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De Facto Custodians: A Response to the Needs of Informal Kin Caregivers?

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I. Introduction

Today more than 2.4 million grandparents have assumed primary responsibility for raising their grandchildren.[1] These grandparent/grandchild relationships are not the idealized ones many people conjure up when thinking of their own grandparents. These are full-time, residential, parenting relationships arising where the parents of the children are often gone or only erratically in their children's lives.[2] Most often loving and nurturing, these relationships are fraught with all the ups and downs of more traditional parent-child relationships. Although grandparents are not the only relatives raising the children of family members, they are, by far, the largest group of kinship caregivers.[3] As the numbers of children in kinship care settings have increased, so have issues regarding the authority of caregivers to make decisions on behalf of the children in their care.

Because these relationships usually arise informally, the caregivers often lack the legal authority to parent the children. This lack of authority gives

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1. *See* summary of census data prepared by AARP and available on their Web site at http://www.aarp.org/confacts/grandparents/pdf/G_Census_Table_1.pdf.

2. Increasing poverty, drug use, AIDS and violence have contributed to the phenomenon of nonparents parenting children. *See* MEREDITH MINKLER & KATHLEEN M. ROE, GRANDPARENTS AS CAREGIVERS: RAISING CHILDREN OF THE CRACK COCAINE EPIDEMIC 157 (1993); Susan L. Waysdorf, *Families in the AIDS Crisis: Access, Equality, Empowerment, and the Role of Kinship Caregivers*, 3 TEX. WOMEN & L. 145, 165-66 (1994); RELATIVES RAISING CHILDREN xiii (Joseph Crumbley & Robert L. Little, eds., 1997); Naomi Karp, *Kinship Care: The Legal Problems of Grandparents and Other Relative Care Givers*, 27 CLEARINGHOUSE REV. 585 (1993).

3. The current census data is summarized on the Web site of the Child Welfare League of America at http://www.cwla.org/programs/kinship/kinshipaboutpage.htm.

rise to many small barriers, such as lack of authority to sign permission slips for school and extracurricular activities. More serious problems also arise. Informal caregivers may encounter difficulties enrolling children in school and consenting to medical care for children. They may have difficulty securing public assistance benefits for a child. Often children in informal caregiving relationships are not eligible for employment-related benefits, such as health insurance and childcare programs. Although legal authority can often be obtained through adoption, guardianship, or voluntary parenting powers of attorney available in some states, each of these approaches has limitations or consequences that can make them undesirable in some situations. As a result, advocates and state legislatures have begun experimenting with alternative approaches to providing the necessary legal authority to informal caregivers.

Legislative responses to kinship care issues encounter problems because of the larger policy debate over how to define parents and families. Continuing concern over divorce rates[4] and the debate over gay marriage[5] are challenging the basic framework that has defined families in the past. Alternative reproductive technologies[6] and adoption by same-sex parents[7] and single parents[8] are challenging our traditional understandings of who parents are. Many of the policy choices we make to facilitate informal kinship care for children will have ramifications in these larger policy debates.

One of the proposals that has emerged in response to the needs of informal caregivers is the recognition of a new status of "de facto custodian." Kentucky was the first state to enact such a proposal in 1998.[9] Recently Minnesota, Indiana, and Idaho have enacted their own de facto custodian statutes.[10] The de facto custodian concept appears to have been derived from American Law Institute's *Principles of the Law of Family*

4. *See, e.g.*, Norval D. Glenn, *Values, Attitudes, and the State of American Marriage*, in PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA (David Papenoe, Jean Bethke Elshtain & David Blakenhorn eds., 1996); Patricia H. Shiono & Linda Sandman Quinn, *Epidemiology of Divorce*, 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 15 (Spring 1994); Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute*, 11 INT'L J. L., POL'Y & FAM. 216 (1997).

5. *See* Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 L. & SOC'Y REV. 285 (2002).

6. *See, e.g.*, Uniform Status of Children of Assisted Conception Act (1988), § 4.

7. *See, e.g.*, Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191 (1995); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families*, 78 GEO. L.J. 459 (1990).

8. *Id.*

9. KY. REV. STAT. ANN. § 403.270 (Banks-Baldwin 2003).

10. IND. CODE ANN. § 31-9-2-35.5 (Michie 2003); MINN. STAT. ANN. § 257C.01 (2003); Act of March 23, 2004, 2004 ID. SESS. LAWS 145.

Dissolution.[11] Although the de facto custodian proposals have great potential to provide the legal authority needed by kin caregivers, as currently adopted in Kentucky, Minnesota, Indiana, and Idaho, they are both under and over-inclusive in their approach and raise the possibility of fractious multi-party litigation over the custody of children. In addition, statutes lack procedural safeguards, such as provisions for the termination of de facto custodianships and do not always accord courts the necessary discretion to act in the child's best interests. Finally, the statutes have the potential to run afoul of parents' rights.

In this article, I will first outline the issues and problems confronting informal kin caregivers and the limitations of the current legal framework in place in most states. I will analyze the "de facto custodian" statutes enacted by Kentucky, Indiana, Minnesota, and Idaho. Finally, I will propose a series of safeguards and guidelines that should be observed by states considering de facto custodian statutes.

II. The Benefits and Problems of Kin Caregiving

Kin caregiving often is an effective solution to parenting children in times of family crisis where parents either are unable or abdicate their responsibility to care for their children. Certainly family solutions to such crises have long been the norm and are still the norm in large segments of the county.[12] As the Child Welfare League of America has summarized, at their best these informal relationships:

- [enable] children to live with persons whom they know and trust;
- [reduce] the trauma children may experience when they are placed with persons who are initially unknown to them;
- [reinforce] children's sense of identity and self-esteem, which flows from knowing their family history and culture;
- [facilitate] children's connections to their siblings; and
- [strengthen] the ability of families to give children the support they need.[13]

The authority of kin caregivers in informal arrangements to parent children is rooted in their physical custody of the child. Without some formal recognition of their authority, they can encounter significant obstacles

11. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(c) and cmt. c. (2002).

12. Sonia Gipson Rankin, *Comment: Why They Won't Take the Money: Black Grandparents and the Success of Informal Kinship Care*, 10 ELDER L.J. 153, 154-55 (2002), citing ROBERT B. HILL, THE STRENGTHS OF AFRICAN AMERICAN FAMILIES: TWENTY-FIVE YEARS LATER 126 (2d ed. 1999) (arguing that Black families have particularly relied on informal kinship care).

13. CHILD WELFARE LEAGUE OF AMERICA, KINSHIP CARE: A NATURAL BRIDGE 2 (1994). *See generally* RELATIVES RAISING CHILDREN, *supra* note 2.

to parenting. Even where a parent has voluntarily transferred the residence and primary caregiving responsibilities for the child to the caregiver, the parent remains responsible for support[14] and for major decisions regarding the care and upbringing of the child.[15] Heightened sensitivity to high conflict in divorcing families[16] and familial kidnapping[17] have meant that many institutions with whom adults interact on behalf of children are increasingly sensitive to ensuring that the adult caring for a child has the legal authority to do so.

Many schools, for example, will decline to enroll a child if the adult does not have proof of legal custody.[18] Other schools may be willing to

14. The prevailing approach to child support is that parents remain liable for support regardless of whether they have custody of their child. *See generally* Leslie Harris, Dennis Waldrop & Lori Waldrop, *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 OR. L. REV. 689 (1990); David Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614 (1982). The Minnesota de facto custodian statute expressly provides that parents remain liable for support even while the child is in the custody of a de facto custodian. MINN. STAT. ANN. § 257C.02(b).

15. Child custody law has long recognized that even when a parent does not have physical custody of a child, their legal custody of the child continues and provides the basis for their ongoing participation in major decision-making regarding the child. This right of legal custody can only be ended through a custody decision withdrawing legal custody from a parent or through parental termination. *See, e.g.*, Lee S. Teitelbaum, *Legal Regulation and Reform: Divorce, Custody, Gender, and the Limits of Law: On* Dividing the Child, 92 MICH. L. REV. 1808, 1821 (1994) (reviewing ELEANOR E. MACCOBY AND ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992)) ("Joint legal custody, by contrast, has no implications of that kind but is concerned with shared responsibility for major decisions affecting the child, wherever he resides."); Marygold Melli, Patricia R. Brown, and Maria Cancian, *Child Custody in a Changing World: A Study of Postdivorce Arrangements in Wisconsin*, 1997 U. ILL. L. REV. 773, 777 ("Joint legal custody involves shared decision making by parents, although the child may reside with one parent who is said to have physical custody of the child").

16. The number of children involved in divorce has steadily increased during the last thirty years. *See* Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 496, n. 2 (2001) (summarizing statistics on the increasing number of children involved in divorce custody litigation). As this trend has affected other institutions such as schools, efforts have been made to increase awareness by professionals interacting with children to address divorce-related issues. For example, cooperative extension education programs in many states have initiatives relating to children involved in divorce. *See also* Sara Gable, Kelly Cole *Helping Children Understand Divorce*, published by the University of Missouri Extension Service and available at http://muextension.missouri.edu/xplor/hesguide/humanrel/gh6600.htm; *Divorce Matters*, published by the Iowa State Extension Service and available at http://www.extension.iastate.edu/Publications/ PM1638.pdf; Harriet Shaklee, *Parenting Apart*, curriculum for divorcing parents described at http://info.ag.uidaho.edu/AgKnowledge/AgKnow155.pdf.

17. The National Center for Missing and Exploited Children, for example, stresses the importance of picture IDs for children as a method of preventing child abduction. *See* http://www.missingkids.com/missingkids/servlet/PublicHomeServlet?LanguageCountry=en_US&.

18. RELATIVES RAISING CHILDREN, *supra* note 2, at 76 ("[m]any schools may refuse to allow a caregiver to enroll a child in school without proof of a change in legal custody."). The reasons for stringent school enrollment standards vary but usually arise from the desire of states and localities to control school enrollment of those residing outside a school's taxing base and to control the number of children served by any given school by limiting school choice.

enroll the child if the adult establishes that she/he is the child's primary physical custodian.[19] Even so, this often requires documentation such as a letter from the child's parent. Although many states do not have specific legislation regarding authority to enroll children in school, individual schools may impose restrictions. Even if kin caregivers are able to enroll the children in their care in school, they may encounter other barriers such as inability to access school records of the child.[20]

One of the most significant obstacles an informal kin caregiver may encounter is lack of authority to consent to medical treatment for the child. Under conventional family law principles, only a parent may consent to medical care for a child.[21] Parents have the right to direct the care and control of their children.[22] In general, parental decision making regarding children's well-being is accorded deferential treatment unless the parent's conduct does not meet minimal standards of parenting.[23] The state may not directly substitute its own judgment for that of a fit parent; nor may the state uphold the substitution of a third party's judgment for that of a fit parent.[24] Because of this legal framework, most health-care

19. Some states have adopted provisions that permit a relative providing informal kin care to enroll a child in school. *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 20-105 (2003) (discussed at http://www.peoples-law.org/education/school_enrollment_informal_kinship_care.htm (permitting informal kin caregivers to enroll children in school based on an affidavit); CAL. FAM. CODE §§ 6550, 6552 (Supp. 2004) (discussed at http://www.gu.org/Files/ gpeducation.pdf) (permitting informal kin caregivers to enroll children in school based on an affidavit); IND. CODE ANN. § 20-8.1-6.1-1 (Michie 1997) (only requiring legal guardianship where school has reason to believe that the child is in care primarily to attend a particular school and parents are able to support child).

20. The Family Educational Rights and Privacy Act of 1974 (FERPA) prevents disclosure of student records to third parties. 20 U.S.C. § 1232g (a)(2003). Although FERPA contains a requirement that parents have access to their children's records, that requirement does not extend to nonparents informally caring for children. *See also* RELATIVES RAISING CHILREN, *supra* note 2, at 76 ("Without a transfer of legal custody, however, it is the parent who is entitled to receive school records and to attend any educational planning meetings regarding the child.").

21. *See* Karen Czapansky, *Solomon's Dilemma: Exploring Parental Rights: Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1316 (1994); RELATIVES RAISING CHILDREN, *supra* note 2, at 77.

22. Troxel v. Granville, 540 U.S. 57 (2000). In her plurality opinion, Justice O'Connor reasoned that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65.

23. *Id.* at 69-70, citing Parham v. J.R., 442 U.S. 584, 602 (1979). Justice O'Connor reasoned that the Washington nonparents visitation statute "contravened the traditional presumption that a fit parent will act in the best interest of his or her child."

24. *Id.* The role of parents as exclusive decision-makers and caregivers for children is discussed in several groundbreaking articles. *See* Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer, Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992); Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983); Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Alternatives When the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1982).

providers are unwilling to provide care for children without the permission of a parent for fear of liability.[25] Where a third party—even a close family member—attempts to secure such care, providers require proof of authority.

In addition to problems securing health care, informal caregivers may be unable to apply for and receive public benefits on behalf of a child in their care. Children in informal kinship care are often eligible for federally funded welfare benefits—Temporary Assistance to Needy Families (TANF)—irrespective of the kin care provider's eligibility.[26] However, caregivers may experience problems applying for TANF Assistance on behalf of children in their care without legal parenting authority depending on the approach taken by individual states.[27] Many states permit kin caregivers to apply for TANF even without legal authority although they may require kin caregivers such as grandparents to provide proof of their relationship to the child, such a birth certificates.[28] Other states may require proof of legal authority such as adoption, custody or guardianship before a caregiver may apply for TANF on behalf of a child.[29]

Caregivers who qualify for TANF based on their own income may be required to participate in work, community service, and training programs even if it is unlikely they will return to the job market because they are disabled or older. Those who are not working at the end of two years could lose TANF benefits and, in any case, the federal program places a five-year lifetime cap on receiving benefits.[30]

Informal caregivers may be eligible for other types of assistance. For example, in many states informal kin caregivers may not qualify for adoption, foster care or guardianship subsidies unless they formalize their relationships with the children in their care and accept significantly greater state supervision of their caregiving.[31] For a child to qualify for Social

25. *See* Lawrence Schlam & Joseph P. Wood, *Informed Consent to the Medical Treatment of Minors: Law and Practice*, 10 HEALTH MATRIX 141, 142 (2000).

26. *See* 42. U.S.C. § 606(a)(2000).

27. As a result of welfare reform implemented in the late 1990s, states participate in a block grant program in which they establish their own requirements for eligibility. *See* The Professional Responsibility and Work Reorganization Act of 1997, Pub. Law 104-193, 110 Stat. 2105, 2112-29 (1996).

28. For example, Arizona requires relatives to prove "the blood relationship with documents, such as birth certificates, baptismal documents (when issued to child before child was five years old), certificates of Indian Blood, Bio Data Sheet provided by refugees, Acknowledgement of Paternity Form, Juvenile Court Records, etc." http://cals.arizona.edu/grandparents/res_book/financial_1.html.

29. Virginia, for example, requires legal authority. *See* http://www.ext.vt.edu/pubs/gerontology/350-255/350-255.html.

30. Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI-KENT L. REV. 1619, 1626-28 (2001).

31. In fact, because of funding incentives in the federal TANF and foster care funding systems, many states will not provide foster care subsidies to kinship caregivers, whereas other states

Security benefits, her parent must either be deceased or drawing disability or retirement benefits. If that is not the case, the child may qualify for Social Security benefits only if, among other requirements, she is legally adopted by her kin care provider.[32]

Finally, children in informal caregiving arrangements may not qualify for coverage by employment-related health insurance or employee benefit programs.[33] This can be a serious problem.

III. Limitations of Current Legal Authority Framework

A. Adoption and Guardianship

In most states, the primary mechanisms for obtaining legal authority to parent children are guardianship and adoption. These mechanisms do not meet the needs of many kin caregivers. Their primary limitations arise because judicial declarations of guardianship and/or adoption often necessitate the termination of parental rights and/or judicial findings of parental unfitness, abandonment or other parental inadequacy.

Adoption is an especially difficult option for many kin caregivers to pursue. Adoption necessitates severance of the parental relationship between the child and his or her natural parents.[34] Although some states

provide greater subsidies to kin caregivers than they do to parents who have custody of their children. *See* Note, *The Policy of Penalty in Kinship Care*. 112 HARV. L. REV. 1047, 1052-53 (1999); Roberts, *supra* note 30, at 1615-29. This current system of federally funded benefits has been criticized because it strongly pushes kin caregivers into the foster care system because the amount of financial support for foster care is much greater than the TANF subsidy available outside foster care. Once in the foster care system, kinship caregivers must accept significant state supervision of their families. *Id. See also* Rankin, *supra* note 12.

32. *See Full Circle of Care: Financing the Care of Your Grandchild*, http://www.fullcircle-care.org/grandparents/grandfinance.htm#ssa.

33. RELATIVES RAISING CHILDREN, *supra* note 2, at 76. The coverage of private health insurance varies from policy to policy. Private health plans are, however, much more likely to cover grandchildren if the parenting relationship with the grandparent is formal. *See, e.g., Relatives as Caregivers Resource Guide for Erie County: Healthcare and Health Insurance for Grandparents and Grandchildren*, http://www.erie.gov/depts/seniorservices/rac/healthcare.phtml.

34. *See, e.g.*, Buchea v. United States, 154 F.3d 1114, 1116 (9th Cir. 1998) (suit by child for wrongful death of birth father dismissed because relationship with father was terminated when she was adopted by her grandparents); *In re* Adoption of Children by D., 293 A.2d 171, 172-73 (N.J. 1972) ("[A] nonconsenting natural parent is thereby permanently cut off from all parental rights . . . as if [the child] were never his . . . ."). *See also* ARIZ. REV. STAT. ANN. § 8-117(B)(1999) ("Upon the entry of the decree of adoption, the relationship . . . between the adopted person and the persons who were his parents just prior to the decree of adoption shall be completely severed and all the . . . legal consequences of the relationship shall cease to exist."); S.D. CODIFIED LAWS ANN. § 25-6-17 (Michie 1999) ("The natural parents of an adopted child are from the time of the adoption, relieved of all parental duties towards, and of all responsibility for the child so adopted, and have not right over it"); CAL. PROB. CODE § 6451(a) (Supp. 2004)(An adoption severs the relationship of parent and child between an adopted person and a natural parent of the adopted person . . . ."); S.C. CODE ANN. § 20-7-1770 (Law. Co-op Supp. 2003) ("After a final decree of adoption is entered, the biological parents of the adoptee are relieved of all parental responsibilities and have no rights over the adoptee.").

have provisions for open adoption agreements that could allow ongoing visitation with birth parents after the adoption, these are unusual.[35] Thus, adoption requires either that the birth parents consent to termination of their parental rights or that a court find that the birth parent(s) are unfit or have abandoned the child.[36]

In many states, guardianship of children can pose equally difficult burdens. The Idaho guardianship statute is typical. Under the Idaho statute, an order appointing a guardian for a minor must be based on findings that "all parental rights of custody have been terminated by prior court order" that a child has been "abused, neglected or abandoned," or that the child's parents are "unable to provide a stable home environment."[37] These provisions essentially require a person seeking a guardianship to allege the same facts as would be required for state intervention in the family in a child protection action.

Adoption and guardianship are the most formal and permanent methods by which kin caregivers can obtain the necessary legal authority to parent children. Yet the very formality and permanency of these approaches also lead to their biggest disadvantages. Many kin caregivers are emotionally unwilling to make the necessary allegations against a member of their own family to obtain a guardianship or adoption.[38] Furthermore, making such public allegations against the child's birth parent(s) may polarize the relationship between the parent and the caregiver and lead to conflict and uncertainty for the child.[39]

In addition, pursuing a guardianship or adoption petition can be time-consuming and expensive for the kin caregiver. The action may move very quickly if the birth parents consent to the arrangement. However, if the birth parents do not consent, or if either of the birth parents is difficult to locate, the action may take significantly longer.[40] Finally, adoption, in particular, is

35. *See* Margaret M. Mahoney, *Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under the Uniform Adoption Act*, 51 FLA. L. REV. 89, 90 (1999).

36. *See, e.g.*, Uniform Adoption Act § 6.

37. IDAHO CODE § 15-5-204 (2003).

38. *See, e.g.*, Ana Beltran, *Kinship Care Providers: Some Permanency Options*, *available at:* http://library.adoption.com/Kinship-Care/Kinship-Care-Providers-Some-Permanency-Options/article/3684/1.html. ("Many caregivers are reluctant to take these steps, however, because the actions entail a court proceeding. The caregiver must sue the child's parents—one of whom is the caregiver's relative—to prove that they are unfit and that adoption, guardianship, or legal custody is in the child's best interest. This adversarial situation can forever tear a family apart").

39. *Id. See also* RELATIVES RAISING CHILDREN, *supra* note 2, at 91 ("Similarly terminating their adult child's parental rights signals that they have given up on that person's ability to ever stabilize his or her life or care for the children.").

40. RELATIVES RAISING CHILREN, *supra* note 2, at 91 ("On a more practical level, adoption may be prohibitively expensive for those caregivers who have no means of paying for the court's and attorney's legal fees. Similarly if the child is not in the child welfare system and eligible for adop-

a permanent arrangement that may not be suited to a family's needs. Where the kin caregiver is taking responsibility for a child on a temporary basis, it may not be desirable or appropriate to terminate the rights of the parents.

Some states have adopted more flexible provisions for standby guardianships under which a parent who is ill, disabled or incapacitated may designate another adult to hold simultaneous guardianship rights.[41] These provisions offer some flexibility for kin caregivers. However, they require the consent of the parent (who may be unwilling or unavailable), and they may not be applicable if the parent's unavailability is not attributable to illness, disability or incapacity.

B. Powers of Attorney

In response to the limitations of adoption and guardianship in addressing kin caregiving for children, some states have created less formal parenting powers-of-attorney.[42] Although many of these provisions are based on the Uniform Probate Code,[43] they can vary wildly from state to state. In California, for example, a parent may execute an affidavit by which she or he specifically authorizes a caregiver to enroll a child in school or consent to medical, dental, and mental health care.[44] These provisions allow a parent to designate a third party to act in the parent's stead in making

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tion assistance funds, then the relative caregiver may experience a decrease in income following the adoption. Although a grandparent's income is not counted in determining public assistance eligibility in foster care, the income is counted once the grandparent becomes the child's legal parent.").

41. *See* Joyce McConnell, *Standby Guardianship: Sharing the Legal Responsibility for Children*, 7 MD. J. CONTEMP. L. ISSUES 249 (1996); Kelly C. Rozmus, *Representing Families Affected by HIV/AIDS: How the Proposed Federal Standby Guardianship Act Facilitates Future Planning in the Best Interests of the Child and Family*, 6 AM. U. J. GENDER SOC. POL'Y & L. 299 (1998).

42. *See, e.g.*, MINN. STAT. ANN. § 524.5-211 (Supp. 2004) ("A parent, legal custodian, or guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding one year, any powers regarding care, custody, or property of the minor or ward, except the power to consent to marriage or adoption of a minor ward"); IDAHO CODE § 15-5-104 (2001) ("A parent or a guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding six (6) months, . . . any of the parent's or guardian's powers regarding care, custody, or property of the minor or ward . . . ."); TENN. CODE ANN. § 34-6-304 (Supp. 2003) ("Through the power of attorney for care of a minor child, the parent may authorize the caregiver to perform the following functions without limitation: (A) Enroll the child in school and extracurricular activities; (B) Obtain medical, dental and mental health treatment for the child; and (C) Provide for the child's food, lodging, housing, recreation and travel.").

43. Uniform Probate Code (1969) § 5-104 provides: "A parent or guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding six months, any power regarding care, custody or property of the minor child or ward, except the power to consent to marriage or adoption of a minor ward." This provision is also part of the Uniform Guardianship and Protective Proceedings Act (1997) § 105.

44. CAL. FAM. CODE § 6550, 6552.

decisions for a child. Parenting powers-of-attorney have the advantage of being simple to implement. No court order is required to give effect to these arrangements. Many parents could prepare such a power of attorney without the aid of an attorney.

Again, the greatest advantage of the power-of-attorney approach—its simplicity, is also is greatest disadvantage. Because the power of attorney must be executed by the parent, it may not be possible if the parent is unavailable, incapacitated or unwilling to consent. Even if consent is obtained, in many states these arrangements expire automatically after periods as short as six months and parental consent must be obtained anew.[45] In such cases, if there is friction between the caregiver and the parent, the re-execution of the power of attorney can become a flashpoint for disagreement. In addition, parenting powers-of-attorney are so informal that some third parties, such as medical providers, may be reluctant to rely on them. Finally, if disputes arise between the caregiver and the parent, these instruments are unilaterally revocable by the parents, regardless of whether a change in the caregiving arrangement is in the best interests of the child.

C. Alternative Methods of Formalizing Caregiving Relationships

Most kin caregivers seek recognition of their parenting role with the child, and stability in the relationship without having to make formal allegations of incompetency against the child's parent. States have begun to experiment with approaches to this problem. Reforms in guardianship and the availability of powers of attorney address some of these concerns. Other states have taken a more piecemeal approach, adopting legislation to address individual barriers encountered by kin caregivers but not providing for general recognition of such relationships outside adoption and guardianship.

IV. Kentucky's De Facto Custodian Statute

One comprehensive approach that has emerged recently is the creation of a new status of "de facto custodian." Kentucky adopted its de facto custodian statute in 1998.[46] A de facto custodian is defined in Kentucky law as "a person who has been shown by clear and convincing evidence to

45. *See, e.g.*, Uniform Guardianship and Protective Proceedings Act (1997) § 105. Idaho recently added language permitting delegations of power to a grandparent to extend as long as the parties agree to such extensions in the instrument creating the power. IDAHO CODE § 15-5-104.

46. Lawrence Schlam, *Third Party Standing in Child Custody Disputes: Will Kentucky's New "De Facto Guardian" Provision Help?*, 27 N. KY. L. REV. 368, 384-97 (2000).

have been the primary caregiver for, and financial support of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older . . . ."[47]

The Kentucky Court of Appeals has upheld the constitutionality of the de facto custodian statute in *Sherfey v. Sherfey*.[48] Whether Kentucky's de facto custodian statute could be unconstitutional under *Troxel v. Granville*[49] is an open question. Consider the following hypothetical:

> Mom has primary physical custody of the child and lives with her parents. Unbeknownst to Dad, Mom is rarely home and a year passes. The maternal grandparents may well be de facto custodians as a result of Mom's conduct. As a result, in a dispute between the maternal grandparents and Dad, a best interests of the child test would be applied. No particular deference would be accorded to Dad's wishes.

In her plurality opinion in *Troxel,* Justice O'Connor reasoned that the visitation statute in question there failed to accord any special weight to the decisions of a fit custodial parent.[50] In the hypothetical, although Dad is not a custodial parent, a result that accords no deference to him may offend *Troxel.*

However, the statute appears to be constitutional in most situations. Under the Kentucky statute, determinations of de facto custodianship are subject to a clear and convincing burden-of-proof and the statutory definition requires that the primary care of the child have been provided by the third party for a significant period of time prior to the action. These provisions generally accord deference to parental decision-making as required by *Troxel.*

The Kentucky law provides that in order to be treated as a de facto custodian "a court must determine by clear and convincing evidence that the person meets the definition of de facto custodian."[51] As a result of this limitation a person must be declared a de facto custodian before she/he

47. KY. REV. STAT. § 403-270(1)(a).

48. 74 S.W. 3d 777 (Ky. Ct. App. 2002) (finding that as applied in a case where the grandparent had virtually exclusive custody for two years prior to the action, the statute was constitutional); *see also* Rogers v. Blair, 2003 WL 1250837 (Ky. Ct. App. Feb 7, 2003) (unreported opinion) (upholding the statute as applied because the parents have voluntarily given custody to grandparent for extended period of time).

49. 530 U.S. 57 (2000).

50. *Id.* at 69-70.

51. *Id.* at § 403.270(1)(b). Despite the statutory language, in French v. Barnett, 43 S.W.3d 289 (Ky. Ct. App. 2001), the court permitted a grandmother to file custody action prior to being found to be the de facto custodian. The court held that the question of whether the grandmother met the definition of a de facto custodian could be decided in the context of the custody proceeding. Despite the statutory language, it did not even require a preliminary or separate hearing on the question of the grandmother's status.

would have standing to initiate or participate in a custody action. Presumably the potential custodian could initiate the custody action and simultaneously seek de facto custodian status. However, the Kentucky statute implies that the status of the alleged de facto custodian must be determined before that individual may participate in or pursue the merits of the case.

The Kentucky statute also provides that time after the filing of a custody action involving the de facto custodian cannot be counted toward the residency requirement in the statute.[52] This section would prevent a person from manipulating the court system by obtaining physical custody of a child, after a relatively short period of time filing an action seeking de facto custodian status, retaining custody during the pendency of the action, and arguing that he or she should be treated as a de facto custodian for purposes of the action.

Once a person is determined to be a de facto custodian, the statute provides that "the court shall give the same standing in custody matters that is given to each parent under this section."[53] Thus, under the Kentucky provision, kin caregivers who have resided with the child for a significant period of time and who have served as the child's primary caregiver and as a financial support of the child are entitled to seek custody of the child in a proceeding governed by the best-interests-of-the-child standard.

The Kentucky de facto custodian statute appears to be derived from language in the *ALI Principles of Family Dissolution* (*ALI Principles*). The *ALI Principles* incorporated the concept of a "de facto parent." The Principles define a de facto parent as:

> [A]n individual other than a legal parent or a parent by estoppel[54] who, for a significant period of time not less than two years;
>
> (i) lived with the child; and,
>
> (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of the complete failure or inability of any legal parent to perform caretaking functions;
>
> (A) regularly performed a majority of the caretaking functions for the child; or
>
> (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.[55]

52. *Id.* at § 403.270(1)(b).

53. *Id. See infra* notes 96-98 and accompanying text for a discussion of this language in the context of the Idaho statute.

54. A legal parent is defined by ALI as "an individual who is defined as a parent under state law." ALI PRINCIPLES, *supra* note 11, at § 2.03(1)(a). A "parent by estoppel is defined as an individual who is obligated to pay child support, or who lived with the child for at least two years and had a good faith belief that he was the child's father, or who lived with the child for a significant period of time, holding out as the child's parent and recognition of the person as the child's parent is in the best interests of the child." *Id.* at § 2.03(1)(b).

55. *Id.* at § 2.03(1)(c).

The purpose of the drafters of the *ALI Principles* was not specifically to address the issue of informal kinship care, but rather was to develop a model law of parenting that accorded significant deference to parents while at the same time recognizing functional definitions of parents.[56] Nonetheless, illustration seventeen in the comments to the *ALI Principles* makes clear that the definition of de facto parent was intended to encompass grandparents and other informal kin caregivers who provide primary care for a child and who live with the child even where the residence may not be full time.[57] The drafters of the *Principles* note that "family members who take children into their homes primarily out of family affinity may be de facto parents . . . ."[58] Yet the *ALI Principles* make clear that a non-kin foster parent would not be a de facto parent because such a person provides care to a child primarily for financial compensation.[59] Both the *ALI Principles* and the Kentucky de facto custodian statute, although different in detail, appear to be aimed at the same goal—recognition of informal parenting relationships that arise over the course of time through the conduct of the parents and caregivers.[60]

Although the Kentucky de facto custodian provision appears to have been significantly influenced by the *ALI Principles,* there are interesting contrasts between the two provisions. The Kentucky law requires that the de facto custodian provide financial support to the child, whereas the *ALI Principles* do not impose such a requirement. Consequently, a grandparent

56. *See, e.g.,* Katherine T. Bartlett, *Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution,* 10 VA. J. SOC. POL'Y & L. 5, 44-51 (2001)(Professor Bartlett served as the reporter for the ALI Principles); Sarah Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and DeFacto Parents under the American Law Institute's Principles of the Law of Family Dissolution,* 8 DUKE J. GENDER L. & POL'Y 285 (2001).

57. Illustration 17, which builds on Illustration 16, is as follows: Six days a week, John drops off his five-year-old son, Jay, at the home of his mother, Celia, who provides Jay's day-to-day care while John works. "John drops Jay off at Celia's house in his pajamas before breakfast and does not pick him up until just before bedtime. Jay stays overnight with Celia an average of two nights per week, and most of his clothes and toys are kept at Celia's house. Jay eats his meals at Celia's house six days of the week. Celia arranges for Jay's medical care, has enrolled him in school for next year, and is his primary source of discipline." The comments suggest that Celia meets the test for de facto parent. ALI PRINCIPLES, *supra* note 11, at § 2.03, illustrations 16 & 17.

58. ALI PRINCIPLES, *supra* note 11, at 2.03, cmt. c(ii).

59. *Id.* Comment c(ii) provides: "Relationships with foster parents are also generally excluded, both because of the financial compensation involved and because inclusion of foster parents would undermine the integrity of a state-run system designed to provide temporary, rather than indefinite, care for children."

60. For discussions of whether the ALI Principles achieve these goals, *see* Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles,* 35 WILLAMETTE L. REV. 769 (1999); Gregory A. Loken, *The New "Extended Family"—"De Facto" Parenthood and Standing Under Chapter 2,* 2001 B.Y.U. L. REV. 1045; James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution,* 2001 B.Y.U. L. REV. 923.

who lives with the child but who has not supported the child might qualify as a de facto parent under the *ALI Principles*, but would not qualify as a de facto custodian under Kentucky law.[61] Another important distinction is the length of time an adult is required to live with the child before their relationship is entitled to recognition. The *ALI Principles* require residence with the child for two years, whereas Kentucky law would recognize relationships as short as six months if the child is under three years of age.

The Kentucky provision addresses the needs of kin caregivers in many ways. First, it provides for official recognition of the relationship between the kin caregiver and the child through a court order giving legal custody to the caregiver. Such a legal custody order would permit a caregiver to enroll a child in school, consent to medical treatment for a child, secure coverage of a child on employment-related health and other benefits (to the extent those benefits are available to dependents of the caregiver). Second, the de facto custodian approach accomplishes this recognition without requiring the kin caregiver to negatively characterize the parent(s) of the child—it is not necessary to show that a parent has failed in her/his parenting responsibilities for a child to meet the test of the de facto custodian statute. Once a de facto custodian is declared, the standard for custody is a child-centered best interest focus.[62] Some informal caregivers may consider the fact that they must obtain a judicial declaration that they are a de facto custodian undesirable. This requirement does mean that caregivers will have to go to court and may need to hire a lawyer to assist them. However, the requirement has the benefit of providing certainty as to the existence of the custodial relationship and documentation of the custodial relationship in the form of the court's order.

Not only does the kin caregiver not have to make direct allegations about the parent's unfitness or other parenting failures to obtain recognition, but the order of legal custody does not terminate the parent's relationship with the child in any way. In fact the custody order could be a joint custody order allowing both the parent and the de facto custodian to exercise parenting rights and responsibilities if that meets the child's needs.[63]

61. *See* ALI PRINCIPLES, *supra* note 11, at Illustration 17.

62. KY. STAT. ANN. § 403.270 (2) ("The Court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian.").

63. *Id.* at § 403.270(5) ("The Court may grant joint custody to the child's parents, or to the child's parents and a de facto custodian, if it is in the best interest of the child."). Unfortunately, the promise of the joint custody provision has been limited by recent Kentucky court decisions. In *Consalvi v. Cawood*, 63 S.W.3d 195 (Ky. Ct. App. 2001), the court refused to find that a stepfather who had resided with the mother of the children was a de facto custodian holding that "it is clear that the statute is intended to protect someone who is the primary provider for a minor child in the stead of a natural parent . . . ." As a result of this holding, it would be difficult to argue that a partner of a parent is a de facto custodian.

Furthermore, a legal custody order under the Kentucky de facto custodian provision is permanent until it is dissolved by the court and remains under the supervision of the court subject to modification as the needs of the child, parent or caregiver change.[64]

Finally, the Kentucky de facto custodian statute has the additional benefit that it is not limited by its language to grandparents and other relatives, but could include a stepparent, godparent, close family friend, life partner of a parent or other third party who might be caring for the child.

The long-term efficacy of the de facto custodian approach is dependent upon the utility of its definition. The big question is whether the definition provides an adequate basis upon which courts may include most of the people who have formed bonded, attached, *parent-like* relationships with a child but may exclude adults who, though important, have not really filled the role of a parent. This distinction is elusive.

The question raised by the provision is whether caregiving and financial support adequately define parenting. States have flirted with similar functional definitions of parenting with mixed results in other contexts. In particular, in the area of custody disputes between parents, several states attempted to choose the primary custodial parent based on which person served as the child's primary caretaker.[65] The experiment with a presumption in favor of the primary caretaker failed in the inter-parental custody context and the only two states to formally adopt the test have ended their experiments with it.[66] The primary caretaker presumption failed in part because it had a disruptive effect on custody litigation.[67] It was also sig-

64. The Kentucky statutory provision relating to custody modifications applies to modifications of a custody award to a de facto custodian. *See* KY. REV. STAT. §§ 403.340 and 403.350 (2003).

65. *See* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1985); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291 (1992). Interestingly, the *ALI Principles* incorporate a functional approach to custody adjudication. The *Principles* do not incorporate a primary caretaker presumption in that they would award shared custodial responsibility where parenting was shared during the relationship. Nonetheless, the *Principles* look to the parenting decisions represented by caretaking, made by the parents in an intact relationship as a basis for allocating parenting responsibility after the relationship breaks down. ALI PRINCIPLES, *supra* note 11, at § 2.09.

66. The West Virginia Supreme Court adopted the test in *Garska v. McCoy*, 278 S.E.2d 357 (W.Va. 1981). It was legislatively overruled in 2000 when West Virginia adopted a statute based on the *ALI Principles*. W.VA. CODE. ANN. § 48-11-206 (Michie 1999). Minnesota's experiment with the primary caretaker presumption is discussed in Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four-Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

67. Katherine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best*

nificantly criticized because of its perceived gender bias.[68] The test also failed because it tended to lock in the parenting choices made by the couple during their relationship even though the basic facts of the relationship that led to those choices changed.

None of these problems in the divorce-custody context are a general indictment of defining parenting based on caregiving. However, focusing on functional parenting responsibilities to define parenting is, at some level, unsatisfactory. Many adults, such as nannies or babysitters, serve caregiving functions for children. Yet, most people would agree that they are not parents. The problem is that the mutual emotional attachment of adult and child is at the center of a parent-child relationship. That emotional bond is not captured by use of a functional test. In custody determinations where both adults presumptively have parental relationships with the child, use of a functional test to allocate responsibilities between them makes sense. However, in the context of a third party's relationship with a child, the existence of that emotional bond cannot be presumed and is not necessarily captured by a functional test of caregiving.

Kentucky's experience with the statute illustrates some of the confusion resulting from the definition of de facto custodian. In 2001, the Kentucky Supreme Court, in *Consalvi v. Cawood*,[69] held that in order to be a de facto custodian, a person had to serve as the primary caregiver and a financial supporter of the child in place of a parent, not alongside a parent. The case was a difficult one involving allegations of abuse against the child's stepfather who sought de facto custodian status. Rather than find the allegedly abusive stepfather to be a de facto custodian, or addressing the factual question of whether the stepfather had been the primary caregiver for the child, the court held that the stepfather could not be a de facto custodian as a matter of law because he had not provided care in place of the parent.[70] This finding seems at odds with the intent of the statute and defeats some of its potential applications. Kentucky's de facto custodian statute is part of its custody statutes. Its effect of giving the de facto cus-

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Interests, 35 WILLAMETTE L. REV. 467, 475-76 (1999) ("[A] primary caretaker approach is an either/or, winner-take-all approach that fails to account for the wider variation in circumstances in which a caretaker may have been providing primary care.").

68. *Id.* at 474-75. Summarizing the experiences of West Virginia and Minnesota, Professor Bartlett noted: "Ironically, the experiences of the only two states that have worked with a primary caretaking presumption . . . appear to show that gender bias against mothers, especially those who do not conform to gender role stereotypes, is at least as serious a problem as bias against fathers."

69. 74 S.W.3d 777 (Ky. Ct. App. 2002).

70. *Id.* at 197-198. Even if the record had supported a finding that the stepfather was a de facto custodian, the court would not have been obligated to award custody to him based on the best interests of the child.

todian the same standing as a parent for purposes of custody is to ensure the application of the best interests of the child test in disputes between a de facto custodian and a parent. As a result of the *Consalvi* decision, a person living with the parent and child, such as a stepparent, life partner or grandparent, would have difficulty qualifying as a de facto custodian unless he or she could demonstrate instances of having taken the place of the parent as the primary caregiver.

V. De Facto Custodians in Other States

A. Indiana

The year after Kentucky adopted its de facto custodian provision, the Indiana legislature passed a similar statute. The Indiana provision includes the same definition of de facto custodian as that contained in the Kentucky law.[71] Like Kentucky, the Indiana statute provides that the status of a de facto custodian must be established by clear and convincing evidence,[72] and that time after the filing of an action does not count toward establishment of de facto custodian status.[73] In addition, however, the Indiana courts have held that the de facto custodian provisions were not intended to displace Indiana's common law presumption in favor of the natural parents' rights.[74] This latter result seems to fly in the face of the statutory intent. There is simply no reason to adopt a de facto custodian statute if not to reverse the common law presumption against nonparents in custody proceedings, at least under some circumstances.[75]

In addition to differing judicial treatment of the statute, Indiana and Kentucky provisions have important textual distinctions. The Indiana statute eliminates the Kentucky language that appears to require a court determination that a person is a de facto custodian before the benefits of that status are accorded to a person.[76] It also expressly excludes foster parents from

71. IND. CODE ANN. § 31-9-2-35.5 provides: " '[d]e facto custodian' . . . means a person who has been the primary caregiver for, and financial support of, a child who has resided with the person for at least: (1) six months if the child is less than three years of age; or (2) one year if the child is at least three years of age."

72. *Id.* at § § 31-17-2-8.5(a) and 31-14-13-2.5.

73. *Id.* at § 31-9-2-35.5.

74. *In re* Guardianship of L.L., 745 N.E.2d 222, 230 (Ind. Ct. App. 2001) ("We do not believe the General Assembly intended in all cases to remove the presumption in favor of parents obtaining or retaining custody of their children through these "de facto custodian" statutory amendments"); Francies v. Francies, 749 N.E.2d 1106, 1115 (Ind. Ct. App. 2002) (finding that the de facto custodian statute did not overrule the common law presumption in favor of the rights of the natural parent).

75. Schlam, *supra* note 46, at 396-400. Schlam argues that the important effect of Kentucky's de facto custodian statute was to overrule the traditional approach of Kentucky law that accorded superior rights in custody cases involving nonparents to the natural parents.

76. *See supra* note 48 and accompanying text.

the de facto custodian provision.[77] In addition, although Kentucky courts have held that a de facto custodian must act in the place of a parent, Indiana courts have concluded that a stepparent could be a de facto custodian based on joint residence with the child and her mother.[78] More significantly, in contrast to the Kentucky statute, the Indiana statute does not contain general language providing that the de facto custodian has the same standing as a parent. Rather, the Indiana legislature, after recognizing the status of a de facto custodian, added that status to its provisions regarding particular actions involving children.[79]

The significance of the Kentucky language providing that a de facto custodian has the same standing as a parent is unclear. Conceivably this language could be the basis for treating a de facto custodian as a parent for all purposes.[80] However, because the Kentucky statute specifically cross-references only the Kentucky custody statute, such a broad interpretation does not seem possible. Nonetheless, the risk to parents' rights of overly broad interpretations of the statute seems to be less in Indiana where the general standing language was omitted.

B. Minnesota

The Minnesota de facto custodian provision, adopted in 2002, deviates even more significantly from the Kentucky provision. Under Minnesota law, a person is a de facto custodian if he or she has "been the primary caretaker for a child who has, within the 24 months immediately preceding the filing of the petition, resided with the individual without a parent present and with a lack of demonstrated consistent participation by a parent" for a period of six months or a year depending on the age of the child.[81] The burden of proof to establish a de facto custodian is clear and convincing.[82] In contrast to both Kentucky and Indiana, the Minnesota definition does not require that the de facto custodian have provided financial support for the child.

77. *Id.* ("the term [de facto custodian] does not include a person providing care for a child in a foster family home . . . .")

78. Nunn v. Nunn, 791 N.E.2d 779 (Ind. Ct. App. 2003) (court had jurisdiction under de facto custodian statute to consider whether stepfather was a de facto custodian).

79. For example, the following language was added to the factors to be considered in awarding custody under Indiana's general custody statute: "Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) [IC 31-17-2-8.5(b)] of this chapter." IND CODE. ANN. 31-17-2-8(8) (2003).

80. If a custodian is entitled to the same standing as a parent one might ask, for example, whether a de facto custodian could make a testamentary designation of guardianship for a child or whether the custodian would automatically be a party to a child protection case.

81. MINN. STAT. ANN. § 257C.01(2)(a)(2003).

82. MINN STAT. ANN. § 257C.03(6).

The Minnesota statute expressly provides that a person who has resided with a child as the partner or spouse of a parent would not be a de facto custodian.[83] Presumably partners of parents are excluded from the Minnesota statute to make de facto custodian status unavailable to a stepparent in a divorce-custody proceeding and to ensure that unmarried gay and straight partners of parents are generally not considered de facto custodians. Unfortunately, by limiting the scope of the statute to steer clear of policy debates over divorce-custody and same-sex relationships, the utility of the statute has been undermined. For example, a grandparent who lives in the same household as a parent would not be a de facto custodian, even where the parent is ill or disabled and depends on the grandparent for assistance with parenting.[84]

Another unfortunate limitation in the Minnesota statute is that recognition of de facto custodians is limited to situations in which the parent has refused or neglected to provide for the child.[85] As a result, the Minnesota statute requires a person seeking de facto custodian status to make allegations that the parent has failed to perform parental functions. Given the reluctance of kin caregivers to make such allegations, this requirement may limit the usefulness of the Minnesota provision.[86]

Finally, like Indiana, the Minnesota provision does not include language that might be construed as conferring general standing as a parent on a de facto custodian. Rather, the situations in which de facto custodianship applies have been specifically included in the statue.[87]

C. Idaho

In 2004, the Idaho legislature adopted a de facto custodian statute.[88]

83. The Kentucky courts have reached a similar result in their holding that a de facto custodian must be acting in place of a parent. *See supra* notes 69-70 and accompanying text. The Indiana court, however, has concluded that a stepparent whose sole residence with the child was while he was married to the child's mother could be a de facto custodian. *See supra* note 79 and accompanying text.

84. *See, e.g.*, Joyce E. McConnell, *Securing Care of Children in Diverse Families: Building Trends in Guardianship Reform*, YALE J. L. & FEMINISM 29, 32-33 (1998) (discussing the needs of vulnerable single parents for empowered kinship care); Waysdorf, *supra* note 2 (discussing the importance of recognizing kin caregivers for mothers with HIV/AIDS).

85. The statute provides that "lack of demonstrated consistent participation" by a parent means a refusal or neglect to comply with the duties imposed upon the parent by the parent-child relationship, including, but not limited to, providing the child necessary food, clothing, shelter, healthcare, education, creating a nurturing and consistent relationship, and other care and control necessary for the child's physical, mental, or emotional health and development. MINN. STAT. ANN. § 257C.01(2)(c).

86. *See supra* notes 39-41 and accompanying text, discussing the reluctance of kin caregivers to make confrontational allegations regarding parents.

87. *See, e.g.*, MINN. STAT. ANN. § 257C.06.

88. An Act Relating to Guardianship of Minors, 2004. *Id.* Sess. Laws 145.

The Idaho legislation was expressly modeled on the Kentucky statute.[89] While the definition of de facto custodian in the Idaho provision does not deviate significantly from the Kentucky statute some of the limitations on de facto custodians in the Kentucky statute are not contained in the Idaho provision.[90] For example, the Idaho de facto custodian provision does not require that the relationship be established by clear and convincing evidence. Nor does it require judicial action before the person qualifies to be treated as a de facto custodian. Rather, under the Idaho statute, once a person has met the definition, they are entitled to be treated as a de facto custodian.[91] Because the Idaho statute does not require a judicial determination of whether a person is a de facto custodian, it also does not include the limitation that time after the filing of the action cannot count toward the establishment of de facto custodianship status. Finally, like Kentucky, but in contrast to Minnesota and Indiana and the *ALI Principles*, the Idaho statute does not exclude from its coverage non-kin foster parents.

The most unusual aspect of the Idaho statute is that it is part of guardianship provisions of the Idaho Code, not the child custody provisions. Thus it authorizes de facto custodians to participate in guardianship proceedings, not in custody proceedings. In this context it appears to add little to pre-existing Idaho law. Idaho's guardianship statute already provided that "any relative of the minor" or "any person interested in the welfare of the minor" could initiate a guardianship proceeding.[92] The new legislation added "de facto custodians" to the list of persons who could initiate guardianship proceedings. Yet, certainly, a person who meets the definition of de facto custodian would also be a "person interested in the welfare of the child."

The Idaho legislation also added de facto custodians to the list of those entitled to notice of a guardianship proceeding.[93] Yet, the guardianship statute already required that notice be provided to any person who has "had the principal care and custody of the minor during the sixty (60) days preceding the date of the petition."[94] Thus, the existing Idaho guardianship

89. *Id.* The Statement of purpose attached to the legislation notes that "[t]he language used in this bill has been in place in the state of Kentucky for several years."

90. *Id.* The Idaho statute provides: " '[d]e facto custodian' means a person who has been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six months or more if the child is under three years of age and for a period of one year or more if the child is three years or age or older."

91. The drafters of the Idaho provision apparently sought to avoid the necessity of a court hearing. *See supra* note 52 and accompanying text.

92. IDAHO CODE §15-5-207 provided "[p]roceedings for the appointment of a guardian may be initiated by any relative of the minor, the minor if he is fourteen years of age, or any person interested in the welfare of the minor."

93. 2004 Idaho Sess. Laws 145, § 1.

94. IDAHO CODE § 15-5-207(a)(2).

notice provision has a significantly shorter time requirement before a person caring for a child is entitled to notice than the time requirement to qualify as a de facto custodian. Moreover, the existing guardianship statute does not require financial support in order to be entitled to notice of a guardianship, whereas the de facto custodian definition does require such support.

The only real expansion of the prior statute is that individuals who are de facto custodians but who are not currently residing with the child or serving as the child's primary caregiver at the time the guardianship proceeding is filed, would be entitled to notice of the guardianship. Such a former residential caregiver's relationship with the child may be attenuated at the time of the guardianship proceeding making it difficult to understand why such a former caregiver should be automatically entitled to notice. Yet, the Idaho de facto custodian statute requires that any de facto custodian, whether current or not, be provided notice and presumably have the opportunity to participate in the action. Moreover, if such a former caregiver does not receive notice of a guardianship proceeding, questions could be raised as to the validity of the court's guardianship order. This raises significant possibility of disrupting guardianship proceedings.

Finally, the Idaho de facto custodian statute provides that: [i]f a person meets the definition of a de facto custodian, the court shall give the person the same standing that is given to each parent *under this act.*"[95] This provision is the most curious part of the legislation. The language giving de facto custodians the same standing as parents "under this act" does not make sense since the de facto custodian legislation does not give standing to parents; the purpose of the legislation is to confer standing on nonparents.

Conceivably, the phrase "under this act" might be read to refer to the guardianship statute in general. But if this is its interpretation, the statute could require that de facto custodians' relationships with children must be terminated for abandonment, abuse or neglect before a guardian could be appointed.[96] It might also mean that de facto custodians may make testamentary designations of guardianship.[97]

95. 2004 Idaho Sess. Laws 145, § 2 (emphasis added).

96. The de facto custodian statute did not amend the grounds for appointment of a guardian. Thus, Idaho law requires that a parent's rights must be terminated or that the parent neglected, abused, abandoned or failed to provide a stable home environment for a child. IDAHO CODE § 15-5-204. If a de facto custodian is to be treated as a parent for purposes of the guardianship statute, then arguably such findings would have to be made not only as to parents but also as to de facto custodians before a guardian can be appointed.

97. Idaho's guardianship statute provides that the *parent* of a minor may make a testamentary appointment of guardian. IDAHO CODE § 15-5-202. Again, if a de facto custodian is to be treated as a parent, possibly the custodian could make a testamentary appointment of guardian.

The phrase "under this act" also could be interpreted to mean that once a de facto custodian is appointed, she/he is to be treated generally as a parent for purposes of any action regarding a child's welfare. This interpretation would mean that de facto custodians would be entitled to be treated as parents in a range of matters involving children including custody, guardianship, child protection and juvenile cases. Whatever the language was intended to mean, as drafted, it is hopelessly ambiguous and certain to lead to litigation regarding the rights of de facto custodians.

VI. Suggestions for Future De Facto Custodian Statutes

De facto custodian statutes have the potential to address the needs of informal kin caregivers by providing a mechanism to recognize kinship care arrangements that are less intrusive than adoption and guardianship. However, as they are currently drafted, these statutes have significant problems. Policy-makers should take the following considerations into account when considering de facto custodian legislation and kinship care for children in general.

De facto custodians should be required to obtain judicial recognition of their relationship prior to being treated as a de facto custodian. Such recognition would solve several potential problems with the existing statutes. It would ensure that the individual's relationship with the child is established before he or she may participate in litigation regarding the child's interests. The mere intervention of a third party in family decision-making regarding a child is itself threatening. An individual should not be able to intervene based on an assertion of status. The question of whether any given person is a de facto custodian is largely a question of fact. If an individual who has not yet established that status can intervene and obtain standing to prove that he is a de facto custodian while at the same time participating in the merits of the case, custody cases could be disrupted and fact hearings required even when, in the end, the individual will not be accorded standing. Formal court declaration of a de facto custodianship also gives the custodian evidence of the relationship to present to schools, health care providers, and others.

Proof of de facto custodian status should be by clear and convincing evidence. Once a de facto custodian establishes the proper status, he or she will stand in the litigation on the same footing as a parent. Because of the constitutional significance accorded parental rights, third parties should not be given such standing deference unless evidence of their relationship with the child is strong. This was the position taken by Justice O'Connor in her plurality opinion in *Troxel v. Granville*. Imposing a high evidentiary burden ensures that only individuals who have significant relationships

with children will be able to secure court intervention and a declaration of custodian status.

Time residing with the child after the filing of the action should not be considered in determining whether a person is a de facto custodian. This limitation, found in the Kentucky, Indiana, and Minnesota statutes ensures that a person cannot manipulate the court process to establish his or her custodial status by filing prematurely and delaying until the requisite residential time period has been attained.

Courts should have the ability to decline de facto custodian status if such recognition would not be in the best interests of the child. Because the test for de facto custodian status is a functional one, in any given case it may not capture the essence of the parental relationship with the child. It is possible that the child's primary caregiver and financial supporter has not been providing quality care to the child. Courts should have the discretion to decline the status even when the functional test is met, if the child is not benefitted by the relationship. Kentucky's experience in the *Consalvi* case illustrates the importance of requiring that the designation of a de facto custodian be in the best interests of the child.

Other than as a preference for temporary or permanent placement of the child, de facto custodian status should not confer standing within the child protection system. The unique demands and responsibilities of the child protection system dictate that de facto custodianship not apply. Within the foster care system, most states have independent provisions for kinship care. Conferring standing within the foster care system to individuals other than the child's parents will delay and complicate the case and permanency planning process.

To be considered a de facto custodian, an individual should establish that his or her relationship with the child is either in existence at the time of the proceeding or has existed recently. As currently worded, all de facto custodian provisions have the flaw that individuals who have been out of the child's life for significant periods of time may nonetheless be considered de facto custodians. Although de facto custodians who do not have a current relationship with the child are unlikely to be awarded custody, they would have standing to intervene and litigate about the child's welfare. Such participation by individuals who do not have a current or continuing relationship with the child would be counter-productive.

In addition, states must provide some way to terminate a de facto custodian relationship if it becomes defunct or no longer is in the best interests of the child. None of the current de facto custodian provisions establish a mechanism for terminating de facto custodian status. Certainly, a court could take custody away from a de facto custodian who is not acting in the best

interests of the child, but the custodian would still be a party to future custody proceedings.

Finally, states should not limit de facto custodian status to situations in which the parent is either not present or is negligent regarding the child's care. Such status with the above limitations should be available to adults who form bonded, attached parenting relationships with children even when they are a grandparent who resides in the same household as the parent and child or when they are a partner of a parent who resides in the household. Much has been written about the importance of recognizing these co-residential relationships not only as a way of supporting single parents, but also as a way of recognizing nontraditional relationships. The exclusion of such individuals eliminates some of the most significant providers of kinship care.