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Constitutional Constraints on Second Parent Laws

JEFFREY A. PARNESS*

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I. INTRODUCTION

American state parentage laws have traditionally required biological or adoptive ties and no more than two parents for any one child at any one time.¹ Biological ties were demonstrated by giving birth or by evidence that one's sperm prompted a birth from consensual sex.² Adoptive ties were

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1. Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769, 771 (1999); see Debra E. Guston & William S. Singer, *The State of Gay and Lesbian Adoption in New Jersey*, 239-APR N.J. LAW. 35, 37-38 (2006).

2. See Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 883, 902 (2000).

established by completion of formal procedures by those desiring to parent, where prospective adopters were assessed for parental worthiness by the state; therein the parental interests of any existing parents were seriously respected, often by affording them veto powers.³ While the two parent policy largely continues,⁴ second parents with no biological or formal adoptive ties and with no rights under a valid child creation pact predating birth (as with assisted reproduction, with or without a surrogate) are increasingly recognized for children (long after birth) with only one parent.⁵ At times, a woman or a man becomes a second parent under law, along with the birth mother, because natural ties are presumed, though sometimes impossible, as when a second woman holds out a child as her own. Other times, a man or a woman becomes a second parent via an informal adoption, as in *de facto* parenthood, where there is no state assessment; little respect for the actual wishes of the existing parent about second parenthood; and, at best, notice to the state only after the fact.

3. Veto powers were usually denied, however, to unwed biological fathers who had not seized their constitutionally-protected parental opportunity interests in a timely fashion under state adoption laws, thus never achieving superior parental rights. *Lehr v. Robertson*, 463 U.S. 248, 267 (1983); *see, e.g., In re Baby Girl S.*, 407 S.W.3d 904, 918 (Tex. Ct. App. 2013) (in some states, maternal concealment of pregnancy will not excuse unwed biological father from seizing paternity interest in a timely fashion).

4. *But see, e.g., Smith v. Cole*, 553 So.2d 847, 854 (La. 1989) and *T.D. v. M.M.M.*, 730 So.2d 873, 877 (La. 1999) (via common lawmaking, court recognizes that three different parents of a child born of sex (a husband, the natural father, and a wife/birth mother) may all childrear per court order); DEL. CODE ANN. tit. 13, § 8-201(c)(1) (West 2013) (*de facto* parent “has had the support and consent of the child’s parent or parents who fostered the formation and establishment of a parent-like relationship between the child and *de facto* parent”), though found unconstitutional if applied to establish three parents, *Bancroft v. Jameson*, 19 A.3d 730, 731 (Del. Fam. Ct. 2010); and *McAllister v. McAllister*, 779 N.W.2d 652, 662 (N.D. 2010) (birth mother granted “decisionmaking responsibility and primary residential responsibility,” while former stepfather (as psychological parent) and biological father each granted visitation). A third parent can also be granted at least visitation, if not custodial, interests where the two designated legal parents do not object. *See, e.g., In re Parentage of J.W.*, 2013 IL 114817 ¶ 53 (determining best interests, not serious endangerment, standard governed visitation request by biological father where birth mother had custody and voluntary parentage acknowledgement father had visitation rights and child support obligations). The prospect of three parents with statutory childcare standing, as proposed in California in 2012, was criticized in Elizabeth A. Pfenson, *Too Many Cooks in the Kitchen?: The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California’s Recently-Proposed Multiple-Parents Bill*, 88 NOTRE DAME L. REV. 2050-2058 (2013). Yet in 2013, California recognized such possible standing, CAL. FAM. CODE § 3040(d) (West 2014), as well as third parent child support duties, CAL. FAM. CODE § 4057(b)(5)(D) (West 2014). On when three (or more?) parents might be recognized see CAL. FAM. CODE § 7612(c) (West 2014) (“court may find . . . more than two persons with a claim to parentage . . . if . . . recognizing only two parents would be detrimental to the child”). When there are initially three parents in California, and no detriment to the child if there are only two parents, the court is required to select just two parents based on the “weightier considerations of policy and logic.” *See, e.g., In re M.C.*, 123 Cal. Rptr. 3d 856, 876-77 (Cal. Ct. App. 2011) (employing CAL. FAM. CODE § 7612(b) (West 2014)).

5. *See, e.g., Frazier v. Goudschaal*, 295 P.3d 542, 545-46 (Kan. 2013) (enforcement of prebirth coparenting agreement between unwed birth mother, who employed assisted reproduction methods, and her same sex partner).

Where a child has one biological or adoptive parent, the recognition of a second parent with no biological, formal adoptive, or child creation pact ties, but with standing to seek childcare,⁶ necessarily impacts the childcare prerogatives of the existing parent. As these prerogatives are constitutionally protected, the second parent cannot be state-recognized over the biological/adoptive/assisted reproduction parent's objection without a showing going beyond the child's best interests.⁷ First, parent constraints on second parent designations are guided by the "superior rights" doctrine.⁸ The federal constitutional demands of this doctrine are unclear, however, given the split opinions of the United States Supreme Court in *Troxel v. Granville*.⁹

As recognitions of childcare interests for second parents necessarily impact existing parents' constitutional interests "in the care, custody and control of their children," what standards should guide? Should the standards follow the principles on losses of other constitutional interests? If so, which interests, since the standards vary between interests? Further, should the standards on second parent childcare vary depending upon whether the child was born of sex to the existing parent, of assisted reproduction to the existing parent, or of assisted reproduction to a surrogate who is not the existing parent?

Where a child has one biological, adoptive, or assisted reproduction parent, the recognition of a second parent, with no biological or formal adoptive ties and with no child creation pacts who can be subject to a child support order, implicates the federal constitutional interests of the second parent. These interests include both procedural protections, including notice and hearing before any second parent designation, and substantive protections, including at least a rational public policy.

What standards should guide child support orders against newly-designated second parents? As to process, the often-utilized three factor balancing test for federal procedural due process clearly operates.¹⁰

6. Childcare orders herein include, but are not limited to, orders regarding custody, visitation, and allocation of parental responsibilities. *See, e.g.*, COLO. REV. STAT. § 14-10-123(1) (West 2012) ("allocation of parental responsibilities") and COLO. REV. STAT. § 14-10-124(1.5) (West 2013) ("allocation of parental responsibilities" includes "parenting time and decision-making responsibilities") and S.D. CODIFIED LAWS § 25-5-29 (2002) (custody and visitation orders).

7. Lawrence Schlam, *Children "Not in the Physical Custody of One of Their Parents": The Superior Rights Doctrine and Third-Party Standing Under the Uniform Marriage and Dissolution of Marriage Act*, 24 S. ILL. U. L.J. 405, 406-07 (2000).

8. *Id.*

9. 530 U.S. 57 (2000).

10. *Mathews v. Eldridge*, 424 U.S. 319, 339-49 (1976) (before governments decide to deprive an individual of life, liberty, or property, they must weigh private interests affected by any governmental action; the governmental interest, including the burdens on government in providing greater process; and the risk of an erroneous deprivation without additional process and the availability of a substitute process that would reduce the risk). *See, e.g.*, *Jarmon v. Comm'r of Soc. Serv.*, 807 A.2d 1109, 1114, 1117

Substantively, the imposition of child support obligations will be fundamentally unfair when the second parent does not have, or should not reasonably have, some level of understanding of a possible later financial obligation.¹¹

After reviewing the uncertainties under *Troxel*, this paper will examine current American second parent laws on childcare and child support. As to each there are significant variations.¹² The paper will conclude by exploring the federal constitutional constraints on second parent childcare and child support.¹³

(Conn. Super. Ct. 2002) (no additional predeprivation process is due when statute allows seizure via a lien of property of a parent “with an arrearage of court-ordered support”).

11. Consider, e.g., a new second parent whose support status only became possible long after he/she established a relationship with the child, as when an existing, but absent, parent dies during the new second parent’s relationship with the child’s other parent and with the child.

12. The paper will chiefly focus on second parent laws outside of parental designations prebirth and at birth when assisted reproductive technologies (ART) are employed, with or without surrogates.

13. The paper will not examine current American nonparent childcare and child support laws where there are also significant variations as well as federal constitutional constraints. Nonparent laws, as with second parent laws, prompt both superior parental rights and due process issues. Admittedly, it is difficult sometimes to distinguish between second parent and nonparent laws if one looks beyond labels to effects. *See, e.g.*, *In re S.H.*, 71 A.3d 973, 974 (Pa. Super. Ct. 2013) (“permanent legal custody” award regarding children to maternal grandmother over natural father’s objection did not foreclose father’s later petition for primary custody as it did not terminate natural father’s superior parental rights) and *Philbrook v. Theriault*, 957 A.2d 74, 79 (Me. 2008) (grandparent can be designated de facto parent and awarded custody over natural parent’s objection where grandparent, while applicable “only in limited circumstances,” undertook “a permanent, unequivocal, committed, and responsible parental role in the child’s life” with the understanding and acceptance of any existing parent). While similar issues arise regarding nonparents and second parents, there are also significant differences suggesting separate treatment is needed; differences include legal failures to place nonparents on equal footing with second parents in either childcare or support settings. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/607 (West 2013) and 750 ILL. COMP. STAT. ANN. 5/602.1(b) (West 2010) (grandparent may only seek visitation while a parent may seek joint custody in a marriage dissolution proceeding).

The paper will also not examine current American parentage laws extending beyond biological and adoptive parents in settings beyond childcare and child support. *See, e.g.*, *McManus v. Hinney*, 143 N.W.2d 1, 1-2 (Wis. 1966) (issue as to whether stepparent was subject to parental immunity doctrine [since abolished] when sued by stepchildren for injuries in car accident, and thus whether stepparent’s insurer could be liable; remand for hearing on whether stepparent stood in loco parentis); *In re Turer’s Estate*, 133 N.W.2d 765, 765 (Wis. 1965) (issue as to whether stepparent could recover from his wife’s estate the past due child support owed by the wife’s former husband; majority found stepparent could recover as otherwise there would be an unjust enrichment of the estate); and *In re Brianna M.*, 163 Cal.Rptr.3d 665, 688 (Cal. Ct. App. 2013) (issue as to whether rebuttal of paternity presumption operates comparably in paternity and dependency settings; court finds only in dependency is “presumed fatherhood . . . a function of a man’s commitment to parental responsibilities, *not* his biology”).

II. UNCERTAIN BOUNDARIES ON SECOND PARENT CHILDCARE AND CHILD SUPPORT ORDERS

A. *Childcare Boundaries*

In *Troxel* in 2000, four United States Supreme Court justices determined that “the liberty interest . . . of parents in the care, custody, and control of their children” (herein childcare interests) generally forecloses states from compelling grandparent childcare over parental objections.¹⁴ States typically advance these liberty interests via a superior rights doctrine.¹⁵ Yet these four justices recognized in *Troxel* that “special factors” might justify a state allowing judicial override of parental objections as long as a parent’s contrary wishes on childcare were accorded “at least some special weight.”¹⁶ The plurality, and one concurring justice, reserved the question of whether any “nonparental” childcare must “include a showing of harm or potential harm to the child” without such childcare.¹⁷ The concurring justice did hint, however, that at least some nonparental childcare could be based solely on a preexisting “substantial relationship” between a child and a nonparent and “the State’s particular best interests standard.”¹⁸

A dissenter observed, not unlike the concurring, that a best interest standard might be constitutional where the nonparent acted “in a caregiving role over a significant period of time,”¹⁹ hinting that such a nonparent might

14. *Troxel*, 530 U.S. at 65 (Justice O’Connor, joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer [hereinafter plurality opinion]) (“Perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *id.* at 68-69 (“So long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”).

15. Sacha M. Coupet, “*Ain’t I A Parent?*”: *The Exclusion of Kinship Caregivers From the Debate Over Expansions of Parenthood*, 34 NYU REV. L. & SOC. CHANGE 595, 615-18 (2010).

16. *Troxel*, 530 U.S. at 70 (plurality opinion) (“If a fit parent’s decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent’s own determination”).

17. *Id.* at 73 (plurality opinion)

We do not consider . . . whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting [nonparent] visitation.”); *id.* at 77 (Souter, J., concurring) (“There is no need to decide whether harm is required.

Id.

18. *Id.* at 76-78 (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).

19. *Id.* at 98-99 (Kennedy, J., dissenting)

even be afforded “de facto” parent status.²⁰ A second dissenter noted the possibilities for both “gradations” of nonparents and carefully crafted definitions of parents.²¹ He believed new laws generally should originate in the states, preferably “in legislative chambers or in electoral campaigns” and not in courts, as this would be “entirely compatible with the commitment to representative democracy.”²² A third dissenter added that because at least some children in nonparent childcare settings likely “have fundamental liberty interests” in “preserving established familial or family-like bonds,”²³ nonparents seeking childcare orders must be distinguished by whether there is a “presence or absence of some embodiment of family.”²⁴

Cases are sure to arise . . . in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto. . . . In the design and elaboration of their visitation laws, States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances.

Id.

20. *Troxel*, 530 U.S. 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.”).

21. *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.”). Gradations of parents are suggested in AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 (2002) (recognizing a legal parent, a parent by estoppel, and a *de facto* parent).

22. *Troxel*, 530 U.S. at 91-93 (expressing no desire for a “new regime of judicially prescribed, and federally prescribed, family law”). A more limited view of the need for legislative deference finds common law precedents on nonparent and new parent childcare are unavailable when statutes already significantly address such childcare, though particular litigants are not included in the statutory scheme. *See, e.g.*, *In re Custody of B.M.H.*, 315 P.3d 470, 488 (Wash. 2013) (Wiggins, J., dissenting in part).

23. *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting). *But see* *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (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”) and *In re Meridian H.*, 798 N.W.2d 96, 99, 107 (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). James G. Dwyer advocates for such interests for children, in either a continuing parent-child or parental-like relationship or a continuing sibling or sibling-like relationship. *See* JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 4 (Cambridge University Press 2006). The book develops

a general theory of what children are morally entitled to as against the state, and correlatively what moral duties the state owes to children, when the state takes it upon itself to make authoritative decisions about the legal family relationships children will have and about which of a child’s social relationships will receive legal protection.

See id. *See also* James G. Dwyer, *Parents’ Self-Determination and Children’s Custody: A New Analytical Framework for State Structuring of Children’s Family Life*, 54 ARIZ. L. REV. 79 (2012). And *see* Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 930 (2012).

After *Troxel*, important federal constitutional questions remain concerning the limits not only on court-compelled grandparent (and other nonparent²⁵) childcare orders,²⁶ but also on second parent designations unrelated to biology, formal adoption or assisted reproduction pacts.²⁷ Some justices in *Troxel*, recognized that states might afford second parent status, rather than nonparent childcare standing, to grandparents and to others who earlier childcared without court order.²⁸ The constitutional questions are particularly challenging when second parent status was never actually contemplated by first parents, as when single parents only thought that their then live-in companions (usually in intimate relationships) were doing “chores” that aided children in the household.²⁹

B. Child Support Boundaries

Because second parent designations often yield not only childcare opportunities, but also child support responsibilities,³⁰ important federal constitutional questions also arise regarding the limits on child support orders against newly-designated second parents.³¹ Such orders are

Lastly, states should consider whether full or half-siblings separated by divorce, the end of a nonmarital relationship, or a parent’s death will have an enforceable right to contact, communication, and visitation, unless a court determines that such connection would be contrary to the best interests of one or more siblings. Such a right would protect and promote sibling relationships, albeit at the cost of some infringement on parental prerogatives. In light of the constitutional constraints that *Troxel* appears to impose, states that decide to create such an enforceable right to sibling visitation might specify that courts will give ‘material weight’ or more to parent’s assessment of her child’s best interests.

See also *Frazier*, 295 P.3d at 557 (denying children opportunities to have two parents and to continue to be reared by a heretofore nonparent under law, “impinges upon the children’s constitutional rights”).

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

25. See, e.g., *In re A.M.K.*, 351 Wis.2d 223, at ¶19 (assumes, as do parties, that *Troxel* grandparent guidelines apply to other nonparents seeking childcare, like former same sex parents).

26. Of course, beyond federal constitutional constraints there can be independent state constitutional constraints more protective of parental authority. See, e.g., *Hawk v. Hawk*, 855 S.W.3d 573, 582 (Tenn. 1993) (state constitutional right to privacy protects parental caretaking as long as parents’ “decisions do not substantially endanger the welfare of their children”).

27. *Troxel*, 530 U.S. at 73 (plurality opinion).

28. *Id.* at 85.

29. Robin Fretwell Wilson, *Limiting the Prerogatives of Legal Parents: Judicial Skepticism of the American Law Institute’s Treatment of De Facto Parents*, 25 J. AM. ACAD. MATRIM. LAW. 477, 486-88 (2013). There are also additional questions involving certain alleged second parents, especially one-time stepparents. See, e.g., *B.M.H.*, 315 P.3d at 483 (“satisfying the consent [to de facto parent status] prong is meaningless in the stepparent context. Consent to coparent within the marriage and family unit is not the same as consent to a life-long, parent-child relationship on the part of the stepparent to continue no matter what happens to the marriage”) (Madsen, C.J., concurring/dissenting).

30. See, e.g., DEL. CODE ANN. tit. 13, § 8-201 (West 2013) (de facto parenthood, once established, places parent in same position as, e.g., birth mother and parent via formal adoption).

31. Mark A. Momjian, *Cause of Action Against Former Domestic Partner to Pay Child Support*, 23 CAUSES OF ACTION 2d 1, §3 (2003).

particularly troublesome when unaccompanied by any second parent standing for childcare. And such orders are troublesome when a second parent obliged to support never actually contemplated that earlier acts could ever lead to support duties, especially after the second parent no longer lived with, or was otherwise connected to, the first parent or child.

Yet child support orders have never required those obliged to pay to have future childcare opportunities or to have had parent-child intentions.³² Thus, failed condoms, maternal deceit about female birth control, and mistakes about male sterility have never excused natural fathers from child support duties for their children born of sex. Some financially obligated men have never had and will never have childcare opportunities. This occurs with men who sire children from sexual assaults³³ and men whose parental rights were terminated shortly after birth.³⁴ Some financially obligated men had, but lost, childcare opportunities with little or no fault on their part because they failed as unwed fathers to step up to their parental responsibilities in a timely fashion.³⁵ Similarly, nonadopting stepparents at times have child support duties arising solely from their marriage to (or other state-recognized marriage-like relationship³⁶ with) a parent—who unlike some childcare opportunity settings—need not be a single parent.³⁷

32. *See, e.g.*, *In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) (“an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child”) and *Danelz v. Gayden*, 2013 WL 1190818 at 1, 12 (Tenn. Ct. App. 2013) (adult child can sue biological father for child support arrearages though mother’s husband raised and supported the child; biological father’s argument that “there is inherent inequity in requiring him to pay . . . when he was not notified that he might be Jordan’s father and was deprived of . . . [an] opportunity to establish a relationship with the child” is only relevant to the amount of support that may be ordered).

33. *See, e.g.*, *Pena v. Mattox*, 84 F.3d 894, 895, 899 (7th Cir. 1996) (male statutory rapist has “no constitutionally protected interest in the offspring of his relationship,” even though it was consensual – a 19-year-old male and a 15-year-old female who placed the child for adoption); *Christian Child Placement Service v. Vestal*, 962 P.2d 1261, 1266 (N.M. Ct. App. 1998) (criminal intercourse means biological father has no voice in adoption proceeding); and *Phillip E.K., Jr. v. Sky M.L.*, 936 N.Y.S.2d 859, 861, 865 (N.Y. Fam. Ct. 2011) (no protected parental interest for 19 year-old male who impregnated a 14-year-old female if child’s best interests would not be served).

34. Not all states, however, allow for a continuing child support obligation after a parental rights termination. *See, e.g.*, *In re H.S.*, 805 N.W.2d 737, 745 n.4 (Iowa 2011) (illustrating how some states continue support duties) and *In re C.N.*, 839 N.W.2d 841, 843 (N.D. 2013) (continued child support after parental rights ended for incarcerated father).

35. *See, e.g.*, *Lehr*, 463 U.S. at 267-68 (need for unwed biological father to seize paternity opportunity interest in a proper and timely fashion or the state can deny childcare standing to the father in the child’s adoption case); *In re Adoption of Baby Girl H.*, 635 N.W.2d 256, 263-64 (Neb. 2001) (father failed to challenge proposed adoption properly as his attorney filed a timely lawsuit, but in the wrong court); *Heidbreder v. Carton*, 645 N.W.2d 355, 361 (Minn. 2002) (similar to *Baby Girl H.* as biological father had no standing to contest adoption due, in large part, to his attorney’s errors); and *Baby Girl S.*, 407 S.W.3d at 910 (maternal concealment of pregnancy does not excuse unwed biological father from timely seizing the *Lehr* paternity opportunity interest).

36. Other state-recognized marriage-like relationships, wherein there may also be stepparents, include domestic partnerships and civil unions.

37. *See, e.g.*, OR. REV. STAT. ANN. § 108.045(1) (West 2005) (“expenses of the family and the education” of stepchildren are “chargeable upon the property of both husband and wife”). *Compare*

Thus, there can easily be three parents for support purposes though there may be only two parents for childcare purposes.

III. STATE SECOND PARENT CHILDCARE AND CHILD SUPPORT LAWS

A. *Childcare Interests of Second Parents*

While important, parental objections to nonparental childcare after *Troxel* are not always dispositive.³⁸ Since *Troxel*, the United States Supreme Court has said little about nonparent childcare, including the “special factors” that may override the “special weight” accorded parental wishes; de facto parents; children’s fundamental liberty interests; or family-like bonds.³⁹ While some state legislatures have extensively refined their grandparent childcare standing laws,⁴⁰ many have not addressed comprehensively the childcare interests of other nonparents, or the children’s interests in preserving family-like bonds with nonparents, as via “gradations” of nonparents, when there is single parent objection.⁴¹

But since *Troxel*, many state lawmakers have addressed the childcare opportunities of newly-designated second parents, be they grandparents or others.⁴² State lawmakers have determined the import of a “caregiving role

DEL. CODE ANN. tit. 13, § 501(b) (West 1995) (“Where the parents are unable to provide a minor child’s minimum needs, a stepparent . . . shall be under a duty to provide those needs”).

38. Whatever *Troxel* demands on respecting parental objections to nonparental childcare, state laws can be more demanding as long as nonparents and their alleged children themselves have no federal law interests in second parent designations.

39. 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 law throughout the country.

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

40. Grandparent visitation statutes are listed in Robyn L. Ginsberg, *Grandparents’ Visitation Rights: The Constitutionality of New York’s Domestic Relations Law Section 72 After Troxel v. Granville*, 65 ALB. L. REV. 205, 205 n.2 (2001) while grandparent and third party visitation statutes are reviewed in Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 1-2 (2013). 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, 940-42 (2009).

41. See, e.g., Solangel Maldonado, *When Father (or Mother) Doesn’t Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 891 (2003).

42. *Id.* at 891-93.

over a significant period of time” and have established parentage gradations.⁴³ States have recognized as parents many who intend to parent. States sometimes declare one to be a parent in one setting but not in another.⁴⁴ State lawmakers more freely recognize new parents when there are no existing parents whose superior rights might be infringed. Further, states now infrequently recognize a third parent with childcare standing. Variations in state parent childcare laws are unsurprising since the United States Supreme Court has said that the regulation of domestic relations rests within the “virtually exclusive province of the states.”⁴⁵

Since *Troxel*, state lawmakers have recognized child caretaking interests for children of single parents in new second parents⁴⁶ through such doctrines as presumed parent,⁴⁷ de facto parent,⁴⁸ in loco parentis,⁴⁹

43. *Id.*

44. *See, e.g.*, In re C.C., 959 N.E.2d 53, 63 (Ill. 2011) (man may be father in dissolution proceeding, but not in a child neglect and shelter proceeding) and *People v. Zajackowski*, 825 N.W.2d 554, 558-59 (Mich. 2012) (presumption of natural ties and thus parentage in husband whose wife bears child for dissolution case purposes does not operate when criminal prosecution depends on criminal defendant’s being “related by blood” to crime victim).

45. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

46. These doctrines are employed, at times, to determine a single parent, as when any biological parent with superior rights has died or abandoned the child. *See, e.g.*, *Marquez v. Caudill*, 656 S.E.2d 737, 743-45 (S.C. 2008) (“psychological parent” of child, whose birth mother died and whose biological father had his parental rights terminated, could be either the child’s stepfather or maternal grandmother).

47. *See, e.g.*, WYO. STAT. ANN. § 14-2-504(a)(v) (West 2003) (man is a presumed father if for first two years of child’s life, he resided in same household with child and openly held child out as his own) and TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2003) (similar). Some comparably presumed fathers are, however, also deemed biological parents – though clearly without biological ties. *See, e.g.*, COLO. REV. STAT. ANN. § 19-4-105(1)(d) (West 2008) (man is presumed natural father if he “receives the child into his home and openly holds out the child as his natural child”) and IND. CODE ANN. § 31-14-7-2(a) (West 2009) (similar for “presumed biological father”). This presumption as to “natural” or “biological” ties is confusing as a man very likely with actual genetic ties is also typically assumed a presumed “natural” father who may lose the presumption, and parental status, to one without “natural” ties who received and held out the child; a better approach is to presume parenthood without reference to presumed natural or biological ties. *See, e.g.*, TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2003); N.M. STAT. ANN. § 40-11A-204(A)(5) (West 2010); N.D. CENT. CODE ANN. § 14-20-10(1)(e) (West 2013); OKLA. STAT. ANN. tit. 10, § 7700-204(A)(5) (West 2006); and WYO. STAT. ANN. § 14-2-504(a)(v) (West 2003) (man presumed a father, though not the natural father) if he resided with child for his/her first two years and represented to others that child was his own). *Compare, e.g.*, COLO. REV. STAT. ANN. § 19-4-105(1)(d), (e), and (2) (man who received and held out child, as well as man with 97 percent chance of natural ties to child, are each “presumed natural father”; when two such men qualify for the presumption, only one continues as a presumed father, with the choice dependent “on the weightier considerations of policy and logic”).

48. *See, e.g.*, In re L.B., 122 P.3d 161, 163 (Wash. 2005) (common law de facto parentage claim was available to former lesbian partner). *And see* MINN. STAT. ANN. § 257c.01(2) (West 2003) (“de facto custodian”) and KY. REV. STAT. ANN. § 403.270 (West 2004) (statutory “de facto custodian”), employed in *Hicks v. Halsey*, 402 S.W.3d 79, 81 (Ky. Ct. App. 2013) (minor child’s aunt can seek de facto custodial status, which would afford her “equal status with parents in court” if she prevails); *J.L.A. v. S.C.*, 2013 WL 843815 at 1 (Ky. Ct. App. 2013) (paternal grandparents are de facto custodians); and *Brumfield v. Stinson*, 368 S.W.3d 116, 119 (Ky. Ct. App. 2012) (insufficient evidence to support finding paternal grandparents are de facto custodians).

equitable parent,⁵⁰ equitable estoppel,⁵¹ and “psychological parent.”⁵² Such second parents are not always romantically involved with the single parents.⁵³ Such second parents need not always have simultaneously both childcare opportunities and child support obligations.⁵⁴ And such second parents may not always be on equal footing with the first parents.⁵⁵

Elsewhere, while often sympathetic to alleged second parents who seek to childcare, in the absence of statutes some state judges have deferred to elected legislators in their own state’s “representative democracy.”⁵⁶ Some

49. *See, e.g.*, *Smith v. Smith*, 97 So.3d 43, 47 (Miss. 2012) (in loco parentis status, with possible visitation or custody rights, can be accorded maternal grandparents only if there has been a clear showing of abandonment, desertion, or unfitness on the part of the parent); *Morgan v. Weiser*, 923 A.2d 1183, 1187 (Pa. Super. Ct. 2007) (once established, rights and liabilities arising from in loco parentis relationship are exactly the same as between biological or adoptive parent and child); and *Latham v. Schwerdtfeger*, 802 N.W.2d 66, 122 (Neb. 2011) (former female domestic partner of birth mother, who had earlier agreed to raise child jointly, can employ common law doctrine of in loco parentis after split with birth mother).

50. *See, e.g.*, *Lipnevicius v. Lipnevicius*, 2012 WL 3318584 at 1, 3-4 (Mich. Ct. App. 2012) (the equitable parent doctrine, adopted in *Atkinson v. Atkinson*, 408 N.W.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).

51. *See, e.g.*, *Juanita A. v. Kenneth N.*, 930 N.E.2d 214, 215 (N.Y. 2010) (putative father could assert equitable estoppel defense when sued by natural mother for child support if mother acquiesced in the development of a close relationship between the child and another father figure and when the disruption of that relationship would be detrimental to the child’s interests).

52. *See, e.g.*, *In re M.W.*, 292 P.3d 1158, 1159 (Colo. App. 2012) (construing COLO. REV. STAT. ANN. § 14-10-123(1) (West 2012) (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); *McAllister*, 779 N.W.2d at 662 (stepfather is psychological parent entitled to visitation though both natural parents also had court childcare orders); and *Bredeson v. Mackey*, 842 N.W.2d 860, 865 (stepmother, wife of biological father who was incarcerated, is not a psychological parent who may be awarded visitation, though other stepparents could be psychological parents).

53. *See, e.g.*, *E.C. v. J.V.*, 136 Cal.Rptr.3d 339, 348 (Cal. Ct. App. 2012).

54. Recognition of parental status in both childcare and support settings, per de facto parenthood for example, does not mean that dual status continues, as when the father – after the holding out – later abandons the child and thereby loses only his childcare status. Child support can continue though opportunity for court-ordered childcare ends. *See, e.g.*, *In re Beck*, 793 N.W.2d 562, 563-64 (Mich. 2010) and *Ex Parte M.D.C.*, 39 So.3d 1117, 1132 (Ala. 2009). *See also* *Aeda v. Aeda*, 310 P.3d 646, 647 (N.M. Ct. App. 2013) (under New Mexico but not some other state laws, termination of father’s parental rights ended father’s child support obligations).

55. *See, e.g.*, MONT. CODE ANN. § 40-4-228 (West 2009) and MONT. CODE ANN. § 40-4-211(7) (West 2009) (“a court may award a parental interest to a person other than a natural parent,” who can then seek visitation; custody proceedings may be commenced “by a parent”). Also consider other settings as in *In re T.P.S.*, 954 N.E.2d 673, 678 (Ill. App. Ct. 2011) (though a court-recognized coguardian of child, same sex partner of birth mother would need to “prove by clear and convincing evidence that a continuation of the guardianship is in the child’s best interests” when birth mother seeks to terminate the guardianship).

56. *Troxel*, 530 U.S. at 91-92 (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.*, 975 N.E.2d 755, 772 (Ill. App. Ct. 2012), the court said:

legislatures have responded quickly to judicial pleas for guidance on the legal effects of changing family structures.⁵⁷

Whether via statutes or precedents, state lawmakers have recognized, over single parent objection, second parent status for a heretofore nonparent because of harm or potential harm to the child or because of varying forms of earlier single parent and nonparent consent, acquiescence, or other conduct regarding child caretaking.⁵⁸ The federal constitutional childcare interests of single parents, often embodied within the superior rights doctrine, are overridden when second parents are accorded standing to seek childcare orders.⁵⁹ Exemplary state laws follow.

(i) *Harm or Potential Harm to the Child*

The *Troxel* plurality and one concurring justice reserved the question of whether any “nonparental” childcare over parental objection must “include

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 our 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 the 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.

See also *In re F.T.R.*, 833 N.W.2d 634, 653 (Wis. 2013) (“we respectfully urge the legislature to consider enacting legislation regarding surrogacy. Surrogacy is currently a reality in our Wisconsin court system.”) and *Debra H. v. Janice R.*, 14 N.Y.3d 576, 596 (N.Y. 2010) (“We agree . . . that any change in the meaning of ‘parent’ under our law should come by way of legislative enactment rather than judicial revamping of precedent.”).

It should be noted, however that sometimes common law rulings are made even though legislation is preferred. See, e.g., *K.E.M. v. P.C.S.*, 38 A.3d 798, 811 (Pa. 2012) (J. Melvin, concurring) (affirming “the continuing viability of the estoppel doctrine in Pennsylvania common law” though believing “the General Assembly should consider creation of relevant legislation”).

57. Consider, e.g., the history behind the Delaware statute on de facto parenthood, DEL. CODE ANN. tit. 13 § 8-201 (West 2013), described in *Bancroft*, 19 A.3d at 749 (“The Delaware Legislature quickly responded to the Supreme Court’s Decision in *Smith v. Gordon* by passing the present de facto parent amendment to Delaware’s Uniform Parentage Act.”).

58. Thaddius A. Townsend, *Going Before Solomon With A Special Request: The Need For Clearer Legal Regulation of Shared Custody Rights Between Parents And Non-biological Parents*, 41 CAP. U. L. REV. 327, 347 (2013).

59. The level of required consent, acquiescence, or other conduct by both the first and second parent may need to be varied depending upon context. In Washington, for example, de facto parentage can be recognized for a former stepparent upon a showing that “the natural or legal parent consented to and fostered the parent-like relationship” between stepparent and stepchild. *B.M.H.*, 315 P.3d at 478 (citing *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005)). Yet, as Chief Justice Madsen observed in concurring/dissenting, “the consent prong is meaningless in the stepparent context. Consent to coparent within the marriage and family unit is not the same as consent to a life-long, parent-child relationship on the part of the stepparent to continue no matter what happens to the marriage.” *B.M.H.*, 315 P.3d at 483.

a showing of harm or potential harm to the child.”⁶⁰ Seemingly, at least, such a showing might also be deemed necessary for any second parentage designation in a childcare setting, although perhaps more may be required for second parent than nonparent childcare standing as only with the later might loss of custody in the single parent be possible. To date, few “harm to the child” standards have been employed in second parent settings,⁶¹ though similar standards operate for some nonparental⁶² childcare orders.⁶³

For example, a Utah appeals court recently surveyed grandparent visitation statutes and found that “many,” but not all, American states permit grandparent visitation orders over parental objection “only where denial of visitation would significantly harm the grandchild.”⁶⁴ It added that

60. *Troxel*, 530 U.S. at 58 (plurality opinion).

61. *But see* *Janice M. v. Margaret R.*, 948 A.2d 73, 87 (Md. 2008) (rejecting any de facto parent status, here with a former same sex partner of adoptive mother; but finding that any de facto parent status alone would not be determinative of “exceptional circumstances” resulting in serious detriment to child – which with parental unfitness – can warrant second parent or nonparent childcare orders over parental objection) and *Copeland v. Todd*, 715 S.E.2d 11, 20 (Va. 2011) (detriment to child’s welfare, together with some showing of parental unfitness, can prompt adoption of child without parental consent).

62. *See, e.g.*, *In re Guardianship of S.M.N.*, 781 N.W.2d 213, 224 (S.D. 2010) (nonparent may obtain childcare order via guardianship proceeding over parental objection by proving by clear and convincing evidence that extraordinary circumstances (beyond abandonment, neglect, forfeiture or abdication) exist which, if nonparent childcare is denied, would result in serious detriment to the child, per S.D. CODIFIED LAWS § 25-5-29(4) (2002)). *Compare* *In re A.W.*, 994 N.E.2d 726, 730 (Ill. App. Ct. 2013) (widowed wife of deceased father who had custody of A.W. could seek guardianship of A.W. if she rebutted by a preponderance of the evidence the presumption that the birth mother is “willing and able to make and carry out day-to-day child-care decisions concerning A.W.”). *See also* TEX. FAM. CODE ANN. § 153.131(a) (West 1997) (parents should be appointed managing conservators unless appointments would significantly impair the child’s physical health or emotional development), applied in *In re Crumbley*, 404 S.W.3d 156, 162-63 (Tex. App. 2013) (no rebuttal of presumption of superior parental authority as managing conservator where parent only “voluntarily relinquished” child to nonparent for extended time, even though nonparent conservatorship would be in the best interests of child).

63. For the social science and psychological research on children’s attachments to nonparents (therein deemed psychological parents), see Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best Interests of the Child*, 13 GEO. J. GENDER & L. 615, 628-29, 641 (2012) (supporting “harm to the child” standard in third party visitation cases wherein parents object).

64. *Jones v. Jones*, 307 P.3d 598, 606-07 (Utah Ct. App. 2013). *See generally* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.18(2)(c) (2002) (custodial and decisionmaking responsibility for a minor child, per Section 201, may be assigned to a grandparent over a parent’s objections if “the available alternatives would cause harm to the child”) [hereinafter ALI Principles]. *Compare* *L.A.L. v. V.D.*, 72 A.3d 690, 695 (Pa. Super. Ct. 2013) (grandparents of children of unwed parents have standing to seek partial child custody; grandparents and great-grandparents may be awarded custody if they earlier had much “personal contact” with the child, the child’s best interests would be served, and a custody award would not interfere with any parent-child relationship, per 23 PA. CONS. STAT. ANN. § 5328(e)(1) (West 2014)); *In re Guardianship of S.M.N.*, 781 N.W.2d 213, 223 (S.D. 2010) (“petitioner [here a grandmother] must demonstrate extraordinary circumstances by clear and convincing evidence to overcome a natural parents’ presumptive right to custody”); and *Fairhurst v. Moon*, 416 S.W.3d 788, 792 (Ky. Ct. App. 2013) (grandparent visits over parental objection when “clear and convincing evidence that the parent is mistaken in the belief that visitation would not be in the best interests of the child”). *And see* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.18(2)(a) (2002) (custodial and decision-making responsibility for a minor child may be assigned to a

evidence as to harm usually had to be “compelling,”⁶⁵ and that even with such evidence, any grandparent visitation order must be “narrowly tailored.”⁶⁶

Yet even when there is or may be a harm or potential harm standard, actual harm or potential harm is often not required where a single parent initially agrees to second parent status or to nonparty childcare standing.⁶⁷ Thus, though superior parental rights must be respected in an initial grandparent visitation proceeding via a harm or potential harm standard, such rights frequently give way when an earlier stipulated grandparent visitation order is sought to be modified;⁶⁸ here, modification usually may be undertaken with just the best interests of the child in mind.⁶⁹

Similarly, single parent pacts on their children’s new second parents are often significant, if not determinative, in assessing the single parent’s later objection to a second parent designation in certain assisted human reproduction settings. For example, birth mothers are often bound to preconception promises of second parent status when the second intended parent is the egg donor.⁷⁰

(ii) *No Harm or Potential Harm to the Child*

The *Troxel* plurality and one concurring justice reserved the question of whether any “nonparental” childcare over parental objection must “include a showing of harm or potential harm to the child.”⁷¹ To date, such a showing is often unnecessary for a second parent designation and an

grandparent over a parent’s objection if the grandparent has a “significant relationship with the child” and the objecting parent “has not been performing a reasonable share of parenting functions for the child”).

65. *Jones*, 307 P.3d at 608.

66. *Id.*

67. *See, e.g.* Townsend, *supra* note 58, at 334.

68. *See, e.g.*, Lovlace v. Copley, 418 S.W.3d 1, 31 (Tenn. 2013) (“extraordinary circumstance” can justify “applying the presumption of superior parental rights” in modification proceedings) and Richard B. v. C.W., 2014 WL 243059 at 2-3 (Cal. Ct. App. 2014) (mother did not appeal 2007 order placing her child with maternal grandmother; in 2012, grandmother can maintain custody even if mother is not unfit as detriment to child includes removal from a stable placement).

69. *Lovlace*, 418 S.W.3d at 38 (“the paramount consideration . . . is the welfare of the child” with “the interests and desires of adult parties . . . secondary to this paramount concern”).

70. Single parents may also be bound to later (postconception) promises of nonparent (as well as second parent) childcare standing. *See, e.g.*, *A.M.K.*, 351 Wis.2d at ¶¶ 3-4 (child born in 1998, who was raised together by two women until 2006, was subject to 2006 written agreement to “equal shared placement” and shared expenses; after agreement was reneged upon by birth mother in 2008, court finds former partner had standing to seek a nonparent childcare order, but could not be ordered to pay child support).

71. *Troxel*, 530 U.S. at 58 (plurality opinion).

ensuing childcare order benefitting the second parent.⁷² Best interests standards frequently dominate.⁷³

Federal constitutional childcare interests of a single parent are adequately protected, without a showing of harm, where a nonparent may be newly designated as a second parent over the first parent's later objection only when the child's best interests are served and only when the first parent and theretofore nonparent earlier voluntarily participated in a state-recognized guardianship proceeding, outside of a formal adoption, wherein the nonparent was designated, or treated like, a second parent with the consent of the first parent.⁷⁴ On rare occasion, such a proceeding can involve an adoption granted by a court, but later deemed void for jurisdictional defects.⁷⁵ More often, such a proceeding involves a guardianship wherein a single parent copetitions with another⁷⁶ for a joint childcare guardianship for a (future or present) child where the guardianship

72. See Maldonado, *supra* note 41, at 871.

73. *Id.*

74. A voluntary guardianship naming a nonparent as guardian with a parent's agreement does not by itself elevate the guardian to parental status. See, e.g., *Masitto v. Masitto*, 488 N.E.2d 857, 859 (Ohio 1986) (maternal grandparents were guardians per parental consent); *Book-Gilbert v. Greenleaf*, 840 N.W.2d 743, 749 (Mich. Ct. App. 2013); and *Resendes v. Brown*, 966 A.2d 1249, 1256 (R.I. 2009) (stipulation by mother as to guardianship made the guardian a "de facto" parent as issue was removed from controversy). Here, the parent and guardian often will share childcare. But such a voluntary guardianship can "guide" a later judicial determination of whether the nonparent guardian's should later be deemed a parent. By comparison, an involuntary guardianship can deprive a single parent of child custody over the parent's objection, as where a petitioning nonparent demonstrates the parent is unwilling or unable to make and carry out day-to-day childcare decisions. *A.W.*, 994 N.E.2d at 729 (rebuttal of statutory presumption of parental fitness; evidentiary hearing often required). Usually, an involuntary guardianship in a nonparent accompanies an order of parental unfitness and a finding of the child's best interests. See, e.g., *In re Guardianship of LaBree*, 76 A.3d 386, 389 (Me. 2013) (involuntary guardianship in nonparent cannot be accompanied by order naming parent as coguardian). *But see* *In re S.H.*, 2013 WL 5519847 at ¶ 25 (Ohio Ct. App. 2013) (limited guardianship for medical decision making purposes when parents refuse to permit medical treatment for seriously ill child). On voluntary and involuntary guardianships, see also *In re F.G.*, 2012 WL 6013184 at 6 (Cal. Ct. App. 2012).

75. See, e.g., *Boseman v. Jarrell*, 704 S.E.2d 494, 494, 496 (N.C. 2010) (after voiding earlier adoption by birth mother's same sex partner, court views ex-partner as nonparty with standing to seek childcare order because birth mother, during earlier adoption proceeding, acted inconsistently with her protected status as mother). See also *Mullins v. Picklesimer*, 317 S.W.3d 569, 571 (Ky. 2010) (while voiding earlier agreed custody award to birth mother and her former same sex partner as there was fraud in employing de facto custodian statute, birth mother waived her superior parental rights by coparenting with former partner and the women were each awarded joint custody). Compare *In re Guardianship of A.J.A.*, 991 N.E.2d 110, 111 (Ind. 2013) (grandparent visitation agreement with child's guardians found in a court order cannot serve as a basis for later grandparent visits when order was void as grandparent earlier had no standing under Grandparent Visitation act).

76. The joinder by the single parent in the petition often does not relieve the court of the duty to find the necessary jurisdictional grounds. See, e.g., *In re A.C.F.H.*, 373 S.W.3d 148, 149-50 (Tex. App. 2012) (under TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2012), stepfather cannot seek joint managing conservatorship with biological mother unless he "had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition").

is not temporary⁷⁷ or otherwise limited in nature.⁷⁸ An adoptive or assisted reproduction single parent may even be able to copetition with an intimate partner for co-guardianship in a state when the forum bars coadoption by the partner (e.g., due to being unwed)⁷⁹ or when an assisted reproduction proceeds in the forum outside the bounds of any statute, but where any third party gametes donor and any surrogate have already lost any opportunity for second parent status.⁸⁰

77. *Witham v. Beck*, 2013 Ark. App. 351, 8 (Ark. Ct. App. 2013) (fit natural parent who consents to child guardianship in a nonparent can later terminate guardianship over nonparent's objection; nonparent can continue guardianship only by showing conditions necessitating guardianship have not been removed or by overcoming the presumption that the parent is acting in the child's best interests).

78. *See, e.g., Chris v. Vanessa O.*, 320 P.3d 16, 17-18 (N.M. Ct. App. 2013) (under the Kinship Guardianship Act, following a referral to the state regarding a birth parent's alleged failure in childcare, with that parent's consent a couple was first appointed as temporary guardians, and later as permanent guardians, with appointments designed to facilitate the transition of the childcare back to the parent; couple later did seek to adopt child).

79. Of course, Full Faith and Credit may need to be accorded in the forum to a sister state's laws on the childcare when the child in the forum only recently arrived. Similarly, certain foreign country laws on childcare may need to be respected per any treaty. Further, comity principles may allow certain copetitions because of the forum state's deference to some other state or foreign country's public policies on childcare, even for children born within the forum. *See, e.g., Debra H.*, 14 N.Y.3d at 600 (comity given to effect of Vermont civil union law on parentage for birth to same sex female couple in New York who were unionized in Vermont after artificial insemination, but before birth, in New York which had no civil union law).

Comparably, other governments' laws, as on marriages, civil unions, and the like, may need to be respected. *See, e.g., Port v. Cowan*, 44 A.3d 970, 982 (Md. 2012) (though same sex marriage not recognized in Maryland, comity requires that Maryland court utilize Maryland divorce laws for same sex couple married in California) and *Hunter v. Rose*, 975 N.E.2d 857, 859 (Mass. 2012) (California registered same sex domestic partnership recognized under principles of comity in Massachusetts dissolution proceeding). *Compare* 23 PA. CONS. STAT. ANN. § 1704 (West 1996) ("A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth."). *Yet see Bourke v. Beshear*, 2014 WL 556729 at 1 (W.D. Ky. 2014) (finding comparable Kentucky laws violate federal constitutional Equal Protection because they serve no rational basis; court does not consider the federal constitutional Full Faith and Credit mandates).

Consider also, e.g., the effects of nonforum laws on, e.g., spousal privileges, entitlements to benefits, and death certificate notations about family. Of course, federal or state constitutional demands involving a fundamental right to childrear may require certain copetitions be recognized. *See, e.g., Meg Penrose, Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILL. L. REV. 169, 172 (2013) (arguing fundamental right to divorce requires a state where gay marriage is not recognized to allow divorces of same sex couples who married outside the state).

80. Postbirth guardianship copetitions were sustained in *Morgan v. Kifus*, 2011 WL 1362691 at 3 (Va. Ct. App. 2011) (joint legal custody in two women who were one time lovers, one of whom was the birth mother who seemingly conceived via artificial insemination that was facilitated by a male friend, where both women had agreed preinsemination to raise any child jointly; custody modification was not, but could have been, sought by birth mother); *T.P.S.*, 954 N.E.2d at 678 (earlier coguardianship orders on two children of same-sex female couple gave standing to nonbirth mother to oppose later guardianship termination requests by birth mother; to continue as guardian nonbirth mother must "prove by clear and convincing evidence that a continuation of the guardianship is in the children's best interests").

Comparable issues arise when earlier consensual guardianships are sought to be continued on behalf of nonparents, like grandparents, who were not in intimate relationships with biological or adoptive parents. *See, e.g., In re Guardianship of S.H.*, 409 S.W.3d 307, 316, 320 (Ark. 2012) (majority

As with voluntary guardianships involving parents and would-be parents, other consent decrees between parents and nonparents on nonparent childcare, as during grandparent visitation proceedings, also adequately protect superior parental rights. Thus, when parents later seek to modify such consent decrees, often they are deemed to be without the parental rights presumption that they act in their children's best interests.⁸¹ To modify here, the parents must show substantial change in circumstances and children's best interests.⁸²

Unlike voluntary guardianships and consent decrees, state-recognized proceedings outside of formal adoption and involving parents and would-be parents need not include major indices of state approval, via a judge or via administrative process guidelines. Thus at times the state is not significantly, or even somewhat assured, that the prospective second parent will serve the child's best interests and that both the first and prospective second parent understand the implications of their conduct. Professor Harris has suggested that the administrative voluntary parentage acknowledgment process (VAP) be made available to actual and intended parents in same sex relationships.⁸³ Zachary Townsend and I suggested expanded VAP availability for prebirth acknowledgments by unwed expectant mothers and by either alleged biological fathers or intimate partners of the expectant mothers regarding children who will be born of sex.⁸⁴ A VAP has also been significant when undertaken by the unwed birth

requires birth mother who opposes continuing guardianship by paternal grandparents to prove guardianship is no longer necessary; dissent believes grandparents should be required to rebut the presumption that a parent acts in a child's best interest and to prove that the guardianship remains necessary). *Compare Witham*, 2013 Ark. App. at 8 (intimate former same sex partner who was child's guardian while mother was in military – where some guardianship of a single soldier's child was required, had to prove that guardianship termination was not in child's interest once mother shows condition necessitating guardianship was removed).

81. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: ERISA, Jurisdiction, and Third-Party Cases Multiply*, 40 FAM. L.Q. 545, 586-87 (2007).

82. *See, e.g., Rennels v. Rennels*, 257 P.3d 396, 401 (Nev. 2011) (earlier visitation, as well as custody, order favoring nonparent “effectively rebutted the parental presumption, after which the child's need for stability becomes a paramount concern”). *See also* *In re Marriage of Purcell*, 825 N.E.2d 724, 724 (Ill. App. Ct. 2005) (birth mother's earlier joint-parenting agreement with husband in marriage dissolution proceeding is still enforceable even after husband becomes stepparent when his lack of biological ties is proven later in order for the child to receive benefits via biological father).

83. *Compare* Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 J. GENDER SOC. POL'Y & L. 467, 487-88 (contrary to most current VAP laws, suggesting a VAP be available where at least one acknowledger has no biological ties to the child – as when a lesbian partner of the birth mother acknowledges parentage with the birth mother though the partner provided no genetic material leading to pregnancy). *See also* Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171, 201-08 (2008) (on expanding VAPs to same sex couples who coparent though there may be three parents).

84. Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BAL. L. REV. 53, 96 (2010) (with care taken for the paternity opportunity interests under *Lehr* for the unwed biological father who is not an acknowledger).

mother and sperm donor for a child born of assisted reproduction even when the mother later objects to the donor's paternity action.⁸⁵

States may also recognize earlier acts by parents ceding some parental authority that do not involve state-controlled proceedings at all, as with private contracts involving parentage.⁸⁶ The ALI Restatement (Second) on Contracts says: "A promise affecting the right of custody of a minor child is unenforceable on grounds of public policy unless the disposition as to custody is consistent with the best interest of the child."⁸⁷ Professor Carbone has suggested that both married and unmarried couples intending to parent should, "shortly after the child's birth," make a commitment in "a ceremony modeled on christening."⁸⁸ Promises made in such ceremonies, and elsewhere,⁸⁹ could then often be considered and perhaps enforced. Here, superior parental rights are significantly protected.

Federal constitutional childcare interests of a single parent are also significantly protected when a nonparent may only be designated a second parent over a single parent's objection where the nonparent had a subjective intent to adopt that was directly expressed and known to the single parent who did not object; held out the child as one's own; and formed a close and enduring familial relationship with the child.⁹⁰ These standards were suggested to two Illinois intermediate appellate courts in 2013⁹¹ by the Illinois Supreme Court,⁹² which had just employed the norms in a case involving an alleged child who sought recovery under an equitable adoption theory from the estate of a heretofore nonparent under law.⁹³

On the other hand, federal constitutional childcare interests of a single parent are less protected, raising more serious concerns under *Troxel*, when absolute parental authority turns to shared parental authority because the single parent allows a nonparent to do childcare chores while living in the

85. *Breit v. Mason*, 718 S.E.2d 482, 489 (Va. Ct. App. 2011) (donor could petition for paternity determination).

86. See Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 *BYU J. Pub. L.* 245, 267-68 (2011).

87. RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981).

88. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 *LA. L. REV.* 1295, 1344 (2005).

89. See, e.g., *Frazier*, 295 P.3d at 545-46 (former female partner of birth mother, with birth via artificial insemination, could enforce coparenting agreements regarding two children, with at least one agreement occurring prebirth) and *C.O. v. W.S.*, 639 N.E.2d 523, 524, 525 (Ohio Comm. Pls. 1994) (agreement upheld between sperm donor and unwed birth mother that there would be a relationship between donor and any child, where mother had solicited donor's participation).

90. See, e.g. *In re J. LaPiana*, 8th Dist. Cuyahoga 2010-Ohio-3606.

91. *In re Marriage of Mancine*, 965 N.E.2d 592, 596 (Ill. App. Ct. 2012) and *Scarlett Z.-D.*, 975 N.E.2d at 768.

92. *Mancine v. Gansner*, 992 N.E.2d 1 (Ill. 2013) and *In re Scarlett Z.-D.*, 992 N.E.2d 3 (Ill. 2013).

93. *DeHart v. DeHart*, 986 N.E.2d 85, 100, 104-05 (Ill. 2013).

same household with the single parent and child.⁹⁴ Lesser protections seemingly are afforded to single parents in New Jersey, where a man with no biological or formal adoptive ties can be “presumed to be the biological father of a child,” on equal footing with the birth mother, if he “openly holds out the child as his natural child” and either “receives the child into his home” or “provides support for the child.”⁹⁵ By contrast, the District of Columbia law on de facto parenthood requires, with the single parent’s “agreement,” residency in the same household since the time of the child’s birth or adoption, or for at least ten of the twelve months preceding the nonparent’s petition for de facto parent status.⁹⁶ A Delaware law does not mention residency at all, permitting de facto parenthood for a second parent if one “exercised “parental responsibility” and served in a “parental role” so that “a bonded and dependent relationship” developed that is “parental in nature,” although this must be done with “the support and consent of the child’s parent.”⁹⁷ Residency, but a lesser degree of first parent consent, is crucial to presumed parentage in Delaware, where a “man is presumed the father of a child if . . . for the first 2 years of the child’s life, he resided in

94. See, e.g., David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 B.Y.U. L. REV. 1075, 1077, 1084-85 and 1099-103 (many read *Troxel* as placing “in doubt” the constitutionality of the ALI’s pronouncement on ceding parental interests based solely on a nonparent undertaking household chores and living in a household for a certain period of time; yet author reads *Troxel* as containing “seeds of a constitutional doctrine quite favorable to the ALI Principles” that recognize legal parents, parents by estoppel and de facto parents). And see Wilson, *supra* note 37, at 484 (arguing that such shared parental authority unduly “overrides the judgments of mothers without sufficient consideration for the risks to children”). See also *Niesen v. Niesen*, 157 N.W.2d 660, 664 (Wis. 1968) (citation omitted), where the court said:

A stepfather is under no obligation to support the child of his wife by a former husband so as to relieve him from support. In some cases where the stepfather takes the child into his family or under his care in such a way that he in fact intends and does place himself in the position of the father and is so accepted by the child, he may thereby assume an obligation to support such child. But a good Samaritan should not be saddled with the legal obligations of another and we think the law should not with alacrity conclude that a stepparent assumes parental relationships to a child.

95. N.J. STAT. ANN. § 9:17-43(a)(4) and (5) (West 1998) (no indication of a need for the single parent’s consent) and N.J. STAT. ANN. § 9:17-40 (West 1983) (“The parent and child relationship extends equally to every child and to every parent”). See also N.J. STAT. ANN. § 9:17-45(d) (West 1998) (no agreement between alleged or presumed father and mother can bar an action to determine the existence or nonexistence of a parent and child relationship except for an agreement “approved by the court”).

96. D.C. CODE § 16-831.01(1) (2009).

97. DEL. CODE ANN. tit. 13, § 8-201(c) (West 2013). These Code provisions may not permit, however, de facto parenthood for a third parent. See, e.g., *Bancroft*, 19 A.3d at 750 (statute is overbroad and violative of due process privacy rights of fit mother and fit father if another person is also named as third parent). The Washington state common law on de facto parentage is similar. *L.P.*, 122 P.3d at 179 (first parent must consent to and foster parent-child relationship with another; de facto parent status requires “active encouragement of the biological or adoptive parent”).

the same household with the child and openly held out the child as his own.”⁹⁸

Outside of Delaware, some presumed parent statutes operate like the Delaware presumed parent statute while others operate like the Delaware de facto parent statute. As in Delaware, presumed parentage arises in New Mexico,⁹⁹ North Dakota,¹⁰⁰ Oklahoma,¹⁰¹ Texas,¹⁰² Washington,¹⁰³ and Wyoming¹⁰⁴ for those who establish residency in the first two years and hold out children as their own.¹⁰⁵ The demands of any first parent “support and consent” are unclear.

Like de facto parentage in Delaware, there is no timed residency requirement on presumed parentage in other states. In Alabama, presumed parentage arises for a man who receives the child into his home and openly holds out the child as his natural child, or otherwise openly holds out the child as his natural child and establishes or has a significant parental relationship with the child involving emotional and financial support.¹⁰⁶ Elsewhere, there is presumed parentage for a man who receives a child into the home and holds out the child as his own.¹⁰⁷ Here, any requirements of first parent “support and consent” are unclear, thus often undercutting superior parental rights to the surprise of the first parent.

Comparably, lesser protections of a single parent’s childcare interests are afforded by laws affording childcare opportunities to persons who may never be designated parents under law. In Oregon, “any person . . . who has

98. DEL. CODE ANN. tit. 13, § 8-204(a)(5) (West 2004).

99. N.M. STAT. ANN. § 40-11A-204(A)(5) (West 2010) (same language as in Delaware).

100. N.D. CENT. CODE ANN. § 14-20-10(1)(e) (West 2013) (same language as in Delaware).

101. OKLA. STAT. ANN. tit. 10, § 7700-204(A)(5) (West 2006) (same language as in Delaware).

102. TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2003) (“continuously resided in the household in which the child resided and he represented to others that the child was his own”).

103. WASH. REV. CODE ANN. § 26.26.116(2) (West 2011).

104. WYO. STAT. ANN. § 14-2-504(a)(v) (West 2003).

105. At times, not holding out a child as one’s own is used to rebut rather than establish presumed parentage. *See, e.g.,* DeBoer v. DeBoer, 822 N.W.2d 730, 734 (S.D. 2012) (presumed parent due to postbirth marriage and voluntary assertion of paternity may be rebutted by evidence the presumed parent “never represented to others that the child was his own,” per TEX. FAM. CODE ANN. § 160.204(a)(4) and 160.607(b)).

106. ALA. CODE § 26-17-204(a)(5) (2009). While presumed parentage statutes, as in Alabama, recognize only men as second parents, women have been deemed second parents under such statutes because the laws are read in gender neutral ways. *See, e.g.,* In re Domestic Partnership of C.P. and D.F., 2013 WL 2099156 at 1 (Cal. Ct. App. 2013).

107. *See, e.g.,* CAL. FAM. CODE § 7611(d) (West 2014); COLO. REV. STAT. ANN. § 19-4-105(1)(d) (West 2008); MINN. STAT. ANN. § 257.55 (West 2006); TENN. CODE ANN. § 36-2-304 (West 2010); and NEV. REV. STAT. ANN. § 126.051 (West 2007). *Compare* MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(4) (West 1998) (man presumed to be a father if “he, jointly with the mother, received the child into their home and openly held out the child as their child”). In California, established presumed parentage may not operate in all settings where parentage is important. *See, e.g.,* Brianna M., 163 Cal.Rptr.3d at 668-69 (Cal. Ct. App. 2013) (father’s presumed biological paternity was not relevant in dependency proceeding).

established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition” may file for a childcare order.¹⁰⁸ But such an order can only follow the rebuttal of a presumption “that the legal parent acts in the best interest of the child,” where the court “may consider” whether the “legal parent has fostered, encouraged or consented to the relationship.”¹⁰⁹ The Oregon presumption can be overcome by “a preponderance of the evidence” where “a child-parent relationship exists.”¹¹⁰ But “clear and convincing evidence” is needed in Oregon where “an ongoing personal relationship exists.”¹¹¹ Fostering a close relationship is quite different from consenting to later second parent status. Parents want their children to have close and meaningful relationships with their teachers, but typically do not view the teachers as performing parental-like acts.

Other nonparent childcare laws offer little protection to superior parental rights. In Montana, a nonparent who “has established a child-parent relationship” with a child¹¹² can obtain either “a parental interest” in the child or “visitation” with the child,¹¹³ each dependent upon a judicial finding of the child’s best interests, when “clear and convincing evidence” demonstrates “the natural parent has engaged in conduct that is contrary to the child-parent relationship.”¹¹⁴ Contrary conduct includes “voluntarily permitting a child to remain continuously in the care of others for a significant period of time so that the others stand in loco parentis to the child.”¹¹⁵ Again, there may be no actual consent by the first parent to second parent status. Here, as well, the statutory language, “conduct . . . contrary to the child-parent relationship,” seems ill-advised as relevant conduct includes acts undertaken to benefit the child and thus the child-single parent relationship.¹¹⁶ A better approach would be to base a possible

108. OR. REV. STAT. ANN. §109.119(1) (West 2003).

109. OR. REV. STAT. ANN. §109.119(1), (2)(a) and (b), 4(a)(C), and 4(b)(D) (West 2003).

110. OR. REV. STAT. ANN. § 109.119(3)(a) (West 2003).

111. OR. REV. STAT. ANN. § 109.119(3)(b) (West 2003).

112. MONT. CODE ANN. § 40-4-211(4)(b) (West 2009) (standing to seek “a parenting plan”).

113. MONT. CODE ANN. § 40-4-228(1) (West 2009).

114. MONT. CODE ANN. § 40-4-228(2) (West 2009) (clear and convincing evidence of best interests for “parental interest” award) and MONT. CODE ANN. § 40-4-228(3) (West 2009) (visitation award “based on the best interests,” with no reference to standard of proof).

115. MONT. CODE ANN. § 40-4-228(2)(a) and (4) (West 2009). Precedent includes *In re M.M.G.*, 287 P.3d 952, 954 (Mont. 2012), *In re L.F.A.*, 220 P.3d 391, 394 (Mont. 2009), and *Kulstad v. Maniaci*, 220 P.3d 595, 609 (Mont. 2009) (in loco parentis status obtainable though nonparent did not act “as a parent to the exclusion of the natural parent”). Compare the Montana provision on terminating parental rights that requires child abandonment, defined as “leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the near future.” MONT. CODE ANN. § 41-3-102(1)(i) (West 2013).

116. MONT. CODE ANN. § 40-4-228(2)(a) (West 2009).

“parental” interest, or a “visitation” interest, of a nonparent on a single parent’s voluntary relinquishment of significant parental authority.¹¹⁷

In Ohio, a parent is bound to a voluntary permanent shared custody agreement with a nonparent, shown by “words or conduct,” by which the parent purposefully relinquishes “some portion of the parent’s right to exclusive custody” of a child.¹¹⁸ By comparison, an Idaho statute provides a bit more, though not absolute, protection of a parent’s superior rights vis-à-vis a nonparent, as it says:

In any case where the child is actually residing with a grandparent in a stable relationship, the court may recognize the grandparent as having the same standing as a parent for evaluating what custody arrangements are in the best interests of the child.¹¹⁹

Superior parent rights are more significantly protected in Mississippi, where nonparent childcare standing must be preceded by a finding the parent abandoned or deserted the child, or was unfit, or has “detrimental immorality.”¹²⁰

While second parents with childcare standing in some states look like nonparents with childcare standing in other states, there are often important distinctions. For example, child support obligations often follow only second parents.¹²¹ But in each setting, a single parent sometimes loses the ability to object to the childcare standing of another where sole custody in the parent would not harm the child and where the parent may have only acted in ways benefitting the child, as by the parent’s ceding some

117. On similarly unfortunate statutory language, *see also* *In re Perales*, 369 N.E.2d 1047, 1052 n.12 (Ohio 1977) (a finding of parental unsuitability can be based on “contractual relinquishment of custody”).

118. *Rowell v. Smith*, 2013 WL 2404814 at 6 (Ohio Ct. App. 2013) (agreement is enforced when child’s best interest is served).

119. IDAHO CODE ANN. § 32-717(3) (West 2007), upheld upon an attack under *Troxel* in *Hernandez v. Hernandez*, 265 P.3d 495, 496 (Idaho 2011) (2 children lived with maternal grandparents only for about 7 years, when parents agreed to switch primary custody per court order from mother to father – who had had no physical contact with the children before then for about 6 years).

120. *Davis v. Vaughn*, 126 So.3d 33, 38 (Miss. 2013).

121. Second parents who can be afforded childcare orders more likely also assume child support obligations whether or not they ever seek childcare, while nonparents with standing to seek childcare, as with former stepparents or grandparents, are less likely subject to child support duties even if they seek childcare orders. *Compare, e.g.*, DEL. CODE ANN. tit. 13, § 8-201 (West 2013) (de facto parent on equal footing, e.g., with birth mother and adoptive parent) with *A.M.K.*, 351 Wis.2d at ¶9 n.3 (former lesbian partner as nonparent can seek childcare order over her former partner/mother’s objection but cannot be pursued by mother for child support) and *Weinand v. Weinand*, 616 N.W.2d 1, 3 (Neb. 2000) (former stepfather can seek childcare order over parental objection though there is no child support duty for him).

There are also other ways beyond shared childcare standing in which acquiescence in shared childcare authority can negatively impact a parent. *See, e.g.*, *Starla D. v. Jeremy E.*, 945 N.Y.S.2d 779, 781 (N.Y. App. Div. 2012) (alleged biological father has equitable estoppel defense in mother’s paternity suit where mother acquiesced in another man’s parental-like relationship).

caretaking authority in order to help the child, with no recognition of any possible second parent status and with no purposeful or extended relinquishment of parental control.¹²²

B. *Child Support Obligations of Second and Third Parents*

Federal constitutional interests of a nonparent in not incurring unwanted child support obligations upon being designated a second (or even third) parent at the request of another¹²³ (usually the first parent, child, or state¹²⁴) are significantly protected when the guidelines require that the possible new parent had a subjective intention to adopt formally which was directly expressed; held out the child as one's own; and formed a close and enduring familial relationship with the child.¹²⁵ As noted, these standards were employed by the Illinois Supreme Court in a decedent's estate case when an alleged child sought recovery under an equitable adoption theory from the estate of a decedent who, theretofore, was a nonparent under law, but who had reared the child like a parent for more than 60 years.¹²⁶ To date, such standards have not been generally employed when determining a living person's child support responsibilities as a second (or third) parent.¹²⁷

122. *See, e.g.*, *Rodriguez v. Rodriguez*, 710 S.E.2d 235, 242 (N.C. Ct. App. 2011); *Powers v. Wagner*, 716 S.E.2d 354, 359 (N.C. Ct. App. 2011) (purposeful temporary relinquishment is less likely inconsistent with parental status than purposeful permanent or long-term relinquishment); *Best v. Gallup*, 715 S.E.2d 597, 601 (N.C. Ct. App. 2011) (relinquishment of childcare to a nonparent, establishing conduct inconsistent with paramount parental status, includes conduct resulting in shared childcare between parent and unwed romantic partner); and *In re D.I.S.*, 249 P.3d 775, 777, 779 (Colo. 2011) (temporary guardianship in paternal aunt and uncle so that mother could address health issues and because it was "untenable" for father to care for child; when parents sought to end guardianship, guardians needed to give "special weight" to parents' decisions, meaning only that guardians needed to prove by a preponderance of the evidence that guardianship's end was not in child's best interests).

123. When second parent status is sought in court by one desiring to childcare over a first parent's objection, federal constitutional interests are less likely to block a court-compelled child support order against the petitioner even if the petitioner fails to secure childcare (as children's best interests guide possible childcare orders, but obligor's best interests do not guide possible support orders). Reduced or lost due process interests of unsuccessful childcare petitioners may be like lost due process interests in personal jurisdiction when petitioning for relief as an original plaintiff; with childcare requests there may come possible child support obligations, as with complaints there may come counterclaims.

124. *See, e.g.*, CAL. FAM. CODE § 7641(a) (West 2014) (child support against father may be pursued by mother, child, public authority, or any other person furnishing reasonable expenses of pregnancy, education or support).

125. Typically, once designated or designateable as parents, second parents cannot avoid unwanted child support by agreements with the other parents, even with a promise to forego parenting time in exchange. *See, e.g.*, *Perkinson v. Perkinson*, 989 N.E.2d 758, 760 (Ind. 2013) (agreements are void as against public policy).

126. *DeHart*, 986 N.E.2d at 89-90, 103-05 (alleged child must prove elements by clear and convincing evidence, but need not prove an enforceable "contract to adopt"; holding of *In re Estate of Ford*, 82 P.3d 747 (Cal. 2004) adopted, and rejection of less rigorous holding of *Wheeling Dollar Sav. & Trust Co. v. Singer*, 250 S.E.2d 369 (W. Va. 1978), where no showing of an intent to adopt was required).

127. They have also not been employed where support is sought from a former stepparent. *See, e.g.*, *Braun v. Braun*, 2012 WL 4563551 at 3 (Tenn. Ct. App. 2012) (statute did not encompass

Some written laws on childcare standing benefitting newly-designated second parents, be they de facto, presumed, or otherwise,¹²⁸ as well as comparable common law rulings,¹²⁹ also permit child support orders to be pursued against newly-designated second parents even when the second parents do not seek childcare. Thus, by developing a parent-like relationship with,¹³⁰ or receiving a child into one's home,¹³¹ one can become a second parent not only eligible to seek childcare, but also obligated to pay support over objection even where there is no longer a shared residence¹³² and even when the earlier conduct was never actually envisioned by the second parent (or single parent or child) as possibly leading to court-ordered child support. Here, there are fewer constitutional protections for the second parent, especially where the second parent was not involved with the first parent before, or at the time of, birth.¹³³ For example, in Delaware a man¹³⁴ or woman,¹³⁵ via statutory de facto parenthood, establishes a parent-

stepfather; court sympathizes with child as stepfather helped cause termination of natural father's childcare rights which, per TENN. CODE ANN. § 36-1-113(1), ended natural father's future child support duties).

128. See, e.g., *DeBoer*, 822 N.W.2d at 733-34, 735 (S.D. 2012) (under Texas law, former stepfather may be liable for child support in divorce proceeding where he earlier had stepchild's name changed to his last name on birth certificate, though his declaration of genetic ties was not true, and was known to be untrue).

129. See, e.g., *Chambers v. Chambers*, 2005 WL 645220 at 1-2 (Del. Fam. Ct. 2005) (former lesbian partner must pay child support as "parent," though not by statutory definition, where she and birth mother pursued artificial insemination and coparented for about 9 years, including after their breakup). Compare *A.M.K.*, 351 Wis.2d at ¶¶ 9 and 9 n.3 (childcare standing in former same sex female partner though no statutory authority to order her to pay child support, even where she had agreed to share "all expenses" related to childrearing).

130. See, e.g., DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6), and (c) (West 2013) (woman or man can become de facto parent by, inter alia, establishing a parent-like relationship) and DEL. CODE ANN. tit. 13, § 8-203 (West 2004) (de facto parentage "applies for all purposes, except as otherwise specifically provided by other law of this state").

131. See, e.g., COLO. REV. STAT. ANN. § 19-4-105(1)(d) (West 2008) (presumed natural father includes one who "receives the child into his home and openly holds out the child as his natural child") and COLO. REV. STAT. ANN. § 19-4-103 (West 1987) ("parent and child relationship extends equally to . . . every parent").

132. See, e.g., WYO. STAT. ANN. § 14-2-204(a) (West 2000) ("any person legally responsible for the support of a child who abandons . . . the child is liable for support of the child") and WYO. STAT. ANN. § 14-2-504(a)(v) (West 2003) (a man is presumed the father of a child when the man resided with the child and openly held out the child as his own for the first 2 years of the child's life). And see Jason M. Merrill, *Falling Through the Cracks: Distinguishing Parental Rights From Parental Obligations in Cases Involving Termination of the Parent-Child Relationship*, 11 J.L. & FAM. STUD. 203, 204-05 (2008) (opining about when child support obligations should end when parental rights are terminated) and *M.D.C.*, 39 So.3d at 118 (parental support obligation not extinguished when parental rights terminated).

133. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (presumed parentage for one who was involved with first parent prebirth, and who helped arrange first parent's pregnancy, differs from presumed parentage of one who only cohabited with first parent after birth and supported child for a while out of "kindness").

134. DEL. CODE ANN. tit. 13, § 8-201(b)(6) (West 2013).

135. DEL. CODE ANN. tit. 13, § 8-201(a)(4) (West 2013).

child relationship, on par, e.g., with an adoptive or birth parent, “for all purposes”¹³⁶ by establishing a “parent-like relationship between the child” and himself/herself;¹³⁷ exercising “parental responsibility for the child;”¹³⁸ and acting “in a parental role” so that there arises “a bonded and dependent relationship.”¹³⁹

There are problems as well when child support arises from precedents lacking statutory foundations, meaning smaller chances of notice of possible later support duties.¹⁴⁰ Yet sex prompting birth usually triggers child support obligations for a male biological parent though no possible childcare was envisioned, as with failed, or assumed but nonexistent, birth control, or sterility.¹⁴¹

Temporary or permanent child support duties are more likely noticed by stepparents as their obligations are guided by statutes that recognize family relationships.¹⁴² Child support duties for stepparents often exist only as long as the stepparents are married to the parents of their stepchildren.¹⁴³ But some stepparent support duties are permanent in that they continue even after marriage dissolution and even without formal adoption.¹⁴⁴ Here, child support may be independent of childcare standing and arises whether or not the financial obligations were actually envisioned by the marrying parents and soon-to-be stepparents.¹⁴⁵ The obligations are at times contingent, as

136. DEL. CODE ANN. tit. 13, § 8-203 (West 2004) (“except as otherwise specifically provided by other law of this State”).

137. DEL. CODE ANN. tit. 13, § 8-201(c)(1) (West 2013).

138. DEL. CODE ANN. tit. 13, § 8-201(c)(2) (West 2013).

139. DEL. CODE ANN. tit. 13, § 8-201(c)(3) (West 2013).

140. *See, e.g., R.K.J. v. S.P.K.*, 77 A.3d 33, 35-36, 42 (Pa. Super. Ct. 2013) (man who signed voluntary paternity acknowledgment and raised child for six years ordered to pay child support though mother was married to another when child was born and a third man was the child’s biological father; child support for the man grounded on the doctrine of paternity by estoppel in order to serve child’s best interests).

141. Thus, when mothers lie about their use of birth control, fathers of children born of sex usually must support. *But see Dier v. Peters*, 815 N.W.2d 1, 3 (Iowa 2012) (fraud claim by putative father against mother whose false representations about paternity led him to expend monies for child’s benefit and to give monies to mother).

142. In some states child support obligations might only be able to arise by statute. *See, e.g., Price v. Price*, 2013 WL 1701814 at 2 (Tenn. Ct. App. 2013) (“in Tennessee, child support is governed by statute. Thus, any obligation to pay child support must arise from Tennessee’s statutes”).

143. *See, e.g., DEL. CODE ANN. tit. 13, § 501(b)* (West 1995) (where parents are unable to support, a stepparent has duty to provide “a minor child’s minimum needs” only while the marriage continues).

144. *See, e.g., Duffey v. Duffey*, 438 S.E.2d 445, 447 (N.C. Ct. App. 1994) (per N.C. GEN. STAT. ANN. § 50-13.4(b), stepparent child obligation, though secondary, continues, after marriage dissolution where stepparent stood “in loco parentis” and “voluntarily” assumed the obligation of support in writing; here, writing was marriage separation agreement) and *Gunter v. Gunter*, 746 S.E.2d 22, 3 (N.C. Ct. App. 2013) (husband’s presumed parentage of child born during marriage overridden by stipulation that husband was not biological father; yet husband might still be stepparent, per N.C. GEN. STAT. ANN. § 50-13.4(b), obliged to provide postdissolution support).

145. *See, e.g., IOWA CODE ANN. § 252A.1* (West 1998) (chapter called “Support of Dependents Law”), *IOWA CODE ANN. § 252A.2(2)* (West 2002) (child defined to include stepchild), and *IOWA CODE*

where they only arise if one or both parents fail to provide support.¹⁴⁶ But some obligations arise for stepparents, even when there are no showings of parental support failures.¹⁴⁷

At times, quasi-stepparents (i.e., cohabitating partners of parents with children) have support duties.¹⁴⁸ And at times, stepparent support duties are only prompted when stepchildren are applicants or recipients of public assistance.¹⁴⁹ Stepparent support failures sometimes prompt criminal sanctions.¹⁵⁰ Yet not everywhere in the United States are stepparents liable for some form of stepchild support.¹⁵¹

ANN. § 252A.3(1) (West 2011) (“A spouse is liable for the support of the other spouse and any child or children under eighteen years of age”).

146. *See, e.g.*, HAW. REV. STAT. § 577-4 (West 1984) (“A stepparent who acts in loco parentis is bound to . . . 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 VT. STAT. ANN. tit. 15, § 296 (West 1985) (stepparent support duty if residence in same household and if “the financial resources” of the parents “are insufficient to provide the child with a reasonable subsistence consistent with decency and health”).

147. *See, e.g.*, OR. REV. STAT. ANN. § 108.045(1) (West 2005) (“expenses of the family and the education” of stepchildren are “chargeable upon the property of both husband and wife;” however, for a stepparent “the obligation shall cease upon entry of a judgment of dissolution”); S.D. CODIFIED LAWS § 25-7-8 (1980) (“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;” natural or adoptive parents are not absolved of any obligation of support); and WASH. REV. CODE ANN. § 26.16.205 (West 2008) (“expenses of the family and the education of the children” chargeable upon the property of stepparents).

148. *See, e.g.*, DEL. CODE ANN. tit. 13, § 501(b) (West 1995) (“Where the parents are unable to provide a minor child’s minimum needs, a stepparent or a 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. Such duty shall exist only while the child makes residence with such stepparent or person and the marriage or cohabitation continues.”)

149. *See, e.g.*, KY. REV. STAT. ANN. § 205.310 (West 1952) (“in addition to any other liability imposed by law,” here stepparent is “legally chargeable with the support . . . in the same manner as a biological parent”). *See also* N.Y. FAM. LAW § 415 (McKinney 1977) (stepparents are like parents) and VA. CODE ANN. § 63.2-1900 (West 2010) and VA. CODE ANN. § 63.2-1908 (West 2002) (“custodial parent” means “a stepparent . . . who has physical custody of the child and with whom the child resides;” custodial parent owes Department for “any payment of public assistance money made . . . for the benefit of any dependent child”).

150. *See, e.g.*, MO. ANN. STAT. § 568.040 (West 2011) (“crime of nonsupport” for parental failure regarding unemancipated stepchild who the stepparent “is legally obligated to provide for”); NEB. REV. STAT. ANN. § 28-706(1) (West 2006) (“criminal nonsupport” of minor stepchild where one knows or reasonably should know of support obligation).

151. In some states only some stepparents have child support duties to their stepchildren. *See, e.g.*, MONT. CODE ANN. § 40-6-217 (West 2009) (“A married person is not bound to support a spouse’s children by a former marriage;” but support duty arises if child is received into the family); N.D. CENT. CODE ANN. § 14-09-09 (West 2007) (stepparent not “bound to maintain the spouse’s dependent children . . . unless the child is received into the stepparent’s family.”). *Compare* N.H. REV. STAT. ANN. § 546-A:1(IV) (2006) (in chapter on Uniform Civil Liability for Support, “child means either a natural or adopted child”); before 2006 the statute included “a stepchild,” as recognized in *Logan v. Logan*, 424 A.2d 403, 404 (N.H. 1980) and *Ruben v. Ruben*, 461 A.2d 733, 735 (N.H. 1983) (stepparent duty to support stepchild ends upon marriage dissolution).

IV. FEDERAL CONSTITUTIONAL CONSTRAINTS ON SECOND PARENT LAWS

A. *Constraints on Second Parent Childcare*

When confronted with federal constitutional challenges to second parent designations in childcare settings,¹⁵² courts often summarily dismiss,¹⁵³ providing little guidance on when such designations infringe upon superior parental rights. Some existing precedent maintains that there can be no third childcare parent when a child already has two parents whose childcare interests have not been lost.¹⁵⁴ There is also general agreement that superior parental rights are more easily overcome when parental control is to be shared than when parental control is lost altogether.¹⁵⁵ There is precedent that when two women agree to jointly raise the child that one will bear using the ova of the other, an express waiver of parental rights signed by the donor on a preprinted form at a reproductive clinic will not always bar the donor from seeking second parent designation.¹⁵⁶ Here, unlike most second

152. Of course there can also be successful state constitutional challenges to attempted second parent designations even when federal constitutional challenges fail. Here, successes may be founded on independent state constitutional interpretations of state constitutional provisions employing the same, or similar, language found within federal constitutional provisions, or on unique state constitutional provisions (i.e., having no federal constitutional counterpart). *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999) (finding “a putative father of a child born [of sexual intercourse] into a marriage may have a right to standing to challenge paternity under the Due Process Clause of the Iowa Constitution;” no standing where right is waived, as when “the challenge is not a serious and timely expression of a meaningful desire to establish parenting responsibility”) and *In Interest of J.W.T.*, 872 S.W.2d 189, 198 (Tex. 1994) (similar; relying on Texas constitutional “due course of law”). *Compare* *Strauser v. Stahr*, 726 A.2d 1052, 1052-53 (Pa. 1999) (evidently no Pennsylvania due process rights for unwed biological fathers as they cannot challenge paternity presumption in husbands whose marriages are intact). *But see* *K.E.M.*, 38 A.3d at 810 (biological father sued for child support for child born to married woman cannot defend based on husband’s paternity [by estoppel] unless it serves the child’s best interests).

153. *See, e.g.*, *Smith v. Guest*, 16 A.3d 920, 930-32 (Del. 2011) (simply recognizing that “de facto” parent designations differ from nonparty standing, without examining closely the “de facto” parent guidelines).

154. *See, e.g.*, *Bancroft*, 19 A.3d at 749-50 (violation of federal due process rights of two fit parents if other persons are also designated under law as parents). Often, the constitutional question remains unanswered (and unraised) because courts focus on state public policy favoring only two parents for any one child. When three parents are initially recognized under law, as with a birth mother, a husband presumed to be a father, and a third person presumed to be a parent because he or she held out a child as his/her own, statutes dictate that courts choose between the two presumed parents. *See, e.g.*, CAL. FAM. CODE § 7612(b) (West 2014) (competing presumptions of natural fatherhood resolved “on the facts . . . founded on the weightier considerations of policy and logic”), employed in *In re Jesusa V.*, 85 P.3d 2, 11 (Cal. 2004), and *G.D.K. v. State*, 92 P.3d 834, 839 (Wyo. 2004) (two conflicting paternity presumptions, with choice between fathers based on “best interests” of child). *But see* CAL. FAM. CODE § 7612(c) (West 2014) (more than two parents will be recognized if otherwise there is detriment to the child).

155. *See, e.g.*, *Frazier*, 295 P.3d at 555 and *Rowell* at 9.

156. *See, e.g.*, *T.M.H. v. D.M.T.*, 79 So.3d 787, 802 (Fla. Dist. Ct. App. 2011) (reviewing other cases).

parent settings, there are biological ties between the alleged second parent and the child.

Further, there is recognition that not all sperm donors for children born of assisted reproduction are comparable when parentage issues arise.¹⁵⁷ Only some look forward to their own future parentage under law, likely making the birth mother more susceptible to a diminishment of her superior parental rights which yield to the donor.¹⁵⁸ By comparison, for the most part all sperm donors for children born of consensual sex are comparable as intentions regarding future pregnancies, births, and parentage are irrelevant to assessments of legal paternity for childcare and child support purposes.¹⁵⁹

The contours of federal constitutional constraints on second parent childcare over first parent objections are otherwise elusive. But there are some relevant, generally recognized, constitutional law principles. One is that not all federal constitutional rights have the same or similar standards on waivers/losses. Consider the explicit federal constitutional jury trial rights in criminal¹⁶⁰ and civil¹⁶¹ cases. In criminal cases, district judges “must address” personally any defendants wishing to plead guilty or nolo contendere about “the right to a jury trial” in order to insure an understanding of the right and a voluntary plea.¹⁶² In civil cases, assuming no prelawsuit waiver of the jury trial right,¹⁶³ parties must “demand a jury

157. See Elizabeth E. McDonald, *Sperm Donor or Written Father? How Written Agreement Statutes are Changing the Way Courts Resolve Legal Parentage Issues in Assisted Reproduction Cases*, 47 FAM. CT. REV. 340, 341 (2009).

158. See *Id.*

159. Thus, reasonable and subjective beliefs by copulating men as to the impossibility of pregnancy (i.e., beliefs as vasectomies or female birth control) do not eliminate the paternity opportunity interests under *Lehr*, 463 U.S. at 248, or the child support obligations under state law.

160. U.S. CONST. amend. VI (applicable in state courts).

161. U.S. CONST. amend. VII (not applicable in state courts).

162. FED. R. CRIM. P. 11(b)(1)(C) and (b)(2), where these rule requisites seemingly are mandated by constitutional precedents, including *Brady v. U. S.*, 397 U.S. 742, 748 (1970).

That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant’s admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant’s consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

Brady, 397 U.S. at 748.

163. Unlike criminal jury trial rights which seemingly are never waiveable prelawsuit, even predispute waivers of civil jury trial rights are often sustained. See, e.g., *Integrated Global Concepts, Inc. v. j2 Global, Inc.*, 2013 WL 5692352 at 2 (D. Cal., N.D. 2013) (“Nearly all states, except Georgia and California, allow contractual waiver of jury trials.”). There is a dispute on whether state law

trial” by “serving the other parties with a written demand” and “filing the demand” with the district court,¹⁶⁴ actions usually taken by nonparty lawyers.¹⁶⁵ While the errors or omissions of lawyers who do not properly demand the civil jury trial rights of their clients are often overlooked,¹⁶⁶ lawyer failures do sometimes prompt client waivers when lawyer acts are inexcusable¹⁶⁷ or unduly prejudice those opposing late jury trial demands.¹⁶⁸

Another principle is that not all federal constitutional rights operate similarly for all who possess the rights. For example, a speaker who defames a public figure can only be liable for defamation per First Amendment precedents if the speaker acted with actual malice.¹⁶⁹ But, a speaker who defames a private figure can be liable for defamation without acting maliciously.¹⁷⁰

As well, similar rights can operate differently for men and women. The Due Process constitutional interests “of parents in the care, custody, and control of their children” born of sex¹⁷¹ are automatically recognized at birth

determines the validity of a predispute civil jury trial waiver in a federal diversity action, where clearly the federal jury trial processes are employed when properly demanded. *AMEC Env't & Infra., Inc. v. Spectrum Serv. Group, Inc.*, 2013 WL 6405811 at 3 (D. Cal., N.D. 2013).

164. FED. R. CIV. P. 38(b)(1) and (2).

165. Comparably, state civil jury trial rights are waived by nonparty lawyers via acts involving either in court conduct or court filings. *See, e.g.*, *Ladd v. Watkins & Vinson*, 168 S.W. 138, 138 (Ark. 1914) (lawyer absent from courtroom when judicial inquiry on jury trial demands); *Johnson v. Sabben*, 282 N.E.2d 476, 477 (Ill. App. Ct. 1972) (counsel intentionally did not ask for jury though client had directed a jury trial demand be made); and *Greene v. City of Chicago*, 382 N.E.2d 1205, 1207-09 (Ill. 1978) (though no party was inconvenienced or prejudiced by late jury trial demand, there is a waiver unless “good cause be shown for failing to comply with the statute” on allowing additional time for doing any act).

166. *See, e.g.*, *Hargreaves v. Roxy Theatre*, 1 F.R.D. 537, 538 (S.D.N.Y. 1940) (as adverse party did not suffer prejudice, “the court should not be too prone to deprive a litigant of a trial by jury because of an error or omission on the part of the agent of her attorney to whom she has entrusted her case; where the act or omission is excusable”), cited by *Cataldo v. E. I. Du Pont De Nemours & Co.* 39 F.R.D. 305, 308 (S.D.N.Y. 1966) (inadvertence alone, however, will not excuse a party from a jury trial waiver).

167. *See, e.g.*, *Galella v. Onassis*, 487 F.2d 986, 996 (2d Cir. 1973) (untimely jury trial demand may only be overlooked with a showing of “cause beyond mere inadvertence”); *Daniel Intern. Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1064 (5th Cir. 1990) (factors on utilizing discretion to try case by jury where jury demand was untimely include whether there will be a disruption in the court’s and adverse party’s schedule; prejudice to adverse party; the length of delay in filing the demand; and any reason for tardiness); and *Todd v. Lutz*, 64 F.R.D. 150, 151 (D. Pa., W.D. 1974) (no excuses due to negligence, inadvertence, or lack of intent to waive).

168. *See, e.g.*, *Baker v. Amtrak Corp.* 163 F.R.D. 219, 221 (S.D.N.Y. 1995) (late demand excused because, *inter alia*, personal injury cases are usually tried by a jury and there was a lack of prejudice to the adverse party). *Compare Lum v. Discovery Capital Mgmt., LLC*, 625 F.Supp.2d 82, 84 (D. Conn. 2009) (no undue prejudice); *Hirschinger v. Allstate Ins. Co.*, 884 F.Supp. 317, 320 (D. Ind., S.D. 1994) (no “strong and compelling” reason to deny untimely jury request offered without explanation or justification); and *Synovus Trust Co., N.A. v. Honda Motor Co., Ltd.*, 223 F.R.D. 699, 701 (D. Ga., M.D. 2004) (any prejudice to opposing party could be minimized).

169. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see, e.g.*, *Neely v. Wilson*, 418 S.W.3d 52, 61 (Tex. 2013).

170. *See, e.g., id.*

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

for all women, but not for all men, who engage in the related sex.¹⁷² Certain men also need to form a “significant custodial, personal, or financial relationship” with the child to attain constitutional protection.¹⁷³ So women and men differ, as do criminal and civil case litigants.

Given the few precedents and these general principles, which second parent childcare laws prompt significant constitutional issues when first parents object? Is a second parent childcare law constitutional when it does not require the one and only legal parent actually intend that the alleged second parent might become a second parent or act as a second parent—as when the first parent simply believes the alleged second parent was only doing household “chores”?¹⁷⁴ Precedents on losses/waivers by biological parents of their veto powers over proposed adoptions establish that actual intentions to relinquish superior parental rights need not always be found in order for parental rights to be ended and for formal adoptions to be approved. In one case, a putative father was not excused from timely objecting to a proposed adoption even though he had earlier filed a timely registration with the Putative Father Registry, appeared at adoption case hearings, filed a paternity case, and reasserted his desire to oppose the adoption about three weeks after the time he was supposed to file a written objection.¹⁷⁵ As well, terminations of all parental childcare interests due to parental unfitness (as by abuse or neglect or abandonment) in adoption proceedings do not usually require findings of intent to relinquish superior parental rights.¹⁷⁶

In one second parent case, a court found that while the first parent need not ever actually intend for the second parent to “obtain any legal rights” regarding the child, more than the undertaking of household “chores” by the

172. *E.g.*, *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

173. *Lehr*, 463 U.S. at 262-63. Certain unwed fathers with such relationships might be foreclosed, however, if the mothers were married to other men in states with a conclusive (i.e., irrebuttable) presumption of paternity for husbands. Justice Scalia, writing for four in *Michael H.*, found American states were free to give categorical preference to mothers’ husbands. *Michael H.*, 491 U.S. at 128. But Justice Stevens, in *Michael H.*, “would not foreclose” the possibility of childcare interests for such unwed fathers while four other Justices recognized federal constitutional childcare interests in such unwed fathers. *Id.* at 133, 136. States now vary on whether to give similar categorical preferences to husbands. *Supra* note 176. So constitutional childrearing rights operate, at least for now, differently for different classes of unwed fathers.

174. *Wilson*, *supra* note 29 at 485.

175. *In re Adoption of A.N.*, 997 N.E.2d 1244, 1251 (Ohio Ct. App. 2013). *See also* *Matter of Baby Boy K.*, 546 N.W.2d 86, 99-101 (S.D. 1996) (reviewing cases) and *In re Adoption of B.W.*, 889 N.E.2d 1236, 1236-37 (Ind. Ct. App. 2008) (biological father loses child to adoption over his objection as he filed his paternity petition in a court other than the adoption court, though he had registered prebirth with the Putative Father Registry).

176. *See, e.g.*, MICH. COMP. LAWS ANN. § 712A.19b(3)(g) (West 2012) (parental rights may be terminated if the parent “without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time”).

second parent was required since the statute on presumed second parentage demanded receipt of the child into the presumed parent's home and the presumed parent "openly" holding out the child as one's own "natural child" (though there need not be actual natural ties).¹⁷⁷ Superior parental rights are somewhat safeguarded, as they are only diminished (but not wholly lost) where the single parent will (or should) see, and typically aid in, the developing parental-like relationship.¹⁷⁸ Far more significant safeguards of superior parental rights arise when statutes or precedents on, e.g., de facto parenthood or presumed parentage, expressly require the single parent's consent or agreement to, or fostering, the developing parental-like relationship between nonparent and child.¹⁷⁹ Such safeguards should be minimally required so as to protect the federal constitutional childrearing interests of the single parent.¹⁸⁰

As well, some states afford fewer safeguards for single parents where there are not second parents, but where there are nonparents who have childcare standing. For example, in Idaho there can be grandparent childcare orders over parental objections where "the child is actually residing with a grandparent in a stable relationship."¹⁸¹ By contrast, in the District of Columbia, there can be "third-party custody" as a "de facto parent" only with parental "agreement."¹⁸²

Beyond safeguarding superior parental rights by requiring significant acquiescence in, and support of, the alleged second parent's acts, a higher burden of proof as to the acts prompting second parentage should also be required.¹⁸³ While preponderance suffices for male sexual acts leading to

177. *S.Y. v. S.B.*, 134 Cal. Rptr.3d 1, 3, 11 (Cal. Ct. App. 2012) (employing CAL. FAM. CODE § 7611(d) (West 2014)).

178. *See, e.g., id.*, at 14.

179. *See, e.g.,* DEL. CODE ANN. § 8-201(c)(1) (West 2013) (de facto parent only with "the support and consent of the child's parent").

180. *See, e.g.,* *Middleton v. Johnson*, 633 S.E.2d 162, 168-69 (S.C. Ct. App. 2006) (in recognizing that "a psychological parent-child relationship" leading to childcare standing must be "strictly limited," the single parent's consent to or fostering the relationship is "critical," as only here may "the legal parent's rights to unilaterally sever that relationship" be "necessarily reduced;" the single parent "cannot maintain an absolute zone of privacy [around his or her child] if he or she voluntarily invites a third party to function as a parent to the child").

181. IDAHO CODE ANN. § 32-717(3) (West 2007).

182. D.C. CODE §§ 16-831.01 and 16-831.03 (West 2009).

183. The latest Uniform Parentage Act, last amended or revised in 2002 and approved by the American Bar Association on February 10, 2003, takes a different approach, seeming to allow presumed parentage for one who "for the first two years of the child's life . . . resided in the same household with the child and openly held out the child as his own," to be established by a preponderance of the evidence. UNIF. PARENTAGE ACT § 204(a)(5) (2002). *Compare id.* at § 608(d) (denial of motion for an order for genetic testing must be based on "clear and convincing evidence").

pregnancy,¹⁸⁴ it does not suffice for conduct that is more difficult to assess and has no reliable scientific test, as with conduct that may be parent-like or just chores around the house.¹⁸⁵ As well, especially where experts may testify, possible first parent child abuse or neglect may be raised, and the de facto parent law is unclear, superior parental rights may need to be safeguarded by appointment, at state expense, of a lawyer for the first parent.¹⁸⁶

B. Constraints on Second Parent Child Support

As with second parent childcare in settings outside of parentage by sex (actual or presumed), assisted reproduction, or formal adoption, there are no significant precedents on the federal constitutional due process constraints on second parent child support orders arising from conduct undertaken long after birth. Seemingly, child support obligations for one deemed a parent are a bit more difficult on policy as well as constitutional grounds when there are already two parents with established support duties and recognized childcare interests.¹⁸⁷ There sometimes should not be two second parents, or three different parents, with child support responsibilities,¹⁸⁸ as when there is little or no real need for additional support and when a third person's obligation would, or will likely, harm the child or interfere significantly with superior parental rights.¹⁸⁹

Yet, with three child support parents, unlike with three childcare parents, generally there is less risk of infringing upon the superior parental rights of existing parents. Child support need not be accompanied by childcare. So at times, three child support obligors should be recognized, as when the child's best interests require additional financial assistance and the

184. *Rivera v. Minnich*, 483 U.S. 574, 574 (1987). As Justice Brennan, in dissent, observed in that case, factual issues as to male genetic ties would usually be similarly determined under either a preponderance or beyond a reasonable doubt standard, as long as blood test results are used. *Id.* at 586.

185. A higher burden of proof also seems appropriate for de facto parenthood for second parents in other settings, as when the only recognized legal parent dies with the child and the alleged second parent seeks recovery through the child's estate over, e.g., grandparent objections. Here there may be few witnesses to counter the self-serving testimony of the alleged second parent.

186. *Compare Lassiter v. Dep't. of Soc. Serv.*, 452 U.S. 18, 32-33 (1981) (when right to appointed counsel may arise in a parental rights termination proceeding).

187. Support duties and childcare interests includes two parents now paying support or eligible to be ordered to pay support, and now exercising or eligible to exercise (or seek to exercise) childcare responsibilities.

188. Sometimes there is not even a second parent for child support purposes. *See, e.g., Karen G. v. Thomas G.*, 972 N.Y.S.2d 608, 608 (N.Y. App. Div. 2013) (mother equitably estopped from pursuing paternity claim against biological father).

189. *See, e.g., Juanita A.*, 930 N.E.2d at 215 (birth mother estopped from pursuing biological father for child support where "another father figure is present in the child's life," the mother's husband who was in the child's life, was on the child's birth certificate, and had raised the child from birth).

child will not be harmed.¹⁹⁰ For example, one without biological, formal adoptive, or assisted reproduction ties who holds out a child of two parents as one's own for a sufficient time¹⁹¹ and in a particular setting (i.e., household or residence¹⁹²) should sometimes be subject to child support though there are already two child support parents.¹⁹³ Child support duties for the third person would less likely impact negatively the superior parental rights of the two other persons also liable for support than would a recognition of childcare opportunities for the third person.¹⁹⁴ While child support duties for second or third persons do implicate their due process property interests, typically these duties can be rationalized as serving children's interests and as fair to obligors who knowingly developed significant, and typically parental-like, relationships with children. If biological dads can owe child support arising from consensual sex never reasonably thought to prompt pregnancy,¹⁹⁵ de facto parents can owe child support arising from their conscious childrearing over some extended time.

Whether there are only two parents, or there are three (or more), with child support obligations, child support assessments against new parents need not be accompanied by judicial recognitions of possible childcare interests involving custody, visitation, or the like. A second (or third) parent may be ordered to pay to support a child for whom that parent never had, and/or now has, no childcare standing. Thus, a biological father of a child born of sex can have child support obligations though he never

190. *J.R. v. L.R.*, 902 A.2d 261, 266 (N.J. Super. Ct. App. Div. 2006) (order of child support against both husband and biological father as "reality cannot be ignored" and the minor "is in need of support and is legally entitled to it"). *Also see* *Little v. Streater*, 452 U.S. 1, 9 n.6 (1981) (finding federal statutes require states to seek reimbursement by establishing paternity for children born out of wedlock who are receiving governmental benefits, "unless . . . it is against the best interests of the child to do so," citing 42 U.S.C. § 654(4)).

191. *Compare, e.g.*, WYO. STAT. ANN. § 14-2-504(a)(v) (West 2003) (presumed parentage for one who holds out child for child's first two years) with ALA. CODE § 26-17-204(a)(5) (2009) (presumed parentage for one who holds out child long enough so that a parent-child like relationship develops).

192. *Compare, e.g.*, TEX. FAM. CODE ANN. § 160.204(a)(5) (Texas 2003) (presumed parentage if residing in same household) with COLO. REV. STAT. ANN. § 19-4-105(1)(d) (West 2008) (no same household or residence requirement for presumed parent).

193. *But see Smith*, 553 So.2d at 855 (declining to decide whether husband, as legal parent, must pay support together with mother and biological father).

194. *Bancroft*, 19 A.3d at 750 (unconstitutional to designate one a "de facto" parent for childcare purposes where there are already two existing parents; any extension of "the sacred right of parenthood to more than two people dilutes the constitutional rights of the two parents"). Yet in Louisiana, childcare can be ordered for three parents. *See, e.g., T.D.*, 730 So.3d at 873.

195. Biological dads can also owe child support to adult children via orders of retroactive support, even when the dads reasonably thought they had settled their obligations in earlier child support cases brought by the birth mothers on behalf of the children. *See, e.g., Knapp v. Bayless*, 2006 WL 2466597 at 3, 5 (Ohio Ct. App. 2006) (child and birth mother not in privity when birth mother settled earlier, and child's best interests had not been considered when the settlement prompted the earlier judgment entry).

developed a relationship with the child prompting childcare opportunities¹⁹⁶ or though he developed a parent-child relationship, but later abandoned the child.¹⁹⁷ Similarly, one who attained second parent status for childcare purposes, as with de facto parenthood, but later abandons the child, should often still be liable for child support.¹⁹⁸ But there should generally be no involuntary support obligations for one who never attained or sought parental childcare status, as with one who was living with a single parent and providing support to the single parent's child out of "kindness."¹⁹⁹

Because second parent status for child support purposes impacts the obligors and families both financially and otherwise "lifelong,"²⁰⁰ a higher burden of proof is appropriate. Though only money may be involved, the financial obligation of child support differs significantly from other financial obligations arising from court judgments.²⁰¹ This difference, together with the prospect of expert testimony, allegations of child abuse or neglect against the second parent as the bases to deny childcare standing,

196. See, e.g., *Still v. Hayman*, 794 N.E.2d 751, 757-58 (Ohio Ct. App. 2003) (overruling a biological father's child support obligation even though the birth mother had told the father that he was not the child's father, fifteen years had passed since the birth of the child, and the biological father's parental opportunity may be barred); *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. 2004) (rejecting biological father's substantive due process claim, stating "neither the laws of biological reproduction nor the Due Process Clause recognize the 'fairness' arguments plaintiff raises. Reproduction and child support requirements occur without regard to the male's wishes or his emotional attachment to his offspring."); and *Com. ex rel. Zercher v. Bankert*, 405 A.2d 1266, 1269 (Pa. Super. Ct. 1979) ("Generally, matters of support are separate and independent from problems of visitation and custody, and ordinarily a support order must be paid regardless of whether the wife is wrongfully denying the father's right to visitation."). On the lack of childcare opportunities for certain unwed biological fathers, see, e.g., *Lehr*, 463 U.S. at 262 (federal constitution only compels state to consider a biological father's opinion "of where the child's best interests lie" provided that he develops "a relationship with his offspring" and accepts "some measure of responsibility for the child's future").

197. See, e.g., *H.S.*, 737 N.W.2d at 745 n.4 (some states allow the continuation of a child support obligation past the termination of parental rights).

198. See, e.g., *State of Kansas/State of Iowa ex rel. Sec'y of Soc. And Rehab. Serv. v. Bohrer*, 189 P.3d 1157, 1157 (Kan. 2008) (where the child of biological father who had undertaken childcare for several years now had a permanent guardian [the child's maternal great-grandmother], the father was still responsible for reimbursing the state for funds expended on behalf of child and for future child support and medical coverage). Consider as well a possible child support order against a former lesbian partner of a birth mother where the former partner initially, but not later on, assumed a presumed second parent status by undertaking both childcare and child support.

199. *Elisa B.*, 117 P.3d at 670 (recognizing that in *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002), the court cautioned that not "every man who begins living with a woman when she is pregnant and continues to do so after the child is born necessarily becomes a presumed father of the child").

200. *Rivera*, 483 U.S. at 584 ("Most of us see parenthood as a lifelong status whose responsibilities flow from a wellspring far more profound than legal decree.") (Brennan, J., dissenting).

201. *Id.* at 583-84 ("The financial commitment imposed upon a losing defendant in a paternity suit is far more onerous and unpredictable than the liability borne by the loser in a typical civil suit.") (Brennan, J., dissenting).

As well, to help "insure the correctness" of second parent designations leading to child support, other procedural protections, via Due Process, may be mandated. *Little*, 452 U.S. at 14 (indigent defendants have right to government-paid blood grouping tests when sued for child support based on biological ties to child).

and uncertain laws, may also prompt a right to state-supported counsel for indigent alleged second parents subject to possible child support orders.²⁰²

V. CONCLUSION

Increasingly, American states are recognizing sometime after birth a second legal parent for a child then with only a single parent under law. Second, parent status can prompt childcare opportunities and/or child support obligations. Such childcare opportunities necessarily diminish the superior parental rights of the theretofore single parent. Such child support obligations necessarily deprive the newly-designated second parent of due process property interests. To date, the federal constitutional constraints on second parent childcare and child support laws have been largely overlooked. Closer examinations reveal serious federal constitutional concerns with at least some current American state childcare and child support laws on second parentage.

202. *Lassiter*, 452 U.S. at 32-33 (on when right to appointed counsel may arise for a parent facing a parental rights termination proceeding).