TROXEL REVISITED: A NEW APPROACH TO THIRD-PARTY CHILDCARE

Jeffrey A. Parness

* Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College, J.D., The University of Chicago. Special thanks to Dave Smith and Amanda Beveroth, third year students at NIU College of Law, for their excellent assistance.
I. INTRODUCTION

In *Troxel v. Granville*, a 2000 Supreme Court decision, four United States Supreme Court justices determined in a plurality opinion that the “liberty interests of parents in the care, custody, and control of their children” (herein childcare interests) generally foreclose states from compelling requested grandparent childcare over current parental objections. Yet, these four justices recognized that “special factors” might justify judicial interference as long as the contrary contemporary wishes of parents were accorded “at least some special weight.” The plurality, and one concurring justice, reserved the question of whether any “nonparental” visitation, presumably encompassing not only grandparents, but also stepparents, siblings and others, must “include a showing of harm or potential harm to the child.” Yet, the concurring justice, Justice Souter, hinted that at least some nonparental visitation could be based solely on a preexisting “substantial relationship” between a child and a nonparent and on “the State’s particular best interests standard.”

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1 *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (O’Connor, J., joined by C.J. Rehnquist & JJ. Ginsburg & Breyer) (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.”). See generally Donald Leo Bach, *The Rapanos Rap: Grappling with Plurality Decisions*, 81 U.S.L.W. 468 (2012) (analyzing plurality opinions).

2 See *Troxell*, 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.”).


4 See *Troxel*, 530 U.S. at 73 (plurality opinion) (“we do not consider . . . whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting [nonparent] visitation.”); id. at 77 (Souter, J., concurring); see also *McGarity v. Jerrolds*, 429 S.W. 3d 562, 570-71 (Tenn. Ct. App. 2013) (establishing harm where it is required); *American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.18(2)(a)(i) (2002) (suggesting that harm is not always needed to support court orders for childcare and that “a grandparent or other relative who has developed a significant relationship with the child” can seek childcare, where “the parent objecting to the allocation has not been performing a reasonable share of parenting functions for the child.”); Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, app. I (2013) (comparing state grandparent and other third party visitation statutes that do not explicitly require the loss of a relationship with a third party to cause harm).

5 *Troxel*, 530 U.S. at 76-77 (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) (Souter, J. concurring). An exemplary statute is *Va. Code Ann.* § 20-124.2(b) (Repl. vol. 2008) stating “[t]he court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to . . . .
Justice Kennedy, in his dissent, not unlike Justice Souter, observed that a best interests standard might be constitutional where the nonparent acted “in a caregiving role over a significant period of time,” hinting that such a nonparent might even be afforded “de facto” parent status. A second dissenter, Justice Scalia, seemingly agreed, noting the need for both “gradations” of nonparents and carefully crafted state law definitions of parents. A third dissenter, Justice Stevens, added that because at least some children in nonparent settings likely “have fundamental liberty interests” in “preserving established familial or family-like bonds,” nonparents seeking childcare must be distinguished by whether there is a “presence or absence of some embodiment of family.”

Thus, while important, current parental objections to nonparent childcare desires are not always dispositive. Since Troxel, the United States Supreme Court has said little about nonparent childcare over current parental objections. It has not addressed the special weight, special factors, harm or potential harm, de facto parenthood, children’s fundamental liberty inter-
ests, or family-like bonds. Since Troxel, state legislatures have extensively refined their third party childcare laws. Various state high courts have heard new challenges to these childcare laws. State legislators and judges differ when examining the “harm or potential harm,” “special factors” and “special weight” that can justify judicial interference with parental “liberty interests” via court orders on grandparent childcare over current parental objections. Not surprisingly, interstate variations appear. As the United States Supreme Court has recognized, the regulation of domestic relations rests within the “virtually exclusive province of the states.”

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

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13 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.


17 Sosna v. Iowa, 419 U.S. 393, 404 (1975) (residency requirement for divorce petitioner). But see Courtney G. Joslin, Federalism and Family Status, 90 IND. L.J. (forthcoming 2015) (describing the long history of some federal family status determinations). Of course, the states may provide greater protections of parental rights than are afforded by the federal constitution. See, e.g., Hunter v. Hunter, 771 N.W.2d 694, 711 (Mich. 2009) (“Nothing in Troxel can be interpreted as precluding states from offering greater protection to the fundamental parenting rights of natural parents, regardless of whether the natural parents are fit. This rule applies here.”)

18 See, e.g., Rose M. Kroider & Renee Ellis, Living Arrangements of Children: 2006, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, June 2011 (especially Figure 1, historical living arrangements of children, 1880-2009, and Table 1, selected 1991-2009 figures showing more and more children not living with two married parents and living with single parent or grandparents only); Stephanie J. Ventura & Christine A. Bachrach, Nonmarital Childbearing in the United States, 1940-99, NAT’L VITAL STAT. REP., Vol. 48, No. 16, 1, 2 (Oct. 18, 2000) (“The percent of births to unmarried women rose almost
many third-party childcare disputes in the state courts, as well as disputes over new forms of parenthood. While court-compelled nonparent childcare, over current parental objections, can arise either from standing of a third-party individual or from a type of newly-recognized parental status, often third-party standing is the only available avenue for nonparents because most new forms of parenthood cannot be employed where there are already two parents under law.19

New de facto parent statutes and cases present a scheme for approaching third-party childcare that does not envision a singular approach to judicial assessments of the special weight to be accorded current parent wishes or the harm or potential harm to children. De facto parentage laws increasing-

without interruption from 1940 (3.8 percent) to 1994 (32.6 percent . . . From 1994 to 1999 there was little change . . . it was 33.0 percent in 1999)); Facts About Children Being Raised by Grandparents, IL DEP’T ON AGING (2014), http://www.illinois.gov/aging/communityservices/caregiver/pages/grg_facts.aspx (over 200,000 children under 18 living in grandparent headed households, with over 40,000 grandparents “responsible for their grandchildren for 5 years or more”); J. Herbie DiFonzo, How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms, 8 RUTGERS J.L. & PUB. POL’Y 521, 523 (2011) (increasing parenting by single parents and relatives); Lynn D. Wardle, Dilemmas of Indissoluble Parenthood: Legal Incentives, Parenting, and the Work-Family Balance, 26 BYU J. PUB. L. 265, 270 (2012) (increasing parenting by unwed couples and by single parents, mostly mothers). Increasing parenting by grandparents, and other relatives, seemingly arises, in part, because of the 2008 Federal Fostering Connections Act. Federal Fostering Connections Act, Federal Fostering Connections Act of 2008, 42 U.S.C. § 671(a)(29) (2012) (within 30 days of removal of child from parental custody, state must exercise “due diligence to identify and provide notice to all adult grandparents and other relatives” and explain options involving kinship guardianship); see, e.g., UTAH CODE ANN. §§ 78A-6-307(7), (18)(c) (2012) (when a child removed from parental custody, preference for placement of the child shall be given to “a relative of the child”); see, also, Judith T. Younger, Families Now: What We Don’t Know Is Hurting Us, 40 Hofstra L. Rev. 719, 722, 733 (2012) (“glaring need for reliable data” on “what is really happening in intimate relationships”). The rising numbers of unwed cohabiting couples has also prompted much litigation over property distribution upon separation as well as future childcare. See, e.g., In re Kelly & Moessling, 287 P.3d 12 (Wash. App. 2012) (applying equitable “committed intimate relationship” doctrine to unwed separating couple who lived in a marital-like relationship and acquired what would have been community property had there been a marriage). To the extent the disputes involve contracts, there may be controlling statutes. See, e.g., Cavalli v. Arena, 42 A.3d 250 (N.J. Super. Ct. Ch. Div. 2012) (new statute, N.J. Stat. 25:1-5(h), requires palimony pacts to be in writing and be subject to independent attorney review and advice (N.J. STAT. ANN. § 25:1-5(h) (West 2010)).

While most American states do not recognize the possibility of three (or more) parents for any child, a few do. See, e.g., CAL. FAM. § 7612(c) (West 2014) (no need to choose between two presumed parents, like a husband of the birth mother and one who holds himself/herself out as a parent, when making a choice “would be detrimental to the child”); T.D. v. M.M.M., 730 So.2d 873 (La. 1999) (holding “dual paternity” possible in both husband and biological father where husband’s marriage to birth mother had been dissolved and where child’s best interests would be served); Smith v. Cole, 553 So.2d 847, 854 (La. 1989) (holding that two men may have “paternal rights” in child, as well as child support obligations). Three parents have also been recognized as possible in New Jersey where a birth parent’s earlier consent to a stepparent’s performance of parental duties leads the stepparent to now possibly be a psychological parent, even though a second parent, here a formal adoptive parent, may not have consented to such duties. K.A.F. v. D.L.M., 96 A.3d 975 (N.J. Super. Ct. App. Div. 2014) (requiring stepparent to show “exceptional circumstances” and the child’s best interests to gain a court-ordered childcare order over the birth parent’s current objection). On the need for emergence of a three (or more) parent family, see, for example, Susan Freligh Appleton, Parents by the Numbers, 37 Hofstra L. Rev. 11 (2008).
ly recognize that a single parent’s current objection to a new second parent carries less “weight” when the single parent explicitly consented to and strongly fostered a “substantial” parent-like relationship between his or her child and the aspiring second parent. Comparably, third-party childcare – without second parent status – should also be given less weight accorded to current parental preference. This is another instance where third-party childcare laws would effectively recognize that the objecting parent earlier acquiesced in a diminishment of his or her superior parental authority, resulting in a greater opportunity for third-party childcare.20

This article will first explore the new de facto parent state laws originating in both statutes and cases. These laws often limit current parental decisionmaking about childcare due to an earlier conscious or implicit ceding of parental authority. The article will then examine current third-party childcare laws, including those specially addressing stepparents and grandparents. The analysis will show that such laws typically do not comparably limit current parental decisionmaking due to earlier ceding of parental authority, making third-party childcare more difficult because of requirements like “harm or potential harm to the child.” Finally, the article suggests a new approach to third-party childcare founded on a justifiable diminution of parental rights due to earlier ceding by existing parents that better serves children and third parties with preexisting “substantial” relationships without infringing unduly upon the “liberty interests of parents in the care, custody and control of their children.” The analysis considers whether such an approach should be employed for all third parties, or just for certain third parties like stepparents or grandparents.

II. DE FACTO PARENTHOOD LAWS

Parentage under the law is increasingly recognized long after birth for individuals without actual or presumed biological ties and without formal adoption ties.21 Recognition can come via precedent; in Wisconsin, case

20 It is a far more difficult case where only one of two existing parents earlier acquiesced in diminished parental authority. See, e.g., K.A.F., 96 A.3d at 983 (holding that stepparent of minor child, a former domestic partner of biological mother, may have childcare standing due to earlier birth mother’s consent though no such consent by adoptive parent of child).

21 Herein the other noted state statutes and precedents on parentage and nonparent childcare are assumed to meet the Troxel standards on losses or diminishments of superior parental rights, whatever those standards may be. Some non-Illinois laws seem of questionable validity. See, e.g., GA. CODE. ANN. § 19-7-1(b.1) (2014) (providing that disputes over custody between parents and, e.g., grandparents, aunts or siblings, “parental power may be lost” if a court, exercising “sound discretion and taking into consideration all the circumstances . . . determines” such losses serve the childrens’ best interest, though there is “a rebuttable presumption” favoring parental custody).
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law recognizes “psychological parent” or “second parent” status. These new types of parentage only arise for a third party when an existing parent has earlier consented to a parent-like relationship between a child and the third party. But often there are these new forms of parentage, defined by a statute, which is a preferred approach for those concerned about inappropriate judicial lawmaking. These cases and statutes carry varying labels besides psychological parent, including de facto parenthood, presumed parenthood, equitable adoption and parentage by estoppel. Herein they are collectively labelled de facto parent laws.

Incidentally, similar labels can have different meanings from state to state. For example, in Delaware, by statute a de facto parent, on equal footing with a biological or formal adoptive 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.” By contrast, in the District of Columbia, by statute, an individual may only seek “third-party custody” as a “de facto parent” if he or she lived with the child since birth or lived in the same household with the child for at least 10 of the 12 months preceding the filing of his or her custody request. Comparably the New Jersey Supreme Court substantially adopted

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23 In re Custody of H.S.H.-K., 533 N.W.2d at 421 (“the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child”).

24 Compare Moreau v. Sylvester, 95 A.3d 416, 424–25 (Vt. 2014) (declining to formulate de facto parent doctrine as “the Legislature is better equipped”, while noting some other state courts have declined to fill the “perceived vacuum”), with Pitts v. Moore, 90 A.3d 1169, 1176–77 (Me. 2014) (“Parenthood is meant to be defined by the legislature, steeped as it is in matters of policy requiring the weighing of multiple viewpoints . . . . Although we have been discussing de facto parenthood for almost thirteen years, there is currently no Maine statutory reference to de facto parenthood. We take this opportunity to again emphasize that, given the evolving compositions of families and the need for a careful approach, this issue would be best addressed by the Legislature. In the absence of Legislative action in such an important and unsettled area, however, we must provide some guidance to trial courts faced with de facto parenthood petitions.”).

the Wisconsin high court’s psychological parent doctrine, but employed it in third-party childcare rather than a “second parent” setting.27

De facto parent statutes sometimes recognize parentage presumptions. These presumptions may, but need not be, dependent upon marriage. At times, natural ties are presumed. Some parentage presumptions establish a minimum time period of earlier childcare.

In Illinois, a man is presumed “to be the natural father of a child” if “the child is born or conceived” during his marriage to the birth mother, or if he and the birth mother married after the child’s birth and he is listed as the father on the child’s birth certificate.28 Elsewhere, a marital paternity presumption arises for a man married to a birth mother who bears a child “during the marriage.”29 In Missouri, a man “shall be presumed to be the natural father of a child if . . . He is obligated to support the child pursuant to a written voluntary promise.”30 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.”31 In Indiana, there is sometimes a comparable “rebuttable presumption,”32 which must include “the consent of the child’s mother”33 and, “to establish the man’s paternity,” a positive genetic test.34 In Alabama, the presumed parent statute requires “a significant parental relationship with the child” involving emotional and financial support.35 In Wyoming, a man “is presumed to be the father of a child if . . . For the first

27 V.C. v. M.J.B., 748 A.2d 539, 549 (N.J. 2000) (utilizing an “‘exceptional circumstances’ category (occasionally denominated as extraordinary circumstances) that has been recognized as an alternative basis for a third party to seek custody and visitation of another person’s child.”).
28 750 ILL. COMP. STAT. 45/5 (2014).
30 Compare Mo. REV. STAT. § 210.822 (2014) (showing that this obligation seemingly can arise without “court order,” as such an order is another way the obligation prompting a presumption can arise, and that where two conflicting presumptions arise via conduct in Missouri, the controlling presumption is the one “founded on the weightier considerations of policy and logic”), with KAN. STAT. ANN. § 23-2208 (2013) (showing that there is a presumption in Kansas where a man “notoriously or in writing recognizes paternity,” which need not involve a voluntary paternity acknowledgement).
31 Compare MINN. STAT. § 257.55 (2014) (showing that where two presumptions arise via conduct in Minnesota, the controlling presumption is the one “founded on the weightier considerations of policy and logic”), with COLO. REV. STAT. § 19-4-105 (2014), and MONT. CODE ANN. § 40-6-105 (2014) (showing the presumptions to be similar).
32 IND. CODE § 31-14-7-2(a) (2009).
33 Id.
34 IND. CODE § 31-14-7-2(b).
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.”

Where natural ties are statutorily presumed, the lack of ties will not necessarily result in a rebuttal of the presumption.

Legal parenthood without biological or formal adoption ties does not always involve presumptions. For example, there are comparable doctrines involving in loco parentis or de facto parentage. All such doctrines effectively permit informal adoptions, that is, adoptions without traditional governmental oversights such as background checks and home visits. Here, the prior criminal acts of informal adopters are only considered after the requests for new parent status have been honored. Thus, such prior acts will often only help to determine whether to grant childcare to newly recognized parents seeking court orders over the objections of earlier recognized parents, usually birth or formal adoptive parents.

Whatever their label, de facto parentage laws, that is, laws recognizing legal parenthood without biological or formal adoptions ties, vary in their requirements on explicit consents by existing parents to any new parentage. As noted, such consent is required in Delaware where to attain “de facto parent status,” an individual must have “a parent-like relationship” with “the support and consent” of the child’s parent(s). Comparably, in Indiana, a man is presumed to be the biological father of a child where the man

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37 See, e.g., Alisha C. v. Jeremy C., 808 N.W.2d 875, 884–85 (Neb. 2012) (holding former husband, under Neb. Rev. Stat. § 43-1412.01 (2008), 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”). Sometimes natural ties are presumed for one who could never have such ties. Cal. Fam. Code § 7611 (d) (West 2014) (stating that a man is presumed to be a 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 (Cal. App. 2011) (reading Cal. Fam. Code § 7611 (d) (West 2011) to include female partners of birth mothers).

38 See e.g., Morgan v. Weiser, 923 A.2d 1183, 1187 (Pa. Super. Ct. 2007) (stating once established, rights and liabilities arising from in loco parentis relationship are exactly the same as between biological or formal adoptive parent and child).

39 See, e.g., Del. Code Ann. tit.13, § 8-201(a)(4) (2014) (mother); Del. Code Ann. tit.13, § 8-201(b)(6) (father); Del. Code Ann. tit.13 § 8-201(c) (to attain “de facto parent status” one must have “a parent-like relationship” with “the support and consent of the child’s parent”; one must have exercised “parental responsibility”; and one must have “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”).

40 Del. Code Ann. tit.13, § 8-201(c) (de facto parent must show “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 the de facto parent”).
receives the child into his home and openly holds out the child as his own with "the consent of the child’s mother".41

By contrast, implicit consent to new de facto parentage by existing parents seems to be required where residency in the child’s home is required, as mandated by some parentage presumption laws that lack explicit consent mandates.42 Some of these de facto parent laws require a certain or definite period of residency (like two years),43 while others do not.44 Consent is implied due to voluntary cohabitation.

The acquiescence of existing parents to new de facto parent recognitions seems far more attenuated in other state laws. For example, in New Jersey a man can be presumed to be the biological father of a child if he “openly holds out the child as his natural child” and “provides support for the child.”45 In Alabama, a man can be a presumed father if, “while the child is under the age of majority,” he “openly holds out the child as his natural child . . . and establishes a significant parental relationship with the child by providing emotional and financial support for the child.”46 This is another instance where an existing parent’s consent to new parentage of the child may be implied but the likelihood of actual consent is lessened.

Regardless of the express state law conditions on de facto parentage, some degree of earlier acquiescence to nonparent childcare is compelled seemingly by the federal constitutional interests of existing parents in the “care, custody and control” of their children.47 Yet, only some de facto parent state laws have expressly recognized the relevance of the earlier paren-

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41 Ind. Code § 31-14-7-2(b) (2009).
43 Compare Wyo. Stat. Ann. § 14-2-504(a)(v) (presuming father if residency in same household for two years of child’s life), and Tex. Fam. Code Ann. § 160.204(a)(5), with Nev. Rev. Stat. § 126.051(1)(b) (2007) (stating a “man is presumed to be a natural father of a child if . . . he and the child’s mother were cohabitating for at least 6 months before the period of conception and continue it through the period of conception.”).
46 Ala. Code § 26-17-204(A)(5).
47 See, e.g., Jeffrey A. Parness, Constitutional Constraints on Second Parent Laws, 40 Ohio N.U. L. Rev. 811, 822, 839 (2014). Acquiescence may be unnecessary where, for example, de facto parenthood arises due to the abandonment, unfitness, or mental impairment of the biological or adoptive parents.
III. Third-Party Childcare Laws

Addressing possible third-party, nonparent childcare over current parental objections, a rather broad 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.”46 In South Dakota, a parent’s “presumptive right to custody” is lost when there is abandonment or persistent neglect; forfeiture or surrender of parental rights to a nonparent, abdication of “parental rights and responsibilities,” or, “extraordinary circumstances” where parental custody “would result in serious detriment to the child.”47 In Kentucky, a “de facto custodian” of a child can seek custody if he or she was “the primary caregiver” and “financial supporter,” resided with the child for at least six months, and the child is less than three years old.48 In Colorado, nonparents have standing to seek an allocation of parental responsibilities when the nonparent “has had the physical care of a child for a period of [six months] or more.”50

There are special third-party childcare statutes that apply only to stepparents (both present and former).52 A rather narrow Illinois statute requires
that a child be at least 12 years old, a marriage of at least five years, and a custodial parent unable to "perform the duties of a parent to the child,"\(^{53}\) for a stepparent to get a childcare order. By contrast, 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."\(^{54}\) In California, "reasonable visitation to a stepparent" is permitted if in "the best interest of the minor child."\(^{55}\) In Oregon, during a dissolution proceeding, 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.\(^{56}\) If a stepparent only proves "an ongoing personal relationship" with the child, the parental presumption must be rebutted by "clear and convincing evidence."\(^{57}\) In Utah, a former "stepparent"\(^{58}\) can obtain childcare in a divorce or "other proceeding"\(^{59}\) by showing "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."\(^{60}\) In Delaware, "upon the death or disability of the custodial or primary placement parent," a stepparent who resided with the deceased or disabled parent can request custody even if "there is a surviving parents. See, e.g., Bethany v. Jones, 378 S.W.3d 731, 733, 736–38 (Ark. 2011) (former lesbian partner obtains child visitation order; court relies on Robinson v. Ford-Robinson, 208 S.W.3d 140 (Ark. 2005), where stepmother was able to seek visitation with stepson over father’s objection as long as visitation was in the child’s “best interest,” deemed the “polestar consideration”).

\(^{51}\) 750 ILL. COMP. STAT. 5/601(b)(3)(A)-(C) (2014). Other requirements for stepparent childcare in Illinois include, inter alia, 5 year residence of the parent and stepparent, the child’s desire to live with the stepparent, and the child’s best interests. 750 ILL. COMP. STAT. 5/601(b)(3)(B),(E),(F). Special stepparent childcare laws, of course, may be coupled with special stepparent adoption laws. See, e.g., LA. CHILD. CODE ANN. art. 1252(A) (2014) (no need for even limited homestudies in some stepparent adoptions); MONT. CODE ANN. § 42-4-302(1)(a) (2014) (stepparent has lived with child and a parent with legal and physical custody for past sixty days).

\(^{52}\) OR. REV. STAT. ANN. § 36-6-303(a) (2014).

\(^{53}\) CAL. FAM. CODE § 3101 (West 2014).

\(^{54}\) OR. REV. STAT. ANN. § 109.119(3)(a) (West 2014). “Child-parent relationship” means a relationship, within the past 6 months, that “fulfilled the child’s psychological needs for a parent as well as the child’s physical needs.” OR. REV. STAT. ANN. § 109.119(10)(a) (West 2014).


\(^{56}\) UTAH CODE ANN. § 30-5a-102(2)(c) (LexisNexis 2014).

\(^{57}\) UTAH CODE ANN. § 30-5a-103(4) (LexisNexis 2014).

\(^{58}\) UTAH CODE ANN. § 30-5a-103(2).
natural parent.”\textsuperscript{61} In Virginia, a former stepparent with a “legitimate interest”\textsuperscript{62} 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.”\textsuperscript{63}

Comparably, there are special third-party childcare statutes that apply only to grandparents.\textsuperscript{64} For example, in Alabama, under certain conditions a grandparent can obtain court-ordered visitation with a grandchild when the marriage of the child’s parents has been dissolved, one or both parents are dead, or the child was born out of wedlock.\textsuperscript{65} In Alaska, visitation can be sought by a grandparent who “has established or attempted to establish ongoing personal contact” with the grandchild.\textsuperscript{66} In Arkansas, a grandparent or great-grandparent has standing to seek visitation if the “marital relationship between the parents . . . has been severed by death, divorce, or legal separation.”\textsuperscript{67} In Georgia, a grandparent may obtain visitation if the court finds “the health or welfare of the child would be harmed unless visitation is granted” and the child’s best interests would be served.\textsuperscript{68} In North Dakota, under statute: “The grandparents and great-grandparents of an unmarried minor child may be granted reasonable visitation rights to the child . . . upon a finding that visitation would be in the best interests of the child and would not interfere with the parent-child relationship.”\textsuperscript{69} Seemingly, these grandparent childcare statutes must be read narrowly in order to comply with the Troxel demands on respecting the “liberty interests of parents.”

\textsuperscript{61} DEL. CODE tit. 13, § 733 (2014).
\textsuperscript{63} VA. CODE ANN. § 20-124.2 (2008 & Supp. 2014); see, e.g., Brown v. Burch, 519 S.E.2d 403, 405-06, 412 (Va. Ct. App. 1999) (holding, over mother’s objection, that “clear and convincing evidence of special and unique circumstances” justified joint custody order favoring father and stepfather, with the latter “retaining physical custody of the boy.”).
\textsuperscript{64} At times grandparents have childcare standing regarding their grandchildren though the parental rights regarding their children have been terminated. See, e.g., Porter v. Hill, 844 N.W.2d 718, 718 (Mich. 2014) (father’s parental rights had been terminated before the father’s death).
\textsuperscript{65} ALA. CODE § 30-3-4.1(b) (1975).
\textsuperscript{66} ALASKA STAT. § 25.20.065 (2014).
\textsuperscript{68} GA. CODE ANN. §19-7-3(c)(1) (2014) (citing harm may be found where “the minor child resided with the grandparent for six months or more” or where “there was an established pattern of regular visitation or child care by the grandparent with the child”).
Special childcare laws can extend beyond grandparents and stepparents to other family members where grandparents and stepparents may also be included. For example, in Florida “an extended family member” may bring an action for temporary custody of a minor child, with such a member including a “relative within the third degree by blood or marriage to the parent” or “the stepparent of a child if the stepparent is currently married to the parent.”\(^0\) In Oregon, “any person . . . who has established emotional ties creating . . . an ongoing personal relationship with the child may petition” for a childcare order.\(^1\) The aforementioned Utah stepparent childcare statute also comparably covers siblings, aunts, uncles and grandparents.\(^2\)

On occasion a third-party childcare order can be pursued where the ultimate goal has little, if anything, to do with childcare. For example, a New York trial court in 2001 appointed the prospective maternal grandparents as guardians of an eight month old fetus, with the consent of the prospective parents, while issuing a “custody and visitation stipulation.”\(^3\) The guardianship was pursued so that the fetus would be provided with medical coverage via the insurer of the grandparents.\(^4\)

The aforementioned New York guardianship proceeding is unusual. A more common form of statutory guardianship involves actual childcare intentions, which overlap in certain ways with third-party childcare laws. A 2014 California appellate court describes that state’s probate guardianship scheme as follows:

> After the passage of the juvenile dependency statutes, probate guardianships . . . provide an alternative placement for children who cannot safely remain with their parents . . . . The differences between the probate guardianships and dependency proceedings are significant . . . . Probate guardianships are not initiated by the state, but by private parties, typically family members. They do not entail proof of specific statutory grounds demonstrating substantial risk of harm to the child, as is required in dependency proceedings . . . . Unlike dependency cases, they are not regularly supervised by the court and a social services agency. No government entity is a party to the proceedings. It is the family members and the guardians who determine, with court approval, whether a guardianship is established, and thereafter whether parent and child will be reunited, or the guardianship continued, or an adoption sought . . . .

\(^0\) Mohorn v. Thomas, 30 So. 3d 710, 711 (Fla. Dist. Ct. App. 2010) (employing FLA. STAT. §751.01 et seq. (West 2010) to recognize temporary custody of a child in a paternal grandmother).

\(^1\) OR. REV. STAT. ANN. § 109-119 (West 2013) (holding “clear and convincing evidence needed” to overrule presumption “that the legal parent acts in the best interests of the child”).

\(^2\) UTAH CODE ANN. § 30-5a-102(2) (LexisNexis 2014).


\(^4\) Id.
The probate court may appoint a guardian, “if it appears necessary or convenient.” . . . “A relative or other person on behalf of the minor, or the minor if 12 years of age or older, may file a petition for appointment of a guardian.” . . .

When a parent objects to the guardianship, he or she is entitled to notice and a hearing. (Prob. Code, § 1511.) “Early authorities held that in contested guardianship cases, parents were entitled to retain custody unless affirmatively found unfit . . . However, the unfitness standard fell out of favor and the best interest of the child, as determined under the custody statutes, became the controlling consideration . . .

In determining the minor’s best interests . . . section 3040 [of the Family Code] specifies the order of preference as: (1) joint custody or either parent; (2) a person in whose home the minor is living in a wholesome and stable environment; and (3) any person deemed suitable by the court who can provide adequate and proper care and guidance for the minor.

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

A finding of detriment does not require any finding of unfitness of the parents . . . A parent who loses . . . custody . . . is not foreclosed from regaining custody based on changed circumstances.75

State statutory guardianship schemes outside of California are comparable. The American Law Institute said the following about the “Distinction between custody decrees and those appointing a legal guardian of the person:”

Custody decrees and those appointing a legal guardian of the person create the same sort of relationship between the child, or incompetent, and the person to whose care is awarded. Custody decrees are frequently handed down in connection with or subsequent to, the divorce or separation of the child’s parents. In such instances, the child’s custody is usually awarded to one of his parents or is divided between them. On the other hand, a legal guardian is usually appointed to take charge of a child whose parents are dead, or have deserted him, or who for some reason are incapable of caring for him. Such a guardian therefore is usually someone other than a parent. In actual practice, however, no sharp distinction may be drawn between the two kinds of decrees. Thus, custody of a child is sometimes awarded to a person who is not a parent, and, under some statutes, a parent may be appointed legal guardian of a child’s person.76


76 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §79 cmt. d (1971). Of course, a “distinction should be drawn between guardians of the person and guardians of the property of infants and incompetents. The sole function of guardians of the property is to manage and conserve the property committed to their charge.” Id. at cmt. e.
In some instances there are third-party childcare orders, perhaps over parental objections, where state officials are left no choice but to end parental childcare in order to avoid anticipated harm to the child. Here, third-party caretakers may not petition for childcare; rather, they are called upon by the state to provide childcare because of the unavailability of parental childcare. For example, in Louisiana, if “custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living… or otherwise to any other person able to provide an adequate and stable environment.” 77

In addition to statutes addressing third-party childcare standing and guardianships, there is also case law precedent that recognizes future childcare interests in nonparents who have earlier provided care for the child, and perhaps acted like parents, but who are not designated as parents under law. For example, in Ohio, there can be no “shared parenting” contracts between parents and nonparents. 78 However, “a parent may voluntarily share with a nonparent the care, custody, and control of his or her child through a valid shared – custody agreement,” which may create for a nonparent “an agreement for permanent shared legal custody of the parent’s child” or an agreement for temporary shared legal custody, like when the agreement is revocable by the parent. 79 In Minnesota, the high court has recognized, under certain conditions, a common law right to visitation over parental objection for a former stepparent or an aunt who stood “in loco parentis” with the child. 80 In New York, a grandparent has standing to seek visitation with a grandchild over parental objection when “conditions exist which equity would see fit to intervene.” 81

77 LA. CIV. CODE ANN. art. 133 (2013). Compare id., with Gansen v. Phillips, No. 304102, 2012 WL 1939758 at *1 (Mich. App. Ct. May 29, 2012) (citing Hunter v. Hunter, 771 N.W.2d 694, 713 (Mich. 2009)) (stating that even where there is an “established custodial environment” involving a child and a third party, the parental custody presumption favors the parent unless the third party demonstrates by clear and convincing evidence that custody with the parent is not in the child’s best interest).

78 In re Bonfield, 780 N.E.2d 241, 245–46 (Ohio 2002).

79 Hobbs v. Mullen (In re Mullen), 953 N.E.2d 302, 305–06 (Ohio 2011); see also In re Bonfield 780 N.E.2d at 249 (stating that custody in the non-parent is only allowed under an agreement when the Juvenile Court deems the non-parent suitable and the shared custody is in the best interests of the child); In re LaPiana, Nos. 93691, 93692, 2010 WL3042394 at *8 (Ohio Ct. App. Aug. 5, 2010) (holding that former lesbian partner could secure visitation with 2 children born of assisted reproduction based on written agreement to raise the first child jointly and evidence of intent to share custody of both children); Sharp v. Stevenson, No. W2009-00096-COA-R3-CV, 2010 WL 786006 at *5–6 (Tenn. Ct. App. Mar. 10, 2010) (using a case where a child’s grandparents who were named as primary residential parents in a parenting plan did not show permanent ceding to demonstrate the difficulties in distinguishing whether an agreement signifies temporary or permanent ceding of parental authority).

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

Some of the aforementioned third-party childcare laws seemingly present significant problems under *Troxel*. For example, the Tennessee, Virginia, and California stepparent visitation laws do not expressly require “harm or potential harm to the child” or “special weight” to parental wishes.

Comparably problematic are the Alabama and Alaska statutes on grandparent childcare when read literally.

**IV. REVISITING *TROXEL***

De facto parenthood laws suggest new approaches to meet the *Troxel* “special weight” requirement for new parent childcare orders notwithstanding current parental objections. New parengage designations without biological or formal adoption ties, but with the child’s best interest served, have often been justified by an earlier ceding of parental authority, demonstrated by consent to or acquiescence in the development of parental-like relationships between the children and nonparent caretakers who later become new parents. Thus, a birth or formal adoptive parent’s earlier wishes or other voluntary acts regarding a nonparent’s childcare diminishes the weight accorded later parental objections when possible new de facto parenage is considered. In this scenario, there does not need to be harm to the child for a new second parent to be recognized.

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

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84 The earlier parental acts may have occurred before the child’s birth, as with a pact between a same sex female couple on the employment by one of the partners of assisted reproductive technologies. Such pre-birth acts are deemed by some judges as best left to the legislature as judicial involvement opens the door wide and waves everyone—including neighbors and even baby sitters—into parenthood. See, e.g., *Mullins v. Picklesimer*, 517 S.W.3d 569, 579 (Ky. 2010) (“we adjudge there can be a waiver of some part of custody rights demonstrating an intent to co-parent a child with a nonparent,” declined in a case involving assisted reproduction and a lesbian couple’s pact); *id.* at 583 (J. Cunningham, concurring in part and dissenting in part) (“judicial engineering undermines the statutory protection of the parent and opens the door wide for all third parties who can show shared participation in child rearing,” including “grandparents, uncles, aunts, neighbors and even babysitters”).
This opinion should not be viewed as an incursion on the general right of a fit legal parent to raise his or her child without outside interference. What we have addressed here is a specific set of circumstances involving the volitional choice of a legal parent to cede a measure of parental authority to a third party; to allow that party to function as a parent in the day-to-day life of the child; and to foster that forging of a parental bond between the third party and the child. In such circumstances, the legal parent has created a family with the third party and the child, and has invited the third party into the otherwise inviolable realm of family privacy. By virtue of her own actions, the legal parent’s expectation of autonomous privacy in her relationship with her child is necessarily reduced from that which would have been the case had she never invited the third party into their lives. Most important, where that invitation and its consequences have altered her child’s life by essentially giving him or her another parent, the legal parent’s options are constrained. It is the child’s best interest that is preeminent as it would be if two legal parents were in a conflict over custody and visitation.

Comparably, the necessary weight accorded current parental objections to childcare by stepparents, grandparents, and other nonparents can be diminished in third-party childcare disputes if earlier parental wishes or other voluntary acts facilitated “bonded and dependent” relationships between the children and the nonparents whose continuing childcare would serve the best interests of children. A finding of a need to avoid harm or potential harm to a child would be unnecessary. Current parental objections to continuing third-party childcare could be afforded less weight where the parent earlier consented to a child custody transfer to the third party.

The 2002 American Law Institute (ALI) Principles recognized that such diminished weight could be accorded current parental objections to continued third party childcare. They recognized that current objections to third-party childcare by fit single parents could be overcome where the parents had not been “performing a reasonable share of parenting functions” and grandparents or other relatives developed “significant” relationships

83 V.C. v. M.J.B, 748 A.2d 539, 553–54 (N.J. 2000). A comparable rationale (also involving, as in V.C., a former lesbian couple) was employed in Bosenor v. Jurrell, 704 S.E.2d 494 (N.C. 2010), unfortunately characterizing the voluntary ceding of parental authority to an intimate partner as acting “inconsistent with” the “paramount parental status,” but not employed in Sides v. Baer, 730 S.E.2d 844 (N.C. Ct. App. 2012), finding that parent did not intentionally chose to create a parental role for a grandparent). See also Massitto v. Massito, 488 N.E.2d 857 (Ohio 1986) (only look to child’s best interest in childcare dispute where father earlier consented to guardianship by maternal grandparents, with his consent incorporated into the father’s divorce decree).

86 DEL. CODE ANN. tit. 13, §8-201(c) (2014) (requirements for “de facto parent status”).

87 See, e.g., S.M. v. R.M., 92 A.3d 1128 (D.C. App. 2014) (no such consent here as birth mother was led to believe she was agreeing to temporary custody while she attended drug treatment program).

with the children. This recognition embodies the view that passive acquiescence by a single parent in the development of such a relationship limits later parental decision-making on the continuation of such a relationship.

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

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

While findings as to the best interests of a child should always precede any court-compelled third party childcare, state lawmakers who want to recognize more than the minimal requisites of parental “liberty interests” could demand there also be judicial findings of harm or potential harm to children preceding any such childcare. However, a demand like this would be nonsensical in some settings; for example, where state lawmakers had not required comparable findings of harm or potential harm before second parents could be newly-recognized, parental “liberty interests” are more significantly devalued than they are in third party childcare settings.

State lawmakers who desire more secure parental “liberty interests” could also demand express, rather than implicit, parental consent to earlier third-party childcare, as well as a preexisting “substantial relationship” between a child and nonparent. Further, legislators could differentiate between the standards applicable to varying third parties; for example, by making standing easier to attain for a grandparent than standing for a former step-grandparent or former stepparent, because only in the former setting does a family relationship necessarily continue.

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89 Id. at § 2.18(2)(a).
90 See id.
91 Id. at § 2.18(2)(b).
92 Id. at § 2.18(2)(c) (“harm to the child” can by itself support judges allocating childcare responsibility to nonparents over current parental objections).
By contrast, state lawmakers could opt to recognize less secure parental “liberty interests.” They could choose, for example, to recognize for some children (and perhaps for some nonparents) “fundamental liberty interests” in “preserving established familial or family-like bonds.”

Deference to parental “liberty interests” can also be calibrated by the degree of proof required to overcome current parental objections to third-party childcare. For example, in contemporary grandparent visitation laws, either a preponderance of the evidence or clear and convincing evidence standard could be used. Of course, different standards could be employed for different issues in the same third-party case, where a higher standard is required for the norm on earlier parental acquiescence and a lower standard for the norm on the current nature of the child third-party relationship (e.g., “established familial or family-like bonds”).

V. CONCLUSION

State legislators and judges need not require “a showing of harm or potential harm to the child” when considering a third-party childcare order over a parent’s current objection where the parent earlier ceded some parental authority to the third party. Less “special weight” can be accorded to current parental wishes where parents have ceded some parental authority than where there was no earlier ceding of parental authority. The best interest of a child could be served without unduly limiting the “liberty interests

91 See, e.g., Ark. Code Ann. § 9-13-103 (2015) (grandparent who petitions a court for a “reasonable” grandchild visitation order must overcome a parental objection by a “preponderance of the evidence” as to a “significant and viable relationship” with the grandchild and as to the grandchild’s “best interest” being served with such an order); In re J.R.A., No. 13CA18, 2014 WL 5089173, at *5, ¶ 22 (Ohio Ct. App. 2014) (“In a child-custody proceeding between a parent and a nonparent, a court may not award custody to the nonparent without first determining that the parent is unsuitable to raise the child, i.e., without determining by a preponderance of the evidence that the parent abandoned the child, contractually relinquished custody of the child, or has become totally incapable of supporting or caring for the child, or that an award of custody to the parent would be detrimental to the child.”).
93 E.g., Cal. Fam. Code § 3041(a)-(e) (West, 2007). A child custody award to a third party, over parental objection, generally requires a finding that parental custody “would be detrimental to the child,” which must be “supported by clear and convincing evidence.” Yet, where by a preponderance of the evidence the third party has been shown to have “assumed, on a day-to-day basis, the role of . . . parent, fulfilling both the child’s physical needs and . . . psychological needs for care and affection . . . for a substantial period of time,” this finding means “parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary.” Further, “the evidentiary standards differ when “the child is an Indian child.” Id.
of parents in the care, custody, and control of their children.” Reasonably, however, state lawmakers may eliminate the need for harm for only certain third parties petitioning for childcare, like current grandparents or stepparents.