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I. INTRODUCTION

Outside of a formal adoption, legal parentage leading to childcare opportunities traditionally arose at or shortly after birth for a woman by giving birth, for a married man by a statutory presumption of natural ties, and for an unmarried man by forming "a significant custodial, personal, or financial relationship" with the child.[1] Parentage long after birth customarily arose

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1. In *Lehr v. Robertson*, 463 U.S 248, 262 (1983), such a formation was necessary for the unwed biological father to have a right to a voice, via his federal constitutional liberty interest, in the proposed adoption of his offspring. Formation is often required under state paternity and adoption laws though it need not be, as the Supreme Court of the United States has not demanded such formation precede any state law recognition of parental rights. *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 191–92 (Iowa 1999) (suggesting a more sympathetic approach to unwed biological fathers under Iowa constitutional due process than they receive under federal constitutional due process under *Lehr*) and compare *In re* Baby Girl S., 407 S.W.3d 904, 918 (Tex. App. 2013) (finding that, in some states, maternal concealment of pregnancy will not excuse an unwed biological father who wishes to rear a child from having to form a "significant custodial, personal or financial relationship" with the child in a timely fashion). If, however, the birth mother was married to another person, that person's parentage might foreclose under state law the *Lehr* opportunity interest in forming a relationship with the child. Michael H. v. Gerald D., 491 U.S. 110, 120 (1989) (holding that California law

from formal adoption by a woman or man who had petitioned the state, which, upon investigation, approved the petition.[2] Recently, parentage for childcare purposes has been increasingly recognized as arising long after birth from a de facto adoption by a man or woman who need not petition the state for approval, but who simply establish de facto parent (or comparable) status, usually encompassing the formation of a parental-like relationship with the child who then has a single parent.[3] Such de facto adoptions have arisen at a time when there have been significant changes in both assisted reproductive technologies and human conduct.[4]

Whereas de facto adoptions have arisen chiefly due to changes in assisted reproductive technologies and human conduct, state lawmakers have responded by striving to accommodate simultaneously the interests of current parents, possible new parents, children, extended family members, and the state by mainly focusing on the conduct of the existing and would-be parents.[5] Unfortunately, children's, family members', and public interests are sometimes underserved—children and governments are far less protected in de facto adoptions than in formal adoptions, and states have few mechanisms in place to thwart socially undesirable parentage via de facto adoptions. Both statutory and common law reforms of state de facto

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established a conclusive presumption of paternity in husband, foreclosing unwed biological father from challenging where the married couple remained an intact family).

2. The varying American state formal adoption laws are compiled in Child Welfare Information Gateway, https://www.childwelfare.gov/systemwide/laws_policies/state/.

3. Parentage terms comparable to de facto parenthood include equitable adoption; paternity presumption; parenthood by estoppel; *in loco parentis*; and equitable parenthood. Incidentally, the same term can have different meanings from state to state, as with de facto parent, which (perhaps surprisingly) sometimes encompasses a parent on par with a birth or adoptive mother or a biological or adoptive father and sometimes encompasses a nonparent who has third-party standing to seek a childcare order over parental objection. *Compare* DEL. CODE ANN. tit. 13, §8-201(a)(4), (b)(6) (West 2013) (finding de facto parenthood, on equal footing with biological or adoptive parenthood where one had a "parent-like relationship" and "acted in a parental role") *with* D.C. CODE § 16-831.01(1) (stating that de facto parent can seek "third-party custody" if one lived with a child since birth). As well, different terms can have comparable meanings. *Compare* DEL CODE ANN. tit. 13, § 8-201(a)(4)-(b)(6) (West 2013) (finding a de facto parent where one had a "parent-like relationship" and "acted in a parental role") *with* ALA. CODE § 26-17-204(a)(5) (stating that one is a "presumed parent" if one, for example, develops "a significant parental relationship with the child" involving emotional and financial support). Herein, de facto parent includes a parent on equal footing with a biological or adoptive parent, whether arising under statute or precedent, including a parent denominated under equitable adoption, paternity presumption, or similar bases.

4. The state laws recognizing de facto adoptions are fully reviewed in Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743, 752–53 (2013) [hereinafter Parness].

5. Parness, *supra* note 4, at 752–63 (providing an overview of new parentage laws).

parenthood laws are needed,[6] especially to ensure that children's best interests are promoted.

II. CHANGES IN ASSISTED REPRODUCTION TECHNOLOGIES AND HUMAN CONDUCT

Two major technology advancements allow parentage determinations to become operative long after birth. The first advancement involves the availability of more reliable, less costly, and less intrusive testing to determine male biological parentage. Soon, at home (and pre-birth) testing may be generally available.[7] Better testing has opened the door to more reliable paternity actions against unwed fathers—especially by governments solely to gain reimbursement for child support—as well as to more paternity disestablishments by men who were presumptive fathers under law due to marriage to birth mothers.

The second technology advancement involves the availability of more reliable, less costly, and generally accessible processes for assisted human reproduction (AHR). Increasingly, parentage for both opposite sex and same sex couples can be planned privately without sexual intercourse.[8] Births employing surrogates can now even be planned so that one or both of the intended parents contribute no genetic material.[9] These advancements have prompted new opportunities for second parent status long after birth for children with but one legal parent at birth. Examples include requests by a biological father of a child whose presumed father was disestablished by genetic testing, or by a same sex female partner who did not contribute gametes for a child born to her mate.

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6. Judicial amenability to common law reforms when legislators fail to act varies, with some courts more deferential to General Assembly lawmaking than others. *Compare* Pitts v. Moore, 90 A.3d 1169, 1177 (Me. 2014) (holding that while legislation is preferred, in its absence "we must provide some guidance to trial courts faced with de facto parenthood petitions") *with* Moreau v. Sylvester, 95 A.3d 416, 424–25 (claiming that the legislature is "better equipped" to address de facto parenthood, with court declining to fill the "perceived void").

7. *See* Andrew Pollack, *Before Birth, Dad's ID*, N. Y. TIMES, June 20, 2012, at B11; *see also* Xin Guo, Letter to the Editor, *A Noninvasive Test to Determine Paternity in Pregnancy*, N. ENG. J. MED. 366, at 1743–45 (May 3, 2012).

8. *See* Lauren Grill, Note, *Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1719–25 (2013) (detailing the history of AHR and the recent growth in free private sperm donation); *see also* A.A.B. v. B.O.C., 112 So.3d 761, 762 (Fla. Dist. Ct. App. 2d 2013) (discussing the increases in AHR on a do-it-yourself basis, making governmental regulation difficult).

9. *See* Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J. L. REF. 899, 899 (2012) (discussing both the Uniform Probate Code (2008) and the Uniform Parentage Act (2002) provisions preferring the term gestational carrier) [hereinafter Knaplund].

As to human conduct, there has been a significant rise in unwed mothers, who at birth or thereafter, choose to raise their children with new intimate partners or with family members, like grandparents. [10] These mothers' children have no fathers listed on their birth certificates[11] and biological fathers who fail to ever attain parental childcare status. Comparably, with the increasing availability of single parent adoptions, chances are that intimate partners or family members will develop parental-like bonds with single parent, formally adopted children long after birth. As well, there are increasing numbers of stepparents who help raise their partners' children.[12] As Justice Stevens observed, there is an "almost infinite variety of family relationships that pervade our ever-changing society."[13]

III. DE FACTO PARENTHOOD AND RELATED DOCTRINES

Nonparents without biological or adoptive ties often morph into parents of children with single parents at undetermined times after birth, usually due to their parental-like relationships with the children. Often this new parentage arises with the active encouragement, or perhaps passive acquiescence, of the single parent. Second parents arise under such doctrines as de facto parenthood, presumed parentage, equitable adoption, and parentage by estoppel, [herein collectively called de facto parenthood], with such doctrines emanating from both statutes and common law precedents. Potential second parents are not confined to intimate partners of the single parents and thus can include grandparents, aunts, and uncles, as well as stepparents.

Usually, but increasingly not always, de facto parenthood cannot be employed to prompt a third parent for a child with two recognized parents because states mostly cling to the tradition of having only two parents under

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10. *See, e.g.*, Katherine K. Baker, *Bionomativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 652 n.9 (2008) [hereinafter Baker]; Elizabeth Wildsmith, Nicole R. Steward-Streng, and Jennifer Manlove, 2011 CHILD TRENDS RESEARCH BRIEF (Nov. 2011), *available at* www.childtrends.org ("In 2009, 41 percent of all births (about 1.7 million) occurred outside of marriage, compared with 28 percent of all births in 1990 and just 11 percent of all births in 1970.").

11. Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 55–56 (2010); *see also* Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 2, n.4 (2013) (providing that in 2012 almost 18 million children were living with mother only). [hereinafter Atkinson].

12. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 63–64 (2000) (O'Connor, J., plurality) ("[W]hile many children have two married parents and grandparents who visit regularly, many other children are raised in single family households . . . . Understandably, in these single parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday task of child rearing."). *Id.* at 64.

13. *Id.* at 90 (Stevens, J., dissenting); *see also id.* at 63 (finding it "difficult to speak of an average American family.") (O'Connor, J., plurality).

law for any child at any one time. Related doctrines, however, allow third persons to have childcare standing (i.e., ability to seek visitation, parenting time, and the like) as nonparents if they develop close relationships with children that resemble the relationships necessary to prompt second or third parent status elsewhere. This third-party standing allows ongoing relationships between children and nonparents in the children's best interests, notwithstanding parental objection.

A. Statutes

Nonparents can become second parents long after birth through statutes. De facto parenthood only sometimes explicitly requires some form of single parent consent. In Delaware, a de facto parent can be judicially recognized for one who had "a parent-like relationship" with "the support and consent of the child's parent;" who exercised "parental responsibility;" and who "acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature."[14] By contrast, also in Delaware, the explicit consent of the child's single parent is not required for presumed parentage to arise, though relevant voluntary acts single parent surely occur; such presumed parentage is prompted when a person "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."[15]

There are comparable state statutes elsewhere on parentage presumptions. While traditionally these presumptions were founded on the possibility of natural ties in the husband married to the mother, today presumptions are not always dependent upon such possible ties or upon marriage.[16] Some statutes require a minimum period of childcare or support. For example, in Missouri, "[a] man shall be presumed to be the natural father of a child if . . . [h]e is obligated to support the child pursuant to a written voluntary prom-

14. DEL. CODE ANN. tit. 13, § 8-201(a)(4) (mother), § 8-201(b)(6) (father), and § 8-201(c) (the three factors to attain "de facto parent status"); *but see* Bancroft v. Jameson (*In re* Bancroft), 19 A.3d 730, 750 (Del. Fam. Ct. 2010) (finding statute overbroad and violative towards mother's and father's due process rights as relates to the mother's boyfriend).

15. DEL CODE ANN. tit. 13, § 8-204(a)(5) (West 2004); s*ee also* N.M. STAT. ANN. § 40-11A-204(A)(5) (West 2010); N.D. CENT. CODE § 14-20-10(1)(e) (West 2010); and OKLA. STAT. tit. 10, § 7700-204(A)(5) (West 2006).

16. *See, e.g.*, COLO. REV. STAT. § 19-4-105(1)(d) (2013) (indicating that while child is a minor, a man is the presumed natural father if he "receives the child into his home" and "openly holds out the child as his natural child"); S.Y. v. S.B., 134 Cal. Rptr. 3d 1, 8–10 (Cal. Ct. App. 2011) (holding CAL. FAM. CODE § 7611(d) (West Supp. 2014) to include same sex female partners). *See also* IND. CODE § 31-14-7-2(a) (Supp. 2013) (indicating the need for the child's mother's consent).

ise."[17] In Minnesota, "[a] man is "presumed to be the biological father of a child if . . . while the child is under the age of majority, he receives the child into his home and openly holds out the child as his biological child."[18] Indiana seemingly has a narrower "rebuttable presumption" than in Minnesota, as there also must be "the consent of the child's mother"[19] and a positive genetic test.[20] Alabama's statute requires "a significant parental relationship with the child" involving emotional and financial support that prompts a presumed parentage.[21] A Wyoming "man is presumed to be the father of a child if . . . [f]or the first two (2) years of the child's life, he resided in the same household with the child and openly held out the child as his own."[22]

Even where natural ties are presumed, a lack thereof will not necessarily result in a rebuttal of the presumption.[23] Though some statutory presumptions explicitly address only presumed paternity, they are applied in neutral ways so that women can become presumed parents by meeting the statutory standards.[24]

Other state statutes recognize that certain parental acts, not amounting to abuse, neglect or abandonment, can diminish superior parental rights by

17. MO. REV. STAT. § 210.822(1)(3)(c) (Supp. 2014). This obligation seemingly can arise without "court order," as such an order is another way the obligation prompting a presumption can arise. *Id.* Where two conflicting presumptions arise via conduct in Missouri, the controlling presumption is the one "founded on the weightier considerations of policy and logic." *Id.* § 210.822(2). Comparably, there is a presumption in Kansas where a man "notoriously or in writing recognizes paternity," which need not involve a voluntary paternity acknowledgement. KAN. STAT. ANN. § 23-2208(a)(4) (2007).

18. MINN. STAT. § 257.55(d) (Supp. 2014). Where two presumptions arise via conduct in Minnesota, the controlling presumption is the one "founded on the weightier considerations of policy and logic." *Id*. 257.55(2). *See also* COLO. REV. STAT. § 19-4-105(1)(d) (providing that a man is considered "to be the natural father of a child if . . . [w]hile the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child."); *see, e.g.*, MONT. CODE. ANN. § 40-6-105(1)(d) (2013).

19. IND. CODE § 31-14-7-2(a).

20. *Id.* § 31-14-2-1(2).

21. ALA CODE § 26-17-204(a)(5) (Supp. 2013).

22. WYO. STAT. ANN. § 14-2-504(a)(v) (2013). *See also* DEL. CODE ANN. tit 13. § 8-204(a)(5) (2009) ("A man is presumed to be the father of a child if . . . [f]or the first two years of a child's life, he resided in the same household with the child and openly held out the child as his own."); *see, e.g.*, TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2014).

23. *See* Alisha C. v. Jeremy C., 808 N.W.2d 875, 884–85 (Neb. 2012) (holding that under section 43-1412.01 of the revised statutes of Nebraska, a former husband may set aside earlier divorce court finding of presumed marital paternity, but only if in the child's best interests, there was no adoption, and the husband did not acknowledge paternity while "knowing he was not the father.").

24. *See, e.g.*, *In re* Parental Responsibilities of A.R.L., 318 P.3d 581, 585 (Colo. App. 2013); Frazier v. Goudschaal, 295 P.3d 542, 554–58 (Kan. 2013) (holding that a second mother is a presumed parent as she "notoriously" recognized a child born to her partner via assisted reproduction; co-parenting pact signed before birth recognizing second mother as a "de facto parent").

prompting third-party, rather than second parent, childcare opportunities. Often, third parties are described as taking on parental duties and look like de facto, presumed, and other second parents. For example, a South Dakota statute allows "any person other than the parent of a child to intervene or petition a court . . . for custody or visitation of any child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship."[25] The parental "presumptive right to custody" is diminished upon abandonment or persistent neglect; forfeiture or surrender of parental rights to a third-party; abdication of "parental rights and responsibilities;" or "extraordinary circumstances" where parental custody "would result in serious detriment to the child."[26] In Kentucky, a "de facto custodian" of a child can seek custody if he or she is "the primary caregiver" and "financial supporter," has resided with the child for at least six months, and the child is under three years of age.[27] In Colorado, a third-party has standing to seek an allocation of parental responsibilities when the third-party "has had the physical care of a child for a period of six months or more."[28] In New Mexico, when "neither parent is able . . . to provide appropriate care," a child may be "raised by . . . kinship caregivers," who include an adult with a significant bond to the child and who cares for the child "consistent with the duties and

25. S.D. CODIFIED LAWS § 25-5-29 (2013). Thus, not all de facto parents can qualify as de facto custodians with standing to seek childcare orders. *See* Truman v. Lillard, 404 S.W.3d 863, 869 (Ky. Ct. App. 2012) (holding that a former same-sex partner of woman who adopted her niece was not a de facto custodian and failed to show a waiver of superior parental right to custody).

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

27. KY. REV. STAT. ANN. § 403.270(1)(a) (West Supp. 2013) (residence for at least one year is required if the child is older than three). Thus, not all de facto parents can qualify as de facto custodians with standing to seek childcare. *See* Spreacker v. Vaughn, 397 S.W.3d 419 (Ky. Ct. App. 2012) (holding that paternal great aunt is de facto custodian); *Truman*, 404 S.W.3d at 869; *see also* MINN. STAT. § 257c.03(6)(a)–(c) (Supp. 2014) (factors of a de facto custodian); K.S. v. B.W., 954 N.E.2d 1050, 1051–52 (Ind. Ct. App. 2011) (employing IND. CODE 31-9-2-35.5). The phrase "de facto custodian," and similar phrases, can also be used in other settings. *See, e.g.*, Colusa Cnty. Dep't of Health and Human Servs./Child Protective Servs. v. R.J. (*In re* Jesse C.), No. C069325, 2012 WL 5902301, at *1, *4 (Cal. Ct. App. Nov. 26, 2012) (stating that a de facto parent is one who cares for child during dependency proceeding, but that de facto parent status is lost when dependency is terminated).

28. COLO. REV. STAT. § 14-10-123(1)(c) (2013). *See, e.g.*, Olds v. Berry (*In re* B.B.O.), 277 P.3d 818, 823–24 (Colo. 2012) (holding that a half-sister had standing). *But see, e.g.*, *In re* D.T., 292 P.3d 1120, 1121–22 (Colo. App. II 2012) (holding that a mother's friend did not gain standing as she "served more of a grandmotherly role, rather than a parental role" and the mother never ceded her parental rights).

responsibilities of a parent."[29] Lastly, in Wisconsin, "a person who has maintained a relationship similar to a parent-child relationship with the child" may secure "reasonable visitation rights . . . if the court determines that visitation is in the best interests of the child."[30]

B. Precedents

Besides statutes, case precedents recognize second parenthood, long after birth, for one who acted as a parent in raising a child together with the child's single parent. Some courts, however, shy away on separation of powers grounds. As one high court observed, "[t]he members of our legislature, as elected representatives of the people, have the power and responsibility to establish the requirements for adoption in this state. The courts cannot simply play that role."[31] Other courts plead for General Assembly action to keep pace with changing family dynamics.[32]

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29. N.M. STAT. ANN. § 40-10B-3(A), (C) (2014), *applied in* Stanley J. v. Cliff L., 319 P.3d 662, 664–65 (N.M. Ct. App. 2013).

30. WIS. STAT. ANN. § 767.43(1) (2007), *applied in* Vanderheiden v. Vanderheiden (*In re* Vanderheiden), 838 N.W.2d 865, 2–3 (Wis. Ct. App. 2013) (regarding visitation for former stepfather).

31. *In re* Adoption of Baby Z., 724 A.2d 1035, 1060 (Conn. 1999). *See also* Smith v. Gordon, 968 A.2d 1, 14–15 (Del. 2009) (providing that de facto parentage must be undertaken by General Assembly); Debra H. v. Janice R., 930 N.E.2d 184, 193 (N.Y. 2010) (same). *But see* Franklin v. Johnston (*In re* Custody of A.F.J.), 314 P.3d 373, 376–77 (Wash. 2013) (finding no need for "statutory gap" for court to use power to fashion "equitable remedy" relating to childcare disputes, including formulation of a de facto parent doctrine).

32. *See, e.g.*, A.C. v. N.J., 1 N.E.3d 685, 692 (Ind. Ct. App. 2013), where the court said this of General Assembly inaction regarding children born to lesbian couples:

> Since King, [a 2005 Indiana Supreme Court decision], the status of the law surrounding a lesbian partner's right, if any, to enjoy the rights of a legal parent of a child born to her partner under the circumstances presented here remains uncertain. When this court decided *In re* A.B. [in 2004], we solicited guidance from the General Assembly on this issue. In the years that have passed since then, none has been forthcoming. The existing statutory framework does not contemplate the increased use of assisted reproductive technologies. Accordingly, it provides no guidance in situations where an intended parent lacks a genetic connection to the child. That deficiency is exacerbated by the growing recognition of less traditional family structures. Our system of government entrusts the General Assembly, not the courts, to fashion a framework for deciding matters as tethered to social mores and sensibilities as this subject is. We feel the vacuum of such guidance even more acutely now than we did eight years ago, when King was decided. Indeed, what began as a trickle is rapidly becoming a torrent, and the number of children whose lives are impacted by rules that have yet to be written only increases with the passage of time. They, and we, would welcome a legislative roadmap to help navigate the novel legal landscape in which we have arrived.

Often, with great reluctance due to concerns about lacking quasi-legislative authority, precedents establish second parenthood. In Wisconsin, a person can achieve "second parent" status by, inter alia, providing financial support with the consent of the single parent and developing a bonded, dependent relationship that is "parental in nature."[33] A "de facto" parent in Washington includes one who lived with the child; established a bonded and dependent relationship with the child, with a single parent's consent and aid; and assumed parental obligations without the expectation of financial compensation.[34]

There are also case precedents recognizing childcare interests in non-parents who have acted like parents. For example, in Ohio, there can be no "shared parenting" contracts between parents and third parties.[35] Despite this precedent, "a parent may voluntarily share with a nonparent the care, custody, and control of his or her child through a valid shared-custody agreement," which may create for a third-party "an agreement for permanent shared legal custody of the parent's child," or an agreement for temporary shared legal custody, as when the agreement is revocable by the parent.[36] Under certain conditions in Minnesota there is a common law right to visitation over parental objection for a former family member, like an aunt, who stood "in loco parentis" with the child.[37] Lastly, in New York, a grandparent

33. Holtzman v. Knott (*In re* Custody of H.S.H.-K.), 533 N.W.2d 419, 435–36 (Wis. 1995).

34. Holt v. Holt (*In re* Custody of B.M.H.), 315 P.3d 470, 478–79 (Wash. 2013) (de facto parent statute can include a former stepparent) (relying on Carvin v. Britain (*In re* Parentage of L.B.), 122 P.3d 161, 174–76 (Wash. 2005) (finding that a statute can include a former lesbian-partner)). *See also In re* A.F.J., 314 P.3d at 377 (finding that a statute can include a foster parent).

35. *In re* Bonfield, 780 N.E.2d 241, 247–48 (Ohio 2002).

36. Hobbs v. Mullen (*In re* Mullen), 953 N.E.2d 302, 305–06 (Ohio 2011). Custody in the nonparent is only allowed under an agreement when the Juvenile Court deems the nonparent suitable and the shared custody is in the best interests of the child. *Bonfield*, 780 N.E.2d at 249. *See also In re* LaPiana, 2010-Ohio-3606, 8–10 (Ohio Ct. App. 2010) (securing visitation for a former lesbian-partner with two children born of assisted reproduction, where there was a written agreement to raise jointly the first child and other evidence of intent to share custody of both children).

37. Rohmiller v. Hart, 811 N.W.2d 585, 593 (Minn. 2012) ("under the common law in Minnesota, a finding of *in loco parentis* status has been essential to the granting of visitation to non-parents over the objection of a fit parent"). *See also* J.S.W. v. A.W.R. (*In re* V.D.W.), 2013 WL 6231797, 4–6 (Miss. Ct. App. 2013) (holding that in a post-divorce proceeding, a mother's ex-husband stood *in loco parentis* to her child, where child had been conceived before the marriage, but born during the marriage). At times, attaining *in loco parentis* status seemingly elevates nonparent to parental status. *See, e.g.*, Daniel v. Spivey, 386 S.W.3d 424, 429 (Ark. 2012) (stating that precedents include stepparent and same sex partner of parent).

has standing to seek visitation with a grandchild over parental objection when "conditions exist which equity would see fit to intervene."[38]

C. Special Laws

Beyond the general laws on second parent and nonparent childcare standing arising from post-birth acts, special childcare laws exist,[39] like those applicable just to stepparents (both present and former) or just to grandparents.[40]

In a Tennessee divorce, "a stepparent to a minor child born to the other party . . . may be granted reasonable visitation rights . . . upon a finding that such visitation rights would be in the best interests of the minor child and that such stepparent is actually providing or contributing towards the support of such child."[41] In California, "reasonable visitation to a stepparent" is permitted if in "the best interest of the minor child."[42] In Wisconsin, a stepparent (as well as a grandparent and others) can petition for "reasonable visitation rights" if a court determines that visitation is in the child's best interests and if there is a preexisting "relationship similar to a parent-child

38. Van Norstrand v. Van Norstrand (*In re* Van Norstrand), 925 N.Y.S.2d 229, 230 (N.Y. App. Div. 2011) (citing DOM. REL. L. § 72[1]). *See also In re* Victoria C., 56 A.3d 338 (Md. Ct. Spec. App. 2012) (holding sibling visitations can be ordered over parental objections only when standards for grandparent visits have been met), *aff'd in part, vacated in part by* 88 A.3d 749 (Md. 2014).

39. Besides special childcare laws, for stepparents there can also be other special laws. *See, e.g.*, S.D. CODIFIED LAWS § 25-7-8 (2014) ("A stepparent shall maintain his spouse's children born prior to their marriage and is responsible as a parent for their support and education suitable to his circumstances, but such responsibility shall not absolve the natural or adoptive parents of the children from any obligation of support.").

40. Many urge laws on present and former stepparent as well as grandparent childcare to be written by state legislators. *See, e.g.*, Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and Their Partners' Children*, 13 THEORETICAL INQUIRIES L. 127, 151 (2012) ("Like Professor Bartlett, I do not think we can simply rely on judges to make extralegal decisions to rescue children in deserving cases, nor do I think that it would be good for the legitimacy of our system of family law. Instead, any new standards should be established by statute, to prevent, insofar as possible, inconsistent and unpredictable judicial decisions in this area.").

41. TENN. CODE ANN. § 36-6-303 (2014) (seemingly of questionable facial validity under Troxel v. Granville, 530 U.S. 57, at 72)(O'Connor, J., plurality opinion), 79 (Souter, J., concurring), 80 (Thomas, J., concurring), as there are no required showings as to, e.g., parental acquiescence in stepparent childcare standing or detriment to child if there is no stepparent childcare).

42. James W. v. Claudine W. (*In re* Marriage of W.), 7 Cal. Rptr.3d 461, 464–65 (Cal. Ct. App. 2003) (finding section 3101(a) of the California Family Code unconstitutional as applied to a child already being raised by two natural parents, at least when there is no showing that the denial of stepparent visitation would be detrimental to the child). CAL. FAM. CODE § 3101(a) (2014).

relationship with the child."[43] During a dissolution proceeding in Oregon, a stepparent can obtain custody or visitation by proving "a child-parent relationship exists;" the presumption that the parent acts in the child's best interest has been "rebutted by a preponderance of the evidence;" and the child's "best interest" will be served.[44] If a stepparent only proves "an ongoing personal relationship" with the child, the parental presumption must be rebutted by "clear and convincing evidence."[45] In Utah, a former "stepparent"[46] can pursue child custody or visitation in a divorce or "other proceeding"[47] through showing by "clear and convincing evidence" that, inter alia, the stepparent "intentionally assumed the role and obligations of a parent;" "formed an emotional bond and created a parent-child type relationship;" contributed to the "child's wellbeing;" and showed the parent is "absent[] or . . . [has] abused or neglected the child."[48] "[U]pon the death or disability of the custodial or primary placement parent," a Delaware stepparent who resided with the deceased or disabled parent can request custody even if "there is a surviving natural parent."[49] Lastly, in Virginia, a former stepparent with a "legitimate interest"[50] can secure custody of or visitation with a child upon a "showing by clear and convincing evidence that the best interest of the child would be served thereby."[51]

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43. WIS. STAT. ANN. § 767.43(1) (2007). There are other special guidelines for grandparents who petition. *Id.* § 767.43(3) (stating requirements that include, inter alia, that the child is a nonmarital child whose parents never married, and that the child has not already been adopted).

44. OR. REV. STAT. § 109.119(3)(a) (2003). "Child-parent relationship" means a relationship, within the past six months, which "fulfilled the child's psychological needs for a parent as well as the child's physical needs." *Id.* § 109.119(10)(a).

45. *Id.* § 109.119(3)(b). An "ongoing personal relationship" means "a relationship with substantial continuity for at least one year, through interaction, companionship, interplay[,] and mutuality." *Id.* § 109.119(10)(e).

46. UTAH CODE ANN. § 30-5a-102(2)(e) (2008).

47. *Id.* § 30-5a-103(4).

48. *Id.* § 30-5a-103(2).

49. DEL. CODE tit. 13, § 733 (2009).

50. VA. CODE ANN. § 20-124.1 (2014).

51. *Id.* § 20-124.2. *See* Brown v. Burch, 519 S.E.2d 403, 412 (Va. App. 1999) (finding, over mother's objection, that "clear and convincing evidence of special and unique circumstances" justify joint custody order favoring father and former stepfather, with the latter "retaining physical custody of the boy").

Besides special statutes, there are some common law rights regarding childcare for some former stepparents. *See, e.g.*, Bethany v. Jones, 2011 Ark. 67, at 8–11, 378 S.W.3d 731, 736–37 (relying on Robinson v. Ford-Robinson, 208 S.W. 3d 140, 142–44 (2005) (finding that a stepmother was able to seek visitation with her stepson over the father's objection, as long as visitation was in the child's best interest), the court held that lesbian former partner can obtain child visitation order).).

Special stepparent childcare laws, of course, may be coupled with special stepparent adoption laws. *See* LA. CHILD. CODE ANN. art. 1252(A) 1991 (finding no need for even limited home studies in some stepparent adoptions) and MONT. CODE § 42-4-302(1)(a) (stating

The special grandparent statutes are comparable in allowing nonparent childcare standing. Many state grandparent visitation statutes were amended after the 2000 United States Supreme Court decision in *Troxel v. Granville*.[52] There, the Court determined that the "substantial" federal constitutional childrearing interests of established parents could not be easily overcome when grandparents sought court-ordered visitation over parental objections,[53] thereby striking down Washington's broad statutory delegation of child visitation.[54] The statute had declared that "any person may petition the court for visitation rights at any time" and "the court may order visitation rights for any person when visitation may serve the best interest of the child."[55] After *Troxel*, it remains unclear whether projected harm to a child is needed before grandparent and other third-party visitation will be ordered over parental objection.[56] State grandparent childcare statutes and precedents vary[57] just like state stepparent childcare laws.

IV. DANGERS IN DE FACTO PARENTHOOD

The increasing recognition of de facto adoptions sometime after birth due to post-birth "parent-like" acts[58] undoubtedly advances, at times, the

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that a stepparent has legal standing to file a petition for adoption if he or she has lived with child and a parent with legal and physical custody for past sixty days).

52. 530 U.S. 57, 57 (2000).

53. *Id.* at 64, 75.

54. *Id.* at 62. In *Troxel*, six justices found unconstitutional the Washington statute authorizing court orders involving grandparent visitation over parental objection, with four deeming the act unconstitutional as applied and two (in separate concurring opinions) finding facial invalidity. *Troxel*, 530 U.S. at 75 (O'Connor, J., plurality opinion), 79 (Souter, J., concurring), and 80 (Thomas, J., concurring).

55. *Troxel*, 530 U.S. at 67, 93 (citing WASH. REV. CODE § 26.10.160(3) (1994)).

56. The *Troxel* opinions left unclear what circumstances can overcome the "substantial" federal interests of established parents in denying visitation opportunities to nonparents. The plurality did recognize that a presumption involving fit parents acting in their children's best interests was embodied in the federal constitution so that "special weight" always must be accorded parental desires, though it did not opine—as did the Washington state high court—that a showing of serious harm or potential serious harm to children was necessary to sustain nonparent visitation over parental objection. *Id.* at 67–68, 73, 77. Current grandparent (and other third-party) childcare standing statutes are reviewed in Atkinson, *supra* note 11, at 5. The California statute on grandparent visitation, as applied, presents interesting federal constitutional issues. *See, e.g.*, Finberg v. Manset, 167 Cal. Rptr. 3d 109, 113–14 (Cal. Ct. App.2d 2014) (applying a rational basis test to determine that a biological father's parent can seek grandparent visitation where father's parental rights were terminated and where child had been adopted by the mother's new husband).

57. Atkinson, *supra* note 11, at 2, 3.

58. *See* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1329 (2005). The state law movement has not, for the most part, followed the principles suggested by the American Law Institute. *See, e.g.*, Robin Fretwell Wilson, *Limiting the Prerogatives of Legal Parents: Judicial Skepticism of the*

interests of both individual children and society at large by allowing loving, bonded, dependent, and familial relationships between an adult and child to continue, even when the adult is no longer involved (usually romantically) with the child's single parent. Sometimes these interests may be poorly served, however, placing children at risk after the superior rights of their single parents have been diminished. Dangers in de facto adoptions must be minimized while parental, child, family member, and societal interests are advanced. What dangers loom?

A. Eligibility

One clear danger lies in the general absence of eligibility standards for de facto adopters that are comparable to the eligibility standards for formal adopters. Convicted child molesters should not be able to adopt informally if they cannot adopt formally.[59] De facto adopters are not subject to individualized state scrutiny (including criminal background checks) before parenthood, while formal adopters are.[60] If anything, eligibility standards should be more rigorous for de facto adopters than for formal adopters.[61]

American Law Institute's Treatment of De Facto Parents, 25 J. AM. ACAD. MATRIM. LAW 477, 500 (2013).

59. *See, e.g.*, CAL. FAM. CODE § 8811(c) (West 2013) (refusing "adoptive placement in any home where the prospective adoptive parent or any adult living in the prospective home has . . . (A) A felony conviction for child abuse or neglect, spousal abuse, crimes against a child, . . . or for a crime involving violence [or] . . . (B) [a] felony conviction that occurred within the last five years for physical assault, battery, or a drug- or alcohol-related offense") *amended by* 2014 Cal. Legis. Serv. 708 (West); IOWA CODE ANN. § 600.8 2b(1) (West 2001 & Supp. 2014) (Approval of a "prospective adoption petitioner [is denied] if the petitioner has been convicted of . . . [c]hild endangerment[,] neglect[,] or abandonment of a dependent person[,] . . . [d]omestic abuse . . . [a] crime against a child[,] . . . [or a] forcible felony."); ME. REV. STAT. ANN. tit. 18-A § 9-304(b-1) (2012 & Supp. 2013) (creating a "rebuttable presumption" against allowing formal adoption by petitioner who "has been adjudicated . . . of sexually abusing a person who was a minor at the time of the abuse"). *See also, e.g.*, ILL. COMP. STAT. ANN. 5/607(e) (West 2009 & Supp. 2014) (denying stepparent or grandparent visitation for certain convicted child molesters); *In re* Joy D., 84 A.3d 223, 236 (Md. Ct. Spec. App. 2014) (holding that child reunification services are not required for one who committed a violent crime against a minor offspring (citing MD. CODE ANN., CTS. & JUD. PROC. 3-812(d) (West 2002 & Supp. 2008))).

60. Statutory home study requirements for prospective formal adopters are outlined, state by state, in *Home Study Requirements for Prospective Parents in Domestic Adoption*, CHILD WELFARE INFORMATION GATEWAY, http://www.childwelfare.gov/systemwide/laws_policies/statutes/homestudyreqs_adoption.cfm (last updated Feb. 2012). Statutory criminal background check requirements for prospective formal adopters are outlined, state by state, in *Criminal Background Checks for Prospective Foster and Adoptive Parents*, CHILD WELFARE AGENCY INFO. GATEWAY, http://www.childwelfare.gov/systemwide/laws_policies/statutes/background.cfm (last updated. Aug. 2011).

61. Consider, for example, whether a single parent's close personal friend (even though neither a spouse nor a romantic partner) who lives separately should be eligible for informal

Tougher standards would not preclude certain loving parental-like figures from adopting; they would simply require them to attain parental status via formal adoption.

Currently, de facto parent laws generally do not omit those who are ineligible to proceed with formal adoption petitions.[62] Allowing questionable folks to attain parental status via de facto adoptions, where such status is unavailable via formal adoptions, creates serious problems for the existing parents, the children, the family members, and the public. Once established, parenthood cannot be easily terminated. To date, prospective de facto parents generally have no federal (or state) due process liberty interests in continuing their parental-like relationships or attaining second parent status. Stricter eligibility standards for de facto adopters would rationally advance the governmental interests in child safety and public welfare, while also protecting the superior parental rights of existing parents.

B. Consent to Second Parenthood

Another danger in de facto adoption involves the frequent inattention to the need for a clearer and more significant form of single parent consent to the developing parental-like relationship between the single parent's child and the prospective de facto adopter—a different form of an eligibility standard. Many states' de facto parent laws do not require single parents to knowingly surrender (partially)[63] their "substantial" childrearing interests protected by federal constitutional due process and state superior rights doctrines; these laws vary interstate in the state of mind requirements for single parents regarding the developing relationships between their children and nonparents.[64] The requisites can also vary intrastate as to different nonparents who seek child visitation after developing parental-like or otherwise

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adoption, though eligible for formal adoption, as in New York per *In re* Adoption of G., 978 N.Y.S.2d 622 (N.Y.C. Sur. Ct. 2013). Statutory eligibility requirements for prospective formal adopters are outlined, state by state, in *Who May Adopt, Be Adopted, or Place a Child for Adoption?* CHILD WELFARE AGENCY INFO. GATEWAY, http://www.childwelfare.gov/systemwide/laws_policies/statutes/parties.cfm (last updated Jan. 2012).

62. Second parent laws are surveyed in Parness, *supra* note 4, at 764–65 (explaining that there are no explicit laws establishing similar standards for de facto and formal adoptions).

63. By comparison, complete surrenders of childrearing interests, outside of courts—as in termination of parental rights in formal adoption settings—usually must be knowing, voluntary, and witnessed. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-107(A) (2014) (requiring two or more credible witnesses when notarized waiver of parental rights is undertaken in anticipation of formal adoption).

64. *Compare, e.g.*, N.J. STAT. ANN. § 9:17-43(a) (West 2013) (presuming parentage for one who openly holds out the child as her own and supports child) *with* D.C. CODE § 16-831.01(1) (2001) (establishing de facto parentage when the prospective de fact parent lives, or has lived, in the same household with the child, takes on responsibilities as the child's parent, and has, with approval of the child's parent, held himself out to be the child's parent).

close relationships, such as between a child and his or her grandparents, stepparents, and others.[65] And, state of mind requirements can vary intrastate for nonparents who seek second parent status via different avenues, like presumed parenthood and de facto parenthood.[66] Less stringent state of mind requirements mean easier, and at times likely unconstitutional, losses of the *substantial* federal constitutional interests of single parents in childrearing decision-making in order to serve the interests of third parties with no such interests.[67] Existing parents whose romances have faded should not frequently have to share childrearing opportunities regarding their children with their former lovers parent.

The de facto laws of the various states address differently a parent's intent regarding the development of a parent-like relationship between his or her child and a nonparent. In Delaware, a de facto parent can only be recognized for one who "established a parent-like relationship" with "the support and consent of the child's parent."[68] In Montana, parental interests can be awarded to a nonparent when the parent "has engaged in conduct that is contrary to the child-parent relationship."[69] In the District of Columbia, de

65. *Compare* 750 ILL. COMP. STAT. ANN. § 5/607 (a-3) (West 2009 & Supp. 2014) (providing grandparents and siblings standing to bring an action requesting visitation with a child one year or older), *and id.* § 5/607(a-5) (giving grandparents and siblings a right to petition for visitation if unreasonably denied by the child's parent and one of the exceptions is satisfied), *with id.* § 5/607(b)(1.5) (requiring a child to be at least twelve years old before a stepparent is able to petition for visitation privileges).

66. *Compare, e.g.*, DEL. CODE ANN. tit. 13, § 8-201(c) (2009) (defining a de facto parent as one who had a "parent-like relationship" with "the support and consent of the child's parent"), *with id.* § 8-204(a)(5) ("A man is presumed to be the father of a child if [f]or the first [two] years of the child's life, he resided in the same household with the child and openly held out the child as his own.").

67. The Supreme Court of the United States has yet to speak on when children or their nonparent, caretakers accrue federal constitutional interests in continuing their personal relationships. 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."). *Compare* Frazier v. Goudschaal, 295 P.3d 542, 557 (Kan. 2013) ("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."), *with* Troxel v. Granville, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (asserting at least some children in nonparent childcare settings likely "have fundamental liberty interests" in "preserving established familial or family-like bonds").

68. DEL. CODE tit. 13, § 8-201(c)(1). *See* Carvin v. Britain (*In re* Parentage of L.B.), 122 P.3d 161, 176–77 (Wash. 2005) (holding that de facto parenthood under common law precedent requires the "natural or legal parent consented to and fostered the parent-like relationship" between the child and nonparent).

69. MONT. CODE ANN. § 40-4-228(2)(a) (2013), *construed in* Kulstad v. Maniaci, 220 P.3d 595, 606–08 (Mont. 2009) (holding that a mother who "ceded her exclusive authority" to parent to her lesbian partner from the time of adoption to the end of their intimate relationship "acted contrary to her child-parent relationship"). *C.f.* MONT. CODE ANN. § 41-3-102(1) (2001) (defining the termination of parental rights for child abandonment as "leaving the

facto parent status depends partly upon the parent's consent to the formation of "a strong emotional bond" and the nonparent holding the child out as his own.[70]

Comparably, there is often inattention to the need for prospective second parents to consent, in some way, to future second parent status, which is accompanied by future child support duties. There is a difference between a third-party agreeing to live with and help raise an intimate partner's child and agreeing to support that child until majority, whether or not the third-party and parent remain partners. As Justice Brennan observed, judicial recognition of a child support duty is very different from judicial recognition of other financial obligations.[71] Only with the former comes a life-long relationship between the obligor and an obligee,[72] which can prompt life-long financial duties.[73]

Concerns about single parent and second parent consent may be deemed sufficiently serious that all or more or some de facto parent designations should go through a judicial process, akin to but different than formal adoption, which should precede any childcare dispute. To date, no state has such a process, though there is some support for a comparable process when parties enter a gestational carrier (surrogacy) pact,[74] where there clearly is much more thought to future parentage than, for example, when single parents choose to live with their children and their new intimate partners or their own parents in a single home.

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child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the near future").

70. D.C. CODE § 16-831.01(1).

71. Rivera v. Minnich, 483 U.S. 574, 583–84 (1987) (Brennan, J., dissenting).

72. Justice Brennan noted the following within his dissent:

> I cannot agree with the Court that a determination of paternity is no more significant than the resolution of "'a monetary dispute between private parties.'" . . . What is at stake for a defendant in such a proceeding is not merely the prospect of a discrete payment in satisfaction of a limited obligation. Rather, it is the imposition of a lifelong relationship with significant financial, legal, and moral dimensions. . . . "Apart from the putative father's pecuniary interest . . . at issue is the creation of a parent-child relationship." . . . The judgment that a defendant is the father of a particular child is the pronouncement of more than mere financial responsibility. It is also a declaration that a defendant assumes a cultural role with distinct moral expectations. Most of us see parenthood as a lifelong status whose responsibilities flow from a wellspring far more profound than legal decree.

Id. (citations omitted).

73. *See, e.g.*, Mayer v. Corso-Mayer, 753 S.E.2d 263, 268 (Va. Ct. App. 2014) (finding a post-majority child support order possible if child is severely and permanently disabled).

74. *See* Knaplund, *supra* note 9, at 933 ("The question is whether all intended parents should go through a judicial process akin to adoption, as the [Uniform Parentage Act] requires, or whether the less onerous procedure of the [Uniform Probate Code] is better suited to gestational carrier agreements.") *Id.*

C. Burden of Proof

Yet another danger with de facto adoptions involves the use of the preponderance of the evidence standard when considering whether the putative adopter meets all the eligibility requirements, including such fact-intensive inquiries on not only single parent consent, but also residency;[75] holding out a child as one's own;[76] financial and emotional support;[77] and the existence of a parental-like relationship.[78] The preponderance standard makes it easier to override superior parental rights in order to prompt shared parenthood between a biological or formal adoptive parent and a de facto parent than it is to override superior parental rights in order to terminate altogether the parenthood of a biological or formal adoptive parent. In parental rights termination settings, involuntary losses of superior parental rights are required by the Constitution to be founded on clear and convincing evidence,[79] where there are, at times, further state law protections like the right to counsel.[80] While only termination leads to a total loss of superior rights, the use of the same clear and convincing standard in a de facto parent setting is necessary because involuntary (at the time of a court order) shared parental rights still infringe significantly upon the same right;[81] involves factual issues not sub-

75. *See, e.g.*, D.C. CODE § 16-831.01(1) (defining de facto parent as an individual who resided in same household with the child since the child's birth or adoption, or for at least ten of the twelve months preceding the petition for de facto parent status); DEL. CODE ANN. tit. 13, § 8-204(a)(5) (2009) (requiring that presumed parent reside in same household with child for first two years of child's life); N.D. CENT. CODE § 14-20-10(1)(e) (2009) (same as Delaware law); OKLA. STAT. ANN. tit. 10, § 7700-204(A)(5) (West 2007) (same as Delaware law).

76. *See* ALA. CODE § 26-17-204(a)(5) (LexisNexis 2009) (presuming a man is the biological father if he holds out the child as his natural child); MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(4) (West 2007) (stating the presumed father must, "jointly with the mother," openly hold out the child "as their child"); N.J. STAT. ANN. § 9:17-43(a)(3)(c) (West 2013) (presuming that the biological father "openly holds out the child as his natural child").

77. *See, e.g.*, ALA. CODE § 26-17-204(a)(5) (requiring that presumed parent has "significant parental relationship with the child by providing emotional and financial support for the child"); N.J. STAT. ANN. § 9:17-43(a)(4)–(5) (stating the presumed father must either receive the child into the home or provide support for the child).

78. *See* DEL CODE ANN. § 8-201(c)(2)–(3) (2009) (establishing de facto parent status if he or she "exercised parental responsibility" and "acted in a parental role" so that "a bonded and dependent relationship" developed "that is parental in nature"); ALA. CODE § 26-17-204(a)(5) (requiring presumed parent to establish "a significant parental relationship with the child by providing emotional and financial support for the child").

79. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

80. *See In re* T.M., 319 P.3d 338, 355 (Haw. 2014) (granting indigent parents right to court-appointed counsel in parental rights termination proceedings under Hawaii constitutional due process).

81. In nonparent child visitation/custody disputes, where parents object, nonparents (often grandparents) frequently must demonstrate the necessary elements by clear and convincing evidence. *See, In re* S.M.N., 781 N.W.2d 213, ¶ 22, at 223 (S.D. 2010) (stating a grandmother "must demonstrate extraordinary circumstances by clear and convincing evi-

ject to much objective (like scientific) evidence;[82] and, unlike typical parental rights termination proceedings, does not require a best interests of child inquiry. A clear and convincing evidence standard is already used in other non-termination proceedings where partial waivers of superior parental rights exist, as with grandparent visitations over parental objections.[83]

D. Lack of Awareness

A final danger with de facto adoptions lies in the lack of awareness by many parents and nonparents on how legal parentage can now arise for a child long after birth where there are neither biological nor formal adoptive ties between the new parent and the child. The possibility of future shared childrearing may not have been envisioned by a single parent. The possibility of future child support may not have been envisioned by one, like a stepparent or grandparent, who helps care for a child with a single parent. While we are all presumed to know the law, such knowledge is difficult with the current fluidity in parentage laws; the creation of new laws via precedents in

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dence to overcome a natural parent's presumptive right to custody"); Fairhurst v. Moon, 416 S.W.3d 788, 792 (Ky. Ct. App. 2013) (allowing 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").

82. Thus, the recognition of a nonparent's conduct establishing an informal adoption is not like the recognition of paternity based on biological ties founded on scientific evidence. In an informal adoption, the burden of proof "would make a practical difference . . . ." Rivera v. Minnich, 483 U.S. 574, 586 (1987) (Brennan, J., dissenting). Here "the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity." *Id.* (quoting Cortese v. Cortese, 76 A.2d 717, 719 (N.J. Super. Ct. App. Div. 1950)). Consider the burden of proof elements in Oregon. There, when a nonparent seeks a childcare order, the presumption that an existing parent "acts in the best interest of the child" can be overcome by "a preponderance of the evidence" where "a child-parent relationship exists" between the nonparent and child. *See* OR. REV. STAT. ANN. § 109.119(2)(a), (3)(a) (West 2003). But, when a nonparent seeks a childcare order, the presumption that an existing parent "acts in the best interest of the child" can only be overcome by "clear and convincing evidence" where "an ongoing personal relationship exists" between the nonparent and child. *See id.* § 109.119(2)(a), (3)(b). Both a "parent-child relationship" and "an ongoing personal relationship" cannot be objectively measured, but their differentiation is crucial in determining superior rights waivers. Both relationships should be subject to the clear and convincing evidence standard. *See* Kulstad v. Maniaci, 220 P.3d 595, ¶ 74, at 606 (2009) (employing "clear and convincing evidence" standard when assessing "child-parent" relationship between child and nonparent under statute, MONT. CODE § 40-4-211, where burden of proof is later deemed "clear and convincing evidence," MONT. CODE § 40-4-228(2)).

83. *See* Rutherford v. Taylor, No. 2013–CA–00707–ME, 2014 WL 355765, at *4 (Ky. Ct. App. 2014) (stating a "heightened standard of proof is required" when a parent's fundamental childrearing right involved) (citing Grayson v. Grayson, 319 S.W.3d 426, 430–31 (Ky. Ct. App. 2010)); Hansen v. Moats (*In re* S.J.H.), 318 P.3d 1021, ¶ 10, at 1022 (Mont. 2014) (holding clear and convincing evidence that nonparent, here a grandparent, had a "child-parent relationship" is needed to award parental interest).

cases not widely debated or reported; and the interstate variations in such legal terms as de facto parent and presumed parent. As Professor Katherine K. Baker has observed:

> It seems clear that the time has come for the law to choose the relative weight it gives to the qualities of parenthood that accompany a bionormative regime. A premium on biology is not mandated by history, evolutionary theory, or morality, but a premium on biology does bring with it attributes that may have real value, and different attributes have different value for different constituencies. Contemporary living patterns demand some sort of change, but any change will come with costs to some and maybe even costs to all. The policy priorities in this area are not easy or obvious, but they should be defined in recognition of the consequences that are likely to follow.[84]

V. NEW GUIDELINES FOR DE FACTO PARENTHOOD

De facto adoptions long after birth by second parents, who are without biological or formal adoptive ties or rights arising from child creation pacts, present dangerous uncertainties for single parents, their "adopted" children, and those who become second parents. Yet there should be no absolute bar to all de facto parenthood. Rather, clearer guidelines are needed, preferably via statutes. Not all who childrear in some way should be eligible to become de facto parents. Superior parental rights of single parents must be better safeguarded, as should the finances of third parties who simply help out with the children of single parents while living with them. New laws can be either general, encompassing many but not all who assumed parental-like roles, or special, like those applying just to stepparents or just to grandparents.

New laws should establish firmer eligibility standards. Child molesters, for example, should be limited (if eligible at all) to formal adoption processes. New laws should also require clear and convincing evidence of relevant facts as important constitutional interests are in play when superior parental rights are compromised, and when extended financial obligations are imposed on third parties. And, all de facto parent laws must be the subject of a public education initiative, making it more likely that substantial parental rights are not unknowingly compromised and that significant parental duties are not involuntarily assumed. This initiative is particularly important, as post-birth parentage laws vary so widely interstate, and families relocate often across state lines.

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84. Baker, *supra* note 10, at 715.

VI. CONCLUSION

"The almost infinite variety of family relationships that pervade our ever-changing society"[85] clearly necessitate at least some new forms of parentage for children with only one parent. These new forms arise long after the child's birth and are connected to the developed relationships between the child and his or her new second parents. Yet, de facto parenthood leading to second parent childcare orders serves to diminish the superior parental rights of existing parents. De facto parenthood leading to second parent child support orders constitutes property deprivations subject to due process limitations.

To date, the dangers in de facto parenthood have not been well addressed, or even recognized. The constitutional interests of single and second parents (if not of their children and their family members) will only be properly respected if de facto parenthood laws are altered to include new eligibility standards; require clearer forms of consent to second parenthood; demand clear and convincing evidence for judicial recognition of parental-like relationships between third parties and children; and become better known, with special attention paid to the significant interstate differences.

85. Troxel v. Granville, 530 U.S. 57, 90 (Stevens, J., dissenting).