

Georgia State University Law Review

Volume 31
Issue 2 *Winter 2015*

Article 3

March 2015

Parentage Prenups and Midnups

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PARENTAGE PRENUPS AND MIDNUPS

Jeffrey A. Parness*

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INTRODUCTION

In July 2012, the National Conference of Commissioners on Uniform State Laws¹ approved and recommended that states adopt the Uniform Premarital and Marital Agreements Act (the Act).² Unlike its predecessor,³ the 1983 Uniform Premarital Agreement Act,⁴ the Act regulates “premarital agreements and marital agreements under the same set of principles and requirements.”⁵

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1. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT 9C U.L.A. III (Supp. 2014). The Conference is also known as the Uniform Law Commission. *Id.*

2. *Id.*

3. UNIF. PREMARITAL AGREEMENT ACT 9C U.L.A. 39 (1983); UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT 9C U.L.A. 13 (Supp. 2014) (stating that in 2012, the Uniform Premarital Agreement Act had been adopted in some form by twenty-six jurisdictions).

4. The history in the United States regarding premarital pacts before the Act is summarized in J. Thomas Oldham, *Would Enactment of the Uniform Premarital and Marital Agreement Act in All Fifty States Change U.S. Law Regarding Premarital Agreements?*, 46 FAM. L.Q. 367, 368–71 (2012), and it is more extensively reviewed in J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL’Y 83 (2011).

5. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT 9C U.L.A. 13 (Supp. 2014). Not all prenups and midnups are treated comparably today. *See, e.g., In re Marriage of Traster*, 291 P.3d 494, 504 (Kan. Ct. App. 2012) (“[W]e recognize the postmarital agreement as a legitimate marital contract in

While both Uniform Acts speak largely to agreements about property, including money,⁶ only the Act expressly recognizes there may be agreements on “custodial responsibility.”⁷

Under the Act,⁸ custodial agreements do not “bind” the courts because “parents and prospective parents do not have the power to

its own right that does not come within the statutory purview of either a premarital or a separation agreement.”). Similar treatment would not mean that any matter subject to a premarital pact might also be subject to a midmarital pact. *See, e.g.,* Husseman *ex rel. Ritter v. Husseman*, 847 N.W.2d 219 (Iowa 2014) (finding that postmarital pact waiving a spouse’s elective share in a decedent’s asset distribution is against public policy).

6. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 2, 9C U.L.A. 15 (Supp. 2014) (stating that agreements regarding “a marital right or obligation” include spousal support, a property right, a responsibility for a liability, and an attorney’s fee award).

7. *Id.* at § 10(a). *See* COLO. REV. STAT. § 14-2-310(3) (2013) (stating that a term that defines “the rights or duties of the parties regarding custodial responsibility” is unenforceable). Before the Act, some state premarital agreement statutes recognized more obliquely the possibility of “custodial responsibility” pacts. *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-203(A)(8) (2007); 750 ILL. COMP. STAT. 10/4(a)(8) (1999) (“Parties to a premarital agreement may contract with respect to . . . any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.”). The foregoing was seemingly taken from the UNIF. PREMARITAL AGREEMENT ACT § 3, 9C U.L.A. 43 (1983). *Compare* MICH. COMP. LAWS § 557.28 (2006) (“A contract relating to property made between persons in contemplation of marriage shall remain in full force after marriage takes place.”), *and* W. VA. CODE § 48-1-203 (2001) (stating that antenuptial or prenuptial agreement “means an agreement . . . by which the property rights and interests of the prospective husband and wife, or both of them, are determined . . .”), *with* N.H. REV. STAT. ANN. § 460:2-a (2004) (“A man and woman in contemplation of marriage may enter into a written interspousal contract However, no contract otherwise enforceable . . . may contain any term which attempts to abrogate the statutory or common law rights of minor children of the contemplated marriage.”), *and* N.J. STAT. ANN. § 37:2-35 (West 2014) (“A premarital or pre-civil union agreement shall not adversely affect the right of a child to support.”), *and* N.M. STAT. ANN. § 40-3A-4(A)(7) (2013) (stating that premarital agreement may contain “any other matter not in violation of public policy.”).

In addition, the American Law Institute’s Principles of the Law of Family Dissolution recognizes that agreements made during or in contemplation of marriage regarding parenting plans “may sometimes be relevant to an allocation of custodial and decision making responsibility.” PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06, at cmt. a (2002) [hereinafter ALI Principles] (citing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.08(1)(8)(e) (allocations of custodial responsibility between parents can be founded, in part, on prior agreements to meet “the reasonable expectations of the parties”) and § 2.09(1)(e) (stating allocations of significant decision making responsibility between parents should be made “in accordance with the child’s best interests, in light of” several factors including a prior agreement)). While the ALI Principles speak to marriage and nonmarriage related pacts, this paper speaks only to marriage related pacts on parentage. Often nonmarriage related pacts on parentage are undertaken when marriage is impossible, as is the case in some jurisdictions with same sex couples. *See, e.g.,* Latham *v. Schwerdtfeger*, 802 N.W.2d 66 (Neb. 2011) (holding an agreement enforceable where a same-sex couple agreed that one partner would have a child that both partners would raise).

8. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 10, 9C U.L.A. 27 (Supp. 2014). In Colorado and North Dakota, statutes expressly note the nonbinding nature of promises regarding parental rights and duties or responsibilities. COLO. REV. STAT. § 14-2-310(3) (2013) (stating “[a] term in a premarital agreement or marital agreement which defines the rights or duties of the parties regarding

waive the rights of third parties (their current or future children)” or “to remove the jurisdiction or duty of the courts to protect the best interests of minor children.”⁹ The Act’s Comment suggests, however, that while such agreements are not always enforceable,¹⁰ they can provide “guidance” to courts.¹¹ Guidance promotes “stability and permanence in family relationships because it allows the intended parents to plan for . . . their child, reinforces the expectations of all parties to the agreement, and reduces contentious litigation that could drag on for . . . several years of the child’s life.”¹² Guidance on “custodial responsibility” should flow from premarital agreements

custodial responsibility is not binding on the court.”); N.D. CENT. CODE § 14-03.2-09(3) (2013) (stating a term that defines “the rights or duties of the parties regarding parental rights and responsibilities is not binding on the court.”).

9. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 10, 9C U.L.A. 27 (Supp. 2014).

10. *Id.*

11. *Id.* (stating a court “might consider by way of guidance” certain contractual provisions, even though they are not binding on a court). Compare RESTATEMENT (FIRST) OF CONTRACTS § 583(2) (1932) (“A bargain by one parent to transfer the custody of a minor child to the other parent or not to reclaim such custody is not illegal if the performance of the bargain is for the welfare of the child.”), with RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981) (“A promise affecting the right of custody of a minor child is unenforceable on grounds of public policy unless the disposition as to custody is consistent with the best interest of the child.”), and *In re Paternity of F.T.R.*, 2013 WI 66, ¶ 65, 349 Wis. 2d 84, 118, 833 N.W.2d 634, 651 (2013) (noting that parentage agreement involving a surrogate cannot be enforced solely because it contemplates a voluntary termination of birth mother’s parental rights; child custody and placement should be determined by the terms of the agreement unless enforcement is contrary to the best interests of the child). On the emerging import of parentage pacts outside of prenups and midnups, see, for example, Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1 (2004); Linda D. Elrod, *A Child’s Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245 (2011).

12. *In re Paternity of F.T.R.*, 2013 WI at ¶ 69, 349 Wis. 2d at 122, 833 N.W.2d at 652 (discussing guidance found in a contract involving a dispute between intended parents and a contracting surrogate and her husband). Seemingly, once guidance is sanctioned, there are differing possible levels of deference to contractual terms. See, e.g., *id.* at ¶ 74, 349 Wis. 2d at 123, 833 N.W.2d at 653 (allowing contract enforcement unless enforcement would be “contrary to the best interests” of the child). *But see* 2013 WI at ¶ 99, 349 Wis. 2d at 135, 833 N.W.2d at 659 (Abrahamson, C.J. concurring) (finding majority’s holding “overly broad” and urging the court to follow statutory guidelines on children’s best interests to resolve disputes between contracting parties). On why childcare pacts deserve significant judicial deference, see Kimberly C. Emery & Robert E. Emery, *Who Knows What Is Best for Our Children? Honoring Agreements and Contracts Between Parents Who Live Apart*, 77 LAW & CONTEMP. PROBS. 151, 154 (2014) (arguing that for married and non-married parents alike, judicial review of parenting plans should be eliminated in the absence of child-protection concerns where parents agree).

On the benefits of recognizing early intentions on parentage, like prebirth declarations, see Dana E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210 (2012) (highlighting that intent, as compared to marital presumption, biology, or functional theories, facilitates family planning and should especially be available for establishing legal parentage in assisted reproduction settings).

(prenups) and marital agreements not contemplating separation or dissolution (midnups)—even if no statute on such agreements exists and even if any statute fails to address custodial responsibility.¹³

The Act implies that there can be guidance within prenups and midnups on future child support for existing and future children.¹⁴ It also implies that there can be guidance on future parentage within such agreements to create or adopt children (child creation agreements).¹⁵ States implementing the Act should expressly recognize that prenups and midnups can address child support and child creation as well as custodial responsibility.

When might child custody, child support, or child creation promises within prenups and midnups be suitable for prospective and current spouses¹⁶ and others? And when might prenups and midnups

13. In the absence of a statute, prenups and midnups are often enforced. *See, e.g.*, *Hodge v. Parks*, 844 N.W.2d 189, 195 (Mich. Ct. App. 2014) (finding postnuptial agreement can be enforced where it is “equitable to do so,” as long as a pact seeks to promote the marriage and not to end it).

14. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 10, U.L.A. 18 (Supp. 2014).

15. The paper does not address the procedural requirements for prenups and midnups on childcare, child support, or child creation, which could include writing and realistic opportunities for consultations with independent counsel and information disclosure duties. *See, e.g.*, *Maeker v. Ross*, 62 A.3d 310 (N.J. Super. Ct. App. Div. 2013), *rev'd*, 99 A.3d 795 (N.J. 2014) (reviewing new statute guiding palimony agreements); Michelle Oberman, *Sex, Lies, and the Duty to Disclose*, 47 ARIZ. L. REV. 871 (2005) (suggesting expanding disclosure duties when there are agreements between those who are sexually intimate with a focus on unwed cohabitants). States remain free to differentiate between the procedural requirements for prenups and midnups, as well as between property and child-related provisions within prenups and midnups, although the Act urges the same set of principles. *See* UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 3(a)(8), 9C U.L.A. 43 (1983) (2012). The paper also does not address “custodial responsibility” pacts involving obligations to abort, which would obviate custody issues altogether. *See, e.g.*, I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008); Dave Hoffman, *The Unenforceability of Contracts to Abort*, CONCURRING OPINIONS (Sept. 21, 2012), www.concurringopinions.com/archives/2012/09/the-unenforceability-of-contracts-to-abort.html (discussing the dispute over the alleged surrogacy pact involving Tagg Romney and his wife with a surrogate, wherein the Romneys’ would control the abortion decision if the fetus or potential child “‘is determined to be physiologically, genetically or chromosomally abnormal’”).

16. While custodial responsibility pacts between both prospective and current spouses are considered herein, the two pacts can raise somewhat different legal issues and can be based on somewhat different factual circumstances. Frequently, the law distinguishes current stepparents from future stepparents; for example, some states that permit third-party standing to seek a childcare order or de facto parent status allow only current stepparents to pursue childcare orders. *Compare* 750 ILL. COMP. STAT. 5/607(b) (1.5) (1999) (allowing child visitation for stepparents during marriage dissolution where stepparents lived with child for at least five years and child is at least twelve years old), *with* OR. REV. STAT. § 109.119(1) (2013) (“[A]ny person, including but not limited to a . . . stepparent . . . who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child,” may seek child visitation or related order) (deemed unconstitutional as applied in a setting wherein a parent’s superior

provide “guidance” to judges? This paper suggests that current and future parents and stepparents¹⁷ could employ such agreements in premarital, midmarital,¹⁸ civil union, and domestic partnership settings¹⁹ to provide childcare guidance for post-dissolution proceedings.²⁰ Without such agreements, stepparents have far less standing to seek childcare orders because of the superior parental

constitutional rights were not properly respected), *and* *Harrington v. Daum*, 18 P.3d 456, 460–61 (Or. Ct. App. 2001). As to facts, prospective stepparents often are less likely to have lived, or to have lived as long, in the same household with their future spouses and their children than are actual stepparents with their current spouses and their children. Factual and public policy differences between prenups and midnups on custodial responsibility may prompt states to vary the applicable principles, although the Act urges that the requirements be the same.

17. In the absence of a prenup or midnup, on marriage dissolution former stepparents otherwise often have little opportunity to seek childcare orders, even where the stepchildren’s best interests would be served. *See, e.g.*, 5/607(b)(1.5) (granting “reasonable visitation privileges” to stepparent if the child’s best interests will be served; the child is at least twelve years old and wishes visitation; “the child resided continuously with the parent and stepparent for at least 5 years”; the parent is “unable to care for the child”; and the stepparent was providing childcare prior to seeking visitation). *But see In re Marriage of Garrity*, 181 Cal. App. 3d 675, 682 n.9 (1986) (finding language in premarital pact indicating that “to the greatest extent possible,” each future stepparent “will assume the role of parent to the other’s children and shall treat the children of the other party as if they were his or her own” did not imply the parties agreed that they would each continue to rear their stepchildren should a divorce occur).

18. Premarital (as in N.J. STAT. ANN. § 37:2-35 (West 2002)) herein includes antenuptial (as in N.H. REV. STAT. ANN. § 460:2-a (2004)) and prenuptial (as in TENN. CODE ANN. § 36-3-501 (2010)). *See also* W. VA. CODE § 48-1-203 (2009) (stating antenuptial and prenuptial agreements have same requirements). Midmarital herein includes, at times, marital (though not separation), nuptial, and postnuptial pacts. *See, e.g.*, Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 324 (2012).

19. Some state statutory provisions on preceremony contracts already expressly cover state-recognized marriage-like relationships. *See, e.g.*, N.J. STAT. ANN. § 37:2-31 (West 2002).

20. The paper distinguishes between midmarital (midnups) and postmarital pacts (and comparable civil union, domestic partnership, and common law marriage pacts), with only the latter occurring in contemplation of the dissolution of the relationship. The paper speaks only to midmarital pacts intending to “promote harmonious marital relations,” and not to pacts in contemplation of dissolution. *See, e.g.*, *Hodge v. Parks*, 844 N.W.2d 189, 193, 195 (Mich. Ct. App. 2014) (distinguishing the two types of midnups and holding that only agreements promoting a continuing union of the couple will be enforced if “equitable”). *In re Placement of A.M.K.* provides an example of a post-relationship pact pertaining to childcare and formed between a birth parent and one who developed a parent-like relationship. *In re Placement of A.M.K.*, No. 2011AP2660, 2013 WL No. at *1 (Wis. App. Sept. 5, 2013) (granting nonbiological parent visitation over her former same-sex partner who was the birth mother, and who made a *Troxel* objection, which assumed superior parental rights doctrine applied). Often pacts contemplating the imminent end of a state-recognized relationship are called separation agreements. Concededly, it will be difficult at times to differentiate between midmarital and postmarital pacts. *See, e.g.*, *In re Marriage of Auriemma*, No. 2-13-0643, 2014 WL, 130643-U at *7 (Ill. App. Mar. 12, 2014) *appeal docketed*, No. 117869 (Ill. Sept. 8, 2014) (finding “post marital agreement” after wife’s marriage dissolution petition voluntarily dismissed, although agreement said her petition was pending; August of 2004 agreement followed by husband’s November of 2012 petition for marriage dissolution). For an argument that courts should give greater deference to postmarital (or separation) pacts on child custody, see Sarah Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67 (2014).

rights of the existing parents, even if the existing parents do not intend to accommodate a child's best interests.²¹ The paper also suggests that childcare pacts in prenups and midnups can guide other current and future family members, like grandparents, aunts, and uncles,²² who later wish to obtain childcare interests.²³

In some states, the law already aids stepparents, grandparents, and other child caretakers in noncontract settings where their earlier acts, such as holding out children as their own, guide their later childcare standing as parents or parental-like figures.²⁴ Prenups and midnups could provide childcare interests for additional child caretakers, such as aunts, uncles, or cousins, who otherwise would have no parental or third party standing to seek a childcare order upon dissolution.²⁵

21. Agreements waiving or limiting parents' future childcare interests, of course, may be approached differently than agreements assuming future childcare interests by nonparents. Yet distinguishing between parents and nonparents in contract settings are sometimes difficult. *See, e.g.,* K.M. v. E.G., 117 P.3d 673, 676, 682 (Cal. 2005) (emphasizing that ova donor's waiver of future childcare interests, so her lesbian partner could bear a child to be raised jointly in a single home with the donor, did not foreclose donor's pursuit of childcare over birth mother's objection after partnership dissolved; as child's right to support cannot be abrogated by parent's contract, parental rights were not relinquished here (especially if it is true, as the donor testified, that she only first saw the waiver ten minutes before she signed and "did not intend to relinquish her rights," although she found parts of the form "odd"))).

22. In the absence of a prenup or midnup, on marriage dissolution, grandparents often have little opportunity to seek childcare orders even when the grandchildren's best interests would be served. *See, e.g.,* E.H.G. v. E.R.G., 73 So. 3d 614, 628–29 (Ala. Civ. App. 2010) (reviewing American state cases and finding Alabama grandparent visitation statute requires grandparents seeking childcare order over parental objections to "prove by clear and convincing evidence that the denial of the requested visitation would harm the child."). Post-dissolution standing is even more difficult for other current or former family members because special statutes typically do not even speak directly to aunts, uncles, cousins, or comparable relations. *See* discussion *infra* Part III–V.

23. *See* discussion *infra* Part III–V.

24. As to stepparents, consider the differences between DEL. CODE ANN. tit. 13, § 733 (2009) (stating that a stepparent, who resides with "a custodial or primary placement parent" and dies or becomes disabled, can seek "permanent custody or primary physical placement," even if there is a surviving, fit, natural parent) and tit.13, § 8-201(c) (noting that de facto parent status for one who, with "a parent-like relationship" with "the support and consent of the child's parent," exercised "parental responsibility" and "acted in a parental role" so as to establish "a bonded and dependent relationship that is parental in nature.").

As to grandparents, consider KY. REV. STAT. ANN. § 403.270(1) (a) (West 2006) (de facto custodian), applied to paternal grandparents in J.L.A. v. S.C., No. 2012-CA-000758-ME, 2013 WL 843815 *3–4 (Ky. Ct. App. 2013).

25. Without prenups or midnups, for example, former stepparents and their parents are often left without standing to pursue a childcare order regardless of children's best interests. *See, e.g.,* 750 ILL. COMP. STAT. 5/607(b)(1.5) (1999) (granting "reasonable visitation privileges" to stepparent if child's best interests will be served; the child is at least twelve years old and wishes visitation; "the child resided continuously with the parent and stepparent for at least 5 years"; the parent is "unable to care for the child," and; the stepparent was providing childcare prior to seeking visitation). Without prenups or

Judicial decisions on stepparent, grandparent, and other childcare standing arising from prenups and midnups must always account for public concerns for children's best interests.²⁶ This paper asks how these public concerns may be furthered because it finds that absolute post-dissolution judicial discretion as to who should actually be responsible for childcare, given an earlier custodial responsibility pact, may not fully protect children.²⁷ The paper posits that more definite rules are needed to address who is eligible to attain childcare standing using prenups and midnups, not unlike eligibility rules for formal adoptions.²⁸ These rules would further guide judges who are already guided by custodial responsibility pacts.

As to child support pacts, superior parental rights, and public concerns about children's interests pose fewer problems.²⁹ In general, additional financial support to a child should not negatively impact parent-provided childcare.³⁰ Public policy does not allow money alone—however beneficial to a child—to form the basis for childcare standing.³¹ Further, as to consideration benefitting the future child supporters, several existing state statutes already declare that promises to furnish child support, growing out of a supposed, presumed, or alleged parent-child relationship, typically do not require consideration.³²

midnups, a dissolution prompted by one spouse's death leaves the parents of the deceased spouse without standing to seek childcare because the grandparents' childcare standing is only "derivative." See, e.g., *Scudder v. Ramsey*, 426 S.W.3d 427, 433 (Ark. 2013).

26. Should the stepparents and grandparents never be elevated to parental status, and thus be third parties or nonparents in childcare settings, they may occasionally obtain custodial responsibility orders unaccompanied by child support orders. See, e.g., *Weinand v. Weinand*, 616 N.W.2d 1 (Neb. 2000) (finding former stepparent gets childcare order, but is not ordered to pay child support where both biological parents are raising the child).

27. *Troxel v. Granville*, 530 U.S. 57, 58 (2000). See discussion *infra* Part III.

28. See discussion *infra* Part III.

29. See discussion *infra* Part IV.

30. ALI Principles, *supra* note 7, at § 3.03(1)(a). The ALI Principles only allow an imposition of parental support obligations in "exceptional cases." *Id.*

31. *Id.* The ALI Principles recognize a support obligation may be judicially imposed on a nonparent, who expressly or implicitly agreed or undertook "to assume a parental support obligation to the child." *Id.*

32. See, e.g., CAL. FAM. CODE § 7614(a) (West 2013) (rendering enforceable a "promise in writing" growing out of a "presumed . . . or alleged" relationship, even without consideration); HAW. REV. STAT. § 584-22(a) (2008) (requiring a "promise in writing . . . growing out of a supposed or alleged" relationship); NEV. REV. STAT. § 126.900(1) (2010) (requiring a writing and "supposed or alleged"

Child creation agreements significantly implicate superior parental rights and other federal constitutional interests (like paternity opportunity interests), as well as public policy concerns.³³ Statutes and common law rulings already respect certain child creation pacts involving assisted human reproduction (AHR), with and without surrogates, outside of prenups and midnups.³⁴ This paper suggests that child creation prenups or midnups should also guide the courts.³⁵

I. SUPERIOR PARENTAL RIGHTS

Federal constitutional interests significantly limit the breadth of parentage prenups and midnups on future childcare, child support, and child creation.³⁶ Prenups and midnups that address the future childcare of existing children clearly implicate superior parental rights.³⁷ Contracts that involve only one of a child's two parents especially implicate the noncontracting parent's constitutional childcare interests.³⁸ Childcare contracts can also implicate the constitutionally protected familial interests of contracting and noncontracting nonparents and of the children themselves.³⁹

relationship); N.J. STAT. ANN. § 9:17-58(a) (West 2013) (requiring a writing and "supposed or alleged" relationship).

33. Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 419, 425–28 (2013).

34. *Id.* at 418.

35. *See infra* Part V. The Act's drafters have provided little guidance about how prenups and midnups on custodial responsibility, childcare standing, child support, or child creation should guide courts. But the general sentiments behind the Act seemingly reflect the view that prenups and midnups will generally be relevant only to issues of money. Atwood & Bix, *supra* note 18, at 344 ("In general, courts will not enforce provisions relating to topics beyond the parties' financial obligations *inter se*").

36. Jeffrey A. Parness, *Parental Law (R)evolution: The Key Questions*, 59 WAYNE L. REV. 743, 747 (2013).

37. *In re Mullen*, 953 N.E.2d 302, 305–06 (Ohio 2011).

38. *Id.*

39. *See generally* Troxel v. Granville, 530 U.S. 57 (2000). Beyond parents, there is little recognition to date of constitutionally protected family-related childcare interests of others. *Id.* Justice Stevens did note, in dissent, that because at least some children in nonparent childcare settings likely "have fundamental liberty interests" in "preserving established familial or family-like bonds," nonparents seeking childcare orders (here, grandparents) must be distinguished by whether there is a "presence or absence of some embodiment of family." *Id.* at 88 (Stevens, J., dissenting). It may also be that similar fundamental liberty interests in family bond preservation are held by other nonparents, including grandparents, siblings, and foster parents. *Id.* at 93.

Prenups and midnups on future child support seem less constrained by federal constitutional interests.⁴⁰ Yet, substantive due process does limit certain agreements.⁴¹

Prenups and midnups that address future parentage creation, whether through formal or informal adoption, assisted reproduction, or otherwise, often implicate both the superior parental rights and familial interests of the contracting parties as well as the interests of others, including surrogates and children.⁴²

While federal constitutional rights undoubtedly constrain parentage prenups and midnups that address childcare, child support, and child creation, the rights have not been fully defined.⁴³ *Troxel v. Granville* demonstrated childcare pacts' uncertainties.⁴⁴ In *Troxel*, six U.S. Supreme Court justices found the State of Washington's third-party child visitation statute was unconstitutional because it unduly interfered with parental rights to direct the upbringing of their children.⁴⁵ Washington's third-party visitation statute effectively permitted any third party to petition a court to review any parent's decision concerning child visitation under a best interest standard.⁴⁶ The *Troxel* plurality of four held the "breathhtakingly broad" statute was unconstitutional because it failed to presume fit parents act in the best interests of their children or to give any deference to parental decisions.⁴⁷ A judicial determination of a child's best interest could not warrant court-ordered visitation when the law accords "no special weight" to parental decisions because the federal constitution

40. Baker, *supra* note 11, at 7.

41. Atwood & Bix, *supra* note 18, at 319.

42. See, e.g., Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 12–13 (2013).

43. See, e.g., *Troxel*, 530 U.S. 57. Of course, states can supplement federal constitutional rights, which can, for example, extend further the superior parental rights or recognize parent creation rights with no federal counterpart. See, e.g., *Jensen v. Cunningham*, 250 P.3d 465, 478 (Utah 2011) (holding state constitutional liberty interests are not identical to comparable federal constitutional liberty interests, and the state can provide parents certain rights where state interferes with parental control over childcare [here medical] decision-making, even where the federal and state constitutional language is "substantially the same").

44. See generally *Troxel*, 530 U.S. 57.

45. *Id.* at 66–67, 76–77, 80.

46. *Id.* at 67 (plurality opinion).

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

embodies “a presumption that fit parents act in the best interests of their children.”⁴⁸ The *Troxel* plurality hinted that nonparent visitation orders would be constitutional when “special weight” is accorded to parental wishes.⁴⁹ The Court did not, however, discuss the weight that should be accorded to childcare pacts. The *Troxel* plurality condemned judicial interference with parents any time there was “mere disagreement” regarding a child’s best interest.⁵⁰ The plurality did not expressly find, as the Washington high court did, that a showing of harm or potential harm was necessary to sustain nonparent visitation over parental objection.⁵¹

Concurring, Justice Souter focused only on what the plurality characterized as a “breath-takingly broad” statute,⁵² which he described as authorizing any person at any time to petition for and to receive visitation rights subject only to a free-ranging, best-interests-of-the-child standard.⁵³ He chose to “say no more,”⁵⁴ and thus did not

48. *Troxel*, 530 U.S. at 68–69. The constitutional presumption that parents act in the best interest of their children was important to the *Troxel* plurality because the grandparents seeking visitation did not allege, and no court found, that the parent was unfit. *Id.* at 68.

49. *Id.* at 69. In New Hampshire, “special weight” means a nonparent must show, to obtain court-ordered childcare, “by clear and convincing evidence,” that such an order is the child’s best interests, meaning it promotes “the child’s ‘essential physical and safety needs,’” with adverse consequences to the child’s psychological well-being if there is no order. *In re Guardianship of Reena D.*, 35 A.3d 509, 511, 514 (N.H. 2011) (citing N.H. REV. STAT. ANN. § 463:8(3)(b) (2004)).

50. *Troxel*, 530 U.S. at 68, 72 (noting the dispute involves nothing more than a simple disagreement between the Washington Superior Court and the mother concerning her children’s best interest).

51. *Id.* at 73, 77. Today, harm or potential harm is often required. *See, e.g., Hernandez v. Hernandez*, 265 P.3d 495, 500 (Idaho 2011) (holding a statute that allows grandparents to seek custody without a threshold showing of parental unfitness not facially unconstitutional after *Troxel*). When harm or potential harm is required, there is some disagreement about whether the burden of proof is preponderance or clear and convincing evidence. *Hollis v. Miller*, No. 10-022075-DZ, 2012 WL 6097307, at *4 (Mich. Ct. App. Dec. 6, 2012) (Gleicher, J., concurring) (“I write separately to respectfully express my belief that a grandparent must establish by clear and convincing evidence, rather than by a preponderance of the evidence, that denial of visitation substantially risks harm to the child.”). At times, statutes presume that severing a relationship between a child and grandparent will cause the child substantial harm. *See, e.g., TENN. CODE ANN. § 36-6-306(b)(4)* (2010) (“[I]f the child’s parent is deceased and the grandparent seeking visitation is the parent of that deceased parent, there shall be a rebuttable presumption of substantial harm to the child based upon the cessation of the relationship between the child and grandparent.”).

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

53. *Id.* at 76 (Souter, J., concurring) (stating the Court should affirm the Washington Supreme Court).

54. *Id.* at 75.

comment on the constitutionality of a more narrowly drawn statute or on any necessary “special weight” or “presumption.”⁵⁵

Justice Thomas in his concurrence simply noted, “Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent’s decision regarding visitation with third parties.”⁵⁶ However, a parent’s earlier agreement to share visitation was not at issue.

The three dissenters filed separate opinions. Justice Stevens stated that it would have been wise to deny certiorari.⁵⁷ As to the statute, he found its terms were “unconstrued” by the state high court so that a remand was in order.⁵⁸ He noted the majority had not cited an adequate “basis for holding that the statute is invalid in all its applications.”⁵⁹ “[A] facial challenge should fail,” Justice Stevens observed, if a statute has a “plainly legitimate sweep.”⁶⁰ Whether such a sweep could encompass a childcare pact was not explored.

In dissent, Justice Scalia, while recognizing an “unenumerated right . . . of parents to direct the upbringing of their children,”⁶¹ previously protected by substantive due process,⁶² nevertheless opined that any additional limits on this right are best determined “in legislative chambers or in electoral campaigns” and not in courts.⁶³ He warned that recognizing further opportunities for judicial review of parental actions would require the court to formulate a “judicially

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

56. *Id.* at 80 (Thomas, J., concurring).

57. *Id.* at 80 (Stevens, J., dissenting).

58. *Troxel*, 530 U.S. at 84–85.

59. *Id.* at 85 (Stevens, J., dissenting).

60. *Id.* at 85 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739–40, n.7 (1997) (Stevens, J., concurring)).

61. *Id.* at 91–92 (Scalia, J., dissenting) (noting the right is among both the “unalienable” rights recognized in the Declaration of Independence and is one of the rights retained by the people under the Ninth Amendment).

62. *Id.* at 92 (noting that two of the three opinions from the Court originated in “an era rich in substantive due process holdings that have since been repudiated”).

63. *Id.* at 91–92 (noting that while it is “entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns” about parental childrearing authority, “[Justice Scalia] do[es] not believe that the power which the Constitution confers upon [him] as a judge entitles [him] to deny legal effect to laws that (in [his] view) infringe upon what is (in [his] view) that unenumerated right.”).

crafted definition of parents,”⁶⁴ “judicially approved assessments of ‘harm to the child,’”⁶⁵ and “judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.)” who can seek childcare notwithstanding parental objections.⁶⁶ He had no desire for “a new regime of judicially prescribed, and federally prescribed, family law.”⁶⁷ Thus, for Justice Scalia, state statutes should regulate childcare pacts.

Justice Kennedy, in dissent, thought the Court should remand the case so that the state courts could consider whether, and to what extent, child visits with nonparents—or just grandparents—might be ordered over parental objections because the visits served the children’s best interests as well as whether child harm “is required in every instance.”⁶⁸ He opined that a “harm to the child standard” is not always required by the Constitution when nonparent visits are ordered,⁶⁹ recognizing that “the conventional nuclear family . . . is simply not the structure or prevailing condition in many households.”⁷⁰ He observed there may be “a substantial number of cases—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,”⁷¹ and suggested that such a third party might be deemed a “de facto” parent.⁷² However, any connection between such possible de facto parenthood and childcare pacts was not discussed.

Since *Troxel*, the U.S. Supreme Court has not spoken again on how superior parental rights limit state legislatures and judges from recognizing childcare interests by nonparents, be they grandparents

64. *Troxel*, 530 U.S. at 92.

65. *Id.* at 93.

66. *Id.*

67. *Id.*

68. *See id.* at 94.

69. *Id.* at 101–02.

70. *Troxel*, 530 U.S. at 98.

71. *Id.* at 98, 100–01 (“In short, 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.”).

72. *Id.* at 100–01. The ALI Principles suggest gradations of parents, including a legal parent, a de facto parent, and a parent by estoppel. ALI Principles, *supra* note 7, at § 2.03.

or others (like former stepparents), over parental objections. The court has not clarified how contracts between—and voluntary actions involving—parents and nonparents might allow nonparents to obtain childcare standing for existing children.

The U.S. Supreme Court has also not spoken on child support contracts or similar voluntary actions involving existing or future children. And it has not spoken on child creation contracts or similar voluntary actions between prospective parents, and perhaps others, who anticipate future pregnancy or adoption.

II. CURRENT WAIVERS OF SUPERIOR PARENTAL RIGHTS

While the U.S. Supreme Court has not spoken on superior parental rights since *Troxel*, many state legislatures and courts have spoken on the partial or total waivers of such rights, often with differing results.⁷³ State lawmakers have not significantly addressed parental rights waivers in prenups and midnups on child custody, child support, and child creation. Parental rights waivers are, however, often recognized in state laws outside of prenups and midnups that address both contractual and noncontractual conduct involving future childcare, child support, and child creation.⁷⁴

A. Prenups and Midnups

While the Act now expressly recognizes that prenups and midnups may speak to “custodial responsibility,”⁷⁵ some earlier American state premarital agreement statutes recognized that prenups could address “personal” matters. In both Arizona⁷⁶ and Illinois⁷⁷ before the Act, persons undertaking premarital agreements could, by statute, “contract with respect to . . . any . . . matter, including . . . personal

73. See, e.g., *In re Paternity of F.T.R.*, 2013 WI 66, ¶ 2, 349 Wis. 2d 84, 94, 833 N.W.2d 634, 639 n.2 (Wis. 2013); MONT. CODE ANN. § 42-2-611 (2013).

74. § 42-2-611; TEX. FAM. CODE ANN. § 161.103 (West 2014).

75. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 10(a), 9C U.L.A. 27 (2012) (treating “premarital agreements and marital agreements under the same set of principles and requirements.”).

76. ARIZ. REV. STAT. § 25-203(A)(8) (2007).

77. 750 ILL. COMP. STAT. 10/4(a)(8) (1999).

rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.”⁷⁸ Distinguishing between property and personal matters can, however, be tricky.⁷⁹ There was even less statutory authority before the Act on midnups addressing personal matters.⁸⁰

Before and since the Act, a few cases have addressed the effects of prenups on personal matters involving custodial responsibility.⁸¹ Some agreements only indirectly spoke to future childcare. For example, when parties litigate parenting plans, some courts have not enforced general attorney fee waivers because, if enforced, the waivers had a potential to create a non-level playing field, making judicial childcare decisions problematic.⁸² Another case involving prenups that directly addressed future childcare disputes held that such agreements are not enforceable in an equity proceeding where the spouses do not seek marriage dissolution.⁸³

Some prenups that were raised in marriage dissolution proceedings prior to the Act directly addressed future childcare and involved

78. ARIZ. REV. STAT. § 25-203(A)(8) (2007); 750 ILL. COMP. STAT. 10/4(a)(8) (1999). These provisions seemingly are grounded on the 1983 Uniform Premarital Agreement Act, at Section 3(a)(8). UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8) 9C U.L.A. 43 (1983). The Comment to the Section declares that a premarital agreement could “provide for . . . the upbringing of children.” In New Mexico, premarital pacts may contain “any . . . matter not in violation of public policy.” N.M. STAT. ANN. § 40-3A-4(A)(7) (2013).

79. Consider, for example, prenups and midnups on dispositions of human embryos on marriage dissolution. *See, e.g.*, Charles P. Kindregan, Jr. & Maureen McBrien, *Assisted Reproductive Technology: A Look at the Disposition of Embryos in Divorce*, FAM. LAW. MAG., July 23, 2013, at 54, available at ssrn.com/abstract=2297561 (explaining that most courts have not used a property approach, and from their survey of cases, many embryo contracts are executed at fertility clinics, and not in prenups or midnups).

80. As states implement the Act’s policy regarding guidance within custodial responsibility pacts, the new laws may only be applied prospectively. *See, e.g.*, *In re Marriage of Howell*, 126 Cal. Rptr. 3d 539 (Ct. App. 2011) (specifying that the requirement for independent counsel for prenup parties who waive future spousal support is not retroactive). *But see* *Maeker v. Ross*, 62 A.3d 310, 316 (N.J. Super. Ct. App. Div. 2013) (finding new statute of frauds requirement for palimony agreements applied retroactively (i.e., to pacts undertaken before statutory amendment) because legislators wanted its application “irrespective of when an agreement . . . may have been entered.”).

81. *See, e.g.*, *In re Marriage of Burke*, 980 P.2d 265 (Wash. Ct. App. 1999).

82. *See, e.g.*, *id.* at 267; *In re Marriage of Heinrich*, 7 N.E.3d 889, 905–06 (Ill. App. Ct. 2014) (holding an agreement’s attorney fee shifting clause violates public policy because it discourages parents from pursuing child’s best interests in litigation).

83. *Kilgrow v. Kilgrow*, 107 So. 2d 885, 887–88 (Ala. 1958) (finding as a matter of fact that parents stated in antenuptial agreement that all children of the marriage are to be baptized and educated in the religion of the father, whether he is living or dead).

religious training.⁸⁴ In one case, an oral prenup required both spouses to raise any children from the marriage in a particular faith, but did not bar a divorced spouse with partial physical custody from taking the children to religious services that involved a different faith.⁸⁵ Among the rationales for the prenup was a concern about violating free exercise rights and parental authority over “religious upbringing.”⁸⁶

There are also some pre-Act precedents on midnups that address personal matters involving childcare. In one case, a midnup provided that, in the event of dissolution, any marital child “shall remain in the custody of the parent of that progeny’s sex.”⁸⁷ This provision was held invalid as “against public policy” because it impermissibly restricted judicial authority over future childcare and thereby disallowed any consideration of a child’s best interests.⁸⁸

Personal matters seemingly can encompass future child support obligations, future parentage, and future childcare.⁸⁹ Child support usually does not implicate superior parental rights.⁹⁰ It should be easier to overcome nonparents’ complaints of due process property deprivations than the complaints of existing parents, who oppose nonparent or new parent childcare and who complain of superior rights infringements.⁹¹ Prenups and midnups do not usually address future nonparent child support pledges or nonparent or new parent

84. *Zummo v. Zummo*, 574 A.2d 1130 (Pa. Super. Ct. 1990).

85. *Id.* at 1140.

86. *Id.* at 1138 (citing *Emp’t Div. v. Smith*, 494 U.S. 872, 883 (1990); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). Other rationales included the indefiniteness of the agreement and lack of contractual intent. *Id.* at 1145–46. *Cf.* *Ramon v. Ramon*, 34 N.Y.S.2d 100, 112 (N.Y. Dom. Rel. Ct. 1942) (upholding prenup providing for education of children in a certain religion); *Shearer v. Shearer*, 73 N.Y.S.2d 337, 358 (N.Y. Sup. Ct. 1947) (employing *Ramon*). A different rationale could be employed where enforcement of prenups’ religious upbringing clauses are needed to serve the children’s best interests. *See, e.g.*, *Kendall v. Kendall*, 687 N.E.2d 1228, 1230 (Mass. 1997) (finding exposure to second religion would cause damage to children’s self-identity because during religious services opinions are voiced that nonbelievers are ““damned to go to hell.””).

87. *Combs v. Sherry-Combs*, 865 P.2d 50, 52 (Wyo. 1993).

88. *Id.* at 54.

89. *Parness*, *supra* note 36, at 750.

90. *Id.* However, “[i]f unwritten consent to parent with the birth mother can prompt a second parent, there are concerns not only about respecting the birth mother’s superior parental rights but also about whether the second parent is unduly saddled with child support duties.” *Id.*

91. *See generally Troxel v. Granville*, 530 U.S. 57 (2000).

childcare, perhaps, in part because the Model Act only first spoke directly to custodial responsibility pacts in 2012.⁹²

B. *Waivers By Other Agreements*

Beyond prenups and midnups, express agreements between parents, or between a future parent and a nonparent, could help prompt a partial waiver of superior parental rights so that, over the parent's later objections, a court may later recognize the contracting nonparent as a second parent or imbue the contracting nonparent, or another person (like the contracting nonparent's parent), with standing to seek childcare. Childcare pacts in these settings can help resolve the "guidance" issues in prenup and midnup settings.⁹³

It is hard to imagine that an agreement between a parent and nonparent could prompt a court to recognize second parent status for a nonparent who is not a party to the agreement. It is also difficult to imagine that an agreement between two recognized parents and a nonparent would today prompt third parent status for the contracting nonparent, or for any other nonparent, because American states typically demand there be only two parents for any one child at any one time.⁹⁴

Statutes that address express childcare or child support agreements could include coparenting and cohabitation pacts between unwed partners; such coparenting and cohabitation pacts could specify the

92. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 10, 9C U.L.A. 27–28 (Supp. 2014).

93. Partial parental rights waivers in other contractual settings seem less helpful to prenup or midnup analyses. Consider, for example, contracts envisioning possible post-adoption visitation opportunities for—or child development updates to—parents whose children are adopted by nonfamily members. *See, e.g., In re Andie B.*, 955 N.Y.S.2d 239, 241 (N.Y. App. Div. 2012) (finding post-adoption contact orders for birth parents permissible in both private placement adoptions and adoptions from authorized agency); Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 339 (2012) (suggesting different approaches when there are "heroic birth mother[s] doing the best for everyone" and "bad" mothers, whose parental rights are terminated).

94. *See, e.g., Bancroft v. Jameson*, 19 A.3d 730, 743 (Del. Fam. Ct. 2010) (finding no de facto parenthood for mother's boyfriend because child already had legal mother and legal father, and third parent recognition would impermissibly interfere with childcare interests of the two fit parents). *But see* CAL. FAM. CODE § 7612(c) (West 2013) (allowing more than two parents if finding otherwise would be detrimental to the child); CAL. FAM. CODE § 8617(b) (West 2013) (allowing prospective adoptive parent(s) and existing parent(s) to agree for existing parents' "duties and responsibilities" to continue); CAL. FAM. CODE § 3040(d) (West 2004) (allocating custody and visitation where child has more than two parents).

care or support for one partner's child and could stipulate that the biological parent will be the only recognized parent under law.⁹⁵ Such pacts may be pre or post cohabitation or coparentage. To date, there are no statutes directly on point.⁹⁶ Without statutes, case law interpreting cohabitation or coparentage agreements can serve as precedent for cases involving prenups or midnups on court-compelled childcare that overrides superior parental rights. Case law can also serve as precedent for cases involving prenups and midnups on court-compelled child support that overrides the nonparent's objections. Informal coparenting and cohabitation agreements about later childcare or child support for existing children include pacts that indicate the parties will act in all ways as a family unit, with each party having the same or similar privileges and obligations.

Informal childcare and child support agreements among existing parents and nonparents (including stepparents and grandparents) are today effectively enforceable through the de facto parent and presumed parent doctrines, and similar statutes.⁹⁷ At times, actual "agreement" is required.⁹⁸

In Delaware, courts recognize a de facto parent where one had "a parent-like relationship" with "the support and consent of the child's parent"; the individual exercised "parental responsibility"; and the individual "acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature."⁹⁹ Not all de facto parents are actually

95. The status as the sole legal parent may be apparent at the time of the agreement, as when the other natural parent is deceased, or may be uncertain, as when an unwed, natural father has assumed or will assume a custodial, personal, or financial relationship with the child prompting parenthood under state law. Elrod, *supra* note 11, at 247.

96. The American Law Institute has suggested, however, that courts could allocate custodial and decision-making responsibilities for children to nonparents under law if they are "biological," nonlegal parents who have agreements with legal parents under which the nonlegal parents "retained some parental rights or responsibilities." ALI Principles, *supra* note 7, at § 2.18(2)(b).

97. DEL. CODE ANN. tit. 13 § 8-201 (2006); D.C. CODE § 16-831.01 (2013); CAL. FAM. CODE § 7611(c-d) (West 2013).

98. *See, e.g.*, D.C. CODE § 16-831.01 (2013) (requiring that the individual has "held himself or herself out as the child's parent with the agreement of the child's parent").

99. DEL. CODE ANN. tit. 13, §§ 8-201(a)(4) (2006) (mother), 8-201(b)(6) (father), & 8-201(c) (outlining three requirements to attain "de facto parent status"). De facto parents are on equal footing with biological or adoptive parents. *See, e.g.*, Smith v. Guest, 16 A.3d 920, 924, 928 (Del. 2011). *But see In re Bancroft*, 19 A.3d 730, 731 (Del. Fam. Ct. 2010) (finding statute overbroad and violative of fit

parents however. In the District of Columbia, one can seek “third-party custody” as a “de facto parent” if, among other requirements, one lived with the child at the child’s birth or lived in the same household with the child for at least ten of the twelve months preceding the filing of one’s custody request with parental “agreement.”¹⁰⁰

Presumed parent laws also differ—and often operate—although there is no “agreement” about childcare or support.¹⁰¹ Outside of marriage, presumed parent laws may be founded on presumed natural ties or only on the parental-like acts of nonparents.¹⁰² In Nevada, a “man is presumed to be the natural father of a child if . . . he and the child’s natural mother were cohabiting for at least 6 months before the period of conception and continued to cohabit through the period of conception.”¹⁰³ Neither preconception or postconception but prebirth acts are needed in Montana, where a presumption of natural fatherhood arises for a “person” who, “while the child is under the age of majority[,] . . . receives the child into the person’s home and openly represents the child to be the person’s natural child.”¹⁰⁴ Although Alabama law makes a similar presumption, it does not presume the “man” has natural ties; he must have established “a significant parental relationship with the child by providing emotional and financial support for the child.”¹⁰⁵ Texas law presumes a man to be the father of a child—though not the natural father—“if . . . during the first two years of the child’s life, he continuously resided in the household in which the child resided and he represented to others that the child was his own.”¹⁰⁶ In Washington,

mother and father’s due process rights as it relates to the mother’s boyfriend’s seeking to be a third parent).

100. D.C. CODE §§ 16-831.01, 831.03 (2013).

101. *See, e.g.*, CAL. FAM. CODE § 7611 (West 2013).

102. §§ 16-831.01, 831.03.

103. NEV. REV. STAT. § 126.051(1)(b) (2010).

104. MONT. CODE ANN. § 40-6-105(1)(d) (West 2013). *See also*, COLO. REV. STAT. § 19-4-105(1)(d) (2005); N.J. STAT. ANN. § 9:17-43(a)(4) (West 2013). *Accord* CAL. FAM. CODE § 7611(d) (West 2013) (making no reference to under majority age, but “child” is received into home).

105. ALA. CODE § 26-17-204(a)(5) (2009).

106. TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2014). *See also*, DEL. CODE ANN. tit. 13, § 8-204(a)(5) (2006) (“resided in the same household”); N.D. CENT. CODE ANN. § 14-20-10(1)(e) (2009); N.M. STAT. ANN. § 40-11A-204(a)(5) (2013); OKLA. STAT. tit. 10, § 7700-204(A)(5) (2009); and WYO.

“a person is presumed to be the parent of a child if, for the first two years of the child’s life, the person resided in the same household with the child and openly held out the child as his or her own.”¹⁰⁷

At times, courts read parentage presumptions—even those involving natural ties and second parent status for a child with an existing parent—to include the post-birth, parent-like acts of a woman who is not the birth mother,¹⁰⁸ putting the intimate partners of single-parent mothers who childrear in certain ways on equal footing regardless of sex.¹⁰⁹

Where there are not yet children, coparenting and cohabitation pacts may primarily address child creation while also contemplating childcare and child support.¹¹⁰ Pacts can address one partner’s future pregnancy through assisted reproduction, with or without gametes of the other partner, and outline future childcare and support.¹¹¹ Such agreements can also address future child creation, childcare, and child support for children born to gestational carriers who, as surrogates, might have no parental rights or obligations.¹¹²

Some states’ statutes address agreements on future pregnancy through assisted reproduction, with or without surrogates.¹¹³ Many of these statutes, however, do not speak directly to all possible child creation pacts, as they are sometimes limited, for example, to married, opposite-sex couples¹¹⁴ or to persons with certain medical

STAT. ANN., § 14-2-504(a)(v) (2013).

107. WASH. REV. CODE § 26.26.116(2) (2011).

108. *See, e.g., In re Domestic Partnership of C.P.*, No. E052672, 2013 WL 2099156, at *2 (Cal. Ct. App. May 16, 2013) (reviewing California cases).

109. *Id.*

110. *See Frazier v. Goudschaal*, 295 P.3d 542, 545–46 (Kan. 2013).

111. *Szafranski v. Dunston*, 993 N.E.2d 502, 508, 514 (Ill. App. Ct. 2013) (“We therefore join those courts that have held that “[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.” (quoting *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998)).”

112. Parness, *supra* note 36, at 747 n.16.

113. *See Susan L. Crokin, Where Is Anonymous Reproduction Taking Us Now?*, 12 DEPAUL J. HEALTH CARE L. 241 (2009) (reviewing American state statutes on parentage from assisted human reproduction (AHR) births without surrogates). *See also*, Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1250–65 (2013) (reviewing American state statutes on parentage from AHR births with surrogates).

114. *See, e.g., 750 ILL. COMP. STAT. 40/2* (2012); *750 ILL. COMP. STAT. 40/3(a)* (2012); *OHIO REV. CODE ANN. § 3111.89* (West 2011). The Parentage Act in Illinois, a state only recently allowing marriage for same-sex couples, only guides births to wives from AHR where the husbands consent. *40/2*

conditions.¹¹⁵ Where pacts go beyond the explicit statutes,¹¹⁶ courts do not always enforce the agreements.¹¹⁷

In states without statutes that address assisted reproduction pacts, the courts have enforced child creation pacts but have urged legislators to take action.¹¹⁸ Enforcement is impossible, however,

(husbands are semen donors); 40/3(a) (husbands are not the semen donors). By contrast, in Ohio there is a separate statutory scheme dealing with “non-spousal artificial insemination for the purpose of impregnating a woman so that she can bear a child that she intends to raise as her child”; however, the section expressly states, “[t]hese sections do not deal with the artificial insemination of a wife with the semen of her husband or with surrogate motherhood.” § 3111.89.

115. *See, e.g.*, 750 ILL. COMP. STAT. 47/20(b)(2) (2012). The Gestational Surrogacy Act in Illinois only recognizes surrogacy contracts when, among other things, there is a “medical need for the gestational surrogacy” by at least one intended parent. *Id.* By contrast gestational agreements are authorized in Texas without a showing of any medical need on the part of the intended parents. *See* TEX. FAM. CODE ANN. § 160.754 (West 2014).

116. *See, e.g.*, *Bethany v. Jones*, 378 S.W.3d 731, 739 (Ark. 2011) (holding it was in child’s best interest to have visitation with biological mother’s former same sex partner, who stood in *loco parentis* to child.); *In re T.P.S.*, No. 5-12-0438, 2013 WL 827539, at *1 (Ill. App. Ct. Mar. 4, 2013) (determining non-birthmother may be able to continue to maintain childcare rights per an earlier joint guardianship established with the birthmother); *In re T.P.S.*, 978 N.E.2d 1070, 1085 (Ill. App. Ct. 2012) (finding a same-sex partner can seek custody per common law contract theory although the statute on assisted human reproduction covered only married couples); *Frazier v. Goudschaal*, 295 P.3d 542, 557–58 (Kan. 2013) (enforcing prebirth coparenting agreements of a lesbian couple involving children born of assisted reproduction over the objection of birth mother); *L.F. v. Breit*, 736 S.E.2d 711, 721–22 (Va. 2013) (finding opposite-sex, unwed couple’s pact on birth via assisted reproduction enforceable and refusing to adopt a per se rule that sperm donor’s due process rights never warranted protection). *Compare In re Mullen*, 953 N.E.2d 302, 308 (Ohio 2011) (finding mother never agreed that former domestic partner would permanently share legal custody though there was coparentage for a while), *with Brown v. Wyandt*, No. 8-13-08, 2014 WL 222820, at *6 (Ohio Ct. App. Jan. 21, 2014) (finding *In re Mullen* does not provide for a statutory “shared parenting” arrangement between a parent and nonparent, but does recognize that a parent can enter a “valid shared custody agreement” with a nonparent, here a man, who cannot prove such an agreement with the birth mother).

117. *See, e.g.*, *Della Corte v. Ramirez*, 961 N.E.2d 601, 602–03 (Mass. App. Ct. 2012). The enforceability of such pacts often will not be considered such as where the parentage effects of child creations are addressed outside any contractual circumstances. *Id.* (holding same-sex, unwed, female couple that facilitated the pregnancy of one partner via artificial insemination were both parents, reasoning the child was born after the couple married).

118. *In re Paternity of F.T.R.*, 2013 WI 66, ¶ 73, 349 Wis. 2d 84, 123, 833 N.W.2d 634, 653 (Wis. 2013) (enforcing most of surrogacy pact between two couples, wherein birth mother agreed to parental rights termination, while urging legislature “to consider enacting legislation regarding surrogacy” as it “is currently a reality in our . . . court system.”). *See also S.N. v. M.B.*, 935 N.E.2d 463, 472 (Ohio Ct. App. 2010) (finding gestational surrogacy contract rebuts maternity under parentage statute arising from giving birth). Not all pacts involving future childcare are enforced. *See, e.g.*, *A.C. v. N.J.*, 1 N.E.3d 685, 697 (Ind. Ct. App. 2013) (finding agreement between same-sex, domestic partners on dual parentage unenforceable, but nonparent has standing to seek child visitation for child conceived artificially with her brother’s sperm); *Dee v. Rakower*, 976 N.Y.S.2d 470, 473, 476, 478 (N.Y. App. Div. 2013) (holding there is no enforcement of oral partnership or joint venture pact between same-sex parents, who litigate post-breakup property division, where one parent contracted to forego her career to care for the couple’s children).

when statutes expressly forbid certain contracts such as surrogacy agreements.¹¹⁹

Where there are not yet children, coparenting and cohabitation pacts could primarily address future formal adoption and subsequent childcare and child support. Such pacts can include agreements that contemplate the situation in which one person undertakes a formal adoption and then coparents with a second person. While no statutes explicitly address such a scenario, some cases have addressed coparenting and cohabitation pacts that anticipate a future adoption.¹²⁰

Beyond prenups, midnups, and cohabitation and coparentage pacts, statutes could explicitly address, for example, parent-grandparent pacts on grandparent childcare and support.¹²¹ Such laws could appear in statutes on marriage dissolution, paternity, third party visitation, or grandparent visitation proceedings. To date there are no statutes on such express contracts.¹²² Courts have, however, upheld some child visitation agreements between grandparents and parents.¹²³ Similarly, courts have upheld some child visitation agreements between soon-to-be former stepparents and parents.¹²⁴

119. *See, e.g.*, MICH. COMP. LAWS § 722.855 (2011) (“A surrogate parentage contract is void and unenforceable as contrary to public policy.”).

120. *See, e.g., In re Marriage of Mancine*, 965 N.E.2d 592, 594–95 (Ill. App. Ct. 2012) (rejecting a de facto parent argument by a cohabitant, who later became a stepfather after the Illinois Supreme Court remanded for consideration of whether an intent to adopt, without a formal adoption, can prompt childcare standing for the former cohabitant and then husband), *vacated and remanded sub nom. Mancine v. Gansner*, 992 N.E.2d 1 (Ill. 2013).

121. Parent-aunt, parent-uncle, and parent-child sibling pacts could also be addressed, as it can be easily imagined that such pacts should lead to, for example, childcare orders over parental objections.

122. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-203 (2007); 750 ILL. COMP. STAT. 10/4 (2012); N.M. STAT. ANN. § 40-3A-4 (2006).

123. *See, e.g., In re M.M.D.*, 820 N.E.2d 392, 399–400 (Ill. 2004), where the court enforced an earlier consent decree involving grandparent visitation over later parental objection (after the grandparent visitation statute was stricken), with the court saying:

The constitution prohibits the state from forcing fit parents to yield visitation rights to a child’s grandparents when the parents do not wish to do so merely because a trial judge believes that such visitation would be appropriate. There is no corresponding constitutional prohibition against a fit parent’s decision to voluntarily bestow visitation privileges on his child’s grandparents. To the contrary, the very constitutional principles that required us to strike down the grandparent visitation statute . . . require that a parent’s voluntary visitation decision be honored. If fit parents have a fundamental right to make decisions regarding the care custody and control of their children . . . they must likewise have the fundamental right to agree to visitation by the children’s grandparents

It appears that grandparents' child support pledges to parents could also be sustained. More problematic, however, is the prospect that a grandparent's financial support of child creation could, over parental objection, give rise to second parent status or prompt later court-compelled grandparent childcare.¹²⁵ Childcare opportunities should not normally be for sale in child creation settings.

C. *Waivers By Noncontractual Conduct*

Beyond agreements, non-contractual conduct can prompt partial waivers of superior parental rights to childcare.¹²⁶ Waiver standards in a noncontract setting, as well as the coparentage and cohabitation settings, can help guide waiver issues in prenup and midnup settings.

Where there were no agreements, inquiries into any earlier single parents' consent to future childcare by nonparents have proved crucial in many cases and statutes, particularly where the single parents later objected to nonparents' childcare petitions.¹²⁷ Thus, nonparents who hold out children as their own, typically with single parents' strong implicit—even if not explicit—consent, may later seek second parent status in childcare settings over the objections of the single parents.¹²⁸ As shown earlier, statutory provisions do not

if they wish to do so The constitutional protections afforded parenthood therefore obligate the courts to uphold voluntary visitation agreements made by fit parents, not declare them invalid.

Id. (emphasis omitted) (citation omitted). See also *Ingram v. Knippers*, 72 P.3d 17, 21–22 (Okla. 2003) (finding grandparent visitation decree pursuant to agreement in paternity action cannot be voided by parent without a showing of a change in circumstances and that child's best interest would be served by modifying the agreement); *Lovlace v. Copley*, 418 S.W.3d 1, 31 (Tenn. 2013) (“Once grandparents have obtained court-ordered visitation, however, the presumption of superior parental rights does not apply in proceedings to modify or terminate grandparent visitation. Declining to apply the presumption . . . not only gives deference to a court's order, but it also promotes the important policy goal of stability for the child.”) (quoting *Rennels v. Rennels* 257 P.3d 396, 401–02 (Nev. 2011)).

124. See, e.g., *In re Marriage of Schlam*, 648 N.E.2d 345, 351 (Ill. App. Ct. 1995) (estopping birth mother from challenging former husband's childcare standing twenty-seven months after a joint custody order was entered). Cf. *In re Marriage of Engelkens*, 821 N.E.2d 799, 806 (Ill. App. Ct. 2004) (allowing parent to challenge former stepparent's childcare standing where earlier child visitation agreement was “gratuitous,” part of a “temporary order,” and where there was no detrimental reliance by former stepparent).

125. See Parness, *supra* note 36, at 766–67.

126. See *Brown v. Wyandt*, No. 8-13-08, 2014 WL 222820, at *6 (Ohio Ct. App. Jan. 21, 2014).

127. *In re Mullen*, 953 N.E.2d 302, 310 (Ohio 2011) (Pfeifer, J., dissenting).

128. See Parness, *supra* note 36, at 757–58.

always require the “agreement” of the recognized parent.¹²⁹ Where statutes do not demand agreement, courts often read statutes to deem consent or comparable voluntary action crucial, or at least very important.¹³⁰ Similarly, common law cases have recognized that a comparable holding out by a nonparent, coupled with single parent acquiescence, can prompt the nonparent to become a newly-designated second parent, or a nonparent with childcare standing, over the single parent’s later objection.¹³¹ In all these instances, the voluntary acts involve one parent’s allowing a nonparent to coparent—not the one parent’s agreeing or acting as though the nonparent may eventually be a parent.¹³²

So, the nature of required parental consent or comparable voluntary action is elusive. It of course includes the situation in which a single parent voluntarily and knowingly gives informed consent to diminish his or her own superior parental rights regarding a certain child, thereby allowing another person to attain second parent status by proving elements such as residency and parent-child like bond or nonparty standing to seek childcare serving a child’s best interests. But in most cases, both parents and nonparents will act having no prior understanding of the legal nuances that guide superior parental rights and their partial waivers. Thus, often without making truly voluntary, knowing, and informed decisions as to what may lie ahead, courts diminish superior parental rights of single parents and grant second parent or nonparent childcare.¹³³ In addition, child support obligations are also assigned to newly designated second parents or to nonparents with childcare standing, impacting the due process property interests of those obligated, without there ever having been, subjectively, a support order foreseeable to the nonparent.¹³⁴

129. *Id.* at 775–77.

130. *See id.* at 756 n.62.

131. *Id.* at 762.

132. *Id.*

133. *Id.* at 751.

134. *See Parness, supra* note 36, at 769–70.

Under Delaware law, de facto parenthood requires a single parent and nonparent to make more informed decisions when evaluating whether to grant the nonparent second parent status, determining childcare opportunities, and negotiating child support obligations.¹³⁵ Delaware law defines a de facto parent as one who exercised “parental responsibility” and served in a “parental role” so that “a bonded and dependent relationship” developed that is “parental in nature,” where there was “the support and consent of the child’s parent.”¹³⁶ Here, both single parents and nonparents are likely more aware of the possible consequences of their childcare acts. Yet, the Delaware Code provision governing presumed parenthood requires less informed decision making, as a “man is presumed the father of a child if . . . [f]or the first 2 years of the child’s life, he resided in the same household with the child and openly held out the child as his own.”¹³⁷ And Nevada law presumes a man to be a natural father of a child if he and the child’s mother were cohabitating for at least six months before conception and continued “to cohabit through the period of conception.”¹³⁸

By comparison, informed decision making requirements that guide diminutions of superior parental rights vary when nonparents acquire childcare standing through non-contractual parental conduct.¹³⁹ In Oregon, “any person . . . who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition” for a childcare order; in determining whether there is a rebuttal of the presumption “that the legal parent acts in the best interest of the child,” the court “may consider” whether the legal parent has “fostered, encouraged or consented to the relationship.”¹⁴⁰ In North Carolina, a nonparent can

135. DEL. CODE ANN. tit. 13, § 8-201(c) (2009).

136. *Id.* Section 203 clarifies that de facto parentage “applies for all purposes, except as otherwise specifically provided by other law of this State.” Tit 13, § 8-203.

137. Tit. 13, § 8-204(a)(5). Comparable state laws include N.M. STAT. ANN. § 40-11A-204(A)(5) (2013); N.D. CENT. CODE § 14-20-10(1)(e) (2009); and OKLA. STAT. tit. 10.7700 § 204 (2009).

138. NEV. REV. STAT. § 126.051(1)(b) (2010).

139. See Parness, *supra* note 36, at 776–77.

140. OR. REV. STAT. § 109.119(1), (2)(a), (2)(b), 4(a)(C), 4(b)(D) (2013) (allowing presumption to be overcome by preponderance of evidence when “a child-parent relationship exists” and holding “clear and convincing evidence” is needed where “an ongoing personal relationship exists”).

seek a child custody award if it would “promote the interest and welfare of the child”¹⁴¹ and if the existing parent acted in a manner inconsistent with his or her parental status, although such action need not constitute bad acts.¹⁴² In New York, nonparent childcare standing arises only after “a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child.”¹⁴³ And in Indiana, only parents, stepparents, and grandparents can seek visitation with a former minor ward over parental objection by demonstrating with clear and convincing evidence that the parent long acquiesced in the guardian’s custody or voluntarily relinquished the child so that the affections of the child and guardian became so close that to sever the relationship would severely harm the child.¹⁴⁴

III. GUIDANCE ON CHILDCARE STANDING VIA PRENUPS AND MIDNUPS

Children change everything when it comes to assessing prenups and midnups. The Act recognizes that children change prenups and midnups by distinguishing between property pacts and custodial responsibility pacts.¹⁴⁵ Similarly, Maine legislators have recognized this concern by declaring that “an effective premarital agreement is void 18 months after the parties to the agreement become biological or adoptive parents or guardians of a minor,” unless they “sign a written amendment” (which need not alter any terms).¹⁴⁶ How should public interests in child welfare, together with the interests of the contracting parties and of any intended contract beneficiaries, be balanced within special laws on prenap and midnap agreements that

141. N.C. GEN. STAT. § 50-13.2(a) (2013).

142. *Heatzig v. Maclean*, 664 S.E.2d 347, 351 (N.C. Ct. App. 2008).

143. *Bennett v. Jeffreys*, 356 N.E.2d 277, 283 (N.Y. 1976).

144. *I.E. v. W.L.*, 997 N.E.2d 358, 364–65 (Ind. Ct. App. 2013) (citing *Kitchen v. Kitchen*, 953 N.E.2d 646 (Ind. Ct. App. 2011), which employed the test from *In re B.H.*, 770 N.E.2d 283, 287 (Ind. 2002)).

145. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 10, 9C U.L.A. 27 (Supp. 2014).

146. ME. REV. STAT. tit. 19-A, § 606 (2012).

go beyond simply recognizing that “personal” matters may be addressed, or that “guidance” may be provided on “custodial responsibility”?

First, state legislators need to coordinate prenup and midnup laws that address post-dissolution custodial opportunities with their existing laws on nonbiological parents, nonadoptive parents, and nonparents in childcare settings. Jurisdictions differ significantly on parental presumptions, de facto parenthood, grandparent visitation, former stepparent visitation, and other avenues to parent and nonparent childcare opportunities for those with no actual biological ties or no formal adoptive ties.¹⁴⁷ Where existing laws already provide some opportunities for childcare standing for new parents and nonparents, any new statutes on prenups and midnups should expressly recognize those laws.

Nonparents should be able to use prenups or midnups to better secure later childcare opportunities by agreeing to act in ways that conform to existing nonparent childcare laws. Single parents should be able to outline directly in prenups or midnups support or opposition to any later second parent or nonparent childcare standing under existing laws where parental “agreement” is important. Such pacts would guide courts that later examine childcare issues.

In addition, new prenup and midnup statutes should extend existing statutory and precedential circumstances for new parent and nonparent childcare standing. That is, prenups and midnups should support second parent status or nonparent childcare standing that would otherwise be unavailable, at least where existing laws are not preemptive of further legal developments and are not undermined by new developments.¹⁴⁸

147. For differences in American parentage laws see, for example, Parness, *supra* note 36, at 755–56 & n.62. For differences in American grandparent visitation laws, see, for example, Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 2 (2013). For differences in American stepparent visitation laws, see, for example, Jeffrey A. Parness, *Survey of Illinois Law: Stepparent Childcare*, 38 S. ILL. U. L.J. 1, 15–16 (2014).

148. For example, prenups and midnups on parentage arising from births to gestational carriers should not be enforced where the laws expressly ban surrogacy pacts. See, e.g., MICH. COMP. LAWS § 722.855 (2011).

Although a prenup or a midnup should provide guidance, judges should not always follow a prenup or a midnup on future childcare. A child's best interest remains paramount and is not limited by superior parental rights. For example, a childcare prenup or midnup that would endanger a child's safety should not be enforced, regardless of its validity at the time of its making or the current intentions of the contracting parties.¹⁴⁹

IV. GUIDANCE ON CHILD SUPPORT VIA PRENUPS AND MIDNUPS

Superior parental rights are generally not endangered by prenups or midnups that promise future child support.¹⁵⁰ Childcare parents, their children, and the state all usually desire more, rather than less, money for children. Enforcement of child support promises is so strongly favored that sometimes there is no requirement that consideration support such promises arising from or growing out of supposed, presumed, or alleged parent-child relationships.¹⁵¹

Likewise, special contract requirements could render enforceable prenup and midnup pacts on future parents and nonparents, even where the pacts address future child support. Such pacts could also encompass support promises by future and present stepparents, future and present grandparents, and other family members.

Usually, a court-compelled child support assessment, according to a prenup or midnup, should not depend on a recognition of childcare standing¹⁵² and certainly need not accompany an award of childcare,

149. See, e.g., *In re Lee*, 411 S.W.3d 445, 463–64, 466 (Tex. 2013) (J. Green, dissenting) (opining that the trial court has discretion not to enforce mediated settlement agreement on child custody where enforcement is not in child's best interest because the child's safety would be endangered).

150. However, "[i]f unwritten consent to parent with the birth mother can prompt a second parent, there are concerns not only about respecting the birth mother's superior parental rights but also about whether the second parent is unduly saddled with child support duties. See Parness, *supra* note 36, at 757–58.

151. See *supra* note 32 and accompanying text.

152. Thus, child support duties often remain for parents whose childcare interests have been involuntarily terminated. See, e.g., *Ex Parte M.D.C.*, 39 So.3d 1117, 1133 (Ala. 2009) and *In re Beck*, 793 N.W.2d 562, 568 (Mich. 2010). See generally Jason M. Merrill, *Falling Through the Cracks: Distinguishing Parental Rights From Parental Obligations in Cases Involving Termination of the Parent-Child Relationship*, 11 J.L. & FAM. STUD. 203 (2008). Voluntary terminations due to anticipated adoptions frequently end such duties, however. See e.g., 750 ILL. COMP. STAT. 50/17 (1999) ("After

even for those with childcare standing.¹⁵³ And one would assume that child support orders, agreed to by contract, would not interfere with childcare, and in fact, would be welcomed by parents, grandparents, stepparents, and others who undertake childcare. Thus, generally courts should enforce prenups of future spouses, future or current grandparents, and others who undertake childcare for future child support. In addition, courts should be keen to enforce current stepparents, grandparents, and step-grandparents' midnups that provide for future child support.

Outside of prenups and midnups, courts already enforce child support promises where there may not otherwise be a support obligation. For instance, courts enforce intimate partner agreements, including an unwed¹⁵⁴ or wed¹⁵⁵ partner's future support.¹⁵⁶ Courts also require child support in the absence of express support promises, even for parties no longer interested in—or eligible for—childcare

either the entry of an order terminating parental rights or the entry of a judgment of adoption, the natural parents of a child sought to be adopted shall be relieved of all parental responsibility for such child and shall be deprived of all legal rights as respects the child, and the child shall be free from all obligations of maintenance and obedience as respects such natural parents.”). *See also In re C.N.*, 839 N.W.2d 841, 845 (N.D. 2013) (using N.D. Code 14-09-08.21 to order child support for a father, whose parental rights were terminated where there was no pending or anticipated adoption).

153. Thus, some state Dissolution of Marriage Acts and Parentage Acts expressly permit child support awards against parents who do not then have custody, visitation, or comparable childcare orders. *See, e.g.*, IOWA CODE § 598.10(b) (2001) (“[T]o encourage compliance with a visitation order, a temporary order for custody shall provide for a minimum visitation schedule with the noncustodial parent, unless the court determines that such visitation is not in the best interest of the child” within dissolution proceeding); 750 ILL. COMP. STAT. 45/14(a)(2) (1999) (“If a judgment of parentage contains no explicit award of custody, the establishment of a support obligation or of visitation rights in one parent shall be considered a judgment granting custody to the other parent” within Parentage Act proceeding).

154. *Compare In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) (finding unwed, male partner bound to support AHR child born to unwed, female partner via common law child support action founded on earlier oral agreement, although it was outside the assisted reproduction statute because there was no written consent and no marriage), *with In re A.M.K.*, No. 2011 AP2660, 2013 WL 4746428, at *3 n.3 (Wis. Ct. App. Sept. 5, 2013) (noting woman's promise to “share all expenses” of child born to her same-sex partner, even if construed as a promise of child support on any breakup, could not support a court order on support as the woman was a nonparent and there was no authorizing statute).

155. *See, e.g.*, Levin v. Levin, 645 N.E.2d 601, 603–04 (Ind. 1994) (equitably estopping husband from denying support duty where he consented to AHR with donor semen).

156. *See, e.g.*, Tirey v. Tirey, 806 N.E.2d 360, 364–65 (Ind. Ct. App. 2004) (noting man could not later escape support duty by showing no biological ties).

orders, as is the case with former stepparents, who acknowledged parentage although they are biologically unrelated.¹⁵⁷

When might courts properly deny enforcement of child support promises within prenups and midnups? Courts should resist enforcement when parents do not wish to pursue or to have pursued—as by the state seeking welfare payment reimbursement—available child support because enforcement would not serve their children’s best interests or would unduly interfere with their superior rights, including decision making about their child’s care, custody, or control.¹⁵⁸ Courts should also reluctantly enforce such agreements when nonparents’ child support promises were undertaken for improper purposes, such as buying parental acquiescence in future childcare standing (e.g., future recognitions of nonparents as parents, or of nonparents as third parties (like grandparents), with childcare standing) where childcare standing would otherwise not arise.¹⁵⁹ Childcare standing should not be able to be bought and sold.¹⁶⁰

157. *See, e.g., DeBoer v. DeBoer*, 822 N.W.2d 730, 735 (S.D. 2012) (employing Texas law to find support could be assessed against a former nonbiological stepfather who helped initiate a new birth certificate to change his wife’s child’s last name to his last name).

158. *See, e.g., In re Starla D. v. Jeremy E.*, 945 N.Y.S.2d 779, 782 (N.Y. App. Div. 2012) (holding mother’s child support action against biological father could proceed because it posed no detriment to child’s interests).

159. A prenup recognizing a future stepparent’s future child support obligations in the event of dissolution, as well as the possibility that the future stepparent might qualify as a de facto parent sometime after marriage, differs from a prenup that recognizes a future stepparent’s future child support obligations, as well as automatic de facto parenthood in the event of dissolution (in that the single parent will not resist, and perhaps conspire to aid in a parentage finding). Childcare standing should not be able to be bought regardless of later circumstances, even if the child would welcome the child support. Perhaps with the latter prenup, a child support promise, should be enforced, even if a promise of automatic de facto parenthood would not be enforced.

160. Special contract requirements on promises not to pursue future child support demand different analyses. Parents usually may not bargain away the support opportunities for the children in their care. For example, in marriage dissolution proceedings, one parent cannot promise not to pursue child support in return for the other parent’s promise not to seek a childcare order. *See, e.g., Tilley v. Tilley*, 947 S.W.2d 63, 65 (Ky. Ct. App. 1997) (“Thus, the statute makes it clear that while the parties are free to enter into a separation agreement to promote settlement of the divorce, the court still retains control over child custody, support, and visitation and is not bound by the parties’ agreement in those areas.”).

V. GUIDANCE ON CHILD CREATION VIA PRENUPS AND MIDNUPS

American state statutes regulate child creation pacts that involve assisted reproduction outside of any statutes or cases on prenups or midnups.¹⁶¹ Assisted reproduction statutes are, at times, incomplete as to all who might contract, such as when they only address married, heterosexual couples.¹⁶²

Where there are no child creation statutes involving assisted reproduction, some state court judges have developed common law principles that look for guidance within child creation contracts.¹⁶³ Other state court judges have decided not to develop common law, calling instead for legislative action.¹⁶⁴

Statutes and case law on prenups and midnups could sanction only child creation pacts, based on the rationale that they are already recognized outside of contemplated or existing marriage or marriage-like settings. But prenups and midnups could also specially speak to

161. For differing approaches to surrogacy pacts, see *supra* note 112 and *In re Paternity of F.T.R.*, 2013 WI 66, ¶¶ 93–95, 349 Wis. 2d 84, 129–30, 833 N.W.2d 634, 653 (Wis. 2013) (outlining both domestic and international approaches). For differing approaches to AHR pacts see *supra* note 112.

162. See, e.g., 750 ILL. COMP. STAT. 45/2.5 (1999) (surrogates used by intended married parents) and tit. 40/3(a) (1999) (discussing artificial insemination employed by married, opposite-sex couple). *But see* *Shineovich v. Shineovich*, 214 P.3d 29, 39–40 (Or. Ct. App. 2009) (denying equal protection to same-sex, domestic partner couples when statutes only address parentage of husband whose wife bears a child through artificial insemination).

163. See, e.g., *Chambers v. Chambers*, No. CN00–09493, 2002 WL 1940145, at *4, *10 (Del. Fam. Ct. Feb. 5, 2002) (finding that while lesbian partner was not an egg donor, she was still a legal parent); *D.M.T. v. T.M.H.*, 129 So. 3d 320, 328 (Fla. 2013) (finding egg donor is a parent because the statute, which requires an egg donor to relinquish parental rights, is unconstitutional); *Szafranski v. Dunston*, 993 N.E.2d 502, 514 (Ill. App. Ct. 2013) (finding dispute over pre-embryos between ex-boyfriend and ex-girlfriend resolved by their intentions in prior agreements); *St. Mary v. Damon*, 309 P.3d 1027, 1036 (Nev. 2013) (finding District Court could enforce contract, which spoke to surrogacy pacts for married couple, between unwed, lesbian couple whereby one partner carried child, the other donated the egg, and each would coparent, outside parameters of parentage statute); *Shineovich*, 214 P.3d at 39–40 (finding statute that recognizes AHR use only by married, opposite-sex couples violates equal protections afforded same-sex, female couples who consent to AHR).

164. See, e.g., *Smith v. Gordon*, 968 A.2d 1, 14–15 (Del. 2009) (noting de facto parentage must be undertaken by General Assembly); *In re T.J.S.*, 16 A.3d 386, 398 (N.J. Super. Ct. App. Div. 2011) (noting the legislature, not the court, should decide whether parentage vests at birth in a wife whose husband’s sperm led to the birth of a child with a surrogate per assisted reproduction). See also, *K.M. v. E.G.*, 117 P.3d 673, 690 (Cal. 2005) (Werdegar, J., dissenting) (disagreeing with the majority’s finding that both lesbian partners were parents of twins born to one partner through assisted reproduction with ova of other partner, and stating, “[o]nly legislation defining parentage in the context of assisted reproduction is likely to restore predictability and prevent further lapses into the disorder of ad hoc adjudication.”).

marriage-related pacts that extend contractual opportunities. Special prenu and midnu child creation laws would then guide courts in determining future parentage, childcare, and support, unless the prenu or midnups were unconscionable,¹⁶⁵ contrary to state public policy,¹⁶⁶ or were per se or otherwise unenforceable.

Child creation prenups and midnups could also contain choice of law provisions,¹⁶⁷ provide written consent,¹⁶⁸ and specify witness,¹⁶⁹ lawyer,¹⁷⁰ and doctor¹⁷¹ participation.

165. Process requirements already attend prenups and midnups dealing with property matters. Such requirements would also operate for child creation prenups and midnups. But additional requirements for child creation pacts may arise from other sources, such as the requirements of assisted reproduction statutes. *See, e.g.*, 40/3(a).

166. For example, in the absence of statutes, some courts have held surrogacy pacts substantively unenforceable in their states. *See, e.g., In re Baby M.*, 537 A.2d 1227, 1235 (N.J. 1988); *R.R. v. M.H.*, 689 N.E.2d 790, 793, 795 (Mass. 1998). Some state statutes explicitly prohibit surrogacy pacts. *See, e.g., ARIZ. REV. STAT. § 25-218(A)* (2007), *invalidated by Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994); D.C. CODE § 16-402(a) (2013); IND. CODE § 31-20-1-1 (2008) (declaring it against public policy to enforce certain terms of a surrogacy agreement); MICH. COMP. LAWS § 722.855 (2013) (“A surrogate parentage contract is void and unenforceable as contrary to public policy.”).

Substantive unenforceability could be limited to certain surrogacy or other AHR pacts where distinctions are drawn between classes of contracting parties. Thus, a prenu child creation pact involving a man, his future or current spouse, and another woman who is to be a surrogate could be per se unenforceable when neither the man nor the woman is to provide genetic material. *See, e.g., In re Paternity of Infant T.*, 991 N.E.2d 596, 600–01 (Ind. Ct. App. 2013) (finding petition to disestablish maternity contrary to public policy where child would be declared motherless). A prenu between a man, his future or current female spouse, and another man that addresses child creation and provides that a man and woman would have sexual intercourse to bear a child that will be reared exclusively by the man and his spouse or spouse-to-be might be per se unenforceable; the *Lehr* paternity opportunity interests in a man’s future child may be deemed not waivable preconception. *But see In re A.R.L.*, 318 P.3d 581, 583–84, 588–89 (Colo. App. 2013) (finding that a biological mother’s former, same-sex partner can seek parental status under the state’s Uniform Parentage Act, where the mother and her friend had sex prompting birth, even though former partner did not know of—or agree to—have sex, although she agreed to the mother’s artificial insemination, at least where the friend consistently pursued an “admission of nonpaternity”).

167. Courts occasionally confront choice of law issues involving child creation, such as when a domestic couple arranges for a surrogate in a foreign state, particularly when two domestic laws conflict, or when domestic laws conflict with international or foreign laws. *See generally* Martin Engel, *Cross-Border Surrogacy: Time for a Convention?*, FAMILY LAW AND CULTURE IN EUROPE: DEVELOPMENTS, CHALLENGES AND OPPORTUNITIES; PROCEEDINGS OF THE FIFTH CONFERENCE OF THE COMMISSION ON EUROPEAN FAMILY LAW (forthcoming 2014), available at <http://ssrn.com/abstract=2348270>.

168. *Compare* ARK. CODE ANN. § 9-10-201(a) (2009), *with* § 9-10-201(b) (“Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman’s husband if the husband consents in writing to the artificial insemination.”) Otherwise, he is a “presumed” parent, “except in the case of a surrogate mother.” *See also* FLA. STAT. § 742.11(1) (2009) (stating except with gestational surrogacy, a child born within wedlock via artificial or in vitro insemination “is irrebuttably presumed” the child of the husband, if he and his wife have “consented in writing”); MASS. GEN. LAWS ch. 46, § 4B (2010) (“Any child born to a married woman as

Child creation prenups and midnups could address matters like ova and sperm sources, surrogate choice, the dispositions of frozen embryos on dissolution of the intimate relationship of the contracting parties, sources of financial support, and child creation timing. Where the child creation contracts themselves are not invalid, even where certain contractual terms or contract formation processes are problematic,¹⁷² the legal effects attending child creation should be significantly guided by fairly formulated prenups or midnups. Included within these legal effects are both parentage designations, such as where the contractors' intentions regarding future parental status are often followed,¹⁷³ and childcare opportunities, for example where the contractors' intentions as to future nonparent (nonparent gestational carrier or grandparent) visitation or support are followed.¹⁷⁴

CONCLUSION

States are increasingly recognizing childcare opportunities and child support obligations for newly recognized parents and for nonparents, and there has been a rapid increase in child creation pacts

a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.”).

169. 750 ILL. COMP. STAT. 47/25(b)(5) (West 2014) (requiring that a “gestational surrogacy contract . . . be witnessed by 2 competent adults.”).

170. 47/35 (requiring “attorneys’ certifications” to establish a parent-child relationship before birth through a gestational surrogacy pact, where different attorneys represent the gestational surrogate and the intended parent or parents).

171. ARK. CODE ANN. § 9-10-202(a) (2009) (“Artificial insemination of a woman shall only be performed under the supervision of a physician licensed under the Arkansas Medical Practices Act”).

172. For problematic contracts involving embryo disposition, see, e.g., Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 442–43 (stating contracts should be “in writing, drafted by or in consultation with an attorney representing the parties (not the physician), and executed with due time to consider the ramifications of the decision . . .”).

173. See, e.g., J.F. v. D.B., 879 N.E.2d 740, 742 (Ohio 2007) (“[A] gestational surrogate, whose pregnancy does not involve her own egg, may have a different legal position from a traditional surrogate, whose pregnancy does involve her own egg.”).

174. For example, courts might enforce child creation pacts that confer childcare opportunities on a child’s maternal grandparents, particularly where the grandparents’ daughter’s genetic material and pregnancy led to birth, but whose death during childbirth left the child with a single parent (who thus gave up, in advance, that single parent’s opportunity to oppose any possible maternal grandparent childcare by invoking the superior rights doctrine).

involving assisted human reproduction. In this context, agreements on—or acquiescence in—childrearing, child support, and child creation are highly relevant when determining which parents and nonparents have childcare standing and child support obligations. After 2012, the Uniform Premarital and Marital Agreements Act recognized that prenups and midnups could directly address “custodial responsibility.”¹⁷⁵ If states adopt the Act, states should include childcare, child support, and child creation promises within the ambit of “custodial responsibility.” Prenups and midnups that contain such promises should guide courts in determining what happens to children of couples whose state-recognized relationships have been dissolved.¹⁷⁶

175. UNIF. PREMARITAL AND MARITAL AGREEMENTS ACT § 10, U.L.A. 18 (Supp. 2014).

176. *Id.*

