

September 2017

# Nonparental Childcare and Child Contact Orders for Grandparents

Jeffrey A. Parness

*Northern Illinois University College of Law*

Alex Yorko

*Northern Illinois University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Family Law Commons](#)

---

## Recommended Citation

Jeffrey A. Parness & Alex Yorko, *Nonparental Childcare and Child Contact Orders for Grandparents*, 120 W. Va. L. Rev. (2017).

Available at: <https://researchrepository.wvu.edu/wvlr/vol120/iss1/5>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

## NONPARENTAL CHILDCARE AND CHILD CONTACT ORDERS FOR GRANDPARENTS

*Jeffrey A. Parness and Alex Yorko\**

I.	INTRODUCTION.....	96
II.	GRANDMA PENNY .....	97
	<i>A. Factual Background .....</i>	97
	<i>B. The Legal Framework.....</i>	100
III.	A NEW MODEL NONPARENT CHILD CUSTODY AND VISITATION ACT AND A REVISED UNIFORM PARENTAGE ACT.....	104
	<i>A. The New NPCCVA .....</i>	104
	<i>B. Amendments to the 2002 RUPA .....</i>	105
IV.	FEDERAL CONSTITUTIONAL LIMITS ON ANY NONPARENT CHILDCARE AND CHILD CONTACT ORDERS OVER PARENTAL OBJECTIONS .....	107
V.	CURRENT GRANDPARENT AND OTHER THIRD PARTY CHILDCARE LAWS .....	112
	<i>A. Terminology.....</i>	112
	<i>B. Illustrative Grandparent and Other Third Party Childcare     Laws.....</i>	113
VI.	KEY ELEMENTS IN ANY NEW GRANDPARENT CHILDCARE LAWS .....	119
	<i>A. What Is Grandparent Childcare? .....</i>	120
	<i>B. Who Should Establish Grandparent Childcare Laws? .....</i>	121
	<i>C. Separate Nonparent Childcare Laws for Grandparents? .....</i>	121
	<i>D. Separate Parent Childcare Laws for Grandparents? .....</i>	123
	<i>E. When Can Parental Objections to Grandparent Childcare Be     Overcome? .....</i>	124
	<i>F. Better Facilitate Compliance with Grandparent Childcare     Orders? .....</i>	127
	<i>G. Grandparent Child Contact Orders.....</i>	128
VII.	CONCLUSION .....	129

---

\* Jeffrey A. Parness is a Professor of Law Emeritus at Northern Illinois University College of Law, with a B.A. from Colby College and a J.D. from The University of Chicago. Alex Yorko is a law student at Northern Illinois University College of Law with a B.A. from Northern Illinois University.

## I. INTRODUCTION

The United States Supreme Court has long recognized that the regulation of certain areas of domestic relations, including standing to seek a childcare order, rests within the virtually exclusive province of the states.<sup>1</sup> State lawmakers recently have undertaken many new domestic relations initiatives relevant to parental and nonparental childcare, prompted, inter alia, by new forms of human reproduction, large numbers of non-marital births, and shifts in family structures. Herein we review past, current, and future state lawmaking on the availability of nonparental childcare and child contact orders for grandparents.<sup>2</sup> Our work coincides with the 2017 inquiries into new model childcare laws by the National Conference of Commissioners on Uniform State Laws (NCCUSL) involving both parental childcare, via a “Revised Uniform Parentage Act” (RUPA), and nonparental childcare, via a new “Nonparental Child Custody and Visitation Act” (NPCCVA). Each model speaks in some ways to childcare by grandparents for their grandchildren. Yet each of these models still fails to adequately address childcare opportunities for third parties, and there is still progress to be made in grandparent and other third party childcare law.

We introduce our examination in Part II by describing one grandmother’s efforts to maintain her connections with her granddaughter after her son’s—the father’s—tragic death. Upon describing Grandma Penny’s efforts to maintain connections with her paternal granddaughter, Sidney, Part III of this article reviews the preliminary work of the NCCUSL. Part IV describes the federal constitutional limits on nonparental childcare orders over parental objections, and in Part V, this article uses current state laws to demonstrate opportunities for grandparent childcare.<sup>3</sup> In Part VI, we explore the key questions facing state lawmakers considering new grandparent childcare and child contact laws. In Part VII, we discuss grandparent child contact orders. We find existing laws, and the NCCUSL models to date, inadequate for the likes of Grandma Penny and Sidney.

---

<sup>1</sup> See, e.g., Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN’S L. REV. 965, 1001 (2016) [hereinafter Parness, *Federal Constitutional Childcare*].

<sup>2</sup> For data on grandparent childcare of grandchildren, see *America’s Families and Living Arrangements: 2016. Table C2. Household Relationship And Living Arrangements Of Children Under 18 Years, By Age and Sex: 2016*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html> (last revised Apr. 6, 2017).

<sup>3</sup> We do not review the standards for when such opportunities should be afforded (i.e., need for detriment to grandchild), where such opportunities may be pursued (i.e., in divorce cases or through original grandparent childcare petitions), how—if at all—postadoption contact agreements involving grandparents and their grandchildren may be sustained, as in GA. CODE ANN. § 19-8-27 (West 2017) (stating adoptive parents and birth relatives may agree to “continuing contact” for children 14 or older), and the opportunities available in dependency proceedings, as in GA. CODE ANN. § 15-11-146(b)(3) (West 2017) (stating placement priority is with “a relative or fictive kin”).

## II. GRANDMA PENNY

A. *Factual Background*

Grandma Penny's battle for visitation with Sidney was long and contentious. It began when Sidney's maternal grandmother, Shirley Skinner, gunned down Steven Watkins, Sidney's father.<sup>4</sup> At the time of his death, Steven was at the home of Jennifer, his estranged wife and the mother of Sidney Watkins, to pick up Sidney for a court-ordered visit.<sup>5</sup> Since then, the paternal grandmother, Penny Watkins, has fought for visitation with Sidney.<sup>6</sup>

Visitation issues began before Steven's death. Shortly after Steven and Jennifer separated, Steven moved in with his parents, Penny and Dale.<sup>7</sup> At that time, Jennifer was Sidney's primary caretaker.<sup>8</sup> After the separation, Steven filed for divorce.<sup>9</sup> Throughout the divorce proceedings, the undertaking of joint parental childcare for Sidney was difficult, as Jennifer and Shirley thwarted the Watkins' family efforts to visit Sidney.<sup>10</sup> Then, on November 25, 2008, when Steven came to Jennifer's home to pick up Sidney, Shirley apparently shot Steven dead.<sup>11</sup>

However, there has been some speculation in the media that Jennifer shot Steven, as she was in the house when the murder occurred, she had motive to kill Steven because she was attempting to keep him away from Sidney, and her story about the events has been inconsistent.<sup>12</sup> According to Shirley's son, Ed, Shirley is "taking the rap" for Jennifer.<sup>13</sup> Ed said that Shirley knew Jennifer "would lose custody of Sidney . . . if Jennifer [ ] was convicted of the killing."<sup>14</sup> Additionally, prosecutors noted that Jennifer "had the strongest motive to kill her husband" and that "there was more physical evidence against Jennifer . . . than there was against Shirley."<sup>15</sup> Prosecutors also noted that the police officer who investigated

---

<sup>4</sup> Bruce Rushton, *The Faces of Jennifer Watkins*, ILL. TIMES (Dec. 8, 2016, 12:11 AM) [hereinafter Rushton, *Faces of Watkins*], <http://illinoistimes.com/article-18005-the-faces-of-jennifer-watkins.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Rachel Otwell, *Bruce Rushton On: 'The Faces of Jennifer Watkins'*, NPR ILL. (Dec. 14, 2016), <http://nprillinois.org/post/bruce-rushton-faces-jennifer-watkins#stream/o>.

<sup>8</sup> Lauren P. Duncan, *Mercy Plea Last Resort for 78-Year-Old Murder Convict*, ILL. TIMES (Jan. 23, 2014, 12:01 AM), <http://illinoistimes.com/article-13396-mercy-plea-last-resort-for-78-year-old-murder-convict.html>.

<sup>9</sup> Rushton, *Faces of Watkins*, *supra* note 4.

<sup>10</sup> *See id.*

<sup>11</sup> Duncan, *supra* at note 8.

<sup>12</sup> Bruce Rushton, *Skinner found guilty; son believes her granddaughter did it*, SJR (May 6, 2010, 5:17 AM), <http://www.sj-r.com/x1381030605/Jury-deliberations-under-way-in-Skinner-murder-trial>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Steven's death had no experience in murder cases.<sup>16</sup> Regardless, Shirley was found guilty of murder.<sup>17</sup>

On December 22, 2009, after Shirley was convicted, Steven's parents sought to maintain their relationship with Sidney, but Jennifer denied them visitation.<sup>18</sup> The paternal grandparents filed a petition in 2009, under the Illinois grandparent visitation statute,<sup>19</sup> wherein they alleged that they had "a close and loving relationship with [Sidney] during Steven's lifetime," as they would often see Sidney during court-ordered visits with him because Steven was living with his parents.<sup>20</sup> But they said that even these visits were often frustrated by Jennifer.<sup>21</sup> The paternal grandparents requested reasonable grandparent visitation.<sup>22</sup>

In 2010, an Illinois circuit court granted visitation,<sup>23</sup> noting that Sidney would suffer psychological harm otherwise.<sup>24</sup> Additionally, the court found that the paternal grandparents were best equipped to relate to Sidney what happened to Steven, with the court and experts opining that the truth about Steven's death may never be known to Sidney without visitation.<sup>25</sup>

Rather than comply with the visitation order, Jennifer moved to Florida.<sup>26</sup> There, police arrested Jennifer on March 15, 2011, for failing to follow the visitation order.<sup>27</sup> Jennifer spent six months in jail,<sup>28</sup> while Jennifer's father,

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See id.*; *see also* *Watkins v. Watkins*, No. 4-10-0759, 2011 WL 10482574, at \*1 (Ill. App. Ct. Feb. 3, 2011).

<sup>19</sup> *Watkins*, 2011 WL 10482574, at \*1. Consider, as an alternative, a request for a guardianship appointment. 755 ILL. COMP. STAT. ANN. 5/11-3 (West 2017) (identifying persons qualified to act as guardians); *Id.* § 11-5 (establishing the norms for guardian appointment). However, if H.B. 3099, Ill. 100th Gen. Assemb., 1st Reg. Sess. (Ill. 2017) passes, then the guardianship appointment requirement under section 11-3(a)(2) would change from "lives in the United States" to "is a resident of the United States," which would include non-American citizens as potential guardians.

<sup>20</sup> *Watkins*, 2011 WL 10482574, at \*1.

<sup>21</sup> *Id.* at \*2.

<sup>22</sup> *Id.* at \*1. The grandparents seemingly would have been foreclosed in seeking a guardianship via an order deeming Sidney a ward. *See, e.g., In re M.M.*, 72 N.E.3d 260, 269 (Ill. 2016) (holding that "[the Juvenile Court] Act does not authorize placing a ward of the court with a third party absent a finding of parental unfitness, inability, or unwillingness [to provide childcare]").

<sup>23</sup> *Watkins*, 2011 WL 10482574, at \*1.

<sup>24</sup> *Id.* at \*5.

<sup>25</sup> *See id.* at \*14; *see also* Bruce Rushton, *Jennifer Watkins Fights for Custody*, ILL. TIMES (Jan. 5, 2017, 12:06 AM) [hereinafter Rushton, *Jennifer Watkins Fights*], <http://illinois-times.com/article-18141-jennifer-watkins-fights-for-custody.html>.

<sup>26</sup> Otwell, *supra* note 7; Bruce Rushton, *Girl of Murdered Dad in State Custody*, ILL. TIMES (Sept. 30, 2016, 11:16 AM) [hereinafter Rushton, *Girl of Murdered Dad*], <http://illinois-times.com/article-17767-girl-of-murdered-dad-in-state-custody-%7C-sidney-watkins-center-of-visitiation-dispute.html>.

<sup>27</sup> Bruce Rushton, *Custody of Watkins Child Transferred to Grandfather*, SJR (May 15, 2011, 2:04 PM) [hereinafter Rushton, *Custody of Watkins*], <http://www.sj-r.com/article/20110515/NEWS/305159954>.

<sup>28</sup> *Id.*; Rushton, *Girl of Murdered Dad*, *supra* note 26.

Robert Webster, had temporary custody of Sidney.<sup>29</sup> After Jennifer was released, a Florida judge ruled that Jennifer did not have to go back to Illinois “to face civil contempt [ ] and criminal misdemeanor charges.”<sup>30</sup>

In 2013, Florida police unsuccessfully tried to arrest Jennifer via an arrest warrant for contempt of court for interfering with court-ordered visitation.<sup>31</sup> Then, in September, 2016, Jennifer was picked up in Massachusetts on an arrest warrant.<sup>32</sup> At that time, she was engaged to a married man who had recently pled “guilty in connection with a \$175 million fraud scheme.”<sup>33</sup> Jennifer later broke off the engagement.<sup>34</sup> Child protective authorities retained custody of Sidney upon Jennifer’s arrest.<sup>35</sup>

Jennifer has claimed that over the years she repeatedly tried to arrange visits between Grandma Penny and Sydney, though this claim is controverted by significant evidence.<sup>36</sup> Penny responded that the only attempt came in a text message in 2011, right before Jennifer left for Florida, that stated, “Gone out of state. You can come visit if you want to.”<sup>37</sup> Penny only had a chance to talk with Sidney twice, and only on birthdays, with the conversations lasting only five minutes.<sup>38</sup> After Penny’s second conversation with Sidney, Jennifer’s phone was disconnected, and Grandma Penny could no longer contact Sidney.<sup>39</sup> During the years that Sidney disappeared with her mother, Penny constantly worried about Sidney’s well-being.<sup>40</sup> Recently, Jennifer has maintained she would comply with any visitation schedule.<sup>41</sup> But a Cass County, Illinois, judge was skeptical.<sup>42</sup> The State of Illinois later urged that Jennifer neglected Sidney and that Sidney should be placed for adoption.<sup>43</sup>

After Jennifer’s arrest in Massachusetts in 2016, Sidney was in the temporary custody of her paternal aunt and uncle due to an Illinois court ruling.<sup>44</sup> Yet because the court did not wish to take Sidney from Jennifer, it scheduled a

---

<sup>29</sup> Rushton, *Custody of Watkins*, *supra* note 27. While Robert had a lawyer in Florida, there was no express indication given that Robert resided in Florida. *See id.*

<sup>30</sup> David Blanchette, *Judge in Watkins Case Keeps Foster Care Arrangement in Place*, SJR (March 21, 2017, 2:54 PM), <http://www.sj-r.com/news/20170321/judge-in-watkins-case-keeps-foster-care-arrangement-in-place>.

<sup>31</sup> Rushton, *Faces of Watkins*, *supra* note 4.

<sup>32</sup> Otwell, *supra* note 7.

<sup>33</sup> Rushton, *Jennifer Watkins Fights*, *supra* note 25.

<sup>34</sup> *Id.*

<sup>35</sup> Rushton, *Girl of Murdered Dad*, *supra* note 26.

<sup>36</sup> *See* Rushton, *Jennifer Watkins Fights*, *supra* note 25.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

review of the case on January 20, 2017, with grandparent visitation continuing.<sup>45</sup> As of August, 2017, Sidney remains in the custody of her paternal aunt and uncle, with Jennifer continuing her court-ordered counselling with Sidney.<sup>46</sup> But the judge was disappointed with Jennifer's progress in counselling and urged her to take it more seriously.<sup>47</sup>

Sidney has always been aware that she is the center of a childcare battle between her paternal grandmother and her mother.<sup>48</sup> Additionally, she is aware of the legal problems facing her mother.<sup>49</sup> In spite of everything, Sidney, at nine, has been doing well, has an IQ of 122, earns high marks and behaves well in school.<sup>50</sup> In addition, it appears Sidney has made friends wherever she has lived.<sup>51</sup>

While she did obtain a visitation order in 2010,<sup>52</sup> Grandma Penny could easily have been stymied by the inadequacies in the Illinois laws on grandparent childcare, which, unfortunately, permeate grandparent childcare laws across the country. Grandmas like Penny may not be as fortunate in the courts in their pursuits of continuing beneficial contacts with their grandchildren.

### B. *The Legal Framework*

In 2010, at the time of the first court order on grandparent visitation, one Illinois law stated: "Grandparents, great-grandparents, and siblings of a minor child, who is one year old or older, have standing to bring an action in circuit court by petition, requesting visitation in accordance with this Section."<sup>53</sup> Additionally, grandparents, great-grandparents and siblings had "standing to file a petition for visitation and any electronic communication rights in a pending dissolution proceeding or any other proceeding that involves custody or visitation issues . . . ."<sup>54</sup>

Under the 2010 law, a grandparent and certain others could file a petition for visitation if there had been "an unreasonable denial of visitation by a parent,"<sup>55</sup> and one of the following conditions existed: the child's other parent (i.e.,

<sup>45</sup> *See id.*

<sup>46</sup> Bruce Rushton, *Sidney Watkins Stays Put*, ILL. TIMES (Aug. 29, 2017, 5:40 PM), [illinois-times.com/article-19064-sidley-watkins-stays-put.html](http://illinois-times.com/article-19064-sidley-watkins-stays-put.html).

<sup>47</sup> *Id.*

<sup>48</sup> Rushton, *Jennifer Watkins Fights*, *supra* note 25.

<sup>49</sup> *See id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See generally id.*

<sup>52</sup> *Id.*

<sup>53</sup> 750 ILL. COMP. STAT. ANN 5/607 (a-3), *repealed* by P.A. 99-90, § 5-20, eff. Jan. 1, 2016. The same law had separate provisions on stepparent visitation. *Id.* § 5/607 (b)(1.5)(A)–(B) (stating a petition for visitation privileges may be met if the child is 12 and has resided with stepparent for at least five years).

<sup>54</sup> *Id.* § 5/607 (a-3).

<sup>55</sup> *Id.* § 5/607 (a-5)(1).

the one without custody) was deceased or missing for at least three months;<sup>56</sup> a parent was incompetent;<sup>57</sup> a parent was incarcerated;<sup>58</sup> the parents were divorced or involved in a court case involving custody or visitation of the child, where at least one parent did not object to visitation;<sup>59</sup> the parents were unwed and not living together, where the maternal grandparents (or others related to the mother) were seeking visitation;<sup>60</sup> or the parents were unwed and not living together, where the paternal grandparents (or others related to the father) were seeking visitation, but only if paternity was established by court order.<sup>61</sup>

Additionally, the 2010 visitation law stated that “there is a rebuttable presumption that a fit parent’s actions and decisions regarding grandparent . . . visitation are not harmful to the child’s mental, physical, or emotional health.”<sup>62</sup> When deciding whether to grant visitation, a court was to consider the child’s preference;<sup>63</sup> the mental/physical health of the child;<sup>64</sup> the mental/physical health of the visitation petitioner;<sup>65</sup> the length/quality of the relationship between the visitation petitioner and the child;<sup>66</sup> the good faith of the person filing the petition;<sup>67</sup> the good faith of the person denying the visitation;<sup>68</sup> the quantity of the visitation time requested;<sup>69</sup> whether the child resided with the visitation petitioner for at least six consecutive months;<sup>70</sup> whether the visitation petitioner had frequent/regular contact with the child for at least twelve consecutive months;<sup>71</sup> any other fact that establishes that the end of the relationship with the petitioner may harm the child’s physical, mental, or emotional health;<sup>72</sup> and whether the visitation petitioner was the primary caretaker of the child for at least six consecutive months.<sup>73</sup> The court could order visitation constituting “reasonable access without requiring overnight or possessory visitation.”<sup>74</sup>

In 2010, when the paternal grandparents were granted visitation, they argued that under the statute, there was an unreasonable denial of visitation by

---

<sup>56</sup> *Id.* § 5/607 (a-5)(1)(A-5).

<sup>57</sup> *Id.* § 5/607 (a-5)(1)(A-10).

<sup>58</sup> *Id.* § 5/607 (a-5)(1)(A-15) (during the three-month period preceding the visitation request).

<sup>59</sup> *Id.* § 5/607 (a-5)(1)(B).

<sup>60</sup> *Id.* § 5/607 (a-5)(1)(D).

<sup>61</sup> *Id.* § 5/607 (a-5)(1)(E).

<sup>62</sup> *Id.* § 5/607 (a-5)(3).

<sup>63</sup> *Id.* § 5/607 (a-5)(4)(A) (when the child is sufficiently mature to express such preference).

<sup>64</sup> *Id.* § 5/607 (a-5)(4)(B).

<sup>65</sup> *Id.* § 5/607 (a-5)(4)(C).

<sup>66</sup> *Id.* § 5/607 (a-5)(4)(D).

<sup>67</sup> *Id.* § 5/607 (a-5)(4)(E).

<sup>68</sup> *Id.* § 5/607 (a-5)(4)(F).

<sup>69</sup> *Id.* § 5/607 (a-5)(4)(G).

<sup>70</sup> *Id.* § 5/607 (a-5)(4)(H).

<sup>71</sup> *Id.* § 5/607 (a-5)(4)(I).

<sup>72</sup> *Id.* § 5/607 (a-5)(4)(J).

<sup>73</sup> *Id.* § 5/607 (a-5)(4)(K).

<sup>74</sup> *Id.* § 5/607 (a-5)(5).



Jennifer.<sup>75</sup> At trial, Jennifer invoked her Fifth Amendment rights.<sup>76</sup> Two doctors testified that Jennifer did not agree with the grandparents' lifestyle choices, believed that they were insincere about their desire for visitation, and believed they lacked a close relationship with Sidney.<sup>77</sup> The same doctors opined that the grandparents were competent and sincere about their visitation desires because they consistently visited with Steven and Sidney when Steven was alive.<sup>78</sup> The trial court deemed Jennifer's denial of visitation unreasonable.<sup>79</sup>

After several years of debate, the Illinois legislature amended its marriage and marriage dissolution laws, effective 2016. These reforms included provisions on "visitation by certain non-parents."<sup>80</sup> Yet the reforms, in our view, still fail to address adequately childcare opportunities for third parties, including grandparents. Under the new laws, grandparents (and certain others)<sup>81</sup> can only pursue "visitation and electronic communication" with a child "who is one year old or older" if there has been "an unreasonable denial of visitation by a parent that causes undue mental, physical, or emotional harm to the child."<sup>82</sup> Additionally, one of the following conditions must exist: a parent must be deceased or missing for at least 90 days,<sup>83</sup> a parent must be incompetent<sup>84</sup> or incarcerated;<sup>85</sup> the parents must be divorced, legally separated,<sup>86</sup> or involved in a court proceeding regarding "parental responsibilities or visitation issues regarding the child,"<sup>87</sup> and at least one parent must not object to visitation,<sup>88</sup> or the parents must be unwed.<sup>89</sup> In assessing grandparent visitation requests, there "is a rebuttable presumption that a fit parent's actions and decisions regarding grandparent . . . visitation are not harmful to the child's mental, physical, or emotional health."<sup>90</sup> Further, courts must take into account the wishes of the child when deciding whether to order nonparent visitation but are not expressly required to consider

<sup>75</sup> *Watkins v. Watkins*, No. 4-10-0759, 2011 WL 10482574, at \*12 (Ill. App. Ct. Feb. 3, 2011); see also 750 ILL. COMP. STAT. ANN. 5/607 (a-5)(1)(A-5), repealed by P.A. 99-90, § 5-20, eff. Jan. 1, 2016 (requiring the visitation petitioner to show that there was "an unreasonable denial of visitation by a parent" where the child's other parent was deceased).

<sup>76</sup> *Watkins*, 2011 WL 10482574, at \*12.

<sup>77</sup> *Id.*

<sup>78</sup> See *id.* at \*14.

<sup>79</sup> *Id.* at \*13.

<sup>80</sup> 750 ILL. COMP. STAT. ANN. 5/602.9 (West 2017).

<sup>81</sup> *Id.* § 5/602.9 (c) ("great-grandparents, step-parents, and siblings").

<sup>82</sup> *Id.* § 5/602.9 (c)(1).

<sup>83</sup> *Id.* § 5/602.9 (c)(1)(A).

<sup>84</sup> *Id.* § 5/602.9 (c)(1)(B).

<sup>85</sup> *Id.* § 5/602.9 (c)(1)(C) (for a period in excess of 90 days "immediately before" visitation is sought).

<sup>86</sup> *Id.* § 5/602.9(c)(1)(D).

<sup>87</sup> *Id.* § 5/602.9(b)(1).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* § 5/602.9 (c)(1)(E) (where the parents "are not living together" and parentage "has been established by a court of competent jurisdiction").

<sup>90</sup> *Id.* § 5/602.9 (b)(4).

the best interests of the child.<sup>91</sup> Under the new laws, there are also no opportunities for nonparents, like grandparents, to secure childcare opportunities by becoming parents in the absence of formal adoption, though varying new parentage law proposals were considered.<sup>92</sup>

Beyond nonparent visitation, under the 2016 laws, nonparents can seek a judicial allocation of “parental responsibilities,” defined as involving more childcare than does child visitation.<sup>93</sup> A “person other than a parent” can petition for such an allocation if the child “is not in the physical custody of one of his or her parents.”<sup>94</sup> Further, a step-parent can petition, *inter alia*, where “the parent having the majority of parenting time is deceased” or otherwise unable to care for the child and “the child wishes to live with the step-parent.”<sup>95</sup> Where one parent is deceased, the decedent’s parent or step-parent can petition if, at the time of the parent’s death, the surviving parent “had been absent from the marital abode for more than one month” without the decedent knowing the whereabouts;<sup>96</sup> the surviving parent was in “state or federal custody;”<sup>97</sup> or the surviving parent had been involved in domestic violence.<sup>98</sup> Clearly, Grandma Penny will be ineligible to seek an allocation of parental responsibilities as long as Sidney is in Jennifer’s custody in Illinois,<sup>99</sup> where they now reside.

---

<sup>91</sup> *Id.* § 5/602.9 (b)(5).

<sup>92</sup> See Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743, 753–56 (2013) [hereinafter Parness, *Parentage Law*].

<sup>93</sup> Compare 750 ILL. COMP. STAT. ANN. 5/601.2(b)(3) (nonparent can seek an allocation), *id.* § 5/602.5 (b) (allocation can include “significant decision-making responsibility for each significant issue affecting the child”), and *id.* § 5/602.7(a) (allocation can include “parenting time”), with *id.* § 5/602.9(a)(4) (“visitation” by non-parents means “in-person time spent between a child” and a nonparent, which “may include electronic communication”).

<sup>94</sup> *Id.* § 5/601.2 (b)(3).

<sup>95</sup> *Id.* § 5/601.2 (b)(4)(A), (C).

<sup>96</sup> *Id.* § 5/601.2 (b)(5)(A).

<sup>97</sup> *Id.* § 5/601.2 (b)(5)(B).

<sup>98</sup> *Id.* § 5/601.2 (b)(5)(C).

<sup>99</sup> *Id.* § 5/601.2 (b)(3). Jennifer’s physical custody was absent, of course, while she was in jail in Florida in 2011. At that time, the 2016 law was not in effect, and even if it was, Sidney was not in Illinois, so Illinois law could not apply. Additionally, notwithstanding Steven’s death, Grandma Penny could not seek such an allocation under another statutory section. *Id.* § 5/601.2 (b)(5).

### III. A NEW MODEL NONPARENT CHILD CUSTODY AND VISITATION ACT AND A REVISED UNIFORM PARENTAGE ACT

Restrictive provisions on childcare orders for grandparents in Illinois and elsewhere in the United States may soon change. The National Conference of Commissioners on Uniform State Laws recently established separate drafting committees, one to establish a new “Nonparental Child Custody and Visitation Act” (NPCCVA), and the other to amend its 2002 Uniform Parentage Act (RUPA).

#### A. *The New NPCCVA*

The NPCCVA, in October, 2016, was described as providing “procedures and factors for courts to apply when asked to grant custody or visitation to non-parents.”<sup>100</sup> The Commissioners at that time recognized separate norms for who, as nonparents, may petition for custody<sup>101</sup> or for visitation.<sup>102</sup> As to custody, nonparents who petition included those who “exercised [primary] care and control of a child” while making “decisions regarding the health, welfare and other needs of the child [for a period of six or more months] during the year before the filing of the petition.”<sup>103</sup> They also included anyone who “has been a de facto parent of the child during the year proceeding the filing of the petition,”<sup>104</sup> defined as one who is not otherwise a legal parent;<sup>105</sup> who within the two years immediately before filing undertook “permanent, unequivocal, committed parental responsibility in the child’s life;”<sup>106</sup> and who so acted with the support of “another parent of the child,” where both “accepted” the developing relationship and “behaved as though” the nonparent “[was] a parent of the child.”<sup>107</sup>

---

<sup>100</sup> NON-PARENTAL CHILD CUSTODY AND VISITATION ACT, Prefatory Note, 1 (UNIF. LAW COMM’N, Drafting Committee Meeting, October 2016) [hereinafter NPCCVA OCTOBER 2016 DRAFT]. Seemingly, such factors would comparably apply when nonparents petition for childcare in a new case, or in a pending case, like a divorce case involving parents. *See, e.g., Burak v. Burak*, No. 97, 2017 Md. LEXIS 609 (Md. Aug. 29, 2017).

<sup>101</sup> NPCCVA OCTOBER 2016 DRAFT, *supra* note 100, § 5. “‘Custody’ means physical custody, legal custody, or both.” *Id.* § 2(4).

<sup>102</sup> *Id.* § 2(18). “‘Visitation’ means the right to spend time with a child, which may include overnights.”

<sup>103</sup> *Id.* § 5(a)(3)–(4).

<sup>104</sup> *Id.* § 5(a)(5).

<sup>105</sup> *Id.* § 2(5)(A). Fortunately, the confusing mix of de facto parentage with nonparent childcare was removed in 2017. *See, e.g., NON-PARENTAL CHILD CUSTODY VISITATION ACT §102(10)* (UNIF. LAW COMM’N, Annual Meeting Draft July 2017) [hereinafter NPCCVA JULY 2017 DRAFT] (“‘non-parent’ means an individual other than a parent”). Unfortunately, some American state laws on nonparent childcare do talk of “de facto” custody. *See, e.g., A.A. v. B.B.*, 384 P.3d 878, 882 (Haw. 2016) (citing HAW. REV. STAT. § 571-46(a)(1)–(2) (West 2017)).

<sup>106</sup> NPCCVA OCTOBER 2016 DRAFT, *supra* note 100, § 2(5)(B).

<sup>107</sup> *Id.* § 2(5)(c)(iii).

As to visitation, nonparents may petition under the 2016 proposal if they “exercised primary care and control of a child and made decisions regarding the health, welfare and other needs of the child for a period of six or more months during the year preceding the filing of a petition;”<sup>108</sup> had “been a de facto parent of the child during the year before the filing;”<sup>109</sup> and had “a substantial relationship” with the child where “denial [of] visitation . . . would be a detriment to the child.”<sup>110</sup>

The NPCCVA, as of July, 2017, defined nonparent as “an individual other than a parent.”<sup>111</sup> The Act applies to “a proceeding in which a nonparent seeks custody or visitation over the objection of a parent,”<sup>112</sup> eliminating the earlier separation of custody and visitation standing. Such a proceeding could be pursued via a petition by a nonparent who is shown by “clear and convincing evidence” to have “acted as a consistent caretaker of the child without expectation of financial compensation”<sup>113</sup> and who “has resided with the child,”<sup>114</sup> where there was explicit or tacit acceptance by “a parent” of the child of the development of a “bonded and dependent relationship between the child and the nonparent,”<sup>115</sup> as well as a showing of the child’s best interests.<sup>116</sup> Alternatively, a petition’s grant could be founded on “clear and convincing evidence” of a “substantial relationship” between nonparent and child, where “denial of custody or visitation would result in a [detriment] to the child”<sup>117</sup> and where a grant of custody or visitation would be “in the best interests of the child.”<sup>118</sup>

### B. Amendments to the 2002 RUPA

The RUPA, in October, 2016, had both a Draft and an Alternative B Draft. Each spoke to parentage without assisted reproduction, with assisted reproduction but no surrogate, and with assisted reproduction with a surrogate. Of course, should a grandparent qualify as a parent, the grandparent may not need to rely on any nonparent childcare laws to secure grandchild childcare.<sup>119</sup>

---

<sup>108</sup> *Id.* § 5(b)(1).

<sup>109</sup> *Id.* § 5(b)(2).

<sup>110</sup> *Id.* § 5(b)(3).

<sup>111</sup> NPCCVA JULY 2017 DRAFT, *supra* note 105, § 102(10).

<sup>112</sup> *Id.* § 103(a).

<sup>113</sup> *Id.* § 112(a)(1).

<sup>114</sup> *Id.* § 112(a)(1)(A) (stating a nonparent must have lived with the child for at least six consecutive months or since birth).

<sup>115</sup> *Id.* § 112 (a)(1)(B).

<sup>116</sup> *Id.* § 112 (a)(1)(C).

<sup>117</sup> *Id.* § 112 (a)(2). The term “harm” is suggested as an alternative to “detriment.” *See id.* § 112(b).

<sup>118</sup> *Id.* § 112 (a)(2).

<sup>119</sup> Where a grandparent otherwise qualifies as a parent but where there are already two continuing childcare parents and where three parents are not authorized, such a grandparent may only be able to seek childcare as a nonparent.

As to children born of sex, under the RUPA October 2016 Draft there could be a presumed parent (and thus is not a nonparent as in the NPCCVA) who, *inter alia*, “(i) resided with the child for a significant period of time; (ii) engaged in consistent caretaking of the child; (iii) accepted full and permanent responsibilities as a parent;” and (iv) “established a bonded and dependent relationship with the child, and the other parent understood, acknowledged, or accepted formation of that relationship or behaved as though the individual is a parent of the child.”<sup>120</sup> A presumed parent also included one who “for the first two years of the child’s life . . . resided in the same household with the child and openly held out the child as the individual’s own child.”<sup>121</sup> Under the RUPA Alternate B Draft in 2016, there could be a “de facto parent,” though he or she is not a presumed parent (and also is not a nonparent as in the NPCCVA).<sup>122</sup> Here, a de facto parent would be “an individual who fully and completely undertook an unequivocal, committed and responsible parental role in the child’s life during the child’s minority.”<sup>123</sup> Such de facto parentage required a determination in line with the 2017 RUPA Draft’s recognition of a presumed parent where same residency in the first two years was not required.<sup>124</sup>

The RUPA, as of March, 2017, moved the presumed parentage without the first two-year requirement into a separate de facto parent section which prompts no presumption.<sup>125</sup> But it maintained “presumed” parentage for residing with the child “for the first two years of the child’s life.”<sup>126</sup> As of July, 2017, this presumption continued,<sup>127</sup> but the July 2017 de facto parent section in RUPA, still prompting no presumption, differed a bit from the earlier section.<sup>128</sup>

Grandma Penny seemingly would have difficulty in her quest for visitation with Sydney under the varying proposed models on parentage and nonparent

<sup>120</sup> REV. UNIF. PARENTAGE ACT § 204(a)(6) (UNIF. LAW COMM’N, Draft Committee Meeting Oct. 2016). Such parentage continued in the REV. UNIF. PARENTAGE ACT § 205(a) (UNIF. LAW COMM’N, Committee Meeting Draft Mar. 2017) [hereinafter RUPA DRAFT MAR. 2017] (“de facto” parent is not a “presumed parent” under this draft); *see also id.* §205(a)(6) (“bonded and dependent relationship with the child was fostered or supported by another parent of the child”).

<sup>121</sup> REV. UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM’N, Committee Meeting Draft Oct. 2016). This continued in REV. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM’N, Meeting July 2017) [hereinafter RUPA MEETING JULY 2017].

<sup>122</sup> REV. UNIF. PARENTAGE ACT § 102(6) (UNIF. LAW COMM’N, Drafting Committee Meeting, Redline Draft—Alternative B, Oct. 2016) [hereinafter ALTERNATIVE B].

<sup>123</sup> *Id.* § 205(a).

<sup>124</sup> *Id.* (including de facto parentage with no presumption); *see also* RUPA MEETING JULY 2017, *supra* note 121, § 609(d).

<sup>125</sup> RUPA DRAFT MAR. 2017, *supra* note 120.

<sup>126</sup> *Id.* § 204(a)(2).

<sup>127</sup> REV. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM’N, Annual Meeting Draft July 19, 2017) [hereinafter RUPA JULY 19 DRAFT], [http://www.uniformlaws.org/shared/docs/parentage/2017AM\\_Parentage\\_AsApproved.pdf](http://www.uniformlaws.org/shared/docs/parentage/2017AM_Parentage_AsApproved.pdf).

<sup>128</sup> *Id.* § 609(d) (requiring, per § 609(d)(5), “a bonded and dependent relationship with the child that is parental in nature”).

childcare to date. Other grandmas might not be as lucky as Penny and might find an unsympathetic court.

#### IV. FEDERAL CONSTITUTIONAL LIMITS ON ANY NONPARENT CHILDCARE AND CHILD CONTACT ORDERS OVER PARENTAL OBJECTIONS

While we believe new laws are needed to better serve the interests of grandparents and their grandchildren regarding familial contacts, there are some limits to any new laws. In *Troxel v. Granville*,<sup>129</sup> four United States Supreme Court justices determined in a plurality opinion that the liberty interest of “parents in the care, custody, and control of their children”<sup>130</sup> (hereinafter childcare interests) generally foreclose states from compelling requested grandparent childcare over current parental objections.<sup>131</sup> Yet, these four justices recognized that special factors might justify judicial interference in parental decision-making as long as the contrary contemporary wishes of parents were accorded “at least some special weight.”<sup>132</sup> The plurality, and one concurring justice, reserved the question of whether any nonparental visitation, which may not only include grandparents, but also stepparents, siblings and others,<sup>133</sup> must “include a showing of harm or potential harm to the child as a condition precedent.”<sup>134</sup> Yet in concurring, Justice Souter hinted that at least some nonparental visitation could

<sup>129</sup> 530 U.S. 57 (2000).

<sup>130</sup> *Id.* at 65 (plurality opinion) (calling the interest “perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

<sup>131</sup> *Id.* at 68–69 (plurality opinion) (explaining that “so long as a parent adequately cares for his or her children [i.e., is fit], there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children”); see generally Donald Leo Bach, *The Rapanos Rap: Grappling with Plurality Decisions*, U.S. L. WEEK, (Oct. 2, 2012), <http://www.dewittross.com/docs/publications/bach-article-lw-oct-2-2012.pdf?sfvrsn=0> (analyzing plurality opinions).

<sup>132</sup> *Troxel*, 530 U.S. at 70 (plurality opinion) (“[I]f 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.”).

<sup>133</sup> See, e.g., *In re Marriage of James & Claudine W.*, 7 Cal. Rptr. 3d 461, 464 (Cal. Ct. App. 2 Dist. 2003) (applying *Troxel* to stepparent visitation request).

<sup>134</sup> *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.”) (Souter, J., concurring). But see *McGarity v. Jerrolds*, 429 S.W.3d 562, 570–71 (Tenn. Ct. App. 2013) (establishing harm where it is required). See generally PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.18(2)(a)(i) (AM. LAW INST. 2002) [hereinafter PRINCIPLES OF FAMILY DISSOLUTION] (suggesting that harm is not always needed to support court orders for childcare responsibility and that “a grandparent or other relative who has developed a significant relationship with the child” can seek childcare where “the parent objecting to the allocation has not been performing a reasonable share of parenting functions for the child”); Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, apps at 18–34 (2013) (comparing state grandparent and other third party visitation statutes that do not explicitly require the loss of a relationship with a third party to cause harm).

be based solely on a preexisting “substantial relationship” between a child and a nonparent together with “the State’s particular best interests standard.”<sup>135</sup>

Several Justices dissented in *Troxel*. Justice Kennedy, in dissent, not unlike Justice Souter, observed that a best interests standard might be constitutional where the nonparent acted “in a caregiving role over a significant period of time,”<sup>136</sup> hinting that such a nonparent might sometimes even be afforded “de facto” parent status.<sup>137</sup> Also in dissent, Justice Scalia seemingly agreed, noting the need for both “gradations” of nonparents<sup>138</sup> and carefully crafted state law definitions of parents.<sup>139</sup> A third dissenter, Justice Stevens, added that because at least some children in nonparent settings likely “have fundamental liberty interests” in “preserving established familial or family-like bonds,”<sup>140</sup> nonparents seeking childcare must be distinguished by whether there is a “presence or absence of some embodiment of family.”<sup>141</sup>

<sup>135</sup> *Troxel*, 530 U.S. at 76–77 (Souter, J., concurring) (analyzing the Washington statute and acknowledging that 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). An exemplary statute is VA. CODE ANN. § 20-124.2(B) (West 2017), which states, “The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest.” An illustrative case is *In re M.W.*, 292 P.3d 1158 (Colo. App. 2012) (employing COLO. REV. STAT. ANN. § 14-10-123 (West 2017)).

<sup>136</sup> *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting) (“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.”) *Id.* at 98–99.

<sup>137</sup> *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.”).

<sup>138</sup> *Id.* at 92–93 (Scalia, J., dissenting) (“Judicial vindication 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.”).

<sup>139</sup> *Id.* (“Judicial vindication of ‘parental rights’ . . . requires . . . a judicially crafted definition of parents.”).

<sup>140</sup> *Id.* at 88 (Stevens, J., dissenting). *But see* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (stating that the Court has not “had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship”); *In re Meridian H.*, 798 N.W.2d 96, 108 (Neb. 2011) (recognizing no federal or state constitutional right to continuing sibling relationships with a sister upon the termination of parental rights regarding the sister, where the sister was placed in foster care and the two older siblings were adopted). *See generally* Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 931 (2012) (urging courts, legislatures, and scholars to pay better attention to “sibling relationships,” concluding that “[f]amily law’s narrow focus on marriage and parenthood, inherited from the common law and then endlessly replicated without normative scrutiny, has constrained critical thinking in family law for too long.”).

<sup>141</sup> *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting). The New York high court utilized this observation to suggest that children’s interests might also prompt broader definitions of parentage. *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 499–500 (N.Y. 2016); *see also In re Clifford K.*,

Thus, while important, current parental objections to nonparent childcare desires need not always be dispositive.<sup>142</sup> Since *Troxel*, the United States Supreme Court has not spoken about nonparent childcare over current parental objections. It has not addressed the special weight, special factors, harm or potential harm, de facto parenthood, children's fundamental liberty interests, or family-like bonds.<sup>143</sup> Following *Troxel*, many state legislatures have refined their third party childcare laws,<sup>144</sup> including crafting new, or recrafting special, grandparent childcare statutes.<sup>145</sup> State high courts have heard challenges to nonparent childcare laws since *Troxel*.<sup>146</sup> State legislators and judges have differed interstate when examining the harm or potential harm, special factors and special weight that can justify judicial interference with parental liberty interests via court orders on third party childcare over current parental objections.<sup>147</sup> As the United

---

217 W. Va. 625, 646 (2005) (reiterating, without reference to *Troxel*, that a child has rights "of a constitutional magnitude" regarding "continued association" with those with whom there are close emotional bonds).

<sup>142</sup> 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, 504 (D.C. 2012). Further, the Court may issue a court order waiving the other parent's required consent in the child's best interest. *Id.*

<sup>143</sup> One distinguished commentator said the following about *Troxel*:

*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.

ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 833 (4th ed. 2011).

<sup>144</sup> For a review of general third party childcare statutes, see Atkinson, *supra* note 134.

<sup>145</sup> 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) (listing grandparent visitation statutes).

<sup>146</sup> See generally Sonya C. Garza, *The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927, 940 n.100 (2009) (providing a review of post-*Troxel* state cases on the constitutionality of such statutes); Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 867 n.5 (2003) (providing an earlier review of such statutes). More recent grandparent childcare cases include *Matter of Custody of L.M.S.*, 387 P.3d 707 (Wash. 2017) and *D.P. v. G.J.P.*, 146 A.3d 204 (Pa. 2016).

<sup>147</sup> See Atkinson, *supra* note 134 (demonstrating variations in, inter alia, laws on great-grandparents, burden of proof, and necessity to show harm). Interstate variations also appear for state law definitions of parents and for state laws on stepparent visitations. See, e.g., Jeffrey A. Parness, *Survey of Illinois Law: Stepparent Childcare*, 38 S. ILL. U. L.J. 575, 588-89 (2014) (providing a survey of Illinois stepparent childcare law); Parness, *Parentage Law*, *supra* note 92, at 753-63 (providing an analysis of American parentage law).



States Supreme Court has recognized, the regulation of domestic relations laws on childcare standing rests within the virtually exclusive province of the states,<sup>148</sup> so that interstate variations may arise even where there are model laws, like those now proposed by the NCCUSL.

Since *Troxel*, there has been an upsurge in primary or significant childcare by grandparents, as well as by other nonparents, including the intimate partners (male or female) of single parents who cohabit, where the single parents are often unwed birth mothers.<sup>149</sup> As a result, there continue to be many third-

---

<sup>148</sup> See, e.g., Parness, *Federal Constitutional Childcare*, *supra* note 1, at 994–1002 (describing and criticizing this approach). *But see* Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 798–815 (2015) (describing the long history of some federal family status determinations). Of course, the states may provide greater protections of parental rights than are afforded by the federal constitution. See, e.g., *Hunter v. Hunter*, 771 N.W.2d 694, 711 (Mich. 2009) (“Nothing in *Troxel* can be interpreted as precluding states from offering *greater* protection to the fundamental parenting rights of natural parents, regardless of whether the natural parents are fit. This rule applies here.”).

<sup>149</sup> See, e.g., J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J.L. & PUB. POL’Y 521, 523 (2011) (noting increasing parenting by single parents and relatives); Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940–99*, NAT. VITAL STAT. REP., 1, 2 (Oct 18, 2000), [https://www.cdc.gov/nchs/data/nvsr/nvsr48/nvsr48\\_16.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr48/nvsr48_16.pdf) (“The percent of births to unmarried women rose almost without interruption from 1940 (3.8 percent) to 1994 (32.6 percent) . . . From 1994 to 1999 there was little change . . . it was 33.0 percent in 1999.”); Lynn D. Wardle, *Dilemmas of Indissoluble Parenthood: Legal Incentives, Parenting, and the Work-Family Balance*, 26 BYU J. PUB. L. 265, 270–71 (2012) (increasing parenting by unwed couples and by single parents, mostly mothers); *Facts About Children Being Raised by Grandparents*, ILL. DEP’T ON AGING, [http://www.illinois.gov/aging/communityservices/caregiver/pages/grg\\_facts.aspx](http://www.illinois.gov/aging/communityservices/caregiver/pages/grg_facts.aspx) (last visited Oct. 3, 2017) (listing more than 200,000 children under the age of 18 as living in grandparent headed households, with more than 40,000 grandparents “responsible for their grandchildren for 5 years or more”); Rose M. Kreider & Renee Ellis, *Living Arrangements of Children: 2009*, U.S. CENSUS BUREAU 2, 4 (June 2011), <https://www.census.gov/prod/2011pubs/p70-126.pdf> (providing illustrations, including Figure 1, illustrating the historical living arrangements of children from 1880–2009, and Table 1, displaying selected 1991–2009 figures, showing more and more children not living with two married parents and living with a single parent or grandparents only).

Increasing instances of parenting by grandparents, and other relatives, seemingly arises, in part, because of the Federal Fostering Connections to Success and Increasing Adoptions Act of 2008. 42 U.S.C. § 671(a)(29) (2012) (requiring the state, within 30 days of removal of child from parental custody, to 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 ANN. § 78A-6-307(7), (9), (18)(c)-(e) (West 2017) (when a child is removed from parental custody, preference for placement of the child shall be given to “a relative of the child”); 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”). The rising amount of unwed cohabiting couples has also prompted much litigation over property distribution, as well as future childcare, upon separation. See, e.g., *In re Kelly & Moesslang*, 287 P.3d 12 (Wash. Ct. App. 2012) (applying equitable “committed intimate relationship” doctrine to unwed separating couple who lived “in a marital-like relationship and acquired what would have been community property had there been a marriage”). To the extent these disputes involve contracts, there may be

party childcare disputes in the state courts, as well as disputes over new forms of parentage. While court-compelled nonparent childcare, over current parental objections,<sup>150</sup> can arise either from third party standing or from a type of newly-recognized parental status, sometimes third party standing is the only available avenue for nonparents because de facto parenthood often cannot be employed where two legal parents already exist.<sup>151</sup>

New de facto parent statutes and cases present a scheme for approaching grandparent (and other nonparent) childcare that does not envision a singular approach to judicial assessments of the special weight to be accorded current parent wishes or of the harm or potential harm to children.<sup>152</sup> De facto parentage laws increasingly recognize that a single parent's current objection to a new second parent carries less weight when the single parent explicitly consented to and strongly fostered a substantial parent-like relationship between his or her child and the aspiring second parent.<sup>153</sup> Comparably, grandparent childcare orders—

---

controlling statutes. *See, e.g.*, *Cavalli v. Arena*, 42 A.3d 250 (N.J. Super. Ct. Ch. Div. 2012) (holding that a claim is barred by a recent amendment N.J. STAT. ANN. § 25:1-5(h) (West 2017) which requires palimony pacts to be in writing and subject to independent attorney review and advice).

<sup>150</sup> Overcoming parental objections to third party or new de facto parent childcare can often be more difficult when custodial (as opposed to non-custodial) parents object. *See, e.g.*, David D. Meyer, *The Custodial Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1466 (2006) (“[T]he Constitution does in fact tolerate unequal roles for parents in the divided family” where “the weakness – of non-custodial parents’ rights” does not “reflect the unique disabilities of the non-custodial parent,” but serves to make “room for sensitive accommodation by the state of the potentially conflicting interests of various family members.”).

<sup>151</sup> While most American states do not recognize the possibility of three (or more) parents for any child, a few do. *See, e.g.*, CAL. FAM. CODE § 7612(c) (West 2017) (no need to choose between two presumed parents, like a husband of the birth mother and one who holds himself or herself out as a parent, when making a choice “would be detrimental to the child”); *T.D. v. M.M.M.*, 730 So. 2d 873, 876 (La. 1999) (holding “dual paternity” possible in both husband and biological father where husband’s marriage to birth mother had been dissolved and where child’s best interests would be served); *Smith v. Cole*, 553 So. 2d 847, 854 (La. 1989) (holding that two men may have paternal rights in a child, as well as child support obligations). Three parents have also been recognized as possible in New Jersey where a birth parent’s earlier consent to a stepparent’s performance of parental duties has led the stepparent to possibly be a psychological parent, even though a second parent, here a formal adoptive parent, may not have consented to such duties. *K.A.F. v. D.L.M.*, 96 A.3d 975, 981 (N.J. Super. App. Div. 2014) (requiring stepparent to show “exceptional circumstances” and the child’s best interests to gain a court-ordered childcare order over the birth parent’s current objection). On the need for emergence of a three- (or more-) parent family, see, for example, Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2008).

<sup>152</sup> *See, e.g.*, *In re Marriage of Meister*, 876 N.W.2d 746 (Wis. 2016).

<sup>153</sup> *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (West 2017) (de facto parent with “support and consent of the child’s parent or parents who fostered . . . a parent-like relationship”); D.C. CODE ANN. § 16-831.01(1)(A) (West 2017) (de facto parent who has “[l]ived with the child in the same household at the time of the child’s birth or adoption by the child’s parent,” who has “taken on full and permanent responsibilities as the child’s parent,” and who has “held himself or herself out as the child’s parent with the agreement of the child’s parent or, if there are 2 parents, both parents”). This approach is suggested in draft revisions to the Revised Uniform Parentage Act. REV. UNIF. PARENTAGE ACT § 205(a) (UNIF. LAW COMM’N, Style Committee Meeting Draft, Mar. 2017) and RUPA JULY 19 DRAFT, *supra* note 127, § 609(d)(6) (“another parent” supported “the bonded and

without second parent status—should also sometimes be founded on less weight than current parental preferences where there was an objecting parent’s earlier acquiescence in a diminishment of superior parental authority.<sup>154</sup>

## V. CURRENT GRANDPARENT AND OTHER THIRD PARTY CHILDCARE LAWS

Third party childcare laws allow certain nonparents to pursue court-ordered childcare over current parental objections, be there one or two or more legal parents. Often such nonparents must have developed bonded, dependent, and perhaps parental-like, relationships with children which courts determine must continue in the children’s best interests. At times, third parties seeking childcare over current parental objections need not demonstrate parental unfitness or extraordinary circumstances.<sup>155</sup> Varying third party childcare laws are now illustrated, after a brief review of the challenges presented by the terminology.

### A. Terminology

Understanding the common terminology employed in American state childcare laws, whether via statutes or precedents, is challenging. There are interstate, and sometimes even intrastate, variations in terms. The same statutory term can have different meanings between states. Different courts will also employ different terms in similar common law settings, which may—but need not—follow the statutory terms used elsewhere and which may have different meanings interstate.

As noted, Justice Kennedy in *Troxel* hinted that American states might be able to afford “de facto” parent status to then-nonparents who acted “in a caregiving role over a significant period of time.”<sup>156</sup> Such status, in fact, is now recognized in several states, though, at times, a differing term is employed, like

---

dependent relationship” that is required), [http://www.uniformlaws.org/shared/docs/parentage/2017AM\\_Parentage\\_AsApproved.pdf](http://www.uniformlaws.org/shared/docs/parentage/2017AM_Parentage_AsApproved.pdf).

<sup>154</sup> See, e.g., *In re Marriage of Meister*, 876 N.W.2d 746, 760 (Wis. 2016) (concluding that a grandparent “need not prove a parent-child relationship in order to secure visitation rights”). It is a far more difficult case where only one of two existing parents earlier acquiesced in diminished parental authority. See, e.g., *K.A.F.*, 96 A.3d at 983 (holding that stepparent of minor child, a former domestic partner of biological mother, may have childcare standing due to earlier birth mother’s consent although no such consent by adoptive parent of child).

<sup>155</sup> See, e.g., *Weldon v. Ballow*, 200 So. 3d 654, 673 (Ala. Civ. App. 2015) (Pittman, J., concurring in part and dissenting in part) (findings of parental unfitness or harm to child not always needed to support a grandparent visitation order over parental objections); *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008); *In re R.A.*, 891 A.2d 564 (N.H. 2005) (determining, per three of five justices, that a finding of parental unfitness is unnecessary for grandparent childcare order).

<sup>156</sup> *Troxel v. Granville*, 530 U.S. 57, 98 (2000) (Kennedy, J., dissenting).

presumed parent, equitable adoption parent, or parent by estoppel.<sup>157</sup> Additionally, the requisites for such childcare parentage can be more particular (e.g., a minimum time period for caregiving) or less particular (e.g., residence in the household and providing some financial support).<sup>158</sup>

Parental childcare status, whatever the term employed (herein “de facto parenthood”) is generally similar across state lines. While it can arise from some pre-birth acts, chiefly it arises from post-birth acts that occur at no precise point in time, for instance, with caregiving over a significant period of time. Imprecise childcare parentage is thus distinguished from childcare parentage arising from giving birth, a state-recognized voluntary parentage acknowledgement, a state-recognized adoption, a birth certificate registration, or a court judgment.<sup>159</sup>

Beyond parental childcare, there are nonparental childcare opportunities. Again, there are significant interstate differences in terminology and requisites. A “de facto parent” might sometimes even be deemed a nonparent for childcare purposes, as it was at one time in the NPCCVA.<sup>160</sup>

### B. Illustrative Grandparent and Other Third Party Childcare Laws

Some current third party childcare laws are quite broad, encompassing many who help raise children.<sup>161</sup> Others are more narrow and address only grandparents or stepparents.<sup>162</sup> Sometimes, nonparents with standing to seek childcare

<sup>157</sup> See, e.g., Jeffrey A. Parness, *Challenges in Handling Imprecise Parentage Matters*, 28 J. AM. ACAD. MATRIM. L. 139, 142–44 (2015) [hereinafter Parness, *Challenges*].

<sup>158</sup> Compare UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM’N 1973) (a man is “presumed to be the natural 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 natural child”), with UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM’N 2002) (a man is “presumed to be the father of a child if . . . for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own”). The original 1973 Uniform Parentage Act is substantially followed in CAL. FAM. CODE § 7611(d) (West 2017); COLO. REV. STAT. § 19-4-105(1)(d) (2017); MONT. CODE ANN. § 40-6-105(d) (2017); and N.J. STAT. ANN. § 9:17-43(a)(4) (West 2017). The 2002 Uniform Parentage Act is substantially followed in DEL. CODE ANN. tit. 13, § 8-204(a)(5) (2017); N.D. CENT. CODE § 14-20-10(1)(e) (2017); N.M. STAT. ANN. § 40-11A-204(a)(5) (2017); OKLA. STAT. tit. 10, § 7700-204(A)(5) (2017); TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2017); and WYO. STAT. ANN. § 14-2-504(a)(v) (2017).

<sup>159</sup> Parness, *Challenges*, *supra* note 157, at 142–44.

<sup>160</sup> NONPARENTAL CHILD CUSTODY AND VISITATION ACT § 2(5) (UNIF. LAW. COMM’N., Committee Meeting Draft Oct. 2016). There can be a bit of confusion even when terminology is not as problematic. See, e.g., D.C. CODE § 16-831.01(1), (5) (West 2017) (defining “de facto parent” in a chapter on third party custody where third parties do not include parents or de facto parents); KY. REV. STAT. ANN. § 403.270 (West 2017) (stating that a “de facto” custodian, not a parent, can seek court-ordered childcare).

<sup>161</sup> See, e.g., D.C. CODE § 16-831.02(a)(1) (West 2017) (“A third party may file a complaint for custody of a child”). However, the third party cannot be “the child’s parent or de facto parent.” *Id.* § 16-831.01(5).

<sup>162</sup> Judicially, there is no opportunity for standing when statutes limit third party standing to certain individuals, like grandparents or stepparents, as via *parens patriae*. See, e.g., *In re Willeke*,

orders are described as having undertaken parental or parental-like duties, though legal parentage is not prompted.<sup>163</sup>

For broader nonparent childcare, consider a South Dakota statute which 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>164</sup> In South Dakota, a parent’s “presumptive right to custody” can be diminished by a third party childcare order when there is abandonment or persistent parental neglect, forfeiture or surrender of parental rights to a nonparent, abdication of “parental rights and responsibilities,” or “extraordinary circumstances” where there will likely be “serious detriment to the child.”<sup>165</sup> In Kentucky, a “de facto custodian” of a child can seek childcare 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>166</sup> In Colorado, there is nonparent childcare standing to seek an allocation of parental responsibilities when the nonparent “has had the physical care of a child for a period of one hundred eighty-two days or more.”<sup>167</sup> In New Mexico, when “neither parent is able . . . to provide appropriate care,” a child may be “raised

160 A.3d 688, 691 (N.H. 2017) (holding the common law authority was abrogated by limited statutes, “although no express terms to that effect are used”).

<sup>163</sup> A review of American state third party childcare laws can be found in Atkinson, *supra* note 134, app. See also Ferrand v. Ferrand, 221 So. 3d 909, 919–37 (La. Ct. App. 2016) (third party review of visitation laws in 12 southern states).

<sup>164</sup> S.D. CODIFIED LAWS § 25-5-29 (2017). 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 863, 869 (Ky. Ct. App. 2012) (holding that 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).

<sup>165</sup> S.D. CODIFIED LAWS § 25-5-29(1)–(4) (2017). The statute has been 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.D. CODIFIED LAWS § 25-5-33 (2017) (parent can be ordered to pay child support to nonparent having “custodial rights”).

<sup>166</sup> KY. REV. STAT. ANN. § 403.270 (West 2017) (requiring residence for at least one year if the child is three or older). 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 869 (holding that 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); Spreacker v. Vaughn, 397 S.W.3d 419, 422 (Ky. Ct. App. 2012) (holding that paternal great-aunt is de facto custodian). There are similar laws in Indiana, e.g., Indiana, K.S. v. B.W., 954 N.E.2d 1050 (Ind. Ct. App. 2011) (employing IND. CODE ANN. § 31-9-2-35.5 (West 2017)); Minnesota, MINN. STAT. ANN. § 257c.03 (West 2017), South Carolina, S.C. CODE ANN. § 63-15-60 (2017); and Idaho, IDAHO CODE § 32-1703 (2017). The phrase “de facto custodian,” and similar phrases, can also be used in other settings. See, e.g., *In re Jesse C.*, C069325, 2012 WL 5902301 (Cal. Ct. App., Nov. 26, 2012) (holding that de facto parent is one who cares for child during dependency proceeding and de facto parent status is lost when dependency is terminated); ME. REV. STAT. ANN. tit. 18-A, § 5-204(d) (2017) (defining “de facto guardian” in probate code); HAW. REV. STAT. § 571-46(a)(2) (2017) (stating that “persons other than the father or mother” may obtain child custody if they had “de facto custody”).

<sup>167</sup> COLO. REV. STAT. § 14-10-123(1)(c) (2012); see, e.g., *In re B.B.O.*, 277 P.3d 818 (Colo. 2012) (holding that the half-sister had standing); *In re D.T.*, 292 P.3d 1120, 1121 (Col. App. 2012)

by . . . kinship caregivers,” including an adult with a significant bond to the child who cares for the child in a manner “consistent with the duties and responsibilities of a parent.”<sup>168</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, [first, the person has] ‘maintained a relationship . . . with the child, [second,] ‘the child’s parents have notice of the hearing,’” and [third,] “the court determines [that] visitation is in the child’s best interest.”<sup>169</sup>

Besides statutes, there is case precedent. For example, in Ohio there can be no “shared parenting” contracts between parents and nonparents.<sup>170</sup> There, “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>171</sup> In Minnesota, under certain conditions, there is a common law right to child visitation over parental objection for a former family member, like an aunt who stood “in loco parentis” with the child.<sup>172</sup>

Now, look at some examples of special nonparent childcare laws.<sup>173</sup> A grandparent in New York has standing to seek visitation with a grandchild over parental objection when “conditions exist which equity would see fit to intervene.”<sup>174</sup> In Alabama, a grandparent, regardless of biologically ties, can obtain

(holding that the mother’s friend did not have standing as she “served more of a grandmotherly role, rather than a parental role” and mother never ceded her parental rights).

<sup>168</sup> Stanley J. v. Cliff L., 319 P.3d 662, 664–65 (N.M. Ct. App. 2013) (applying N.M. STAT. ANN. § 40-10B-3(A), (C) (West 2017)).

<sup>169</sup> Vanderheiden v. Vanderheiden, No. 2011AP2672, 2013 WL 5311475, at \*3 (Wis. Ct. App. Sept. 24, 2013).

<sup>170</sup> *In re Bonfield*, 780 N.E.2d 241, 247 (Ohio 2002) (declining to extend the narrow class of persons who are defined as parents for the purposes of entering a shared parenting agreement).

<sup>171</sup> *In re Mullen*, 953 N.E.2d 302, 305, 306, 308 (Ohio 2011). Custody by a 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 245; *see also In re LaPiana*, Nos. 93691, 93692, 2010 WL 3042394, \*10 (Ohio Ct. App. Aug. 5, 2010) (granting a former lesbian partner 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).

<sup>172</sup> *Rohmiller v. Hart*, 811 N.W.2d 585, 593 (Minn. 2012) (“[U]nder the common law in Minnesota, a finding of in loco parentis status has been essential to the granting of visitation to nonparents over the objection of a fit parent.”). 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) (describing stepparent and same sex partner of parent as precedents).

<sup>173</sup> Beside special childcare laws, there can also be other special laws addressing nonparents. *See, e.g., S.D. CODIFIED LAWS § 25-7-8* (2017) (“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.”).

<sup>174</sup> *Van Nostrand v. Van Nostrand*, 925 N.Y.S.2d 229, 230 (N.Y. App. Div. 2011) (citing N.Y. DOM. REL. LAW § 72(1) (McKinney 2004); *see also In re Victoria C.*, 56 A.3d 338 (Md. Ct. Spec.

court-ordered visitation with a grandchild when the marriage of the child's parents is dissolving or has been dissolved, one or both parents are dead, or the child was born out of wedlock.<sup>175</sup> When the grandchild is adopted intra-family, post-adoption visitation rights only arise for "natural grandparents."<sup>176</sup> In Alaska, visitation can be sought by a grandparent who "has established or attempted to establish ongoing personal contact" with the grandchild.<sup>177</sup> In Arkansas, a grandparent has standing to seek visitation if the "marital relationship between the parents . . . has been severed by death, divorce, or legal separation."<sup>178</sup> In Georgia, a grandparent, or any family member, can obtain visitation if the court finds "the health or welfare of the child would be harmed unless visitation is granted" and the child's best interests would be served.<sup>179</sup> In North Dakota, it is permitted by statute that "[t]he grandparents . . . of an unmarried minor child may be granted reasonable visitation rights to the child . . . upon a finding that visitation would be in the best interests of the child and would not interfere with the parent-child relationship."<sup>180</sup> And in Wisconsin, "the special grandparent visitation provision" only applies to "a nonmarital child whose parents have not subsequently married."<sup>181</sup>

Sometimes states have statutes specifically relating to stepparents. As to stepparents, in a Tennessee divorce,

---

App. 2012) (holding that sibling visitations can be ordered over parental objections only when same standards for grandparent visits have been met).

<sup>175</sup> ALA. CODE § 30-3-4.2(a)(1), (b) (2017).

<sup>176</sup> ALA. CODE § 26-10A-30 (2017); *see also* WYO. STAT. ANN. § 20-7-101(c) (2017) (allowing no visitation for biologically-tied grandparent where minor child is adopted and "neither adopting parent is related by blood to the child"); *Ex parte* D.W., 835 So. 2d 186, 191 (Ala. 2002) (ruling similarly on Alabama statute); *Hede v. Gilstrap*, 107 P.3d 158, 175 (Wyo. 2005) (ruling that Wyoming statute does not infringe upon "constitutionally protected liberty interests" of biologically-tied grandparents).

<sup>177</sup> ALASKA STAT. § 25.20.065(a)(1) (2017).

<sup>178</sup> ARK. CODE ANN. § 9-13-103(b) (2017).

<sup>179</sup> GA. CODE ANN. § 19-7-3(c)(1) (2017) (stating that harm may be found where the minor child resided with the family member for over six months; where the family member provided financial support for the basic needs of the child for at least one year; where there was "an established pattern of regular visitation or child care by the [grandparent] with the child;" or where other circumstances indicate that "emotional or physical harm would be reasonably likely" without visitation).

<sup>180</sup> N.D. CENT. CODE § 14-09-05.1(1) (2017); *see also* *Kulbacki v. Michael*, 845 N.W.2d 625 (N.D. 2014) (deeming statute constitutional and determining that a trial court must give parents a favorable presumption and place the burden of proof on grandparents or great-grandparents); *In re S.B.*, 845 N.W.2d 317 (N.D. 2014) (applying statute).

<sup>181</sup> WIS. STAT. ANN. § 767.43(3) (West 2017) (applicable, per (d), to a grandparent who has maintained, or has tried to maintain a "relationship with the child"). *Compare id.*, with WIS. STAT. ANN. § 767.43(1) (West 2017) (stating a nonparent, including a grandparent or others, may seek reasonable visitation and held, in *In re Marriage of Meister*, 876 N.W.2d 746, 760 (Wis. 2016), to mean that a grandparent, great-grandparent, or stepparent, unlike some other nonparents, "need not prove a parent-child relationship to secure visitation rights").

[A] stepparent to a minor child born to the other party . . . may be granted reasonable visitation rights . . . upon a finding that such visitation rights 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>182</sup>

In California, “reasonable visitation to a stepparent” is permitted if in “the best interest of the minor child.”<sup>183</sup> In Oregon, during a dissolution proceeding, a stepparent can obtain custody or visitation by proving (1) “a child-parent relationship exists,” (2) the presumption that the parent acts in the child’s best interest has been “rebutted by a preponderance of the evidence,” and (3) the child’s “best interest” will be served.<sup>184</sup> If a stepparent proves only “an ongoing personal relationship” with the child, the parental presumption in Oregon must be rebutted by “clear and convincing evidence.”<sup>185</sup> In Utah, a former “stepparent”<sup>186</sup> can pursue child custody or visitation in a divorce or “other proceeding”<sup>187</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 well being;” and showed the parent is “absent” or has “abused or neglected the child.”<sup>188</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>189</sup> In Virginia, a former stepparent with a “legitimate interest”<sup>190</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.”<sup>191</sup> Finally, in Vermont, under case law,

---

<sup>182</sup> TENN. CODE ANN. § 36-6-303 (2017) (seemingly of questionable facial validity under *Troxel* without any showings as to, e.g., parental acts or child detriment).

<sup>183</sup> CAL. FAM. CODE § 3101 (West 2017).

<sup>184</sup> OR. REV. STAT. ANN. § 109.119(3)(a) (West 2017). “Child-parent relationship” means a relationship, within the past six months, that “fulfilled the child’s psychological needs for a parent as well as the child’s physical needs.” *Id.* § 109.119(10)(a).

<sup>185</sup> *Id.* § 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.” *Id.* § 109.119(10)(e).

<sup>186</sup> UTAH CODE ANN. § 30-5a-102(2)(e) (West 2017).

<sup>187</sup> *Id.* § 30-5a-103(4).

<sup>188</sup> *Id.* § 30-5a-103(2).

<sup>189</sup> DEL. CODE ANN. tit. 13, § 733 (West 2017).

<sup>190</sup> VA. CODE ANN. § 20-124.1 (2017).

<sup>191</sup> *Id.* § 20-124.2; *see, e.g.*, *Brown v. Burch*, 519 S.E.2d 403, 412 (Va. Ct. App. 1999) (holding, over mother’s objection, that “clear and convincing evidence of special and unique circumstances” justified joint custody order favoring father and former stepfather, with the latter “retaining physical custody of the boy”). Beside special statutes, there are some common law rights regarding childcare for some former stepparents. *See, e.g.*, *Bethany v. Jones*, 378 S.W.3d 731, 738 (Ark. 2011) (granting former lesbian partner’s child visitation order; relying on previously case, *Robinson v. Ford-Robinson*, 208 S.W.3d 140 (Ark. 2005), where a stepmother was able to seek visitation



if a stepparent stands in loco parentis to a child of the marital household, custody of that child may be awarded to the stepparent if it is shown by clear and convincing evidence that the natural parent is unfit or that extraordinary circumstances exist to warrant such a custodial order, and that it is in the best interests of the child for custody to be awarded to the stepparent.<sup>192</sup>

Special childcare laws can extend beyond grandparents and stepparents to other family members where grandparents and stepparents may also be included, either indirectly or directly. For example, in Florida, “an extended family member” may bring an action for temporary custody of a minor child, with such a member including a “relative within the third degree by blood or marriage to the parent” or “the stepparent of a child if the stepparent is currently married to the parent.”<sup>193</sup> In both Arkansas and North Dakota, great-grandparents accompany grandparents in third party visitation laws.<sup>194</sup> In Illinois, the current third party visitation law includes “grandparents, great-grandparents, step-parents and siblings.”<sup>195</sup>

It should be noted that third party childcare orders are sometimes pursued where the ultimate goal has little to do with childcare. For example, a New York trial court in 2001 appointed the prospective maternal grandparents as guardians of an eight-month-old fetus, with the consent of the prospective parents, while issuing a “custody and visitation stipulation.”<sup>196</sup> The guardianship was pursued so that the unborn child would be provided with medical coverage via the insurer of the grandparents.<sup>197</sup> A more common form of statutory guardianship, as well as a statutory dependency proceeding, can involve childcare intentions which overlap with third party childcare laws.<sup>198</sup>

---

with her stepson over the father’s objection as long as visitation was in the child’s “best interest,” which was deemed the “polestar consideration”). Special stepparent childcare laws, of course, may be coupled with special stepparent adoption laws. *See, e.g.*, LA. CHILD. CODE ANN. art. 1252(A) (2012) (stating that there is no need for even limited home studies in some intrafamily, stepparent adoptions); MONT. CODE ANN. § 42-4-302(1)(a) (2017) (granting standing to petition for adoption to a stepparent who has lived with child and a parent with legal and physical custody for past sixty days).

<sup>192</sup> *LeBlanc v. LeBlanc*, 100 A.3d 345, 352 (Vt. 2014) (quoting *Paquette v. Paquette*, 499 A.2d 23, 30 (Vt. 1985)).

<sup>193</sup> *Mohorn v. Thomas*, 30 So. 3d 710, 711 (Fla. Dist. Ct. App. 2010) (employing FLA. STAT. § 751.01 (2017) to recognize temporary custody of a child in a paternal grandmother).

<sup>194</sup> ARK. CODE ANN. § 9-13-103(b) (West 2017); N.D. CENT. CODE § 14-09-05.1 (2017).

<sup>195</sup> 750 ILL. COMP. STAT. ANN. 5/602.9(c) (West 2017).

<sup>196</sup> *In re Guardianship of Baby K.*, 727 N.Y.S.2d 283, 286 (N.Y. Sur. Ct. 2001).

<sup>197</sup> *Id.*

<sup>198</sup> In *Guardianship of Richard C.*, B247332, 2014 WL 1316684, at \*4–5, \*9 (Cal. Dist. Ct. App. Apr. 2, 2014), the court distinguished between guardianship and dependency as follows:

[P]robate guardianships . . . provide an alternative placement for children who cannot safely remain with their parents . . . The differences between the probate guardianships and dependency proceedings are significant . . . Probate guardianships are not initiated by the state, but by private parties, typically

## VI. KEY ELEMENTS IN ANY NEW GRANDPARENT CHILDCARE LAWS

Within the federal constitutional limits set by *Troxel*, and with guidance from the NCCUSL, American state lawmakers should begin, or continue, their exploration of court-compelled connections between grandparents and their grandchildren. Grandmas like Penny and their grandchildren deserve greater opportunities to secure, through court orders, their continuing beneficial connections. Notwithstanding parental objections, such connections should be available to promote the best interests of grandchildren and, perhaps, should provide avenues for them to evade significant detriments. Such connections can involve childcare, herein encompassing child custody and/or child visitation orders, or non-childcare orders, herein encompassing orders on establishing or continuing contacts between grandparents and their grandchildren which do not involve custody or visitation.<sup>199</sup> Connections beyond custody or visitation are distinguished

---

family members. They do not entail proof of specific statutory grounds demonstrating substantial risk of harm to the child, as is required in dependency proceedings . . . Unlike dependency cases, they are not regularly supervised by the court and a social services agency. No governmental entity is a party to the proceedings. It is the family members and the guardians who determine, with court approval, whether a guardianship is established, and thereafter whether parent and child will be reunited, or the guardianship continued, or an adoption sought . . . .

The probate court may appoint a guardian, “if it appears necessary or convenient” (citation omitted). “A relative or other person on behalf of the minor, or the minor if 12 years of age or older, may file a petition for appointment of a guardian” (citation omitted).

When a parent objects to the guardianship, he or she is entitled to notice and a hearing (citation omitted). “Early authorities held that in contested guardianship cases, parents were entitled to retain custody unless affirmatively found unfit . . . . However, the unfitness standard fell out of favor and the best interest of the child, as determined under the custody statutes, became the controlling consideration . . . .

In determining the minor’s best interests . . . [the Family Code] specifies the order of preference as: (1) joint custody of either parent; (2) a person in whose home the minor is living in a wholesome and stable environment; and (3) any person deemed suitable by the court who can provide adequate and proper care and guidance for the minor . . . .

Before granting custody to a nonparent over a parent’s objection, “the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child” (citation omitted).

A finding of detriment does not require any finding of unfitness of the parents (citation omitted). [A] parent who loses . . . custody . . . is not foreclosed from regaining custody based on changed circumstances.

<sup>199</sup> We employ the terms custody, visitation, and child contact orders even though we acknowledge that some state lawmakers, like those in Illinois, have moved away from child custody and visitation to employ the terms allocations of parental decision-making and allocations of parental responsibilities.

by their lack of regular and consistent physical ties. Thus, they embody orders facilitating regular or periodic communications between grandparents and grandchildren, by email, post, Skype, or other periodic (i.e. non-regular) or one-time physical encounters which may include overnight stays, for example.

We next address the key elements demanding consideration when new or amended grandparent childcare laws are explored.<sup>200</sup> Later, we examine possible laws on child contact orders, which, to date, have not been significantly embodied in statutes or common law precedents.

### A. *What Is Grandparent Childcare?*

As noted, grandparent childcare orders herein encompass judicial orders granting grandchild custody and/or visitation. In some states, such orders employ different terms.<sup>201</sup> Such orders often originate from case settlements between one or more parent(s) and one or more grandparent(s), including friendly proceedings wherein grandchild care is sought to be more firmly secured (as compared, e.g., to agreements outside of court orders). Grandchild care can also result from adversarial proceedings arising from disputes between parents and grandparents over new or continuing grandchild care.

As with childcare disputes between parents, or between parents and non-parents beyond grandparents, grandparent custody orders are, and should be, more difficult to secure than grandparent visitation orders. Any such orders should also be more difficult to secure than a non-childcare order recognizing (in an agreement) or mandating (by a judge) certain grandparent-grandchild contacts.

Within any state, the meaning of child custody, child visitation, and child contact orders should be uniform, comparably applicable to all nonparents and parents or alleged parents who petition courts. Uniformity avoids confusion to judges, lawyers, and litigants. Given existing federal constitutional parental childcare interests, but no federal constitutional nonparental childcare interests as yet, petitions for parentage recognitions in childcare disputes should be processed distinctly from petitions for nonparental childcare. To date, required federal constitutional childcare interests have been generally limited in federal judicial precedents to biological (actual or presumed, as with husbands) and formal adoptive parents, though state laws may extend parental childcare interests to others (like *de facto* parents) who would then receive federal constitutional protections.<sup>202</sup>

---

<sup>200</sup> We do not explore grandparent childcare rights when there are ongoing parental rights termination proceedings. *See, e.g.*, T.T. v. C.E., 204 So. 3d 436 (Ala. Civ. App. 2016).

<sup>201</sup> *See, e.g.*, N.M. STAT. ANN. § 40-10B-5 (West 2017) (referring to the child being “raised” by “kinship caregiver” for one who seeks an appointment of a guardian for a child).

<sup>202</sup> *See, e.g.*, Parness, *Federal Constitutional Childcare*, *supra* note 1, at 972–75.

### B. *Who Should Establish Grandparent Childcare Laws?*

Unlike parental childcare interests, there are as yet no federal constitutional childcare interests benefitting grandparents. This leaves significant discretion as to who within each state should craft grandparent childcare norms, within the *Troxel* limits, of course. Here, unlike parental childcare settings,<sup>203</sup> there has been very little state judicial common lawmaking that is untethered to state statutory schemes.<sup>204</sup> And there has been little, if any, state constitutional lawmaking benefitting grandparents, even where independent state constitutional interpretation has recognized parental interests extending beyond federal constitutional childcare interests.<sup>205</sup> For now, state legislators will provide for any grandparent childcare interests, whether embodied within general or special nonparent childcare statutes. Many of these lawmakers likely will be lobbied to craft new provisions benefitting grandparents and their grandchildren once the NCCUSL model acts are completed.

### C. *Separate Nonparent Childcare Laws for Grandparents?*

Both the NPCCVA and the RUPA (in each alternate form) drafts in 2017 fail to recognize any special childcare standing for grandparents. Grandparents may petition for custody or visitation under the NPCCVA if they meet the separate, general standing norms for nonparents. Additionally, per either version of the RUPA, a grandparent may be labeled a “de facto parent.” These approaches to grandparent childcare differ from some current American state statutes where special grandparent childcare standing exists. Such special laws may be accompanied by other special childcare laws, for stepparents or siblings, for example, which can, but need not, be distinct. They may also be joined by general laws, like those contemplated in the NPCCVA and RUPA drafts, which can include

---

<sup>203</sup> Examples of both statutory and common law directives on parents in childcare settings are found in Parness, *Parentage Law*, *supra* note 92, at 753–63. The separation of powers issues arising in these settings are reviewed in Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479 (2017).

<sup>204</sup> Grandparent and other nonparent childcare statutes are reviewed in Atkinson, *supra* note 134, apps. at 18–34. Illustrative of untethered judicial common lawmaking on nonparental childcare are reviewed in *Cooper v. Merkel*, 470 N.W.2d 253, 255–56 (S.D. 1991) (quoting *Langerman v. Langerman*, 336 N.W.2d 669, 670 (S.D. 1983) (requiring, upon parental objection, a finding of “gross misconduct or unfitness, or other of extraordinary circumstances affecting the welfare of the child”); *Quinn v. Mouw-Quinn*, 552 N.W.2d 843, 846 (S.D. 1996) (finding “extraordinary circumstances” in allowing childcare by former stepparent). *But see id.* at 849 (Amundson, J., dissenting) (arguing that “South Dakota Legislature must make the decision”). In addition, compare *Rohmiller v. Hart*, 811 N.W.2d 585, 592 (Minn. 2012) (engaging in no common lawmaking on child visitation in absence of statute unless child visitation petitioners stand “in loco parentis”), with *In re Willeke*, 160 A.3d 688, 691 (N.H. 2017).

<sup>205</sup> Parental childcare, though not grandparent childcare, interests are specially protected in Iowa, for example. See *Callender v. Skiles*, 591 N.W.2d 182, 187 (Iowa 1999).

grandparents. Thus, grandparent childcare orders may arise today from either a general or a special statute.

Special grandparent childcare laws can be founded on distinct, or a combination of varied, public policies. One policy could involve the import of biological ties to family relations. Here then, biological grandparents would be distinguished from other grandparents, like step-grandparents.<sup>206</sup> Additionally, a public policy could effectively prefer younger grandparents in childcare settings by distinguishing between grandparents and great-grandparents in special laws. Yet another public policy could involve a recognition of the import of longer-standing family relationships, with or without biological ties. Here, childcare by former step-grandparents would be distinguished from childcare by those who were grandparents at the moment their children became parents. Further, public policy could involve a special recognition of the positive roles played by grandparents in the lives of their grandchildren, as demonstrated, for example, by social science evidence. Here, the standards on court-ordered childcare opportunities for grandparents may be relaxed as compared to the opportunities afforded other nonparents who also seek childcare orders over parental objections.

When drafting new grandparent childcare laws, there are a number of questions lawmakers should ask. If there are to be special grandparent childcare laws, how should eligible grandparents be defined? If step-grandparents are to be included, should they include former as well as current step-grandparents? Further, should any special laws encompass all or some great-grandparents, as is done in some current American state statutes?<sup>207</sup> Finally, should grandparent childcare standing be dependent upon the continuing parental childcare interests of their children? Or should grandparent standing be independent, and thus not based on who are now childcare parents? If dependent, should grandparents only lose opportunities for grandchild care because their children failed to grasp or lost their superior parental rights? To the Authors, the acts (sins) of parents should not automatically foreclose at least continuing healthy relationships between grandparents and their grandchildren. But where parental sins do foreclose certain grandparents, for example, to avoid interference with family structures that then exist, grandparents could still be granted childcare standing, perhaps under more stringent norms, when their children or non-child-caring parents are sinless, as when the parents are deceased, incapacitated, or incarcerated for reasons unrelated to their earlier parenting.<sup>208</sup>

---

<sup>206</sup> And if, for example, step-grandparents are included, they could include all former as well as current step-grandparents, or only a subset of former step-grandparents, like those whose own children (i.e., the stepparents) are deceased and thus unable to facilitate grandparent-grandchild connections. *See, e.g.*, N.H. REV. STAT. ANN. § 461-A:13(I) (2017) (permitting grandparents, “whether adoptive or natural,” to seek grandchild visitation).

<sup>207</sup> *See, e.g.*, GA. CODE ANN. § 19-7-3(a)–(b) (2017) (including but distinguishing the rights of grandparents and great-grandparents, as only the former can file “original” actions for visitation).

<sup>208</sup> In Georgia, grandparents must show “by clear and convincing evidence that the health or welfare of the child would be harmed unless . . . visitation is granted,” as long as the child’s parents

#### D. *Separate Parent Childcare Laws for Grandparents?*

Grandparents may seek childcare orders upon judicial determinations that they qualify as non-biological and nonadoptive parents. As noted, parentage designations for current grandparents (and other nonparents) arise under varying doctrines, including *de facto* parenthood, presumed parent, and equitable adoption. Where such doctrines operate, should they distinguish between grandparents (however defined) and other nonparents aspiring to obtain legal parentage? To date, while there are many special nonparent childcare laws benefitting just grandparents, there are no comparable special parent childcare laws solely for grandparents.<sup>209</sup>

However, if grandparents are covered in general and/or separate non-parent childcare laws, should special conditions be placed on grandparents who seek to become childcare parents when current parents object? For example, should standing be limited to biological grandparents whose children were parents, but who died and thus are now unable to facilitate child connections? Or, should parentage standing extend to step-grandparents whose children were step-parents, but who died and thus are now unable to facilitate child connections? In answering, American state lawmakers must determine the import of biological ties.

Further, should a condition of any grandparent seeking childcare parentage be the continuing recognition of the childcare parentage in the child of the petitioning grandparent? If so, one parent may be driven to terminate the parental rights of another parent whose own parents desire childcare, even where the other parent has no custody/visitation but has a continuing duty to provide child support. Here, the loss of parental child support and the loss of possible grandparent-grandchild connections would each disserve the grandchild. Again, to us, it seems unfair to saddle loving grandparents with the sins of their children, as well as to deny grandchildren the care of their (one-time) grandparents that would serve their best interests.

---

“are not separated and the child is living with both parents.” *Id.* § 19-7-3 (a)(1), (c)(1), (b)(3). Yet if the child of the grandparent (that is, the parent of the child) is “deceased, incapacitated or incarcerated,” grandparent visitation can follow proof of “best interests of the child.” *Id.* § 19-7-3(d). Compare *id.*, with KY. REV. STAT. ANN. § 405.021(1), (3) (West 2017) (stating that termination of parental rights does not adversely affect grandparent visits already established if in grandchild’s best interests; yet if parent dies, new grandchild visitation order depends upon grandparent assuming “the financial obligation of child support owed by the deceased parent”).

<sup>209</sup> Like its predecessors, RUPA also does not recognize special presumed or *de facto* parentage norms applicable just to grandparents. REV. UNIF. PARENTAGE ACT § 204(a) (UNIF. LAW COMM’N, Annual Meeting Draft, July 2017) (“individual” is presumed); *id.* § 609 (“individual” may be *de facto*).

*E. When Can Parental Objections to Grandparent Childcare Be Overcome?*

As noted earlier, de facto parenthood laws suggest new approaches to meet the *Troxel* “special weight” requirement for nonparent childcare orders over current parental objections. New parentage designations without biological or formal adoption ties, but with the child’s best interest served, have often been justified by an earlier ceding of parental authority, demonstrated by consent to or acquiescence in the development of parental-like relationships between the child and nonparent caretaker who can later become a de facto parent. Thus, a birth or formal adoptive parent’s earlier wishes, or other voluntary acts regarding a nonparent’s childcare, diminish the weight accorded later parental objections when possible new de facto parentage is considered.<sup>210</sup> Here, detriment to the child should not be required for a de facto parent to be recognized. The RUPA proposals on presumed and de facto childcare parentage recognize this.<sup>211</sup>

The New Jersey Supreme Court described the impact of earlier parental ceding of childcare authority on later judicial deference to parental wishes as follows:

This opinion should not be viewed as an incursion on the general right of a fit legal parent to raise his or her child without outside interference. What we have addressed here is a specific set of circumstances involving the volitional choice of a legal parent to cede a measure of parental authority to a third party; to allow that party to function as a parent in the day-to-day life of the child; and to foster the forging of a parental bond between the third party and the child. In such circumstances, the legal parent has created a family with the third party and the child, and has invited the third party into the otherwise inviolable realm of family privacy. By virtue of her own actions, the legal parent’s

---

<sup>210</sup> The earlier parental acts may have occurred before the child’s birth, as is done with a pact between a same sex female couple on the employment by one of the partners of assisted reproductive technologies. Such pre-birth acts are deemed by some judges as best left to the legislature because judicial involvement opens the door wide and waves everyone—including neighbors and even baby sitters—into parenthood. *See, e.g.,* *Mullins v. Picklesimer*, 317 S.W.3d 569, 579 (Ky. 2010) (declaring in a case involving assisted reproduction and a lesbian couple’s pact, “we adjudge that there can be a waiver of some part of custody rights demonstrating an intent to co-parent a child with a nonparent”); *id.* at 583 (Cunningham, J., concurring in part and dissenting in part) (arguing that “judicial engineering undermines the statutory protection of the parent and opens the door wide for all third parties who can show shared participation in child rearing,” including “grandparents, uncles, aunts, neighbors and even babysitters”).

<sup>211</sup> *See, e.g.,* REV. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM’N, Annual Meeting Draft July 2017) (presumed parent resides in household for first two years of child’s life and openly holds out child as the individual’s own); *id.* § 609(d)(6) (where only then one parent, a de facto parent can be designated where, e.g., the current sole parent “fostered or supported” a “bonded and dependent relationship” between the child and would-be de facto parent). *Compare id., with id.* § 613(c), Alternative B (more than two parents possible where otherwise “detriment to the child”).

expectation of autonomous privacy in her relationship with her child is necessarily reduced from that which would have been the case had she never invited the third party into their lives. Most important, where that invitation and its consequences have altered her child's life by essentially giving him or her another parent, the legal parent's options are constrained. It is the child's best interest that is preeminent as it would be if two legal parents were in a conflict over custody and visitation.<sup>212</sup>

Comparably, the necessary weight accorded current parental objections to grandparent childcare should be diminished if earlier parental wishes, or other voluntary acts, facilitated beneficial relationships between the grandchildren and their grandparents whose continuing childcare would serve the best interests of the grandchildren. A finding of a need to avoid harm or potential harm to the grandchild should be unnecessary, as implicitly recognized, though in limited settings, in a 2017 NPCCVA Draft.<sup>213</sup> Current parental objections to continuing grandparent childcare could be afforded less weight, for example, where the parent earlier consented to a child custody transfer to the grandparent.<sup>214</sup>

The 2002 American Law Institute (ALI) Principles recognized that such diminished weight could be accorded current parental objections to continued third party childcare.<sup>215</sup> They declared that current objections to third party childcare by fit single parents could be overcome where the parents had not been "performing a reasonable share of parenting functions" and grandparents (or other relatives) developed "significant" relationships with the children.<sup>216</sup> This recognition embodies the view that passive acquiescence by a single parent in the development of such a relationship limits later parental decision-making on the

---

<sup>212</sup> *V.C. v. M.J.B.*, 748 A.2d 539, 553–54 (N.J. 2000). A comparable rationale (also involving, as in *V.C.*, a former lesbian couple) was employed in *Boseman v. Jarrell*, 704 S.E.2d 494, 505 (N.C. 2010), which unfortunately characterized the voluntary ceding of parental authority to an intimate partner as acting "inconsistently with" the "paramount parental status" but not employed in *Sides v. Ikner*, 730 S.E.2d 844, 854 (N.C. Ct. App. 2012), which found that a parent did not intentionally choose to create a parental role for a grandparent; see also *Masitto v. Masitto*, 488 N.E.2d 857, 860 (Ohio 1986) (looking only to child's best interest in childcare dispute where father earlier consented to guardianship by maternal grandparents, with his consent incorporated into the father's divorce decree).

<sup>213</sup> NONPARENTAL CHILD CUSTODY AND VISITATION ACT § 106(a)(1) (UNIF. LAW. COMM'N., Annual Meeting Draft July 2017) (stating that a nonparent has standing to seek childcare over parents' current objection if the nonparent acted as a "consistent caretaker of the child for six or more consecutive months" or "since the birth of the child" for a child less than six months of age where "a parent . . . explicitly or tacitly accepted the development of a bonded and dependent relationship between the child and the nonparent").

<sup>214</sup> See, e.g., *S.M. v. R.M.*, 92 A.3d 1128, 1139–40 (D.C. 2014) (finding no consent as birth mother was led to believe she was agreeing to temporary custody while she attended drug treatment program).

<sup>215</sup> See PRINCIPLES OF FAMILY DISSOLUTION, *supra* note 134, § 2.18.

<sup>216</sup> *Id.* § 2.18(2)(a).



continuation of such a relationship.<sup>217</sup> The ALI Principles also declared that diminished weight in childcare disputes could be accorded to the current objections of a single parent (often an unwed birth mother) who earlier agreed with a biological parent of a child who “is not the child’s legal parent” (often a man whose sex with the single birth mother prompted the birth of the child) that such a nonparent “retained some parental rights or responsibilities.”<sup>218</sup> In both settings, the ALI Principles contemplated that there need not be “harm to the child” for childcare responsibilities to be judicially assigned to at least some nonparents.<sup>219</sup>

In accordance with these principles, and comparable to many de facto parent laws, court-compelled continuing grandparent childcare over current parental objections can be justified when there was earlier parental acquiescence in the childcare and when the child’s best interests will be served even though the absence of such continuing childcare will not prompt harm or potential harm to the child.

While findings as to the best interests of a child should always precede any court-compelled grandparent childcare,<sup>220</sup> state lawmakers who wish to recognize more than the minimal requisites of parental “liberty interests” could demand that there also be judicial findings of harm or potential harm to children. However, such a demand would be nonsensical in some settings. For example, consider state lawmakers who do not require findings of harm or potential harm before de facto childcare parents can be newly-recognized. Parental liberty interests are much less significantly devalued in grandparent childcare settings than in de facto parent childcare settings.

State lawmakers who desire more secure parental liberty interests could also demand express, rather than implicit, parental consent to earlier grandparent childcare before grandparent childcare might be ordered over parental objections.<sup>221</sup> Further, legislators could differentiate between the standards applicable to varying grandparents by making standing easier to attain for a biologically-tied grandparent than for a former step-grandparent because only in the former setting might there be said to be a continuing family relationship.

By contrast, state lawmakers could opt to recognize less secure parental liberty interests. They could choose, for example, to follow Justice Stevens’s ob-

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* § 2.18(2)(b).

<sup>219</sup> *Id.* § 2.18(2)(c) (providing that “harm to the child” can by itself support judges allocating childcare responsibility to nonparents over current parental objections).

<sup>220</sup> As to what constitutes a child’s best interest served by grandparent childcare, see *Walker v. Blair*, 382 S.W.3d 862, 871 (Ky. 2012), and *Smith v. Martin*, 222 So. 3d 255, 259–60 (Miss. 2017).

<sup>221</sup> See, e.g., NONPARENTAL CHILD CUSTODY AND VISITATION ACT § 106(a)(1) (UNIF. LAW. COMM’N., Annual Meeting Draft July 2016) (need for residence with the child for nonparent childcare standing, as well as “consistent” caretaking and explicit or tacit acceptance of development of a relationship by “a parent”). Compare *id.*, with *id.* § 106(a)(2) (no need for such acceptance or residence where nonparent “has a substantial relationship with the child” and “denial of custody or visitation would result in [detriment] to the child”).

servation in *Troxel* by ruling that some grandchildren (and perhaps some grandparents) have “fundamental liberty interests” in “preserving established familial or family-like bonds.”<sup>222</sup>

Deference to parental liberty interests can also be calibrated by the degree of proof required to overcome current parental objections to grandparent childcare. For example, in contemporary grandparent childcare laws, either a preponderance of the evidence<sup>223</sup> or a clear and convincing evidence<sup>224</sup> standard could be used. Of course, different standards could be employed for different issues in the same grandparent childcare case. Thus, a higher standard may be required, for example, on earlier parental acquiescence and a lower standard on the current nature of the grandparent-grandchild relationship.<sup>225</sup>

#### F. Better Facilitate Compliance with Grandparent Childcare Orders?

As Grandma Penny knows, not all grandparent childcare orders are obeyed. Criminal contempt, as was the case with Jennifer, can serve to prompt compliance. But state lawmakers should consider whether additional compliance incentives are needed and, if so, whether they should specifically address disobedience of grandparent childcare orders.

<sup>222</sup> *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

<sup>223</sup> See, e.g., ARK. CODE ANN. § 9-13-103(c) (West 2017) (stating that a grandparent who petitions a court for a “reasonable” grandchild visitation order must overcome a parental objection by a “preponderance of the evidence” as to a “significant and viable relationship” with the grandchild and as to the grandchild’s “best interest” being served with such an order); *In re J.R.A.*, No. 13CA18, 2014 WL 5089173, at \*5 (Ohio Ct. App. Sept. 30, 2014) (citing *In re C.J.L.*, No. 13CA3545, 2014 WL 1691638, at \*3 (Ohio Ct. App. Apr. 14, 2014) (“In a child-custody proceeding between a parent and a nonparent, a court may not award custody to the nonparent without first determining that the parent is unsuitable to raise the child, i.e., without determining by a preponderance of the evidence that the parent abandoned the child, contractually relinquished custody of the child, or has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child.”)).

<sup>224</sup> See, e.g., KY. REV. STAT. ANN. § 403.270(1)(b) (West 2017) (de facto custodian must be proven by “clear and continuing evidence”); VA. CODE ANN. § 20-124.2(B) (2017) (similar); *Hunter v. Hunter*, 771 N.W.2d 694, 713 (Mich. 2009) (no grant of child custody to third parties unless third parties “demonstrate by clear and convincing evidence” parental custody “does not serve the children’s best interests”); *Mullins v. Neely*, No. 2013-CA-001876-ME, 2014 WL 2938621, at \*2 (Ky. Ct. App. June 27, 2014) (waiver of superior parental rights requires clear and convincing evidence).

<sup>225</sup> For example, in California, a child custody award to a third party over parental objection generally requires a finding that parental custody “would be detrimental to the child,” which must be “supported by clear and convincing evidence.” CAL. FAM. CODE § 3041(a)–(d) (West 2017). Yet whereby a showing of preponderance of the evidence, the third party has been shown to have “assumed, on a day-to-day basis, the role of . . . parent, fulfilling both the child’s physical needs and . . . psychological needs for care and affection . . . for a substantial period of time,” this finding means “parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary.” *Id.* But “the evidentiary standards” differ when “the child is an Indian child.” *Id.* § 3041(e).

Tort claims, whether founded on intentional or negligent conduct, are possibly available for harm to grandparents caused through the infliction of emotional distress. Such claims should even be available against those who were not directly subject to a court childcare order and who did not aid or abet a violation of it (e.g., by a parent subject to such an order).<sup>226</sup> Recall that Sidney was in the custody of Jennifer's father, Robert, while Jennifer was in jail. During that time, Robert's denial of contact by between Sidney and Penny, if contact was sought by Penny, should be actionable in tort, even where Robert was not a named party in, or otherwise subject to, the Illinois 2010 visitation order.<sup>227</sup>

Further, parental noncompliance with grandparent (and with other third party) childcare orders could be explicitly deemed pertinent in any later parental fitness proceeding.<sup>228</sup>

### G. Grandparent Child Contact Orders

As noted, we support laws on grandparent-grandchild contact orders that are distinct from childcare orders—that is, from custody or visitation orders. Such contact orders could contemplate, for example, regular and consistent connections without physical ties, by email, post, or Skype, for example. They also could contemplate some physical ties, as seen with orders on periodic (i.e., non-regular) or one-time personal encounters, which may include overnight stays.

Child contact orders may, but need not, include requirements on facilitating grandparent-grandchild contacts by parents, guardians and the like. Such orders could require affirmative acts, like arranging, or helping to accomplish, grandparent-grandchild meetings. They could require passive acts, like not interfering with email or Skype communications.

Child contact orders, independent of any judicial directive on custody or visitation, are often not expressly recognized in current nonparent childcare laws. When there is recognition, unfortunately sometimes there is a failure to appreciate how grandparent child contact laws can supplement grandparent childcare

<sup>226</sup> Though not a named party, Robert might still be held accountable in contempt for violating the visitation order if he had notice. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/11-101 (equitable order “binding” upon “those persons in active concert or participation” with parties when they “receive actual notice”) and FED. R. CIV. P. 65(d)(2) (similar).

<sup>227</sup> Further, might a tort claim also be pursued against Jennifer's one-time fiancé from Massachusetts? Compare RESTATEMENT (SECOND) OF TORTS § 46 (regarding liability for “extreme and outrageous conduct intentionally or recklessly caus[ing] severe emotional distress to another”), with *Vonfeldt v. Grapsy*, No. 1:1cv1179, 2017 WL 590337, at \*5 (M.D.N.C. Feb. 14, 2017) (recognizing alienation of affection and criminal conversation torts under North Carolina laws on interference with marital relations).

<sup>228</sup> *See, e.g.*, 750 ILL. COMP. STAT. ANN. 50/1(D) (West 2017) (“[u]nfit person” to have a child makes no reference to willful failure to comply with childcare order benefitting others); MINN. STAT. ANN. § 260C.301 (West 2017) (no mention of noncompliance as a rationale for terminating parental rights); OR. REV. STAT. ANN. § 419B.504 (West 2017) (parental rights termination factors do not include failure to comply with nonparental (or parental) childcare order).

laws. Recall, for example, the 2016 Illinois nonparent visitation statute which speaks to pursuit of “visitation and electronic communication” order, but not solely to an electronic communication order.<sup>229</sup> By comparison, an Oregon law on ongoing “personal” relationships between grandparents and grandchildren recognizes there can be, over parental objections, court-ordered “visitation or contact rights.”<sup>230</sup>

A child contact order could benefit greatly a Grandma Penny when Jennifer maintained custody of Sidney and moved her a great distance from Penny. Recall that the 2016 Illinois law reforms allowed grandparent and certain others<sup>231</sup> to pursue only “visitation and electronic communication” with a child.<sup>232</sup> A request for an order prompting electronic communications between Penny and Sidney (or Robert and Sidney, or even Sidney and her paternal aunt and uncle in Virginia) should not also require a request for an accompanying visitation request. Further, recall that the 2016 Illinois law reforms only would authorize an electronic communication order involving Penny and Sidney where a denial of visitation between Penny and Sidney by Jennifer has caused Sidney “undue mental, physical, or emotional harm.”<sup>233</sup> To the Authors, this goes too far in protecting superior parental rights and not far enough in protecting the interests of grandparents and grandchildren.

## VII. CONCLUSION

Current childcare and child contact laws generally provide inadequate opportunities for continuing grandparent-grandchild connections serving the best interests of grandchildren without unduly infringing upon the superior parental rights of objecting parents. The National Conference of Commissioners on Uniform State Laws is now contemplating new model childcare principles. It should consider allowing expanded grandparent childcare opportunities, as well as separate child contact opportunities.

American state legislators should enhance the opportunities for judicial orders on grandparent childcare and child contact. In formulating new laws, they should consider, *inter alia*, whether separate laws are needed just for grandparents; how to define grandparents if there are to be separate laws; how superior parental rights should be protected; and when superior parental childcare rights may be overcome to serve the best interest of grandchildren (and their loving

---

<sup>229</sup> 750 ILL. COMP. STAT. ANN. 5/602.9(c) (West 2017).

<sup>230</sup> OR. REV. STAT. ANN. § 109.119 (3)(b) (West 2017).

<sup>231</sup> 750 ILL. COMP. STAT. ANN. 5/602.9(c) (West 2017).

<sup>232</sup> *Id. Compare id., with* OR. REV. STAT. ANN. § 109.119(3)(b) (West 2017) (providing that a court may grant “visitation or contact rights” to those with an “ongoing personal relationship”).

<sup>233</sup> 750 ILL. COMP. STAT. ANN. 5/602.9(c)(1) (West 2017). Additional conditions in the 2016 Illinois law also preclude Penny from seeking a child contact order. *Id.* (1)(A-E) (e.g., one parent does not object to visitation).

grandparents). In doing so, state legislators should take into account the unfortunate consequences for grandchildren and grandparents, like Sidney and Penny, that can occur where legal remedies are inadequate. New laws are needed to preserve the loving relationships between grandchildren and their grandparents, while respecting parental rights.