

Federal Constitutional Childcare Interests and Superior Parental Rights in Illinois

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I. INTRODUCTION

In *Troxel v. Granville*, in 2000,² four United States Supreme Court Justices determined that “[t]he liberty interest[s] . . . of parents in the care, custody, and control of their children” (herein childcare interests) generally foreclose states from compelling grandparent childcare over parental objections.³ Yet, these four recognized that “special factors” might justify judi-

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2. *Troxel v. Granville*, 530 U.S. 57 (2000).

3. *Id.* at 65 (Justice O’Connor, joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer [hereinafter plurality opinion]) (“[P]erhaps the oldest of the fundamental liberty interests recognized by this Court.”); *id.* at 68-69 (“[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”). On analyzing

cial interference as long as a parent's contrary wishes on visitation were accorded "at least some special weight."⁴ The plurality opinion and one concurring Justice reserved the question of whether any "nonparental visitation" must "include a showing of harm or potential harm to the child."⁵ The concurring Justice hinted, however, that at least some nonparental visitation could be based solely on a preexisting "substantial relationship" between a child and a nonparent and on "the State's particular best-interests standard."⁶

A dissenter, not unlike the concurrer, observed that a best-interests standard might be constitutional where the nonparent acted "in a caregiving role over a significant period of time,"⁷ hinting that such a nonparent might even be afforded "*de facto*" parent status.⁸ A second dissenter seemingly agreed, noting the need for both "gradations" of nonparents⁹ and carefully crafted state law definitions of parents.¹⁰ A third dissenter added that because at least some children in nonparent visitation settings likely "have

plurality opinions, see Donald Leo Bach, *The Rapanos Rap: Grappling with Plurality Decisions*, 81 U.S.L.W. 468 (2012).

4. *Troxel*, 530 U.S. at 70 (plurality opinion) ("[I]f a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.").

5. *Id.* at 73 (plurality opinion) ("[W]e do not consider . . . whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting [nonparent] visitation."); *id.* at 77. (Souter, J., concurring) ("[T]here is no need to decide whether harm is required.").

6. *Id.* at 76-77 (Souter, J., concurring) (while not every nonparent should be capable of securing visitation upon demonstrating a child's best interests, perhaps a nonparent who establishes "that he or she has a substantial relationship with the child" should be able to petition if the state chooses). An exemplary statute is Virginia Code 20-124.2B. See VA. CODE ANN. § 20-124.2(B) (2008) ("The court shall give due regard to the primacy of the parent-child relationship[,] but may[,] upon a showing by clear and convincing evidence that the best interest of the child would be served[,] thereby award custody or visitation to any other person with a legitimate interest."). An illustrative case is *In re M.W.*, No. 12CA0771, 2012 WL 4464386 (Colo. App. Sept. 27, 2012) (employing C.R.S.A. § 14-10-123).

7. *Troxel*, 530 U.S. at 98-99 (Kennedy, J., dissenting) ("Cases are sure to arise . . . in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. . . . In the design and elaboration of their visitation laws, States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances.").

8. *Id.* at 100-01 (Kennedy, J., dissenting) ("[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.").

9. *Id.* at 92-93 (Scalia, J., dissenting) ("Judicial vindications of 'parental rights' . . . requires . . . judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents.").

10. *Id.* ("Judicial vindication of 'parental rights' . . . requires . . . a judicially crafted definition of parents . . .").

fundamental liberty interests in preserving” “established familial or family-like bonds,”¹¹ nonparents seeking childcare must be distinguished by whether there is a “presence or absence of some embodiment of family.”¹²

So, while important, parental objections to nonparental childcare (including both visitation and custody) are not always dispositive.¹³ Since *Troxel*, the U.S. Supreme Court has said little about nonparent childcare, including the weight of special factors, de facto parents, children’s fundamental liberty interests, and family-like bonds.¹⁴ While some state legislatures since *Troxel* have extensively refined their grandparent visitation laws,¹⁵ many have not fully addressed the childcare interests of other non-

11. *Id.* at 88 (Stevens, J., dissenting). *But see* Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (the Court has not “had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship”); *In re Meridian H.*, 798 N.W.2d 96 (Neb. 2011) (no recognition of a federal or state constitutional right to continuing sibling relationships with a sister upon the termination of parental rights regarding the sister, where the sister was placed in foster care and the two older siblings were adopted); Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897 (2012) (urging courts, legislatures, and scholars pay better attention to “sibling relationships,” concluding: “[f]amily law’s narrow focus on marriage and parenthood, inherited from the common law and then endlessly replicated without normative scrutiny, has constrained critical thinking in family law for too long”).

12. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

13. Comparably, one parent’s objection to placement for adoption is not always dispositive when the other parent agrees and placement clearly and convincingly serves the child’s best interests. *See, e.g., In re C.L.O.*, 41 A.3d 502 (D.C. 2012).

14. One distinguished commentator said about *Troxel*:

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

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

15. The Illinois judicial and legislative response to *Troxel* is described in Michael A. Goldberg, *Over the River and Through the Woods—Again: The New Illinois Grandparent Visitation Act*, 29 S. ILL. U. L.J. 403 (2005) (reviewing other American state responses to *Troxel*). Grandparent visitation statutes are listed in Robyn L. Ginsberg, Comment, *Grandparents’ Visitation Rights: The Constitutionality of New York’s Domestic Relations Law Section 72 After Troxel v. Granville*, 65 ALB. L. REV. 205, 205 n.2 (2001), while the post-*Troxel* state cases on the constitutionality of such statutes are reviewed in Sonya C. Garza, *The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927 (2009).

parents or the children's interests in preserving family-like bonds,¹⁶ be it via "gradations" of nonparents or new forms of parenthood. State legislators and judges are thus often left to determine the import of a "caregiving role over a significant period of time," the breadth of any "de facto" parenthood doctrine, nonparent and parentage "gradations," and children's liberty interests. As the U.S. Supreme Court has said, the regulation of domestic relations rests within the "virtually exclusive province of the states."¹⁷ Within this province, states may declare one to be a parent in one setting while not a parent in another setting.¹⁸

An urgent need for new state childcare laws has arisen due to the rising number of children who are no longer raised by their two natural or adoptive parents in marital homes. There has been an upsurge in childcare by cohabiting, unwed, natural mothers and fathers; by unwed, natural mothers and their intimate partners (be they male or female); by grandparents; and solely by natural mothers.¹⁹ Thus, there are more frequent child-

16. See, e.g., Solangel Moldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865 (2003).

17. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). On recent federal law policies on families and childcare, see, e.g., Helen M. Alvaré, *Curbing Its Enthusiasm: U.S. Federal Policy and the Unitary Family*, 2 INT'L J. JURISPRUDENCE FAM. 107 (2011).

18. See, e.g., *In re C.C.*, 2011 IL 111795, ¶ 49 (man may be father in dissolution proceeding, but not in a child neglect and shelter proceeding).

19. See, e.g., Stephanie L. Ventura & Christine A. Bachrach, CENTERS FOR DISEASE CONTROL AND PREVENTION, 48 NATIONAL VITAL STATISTICS REPORTS NO. 16: NONMARITAL CHILDBEARING IN THE UNITED STATES, 1940-99, at 2 (Oct. 18, 2000) ("The percent of births to unmarried women rose almost without interruption from 1940 (3.8 percent) to 1994 (32.6 percent) From 1994 to 1999 there was little change . . . it was 33.0 percent in 1999."); Lynn D. Wardle, *Dilemmas of Indissoluble Parenthood: Legal Incentives, Parenting and the Work-Family Balance*, 26 BYU J. PUB. L. 265, 270 (2012) (increasing parenting by unwed couples and by single parents, mostly mothers); J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J.L. & PUB. POL'Y 521, 523 (2011) (increasing parenting by single parents and relatives); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, LIVING ARRANGEMENTS OF CHILDREN: 2009 2-4, tbl. 1, fig. 1 (June 2011) (especially Figure 1, historical living arrangements of children, 1880-2009, and Table 1, selected 1991-2009 figures showing more and more children not living with two married parents and living with single parent or grandparents only); *Facts About Children Being Raised by Grandparents*, ILL. DEP'T OF AGING, www.state.il.us/aging/intergen/grg_facts.htm (last visited Mar. 23, 2013) (over 200,000 children under eighteen living in grandparent-headed households, with over 40,000 grandparents "responsible for their grandchildren for 5 years or more"). Increasing parenting by grandparents and other relatives seemingly arises, in part, because of the Federal Fostering Connections Act of 2008. 42 U.S.C. § 671(a)(29) (2010) ("[W]ithin thirty days after the removal of a child from the custody of the parent or parents of the child, the state shall exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives [and explain options involving kinship guardianship]."). See, e.g., UTAH CODE ANN. § 78A-6-307(7), (18)(c) (LexisNexis 2012) (when a child removed from parental custody, preference for placement of the child shall be given to "a relative of the child"). See also

care disputes when at least some prospective caretakers have no biological or adoptive ties with the children.²⁰

Since *Troxel*, some state courts have recognized child caretaking interests in nonbiological and nonadoptive caretakers through doctrines²¹ such as de facto parent,²² in loco parentis,²³ equitable parent,²⁴ equitable estop-

Judith T. Younger, *Families Now: What We Don't Know Is Hurting Us*, 40 HOFSTRA L. REV. 719, 722, 733 (2012) (“glaring need for reliable data” on “what is really happening in intimate relationships”).

20. Comparably, the rising numbers of unwed cohabitating couples has prompted much litigation over property distribution upon separation. *See, e.g., In re Kelly*, 287 P.3d 12 (Wash. Ct. App. 2012) (applying equitable “committed intimate relationship” doctrine to unwed separating couple who lived in a marital-like relationship and acquired what would have been community property had there been a marriage). To the extent the disputes involve contracts, there may be controlling statutes. *See, e.g., Cavalli v. Arena*, 42 A.3d 250 (N.J. Super. Ct. Ch. Div. 2012) (new statute, N.J. STAT. ANN. § 25:1-5(h) (West 2012), requires palimony pacts to be in writing and be subject to independent attorney review and advice).

21. *See, e.g., Maldonado, supra* note 16, at 893-97 (demonstrating how *Troxel* allows visitation/custody petitions by certain nonparents). At times, these doctrines could be used where the nonparents have no intimate, unitary, or quasi-marital familial relationships with one or both parents but where there are quasi-parent relationships with the children for whom they seek custody or visitation. *See, e.g., E.C. v. J.V.*, 136 Cal. Rptr. 3d 339 (Ct. App. 2012).

22. *See, e.g., In re Custody of B.M.H.*, 267 P.3d 499 (Wash. Ct. App. 2011) (holding common law de facto parentage claim was available to former stepparent as long as child had only one existing fit parent; court noted that a similar claim was made available in an earlier case to a former same-sex female partner of a birth mother); KY. REV. STAT. ANN. § 403.270 (LexisNexis 2010) (statutory “de facto custodian”). Some grandparents can achieve de facto parent status under statute. *See, e.g., Guardianship of Estates of Vaughan*, 207 Cal. App. 4th 1055 (2012) (stating grandparents are de facto parents where, pursuant to California Family Code section 3041(c), they provide “a stable placement” of their grandchild by “fulfilling both the child’s physical needs and the child’s psychological needs . . . for a substantial period of time,” even where the parent has not been found unfit or to have abandoned the child).

23. *See, e.g., Smith v. Smith*, 97 So. 3d 43 (Miss. 2012) (recognizing that in loco parentis status, with possible visitation or custody rights, can be accorded to maternal grandparents “only if there has been a clear showing of abandonment, desertion, or unfitness on the part of the parent”). *But see Strauss v. Tushman*, 216 P.3d 370 (Utah Ct. App. 2009) (stating former stepfather’s in loco parent status ends with divorce and mother’s objection to continued contact); *Rohmiller v. Hart*, 811 N.W.2d 585, 593 (Minn. 2012) (explaining a maternal aunt could assume in loco parentis status, though not proven here). *See also Glancy v. Spradley*, No. CA2012-02-024, 2012 WL 4074986 (Ohio Ct. App. Sept. 17, 2012) (stating a cohabiting paramour could not be charged with domestic violence for “switching” his mate’s child as the mate concurred in the “switching” (a form of corporal punishment) and the paramour stood “in loco parentis”).

24. *See, e.g., Lipnevicius v. Lipnevicius*, No. 304520, 2012 WL 3318584 (Mich. Ct. App. Aug. 14, 2012) (holding the equitable parent doctrine, adopted in *Atkinson v. Atkinson*, 408 N.E.2d 516 (Mich. Ct. App. 1987), cannot be used by former husband of child’s mother where his marital presumption of paternity was earlier rebutted and where the natural father had been judicially declared the father under law).

pel,²⁵ and “psychological parent.”²⁶ Other state courts, while often sympathetic to nonbiological and nonadoptive parents, have deferred to elected legislators in their own state’s “representative democracy.”²⁷ In fact, some legislatures have established parenthood gradations (as with legal and equitable parents) or otherwise recognized childcare interests (as with parental responsibilities and parenting time) in some with neither biological nor adoptive ties.

In Illinois, the *Troxel* “liberty interests of parents” are reflected in the “superior rights doctrine,” which holds that parents have the superior right to care for their children.²⁸ This doctrine is incorporated into some Illinois

25. See, e.g., *Juanita A. v. Kenneth N.*, 930 N.E.2d 214 (N.Y. 2010) (holding putative father could assert equitable estoppel defense when sued by natural mother for child support if mother acquiesced in the development of a close relationship between the child and another father figure and when the disruption of that relationship would be detrimental to the child’s interests); *In re Comm’r of Social Servs. v. Julio J.*, 94 A.D.3d 606 (N.Y. App. Div. 2012) (holding in certain circumstances, including “operative parent-child relationship,” equitable estoppel can bar a man from denying paternity of a nonmarital child with whom he has no genetic ties).

26. See, e.g., *In re M.W.*, 292 P.2d 1158 (Colo. Ct. App. 2012) (construing C.R.S.A. § 14-10-123(1) allowing the pursuit of an allocation of parental responsibilities for a child in one who had physical care of the child for six months or more and who pursues within six months of the termination of such care).

27. *Troxel v. Granville*, 530 U.S. 57, 92-93 (Scalia, J., dissenting). For example, in a case involving a former boyfriend (Jim) seeking to establish parentage of a child (Scarlett) who had been adopted by his former girlfriend during a romantic relationship, *In re Scarlett Z.-D.*, 2012 IL App (2d) 120266, the court said:

While we are not unsympathetic to Jim’s position, or indeed, to Scarlett’s situation . . . not only would it be inappropriate for us to ignore existing Illinois law, but [] doing so would likely be fraught with unintended consequences. Legal change in this complex area of social significance must be the product of careful, extensive policy debate, sensitive not only to the evolving realities of nontraditional families and the needs of persons within those families, not the least of whom are the children, but also to parents’ fundamental liberty interest embodied in the superior rights doctrine and its restriction of the ability of the state to interfere in family matters. In short, the comprehensive legislative solution demanded here must be provided by our General Assembly.

In re Scarlett Z.-D., 2012 IL App (2d) 120266, ¶ 49.

At times, common law rulings are made even though legislation is preferred. See, e.g., *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012) (Melvin, J., concurring) (affirming “the continuing viability of the [paternity by] the estoppel doctrine in Pennsylvania common law though” “believ[ing] the General Assembly should consider the creation of relevant legislation”).

28. See, e.g., *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 15 (citing *In re R.L.S.*, 844 N.E.2d 22 (Ill. 2006)). Before *Troxel*, parental rights to childrear in Illinois, when challenged by nonparents, seemingly were less superior. See, e.g., *Cebzynski v. Cebzynski*, 379 N.E.2d 713 (Ill. App. Ct. 1978) (ordering, as both stepmother and natural mother were fit parents after father’s death, joint and mutual custody to both mothers with actual physical custody to stepmother alone and with visitation rights to natural mother).

statutes, as where a custody opportunity may be afforded to a nonparent “only if [the child] is not in the physical custody of one of his parents.”²⁹ There are some “judicially-prescribed” exceptions, as when a man is deceived by the biological mother into believing he is the child’s biological father,³⁰ and some statutory exceptions, as when “reasonable visitation privileges” are afforded to a stepparent.³¹

The Illinois superior rights doctrine was employed in the 2012 appellate court case of *In re Marriage of Mancine*.³² There, a man was denied custody (with few words on visitation) because of maternal objection, although the man had assumed, with the mother, “a caregiving role over a significant period of time”³³ and had “established familial or family-like bonds.”³⁴ There was no talk of “gradations” of nonparents³⁵ and a rejection of a de facto parent doctrine³⁶ though there was “some embodiment of family.”³⁷ There was no recognition of a child’s liberty interest in preserving “family-like bonds.”³⁸

In reviewing *Troxel* and *Mancine*, this Article will chiefly examine parentage definitions and nonparent standing in Illinois childcare disputes involving children born of sex.³⁹ It will explore who may be a parent under

29. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 17 (citing 750 ILL. COMP. STAT. 5/601(b)(2) (State Bar Edition 2010)).

30. *See, e.g., id.* ¶ 18 (citing *Koelle v. Zwiren*, 672 N.E.2d 868 (Ill. App. Ct. 1996)).

31. 750 ILL. COMP. STAT. 5/607(b)(1.5) (State Bar Edition 2010) (if “the child is at least 12 years old” and has lived with the parent and stepparent for at least five years).

32. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 15. A recent comparable case (though the opposite sex couple never married and the child was adopted by the mother in Slovakia), relying on *Mancine*, is *In re Scarlett Z.-D.*, 2012 IL App (2d) 120266, ¶ 27 (“We agree with the reasoning and the holding of *Mancine*.”). An earlier comparable case involving a lesbian relationship and a child born of artificial insemination is *In re C.B.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999).

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

34. *Id.* at 88 (Stevens, J., dissenting).

35. *Id.* at 92-93 (Scalia, J., dissenting).

36. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶¶ 15-23.

37. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).

38. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 39 (“However, we note that the Illinois Supreme Court has specifically held that no liberty interest exists with respect to a child’s psychological attachment to a nonbiological parent.” (citing *In re Marriage of Simmons*, 825 N.E.2d 303, 315 (Ill. App. Ct. 2005))).

39. Comparable, but not wholly similar, examinations are also needed regarding children not born of sex, where further distinctions are likely required, as between children born and not born to surrogates. In Illinois today, for children born of assisted reproduction, there are both general statutory provisions, 750 ILL. COMP. STAT. 40/1 to 40/3 (State Bar Edition 2010), and special provisions governing surrogacy agreements, 750 ILL. COMP. STAT. 47/1 to 47/75 (State Bar Edition 2010).

Only for children born of sex has the U.S. Supreme Court recognized automatic parental status/childrearing rights in most childbearing mothers and paternity opportunity interests in most copulating fathers (where adulterous men may, in an American state’s discretion, not

Troxel, when might a parent's "superior rights" be lost, and whether possible parental rights, once lost, might ever be resurrected. The Article will make recommendations about parenthood status and nonparty standing in Illinois childcare settings after examining recent precedents and pending statutory proposals. Generally, the Article will support greater opportunities for childcare for those with no biological or adoptive ties, but who childreared for some time, especially with the consent of those with such ties.

II. *TROXEL* ON FEDERAL CONSTITUTIONAL CHILDCARE

Brad Troxel committed suicide in May 1993, leaving behind two daughters whose mother, Tommie Granville, had separated from Brad in June 1991. Upon separation, Tommie retained residential custody.⁴⁰ Before his death, Brad lived in the home of his parents, Gary and Jennifer Troxel, where he regularly brought the girls for weekend visits.⁴¹ At first, Gary and Jennifer continued to see their grandchildren on a regular basis after Brad's death, but in October 1993, Tommie limited their visitation to one short visit per month.⁴²

Gary and Jennifer then petitioned for additional visits⁴³ under a Washington statute that arose due "to these changing realities of the American family."⁴⁴ In the trial court, the grandparents requested two weekends of overnight visitation per month and two weeks of visitation each summer.⁴⁵ Tommie proposed only one day of visitation per month with no overnight stays.⁴⁶ The trial court ordered the grandparents have visitation one weekend per month, one week during the summer, and four hours on each of the grandparent's birthdays.⁴⁷

The trial court found authority for such visits in a statute which declared "[a]ny person may petition the court for visitation rights at any time" and "[t]he court may order visitation rights for any person when visitation

have such interests should the mothers and their husbands wish to childcare together). *See, e.g.,* *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989). This examination encompasses children born of sex to married people and civil unionized people, as well as to cohabitating couples and other single people.

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

41. *Id.*

42. *Id.* at 60-61.

43. *Id.* at 61.

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

45. *Troxel*, 530 U.S. at 61.

46. *Id.*

47. *Id.*

may serve the best interest of the child whether or not there has been a change of circumstances.”⁴⁸ The trial judge made (what the *Troxel* plurality called) “slender findings”⁴⁹ in concluding that grandparent visitation was in the children’s best interest.

The appellate court reversed on nonconstitutional grounds, holding the grandparents lacked statutory standing.⁵⁰ The Washington high court affirmed on different grounds,⁵¹ focusing on the failure of the statute to require a showing of harm to the child to justify a nonparent visitation order over parental objection, as well as on the statutory authorization of “[a]ny person” at “any time” to petition for visitation rights subject only to a best-interests-of-the-child standard. Each rationale was said to make the statute facially inconsistent with the Federal Constitution.⁵²

In a challenge in the U.S. Supreme Court on substantive due process grounds involving the liberty interests of parents in the care, custody, and control of their children,⁵³ the *Troxel* plurality said parental liberty interests are “perhaps the oldest of the fundamental liberty interests.”⁵⁴ Supporting precedents involved the rights of parents “to direct . . . upbringing” of their children,⁵⁵ to “establish a home and bring up children,”⁵⁶ and to maintain “broad [] authority over minor children.”⁵⁷

Six U.S. Supreme Court Justices agreed that the Washington statute was unconstitutional. Justice O’Connor, in her plurality opinion for four Justices, found the Washington statute unconstitutional as applied.⁵⁸ Justices Souter and Thomas found facial invalidity in separate concurring opinions.⁵⁹

48. *Id.* at 61, 73 (citing WASH. REV. CODE § 26.10.160(3) (2005)).

49. *Id.* at 72 (“[T]he Superior Court made only two formal findings in support of its visitation order. First, the Troxels ‘are part of a large, central, loving family, all located in this area, and the [Troxels] can provide opportunities for the children in the areas of cousins and music. Second, the [t]he children . . . would be benefitted from spending quality time with the [Troxels,] provided that that time is balanced with time with the childrens’ [*sic*] nuclear family.’”).

50. *Troxel*, 530 U.S. at 61 (under the Revised Code of Washington section 26.10.160(3), no standing unless a custody action was pending).

51. *Id.* at 62.

52. *Id.*

53. *Id.* at 65.

54. *Id.*

55. *Troxel*, 530 U.S. at 65 (quoting *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925)).

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

57. *Compare id.* (quoting *Parham v. J.R.*, 442 U.S. 589, 602 (1979)), with *Elwell v. Byers*, 699 F.3d 1208, 1217 (10th Cir. 2012) (noting that pre-adoptive foster parents have federal constitutional liberty interests in children, though these interests are not as strong as the liberty interests of biological parents).

58. *Troxel*, 530 U.S. at 75.

59. *Id.* at 79 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring).

Washington's third-party visitation statute was problematic because it effectively permitted any third party to petition a court to review any parent's decision concerning child visitation under a best-interests standard.⁶⁰ The *Troxel* plurality held the "breathtakingly broad" statute was unconstitutional because it failed to presume that fit parents act in the best interests of their children or to give any deference to parental decisions.⁶¹ A judicial determination of a child's best interest cannot warrant court-ordered visitation when the law accords "no special weight" to parental decisions since the Federal Constitution embodies "a presumption that fit parents act in the best interests of their children."⁶² The *Troxel* plurality hinted that nonparent visitation orders would be constitutional when "special weight" is accorded parental wishes.⁶³ The *Troxel* plurality did not condone, however, judicial interference with parents any time there was "mere disagreement" regarding a child's best interest.⁶⁴ The plurality did not expressly find, as the Washington high court did, that a showing of harm or potential harm was necessary in order to sustain nonparent visitation.⁶⁵

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

61. *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).

62. *Troxel*, 530 U.S. at 67-68. The constitutional presumption that parents act in the best interest of their children was important to the *Troxel* plurality because the Troxels did not allege, and no court found, that Tommie was an unfit parent. *Id.* at 68.

63. *Id.* at 67-68. 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.*, 163 N.H. 107, 114 (2011).

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

65. *Troxel*, 530 U.S. at 73, 77. Today, harm or potential harm is often required. *See, e.g., Hernandez v. Hernandez*, 265 P.3d 495 (Idaho 2011) (holding that grandparents could seek custody though no threshold showing of parental unfitness); S.D. CODIFIED LAWS §§ 25-5-29(4), -30(2), -30(4), -30(5), -30(8) (2004) (stating that serious detriment to the child can prompt nonparent custody or visitation, where assessment factors include "unjustifiable absence of parental custody"; "bonded relationship between child" and nonparent; "substantial enhancement of the child's well-being while under" nonparent's care; and "degree of stability and security in the child's future with the parent"), *construed in Feist v. Lemieux-Feist*, 793 N.W.2d 57 (S.D. 2010) (holding that third-party custody or visitation need not be preceded by explicit finding of parental unfitness), *Beach v. Coisman*, 814 N.W.2d 135 (S.D. 2012) (similar to *Feist*); *Bowen v. Bowen*, 2012 Ark. App. 403 (2012) (holding that grandparents seeking visitation must show likelihood of harm to child if visits are denied). When harm or potential harm is required, there is sometimes disagreement on whether the

In concurring in the judgment, Justice Souter focused only on what the plurality characterized as a “breathtakingly broad” statute,⁶⁶ which Souter described as authorizing “‘any person’ at ‘any time’ to petition for and to receive visitation rights subject only to a free-ranging best-interests-of-the-child standard.”⁶⁷ He chose to “say no more,”⁶⁸ thus not commenting upon the constitutionality of more narrowly drawn statutes or upon any necessary “special weight” or “presumption.”⁶⁹

In concurring in the judgment, Justice Thomas simply noted one basis: “[T]he State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing any fit parent’s decision regarding visitation with third parties.”⁷⁰

The three dissenters each filed a separate opinion. Justice Stevens deemed that it “would have been [] wiser to deny certiorari.”⁷¹ As to the statute, he found its terms were “unconstrued” by the state high court so that a remand was in order.⁷² He noted there was no “basis for holding that the statute is invalid in all its applications,”⁷³ observing that the statute should survive a facial challenge if it had “a ‘plainly legitimate sweep.’”⁷⁴

In dissent, Justice Scalia, while recognizing an “unenumerated right” “of parents to direct the upbringing of their children,”⁷⁵ previously protect-

burden of proof is preponderance, *Hollis v. Miller*, No. 306090, 2012 WL 5853824 (Mich. Ct. App. Nov. 8, 2012), or clear and convincing evidence, *id.* (Gleicher, J., concurring). At times, future substantial harm resulting from no grandparent visits is statutorily presumed. *See, e.g.*, TENN. CODE ANN. § 36-6-306(b)(4) (2010) (stating that “rebuttable presumption of substantial harm to the child based upon the cessation of the relationship between the child and grandparent” when the child’s parent is deceased and the grandparent seeking visitation is the parent of the deceased parent).

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

67. *Id.* at 76 (Souter, J., concurring) (employing the Washington Supreme Court view).

68. *Id.* at 75.

69. *Id.* at 77 (“[T]here is no need to decide whether harm is required or to consider the precise scope of the parent’s right or its necessary protections.”).

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

71. *Troxel*, 530 U.S. at 80 (Stevens, J., dissenting).

72. *Id.* at 84-85. The Washington statute was similar to a Connecticut statute, which has been construed in line with *Troxel*. *See, e.g.*, *DiGiovanna v. St. George*, 12 A.3d 900, 907-08 (Conn. 2011) (recognizing that in *Roth v. Weston*, 789 A.2d 431 (Conn. 2002), the court “substituted the parent-like relationship and substantial harm elements for the statutory elements of ‘any person’ and ‘best interest of the child,’ respectively, as a judicial gloss to [] remedy the constitutionally infirm language”).

73. *Troxel*, 530 U.S. at 85 (Stevens, J., dissenting).

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

75. *Id.* at 91-92 (Scalia, J., dissenting) (noting the right is among both the “unalienable [r]ights” recognized in the Declaration of Independence and “the othe[r] [rights] retained by the people” per the Ninth Amendment).

ed by substantive due process,⁷⁶ nevertheless opined that any additional limits on this right are best determined “in legislative chambers or in electoral campaigns” and not in courts.⁷⁷ He warned that extending further opportunities for “[j]udicial vindication” of parental rights⁷⁸ would require the Court to formulate “a judicially crafted definition of parents”;⁷⁹ “judicially approved assessments of ‘harm to the child’”;⁸⁰ and “judicially defined gradations of other persons (grandparents, extended family members, adoptive family members in an adoption later found to be invalid, long term guardians, etc.)” who have childcare claims against parental wishes.⁸¹ He had no desire for “a new regime of judicially prescribed, and federally prescribed, family law.”⁸²

Justice Kennedy, in dissent, thought the case should be remanded 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.”⁸³ Justice Kennedy opined that a “harm to the child standard” is not always required by the Federal Constitution when nonparent visits are ordered,⁸⁴ given that “the conventional nuclear family . . . is simply not the structure or prevailing condition in many households.”⁸⁵ He recognized 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,”⁸⁶ suggesting such a third party might be deemed a “de facto” parent.⁸⁷

Since *Troxel*, the U.S. Supreme Court has not spoken. State statutes and common law rulings vary. Illinois law and the different laws in other states will now be explored via the 2012 Illinois appellate court decision in *Mancine*.

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

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

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

79. *Id.* at 92.

80. *Id.* at 93.

81. *Id.*

82. *Id.* at 92-93.

83. *Troxel*, 530 U.S. at 94 (Kennedy, J., dissenting).

84. *Id.* at 101-02.

85. *Id.* at 98.

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

87. *Id.* at 100-01.

III. *MANCINE* ON SUPERIOR PARENTAL RIGHTS IN ILLINOIS

In *Mancine*, the appeals court affirmed that in civil cases, legal parenthood of children born of sex is contextual, meaning that parentage definitions depend upon setting,⁸⁸ that there is not, as of yet, much common law on legal parenthood; that legal parentage may not track actual parenting; that sometimes a child's best interests need not be considered in determining legal parenthood; and that there are exceptions to superior parental interests "in the care, custody, and control of their children."⁸⁹

Mancine involved a marriage dissolution proceeding in which both the husband, Nicholas Gansner, and his wife, Miki Loveland Mancine, sought custody of a minor, William, born in August 2008.⁹⁰ William had been adopted by Miki in Wisconsin in March 2009 before her marriage to Nicholas in May 2009, though a preadoption wedding had been contemplated.⁹¹ By the time she met Nicholas, Miki already had another adopted child,

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

89. *Troxel*, 530 U.S. at 65 (plurality opinion).

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

91. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶¶ 3-4 ("Miki and Nicholas decided they would marry in approximately June or July of 2008 . . . William [the child involved in the custody dispute] was born on August 5, 2008 . . . Nicholas and Miki became formally engaged in December 2008."). The appellate court's factual account is derived chiefly from trial court pleadings and affidavits on which there was no trial but little party disagreement. The appellate court briefs reveal, however, other facts disputed by the parties, which evidently were unimportant to the court's resolution. For example, Miki and Nicholas disagreed on why Nicholas got a vasectomy. Compare Brief of Respondent-Appellant at 2, *In Re Marriage of Mancine*, 2012 IL App (1st) 111138 (No. 10 D 9394) [hereinafter Appellant Brief] (believing Miki "that he would be William's father forever," Nicholas got a vasectomy), with Response Brief of Petitioner-Appellee at 13-14, *In Re Marriage of Mancine*, 2012 IL App (1st) 111138 (No. 10 D 9394) [hereinafter Appellee Brief] (urging the vasectomy was prompted because Nicholas "did not want to pass on his genetic material for his mental illness (depression, et. cetera)," while noting the vasectomy was not mentioned in Nicholas's trial court pleadings or his affidavit). The parties also disagreed on whether "Miki engaged in pathological extramarital sexual behavior" and prostitution during her marriage to Nicholas. Compare Appellant Brief at 22, with Appellee Brief at 11-12 ("smear campaign" which is "repugnant"). The briefs also reveal additional factual assertions which seem undisputed, but outside the appellate court opinion. See, e.g., Appellant Brief at 5 (stating Nicholas and Miki had their first date in the spring of 2008, a few days before Miki and John Mancine officially divorced; even then, Nicholas knew of soon-to-be William's adoption, and of Elizabeth), *id.* at 6-7 (stating Nicholas and Miki accompanied William's birth mother to the hospital "and were with her in the delivery room").

Elizabeth, who earlier lived with Miki and her ex-husband John Mancine.⁹² In Wisconsin, an unmarried couple cannot simultaneously adopt a child, but a single woman can adopt.⁹³ Within a month of William's birth, Nicholas and Miki "had moved in" together and "Nicholas . . . was co-parenting William."⁹⁴

An adoption agent advised Nicholas that he could adopt William as a stepparent after the marriage.⁹⁵ William's birth certificate did reflect Nicholas's last name, though Nicholas only married Miki in Wisconsin about two months after William's adoption was finalized.⁹⁶ Nicholas had moved in with Miki at least nine months before the wedding and was co-parenting at their home.⁹⁷ Nicholas was named by Miki in prospective adoption papers (though evidently not in a court proceeding) "as the [child's] sole guardian" about three months before the wedding.⁹⁸ Finally, Nicholas and Miki were named as "parents" on William's baptism record about seven months before the wedding.⁹⁹

About a month after the wedding, the adoption agency said it would support a stepparent adoption.¹⁰⁰ About a year later, the agency told Nicholas he was free to file his petition for stepparent adoption¹⁰¹ at a time when yet a third child, Henry, was soon to be adopted.¹⁰² At that time, Nicholas primarily cared for all the children in the household since only Miki was working.¹⁰³ When Nicholas began working, he continued his childcare.¹⁰⁴

92. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 3 (stating when Miki and Nicholas began dating in the spring of 2008, Elizabeth—Miki's adopted daughter—was one-year-old and Miki was separated from her then-husband, John Mancine; Miki and Nicholas had at one time planned to marry in June or July of 2008).

93. *Id.* ¶ 3 (citing WIS. STAT. ANN. § 48.82 (West 2008)).

94. *Id.* ¶ 4.

95. *Id.* ¶ 3.

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

97. *Id.* ¶ 4 (explaining William was born in August 2008 and was living with Miki and Nicholas in a single home by early September 2008; Miki and Nicholas married in May 2009.).

98. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶¶ 4-5 ("Miki named Nicholas as the sole guardian of William and any future child she has, and named her parents as alternate guardians.").

99. *Id.* ¶ 4 (baptism occurred in November 2008 and the wedding occurred in May 2009).

100. *Id.* ¶ 5.

101. *Id.* (an August 2010 email to Nicholas).

102. *Id.* ¶ 6.

103. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 7 (stating that by then, in September, 2009, a third adopted child, Henry, was in the household which had been moved to Chicago).

104. *Id.* ¶ 8.

According to Nicholas, Miki held the couple and all the children out as a family unit, using the last name of Gansner.¹⁰⁵

Miki sought a divorce about fifteen months into the marriage, after the entire family moved to Illinois to be closer to Miki's parents.¹⁰⁶ Miki challenged Nicholas's standing to seek custody of William as William had never been adopted by Nicholas.¹⁰⁷ Because the family had lived in Illinois for more than six months, both the trial¹⁰⁸ and appellate¹⁰⁹ courts employed Illinois law¹¹⁰ and found a lack of standing in Nicholas.¹¹¹ The courts rejected "equitable parent," "equitable estoppel" (barring Miki from challenging Nicholas's standing), "equitable adoption," and *parens patriae* arguments.¹¹²

105. *Id.* ("According to Nicholas, Miki always held out William as Nicholas' child and held out herself, Nicholas, Elizabeth, William and Henry as 'the Gansner family.'"). Two months after seeking to divorce Nicholas, Miki petitioned to change William's last name to Mancine, her first husband's last name. *In re Marriage of Mancine*, 2012 IL App (1st) 111138 (No. 10 D 9594) at 1 n.1 [hereinafter Appellant Petition].

106. *In re Marriage of Mancine* 2012 IL App (1st) 111138, ¶ 9 (dissolution sought on September 24, 2010).

107. *Id.* ¶ 11.

108. *Id.* (explaining that the trial court dismissed because "Nicholas lacked standing").

109. *Id.* ¶ 12 ("Nicholas' arguments are not well grounded.").

110. The Illinois courts employed Illinois, and not Wisconsin laws, seemingly because William's "home state" was Illinois. *See, e.g.*, 750 ILL. COMP. STAT. 36/102(7) (2010) ("state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of the child custody proceeding"). Had Wisconsin law been applied, the outcome may have differed. *See, e.g.*, *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 641-42 (Wis. 2004) (precluding the use of "the equitable parent doctrine," court allows "equitable estoppel" to "address those instances where unfairness in a proceeding would harm children and adults, absent the intervention of the court's equitable powers"); *Hendrick v. Hendrick*, 765 N.W.2d 865, 868 (Wis. 2009) ("[T]he focus of a proceeding to determine a child's paternity is whether the 'best interests' of the child would be served thereby."). *But see In re Christian R.H.*, 794 N.W.2d 230, 233-34 n.7 (Wis. Ct. App. 2010) (stating that while there is common law authority to order child "visitation," there is no nonstatutory authority to confer "parental rights"). Had William been formally adopted by Nicholas under Wisconsin laws, the *Mancine* court would likely have deferred to Wisconsin adoption law. *See, e.g.*, 750 ILL. COMP. STAT. § 45/27 (2010) (stating that full faith and credit to paternity establishments in other states when done "through voluntary acknowledgment, tests to determine inherited characteristics, or judicial or administrative processes"). *See also Port v. Cowan*, 426 Md. 435 (2012) (stating that under the doctrine of comity, Maryland allows same-sex couples to wed in a civil ceremony in California to divorce in Maryland though a same-sex marriage was not then allowed in Maryland, where same-sex marriage was also not explicitly deemed by the Maryland legislature as void or unenforceable). On when "home state" law may not be applied (e.g., so that a *Mancine* court would apply Wisconsin common law rulings), *see, e.g.*, *Castro v. Castro*, 818 N.W.2d 753 (N.D. 2012).

111. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 12.

112. Neither the trial nor appellate court examined whether the trial judge had some other, independent authority to order "a child's best interest" inquiry during the custody dispute between Miki and Nicholas. *See, e.g.*, *In re Joshua S.*, 2012 IL App (2d) 120197

The appellate court noted, in rejecting equitable parenthood, that by statute, Nicholas, as a nonparent, could only seek custody if William was not in the “physical custody” of Miki.¹¹³ It did observe, however, that Nicholas would have had standing to seek custody if Miki deceived him into believing he was William’s biological father if William was born of sex to Miki, though here there may be no statute.¹¹⁴ It did not address in detail why an adoptive parent’s deception involving a nonparent who could not be a natural parent should not prompt a hearing for the nonparent wishing to

(invalidating a criminal case plea agreement where the State promised not to seek parental rights termination; the court ruled: “A trial court, if convinced that it is in a child’s best interest, can order the State to prosecute a petition for termination of parental rights against the State’s wishes without violating the separation-of-powers doctrine.”).

113. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 17 (citing 750 ILL. COMP. STAT. 5/601(b)(2) (2010)); see also *In re T.W.*, 851 N.E.2d 881 (Ill. App. Ct. 2006). Illinois is not alone in its focus on “physical custody.” See, e.g., *In re B.B.O.*, 277 P.3d 318 (Colo. 2012) (stating that parental consent to nonparent child care is unnecessary where child is not in parent’s physical custody and nonparent has cared for child for at least six months).

114. *Id.* ¶ 18 (citing *Koelle v. Zwiren*, 672 N.E.2d 868 (Ill. App. Ct. 1996)). In *Koelle v. Zwiren*, a deception case, the court expressly recognized there was no statutory standing to seek visitation for the deceived man who actually parented if the natural mother objected, but that “general principles of equity” supported standing. *Koelle*, 672 N.E.2d at 872 (no support in Illinois Parentage Act or Illinois Marriage and Dissolution of Marriage Act). *Koelle* relied, in part, on *In re Townsend*, 427 N.E.2d 1231 (Ill. 1981), where a natural mother was in prison and the child was being raised by this mother’s daughter, who sought custody as did the natural father. *Townsend*, 427 N.E.2d at 1233, 1237. There too both the majority, *id.* at 1235 (stating that no divorce, adoption or juvenile court statute applied, but the Probate Act—though technically inapplicable—supports the superior parental rights doctrine in cases like this), and dissent, *id.* at 1239 (“a deficiency in the statutes”) (Simon, J., dissenting), found that while no statute was applicable, the daughter might obtain custody if she overcame the father’s superior right to childrear via a showing of the child’s best interests. *Koelle* also employed another deceived father case, *In re Marriage of Roberts*, 649 N.E.2d 1344 (Ill. App. Ct. 1995), where a deceived husband had standing to seek visitation notwithstanding the natural mother’s superior rights, as well as a foster parent case, *In re Ashley*, 571 N.E.2d 905 (Ill. App. Ct. 1991), where the foster parents had custody and were de facto parents for the child’s first five years before the natural parents (former drug addicts) sought custody and where the court seemingly would allow the foster parents custody based “solely on the best interest” of the child, *In re Ashley*, 571 N.E.2d at 930-31. *Koelle*, 284 672 N.E.2d at 872-74. Since *Troxel*, any custody or visitation requests by nonparents, like aunts or foster caregivers, would be subject to much closer scrutiny given recognized parental liberty interests in their children. See, e.g., *In re R.L.S.*, 844 N.E.2d 22, 34 (Ill. 2006) (stating that under *Troxel*, Probate Act does not allow “divesting a parent of custody” in the absence of “a finding of unfitness as a condition precedent”); *In re Scarlett D.-Z.*, 2012 IL App (2d) 120266, ¶ 34 (“We have serious doubts that *Koelle*, decided before *Troxel*, would survive scrutiny under a *Troxel* analysis.”).

childcare as long as the child's best interests might be served. Evidently, male beliefs in (possible) biological ties are important.¹¹⁵

The appeals court in *Mancine* hinted (though not strongly) that Nicholas may have had standing to seek visitation (as compared to custody).¹¹⁶ However, an uncited Illinois statute says "reasonable visitation privileges" may be granted to a stepparent only if "the child is at least 12 years old" and the child has lived with the parent and stepparent for at least five years.¹¹⁷ The court did not address any common law stepparent visitation rights going beyond this statute or other statutes that might confer childcare standing on Nicholas.¹¹⁸

As to equitable estoppel,¹¹⁹ the appeals court found no misrepresentation or concealment of a material fact, as Nicholas always knew "that for-

115. The appellate court also did not address how maternal deception about biological ties would undercut the superior parental right under *Troxel*. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶¶ 14-17.

116. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 18 (recognizing there are "exceptions . . . where a nonparty may be awarded custody or visitation"; *Koelle*, cited by Nicholas, was distinguished as there the deceived father "sought only visitation privileges"). See also *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 20 (distinguishing another case cited by Nicholas, *In re Marriage of Roberts*, 649 N.E.2d 1344 (Ill. App. Ct. 1995), because in that case there was a presumption of paternity in the man seeking child custody due to marriage at the time of birth).

117. *Comapre* 750 ILL. COMP. STAT. 5/607(b)(1.5) (2010), with CAL. FAMILY CODE 3101(a), (c), (d)(2) (West 2004) (stating that in a marriage dissolution proceeding a stepparent may obtain "reasonable visitation" if "in the best interest of the minor child" and not in conflict with the custody or visitation rights of a birth parent not a party to the dissolution proceeding).

118. There are statutory provisions on "reasonable visitation rights" for "[g]randparents, great-grandparents, and siblings of a minor child, who is one year or older," where "there is an unreasonable denial of visitation by a parent" and perhaps parental objection. 750 ILL. COMP. STAT. 5/607(a), (a-3), (a-5)(1)(A-15) (2010). See also *In re R.L.S.*, 844 N.E.2d at 34 (stating that grandparents who petition for guardianship of grandchild need not show lack of physical custody in parent; but to prevail, they must show each parent is unfit). There are also statutory provisions allowing guardians to seek visitation where natural parents desire to end the guardianships and nonparent visits. See, e.g., *In re T.P.S.*, 2011 IL App (5th) 100617 (citing 755 ILL. COMP. STAT. 5/11-14.1(b) (2010)) (stating that a former same-sex female partner had standing; even with material change of circumstances, as with a breakup of a same-sex couple, earlier-appointed guardian—who had secured a natural parent's consent—could continue visitation if it served the best interests of the minor).

119. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶¶ 25-29. Parenthood by equitable estoppel differs from equitable parenthood because only with the former may one, here Nicholas, choose to block the attempt by another, here Miki, to deny one's (here Nicholas's) parenthood. Seemingly, with equitable parentage, one may not choose to avoid parenthood one had earlier embraced. See, e.g., *In re Mallett*, 37 A.3d 333, 336 (N.H. 2012) (distinguishing the two equitable concepts in discussing the limited opportunity for a common law marriage). Equitable estoppel may also bar one who petitions for a parentage order from seeking such an order. See, e.g., *In re Felix O.*, 89 A.D. 1089 (N.Y. App. Div. 2011) (stating that the alleged natural father is barred from attacking marital paternity presumption

mal adoption was necessary.”¹²⁰ It suggested Nicholas slept on his rights.¹²¹ Nicholas’s vasectomy, prompted by Miki’s treatment of him as a father, did not help him in his quest for custody, as reliance on statements become irrelevant when the statements are not false or misleading.¹²²

As to equitable adoption, the court found the theory was unavailable in Illinois custody cases.¹²³ Yet, the court observed that the theory is available in intestate succession and wrongful death cases, particularly if there had been a “contract to adopt.”¹²⁴ In these cases, however, a child would benefit financially regardless of the level of earlier childrearing and there would be no childcare issues.

As to *parens patriae*, there was no statutory provision generally allowing a nonparent to seek custody even if in the child’s best interests.¹²⁵ Any such a provision would create tensions with “[t]he superior rights doctrine,”

for mother’s husband, as paternity case filed five years after birth); *In re Starla D.*, 95 A.D. 1605 (N.Y. App. Div. 2012) (alleging biological father may equitably estop mother’s pursuit of paternity order when she acquiesced in development of a close relationship between child and another father figure where the disruption of that relationship would be detrimental to child’s interests; no estoppel here as no “recognized and operative parent-child relationship” in another man); see also TEXAS ESTATES CODE ANN. § 1002.004 (West 2011) (for guardianship proceedings, “[c]hild” includes “one ‘adopted by a parent under a statutory procedure or by acts of estoppel’”). Similar is TEXAS PROBATE CODE ANN. § 601(3) (West, Westlaw through the end of the 2011 Regular Session and First Called Session of the 82nd Legislature).

120. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 27.

121. *Id.* ¶ 29 (stating that upon noting that Nicholas never petitioned to adopt William, the court quoted *Bell v. Louisville & Nashville, R.R. Co.*, 106 Ill. 2d 135, 146 (1985) [which cited *Flannery v. Flannery*, 51 N.E.2d 349, 354 (1943), where the court said: “[e]quity aids the vigilant, not those who slumber on their rights.”]).

122. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 25. Had Miki treated Nicholas as a father in some agreed court order, then Nicholas may have acquired parental standing. *In re Marriage of Schlam*, 648 N.E.2d 345 (Ill. App. Ct. 1995) (stating that mother’s earlier agreement, during divorce, to joint parenting estopped her from challenging former husband’s visitation interests years later, though ex-husband was not a presumed father as he married the mother six years after the birth of the child); *In re M.M.D.*, 820 N.E.2d 392, 401 (Ill. 2004) (stating that father’s earlier agreement on grandparent visitation incorporated into a court order was enforceable even when based on a statute later declared unconstitutional; father could seek court modification of visitation order). The *Mancine* court incidentally observed that even if reliance on Miki’s misrepresentations or concealments were relevant, any “such reliance was not reasonable.” *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 29.

123. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶¶ 31-34.

124. *Id.* ¶¶ 32-34 (showing the court was more sympathetic to equitable adoption in intestate succession cases, as here the children benefit and there is no infringement on superior parental rights); see also *infra* notes 127-129 and accompanying text. See also *DeHart v. DeHart*, 2012 IL App (3d) 090773 (stating that in intestate succession setting there can be both a contract to adopt and an equitable adoption claim by one who was neither born to nor formally adopted by the decedent).

125. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 37.

encompassing rights involving the “care, custody and control of [] children.”¹²⁶

Finally, as to leaving the child “fatherless,” the court observed that “no liberty interest exists with respect to a child’s psychological attachment to a nonbiological parent.”¹²⁷ Evidently as well, there was no common law interest held by William or Nicholas.¹²⁸ Recognition of parent-like attachments, to serve children’s as well as societal and nonparents’ interests, seemingly must come in Illinois via statute. In the trial court in *Mancine*, the circuit judge lamented over the lack of general statutory authority, saying “our evolving social structure has created nontraditional relationships” that demand “a comprehensive legislative solution.”¹²⁹

New Illinois statutes should respond to *Mancine* by expressly permitting expanded opportunities for parenthood¹³⁰ or by establishing broader

126. *Id.* ¶ 37 (saying that no precedent cited allows “extraordinary” judicial power to confer standing on one in a custody case who “is not legally” the parent of the child).

127. *Id.* ¶ 39 (citing *In re Marriage of Sterling Simmons*, 355 Ill. App. 3d 945, 956, which cited *In re Petition of Otakar Kirchner*, 164 Ill. 2d 468, 500 (2006); in these two cases, the lack of a “liberty interest” was found regarding “a child’s psychological attachment to a nonbiological parent,” including a transsexual male who undertook an “invalid same-sex marriage” to a woman who later bore “an artificially inseminated child,” *In re Marriage of Sterling Simmons*, 355 Ill. App. 3d at 945, 955-56 (2005), and an adoptive parent who childreared under a private adoption that was later deemed invalid, *Kirchner*, 164 Ill.2d at 472-474). *But see* *Lofton v. Sec’y of DCF*, 358 F.3d 804, 814 (11th Cir. 2004) (stating that a liberty interest could arise where state law “created a ‘justifiable expectation’ of family unit permanency,” as with a foster parent, or a legal guardian, or perhaps a common law parent).

128. *Simmons v. Simmons*, 486 N.W.2d 788 (Minn. Ct. App. 1992) (former stepparent, with no statutory right to visitation because he had not lived with the child for two years, could urge a common law right to visitation if in loco parentis to the child).

129. Transcript of Proceedings at 14, *Mancine v. Gansner*, No. 10D9394 (2011). Judge Katz also observed that it was an “unfortunate situation” that Nicholas lacked standing to seek custody under the Illinois Marriage and Dissolution of Marriage Act and that she “would love nothing better than to determine what is in William’s best interests” regarding Nicholas’s parenting in this “heart breaking case.” *Id.* at 5, 14-15.

130. *See, e.g.*, Stephen N. Peskind, *Who’s Your Daddy? An Analysis of Illinois’ Law of Parentage and the Meaning of Parenthood*, 35 LOY. U. CHI. L.J. 811 (2004) (stating that parentage opportunities for nonbiological and nonadoptive parents in Illinois should be grounded in new statutory provisions generally prioritizing children’s best interests). Peskind’s argument not fully embraced herein, in part, because of its difficulties under *Lehr v. Robertson*, as described in Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (and Other Parenthood) After Lehr and Michael H.*, 43 U. TOL. L. REV. 225 (2012) (stating that federal constitutional paternity opportunity interests in unwed fathers who sire children via sex with unwed mothers), and because of the need under the Illinois superior rights doctrine that consents (express or implicit) by natural or adoptive parents for others to childrear usually be judicially recognized. *See, e.g.*, *In re Marriage of Engelkens*, 821 N.E.2d 799 (Ill. App. Ct. 2004) (stating that the child’s best interests cannot override a biological father’s decision to discontinue reasonable visitation privileges for former stepmother notwithstanding his earlier agreement to allow such visits where the former stepmother did not detrimen-

judicial discretion to recognize childcare opportunities for nonparents.¹³¹ For now, per *Mancine*, childcare decisions generally are left to “natural or adoptive parents.”¹³²

IV. ILLINOIS CHILDCARE AFTER *MANCINE*

Mancine affirms the importance of context, as with equitable adoption in intestate and wrongful death cases. Differing approaches to legal parenthood for Nicholas also seem appropriate during his marriage to Miki, as in either a child support¹³³ or a parental neglect¹³⁴ setting.

tally alter her position in reliance on the agreement); *In re Coulter*, 2012 IL 113474 (stating that joint parenting agreements on relocation differ when they are and are not incorporated into court orders).

131. For an argument that Illinois common law should recognize childcare interests in nonbiological and nonadoptive child caretakers whose same sex couple relationships are dissolving, see Desiré Sierens, *Protecting the Parent-Child Relationship: The Need for Illinois Courts to Extend Standing to Non-biological Parents in Regard to Visitation Proceedings*, 25 N. ILL. U. L. REV. 483 (2005).

132. 750 ILL. COMP. STAT. ANN. 45/2 (West 1984). While certainty seemingly is promoted, it comes at the expense of children’s and adults’ lived experiences and legitimate expectations, creating a new class of illegitimate children. Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. UNIV. J. OF GENDER, SOC. POL’Y & L. 623 (2012).

133. See, e.g., *Wener v. Wener*, 312 N.Y.S.2d 815, 819 (N.Y. App. Div. 1970) (stating that the husband must support child he neither fathered nor adopted, since husband had agreed at one time to adopt and had treated the child as his own prior to a marital separation). Compare OR. REV. STAT. ANN. § 108.045(1) (“[T]he education of minor children, including stepchildren, are chargeable upon the property of both husband and wife, or either of them.”), and S.D. CODIFIED LAWS § 25-7-8 (“A stepparent shall maintain his spouse’s children born prior to their marriage and is responsible as a parent for their support and education suitable to his circumstances.”), with VT. STAT. ANN. tit. 15, § 296 (“A stepparent has a duty to support a stepchild if they reside in the same household and if the financial resources of the natural or adoptive parents are insufficient to provide the child with a reasonable subsistence consistent with decency and health.”), DEL. CODE ANN. tit. 13, § 501(b) (“[W]here the parents are unable to provide a minor child’s minimum needs, a stepparent or person who cohabits in the relationship of husband and wife with the parent of a minor child shall be under a duty to provide those needs.”), HAW. REV. STAT. § 577-4 (“A stepparent who acts in loco parentis is bound to provide, maintain, and support the stepparent’s stepchild during the residence of the child with the stepparent if the legal parents desert the child or are unable to support the child, thereby reducing the child to destitute and necessitous circumstances.”), and MO. ANN. STAT. § 453.400(1) (“A stepparent shall support his or her stepchild to the same extent that a natural or adoptive parent is required to support his or her child so long as the stepchild is living in the same house as the stepparent.”). See also OKLA. STAT. ANN. tit. 43, § 112.4 (“A stepparent is not required to maintain his or her spouse’s children from a prior relationship.”).

134. See, e.g., 720 ILL. COMP. STAT. ANN. 555/1(a)(6), (b) (stating that a step-parent commits an offense as a parent if he or she knowingly permits a minor to break curfew).

Mancine also prompts thoughts about childcare reforms, especially if one sympathizes with Nicholas and laments his likely absence in William's (and Elizabeth's) life. What should have happened to the children in *Mancine* if Miki died a day after the marriage dissolution order granted her sole custody of William, as Nicholas could not then pursue child custody under the current Illinois statute recognizing stepparent interests?¹³⁵ Should Nicholas be accorded at least some parental opportunity interests if Miki, during the marriage, sought to place William (and Elizabeth) for adoption?

While context matters, given current Illinois statutes and the disinclination of Illinois courts for further common law developments, unfortunately a child's best interests (as well as societal and nonparent interests in children) often will not be well-served. The "superior rights" of parents will be favored in childcare settings regardless of what parents do, short of abandonment or significant abuse. In certain noncare settings, such as intestacy and wrongful death, however, common law "contract to adopt" principles will be key, as here there are only financial benefits to children, no parental childrearing interests, no concerns about children's best interests regarding childcare, and no possible infringements on superior parental rights.¹³⁶

It is time to redo childcare statutes, or at least to recognize broader common law powers that could serve children's best interests without interfering unduly with superior parental rights.¹³⁷ Illinois lawmakers should

135. 750 ILL. COMP. STAT. ANN. 5/601(b)(3) (Nicholas was no longer a stepparent). Nicholas could pursue custody as a nonparent, 750 ILL. COMP. STAT. ANN. 601(b)(2) (since William was not in the physical custody of a parent). But, Nicholas is given no superior rights to other nonparents, 750 ILL. COMP. STAT. ANN. 601(b)(2), including grandparents who have special statutory standing regarding custody when there are no parents available to childrear. 750 ILL. COMP. STAT. ANN. 601(b)(4) (likely to apply to Miki's parents even though the statute does mention a "surviving parent" since Nicholas was not a surviving parent to William). Nicholas suggested that if he died a day after the dissolution, William "could seek to inherit." Appellant Petition at 19, *Mancine v. Gansner*, No. 10D9394 (2011).

136. *In re Marriage of Mancine*, 2012 IL App (1st) 11138, ¶ 32 (stating that where decedents had orally contracted to adopt, intestate decedents' estates must be shared with those who were intended to be adopted). By contrast, where intended parents sue for wrongful death of children not formally adopted, but for whom there were contracts to adopt, such intended parents are not the next of kin under the wrongful death statute. *Id.* ¶ 33.

137. See, e.g., *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Fla. Dist. Ct. App. 2011), a case involving possible future childrearing by a woman who provided her ova to her lesbian partner so both women could childrear; a concurring opinion declared:

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

redefine parents who possess superior childrearing rights; create additional exceptions allowing nonparents to childcare where there are “special factors”; and recognize the prospect of resurrected childcare interests for those earlier foreclosed, as when parents die. Floodgates will not open if legislators proceed cautiously.¹³⁸

The Illinois General Assembly recently recognized the need for reforms by creating a study committee, resulting in the January 2013 proposed Illinois Parentage Act (Proposed Parentage Act).¹³⁹ The study committee also proposed amendments in 2012 to the Illinois Marriage and Dissolution Act (Proposed MDM Act)¹⁴⁰ on childcare. The proposals must be read together. For example, the marital presumptions establishing parentage are found in the Proposed Parentage Act,¹⁴¹ while the Proposed MDM Act establishes parentage for certain unwed parents.¹⁴² The proposals, at times,

come to grips with what is best for the child. Here, having two parents is better than one.

T.M.H., 79 So. 3d at 804-05 (Monaco, J., concurring).

138. Miki argued that any recognition of Nicholas’ child care interests in William “would open the floodgates” to any ex-boyfriend or to “virtually anyone” who cared for William. Appellee’s Answer to Petition for Leave to Appeal at 4, *Mancine v. Gansner*, No. 10D9394 (2011) [hereinafter Appellee Answer]. Similar concerns have been judicially expressed where adequate limits have nevertheless been found. *See, e.g.*, *Chatterjee v. King*, 280 P.3d 283, 297 (N.M. 2012) (Bosson, J., specially concurring) (“I agree with the outcome reached by the majority, but on narrower grounds. I write out of concern that this Opinion might be interpreted to expand the population of presumed parents in a manner that would shake settled expectations of custody rights and child support responsibilities.”).

Open adoption contracts could also subject to floodgate concerns. But, as Professor Brian Bix observes: “Gradually, courts and legislatures have moved toward making these arrangements enforceable. As of May 2011, 26 states and the District of Columbia have statutes authorizing the enforcement of such agreements.” “Agreements in Family Law,” posted at SSRN, abstract 2125343, at 15 (March 1, 2012) (stating that such agreements are usually “conditional on judicial approval and subject to judicial modification”) [hereinafter Bix].

139. The Illinois Family Law Study Committee’s work led to H.B. 1243, which includes a Proposed Illinois Parentage Act of 2013. H.B. 1243, 98th Ill. Gen. Assemb., Reg. Sess. (Ill. 2013) [hereinafter “Proposed Parentage Act”].

140. The Illinois Family Law Study Committee’s work led to H.B. 1452, which included proposed changes to a variety of Illinois statutes governing family matters, including the Marriage and Dissolution of Marriage Act, the Alienation of Affections Act, and the Domestic Violence Act. H.B. 1452, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) [hereinafter Proposed MDM Act]. The major proposed changes are described in Adam W. Lasker, *Is Family-Law Overhaul on the Way?*, 100 ILL. B.J. 458 (2012).

141. *See, e.g.*, Proposed Parentage Act, §204(a)(1) (stating that a man presumed a parent of a child if “he and the mother . . . are married to each other or are in a state-recognized civil union and the child is born . . . during the marriage or civil union, except as provided by the Gestational Surrogacy Act or Article 7 of this Act.” [Child of Assisted Reproduction]).

142. *See, e.g.*, Proposed MDM, § 750 ILL. COMP. STAT. ANN. 5/600 (“Equitable parent” includes “a person who, though not a legal parent of a child . . . lived with the child for at least 2 years” while believing to be “the child’s biological parent.”).

address similar settings.¹⁴³ And, unfortunately, the proposals insufficiently address many of the childcare issues raised by *Mancine*.

A. PARENTS WITH SUPERIOR RIGHTS

Under *Mancine*, the parents of children born of sex having superior rights generally include biological and adoptive parents.¹⁴⁴ Parentage laws should include others¹⁴⁵ who can achieve “de facto parent” or similar status.

1. *Current Biological Parents*

Biological parents in Illinois now include men whose natural ties are statutorily presumed, though lacking in reality. Men whose wives naturally conceive or bear children born of sex are presumed natural parents.¹⁴⁶ Seemingly, there is no presumption (at least statutory) for a man married to a mother during her pregnancy, but unmarried either at the time of conception or birth.¹⁴⁷ Where natural ties in the husband are known to be lacking at birth, or are shown to be lacking thereafter, this presumption can neverthe-

143. Compare, e.g., Proposed Parentage Act, § 204(a)(5) (“[M]an is presumed to be a parent of a child if . . . for the first two years of the child’s life, he resided in a household with the child and openly held out the child as his own during that time.”), with Proposed MDM, § 750 ILL. COMP. STAT. ANN. 5/600 (“Equitable parent” includes “a person who, though not a legal parent of the child . . . lived with the child since the child’s birth or for at least 2 years, and held himself out as the child’s parent while accepting parental responsibilities, under an agreement with the child’s legal parent (or, if there are 2 legal parents, both parents) to rear the child together, each with allocated parental rights and responsibilities, provided that a court finds that recognition of the person as a parent is in the child’s best interests.”).

144. See, e.g., 750 ILL. COMP. STAT. ANN. 45/2 (under Illinois Parentage Act of 1984, “parent and child relationship” includes child and “natural or adoptive parents.”). The same general approach has been employed elsewhere, albeit with dissent. See, e.g., Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. App. Div. 2010) (differing views on the approach, earlier approved *In re Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. App. Ct. 1991)). Biological and adoptive children have not always been comparably treated. See, e.g., *Anderson v. BNY Mellon*, 463 Mass. 299 (2012) (stating that before 1958, adopted children were generally excluded from many instruments addressing inheritance).

145. Parentage for children not born of sex presents different questions. See, e.g., 750 ILL. COMP. STAT. ANN. 47/1 et seq. (Gestational Surrogacy Act) (stating that children born to surrogates may be parented by gametes contributors, 47/20(b)(1)); 750 ILL. COMP. STAT. ANN. 40/3 (stating that a semen donor is treated as natural father of a child conceived via artificial insemination and born to his wife).

146. See, e.g., 750 ILL. COMP. STAT. ANN. 45/5(a)(1) (“A man is presumed to be the natural father of a child if . . . he and the child’s natural mother are or have been married to each other . . . and the child is born or conceived during such marriage.”).

147. Compare MO. ANN. STAT. § 210. 822(1) (“born during the marriage”), with CAL. FAM. CODE § 7540 (“child of a wife cohabiting with her husband”).

less continue, at times even when the real natural father,¹⁴⁸ wife,¹⁴⁹ or husband,¹⁵⁰ objects.¹⁵¹ There are, for example, statutory standing requirements

148. An alleged real natural father can bring an “action to determine the existence of the father and child relationship, whether or not such a relationship is presumed.” 750 ILL. COMP. STAT. ANN. 45/7(a). Under statute, such an action by the alleged “natural parent” shall only “be barred if brought later than 2 years after the child reaches the age of majority.” 750 ILL. COMP. STAT. ANN. 45/8(a)(1). Yet the Illinois Supreme Court has suggested that an alleged natural father who comes in “ten years later,” saying “I want a cotton swab, I’m the dad,” would likely lose. *In re Parentage of John M.*, 817 N.E.2d 500, 510 (Ill. 2004). In so suggesting, it urged law reformers seeking greater clarification go to the General Assembly. *Id.* at 511; *see also In re Marriage of Slayton*, 685 N.E.2d 1038 (Ill. App. Ct. 1997) (stating that the real natural father waived objection to ex-husband’s request for visitation under suspect federal constitutional standard). *Compare* OKLA. STAT. 10, § 3B (“If a child is born during the course of the marriage and is reared by the husband and wife as a member of their family without disputing the child’s legitimacy for a period of at least two (2) years, the presumption cannot be disputed by anyone.”), *with Slowinski v. Sweeney*, 64 So. 3d 128 (Fla. App. Dist. Ct. 1st 2011) (stating that the alleged biological father has no statutory standing to bring paternity suit where marriage and family is intact), *and Evans v. Wilson*, 856 A.2d 679 (Md. 2004) (similar to Florida’s approach).

149. The wife, “the natural mother” under 750 ILL. COMP. STAT. ANN. 45/7(b), can seek solely to rebut a marital paternity presumption, under 750 ILL. COMP. STAT. ANN. 45/(a)(1) and (2), but only within “2 years after the petitioner obtains knowledge of relevant facts,” 750 ILL. COMP. STAT. ANN. 45/8(a)(3); *see also Slayton*, 292 Ill. App. 3d at 385 (waiver of chance to rebut as objection raised only at end of custody hearing). Rebuttal perhaps may be sought indirectly, however, in an action by the mother which seeks to determine, on behalf of her child, an alleged natural father’s paternity, which itself can be brought up to 2 years after the child reaches the age of majority, 750 ILL. COMP. STAT. ANN. 45/8(a)(1). *Compare* LA. CIV. CODE ANN. art. 185-193 (stating that while husband residing with wife may “disavow paternity” within a year of when he “learns or should have learned of the birth,” wife may disavow only when she seeks to establish her new husband is the father), *and Clark v. Evans*, 254 P.3d 672 (Okla. 2011) (stating that former wife estopped from rebutting marital presumption seven years after divorce), *with In re Custody of D.T.R.*, 796 N.W.2d 509, 513 (Minn. 2011) (stating that wife can appeal loss by biological father of paternity action to husband with a marital presumption, even where the biological father does not appeal, as she is “an aggrieved party”).

150. A husband, a presumed natural father under 750 ILL. COMP. STAT. ANN. 45/5(a)(1), can seek solely to rebut the presumption, under 750 ILL. COMP. STAT. ANN. 45/7(b), but only within “2 years after petitioner obtains knowledge of relevant facts,” 750 ILCS 45/8(a)(3); *see also In re Roberts*, 271 Ill. App. 3d 972, 981 (4th Dist. 1995) (stating that husband, who was not biological father, can seek custody when he petitions for marriage dissolution as long as marital presumption had not been rebutted earlier). *Compare* UTAH CODE 7-45(g)-607(1) (stating that a man presumed to be father under marital presumption, UTAH CODE 78-45(g)-204(1)(a), may challenge “at any time prior to filing an action for divorce”), *and* LA. CIV. CODE ANN. art. 189 (stating that action by husband for disavowal of marital paternity presumption, under article 184, usually “is subject to a liberative prescription of one year”), *with* MINN. STAT. ANN. § 257.57(b) (stating that to declare “nonexistence” of marital paternity presumption, husband may not sue “later than three years after the child’s birth”). In Illinois, while a husband has two years to seek rebuttal of the marital presumption, his wife has twenty years to sue the natural father in a paternity action even when

and time limits for objections.¹⁵² The marital presumption operates in Illinois, though not elsewhere, even where the husbands are sterile or living and sleeping apart from their wives.¹⁵³ Incidentally, presumed parentage for

the husband objects because he may lose his parental status in the paternity action. *In re G.M.*, 2012 IL App (2d) 110370.

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

152. In Illinois, the statutory requirements vary by who petitions to rebut the presumption. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 7(b), (b-5) (stating that an action to declare nonexistence of parent and child relationship may be brought “by the child, the natural mother, or a man presumed to be the father”; such an action may also be brought “subsequent to an adjudication of paternity in any judgment by the man adjudicated to be the father” pursuant to certain statutory presumptions if DNA tests show he is not the natural father). *Compare* COLO. REV. STAT. ANN. § 19-4-107(1)(b) (“declaring the nonexistence of the father and child relationship presumed” due to marriage or attempted marriage, an action must be “brought within a reasonable time after obtaining knowledge of relevant facts but in no event later than five years after the child’s birth”; for a similar declaration involving a presumption due to receipt into home and openly holding out the child as one’s own, due to a paternity acknowledgement or due to genetic tests, there are no comparable time limits), *with* COLO. REV. STAT. ANN. § 19-4-105(2)(c) (special factors, involving “fraud, duress or mistake of material fact,” are necessary in challenging certain paternity acknowledgements). *See also* TENN. CODE ANN. § 36-2-30430(b)(2)(A) (stating that if mother and husband were married and living together at the time of conception and “ha[ve] remained together . . . through the date a petition to establish parentage is filed,” and if mother and husband swear the “husband is the father[,] . . . any action seeking to establish parentage must be brought within twelve (12) months of the birth of the child”; husband and wife are “estopped to deny paternity in any future action” if they so swear); WASH. REV. CODE ANN. § 26.26.530 (stating that with certain exceptions, actions to rebut marital paternity presumptions, 26.26.116, must be “commenced not later than two years after the birth of the child” by “a presumed father, the mother, or another individual”).

Elsewhere, there are also common law doctrines limiting attempts to disestablish statutory presumptions of parentage. *See, e.g.*, *K.E.M. v. P.C.S.*, 38 A.2d 798, 810 (Pa. 2012) (paternity by estoppel can bar a mother’s husband from denying paternity of a marital child where the child’s best interests are served, perhaps even if there has been no deceit, in an action by the mother against the biological father for child support).

153. *Compare, e.g.*, 750 ILL. COMP. STAT. ANN. 45/2 (stating that paternity presumption where man is or was married to natural mother when a child born of sex was conceived or delivered), *with* CAL. FAM. CODE § 7540 (“[T]he child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”).

a husband continues elsewhere even when the biological father timely seeks to childcare.¹⁵⁴

The Proposed Parentage Act in Illinois not only generally maintains the current marital paternity presumptions¹⁵⁵ but also extends presumptions outside of marriage. The proposal, for example, recognizes “parentage” in a man who is presumed to have natural ties if “for the first 2 years of the child’s life,” the man resided “in a household with the child and openly held out the child as his own during that time.”¹⁵⁶ This presumption would not literally cover Nicholas Gansner, as he “had moved in” with Miki only within a month of William’s birth.¹⁵⁷ This proposal, with its two year residency requirement, contains a more limited presumption than has been undertaken elsewhere.¹⁵⁸ For example, in other states, specific habitation periods are unnecessary.¹⁵⁹

154. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (stating that conclusive marital paternity presumption promotes “family integrity and privacy”). However, it remains unclear whether the U.S. Supreme Court will rule that all biological fathers have no “federal constitutional parental prerogatives” when their children are born into intact marriages. Parness & Townsend, *supra* note 130, at 237-38.

155. The proposal does limit, significantly, the current presumption by covering children born “during” marriage, but not children “conceived” during marriage. Compare Proposed Parentage Act, § 204(a)(1) (stating that a man is presumed a parent if a child born to the mother “during” a marriage or civil union), with 750 ILL. COMP. STAT. ANN. 45/5(a)(1) (“A man is presumed to be the natural father of a child if: (1) he and the child’s natural mother are or have been married to each other . . . and the child is born or conceived during such marriage . . .”).

156. Proposed Parentage Act, § 204(a)(5). Holding out to be something one is not, and acquiring the status one falsely claims, is not unique to parentage. See, e.g., *Small v. McMaster*, 352 S.W.3d 280, 282 (Tex. Ct. App. 2011) (evidencing a Texas statute recognizing “informal” marriage requires a couple to present “to others that they were married”). There is no “first 2 years” rule in Minnesota or Alabama. See MINN. STAT. ANN. § 257C.08(4) (stating that a minor who resided with a person for 2 years may be subject to a reasonable visitation order, if the person established “emotional ties creating a parent and child relationship,” if visitation served the child’s best interests, and if such visitation “would not interfere with the relationship between the custodial parent and the child”); ALA. CODE § 26-17-204(a)(5) (stating that a man receives child into his home, openly holds out child as his natural child, and “establishes a significant parental relationship”).

157. *In re Marriage of Mancine*, 2012 IL App (1st) 111138 (No. 10 D 9594), ¶ 4. There was no indication in the Appellate or Supreme Court briefs of allegations that William resided in any way with Nicholas before Nicholas and Miki moved in together.

158. See, e.g., N.M. STAT. ANN. § 40-11-5 (A)(4) (stating that the paternity presumption of “natural” fatherhood for a man who “openly holds out the child as his natural child and has established a personal, financial or custodial relationship with the child”), applied to a woman in *Chatterjee*, at 287-288; ALA. CODE § 26-17-204 (a)(5) (stating that the paternity presumption outside of marriage when man receives child into his home, openly holds child out as his own, and establishes a significant parental relationship), applied in *Ex parte T.J.*, 89 So. 3d 744 (Ala. 2012) (stating that the nonbiological father of a child could be presumed father under this section); MONT. CODE ANN. § 40-4-211(4)(b) (6) (“parenting plan” can be pursued by a nonparent with a “child-parent relationship”).

There are also no current or proposed statutory presumptions in Illinois establishing parentage for men, with or without natural ties, whose girlfriends bear children and where cohabitation began before birth and continued thereafter; there was an agreement on dual parentage; and the couple lived in a unitary family unit.¹⁶⁰ Further, as there is no common law marriage in Illinois, there is not much chance for presumed common law parentage.¹⁶¹

Extending such parentage to a woman is more problematic for children born of sex, as the natural mother acquires parental rights simply by giving birth. *See, e.g., In re D.S.*, 207 Cal. App. 4th 1088, 1092 (2012) (stating the stepmother who received a child to her home, CAL. FAM. CODE § 7611(d), nevertheless is not a presumed mother where natural mother objects though child had been living with natural father; stepmother must seek to adopt to attain parenthood status where natural mother “abandoned her parental rights and responsibilities”). *See also* KY. REV. STAT. ANN. § 403.270 (1)(a) and (b) (“de facto custodian” is a primary caregiver and financial supporter of a child who resided with the child for more than 6 months if the child is under 3; such custodian has “the same standing in custody matters that is given to each parent”). Incidentally, in Kentucky, even when nonparents have not established de facto custodian status, they can pursue custody notwithstanding the superior right of parents by presenting “clear and convincing” evidence of parental unfitness or waiver of superior rights. *Mullins v. Picklesimer*, 317 S.W. 3d 569, 578 (Ky. 2010). De facto custodians were found in, e.g., *Ramsey v. Ramsey*, 2012 WL 3047210 (Ky. App. 2012) (stating that the maternal grandparents deemed de facto custodians over their daughter’s [the natural mother’s] objection), and *Ball v. Tatum*, 373 S.W.3d 458 (Ky. App. 2012) (stating that the maternal grandparents deemed primary residential custodians over mother’s objection).

159. *See, e.g.,* CAL. FAM. CODE § 7611(d) (stating that receipt of child in home and openly holding out child as her/his natural child), *applied in* L.M. v. M.G., 145 Cal. App. 4th 133 (2012) (former lesbian partner is presumed parent of child adopted by her ex-partner during their cohabitation—though there was no registered domestic partnership); *In re Bryan D.*, 130 Cal. Rptr. 3d 821 (Cal. App. 2011) (recognizing grandmother may be presumed parent under Section 7611(d)); *In re Jose C.*, 188 Cal. App. 4th 147, 162 (Cal. App. 2010) (stating that in dependency proceeding, Section 7611(d) applies; here, maternal grandfather was not a “presumed father” though he “acted as the functional equivalent” of child’s father).

160. Seemingly such statutory presumptions are available to state legislators wishing to protect “unitary” families under the reasoning of federal constitutional cases like *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). This availability, while not yet generally seized by states, is discussed in Parness & Townsend, *supra* note 130, at 233-42. Another area of possible presumptions involves children born to unwed mothers as a result of artificial insemination consented to by their intimate partners. In Illinois, such consents do not prompt parental rights. 750 ILL. COMP. STAT. ANN. 40/2, 3 (consents available only to husbands). Yet another possible presumption involves a surrogacy contract between a woman who will bear a child and an unwed couple who will secure custody and raise the child upon birth. In Illinois, such surrogacy contracts can be valid if the statutory requirements on consent and the like are met. 750 ILL. COMP. STAT. ANN. 47/1 et seq. (Gestational Surrogacy Act, especially Sections 10 and 20(b)). Outside of Illinois, such surrogacy pacts can be “void and unenforceable as contrary to public policy.” *See, e.g.,* MICH. COMP. LAWS ANN. § 722.855.

161. *See, e.g.,* Ayala v. Fox, 564 N.E.2d 920 (Ill. App. Ct.1990). *Compare* IOWA CODE ANN. § 252A.3 (“A child or children born of parents who held or hold themselves out

2. Current Adoptive Parents

As for adoption, under *Mancine*, the superior parental rights with respect to care of children born of sex seemingly arise only when there are formal adoptions.¹⁶² Intent or agreement to adopt or parental allowance of childcare by others, if not undertaken under the statutory adoption scheme, are irrelevant in later childcare disputes.

While the *Mancine* court rejected any use by Nicholas of an “equitable adoption” doctrine,¹⁶³ the court did recognize that the theory of “contract to adopt” is available in other cases where there has been no formal adoption. What distinguishes the cases? Simply put, a “contract to adopt” theory may be used in Illinois under *Mancine* only where the children subject to the adoption contracts may be benefitted financially by the demise of their intended adopters.¹⁶⁴ In *Mancine*, two high court cases were distinguished. In each, the property of intended adopters, who died intestate and who had contracted with the birth parents to adopt, was available to the intended adoptees as child heirs.¹⁶⁵ As well, in *Mancine*, while the court said no “contract to adopt” could establish the intended adopters as parents with standing to sue for the wrongful deaths of the intended adoptees,¹⁶⁶ it did

as husband and wife by virtue of a common law marriage are deemed the legitimate child or children of both parents.”), *with* *Small v. McMaster*, 352 S.W.3d 280, 282 (14th Dist. Ct. App. 2011) (applying Texas Family Code 2.401(a), which court describes as recognizing an “informal or common-law marriage”), *and* *Clark Sand Co., Inc. v. Kelly*, 60 So. 3d 149, 157 (Ala. 2011) (stating that elements of a common law marriage do not necessarily include “ceremony or particular words,” citing *Boswell v. Boswell*, 497 So. 2d 479, 480 (Ala. 1986)). Even where there was common law marriage, there need not be common law parentage (i.e., no parentage without biological ties or formal adoption per statute). There is also no statute in Illinois recognizing a marriage that is not solemnized as legal and valid. UTAH CODE ANN. § 30-1-4.5 (stating that man and woman have a contract and hold themselves out as husband and wife).

162. Superior parental rights for children not born of sex may arise without marital presumptions or adoptions. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 47/25 (stating that in certain settings, gestational surrogacy contracts are enforceable).

163. *In re* Marriage of *Mancine*, 2012 IL App (1st) 111138, ¶¶ 31-34.

164. The *Mancine* court also concluded the contract to adopt theory was unavailable “because here there was no contract to adopt.” *Id.* ¶ 32. This conclusion was not explained and, for me, is contradicted by Nicholas’s allegations as to his arrangements with Miki about his adoption of William after the marriage.

165. *Id.* ¶ 32; *Monahan v. Monahan*, 14 Ill.2d 449, 453 (1958) (stating that oral contract must be proven by “clear and convincing” evidence; though intended adopters were advised their intended son could be provided for by will [as no formal adoption was possible given the son’s age-incidentally, bad legal advice], the absence of any will did not estop the intended son); *Dixon Nat. Bank of Dixon v. Neal*, 5 Ill.2d 328, 335 (1955) (stating that an agreement to adopt established “clearly and positively”).

166. *In re* Marriage of *Mancine*, 2012 IL App (1st) 111138, ¶ 33; *In re* Estate of *Edwards*, 106 Ill. App. 3d 635 (1982) (stating that intended adopters were not “next of kin” under statute) [Edwards].

not say that intended adoptees who could prove a “contract to adopt” could not pursue wrongful death claims involving intended adopters.¹⁶⁷ So, adoption contracts can lead to parentage only for those people who die where any intended children benefit financially.¹⁶⁸ Contracts to adopt cannot, in the absence of formal adoption, lead to childcare opportunities for willing, able, and living intended parents, meaning that any intended adopted children do not have the chance to benefit when the intended parents remain living. Here, the superior rights of biological or adoptive parents (like Miki) are secured, though these parents may have invited nonparents to childrear and though the intended parents, children, and others (like intended siblings) are often significantly harmed by the terminations of “established familial or family-like bonds.”¹⁶⁹

By contrast, the superior parental rights of a mother are waivable via nonadoption contracts in certain artificial reproduction settings.¹⁷⁰ Under *Mancine*, nonadoption prebirth contracts by willing, nongenetic, married parents in assisted reproduction settings differ from nonadoption postbirth contracts by willing, nongenetic parents, like Nicholas, in settings where children are born of sex, adopted, or born via assisted reproduction. Should it only matter how children came into the world? Should it matter whether the willing parent has genetic ties if the child is born of sex? Should it matter whether the willing parent is married? Consents to childrear, together with assessments of children’s welfare, should matter when courts decide

167. *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶¶ 33-34 (citing *Edwards*, 106 Ill. App. 3d 635). While the *Edwards* court said “the wrongful death statute . . . is to be strictly construed,” it recognized both that the “contract to adopt” theory could be applied in the intestate cases where intended adoptees sought to recover and that an intended adoptee, or at least his/her biological parent who orally contracts for adoption, can sue to obtain “enforcement of contract rights.” *Edwards*, 106 Ill. App. 3d at 638. See also *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 33 (“[O]ral contract to adopt merely permits the enforcement of contract rights,” presumably by the intended adoptees, and “does not create a parent-child relationship or afford all of the legal consequences of a statutory adoption,” presumably to the intended adopters.).

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

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

170. See, e.g., 750 ILL. COMP. STAT. 40/3(a) (2010) (stating that only a husband who consents will be “treated in law if he were the natural father of a child” conceived when she was “inseminated artificially with semen donated by a man not her husband”). Such nongenetic consenting parents may also need to include lesbians whose partners (in and outside of state-recognized relationships like marriage and civil unions) deliver children from assisted reproduction where the lesbians consented. See, e.g., *Shineovich v. Shineovich* 214 P.3d 29, 39-40 (Or. App. Ct. 2009) (equal protection denial due to sexual orientation).

issues of parentage and allocations of childcare responsibilities. In California, a man or a woman, whether or not married to a parent, is a presumed second parent of a child for childcare purposes whether the child is born of sex or assisted reproduction, as long as the man or woman receives the child into the home and openly “holds out” as being the second parent.¹⁷¹ Where the second parent in such settings does not wish to rear any longer, the child’s initial parent may even be able to pursue child support.¹⁷²

3. *More Parents with Superior Rights*

i. Other State Experiences

Elsewhere, parentage for children born of sex is extended to some with no actual or presumed biological ties and with no formal adoptions.¹⁷³ At times, extensions come via precedents, as in Wisconsin where case law recognizes “psychological parent” or “second parent” status.¹⁷⁴ But, often there are statutes, a preferred approach for those concerned about inappropriate judicial lawmaking.¹⁷⁵

Some state statutes recognize parentage that is dependent upon the biological or adoptive parent’s consent as well as upon earlier childrearing. For example, in Delaware, by statute, a de facto parent can be judicially recognized for one who had “a parent-like relationship” with “the support and consent of the child’s parent”; who exercised “parental responsibility”; and who “acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental

171. CAL. FAM. CODE § 7611(d) (2012), *construed in* *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (former lesbian partner is second parent to child born of assisted reproduction).

172. *See, e.g., H.M. v. E.T.*, 906 N.Y.S.2d 85 (N.Y. App. 2010) (stating that a lesbian’s implied promise to support child later conceived and born to former partner supports a claim by former partner for child support).

173. Herein, the other noted state statutes and precedents on parentage and nonparent childcare are assumed to meet the *Troxel* standards on losses or diminutions of superior parental rights, whatever those standards may be. *See Troxel*, 530 U.S. at 75. Some non-Illinois laws seem of questionable validity. *See, e.g., GA. CODE ANN. § 19-7-1(b.1)* (2010) (stating that in disputes over custody between parents and, e.g., grandparents, aunts or siblings, “parental power may be lost” if a court, exercising “sound discretion and taking into consideration all the circumstances . . . determines” such losses serve the children’s best interest, though there is “a rebuttable presumption” favoring parental custody).

174. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (stating that consent, parent-like relationship, financial support, and “bonded, dependent relationship are parental in nature”).

175. *See, e.g., Appellee Brief for Petitioner-Appellee at 21-23, In re Marriage of Mancine v. Gansner*, 2012 IL App (1st) 111138 (No. 10-D-9394) (“It is clearly within the legislature’s sphere of authority to decide who has standing to ask for custody and who has standing to seek visitation.”).

in nature.”¹⁷⁶ And in the District of Columbia, by written law, one might seek “third-party custody” as a “de facto parent” if one lived with the child since birth or lived in the same household with the child for at least ten (10) of the twelve (12) months preceding the filing of one’s custody request.¹⁷⁷

Elsewhere, there are also statutes on natural parentage presumptions that are not dependent upon marriage¹⁷⁸ and are not necessarily rebutted when a lack of natural ties is proven. Some establish a minimum time period of childcare. For example, in Missouri, a man “shall be presumed to be the natural father of a child if . . . [h]e is obligated to support the child pursuant to a written voluntary promise.”¹⁷⁹ In Minnesota, a man is “presumed to be the biological father of a child if . . . [w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his biological child.”¹⁸⁰ In Indiana, there is a comparable “rebuttable presumption,” but it must include “the consent of the child’s mother”¹⁸¹ and a positive genetic test.¹⁸² In Alabama, a statute requires “a significant parental relationship with the child” involving emotional and

176. DEL. CODE ANN. tit. 13, § 8-201(a)(4) (2009) (mother), § 8-201(b)(6) (2009) (father), § 8-201(c) (2009) (stating the three factors to attain “[d]e facto parent status”). *But see In re Bancroft v. Jameson*, 19 A.3d 730 (Del. Fam. Ct. 2010) (finding statute overbroad and violative of fit mother’s and father’s due process rights as relates to the mother’s boyfriend).

177. D.C. CODE § 16-831.01 (2012) and § 831.03 (2012) (with parental “agreement”).

178. *See, e.g.*, COLO. REV. STAT. § 19-4-105(1)(d) (2008) (stating that while child is a minor, a man is the presumed natural father if he “receives the child into his home” and “openly holds out the child as his natural child”); *see also* CAL. FAM. CODE § 7611(d) (2012), *construed in* S.Y. v. S.B., 134 Cal. Rptr. 3d 1 (Cal. App. 2011) (including same-sex female partners); *see also* IND. CODE § 31-14-7-2(a) (2012) (presuming the same but with the need for the child’s mother’s consent).

179. MO. REV. STAT. § 210.822 (2012). This obligation seemingly can arise without “court order,” as such an order is another way the obligation prompting a presumption can arise. *Id.* Where two conflicting presumptions arise via conduct in Missouri, the controlling presumption is the one “founded on the weightier considerations of policy and logic.” MO. REV. STAT. § 210.822.2 (2012). Comparably, there is a presumption in Kansas where a man “notoriously or in writing recognizes paternity,” which need not involve a voluntary paternity acknowledgement. KAN. STAT. ANN. § 38-1114(a)(4) (2012).

180. MINN. STAT. § 257.55(d) (2012). Where two presumptions arise via conduct in Minnesota, the controlling presumption is the one “founded on the weightier considerations of policy and logic.” MINN. STAT. § 257.55(2) (2012). Similar are the presumptions arising under MONT. CODE ANN. § 40-6-105(d) (2011) and COLO. REV. STAT. § 19-4-105(1)(d) (2008).

181. IND. CODE § 31-14-7-2 (2012).

182. IND. CODE § 31-14-7-2(b) (2012) (stating that the “rebuttable presumption” does “not establish the man’s paternity”; paternity may only be established via IND. CODE § 31-14-2-1(3) (2012), which requires a positive genetic test in the absence of a marriage or attempted marriage).

financial support.¹⁸³ In Wyoming, a man “is presumed to be the father of a child if . . . [f]or the first two (2) years of the child’s life, he resided in the same household with the child and openly held out the child as his own.”¹⁸⁴ Where natural ties are statutorily presumed, the lack of ties will not necessarily result in a rebuttal of the presumption.¹⁸⁵

ii. Adaptations in Illinois

In the *Mancine* assessment of biological or adoptive parenthood for William, the parenthood of any other children in the same household seemed irrelevant. In the case, Nicholas evidently did not seek a court order so he could continue to care for Elizabeth, though she allegedly called him “Daddy” (while Miki’s first husband was called “Daddy John”).¹⁸⁶ Further, Miki evidently conceded that “Nicholas was a fit and proper person to share Henry’s joint custody with her.”¹⁸⁷ Any further intrusions into superior parental rights, perhaps founded on other state experiences, should require that courts take into account sibling relationships.¹⁸⁸ Thus, in future cases, the ties between William, Henry, and Elizabeth should be examined in assessing childcare for William.¹⁸⁹

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

184. WYO. STAT. ANN. § 14-2-504(a)(v) (2011). Similar is TEX. FAM. CODE § 160.204(a)(5) (2011) and DEL. CODE. ANN. 13 § 8-204(a)(5) (2009).

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

186. See, e.g., Brief for Respondent-Appellant at 10, *In re Marriage of Mancine v. Gansner*, 2012 IL App (1st) 111138 (No. 10-D-9394).

187. *Id.* at 16. Henry was born on September 16, 2009, after the Nicholas-Miki marriage in May 2009, making Henry simultaneously adoptable by Nicholas and Miki under Wisconsin law, see also *id.* at 9 (Nicholas and Miki moved up their wedding to May 21, 2009, “to prevent any issues” for their adoption of Henry).

188. Compare *Pettaway v. Savage*, 87 A.D. 3d 796 (N.Y. Sup. App. 2011) (stating that nonparent custodian, who lived with the child’s now deceased mother and child’s half-sister, awarded sole custody of the child, with visitation to biological father, as there were “extraordinary circumstances,” including the child’s relationship with her sister), with CAL. WELF. & INST. CODE § 366.26(c)(1)(B)(v) (2012) (stating that termination of parental rights may be avoided by parent when it is shown that such termination would substantially interfere with an existing sibling relationship), and MINN. STAT. §§ 257c.03(1), 257c.03(6)(b)(6), 257c.03(7)(b)(7) (2012) (stating that when “interested third party” or a “de facto” custodian petitions for child custody, court must consider whether the sibling of the child is already in the care of the petitioner).

189. See, e.g., *In re D.C.*, 4 A.3d 1004 (N.J. 2010) (stating that per statute, siblings can petition for visitation with their brothers and sisters who have been adopted by nonrelatives, subject to the avoidance of harm standard); 23 PA. CONS. STAT. § 2733(b) (2011) (“Where siblings have been freed for adoption through the termination of parental rights . . .

Equally irrelevant in *Mancine* were the relationships between William and a nonsibling who was not a (quasi) parent, like Nicholas's father,¹⁹⁰ but who may have grown close in a family way. Exploration of any intrusion into Miki's superior rights should take into account the effects on nonsiblings, at least when family bonds were invited by the only parent, like Miki, with superior rights.

Further, relationships between children, siblings, and other nonparents should be considered simultaneously, not seriatim, when superior parental rights and their waivers or exceptions are assessed for multiple children sharing common familial bonds.¹⁹¹ In doing so, courts would recognize that "the conventional nuclear family . . . is simply not the structure or prevailing condition in many households."¹⁹²

(1) *Expanded Acknowledgements*

Beside adaptations of other states' laws on de facto and presumed parentage and on contracts to adopt, additional parents with superior rights around the time of birth could be recognized in Illinois via expanded opportunities for voluntary acknowledgments of parentage (VAPs). Currently in Illinois, and in other American states, VAPs are chiefly employed by unmarried, heterosexual couples having children born of sex, wherein both the mothers and the purported fathers sign and file forms postbirth with government. Usually, the forms expressly indicate the signers' beliefs that the acknowledging men are natural (or biological or genetic) parents.¹⁹³ Yet, at times, VAPs are used and continue to determine legal paternity when the

and the prospective adoptive parent is not adopting all the siblings, each sibling who is under 18 years of age shall be represented by a guardian ad litem in the development of an agreement."); MICH. CT. R. 3.204(A)(3) (2012) ("[w]henver possible," one child's parenting time case "shall be administered" with the parenting time cases of any other children of the same parents).

190. Allegedly, and undisputed by Miki in her Appellate Court brief, William was named, in part, after Nicholas's father whose pictures appeared in family photos in "William's cubby in his classroom." Brief for Respondent-Appellant at 6, 12, *In re Marriage of Mancine v. Gansner*, 2012 IL App (1st) 111138 (No. 10-D-9394).

191. MONT. CODE ANN. § 40-4-212(c) (2011) (stating that in determining "the parenting plan in accordance with the best interest of the child," the court shall consider "the interaction and interrelationship of the child with the child's . . . siblings and with any other person who significantly affects the child's best interests").

192. *Troxel v. Granville*, 530 U.S. 57, 98 (2000) (Kennedy, J., dissenting).

193. There are a few states allowing prebirth filings and other states that do not explicitly require the signers' beliefs as to natural ties. See Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 70-82 (2010) [hereinafter Parness & Townsend, *Not John Edwards*].

beliefs are shown to be mistaken or even when there were no, or only singular, beliefs at the time of signing as to natural ties.¹⁹⁴

Explicit expansions of VAP opportunities in the mates of birth mothers and birth fathers who have no natural ties might be characterized as new forms of adoption. They could be made available to both opposite sex and same sex couples, formally unrecognized by government, when one member of the couple has a child born of sex.¹⁹⁵ They could be made available shortly before birth.¹⁹⁶ But, postbirth availability is the better approach. In fact, VAP opportunities should best come only after the mates with no natural ties have actually childreared for some designated time. VAP completion would then effectively allow a de facto parent to gain parental status under law. Superior parental rights would not be infringed as the mates with natural ties would need to have invited the nonparent to childrear and sign the VAPs.¹⁹⁷

As compared to traditional postbirth adoptions, any such VAPs should have less—but still some—governmental oversight.¹⁹⁸ For example, VAPs should not be made available when children already have two parents under

194. See, e.g., Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 J. GENDER SOC. POL'Y & L. 467 (2012); see also Woodell v. Lagerquist, No. 2121-11-3, 2012 WL 5866481 (Va. App. Salem Nov. 20, 2012) (cohabiting opposite-sex couple); see also Parness & Townsend, *Not John Edwards*, *supra* note 193, at 72 (“Several state paternity-acknowledgment forms, including those in Alaska and Nevada, do not address whether genetic ties are required, or even preferred, to establish paternity.”).

195. State-recognized couples live within a marriage, civil union or domestic partnership allowed by state law. For an argument that state-recognized couples should also arise under a “registered contractual relationship,” see Erez Aloni, *Registering Relationships*, TUL. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2135562>.

196. If operative before birth, availability should occur only postviability where postviable abortion rights are not recognized. This would respect women’s reproductive choices. As well, it would be more likely that the acknowledging parents intend to and will childrear the later-born children then, when acknowledgements occur earlier (as a couple’s relationship may change during pregnancy).

197. By comparison, there are reasons to allow unwed male mates with actual or possible natural ties to complete VAPs sooner, even before birth. At least where the expectant or actual mothers are unwed, the unwed males have paternity opportunity interests. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983). These interests can, and should, be permitted to be seized by, for example, VAPs, even prebirth. See, e.g., Parness & Townsend, *Not John Edwards*, *supra* note 193, at 97 (“Third-trimester acknowledgments are less likely to interfere” with “constitutional privacy interests of expectant mothers.”).

198. The superior parental rights or parental preference doctrines under state laws recognize parents usually childrear in fashions that serve their children’s best interests. Yet, parental decision making is not unfettered because of “the courts’ role as guardians of the best interests of children” this role is “vouchsafed only when . . . state-created processes relating to parental status are followed.” Bix, *supra* note 138, at 12. State processes for voluntary parentage acknowledgments should promote informed and voluntary parental accessions of their superior rights to others as well as and the informed and voluntary consents by these others who will childrear.

law; when the mate with no natural ties has a record of child abuse or abandonment; or when either one of the mates has not earlier received independent counseling, or at least information as to the effects of a VAP.¹⁹⁹ There should also be rescission options, as well as avenues for challenges by natural fathers or others claiming childcare interests who were uninformed about and excluded through no personal fault from the earlier VAP establishments.²⁰⁰

New VAP opportunities would be unnecessary, perhaps, if expedited adoptions were permitted. For example, in Wyoming, upon finding “the best interest and welfare of the child,” a court may enter a final decree of adoption “if the child has resided in the home of the petitioner for six (6) months.”²⁰¹

(2) Family Relations Contracts

As well, there could be additional nonadoptive and nonbiological parents via family relations contracts, which could include pacts expressly or implicitly allowed by statutes on premarriage, midmarriage, and marriage separation pacts. For example, in premarital agreements, single parents (i.e., where a child has one parent) could be permitted to agree that their future spouses become second parents after some time, assuring childcare interests for the second parents and child support for the children.²⁰² Individual con-

199. Compare, e.g., UTAH CODE ANN. § 78A-6-307(11)(a)(iii) (2012) (An abused or neglected child, removed from parental authority, can only be placed with “a noncustodial parent or a relative of the child” after court conducts “a criminal background check.”). Failure to comply with process requirements should prompt possible sanction, including criminal prosecution and loss of caretaking status, thereby deterring deceit.

200. For an expanded argument on the need for more VAP opportunities for unwed fathers with natural ties, see Parness & Townsend, *Not John Edwards*, *supra* note 193, at 92-104.

201. WYO. STAT. ANN. § 1-22-111(a)(iii) (2011), *applied in In re Adoption of SDL*, 278 P.3d 242 (Wyo. 2012).

202. The Illinois Uniform Premarital Agreement Act, 750 ILL. COMP. STAT. 10/4(8) (State Bar Edition 2011), recognizes premarital pacts can cover “personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.” At least some parental waivers of superior rights, as by stepparent adoptions, are not violative of the public policy and do not constitute crimes. Premarital pacts, however, cannot adversely affect the “right of a child to support.” 750 ILL. COMP. STAT. 10/8(b) (State Bar Edition 2011). While the Uniform Premarital and Marital Agreements Act, as of July, 2012, initially addresses only contracts involving “rights or obligations arising between spouses because of their marital status,” § 2(4), it later states that “a term . . . which defines the rights or duties of the parties regarding custodial responsibility [defined to include “legal custody, parenting time, access, visitation or other custodial right of duty”] is not binding on the court,” thus suggesting custodial responsibility pacts can be binding with judicial approval, § 10(a) and (c). The Comment to § 10 recognizes a court might consider a custodial responsibility pact “by way of guidance.” See also *In re Marriage of Neuchterlein*, 587 N.E.2d 21, 25 (Ill. App.

tract validity and enforcement issues would be made subject to judicial review.

Further, in the absence of express or implicit statutory recognition, there could be additional parents via common law family relations contracts between those who may or may not be formally wed, domestically partnered, or unionized.²⁰³ Expanding upon high court precedent enforcing common law contracts on child support between unmarried, opposite-sex couples involving artificial inseminations leading to births,²⁰⁴ an Illinois appellate court, in its second ruling in *In re T.P.S.* in October 2012, recognized common contract law and promissory estoppel claims involving custody or visitation, as well as support, on behalf of a former same-sex female partner whose one-time mate conceived and bore a child via artificial insemination.²⁰⁵ Earlier appellate court decisions rejecting common law contracts to adopt and similar theories were distinguished as not involving births by artificial insemination.²⁰⁶ Should the acts prompting the births

Ct.1992) (premarital agreement to raise children born into marriage as Lutherans is not always enforceable, but the agreement may be considered “as a factor” in the “custody decision”).

203. See, e.g., *Smith v. Carr*, No. CV 12-3251-CAS (JCGx), 2012 WL 3962904 (C.D. Cal. Sept. 10, 2012) (exploring childcare pacts between the unwed in light of *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), while recognizing a written agreement for partner support might be enforceable as long as it is not premised on meretricious consideration) and *Custody of H.S.H.-K.*, 533 N.W.2d at 434 (“[W]e conclude that public policy considerations do not prohibit a court from relying on its equitable powers to grant visitation apart from sec. 767.245 on the basis of a co-parenting agreement between a biological parent and another when visitation is in a child’s best interest.”). Compare *Christian R.H.*, 794 N.W.2d at 233-34 n.7 (stating while there is common law authority to order child “visitation,” there is no nonstatutory authority to confer “parental rights”). In Illinois already, when certain children are not born of sex, but of assisted reproduction, certain parents can contract under statute to become parents though they have no biological ties. See, e.g., 750 ILL. COMP. STAT. 40/3(a) (State Bar Edition 2010) (upon consent husband of artificially inseminated wife will often be “treated in law as if he were the natural father of a child thereby conceived” even if he was not the semen donor); 750 ILL. COMP. STAT. 47/20(b) (State Bar Edition 2010) (stating two people can become parents under an agreement governed by the Gestational Surrogacy Act if one contributes “at least one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term.”).

204. *In re Parentage of M.J.*, 203 Ill.2d 526 (2003).

205. *In re T.P.S.*, 2012 IL App (5th) 120176 [hereinafter *T.P.S. II*].

206. *T.P.S. II*, ¶ 11. Outside of Illinois comparable contracts involving children not born of sex are also validated at times under common law principles, see, e.g., *S.N. v. M.B.*, 935 N.E.2d 463 (Ohio Ct. App. 2010) (common law guidelines on enforceable surrogacy contracts). At other times, common law contracts are unenforceable. See, e.g., *Recent Cases: Family Law*, 118 HARV. L. REV. 1039 (2005) (noting the tensions between *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004) (no support obligation for nonbirth mother for child born of artificial insemination arising from implied contract between same-sex female couple) and *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (“de facto” parenthood recognized in same-sex partner who sought child visitation).

matter so much? In *T.P.S.*, it was urged that there had been no formal adoption by the non-birth mother only because she and her mate were told that adoption was not legally possible.²⁰⁷

Expanded family relations contracts seem far more problematic than expanded VAP opportunities. Those undertaking such contracts currently have little opportunity for securing court approval of the contracts in advance of any disputes between the contractors. Thus, they are less like marriage separation agreements, which are often incorporated into marriage dissolution judgments,²⁰⁸ and more like cohabitation pacts, which are not recognized currently in Illinois. By contrast, expanded VAPs, like current VAPs, could be deemed to have “the full force and effect of a judgment,”²⁰⁹ as there is governmental recognition at the time of signing, something not usually occurring with family relations contracts.

(3) *Expanded Guardianships*

Beside adaptations of other state laws, expanded VAPs, or newly recognized family relations contracts, earlier guardianship appointments by courts²¹⁰ could be more broadly available to establish parentage, or at least standing to seek to childcare over a parent’s objections, when intimate partner relationships end. Thus, in its initial ruling in the *T.P.S.* case, a lesbian partner, who had been appointed guardian of each of the two children born to her then mate, was allowed to seek continuation of the guardianships under the Illinois Probate Act once the two women ended their relationship.²¹¹ The birth mother’s earlier consents to guardianship overcame the presumptions of superior parental rights,²¹² giving her former partner “a

207. Brief for Catherine D.W. as Amici Curiae Supporting Petitioner-Appellant at 4, *Catherine D.W. v. Deanna C.S.*, 2012 IL App (5th) 120176 (No. 2012-F-2).

208. See, e.g., *In re Coulter*, 2012 IL 113474, ¶ 17 (Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. 5/502(d)-(e) (2010) (stating a joint parenting agreement set forth, or incorporated by reference, in a judgment is “enforceable as both an order of the court and as a contract,” while such an agreement without either attribute “is merely identified and approved” and “must be enforced as a contract”).

209. 750 ILL. COMP. STAT. 45/6(b) (State Bar Edition 2010) (stating paternity established via VAP can serve “as a basis for seeking a child support order without any further proceedings to establish paternity”).

210. Court-appointed guardians thus differ from folks like Nicholas whose girlfriends/wives name them as sole guardians in adoption papers when adoption petitions are pending. See *In re Marriage of Mancine*, 2012 IL App (1st) 111138 (No. 10 D 9594), ¶¶ 4-5 (explaining Nicholas was named sole guardian of William by Miki, as reflected in adoption agent’s report of February 27, 2009, involving Miki’s proposed adoption of William; the adoption was finalized in March 2009).

211. *In re T.P.S.*, 2011 IL App (5th) 100617 (No. 5-10-0617), ¶ 18.

212. *Id.* ¶ 17.

cognizable interest” in the children’s welfare.²¹³ To end the guardianship, the court held the birth mother would only prevail if she showed, by a “preponderance of the evidence, . . . a material change in the circumstances,” “unless the guardian establishes, by clear and convincing evidence, that termination of the guardianship would not be in the best interests of the [child].”²¹⁴

As well, additional guardianship opportunities could be extended to those, like grandparents, who are not involved in intimate partner relationships with parents. Consider, for example, guardianships vesting custody in family members that are stipulated to by parents facing possible parental rights terminations.²¹⁵ Such stipulations could include “the equivalent of a reunification service plan” that would allow the parents to regain custody or undertake other new court-authorized childcare.²¹⁶

Thus, guardianships, whether pursuant to new statutes or case precedents utilizing “implied” authority from the current Probate Code provisions,²¹⁷ could lead to childcare orders in Illinois on behalf of those appointed guardians who act as parents. Such orders would need to serve the

213. *Id.*

214. *Id.* ¶ 16 (quoting the Probate Act provision, effective January 1, 2011, found at 755 ILL. COMP. STAT. 5/11-14.1(b)). It should be noted that when the *T.P.S.* case returned to the appeals court after a remand, about sixteen months later, the court—in an opinion authored by a Justice who had not participated in the initial ruling—focused on common law contract and promissory estoppel theories, and not on the coguardianship agreements to recognize the nonbiological and nonadoptive parent’s standing to seek childrearing. *In re T.P.S.*, 2012 IL App (5th) 120176, ¶ 61.

215. *See, e.g.*, *Yuba Cnty. Health and Human Servs. v. R.K.*, No. C070564, 2012 WL 6013184 (Cal. Ct. App. Nov. 30, 2012) (distinguishing consensual and contested guardianships sought by nonparents); *In re Kaylee H.*, 139 Cal. Rptr. 3d 867 (Cal. Ct. App. 2012) (guardianship in nonparent with parental consent).

216. *Compare, e.g.*, *In re A.S.A.*, 279 P.3d 419 (Utah Ct. App. 2012) (such stipulations nullify parental superior rights, though parents can regain childcare interests when children can be safely returned), *with In re B.R.D.*, 280 P.3d 78 (Col. Ct. App. 2012) (“We are aware that mother and father seek to modify a long-term arrangement under which the couple [prospective adoptees], with the mother’s and father’s consent, have assumed a significant measure of control and care of the boy, and that they have strong bonds with him. However, we perceive nothing within the circumstances of this case that . . . would otherwise call for an elevation of the presumption favoring established custodial environments over the *Troxel* presumption [of superior parental rights].”).

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

basic goals of the Probate Code, chiefly involving the promotion of the best interests of the wards.²¹⁸

The statutory and nonstatutory opportunities for nonparents to be designated child guardians, and thereafter obtain judicially-authorized childcare responsibilities over parental objections, have already been increased in Illinois over the years.²¹⁹ Today, even without parental consent, a guardian may be appointed for a minor where there is no living parent “who is willing and able to make and carry-out day-to-day childcare decisions concerning the minor” or where “the parent or parents voluntarily relinquished physical custody of the minor.”²²⁰

B. EXCEPTIONS TO SUPERIOR PARENTAL RIGHTS

Besides guardians, certain stepparents,²²¹ grandparents,²²² and deceptions about male biological ties,²²³ should there be other exceptions allowing certain nonbiological and nonadoptive caregivers in Illinois to continue to childrear as nonparents over parental objections? Should such exceptions arise even where there were no earlier court orders recognizing the childrearing?²²⁴ Are exceptions warranted when there were earlier family relations contracts that prompted nonbiological and nonadoptive caregivers to childrear, even when such contracts do not lead to parental status? If so,

218. *Karbin*, 2012 IL 112815, ¶ 49.

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

220. *Id.* ¶ 20 (citing 735 ILL. COMP. STAT. 5/11-5(b), which establishes a rebuttable presumption that a parent can make and carry out child care decisions; the presumption can be overcome by a preponderance of the evidence).

221. *See, e.g.*, 750 ILL. COMP. STAT. 5/607(b)(1.5) (West, Westlaw through P.A. 97-1169 of the 2012 Reg. Sess., and through P.A. 98-2 of the 2013 Reg. Sess.) (stepparent visits can be ordered during marriage dissolution proceeding if stepparent lived with child for at least five years and child is at least twelve years old).

222. *See, e.g.*, 750 ILL. COMP. STAT. 5/607(a-5)(3) (West, Westlaw through P.A. 97-1169 of the 2012 Reg. Sess., and through P.A. 98-2 of the 2013 Reg. Sess.) (grandparent visitation order only where grandparent shows parent’s objections “are harmful to the child’s mental, physical, or emotional health”), *applied in* *Flynn v. Henkel*, 880 N.E.2d 166 (Ill. 2007) and *In re Anaya R.*, 2012 IL App (1st) 121101.

223. *See, e.g.*, *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 18 (citing *Koelle v. Zwiren*, 284 Ill. App. 3d 778, 784 (1996)).

224. Things are different where there was an earlier consent decree allowing continued grandparent visits over parental objection, though “changed circumstances” could be used to end all visits. *See, e.g.*, *In re M.M.D.*, 213 Ill. 2d 105, 108-09 (2004) (consolidated cases involving maternal grandparents seeking guardianship of deceased daughter’s child with unwed biological father wherein parties earlier agreed to consent order awarding permanent custody to father and recognizing grandparents’ “specific and detailed visitation rights, telephone access to the child, information about the child’s education and medical care, and authorization to speak with child’s teachers, school personnel, counselors and physicians”).

later parental objections could be made to yield to children's best interests, rather than to yield only when there is likely harm to children if nonparent childcare is ended.

Such caregivers, excepted from superior parental rights, could include additional stepparents, grandparents (i.e., beyond those covered by current statutes), aunts, cousins, or siblings.²²⁵ How about including a long-time live-in boyfriend, girlfriend, or friend (i.e., no sexual relationship)²²⁶ of the biological or adoptive parent?²²⁷

The U.S. Supreme Court has not spoken since *Troxel* on the limits of any additional nonparent childrearing over parental objection. But, some individual opinions in *Troxel* suggest there are others who could be permitted to childrear notwithstanding parental objections. In *Troxel*, nonparent visitation opportunities were deemed possible by the plurality, perhaps without a showing of potential harm;²²⁸ by Justice Stevens, if there was statute with "a plainly legitimate sweep";²²⁹ by Justice Scalia, as long as it was the legislature and not the courts who crafted the "gradations" of non-parents "who may have some claim against the wishes of the parents";²³⁰ and by Justice Kennedy, as long as the nonparent had acted "in a caregiving role over a significant period of time."²³¹

Outside Illinois, there are state laws recognizing childcare acts prompting nonparent childcare interests notwithstanding parental objec-

225. Consider the unusual case of *Palmer v. Burnett*, 384 S.W.2d 204 (Ky. Ct. App. 2012) (a biological birth mother, who gave up her child for adoption by the maternal grandmother, later denied grandparent visitation standing for nonparent visits with the child of her daughter; the birth mother then was only an aunt as she had become her own daughter's stepsister).

226. See, e.g., *E.C. v. J.V.*, 136 Cal. Rptr. 3d 339 (Ct. App. 3d 2012) (girlfriend of mother could seek parental status, assuming she received child into her home and openly held out child as her "natural child," even though she may not have been having sex with the mother when the child was born).

227. In some places, nonparents can acquire childcare opportunities where parents can delegate to them the parents' childcare interests. See, e.g., FLA. STAT. 61.13002(2) (where a parent in the military cannot comply with time-sharing childcare order due to military duties, "parent may designate a person or persons to exercise time-sharing with the child on the parent's behalf," with any such designation "limited to a family member, a stepparent, or a relative of the child by marriage"); Ronald H. Kauffman, *Bleeding Grandparent Visitation Rights*, FLA. B.J. Sept./Oct. 2012, at 42, 42.

228. *Troxel v. Granville*, 530 U.S. 57, 73, 77 (2000).

229. *Id.* at 85 (internal quotation marks omitted).

230. *Id.* at 93.

231. *Id.* at 98; see also *id.* at 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.").

tions.²³² These laws often recognize that certain parental acts—not amounting to abuse, neglect, or abandonment—can waive, or cause the loss of superior parental rights. These laws, constituting exceptions to the superior parental rights doctrine, are often comparable to other American state laws recognizing parental status in those with no biological or genetic ties. Yet, within Illinois, the formalities of adoption and marriage reign despite the ever-rising numbers of cohabitating, unwed couples or grandparents who raise children outside adoption. Even express private contracts regarding childcare seem insufficient, as Illinois is one of only a few American states generally refusing to enforce cohabitation agreements.²³³

As for nonparent childcare interests over parental objections in other states, consider the rather broad South Dakota statute allowing

any person other than the parent of a child to intervene or petition a court . . . for custody or visitation of any child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship.²³⁴

In South Dakota, “[a] parent’s presumptive right to custody” is lost when there is abandonment or persistent neglect; forfeiture or surrender of parental rights to a nonparent; abdication of “parental rights and responsibilities”; or “extraordinary circumstances” where parental custody “would result in

232. Certain nonparents may not have both custody and visitation opportunities. *See, e.g., Morris v. Morris*, 710 S.E.2d 601, 603 (Ga. Ct. App. 2011) (under Georgia Code 19-7-1 and 19-7-3, aunts have custody, but not visitation, opportunities).

233. Natalie T. Lorenz, *Cohabitation Agreements After the Civil Union Act*, ILL. B.J., June 2012, at 308, 308. Illinois policy, founded on *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1209 (Ill. 1979), is opined to be outdated in light of the Civil Union Act’s explicit recognition of family units outside of marriage. *But see, e.g., Costa v. Oliven*, 849 N.E.2d 122, 123-25 (Ill. App. Ct. 2006) (refusing to reject *Hewitt* due to recent “legislative activity and changes in social and judicial attitudes,” while emphasizing “it is for the legislature and not the courts to bring about that change”). Yet, there is some Illinois precedent supporting a former stepparent’s contractual right to childrear over parental objection via the equitable estoppel doctrine; at least where there is harm to the child, an earlier agreement by the parent to allow a former stepparent an opportunity for child visitation, reasonable reliance by the former stepparent on the agreement, and a detrimental “change” to the former stepparent’s position as a result of the agreement. *See, e.g., In re Marriage of Engelkens*, 821 N.E.2d 799, 806 (Ill. App. Ct. 2004). Equitable estoppel is more readily available when the agreement becomes part of a court order, as in *In re Marriage of Schlam*, 648 N.E.2d 345, 348 (Ill. App. Ct. 1995).

234. S.D. CODIFIED LAWS § 25-5-29. Thus, not all de facto parents can qualify as de facto custodians with standing to seek childcare orders. *See, e.g., Truman v. Lillard*, No. 2012-CA-000160-ME, 2012 WL 5372121 (Ky. Ct. App. Nov. 2, 2012) (former same-sex partner of woman who adopted her niece was not a de facto custodian, and failed to show a waiver of superior parental right to custody).

serious detriment to the child.”²³⁵ In Kentucky, a “de facto custodian” of a child can seek custody if he or she was “the primary caregiver” and “financial supporter,” he or she resided with the child for at least six months, and the child is under three.²³⁶ And in Colorado, there is nonparent standing to seek an allocation of parental responsibilities when the nonparent “has had the physical care of a child for a period of six months or more.”²³⁷

Elsewhere, there are special statutes on court orders involving child-care by stepparents (both present and former) that, unlike Illinois, do not require a child at least twelve years old, a marriage of at least five years, and a custodial parent unable to “perform the duties of a parent to the child.”²³⁸ For example, in a Tennessee divorce, “a stepparent to a minor child born to the other party . . . may be granted reasonable visitation rights . . . upon a finding that such visitation rights would be in the best interests of the minor child and that such stepparent is actually providing or contrib-

235. S.D. CODIFIED LAWS § 25-5-29(1)-(4). The statute was applied to permit visitation favoring a man with no biological or adoptive ties. *Clough v. Nez*, 759 N.W.2d 297 (S.D. 2008). See also S.D. CODIFIED LAWS 25-5-33 (parent can be ordered to pay child support to nonparent having “custodial rights”).

236. KY. REV. STAT. ANN. § 403.270 (residence for at least one year is required if the child is older than three). Thus, not all de facto parents can qualify as de facto custodians with standing to seek childcare. See, e.g., *Truman v. Lillard*, No. 2012-CA-000160-ME, 2012 WL 5372121 (Ky. Ct. App. Nov. 2, 2012) (former same-sex partner of woman who adopted her niece was not a de facto custodian and failed to show a waiver of superior parental right to custody); *Spreacker v. Vaughn*, 2011-CA-002011-ME, 2012 WL 5970232 (Ky. Ct. App. Nov. 30, 2012) (paternal great aunt is de facto custodian). There are similar laws in Indiana, *K.S. v. B.W.*, 945 N.E.2d 1050 (Ind. Ct. App. 2011) (employing Indiana Code 31-9-2-35.5), and Minnesota, MINN. STAT. § 257c.03(2) (“de facto custodian”). The phrase “de facto custodian,” and similar phrases, can also be used in other settings. See, e.g., *In re Jesse C.*, No. C069325, 2012 WL 5902301 (Cal. Ct. App. Nov. 26, 2012) (de facto parent is one who cares for child during dependency proceeding; de facto parent status is lost when dependency is terminated).

237. COLO. REV. STAT. § 14-10-123(1)(c). See, e.g., *In re B.B.O.*, 277 P.3d 818 (Colo. 2012) (half-sister has standing); *In re D.T.*, No. 11CA1006, 2012 WL 3755608 (Col. Ct. App. Aug. 30, 2012) (mother’s friend did not gain standing as she “served more of a grandmotherly role, rather than a parental role” and as mother never ceded her parental rights).

238. 750 ILL. COMP. STAT. 5/601 (c)-(A)-(C). Other requirements for stepparent childcare in Illinois include, inter alia, five year residence of the parent and stepparent, the child’s desire to live with the stepparent, and the child’s best interests. 750 ILL. COMP. STAT. 5/601(B), (E), (F). Beside special statutes, there are some common law rights regarding childcare for some former stepparents. See, e.g., *Bethany v. Jones*, 378 S.W.3d 731 (Ark. 2011) (former lesbian partner obtains child visitation order; court relies on *Robinson v. Ford-Robinson*, 208 S.W.3d 140 (Ark. 2005), where stepmother was able to seek visitation with stepson over father’s objection as long as visitation was in the child’s “best interest”). Special stepparent childcare laws, of course, may be coupled with special stepparent adoption laws. See, e.g., LA. CHILD. CODE ANN. art. 1252(A) (no need for even limited home studies in some stepparent adoptions); MONT. CODE ANN. § 42-4-302(1)(a) (stepparent has lived with child and a parent with legal and physical custody for past sixty days).

uting towards the support of such child.”²³⁹ In California, “reasonable visitation to a stepparent” is permitted if “in the best interest of the minor child.”²⁴⁰ In Wisconsin, a stepparent (as well as a grandparent and others) can petition for “reasonable visitation rights” if a court determines that visitation is in the child’s best interests and if there is a preexisting “relationship similar to a parent-child relationship with the child.”²⁴¹ In Oregon, during a dissolution proceeding, a stepparent can obtain custody or visitation by proving that “a child-parent relationship exists,” that the presumption that the parent acts in the child’s best interest has been “rebutted by a preponderance of the evidence,” and that the child’s “best interest” will be served.²⁴² If a stepparent only proves “an ongoing personal relationship” with the child, the parental presumption must be rebutted by “clear and convincing evidence.”²⁴³ In Utah, a former “stepparent”²⁴⁴ can pursue child custody or visitation in a divorce or “other proceeding”²⁴⁵ through showing by “clear and convincing evidence” that, *inter alia*, the stepparent “intentionally assumed the role and obligations of a parent”; formed “an emotional bond and created a parent-child type relationship”; contributed to the “child’s wellbeing”; and showed the parent is “absent” or has “abused or neglected the child.”²⁴⁶ In Delaware, “upon the death or disability of the custodial or primary placement parent,” a stepparent who resided with the deceased or disabled parent can request custody even if “there is a surviving natural parent.”²⁴⁷ And in Virginia, a former stepparent with a “legitimate interest”²⁴⁸ can secure custody of or visitation with a child “upon a showing by clear and convincing evidence that the best interest of the child would be served thereby.”²⁴⁹

239. TENN. CODE ANN. § 36-6-303 (for use of questionable facial validity under *Troxel* without any showings as to, for example, parental acts or child detriment).

240. CAL. FAM. CODE § 3101.

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

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

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

244. UTAH CODE ANN. § 30-5a-102(2)(e) (West 2012).

245. UTAH CODE ANN. § 30-5a-103(4) (West 2012).

246. UTAH CODE ANN. § 30-5a-103(2) (West 2012).

247. DEL. CODE ANN. tit. 13, § 733 (West 2012).

248. VA. CODE ANN. § 20-124.1 (West 2012).

249. VA. CODE ANN. § 20-124.2 (West 2012). *See, e.g.*, *Brown v. Burch*, 519 S.E.2d 403, 412 (Va. Ct. App. 1999) (holding, over mother’s objection, “clear and convincing evi-

Besides statutes, there are case precedents recognizing childcare interests in nonparents who have acted like parents but who are not designated as parents under law. For example, in Ohio, there can be no “shared parenting” contracts between parents and nonparents.²⁵⁰ However, “a parent may voluntarily share with a nonparent the care, custody, and control of his or her child through a valid shared-custody agreement,” which may create for a nonparent “an agreement for permanent shared legal custody of the parent’s child” or an agreement for temporary shared legal custody, like when the agreement is revocable by the parent.²⁵¹ In Minnesota, under certain conditions, there is a common law right to visitation over parental objection for a former stepparent or an aunt who stood “in loco parentis” with the child.²⁵² And in New York, a grandparent has standing to seek visitation with a grandchild over parental objection when “conditions exist which equity would see fit to intervene.”²⁵³

C. CONTINGENT OR RESURRECTED CHILDCARE RIGHTS

Though in *Mancine* Nicholas had no unconditional childcare interests in William (or Elizabeth) upon divorce, might Nicholas nevertheless later be afforded contingent or resurrected interests, even without any adoption, guardianship, foster care placement, or the like? What if Miki died or placed William (or Elizabeth) up for adoption a day after the divorce? Then, there would be no one with superior parental rights regarding William, and William’s (and Elizabeth’s)²⁵⁴ best interests might be well served by permitting Nicholas to childcare. Here, a *de facto* (or comparable)

dence of special and unique circumstances” justify joint custody order favoring father and former stepfather, with the latter “retaining physical custody of the boy”).

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

251. *In re Mullen*, 953 N.E.2d 302, 306 (Ohio 2011). Custody in the nonparent is only allowed under an agreement when the juvenile court deems the nonparent suitable and the shared custody is in the best interests of the child. *Bonfield*, 953 N.E.2d at 312-13; *see also In re LaPiana*, Nos. 93691, 93692, 2010 WL 3042394 (Ohio Ct. App. Aug. 5, 2010) (holding former lesbian partner secures visitation with two children born of assisted reproduction, where there is a written agreement to raise jointly the first child and other evidence of intent to share custody of both children).

252. *Rohmiller v. Hart*, 811 N.W.2d 585, 593 (Minn. 2012).

253. *In re Van Nostrand*, 925 N.Y.S.2d 229, 230 (App. Div. 2011) (citing Domestic Relations Law §72[1]). *See also In re Victoria*, 208 Md. 87, 106-07 (2012) (holding sibling visitations can be ordered over parental objections only when standards for grandparent visits have been met).

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

parenthood doctrine could be made contingent upon Miki's death or abandonment to adoption²⁵⁵ via a special former stepparent statute.²⁵⁶

In an Illinois childcare proceeding today, upon a Miki's death, "a person other than a parent" can seek custody of a William who "is not in the physical custody of one of his parents."²⁵⁷ Today, there is no special statute (or presumption) favoring a former stepparent like Nicholas.²⁵⁸ But, there is a statute mandating "visitation rights" for the grandparents, regardless of

255. Comparably, at times when a parent places a child for adoption with a certain couple, that parent can later seek renewed custody if the adoption fails. Here, the termination of parental rights is contingent. *See, e.g., A.D.R. v. J.L.H.*, 994 So. 2d 177, 183 (Miss. 2008). As well, when a designated adopting person or couple (like the grandparents) die, at times a parent may not be able to resurrect fully her superior rights, but might be given an opportunity to reclaim custody, as upon a showing by clear and convincing evidence that custody is in the child's best interests. *See, e.g., D.M. v. D.R.*, 62 So. 3d 920 (Miss. 2011).

256. Note that not all parental abandonments necessarily mean the abandoning parent has no further contacts with child. At times when parental interests are terminated, the terminated parents may have significant opportunities for further contact when the children – upon termination – must be considered for custody placement with "relatives." *See, e.g., VA. CODE ANN. § 16.1-283(A)* (West 2012) (stating that a termination order should be followed by a custody order which must give "consideration to granting custody to relatives of the child, including grandparents"), *applied in Bagley v. City of Richmond, Dep't of Soc. Serv.*, 721 S.E.2d 21 (Va. Ct. App. 2012) (holding that immediate relatives do not include the parents of the girlfriend of the natural mother's brother). Consider, as well, 705 ILL. COMP. STAT. 405/1-5(2)(a) (State Bar Edition 2006) (stating that a previously appointed relative caregiver interested in minor has a right to be heard in certain childcare proceedings involving the minor).

257. 750 ILL. COMP. STAT. 5/601(b)(2) (State Bar Edition 2005).

258. *See, e.g., 755 ILL. COMP. STAT. 5/11-3(a)* (State Bar Edition 2005); 755 ILL. COMP. STAT. 5/11-5(a), (a-1), (b) (2011) (stating guardianship qualifications when legal parents are not available include a "best interest" test and no preference for a former stepparent, or "de facto" parent, with perhaps some preference for one who is designated in writing by a parent or parents as a guardian should the parent or parents die). Any special statute need not necessarily grant standing to a former stepparent to seek a childcare order; it may grant simply a right to be heard, with an opportunity to seek standing later in order to pursue renewed custody/visitation. *See, e.g., 705 ILL. COMP. STAT. 405/1-5(2)(a)* (State Bar Edition 2006) (any "relative caregiver" "has the right to be heard" in a child neglect and shelter proceeding, though not the right to be a party). For a review of American state laws on parental testamentary appointments of child guardians, see Alyssa A. DiRusso & S. Kristen Peters, *Parental Testamentary Appointments of Guardians for Children*, 25 QUINNIPIAC PROB. L.J. 101 (2012), which urges statutory reforms so that parental wishes will more likely be followed. Not only is there no special statute on former stepparents but also there are times when former stepparents seem excluded from possible consideration for undertaking the care of a former stepchild. *See, e.g., 20 ILL. COMP. STAT. 505/7(b)* (State Bar Edition 2013) (stating that the Department of Children and Family Services may consider a child's placement with a relative, who includes "the child's step-father, step-mother, or adult step-brother or step-sister," but not a former step-father or step-mother).

their earlier childcare, “unless it is shown that such visitation would be detrimental to the best interests and welfare of the minor.”²⁵⁹

If Miki were to place William up for adoption a day after the divorce, Nicholas’s standing would not be recognized in Illinois today, as notice of a placement for adoption is required only for “any person who is openly living with the child or the child’s mother at the time the proceeding is initiated and who is holding himself out to be the child’s father.”²⁶⁰ So, if Miki had a brand new boyfriend, he would have standing, but Nicholas would not.²⁶¹

Nicholas’s failure to formally adopt William causes both Nicholas and William to lose any chance to pursue a continuing familial relationship upon Miki’s death or upon Miki’s placement of William for adoption, regardless of William’s best interest. Yet, in many parental rights termination settings, bad acting parents get second chances, as where parent-child reunification obligations are imposed on the state and where there is no termination of parental rights unless a child’s best interest is served.²⁶² So, many marginal parents maintain their superior rights notwithstanding their earlier parenting failures and their children’s contrary interests. But, many “de facto” parents and their children have their families destroyed notwithstand-

259. 755 ILL. COMP. STAT. 5/11-7.1 (State Bar Edition 2012) (“[R]easonable visitation rights may be granted to any other relative of the minor or other person having an interest in the welfare of the child.”). New grandparent visits also arise upon the death of a parent when the grandparents had earlier secured visits during a marriage dissolution proceeding and later seek to modify the divorce court order. *See, e.g.,* *Moreno v. Perez*, 363 S.W.3d 725, 744 (Tex. Ct. App. 2011). By contrast, grandparents, upon the death of parents, can easily acquire custody of their grandchildren via guardianship appointments when the deceased parents provided for such custody in written instruments. *See, e.g.,* UTAH CODE ANN. § 75-5-202.5 (West 2012) (stating that no notice is required to anyone before appointment becomes effective), *applied in In re T.D.G.*, 2012 UT 88, 29 P.3d 279 (2012) (Utah Sup. Ct. Standing Order No. 4).

260. 750 ILL. COMP. STAT. 50/7(c)(e) (State Bar Edition 2013). As there was a baptism record, *see also* 750 ILL. COMP. STAT. 50/7(c)(f) (State Bar Edition 2013) (stating that notice is required to one “identified as the child’s father by the mother in a written, sworn statement”). As to the need for Nicholas’s consent to any later adoption by another, consider 750 ILL. COMP. STAT. 50/8(b)(vi) (State Bar Edition 2011) (stating that consent to adoption of child over six months is required of “father” who “openly lived with the child” and “openly held himself out to be the father of the child”), 750 ILL. COMP. STAT. 50/8(a)(2) (State Bar Edition 2011) (stating that consent is not required, however, when the father is neither “the biological or adoptive father of the child”). Even if Nicholas’s consent is deemed required under this provision, the power to veto is undercut as there is no explicit duty to give Nicholas any notice.

261. It would be wrong to equate Miki and Nicholas here, as only Miki gave William up for adoption. And, it is not necessarily true that William’s best interests would be better served by placement with Miki’s new boyfriend rather than with Nicholas.

262. *See, e.g., In re Destiny R.*, No. H12CP08011921A, 2011 WL 3930352, at *9 (Conn. Super. Ct. Aug. 11, 2011).

ing both unquestioned love and healthy familial relationships because formal adoptions were not finalized.

The Proposed MDM Act recognizes some standing for current step-parents, former stepparents, and others who childcared should a Miki die or should a Miki place a William (or an Elizabeth) for adoption. However, many significant caregivers remain without voices during the proposal's hearing on "allocation of parental responsibilities."²⁶³ The proposal recognizes both a legal parent, defined as "a biological or adoptive parent,"²⁶⁴ and an "equitable parent," defined as one who is not a legal parent but who is obligated by court order to pay child support; is a stepparent; lived with the child for at least two years and reasonably believed he or she was "the child's biological parent"; or "lived with the child since the child's birth or for at least 2 years, and held himself out as the child's parent . . . under an agreement with the child's legal parent" or legal parents.²⁶⁵ As a stepparent includes one "who was married to a legal parent,"²⁶⁶ the Proposed Act could help a Nicholas, as an "equitable parent," should a Miki die. The proposal allows an equitable parent to file a petition for allocation of parental responsibilities if "a legal parent is deceased or disabled and cannot perform caretaking functions with respect to the child."²⁶⁷ At least as to an Elizabeth, however, there seemingly is a living legal parent, a John Mancine, if a Miki died, so that a Nicholas could not seek an allocation regarding childcare.

Under the Proposed MDM Act, an equitable parent can also seek "an allocation of parenting time" if the relationship between the equitable and legal parent has ended or may end via a court case.²⁶⁸ Allocations of parental responsibilities involve more significant childcare opportunities than allocations of parenting time.²⁶⁹ Seemingly, a Nicholas can seek an alloca-

263. Proposed MDM Act, 750 ILL. COMP. STAT. 5/601.2.

264. Proposed MDM Act, 750 ILL. COMP. STAT. 5/600.

265. Proposed MDM Act, 750 ILL. COMP. STAT. 5/600.

266. Proposed MDM Act, 750 ILL. COMP. STAT. 5/600.

267. Proposed MDM Act, 750 ILL. COMP. STAT. 5/601.2(b)(2).

268. Proposed MDM Act, 750 ILL. COMP. STAT. 5/601.2(b)(3), with parenting time defined in 750 ILL. COMP. STAT. 5/600. As compared to parenting "responsibilities" or "time," in Ohio noncustodial family members, including grandparents and other relatives, may seek "reasonable companionship or visitation rights" when a related custodial parent dies, OHIO REV. CODE ANN. 3109.11 (West 2011), as long as *Troxel* limits are met, *Oliver v. Feldner*, 776 N.E.2d 499, 509 (Ohio Ct. App. 2002) (holding that *Troxel* limits were not met); *In re K.P.R.*, 966 N.E.2d 952, 956-57 (Ohio Ct. App. 2011) (holding that *Troxel* limits may have been met where "relative" of deceased mother was a stepfather who was awarded visitation, in a setting where the custodial biological father objected but had earlier waived nonjurisdictional arguments regarding the visits).

269. Proposed MDM Act, 750 ILL. COMP. STAT. 5/600 (parental responsibilities include both "parenting time" and "significant decision-making responsibilities with respect to a child").

tion of parenting time for a William (or an Elizabeth) under the proposal. Yet, if he never married a Miki, a Nicholas would be barred because there was less than a two-year period of cohabitation.²⁷⁰

Should a Miki die soon after divorce outside of Illinois, a Nicholas or even a William Gansner, Nicholas's father and putative paternal grandfather, would fare better in seeking a childcare order. For example, if a Miki died in Arizona, a Nicholas could obtain custody of an Elizabeth if he stood "in loco parentis" to Elizabeth,²⁷¹ if it would be "significantly detrimental" to Elizabeth to be placed in John Mancine's custody,²⁷² and if there is "clear and convincing evidence that awarding custody" to John Mancine is not in Elizabeth's "best interests."²⁷³ A William Gansner could even obtain "reasonable visitation rights" to Elizabeth in Arizona if he also stood "in loco parentis" and visitation would serve Elizabeth's "best interests."²⁷⁴ If a Miki died in Utah,²⁷⁵ either a Nicholas or a William Gansner²⁷⁶ could seek custody or visitation with a William (or an Elizabeth) by showing, inter alia, intentional assumption of "the role and obligations of a parent"; "an emotional bond" and "a parent-child type relationship"; emotional or financial contribution to the child's well-being; and the child's best interests.²⁷⁷

As well, should a Miki place a William (or an Elizabeth) for adoption outside of Illinois soon after divorce, a Nicholas or even Nicholas's father would sometimes fare better, as where each is afforded preferential standing as a prospective adopter. In Utah, when a child is placed for adoption, while a married, opposite sex couple is preferred, a child may be placed

270. Nicholas and Miki began cohabitating in September 2008, and Miki sought marriage dissolution in August 2010. As well, Elizabeth already had two legal parents—Miki and John Mancine. Compare MONT. CODE ANN. § 40-4-221 (West 2011), and MONT. CODE ANN. § 40-4-211(6) (West 2011) (stating that "[u]pon death of a parent," a nonparent who had established with the child a child-parent relationship can seek "a parenting plan hearing"), with COLO. REV. STAT. § 14-10-123(1)(b), (c) (West 2012) (stating that a nonparent can seek "allocation of parental responsibilities" if nonparent "has had the physical care of a child" for more than 182 days, as long as action is commenced within 182 days "after the termination of such physical care").

271. ARIZ. REV. STAT. ANN. § 25-415(A)(1) (West 2013). This status is achieved by being "treated as a parent by the child" and forming "a meaningful parental relationship with the child for a substantial period of time." ARIZ. REV. STAT. ANN. § 25-415(G)(1) (West 2013).

272. ARIZ. REV. STAT. ANN. § 25-415(A)(2) (West 2013).

273. ARIZ. REV. STAT. ANN. § 25-415(B) (West 2013). If not custody, Nicholas could be awarded "reasonable visitation" on a lesser showing. ARIZ. REV. STAT. ANN. § 25-415(C) (West 2013) ("in loco parentis" and "best interests").

274. ARIZ. REV. STAT. ANN. § 25-415(C) (West 2013).

275. Miki's death would need to have her deemed "absent." UTAH CODE ANN. § 30-5a-103(2)(g)(1) (West 2012).

276. UTAH CODE ANN. § 30-5a-102(2)(d), (e) (West 2012) (former step-parent and step-grandparent).

277. UTAH CODE ANN. § 30-5a-103(2)(a), (b), (c), (e) (West 2012).

“with a person who has already developed a substantial relationship with the child.”²⁷⁸

V. CONCLUSION

After *Mancine*, a question lingers for Illinois legislators and judges: “Is filial love something to be dangled and then snatched away, promised and then reneged upon?”²⁷⁹ The question is difficult; rules regarding “dangled and snatched away” widgets are more challenging than rules regarding “dangled and snatched away” children. Those with no natural or formal adoptive ties who have developed “familial bonds” with children should have childcare interests (and perhaps superior rights) not held by nonowner widget users who have bonded with someone else’s widgets. Additional statutory guidelines on childcare interests for those with no natural or adoptive ties are necessary.²⁸⁰ As occurs in other family settings, like premarital and open adoption pacts,²⁸¹ certain family-related agreements on childcare deserve explicit statutory recognition.²⁸² Expanded VAP and guardianship

278. UTAH CODE ANN. § 78B-6-117(4)(c) (West 2012). *But see In re Adoption of I.M.*, 288 P.3d 864, 869 (Kan. Ct. App. 2012) (holding that former stepparent could not adopt child via “second-parent adoption” afforded stepparent and that the court is reluctant to allow adoption where statutory language is “clear and unambiguous”).

279. *In re Mullen*, 953 N.E.2d 302, 311 (Ohio 2011) (Pfeifer, J., dissenting).

280. The desirability of greater certainty and comprehensive coverage, as well as separation of powers concerns, means these guidelines should normally originate in statutes. *See, e.g., Kitchen v. Kitchen*, 953 N.E.2d 646, 649 (Ind. Ct. App. 2011) (rejecting visitation standing in maternal aunt and uncle over father’s objection where the mother had died, and recognizing grandparent visitation standing has come by statute, former stepparent visitation standing has come by precedent, and former foster parent visitation standing has been rejected by precedent).

281. *But see Bix*, *supra* note 138, at 19 (recognizing that in all these areas, “a significant part of the resistance to private ordering comes from legitimate concerns that courts and legislatures have in protecting vulnerable parties, as well as reasonable worries regarding the long-term societal effects of (encouraging) altered forms of marital or parental status”). One example is PA. STAT. ANN. §2733(a) (West 2011) (“A prospective adoptive parent of a child may enter into an agreement with a birth relative of the child to permit continuing contact or communication between the child and the birth relative or between the adoptive parent and the birth relative.”).

282. In the absence of an express Illinois statute, agreements on child care between parents and nonparents (including former stepparents, grandparents, former cohabitants, and others—like aunts and uncles), the nonparents who wish to continue child care over parental objections seemingly must utilize the narrow range of common law precedents on equitable estoppel of the parents, deeming such agreements important, if not dispositive, where there is shown detrimental reliance, earlier judicial recognition of the agreements, children’s best interests, and, perhaps, harm to children. *See, e.g., In re Marriage of Engelkens*, 821 N.E.2d 799, 804, 806 (Ill. App. Ct. 2004) (distinguishing *In re Marriage of Schlam*, 648 N.E.2d 345 (Ill. App. Ct. 1995)).

opportunities should also be available to establish new avenues of childcare.

Childcare interests should sometimes be recognized as though there were no formal or informal contracts or VAPs, at least when the legal parent(s) facilitated familial bonds and when bond preservation furthers the child's best, or perhaps compelling, interest, even over the objection of the legal parent(s).²⁸³ Preservation of familial bonds can be secured through either expanded definitions of legal parenthood or expanded opportunities for judicially-monitored childcare by nonparents. The Proposed Parentage Act and Proposed MDM Act are steps in the right direction. But even with their enactments, more statutory law (and some common law) will be needed to promote additional "familial love" for deserving children and all who care for them. Beyond these proposals, the General Assembly should address a broader array of "established familial or family-like bonds,"²⁸⁴ or allow expressly authorized judicial action, as courts will often "decline to go where the legislature has not led."²⁸⁵

283. *See, e.g., Sides v. Ikner*, 730 S.E.2d 844, 853-54 (N.C. Ct. App. 2012) (holding that there is a need to look at legal parents' conduct and intentions, not just nonparent acts, to insure protection of rights emanating from "paramount parental status").

284. *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

285. *In re Adoption of A.W.*, 796 N.E.2d 729, 736 (Ill. App. Ct. 2003).