where "the parent or parents voluntarily relinquished physical custody of the minor."<sup>217</sup>

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Mancine, 2012 IL App. (1st) 111138, ¶¶ 4-5 (Nicholas named sole guardian of William by Miki, as reflected in adoption agent's report of February 27, 2009 involving Miki's proposed adoption of William; the adoption was finalized in March 2009).

210. *T.P.S.*, 2012 IL App (5th) 120176, ¶ 18.

211. *Id.* at ¶ 17.

212. *Id.* at ¶ 17.

213. *Id.* at ¶ 16 (quoting the Probate Act provision, effective January 1, 2011, found at 755 ILL. COMP. STAT. 5/11-14.1(b)). It should be noted that when the *T.P.S.* case returned to the appeals court after a remand, about sixteen months later, the court—in an opinion authored by a Justice who had not participated in the initial ruling—focused on common law contract and promissory estoppel theories, and not on the co-guardianship agreements, to recognize the nonbiological and nonadoptive parent's standing to seek childrearing. *Id.* at ¶ 61.

214. *See, e.g.*, *Karbin v. Karbin*, 2012 IL 112815 ¶ 32 ("implied" authority under Probate Code for guardian of "disabled" adult to seek a marriage dissolution on behalf of the ward). *But see In re M.M.*, 156 Ill.2d 53, 63-64, 619 N.E. 2d 702, 709-10 (1993) ("implied" guardianship authority, empowering child guardians to consent to adoptions allowing continuing contacts with biological parents and their families, is not recognized; here there must be express statutory authority since "traditional common law" powers cannot be transcended); *In re C.C.*, 2011 IL 111795, ¶ 41 (guardianship statute applied "as written;" courts should not "carve out exceptions that do not appear in the statute simply because" courts "do not like how the statute applies in a given case").

215. *Karbin*, 2012 IL 112815, ¶ 52.

216. *In re Guardianship of Tatyanna T.*, 2012 IL App (1st) 112957, ¶¶ 20-27.

217. *Id.* at ¶20 (citing 735 ILL. COMP. STAT. 5/11-5(b) (2010), which establishes a rebuttable presumption that a parent can make and carry out childcare decisions, where the presumption can be overcome" by a preponderance of the evidence").

An easy, but significant, first initiative for expanding stepparent childcare standing would be an amendment to the current stepparent statute to recognize greater opportunities for stepparents to attain parental status and/or broader opportunities for stepparents to attain nonparent childcare standing. In either setting, respect for an adoptive or biological parent's superior rights requires more than "a thinned-out conception" of a childcare taker with childcare standing; parental consent must also be rigorously examined.<sup>218</sup> Enforcing certain premarital or midmarital pacts on child caretaking between single parents and soon-to-be or current stepparents would also insure that necessary respect for superior parental rights.

## 2. *New Conditional Stepparent Childcare Interests*

Even if a former stepparent has no unconditional childcare opportunities in a former stepchild upon dissolution, he or she nevertheless might also be afforded contingent interests, even without any adoption, guardianship, or the like. What if a single parent like Miki in the *Mancine* case died, or placed William for adoption, a day after her divorce from Nicholas? Then, there would be no one with superior parental rights<sup>219</sup> though William's best interests would be well served by permitting Nicholas to care for the child. Here, a special de facto (or comparable) parenthood doctrine governing former stepparents could be made contingent upon a single parent's death or child relinquishment within a short time of dissolution where the stepparent had developed a "substantial relationship" with the stepchild<sup>220</sup> and the child's best interests would be served.<sup>221</sup> In an Illinois childcare proceeding today, upon a single parent's death, "a person other than a parent" can seek custody of a child who "is not in the physical custody of one of his parents."<sup>222</sup> There is today no special statute (or

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218. Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of DeFacto Parents*, 38 HOFSTRA L. REV. 1103, 1109 (2010) (warning against "a thinned-out conception of parenthood" that is "primarily a function of co-residence" and that "would give former live-in partners access to a child" even when opposed by the legal parent, "nearly always a child's mother"), employed in *In re Custody of B.M.H.*, 315 P.3d 470, 486 (Wash. 2013) (Madsen, C.J., concurring dissenting).

219. *See, e.g., In re A.P.P.*, 251 P.3d 127, 129 (Mont. 2011) (parental interest recognized in stepfather after child's mother died, where substantial evidence established that father "engaged in conduct contrary to the child-parent relationship").

220. *Troxel v. Granville*, 530 U.S. 57, 76-77 (Souter, J., concurring in the judgment).

221. Comparably, at times when a parent places a child for adoption with a certain couple, that parent can later seek renewed custody if the adoption fails. Here the termination of parental rights is contingent. *See, e.g., A.D.R. v. J.L.H.*, 994 So.2d 177 (Miss. 2008). As well when a designated adopting person or couple (like the grandparents) die, at times a parent may not be able to resurrect fully her superior rights, but might be given an opportunity to reclaim custody, as upon a showing by clear and convincing evidence that custody is in the child's best interests. *See, e.g., D.M. v. D.R.*, 62 So.2d 920 (Miss. 2011).

222. 750 ILL. COMP. STAT. 5/601(b)(2) (2013).

presumption) favoring a former stepparent.<sup>223</sup> But, there is a statute mandating “visitation rights” for the grandparents, regardless of their earlier childcare, “unless it is shown that such visitation would be detrimental to the best interests and welfare of the minor.”<sup>224</sup> Furthermore, there is a statute allowing grandparents, great-grandparents, and siblings (including stepbrothers and stepsisters) to petition for visitation with a minor child, one year or older, if “there is an unreasonable denial of visitation by a parent” and “the child’s other parent is deceased or has been missing for at least 3 months” or the child has been born out of wedlock to parents who are not living together.<sup>225</sup> Why favor grandparents and stepsiblings—who likely never acted like parents—over stepparents, like Nicholas—who likely acted as parents?

If a parent was to place a child for adoption a day after a divorce, a former stepparent would not receive any notice of the placement for adoption since notice is required today only for “any person who is openly living with the child or the child’s mother at the time the proceeding is initiated and who is holding himself out to be the child’s father.”<sup>226</sup> So, if postdissolution Miki

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223. *See, e.g.*, 755 ILL. COMP. STAT. 5/11-3(a) (2005); 755 ILL. COMP. STAT. 11-5(a), (a-1), (b) (2012) (guardianship qualifications when legal parents are not available include a “best interest” test and no preference for a former stepparent, or “de facto” parent, with perhaps some preference for one who is designated in writing by a parent or parents as a guardian should the parent or parents die). Any special statute need not necessarily grant standing to a former stepparent to seek a childcare order; it may grant simply a right to be heard, with an opportunity to seek standing later in order to pursue renewed custody/visitation. *See, e.g.*, 705 ILL. COMP. STAT. 405/1-5(2)(a) (any “relative caregiver” “has the right to be heard” in a child neglect and shelter proceeding, though not the right to be a party, 705 ILL. COMP. STAT. 405/1-5(1)). For a review of American state laws on parental testamentary appointments of child guardians, *see* Alyssa A. DiRusso and S. Kristen Peters, *Parental Testamentary Appointments of Guardians for Children*, 25 QUINNIPIAC PROB. L.J. (2012) (urging statutory reforms so that parental wishes will more likely be followed).

Not only is there no special statute on former stepparents, but also there are times when former stepparents seem excluded from possible consideration for undertaking the care of a former stepchild. *See, e.g.*, 20 ILL. COMP. STAT. 505/7(b) (Department of Children and Family Services may consider a child’s placement with a relative, who includes “the child’s step-father, step-mother or adult step-brother or step-sister,” but not a former step-father or step-mother).

224. 755 ILL. COMP. STAT. 5/11-7.1 (statute also recognizes “reasonable visitation rights may be granted to any other relative of the minor or other person having an interest in the welfare of the child”). New grandparent visits also arise upon the death of a parent when the grandparents had earlier secured visits during a marriage dissolution proceeding and later seek to modify the divorce court order. *See, e.g.*, *Moreno v. Perez*, 363 S.W.3d 725 (Tex. App. - Houston 1st 2011).

As well, grandparents, upon the death of parents, can easily acquire custody of their grandchildren via guardianship appointments when the deceased parents provided for such custody in written instruments. *See, e.g.*, UTAH CODE ANN. 75-5-202.5 (no notice required to anyone before appointment becomes effective), applied in *In re Guardianship of A.T.I.G.*, 293 P.3d 276 (Utah 2012).

225. 750 ILL. COMP. STAT. 5/607 (a-3) and (a-5)(1)(A-5) and (E).

226. 750 ILL. COMP. STAT. 50/7C(e)(2013). As there was a baptism record, *see also* 750 ILL. COMP. STAT. 50/7(f) (notice required to one “identified as the child’s father by the mother in a written, sworn statement”). As to the need for Nicholas’ consent to any later adoption by another, consider 750 ILL. COMP. STAT. 50/8(b)(vi) (consent to adoption of child over six months required of “father” who “openly lived with the child” and “openly held himself out to be the father of the child”) and

had a new intimate partner with whom she lived, that partner might have standing, but not the fit and loving Nicholas. Here too, as in death, a special statute could protect certain stepparents and their children.

A stepparent's failure to adopt formally a single parent spouse's child, for whatever reason, causes both the stepparent and the child to lose any chance to pursue a continuing familial relationship upon a single parent's death or upon placement for adoption, regardless of the child's best interest. Yet in many parental rights termination settings, bad acting parents get second chances, as where parent-child reunification obligations are imposed on the state and where there is no termination of parental rights unless a child's best interest is served.<sup>227</sup> So, many marginal parents maintain their superior rights notwithstanding their earlier parenting failures and their children's contrary interests. But stepparents and their stepchildren can see their loving families crumble if former stepparents and their ex-spouses no longer get along for whatever reason.

The Proposed MDM Act recognizes some standing for current stepparents, former stepparents and others who childcared should a parent die or place a child for adoption. However, many significant caregivers remain without voices under the proposal's guidelines on "allocation of parental responsibilities."<sup>228</sup> The proposal recognizes both a legal parent, defined as "a biological or adoptive parent,"<sup>229</sup> and an "equitable parent," defined as one who is not a legal parent, but who is obligated by court order to pay child support; is a stepparent; lived with the child for at least two years and reasonably believed he or she was "the child's biological parent;" or "lived with the child since the child's birth or for at least 2 years, and held himself out as the child's parent . . . under an agreement with the child's legal parent" or legal parents.<sup>230</sup> As a stepparent includes one "who was married to a legal parent,"<sup>231</sup> the proposed Act could help a former stepparent, as an "equitable parent," should a parent die. The proposal allows an equitable parent to file a petition for allocation of parental responsibilities if "a legal

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50/8(a)(2) (consent not required, however, when the father is neither "the biological or adoptive father of the child"). Even if Nicholas' consent is deemed required under this provision, the power to veto is undercut as there is no explicit duty to give Nicholas any notice. Also see 50 ILL. COMP. STAT. 50/14.5(a) (former parent, where parental rights were terminated due to unfitness, can petition to adopt former child).

227. See, e.g., *In re Destiny R.*, 2011 WL 3930352 (Conn. 2011); *In re J.G.*, 2013 IL App (2d) 130645-U (guardianship of minor born with cocaine in her system in state immediately after birth, with mother then deemed "unfit or unable" to childcare; five years later, after significant attempts to reunite mother and child, mother's parental rights are terminated). See also 50 ILL. COMP. STAT. 50/14.5(a) (former parent, whose parental rights were terminated due to unfitness, can petition to adopt former child).

228. Proposed MDM Act, codified at 750 ILL. COMP. STAT. 5/600.

229. *Id.*

230. *Id.*

231. *Id.*

parent is deceased or disabled and cannot perform caretaking functions with respect to the child.”<sup>232</sup>

Should a single parent die soon after divorce, a former stepparent, and even a former stepparent’s parent, often fares better outside Illinois in a childcare setting than a former stepparent in Illinois. For example, if a parent died in Arizona, a former stepparent could obtain custody of a child if he or she stood “in loco parentis,”<sup>233</sup> it would be “significantly detrimental” for the child to be placed in a second parent’s custody,<sup>234</sup> and there is “clear and convincing evidence that awarding custody” to the second parent is not in the child’s “best interests.”<sup>235</sup> If a single parent died in Utah,<sup>236</sup> a former stepparent<sup>237</sup> could seek custody or visitation with a former stepchild by showing, inter alia, intentional assumption of “the role and obligations of a parent;” “an emotional bond” and “a parent-child type relationship;” emotional or financial contribution to the child’s wellbeing; and the child’s best interests.<sup>238</sup>

As well, should a parent place a child for adoption outside of Illinois soon after divorce, a former stepparent, or even his or her parent, sometimes fares better, as where each is afforded preferential standing as a prospective adopter. In Utah, when a child is placed for adoption, while a married opposite sex couple is preferred, a child may be placed “with a person who has already developed a substantial relationship with the child.”<sup>239</sup>

## VI. CONCLUSION

Former stepparents with no formal adoptive ties who have developed “familial bonds” with their stepchildren in Illinois should have greater nonparent childcare standing, if not superior parental rights. Additional special statutory guidelines are preferred,<sup>240</sup> including statutes directed to

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232. *Id.* at 750 ILL. COMP. STAT. 5/601.2(b)(2).

233. ARIZ. REV. STAT. ANN. 25-415(A)(1). This status is achieved by being “treated as a parent by the child” and forming “a meaningful parental relationship with the child for a substantial period of time.” ARIZ. REV. STAT. ANN. 25-415(G)(1).

234. ARIZ. REV. STAT. ANN. 25-415(A)(2).

235. ARIZ. REV. STAT. ANN. 25-415(B). If not custody, Nicholas could be awarded “reasonable visitation” on a lesser showing. ARIZ. REV. STAT. ANN. 25-415(C) (“in loco parentis” and “best interests”).

236. UTAH CODE ANN. 30-5a-103(2)(g)(1) (a parent’s death would need to have him or her deemed “absent”).

237. UTAH CODE ANN. 30-5a-102(2)(d) and (e) (former step-parent and step-grandparent).

238. UTAH CODE ANN. 30-5a-103(2)(a), (b), (c) and (e).

239. UTAH CODE ANN. 78B-6-117(4)(c). *See also In re Adoption of I.M.*, 288 P.3d 864 (Kan. App. 2012) (former stepparent could not adopt child via “second-parent option” afforded stepparent; court is reluctant to allow adoption where statutory language is “clear and unambiguous”).

240. The desirability of greater certainty and comprehensive coverage, as well as separation of powers concerns, suggest guidelines should normally originate in statutes. *See, e.g., Kitchen v. Kitchen*, 953 N.E.2d 646 (Ind. App. 2011) (in rejecting visitation standing in maternal aunt and uncle over

former stepparents as parents and to former stepparents eligible for nonparent childcare standing. As occurs in other family settings, like premarital and open adoption pacts,<sup>241</sup> certain family-related agreements on childcare also deserve recognition.<sup>242</sup>

Expanded childcare opportunities for former stepparents could also be generally recognized within laws governing childcare when a parent facilitated familial bonds with a nonparent and when family bond preservation furthers the child's best, or perhaps compelling, interest, even over the objection of the parent.<sup>243</sup> Without a special stepparent statute, preservation of familial bonds can be secured for a former stepparent and stepchild through either an expanded definition of legal parenthood or an expanded opportunity for judicially-monitored childcare by a nonparent, including a former stepparent. The Proposed Parentage Act and Proposed MDM Act take small steps in the right direction. But even with them, more statutory (and some common law) will be needed to promote additional familial love for deserving children and the stepparents who have cared for and loved them. The Illinois General Assembly should recognize a broader array of "established familial or family-like bonds"<sup>244</sup> and expressly authorize judicial action on behalf of former stepparents and stepchildren, as courts will often "decline to go where the legislature has not led."<sup>245</sup> Should

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father's objection where the mother had died, court recognizes grandparent visitation standing has come by statute, former stepparent visitation standing has come by precedent, and former foster parent visitation standing has been rejected by precedent).

241. *But see*, Bix, *supra*, note 166, at 19 (recognizing that in all these areas, "a significant part of the resistance to private ordering comes from legitimate concerns that courts and legislatures have in protecting vulnerable parties, as well as reasonable worries regarding the long-term societal effects of (encouraging) altered forms of marital or parental status"). One example prompting such resistance is PENN. STAT. 2733(a) ("A prospective adoptive parent of a child may enter into an agreement with a birth relative of the child to permit continuing contact or communication between the child and the birth relative or between the adoptive parent and the birth relative."). Yet private ordering is here to stay, as demonstrated by the ever increasing childcare opportunities for non-genetic and non-adoptive parents and nonparent child caretakers. Vulnerable parties (i.e., children) can be well-protected by continuing with close judicial scrutiny of proposed childcare or actual childcare.
242. In the absence of an express Illinois statute, agreements on future childcare opportunities between parents and nonparents (including former stepparents, grandparents, former cohabitants, and others—like aunts and uncles) where the nonparents seek later childcare opportunities over parental objections seemingly must utilize the narrow range of common law precedents on equitable estoppel of the parents. Precedents deem such agreements important, if not dispositive, where there is shown detrimental reliance, earlier judicial recognition of the agreements, children's best interests, and, perhaps, harm to children. *See, e.g., Engelkens*, 821 N.E.2d at 804-806 (distinguishing *Schlam*, 648 N.E.2d at 349-50). Here, unlike potential childcare opportunities for certain former stepparents without agreements, childcare standing seems best developed through common law precedents.
243. *See, e.g., Sides v. Ikner*, 730 S.E.2d 844 (N.C. App. 2012) (need to look at legal parents' conduct and intentions, not just nonparent acts, to insure protection of rights emanating from "paramount parental status").
244. *Troxel v. Granville*, 530 U.S. 57, 88 (Stevens, J., dissenting).
245. *In re Adoption of A.W.*, 796 N.E.2d 729, 736 (Ill. App. 2d 2003).

the General Assembly fail to act, there should be incremental common law developments preserving “substantial”<sup>246</sup> stepparent-child relationships<sup>247</sup> while respecting superior parental rights.

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246. *Troxel*, 530 U.S. at 76-77 (Souter, J.).

247. *See, e.g., In re Custody of A.F.J.*, 314 P.3d 373 (Wash. 2013) (where legislature has taken no action in response to common law de facto parent developments, legislative approval of continuing common law rulings is inferred).