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DE FACTO PARENT AND NONPARENT CHILD SUPPORT ORDERS

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Traditionally, American state laws have recognized that the federal constitutional right to the care, custody, and control of a child vests in either the heterosexual birth parents or the adoptive parents of the child. Recently, state laws have also recognized this parental right of "care, custody, and control" to opposite sex unmarried couples who bore the child of sex. Even more recently, state laws have recognized this parental right for those who did not engage in sexual intercourse leading to a pregnancy and birth. State laws have also increasingly limited this childcare right of traditionally recognized parents by allowing nonparents to secure court-ordered childcare over the objections of current parents, whether by recognizing these nonparents as de facto parents or as third parties with childcare standing. While state childcare law opportunities have evolved significantly as family structures, genetic testing, and assisted reproduction techniques have changed, the laws on parental and nonparental child support have not changed much. This Article explores actual and potential child support laws arising from the new childcare laws for both parents and nonparents.

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INTRODUCTION

Under state norms, nonparents seeking childcare orders increasingly can be declared legal parents on equal footing with existing parents. Such declarations occur under differing names, including de facto, presumed, and psychological parentage (herein collectively referred to as de facto parentage).[1] De facto parentage determinations generally encompass recognition of parental status in the absence of biological ties or an earlier formal act, like a voluntary paternity acknowledgement, a birth certificate registration, marriage

1. *See, e.g.*, LP v. LF, 338 P.3d 908, 915 n.9 (Wyo. 2014) ("Although the elements of *in loco parentis*, psychological parentage, and de facto parentage are slightly different, we will occasionally refer to them collectively as de facto parentage.").

to the birth mother, or adoption.[2] Nonparents with childcare interests can, however, pursue court-ordered childcare without recognition as de facto parentage in certain situations.

In cases where nonparents are not recognized as de facto parents, these nonparents can still secure childcare orders over the objections of current legal parents.[3] Often labeled as third parties, these nonparents are frequently grandparents or stepparents.[4] Childcare rights for nonparents usually involve fewer parental opportunities than de facto parent childcare, illustrated by distinctions between visitation and custody or between allocations of parental responsibilities involving "decision making"[5] and "parenting time."[6]

Residential family ties, the types of adult-child relationships, and childcare agreements often are key in assessing both de facto parent and nonparent childcare requests. Therefore, any opportunity for court-ordered childcare for potential de facto parents or for nonparents over the objection of current legal parents usually depends on the existence of certain facts such as family ties, adult-child relationships, and agreements between nonparents and parents. These prerequisites can act concurrently or independently to prompt courts to grant childcare requests.

When a childcare order is secured, whether by a de facto parent or by a nonparent, some financial and nonfinancial child support is

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2. *See id.* at 910, 912, 921 (declining to adopt de facto parentage or parentage by estoppel to appellant because although he testified to having a sexual relationship with the mother of the child during the time period that the child could have been conceived, genetic testing concluded that he was not the child's biological father).

3. *See* Jeffrey A. Parness, *Constitutional Constraints on Second Parent Laws*, 40 OHIO N.U. L. REV. 811, 813 n.9 (2013) (citing COLO. REV. STAT. § 14-10-123(1) (2012); COLO. REV. STAT. § 14-10-124(1.5) (2013); S.D. CODIFIED LAWS § 25-5-29 (2002)) (noting that childcare orders may include, among other things, "orders regarding custody, visitation, and allocation of parental responsibilities").

4. *See* Leah M. Hauser, *Grandparents as De Facto Parents: Custody or Visitation Rights to the Child*, MILES & STOCKBRIDGE (Apr. 12, 2016), http://www.milesstockbridge.com/family-law-blog/posts/grandparents-de-facto-parents-custody-or-visitation-rights-child (explaining that a difference between de facto parents and third parties, like grandparents, is that third parties do not have rights to custody of or visitation to the child in question, while de facto parents do).

5. *See, e.g.*, 750 ILL. COMP. STAT. 5/602.5(b) (2016) (directing courts to allocate which parent will make decisions regarding education, health, religion, and extracurricular activities).

6. *See id.* at 5/602.7 to 602.10 (allocating parent time according to the child's "best interests" by considering factors such as the child's interests, the parent's interests, whether either parent has ever been convicted of a crime, and the mental health of all individuals involved).

inevitably assumed. Upon reviewing de facto parent and nonparent childcare laws, we examine the potential (and desired) child support consequences. In this Article, we chiefly explore what child support might arise involving financial support directed to current legal parents. Thus, we look to what financial child support orders might be entered against those who do or could seek de facto parent or nonparent childcare. Finally, we explore child support from those ineligible to pursue childcare orders, but who promised to provide such support.

We begin our exploration of de facto parent and nonparent child support by reviewing a problematic case where a non-biological grandparent was found to be a de facto parent responsible for child support against his wishes.[7] We then examine exemplary de facto parent and nonparent childcare laws, as they necessarily involve at least some degree of child support. Thereafter, we summarize the constitutional limits on de facto parent and nonparent child support orders. Within these limits, we review existing state laws, as well as suggested model laws and principles, on both de facto parent and nonparent child support. We conclude by urging further examinations of de facto parent and nonparent child support issues, particularly by the American Law Institute (ALI) via its 2016 draft of its Restatement of the Law: Children and the Law ("2016 ALI Restatement draft"),[8] and by the National Conference of Commissioners on Uniform State Laws (NCCUSL) via its recently adopted "2017 Uniform Parentage Act" ("2017 UPA")[9] and "Nonparental Child Custody and Visitation Act" ("NPCCVA").[10] These august bodies have done much to educate and to spur legal reforms on de facto parent and nonparent childcare; yet, these institutions, and others, have said little about how childcare reforms should impact child support duties.

We suggest that in examining de facto parent and nonparent child support issues, the ALI and NCCUSL, as well as American state lawmakers, recognize that not all de facto parents or nonparents with childcare standing should be treated comparably. For instance, some de facto parents and nonparents may have childcare opportunities, but no child support duties, while other de facto parents and nonparents may have child support duties though no childcare opportunities. Furthermore,

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7. Johnson v. Johnson, 617 N.W.2d 97 (*Johnson I*) (N.D. 2000).

8. RESTATEMENT OF CHILDREN AND THE LAW (AM. LAW INST., Preliminary Draft No. 2, 2016).

9. UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017).

10. NONPARENTAL CHILD CUSTODY & VISITATION ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW, Draft for Discussion, 2017).

we suggest that where child support is available from de facto parents and/or nonparents, especially when it is independent of any childcare, the assessment standards should differ from the standards utilized in assessing child support from biological, marital, and adoptive parents.

I. AN ILLUSTRATIVE CASE: ANTONYIO AND MADONNA JOHNSON

The case of *Johnson v. Johnson*,[11] resolved by the North Dakota Supreme Court in 2000, illustrates how de facto parent or nonparent child support orders can arise and surprise. It further exemplifies the need for new guidelines on such child support.

Antonyio and Madonna Johnson were married in September 1986.[12] No child was born during this marriage.[13] In 1988, the Johnsons, then living in New Jersey, took custody of Jessica in Pennsylvania, then three months old and the natural granddaughter of Madonna.[14] While Jessica was scheduled to remain with the Johnsons for so long as it would take Michelle, the birth mother, to get back on her feet, ten years later Jessica was still living with the Johnsons.[15] Until the age of nine, Jessica believed that Madonna and Antonyio were her biological parents.[16] During that decade, Jessica was raised as the Johnsons' child, residing with them as they regularly changed residences due to Antonyio's deployments as an Air Force officer.[17] The Johnsons initiated two separate formal adoption proceedings: one in New Jersey and one in Kentucky (where Jessica's natural parents lived).[18] However,

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11. *Johnson I*, 617 N.W.2d at 97 (N.D. 2000).

12. *Id.* at 100.

13. *Id.*

14. *See id.* Jessica's biological mother is Michelle Clayton, who was married to Madonna's son David Clayton. *Id.* In 1988, David was incarcerated in Vermont. *Id.* Michelle called the Johnsons requesting help and the Johnsons housed Michelle for about a week at which point Michelle went back to Kentucky, leaving Jessica with the Johnsons. *Id.* Madonna obtained a temporary custody order for thirty days, but Michelle never returned to retake custody of Jessica. *Id.* Jessica has no biological ties to Antonyio. *Id.*

15. *See id.*

16. Brief for Appellant, *Johnson I*, 617 N.W.2d 97 (N.D. 2000) (No. 990353), https://www.ndcourts.gov/_court/briefs/990353.atb.htm (contending that Antonyio did not believe Jessica should have been told "until later in her life" but "Antonyio testified that he did not see even the—eventual—disclosure of her biological parentage as being a factor that was going to change [his] relationship with [Jessica]" (internal quotation marks omitted)).

17. *Johnson I*, 617 N.W.2d at 100.

18. *Id.*

neither proceeding was completed due to Antonyio's redeployment.[19] From August 1988 to May 1997, the Johnsons resided in New Jersey, Kentucky, and Florida, with Antonyio occasionally deployed overseas.[20]

In 1997 Antonyio was deployed to Korea while Madonna and Jessica resided in Florida.[21] Antonyio requested Madonna file for divorce in Florida while he was away, but she never did.[22] In May 1998, Antonyio was sent to Grand Forks, North Dakota.[23] By then, Antonyio and Madonna were living in Kentucky.[24]

Antonyio filed for divorce in North Dakota in July 1998.[25] There, Madonna sought child support for Jessica, who Madonna urged had been equitably adopted by herself and Antonyio.[26] From 1997 until 1998, Antonyio voluntarily sent Madonna $500 for support, which a North Dakota court ordered to continue from July 1998 until the beginning of the divorce trial in April 1999, at which point Antonyio stopped making support payments.[27]

The North Dakota Supreme Court concluded in 2000 that "North Dakota law clearly recognizes the doctrine of equitable adoption,"[28] citing cases which applied the inheritance law principle of "contract to adopt."[29] It determined that state public policy supported application

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19. *See id.* (clarifying that these deployments were due to Antonyio's military work transfers).

20. *Id.* at 100.

21. *Id.* at 124.

22. Brief for Appellant, *supra* note 16, at 5 (describing how Antonyio asked Madonna to move to Kentucky, and subsequently for her to file for divorce in there while he was stationed overseas, which she never did).

23. *See Johnson I*, 617 N.W.2d at 124.

24. *Id.* at 124–25.

25. *Id.* at 125.

26. The basis of Madonna's argument that she and Antonyio equitably adopted Jessica are laid out in *Johnson I*, 617 N.W.2d at 100, which lists factors such as Madonna and Antonyio raising Jessica to believe she was their daughter, the Air Force listing Jessica as Antonyio's dependent daughter on his transfer orders, Jessica's baptism in Antonyio's family's church, Madonna and Antonyio telling Jessica they had adopted her, and Antonyio signing letters to Jessica with "Love, Dad."

27. *See* Johnson v. Johnson (*Johnson II*), 652 N.W.2d 315, 318 (N.D. 2002) (stating that the last payment Antonyio made was on March 4, 1999).

28. *See Johnson I*, 617 N.W.2d at 101 (defining equitable adoption as "an equitable remedy to enforce a contract right and, therefore, it is not intended to create the legal relationship of parent and child, with all its attendant consequences, and does not effect a legal adoption").

29. *Id.* at 103 (citing Geiger v. Estate of Connelly, 271 N.W.2d 570, 571 (N.W. 1978); Fish v. Berzel, 101 N.W.2d 548, 556–57 (N.D. 1960); Zimmerman v. Kitzan, 65 N.W.2d 462, 466 (N.D. 1954); Muhlhauser v. Becker, 20 N.W.2d 353, 354 (N.D. 1945)).

of the doctrine "to impose a child support obligation under certain circumstances," and that no North Dakota statutes forbade it.[30] The high court's opinion did not address any distinction between Antonyio's legal parenthood in child support versus childcare.[31] Instead, the North Dakota Supreme Court remanded the case for resolution of factual issues involving the application of the North Dakota equitable adoption doctrine to determine if Antonyio needed to provide support.[32]

On remand, the lower court found that Antonyio and Madonna had equitably adopted Jessica.[33] It set child support from Antonyio at $669.[34] The case returned to the North Dakota Supreme Court on the issue of the amount of support Antonyio owed from the time the first trial began in April 1999 until a support order was issued in a second

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30. *See id.* at 109; *see also id.* at 106 n.3 (explaining that such an application of the equitable adoption doctrine was "limited" as the court expressed "preference for adherence to statutory procedures" on formal adoptions).

31. *Id.* at 101 (clarifying that Antonyio never sought childcare or visitation opportunities; therefore, the request from Madonna was solely for monetary support for herself and child support for Jessica, both of which were denied). *But see* State *ex rel.* L.N. v. State, 157 P.3d 352, 354–55 (Utah App. 2007) (holding that grandparents who became child caretakers, but then abandoned the child, were nevertheless responsible for child support payments to the state that had taken custody of the child due to abuse by the person with whom the grandparents had placed the child).

32. *See Johnson I*, 617 N.W.2d, at 110. *But see id.* at 112 (Sandstrom, J., dissenting) ("This is a case of a grandmother and her grandchild who have never lived in North Dakota . . . . [I]t is clear that if an 'equitable adoption' took place, it took place in New Jersey or Kentucky and would therefore be governed by the law of one of those states."). In both New Jersey and Kentucky there was no equitable adoption doctrine. Here, the dissent deemed New Jersey or Kentucky law appropriate under North Dakota choice of law rules for contract case, and the majority did not respond. *Id.* at 123.

Unfortunately, the court in *Johnson* did not consider utilizing a conflict of laws interest analysis to determine which state's child support law might operate, given that Antonyio was in North Dakota and Jessica was in Kentucky. Also, neither opinion considered whether to decline jurisdiction altogether, or at least over the parentage or child support issues.

33. *See Johnson II*, 652 N.W.2d 315, 316 (N.D. 2002).

34. Brief for Appellant at 7, *Johnson II*, 652 N.W.2d 315 (No. 20010288), http://www.ndcourts.gov/_court/briefs/20010288.atb.htm (stating that the trial court applied the child support calculation standard of North Dakota, but held the payments to be effective August 2001, after the court ruled that the equitable adoption occurred; the court also ruled that Antonyio was eligible for interim support of $500 for August and September 2001).

trial in July 2001.[35] In 2002, the North Dakota Supreme Court recognized that Antonyio had been paying Madonna $500 a month in "interim spousal support" from May 1997 (before he moved to North Dakota) until April 1999, which was "intended to be child support."[36] The court held that because the trial court had correctly found Antonyio equitably adopted Jessica, the original $500 order should apply retroactively to the time between the start of the first trial in April 1999 and the end of the second trial in July 2001.[37] It also ruled the $669.00 support order should operate after the end of the second trial, beginning in August 2001.[38] The decision rested on the equitable adoption finding that Antonyio was Jessica's legal parent before the divorce case was filed.[39] Although Antonyio never sought a childcare order, he was still liable for child support to Madonna, who had custody of Jessica, even though both were in Kentucky.[40]

The equitable adoption doctrine in North Dakota allowed a previous nonparent like Antonyio to become a parent responsible for child support. The support obligation could be applied retroactively to cover any time when there was de facto parentage. In *Johnson II*, Antonyio's de facto parentage was recognized as arising (at least) at the time he filed for divorce.[41]

Outside of North Dakota, various parental and nonparental childcare laws exist with different implications. For example, it may be that nonparents like Antonyio can be responsible for child support

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35. *Johnson II* shows that Madonna again appealed the retirement income and spousal support denials, in addition to arguing that child support should begin on January 1, 1999, in the amount of $669 per month. 652 N.W.2d at 318. In upholding the equitable adoption, the court also recognized that since 2000, a guardian *ad litem* appointed for Jessica, as well as Jessica's biological parents, "consented to an equitable adoption of Jessica," removing any argument that Jessica had four possible parents. *Id.* at 317–18.

36. *See id.* at 318–19 (explaining that while Antonyio was ordered to pay child support to Madonna in the amount of $500 through August 1998, the last payment was made March 4, 1999, and from the commencement of the first trial in April 1999 until July 2001, Antonyio was not ordered to pay and did not pay anything to Madonna for child support).

37. *Id.* at 320.

38. *See id.* (ruling that Antonyio's equitable adoption of Jessica applied the interim child support order to more than two years of back child support from the commencement of the first trial in April 1999).

39. *See id.*

40. *Id.*

41. *See id.* at 315 (holding that Madonna was entitled to child support payment for the months it took for the divorce judgment to be entered, indicating that Antonyio was Jessica's de facto parent by the time he filed for divorce).

even without any designation of legal parentage, or that nonparents like Antonyio may never be responsible for child support. Statutes on de facto parent childcare opportunities can encompass child support duties for newly named parents.[42] Statutes on nonparent childcare could encompass child support duties for nonparent child caretakers.[43] This Article reviews American state parental and nonparental childcare laws, as they are quite relevant to any child support duties for de facto parents and nonparents. This review demonstrates the general lack of written standards on de facto parent or nonparent child support.

II. DE FACTO PARENT CHILDCARE LAWS

Grandparents, stepparents, and other current nonparents can secure childcare orders after being declared de facto legal parents. Then, under state laws, they are usually deemed to be on comparable footing as existing childcare parents.[44] Such parentage declarations occur under differing names, including equitable adoption; parentage by estoppel; and de facto, presumed, or psychological parentage.[45] De

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42. *See, e.g.*, S.D. CODIFIED LAWS § 25-7-8 (2013) (allocating child support duties to stepparents, who become responsible as parents once they marry spouses who already have children).

43. *See, e.g.*, TEX. FAM. CODE ANN. § 153.371 (West 2016) (listing examples of nonparent duties such as caring for and protecting the child, disciplining the child, and providing the child with necessities such as clothing and shelter).

44. *See, e.g.*, DEL. CODE ANN. 13 § 8-203 (2009) ("Unless parental rights are terminated, a parent-child relationship established under this chapter[, which includes giving birth, adoption, de facto parenthood, and presumed parenthood,] applies for all purposes, except as otherwise specifically provided . . . ."); D.C. CODE § 16-831.03(c)(1) (2001) (stating that for certain statutory proceedings involving children, "a parent and a de facto parent" are comparably "governed"); ME. REV. STAT. ANN. tit. 19-A § 1853(1) (2016) (dictating similar applications to the Delaware Code); Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich. Ct. App. 1987); V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000) ("Once a third party has been determined to be a psychological parent to a child . . . he or she stands in parity with the legal parent."); *In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) ("We thus hold that henceforth in Washington, a de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.").

45. *See* CAL. FAM. CODE § 7611(d) (West 2016) (presumed parent); DEL. CODE. ANN. tit. 13 § 8-201(c) (de facto parent); *Atkinson*, 408 N.W.2d at 520 (equitable adoption); Johnson v. Johnson, 286 N.W.2d 886, 887–88 (Mich. Ct. App. 1979) (parentage by estoppel); *V.C.*, 748 A.2d at 551–52 (psychological parentage).

These forms of legal parentage, both statutory and common law, are reviewed generally in Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743, 752–63 (2013) [hereinafter *Parentage Law (R)Evolution*]. The varying

facto parentage typically arises under imprecise norms that encompass recognition of parental status in the absence of an earlier formal act, like marriage to the birth parent, a voluntary parentage acknowledgement, a birth certificate registration, a state recognized adoption, or a court judgment.[46] Imprecise norms establishing de facto parenthood can include same-household residence as the child, holding out a child as one's own, and/or the establishment of a parental-like relationship.[47]

Several norms and nomenclatures often operate within the de facto parent laws of a single state. One term can have a different meaning in different jurisdictions, prompting some interstate confusion.[48] For example, a de facto parent must live "in the same household" with the child in the District of Columbia,[49] but not in Delaware.[50] Household residence can lead to presumed fatherhood for a man (and likely motherhood for a woman) in Texas rather than to de facto parentage.[51] Psychological parenthood can arise for a woman (and a man) in Washington State.[52] In some imprecise parentage cases, women can be fathers.[53] Children

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approaches in southern states to both de facto parent and nonparent childcare orders over the current objections of biological or adoptive parents are reviewed in detail in *Ferrand v. Ferrand*, 221 So. 3d 909, 918–38 (La. Ct. App. 2016).

46. *See* Jeffrey A. Parness, *Choosing Among Imprecise American State Parentage Laws*, 76 LA. L. REV. 481, 493 (2015).

47. *See, e.g.*, DEL. CODE ANN. tit. 13 § 8-201(c) (describing a de facto parent as someone who encompasses a "parent-like relationship" with the child).

48. *See* § 8-204(a)(5) (defining a "presumed" parent as one that, "[f]or the first [two] years of the child's life," resides "in the same household with the child," while holding out the child as one's own); *see also* § 8-201(c) (deeming a person a "de facto" parent if, inter alia, a person exercised "parental responsibility" and "acted in a parental role," and also if the person "had the support and consent of the child's parent or parents"); § 8-204(a)(1) (demonstrating that a "presumed" marital parent for a child born during the marriage is not an imprecise norm).

49. *See* D.C. CODE § 16-831.01(1)(A)(i)–(B)(i) (stating that a de facto parent is someone who lived in the same household of the child at time of the child's birth or for at least ten of twelve months preceding custody request).

50. *See* DEL. CODE. ANN. tit. 13 § 8-201(c) (indicating that a de facto parent must have received "support and consent of the child's" parent(s), "exercised parental responsibility," and "acted in a parental role").

51. *See* TEX. FAM. CODE ANN. § 160.204(a)(5) (2016) (allowing for presumed fatherhood for a man who continuously lived with the child for the child's first two years of life).

52. *See In re* Parentage of L.B., 122 P.3d 161, 168 (Wash. 2005) (defining "psychological parent" as a parent-like relationship based on "day-to-day interaction, companionship, and shared experiences").

53. *See* TEX. FAM. CODE ANN. § 160.106 (stating that paternity presumptions apply to maternity); § 160.204(a)(5) (allowing for presumption of fatherhood if, inter alia,

may have three (or more) childcare parents.[54] A household residency norm for de facto parenthood may or may not have a fixed time.[55] De facto parentage may or may not be accompanied by an explicit requirement of consent by a current legal parent to the developing parental-like relationship between child and nonparent.[56] Some de facto parents, like unwed fathers with biological ties, could have achieved parentage via formal acts, like voluntary acknowledgements, but failed to do so.[57]

De facto parental childcare interests can arise from either statute or common law. In some states, common law recognitions beyond statutes are quite limited, typically because of separation of powers concerns.[58]

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the man resides with the child for the child's first 2 years and holds out as one's own); *In re* Guardianship of Madelyn B., 98 A.3d 494, 496 (N.H. 2014) (concluding that a former same-sex partner sufficiently stated a claim that she was the presumed parent of a child when she cared for the child on a daily basis, made important decisions for the child, and sent the child weekly child support checks); Chatterjee v. King, 280 P.3d 283, 284, 297 (N.M. 2012) (holding that although a former same-sex partner was not a child's biological or adoptive mother, she could still establish presumptive paternity because she financially supported and co-parented the child).

54. *See* CAL. FAM. CODE § 7612(b) (West 2016) (leaving room for more than two persons as parents); ME. REV. STAT. ANN. tit. 19-A, § 1853(2) (2016) ("[A] court may determine that a child has more than [two] parents."); Dawn M. v. Michael M., 47 N.Y.S.3d 898, 903 (N.Y. App. Div. 2017) (providing an example of "tri-custody" of ten-year-old child born of sex to best friend of husband's wife); *In re* Parentage of J.B.R., 336 P.3d 648, 649–50 (Wash. Ct. App. 2014) (discussing possible de facto parentage for a stepfather even though two other legal parents already exist).

55. *Compare* TEX. FAM. CODE. ANN. § 160.204(a)(5) (stating that a presumed parent is someone who "continuously resided in the household" during the child's "first two years" of life), *with* DEL. CODE ANN. tit. 13, § 8-201(c) (lacking a specific residency requirement for a person to be a de facto parent).

56. *Compare* DEL. CODE ANN. tit. 13, § 8-201(c) (allowing for "de facto" parentage with "the support and consent of the child's parent or parents"), *with* § 8-204(a)(5) (stating that a man is a "presumed" father when, "[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"). At times, implicit consents are differently prompted. *Compare* MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(4) (West 2016) (explaining that a man is presumed the father if he and the mother jointly receive "the child into their home"), *with* TEX. FAM. CODE ANN. § 160.204(a)(5) (indicating that a presumed father would reside in the same household with the child).

57. *See, e.g.*, Jason P. v. Danielle S., 215 Cal. Rptr. 3d 542, 546, 563 (Ct. App. 2017) (explaining that a sperm donor who assisted in reproduction may be a presumed parent by receiving the child into his home and holding out the child as his own).

58. The balance of lawmaking between legislatures and courts is explored in Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479 (2017).

III. NONPARENT CHILDCARE LAWS

Nonparents who do not secure, or are ineligible to secure, de facto parent status may be eligible to secure childcare orders over the current objections of existing parents. Nonparent childcare standing can arise under general laws or special laws applicable to only some, like grandparents or stepparents.

Sometimes, nonparents eligible to seek childcare orders are described as having undertaken parental or parental-like duties, though these acts do not prompt de facto parentage.[59] The eligibility requirements in general and special nonparent childcare laws vary, meaning a person (like a grandparent) who is not eligible under a special law may still be able to utilize a general law to secure a childcare opportunity.

A. General Laws

General nonparent childcare laws dictate when nonparents may have custody or visitation rights regarding a child. As to broader nonparent childcare laws, consider a South Dakota statute that 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."[60] Further, under a South Dakota statute, a "[p]arent's presumptive right to custody" can also be diminished by a third-party childcare order when there is abandonment or persistent parental neglect, forfeiture or surrender of parental rights to a nonparent, abdication of "parental rights and responsibilities," or "extraordinary circumstances" where there would be "serious detriment to the child."[61] In Kentucky, a "de facto custodian" of a child can seek childcare if he or she was "the

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59. *See, e.g.*, Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995) (explaining that a "parent-like relationship" is needed for a nonparent, providing the example of a biological mother's former partner having standing to seek visitation without an available custody opportunity).

60. 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, e.g.*, Truman v. Lillard, 404 S.W.3d 863, 865 (Ky. Ct. App. 2012) (describing the situation of a former same-sex partner of a woman who adopted her niece not being a de facto custodian and failing to show a waiver of superior parental right to custody).

61. 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. *See* Clough v. Nez, 759 N.W.2d 297, 303–04 (S.D. 2008); *see also* § 25-5-33 (allowing courts to order a parent to pay child support to nonparent having "custodial rights").

primary caregiver" and "financial supporter," resided with the child for at least six months, and the child is under the age of three.[62] In Colorado, nonparent childcare involving an allocation of parental-like responsibilities can arise when the nonparent "has had the physical care of a child for a period of [182] days or more."[63] In New Mexico, "[w]hen neither parent is able . . . to provide appropriate care," a child may be "raised by . . . kinship caregivers," including an adult with a significant bond to the child who cares for the child "consistent with the duties and responsibilities of a parent."[64] Finally, 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."[65]

Beyond statutes, case precedents on nonparent childcare also differ interstate. For instance, in Ohio, there can be no "shared parenting" contracts between parents and nonparents.[66] 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

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62. *See* KY. REV. STAT. ANN. § 403.270(1)(a) (2006) (declaring that residence for at least one year is required if the child is older than three). Thus, not all de facto parents can qualify as de facto custodians with standing to seek childcare. *See, e.g.*, *Truman*, 404 S.W.3d at 863 (concluding 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); Spreacker v. Vaughn, 397 S.W.3d 419, 422–23 (Ky. Ct. App. 2012) (deciding that a paternal great aunt is de facto custodian). There are similar laws in Indiana and Minnesota. *See* MINN. STAT. § 257c.03(2) (2016) (defining "de facto custodian"); K.S. v. B.W., 954 N.E.2d 1050, 1051 (Ind. Ct. App. 2011) (citing IND. CODE. § 31-9-2-35.5 (2007)). The phrase "de facto custodian," and similar phrases, can also be used in other settings. *See, e.g.*, Colusa Cty. Dep't of Health and Human Servs. v. R.J. (*In re* Jesse C.), No. C069325, 2012 WL 5902301, at *4 (Cal. Ct. App. Nov. 26, 2012) (describing a de facto parent as one who cares for child during a dependency proceeding, but that de facto parent status is lost when dependency is terminated).

63. COLO. REV. STAT. § 14-10-123(1)(c) (2017); *see, e.g.*, Olds v. Berry (*In re* Child B.B.O.), 277 P.3d 818, 824 (Colo. 2012) (holding that half-sister has standing); *In re* Parental Responsibilities of D.T., 292 P.3d 1120, 1121 (Colo. App. 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 as mother never ceded her parental rights).

64. N.M. STAT. ANN. §§ 40-10B-2, 3(A) (2016); *see* Stanley J. v. Cliff L., 319 P.3d 662, 668 (N.M. Ct. App. 2013) (acknowledging that sporadic stays with mother's friends prior to her death and children's "nomination" of friends as guardians sufficient to demonstrate a "bond").

65. WIS. STAT. § 767.43(1) (2016); *see* Vanderheiden v. Vanderheiden, No. 2011AP2672, 2013 WL 5311475, at *9 (Wis. Ct. App. Sept. 24, 2013) (citing § 767.43(1)) (awarding former stepfather visitation of child).

66. *See In re* Bonfield, 780 N.E.2d 241, 249 (Ohio 2002).

create, for a nonparent, "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.[67] In Minnesota, under certain conditions there is a common law right to child visitation over parental objection for a former family member, like an aunt who stood in loco parentis with the child.[68]

While jurisdictions vary in application, many states recognize at least limited custodial or contact rights without requiring a biological connection between a child and caregiver. On occasion, general de facto parent and nonparent childcare interests are recognized in a single statute. For example, in Oregon "any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent[,] or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition" for an order involving "custody, placement[,] or guardianship of that child."[69] Where there is a "child-parent relationship," the petitioner may be granted "custody, guardianship, right of visitation[,] or other right," seemingly as a de facto parent.[70] Where there is "an ongoing personal relationship," the petitioner may be granted "visitation or contact rights," seemingly as a nonparent.[71]

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67. *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. *See In re Bonfield*, 780 N.E.2d at 244, 249; *see also In re* LaPiana, Nos. 93691, 93692, 2010 WL 3042394, at *10 (Ohio Ct. App. Aug. 5, 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).

68. *See* Rohmiller v. Hart, 811 N.W.2d 585, 593 (Minn. 2012) ("[U]nder 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 In re* V.D.W., 152 So. 3d 336, 341–42 (Miss. Ct. App. 2013), *rev'd sub nom.* Waites v. Ritchie (*In re* Waites), 152 So. 3d 306 (Miss. 2014) (describing a post-divorce situation where the mother's ex-husband stood in loco parentis to her child, who 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) (describing precedent that granted in loco parentis status to stepparents and same sex partners of parents).

69. OR. REV. STAT. ANN. § 109.119(1) (West 2016).

70. § 109.119(3)(a).

71. § 109.119(3)(b).

B. Special Grandparent Laws

Special nonparent childcare laws[72] sometimes operate only for grandparents.[73] For instance, a grandparent in New York has standing to seek visitation with a grandchild over parental objection when "conditions exist which equity would see fit to intervene."[74] In Alaska, visitation can be sought by a grandparent who "has established or attempted to establish ongoing personal contact" with the grandchild.[75] In Georgia, a grandparent can 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.[76] In North Dakota, per statute: "The 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."[77]

Unlike the Georgia statute, some grandparent childcare statutes are more restrictive. In Arkansas, a grandparent has standing to seek visitation if the "marital relationship between the parents . . . has been severed by death, divorce, or legal separation."[78] In Alabama, under certain conditions a grandparent can obtain reasonable visitation rights with a grandchild when the marriage of the child's parents is

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72. Beside special childcare laws, there can also be other special laws addressing nonparents' rights and responsibilities to a child. *See, e.g.*, S.D. CODIFIED LAWS § 25-7-8 (2013) ("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.").

73. Grandparent childcare laws are reviewed in Jeffrey A. Parness & Alex Yorko, *Nonparental Childcare and Child Contact Orders for Grandparents*, 120 W. VA. L. REV. (forthcoming 2017).

74. Van Norstrand v. Van Norstrand, 925 N.Y.S.2d 229, 230 (N.Y. App. Div. 2011) (quoting N.Y. DOM. REL. LAW § 72[1] (McKinney 2010)); *see also In re* Victoria C., 56 A.3d 338, 349 (Md. Ct. Spec. App. 2012) (finding sibling visitations can be ordered over parental objections only when standards for grandparent visits have been met), *aff'd in part, vacated in part*, 88 A.3d 749 (2014).

75. ALASKA STAT. § 25.20.065(a)(1) (2016).

76. GA. CODE ANN. § 19-7-3(c)(1) (2015) (stating harm may be found where the minor child resided with the grandparent for over six months or where there was "an established pattern of regular visitation or child care by the grandparent with the child").

77. N.D. CENT. CODE § 14-09-05.1(1) (2009). Section 14-09-05.1 was deemed constitutional in *Kulbacki v. Michael*, 845 N.W.2d 625, 627 (N.D. 2014) (deciding the trial court must give parents a favorable presumption and place the burden of proof on grandparents or great-grandparents), and applied in *Bjerke v. Bjerke* (*In re* S.B), 845 N.W.2d 317, 318 (N.D. 2014).

78. ARK. CODE ANN. § 9-13-103(b)(1) (2015).

dissolving or has been dissolved,[79] or the child was born out of wedlock.[80] When a child has been adopted, "natural grandparents" in Alabama may only seek post-adoption grandchild visitation when there was an intra-family adoption.[81] In Wyoming, a grandparent can seek "reasonable visitation," but not where a "minor grandchild has been adopted and neither adopting parent is related by blood to the child."[82] And in Missouri, grandparents may seek "reasonable" visitation under certain circumstances, as when the grandchild's parents have filed for divorce, but have no standing even when "unreasonably denied visitation" where the "natural parents are legally married . . . and are living together with the child."[83]

C. Special Stepparent Laws

Special nonparent childcare laws also sometimes operate for stepparents. Here, a stepparent's affirmative steps toward forming a parent-child relationship is often key. 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."[84] In California, "reasonable visitation to a stepparent" is permitted if in "the best interest of the minor child."[85] 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

79. ALA. CODE § 30-3-4.2(b)(1) (2016).

80. § 30-3-4.2(b)(2)–(3) (noting that paternity must have been "legally established" for a paternal grandparent).

81. § 26-10A-30 (stating that such adoption may be by "stepparent, a grandfather, a grandmother, a brother, a half-brother, a sister, a half-sister, an aunt or an uncle and their respective spouses").

82. WYO. STAT. ANN. § 20-7-101(a), (c) (2017).

83. MO. REV. STAT. § 452.402.1(1), (4) (2016); *see also In re* Adoption of E.N.C., 458 S.W.3d 387, 398 (Mo. Ct. App. 2014) (finding grandparents have no visitation standing beyond what is allowed by statute).

84. TENN. CODE ANN. § 36-6-303(a) (2017). The Tennessee statute is seemingly of questionable facial validity under *Troxel v. Granville*, 530 U.S. 57 (2000), as there are no required showings as to, e.g., parental unfitness or acquiescence, or child detriment.

85. CAL. FAM. CODE § 3101(a) (West 2004).

served.[86] If a stepparent only proves "an ongoing personal relationship" with the child, the parental presumption in Oregon must be rebutted by "clear and convincing evidence."[87] In Virginia, a former stepparent with a "legitimate interest"[88] 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."[89] And in New York, a court has recognized that a stepparent can pursue stepchild visitation where the biological parent earlier urged successfully that the stepparent was "chargeable with the subject child's support."[90]

Stepparents are sometimes provided childcare opportunities only when one (or more) of the legal parents is no longer available as a parent. In Utah, a former stepparent[91] can pursue child custody or visitation in a divorce or "other proceeding"[92] 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," and

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86. OR. REV. STAT. ANN. § 109.119(3)(a) (West 2017). "Child-parent relationship" means a relationship within the past six months that "fulfilled the child's psychological needs for a parent as well as the child's physical needs." § 109.119(10)(a).

87. § 109.119(3)(b). An "'[o]ngoing personal relationship' means a relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality." § 109.119(10)(e).

88. VA. CODE ANN. § 20-124.1 (2016) (mandating that a person with a legitimate interest is to be "broadly construed" and may include "former stepparents").

89. § 20-124.2.B; *see, e.g.*, Brown v. Burch, 519 S.E.2d 403, 412 (Va. Ct. App. 1999) (finding over the mother's objection, "clear and convincing evidence of special and unique circumstances" that justify the joint custody order favoring the father and former stepfather, with the latter "retaining physical custody of the boy"). Beside special statutes, there are some common law rights regarding childcare for some former stepparents. *See, e.g.*, Bethany v. Jones, 378 S.W.3d 731, 736 (Ark. 2011) (granting former lesbian partner visitation rights after relying on *Robinson v. Ford-Robinson*, 208 S.W.3d 140, 144 (Ark. 2005), where 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"). Special stepparent childcare laws, of course, may be coupled with special stepparent adoption laws. *See, e.g.*, LA. CHILD. CODE ANN. art. 1252(A) (2012) (stating that there is no need for even limited home studies in some stepparent adoptions); MONT. CODE ANN. § 42-4-302(1)(a) (2015) (granting standing for potential adoption rights if stepparent has lived with child and a parent with legal and physical custody for past sixty days).

90. Paese v. Paese, 41 N.Y.S.3d 245, 248 (N.Y. App. Div. 2016) (finding that a mother was "judicially estopped" from arguing that a stepfather was "not a parent for the purpose of visitation").

91. UTAH CODE ANN. § 30-5a-102(2)(e) (LexisNexis 2013) (defining "[p]erson other than a parent" to include "current or former step-parents").

92. § 30-5a-103(4).

contributed to the "child's wellbeing," where the parent is "absent" or has "abused or neglected the child."[93] In Delaware, "upon the death or disability of the custodial or primary placement parent," a stepparent who resided with the deceased or disabled parent can request custody even if "there is a surviving natural parent."[94] And, in Vermont, under case law,

> if a stepparent stands in loco parentis to a child of the marital household, custody of that child may be awarded to the stepparent if it is shown by clear and convincing evidence that the natural parent is unfit or that extraordinary circumstances exist to warrant such a custodial order, and that it is in the best interests of the child for custody to be awarded to the stepparent.[95]

D. Other Special Laws

Special nonparent childcare laws can extend beyond eligible grandparents and stepparents. For example, in Florida an "extended family member" may bring an action for temporary custody of a minor child; these members include a "relative of a minor child within the third degree by blood or marriage to the parent" or "the stepparent of a minor child if the stepparent is currently married to the parent."[96] In both Arkansas and North Dakota, great-grandparents are included with grandparents in third-party visitation laws.[97] In Illinois, the third-party visitation law includes "grandparents, great-grandparents, stepparents, and siblings."[98]

IV. CONSTITUTIONAL LIMITS ON CHILD SUPPORT ORDERS AGAINST DE FACTO PARENTS AND NONPARENTS

State laws recognizing financial child support responsibilities for existing, newly-designated, or even eligible de facto parents, as well as for nonparents, are limited by the constitutional rights of established legal parents and the prospective child supporters. There are due process limits on child support as there are limits on childcare for de

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93. § 30-5a-103(2).

94. DEL. CODE ANN. tit. 13, § 733 (2009).

95. LeBlanc v. LeBlanc, 100 A.3d 345, 352 (Vt. 2014) (quoting Paquette v. Paquette, 499 A.2d 23, 30 (Vt. 1985)).

96. FLA. STAT. § 751.011 (2017); *see* Mohorn v. Thomas, 30 So. 3d 710, 711 (Fla. Dist. Ct. App. 2010) (employing § 751.01–.011 to recognize temporary custody of a child in a paternal grandmother).

97. ARK. CODE ANN. § 9-13-103(b) (2015); N.D. CENT. CODE § 14-09-05.1.1 (2009).

98. 750 ILL. COMP. STAT. 5/602.9(c) (2016).

facto parents and nonparents given the superior parental childcare rights of established parents.

A. Limits on De Facto Parent Child Support when Accompanied by Childcare

The constitutional rights of established legal parents chiefly come into play when child support responsibilities for a de facto parent or a nonparent are accompanied by opportunities for childcare orders over the objections of the established parents. Child support unaccompanied by childcare orders typically prompt far fewer objections by existing parents since their superior rights regarding the care, custody, and control of their children are not impeded.[99]

It is rare for a de facto parent to object to providing child support while exercising court-ordered childcare responsibilities. Childcare and child support are implicitly (and often explicitly) connected obligations. Any objections by de facto parents are more likely when child support is ordered to be paid to other child caretakers, like the legal parents who are biological or adoptive parents.

When confronted by established legal parents challenging a de facto parent's constitutional childcare rights,[100] courts often summarily

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99. Existing legal parents would have little reason to object if the ability to exhibit care, custody, and control of their children is not at stake under *Troxel v. Granville*, 530 U.S. 57, 66 (2000). *See infra* note 132 and accompanying text (discussing the outcome of the childcare interests challenge in *Troxel*); *infra* note 149 and accompanying text (discussing the superior parental rights of existing legal parents).

100. Of course there can also be state constitutional challenges to attempted de facto parent childcare, often founded on independent state constitutional interpretations of state constitutional provisions employing the same, or similar, language found within the federal constitution, or on unique state constitutional provisions (i.e., having no federal constitutional counterpart). *Compare* Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999) (en banc) (finding "a putative father of a child born [of sexual intercourse] into a marriage may have a right to standing to challenge paternity under the Due Process Clause of the Iowa Constitution," but finding no standing where right is waived, as when "the challenge is not a serious and timely expression of a meaningful desire to establish parenting responsibility"), *and In re* J.W.T., 872 S.W.2d 189, 198 (Tex. 1994) (relying on Texas constitutional "due course of law" to find unconstitutional laws restricting a biological father's ability to challenge a presumed father's custody), *with* Strauser v. Stahr, 726 A.2d 1052, 1053 (Pa. 1999) (concluding that no Pennsylvania due process rights are applicable for unwed biological fathers as they cannot challenge paternity presumption in husbands whose marriages are intact). *But see* K.E.M. v. P.C.S., 38 A.3d 798, 810 (Pa. 2012) (holding that a biological father sued for child support for child born to married woman cannot defend based on husband's paternity by estoppel unless it serves the child's best interests).

dismiss,[101] providing little guidance on when such de facto parental rights infringe upon the superior parental rights of existing parents. In one case, there could be no third childcare parent when a child already has two legal parents whose childcare interests have not been lost.[102] Yet elsewhere, state lawmakers increasingly are open to three (or more) childcare parents, though in limited settings.[103]

There is also precedent that superior parental rights are more easily overcome when a private agreement exists which provides for shared parental control,[104] as opposed to private agreements relinquishing parental rights altogether.[105] In some states, there is precedent stating that when two women agree to jointly raise the child that one will bear using the ovum of the other, an express waiver of parental rights signed by the ovum donor on a preprinted form at a reproductive clinic will

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101. *See, e.g.*, Smith v. Guest, 16 A.3d 920, 930–32 (Del. 2011) (en banc) (recognizing that "de facto" parent designations differ from nonparty standing without examining closely the "de facto" parent guidelines).

102. *See, e.g.*, Bancroft v. Jameson, 19 A.3d 730, 749–50 (Del. Fam. Ct. 2010) (declaring a violation of federal due process rights of two fit parents if other persons are also designated under law as parents). Often, the constitutional question remains unanswered (and unraised) because courts focus on state public policy favoring only two parents for any one child. When three parents are initially recognized under law, as with a birth mother, a husband presumed to be a father, and a third person presumed to be a parent because he or she held out a child as his or her own, statutes dictate that courts choose between the two presumed parents. *See, e.g.*, CAL. FAM. CODE § 7612(b) (West 2017) (mandating that competing presumptions of natural fatherhood should be resolved "on the facts . . . founded on the weightier considerations of policy and logic"); *see also* L.A. Cty. Dep't of Children & Family Servs. v. Heriberto C. (*In re* Jesusa V.), 85 P.3d 2, 11 (Cal. 2004) (employing § 7612(b)); GDK v. State, 92 P.3d 834, 836–37 (Wyo. 2004) (considering two conflicting paternity presumptions, with choice between fathers based on "best interests" of child). *But see* CAL. FAM. CODE § 7612(c) (determining that more than two parents will be recognized if there is otherwise detriment to the child); ME. STAT. tit. 19A, § 1853(2) (2016) ("[A] court may determine that a child has more than [two] parents.").

103. *See, e.g.*, CAL. FAM. CODE § 7612(c) (stating that courts may find detriment to the child of only two parents by analyzing the "child's psychological needs"); ME. STAT. tit. 19A, § 1853(2).

104. *See, e.g.*, Frazier v. Goudschaal, 295 P.3d 542, 557 (Kan. 2013). In *Frazier*, the court found that a mother who entered into a co-parenting agreement had exercised her due process rights at the time of the agreement, and because of the constitutional right to decide the care, custody, and control of her children, she had waived her parental preference upon signing. *Id.* Courts should not be required to grant the mother more rights than she herself had claimed when agreeing to a co-parenting contract. *Id.*

105. Several states have requirements assuring voluntary and informed consent by a parent regarding placement of a child for formal adoption. *See, e.g.*, 750 ILL. COMP. STAT. 50/10 (2016) (requiring form of consent to substantially comply with varying requirement promoting informed decision making); IND. CODE § 31-19-9-2 (2017) (requiring consent in court or before a notary public).

not always bar the ovum donor from seeking de facto parentage.[106] Here, unlike most second parent settings, there are biological ties between the alleged de facto parent and the child.

Some American state statutes go further by upholding joint parenting agreements between opposite sex,[107] same sex female,[108] or same sex male couples[109] where only one partner has biological ties, whether by bearing a child[110] or by donating genetic material prompting birth (as through a gestational[111] or a genetic[112] surrogate).

Further, some courts have recognized that in assisted reproduction settings, not all sperm donors have comparable childcare interests.[113] Some sperm donors can seize parental childcare rights, like when there was a preimplantation co-parent agreement. In this situation, the sperm donor's parental rights are established even though these rights necessarily diminish a birth mother's unilateral superior parental rights.[114] In these cases, typically sperm donors must promptly and affirmatively seize their paternity opportunity interests, often

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106. *See, e.g.*, T.M.H. v. D.M.T., 79 So. 3d 787, 802 (Fla. Dist. Ct. App. 2012) (reviewing other cases and deciding that the appellant donor did not waive her parental rights).

107. *See, e.g.*, FLA. STAT. § 742.11(1)–(2) (2017) (stating a presumption of parentage for husband and wife who consent to assisted reproduction birth outside of surrogacy); TEX. FAM. CODE ANN. § 160.7031 (West 2014) (providing a presumption of parentage for sperm donor in the case of an unwed opposite sex couple).

108. *See, e.g.*, CAL. FAM. CODE § 7613 (describing conception involving consent of "another intended parent"); N.M. STAT. ANN. § 40-11A-703, 704 (2017) (stating that a person who provides eggs or consents to assisted reproduction with intent to parent is a parent).

109. *See, e.g.*, N.H. REV. STAT. ANN. § 168-B:7 (Supp. 2016) (identifying "intended parent or parents" in gestational carrier agreements, which may include same sex male couples); Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235, 1235–36 (2014) (describing some states' hostility to gay parent adoption).

110. *See, e.g.*, FLA. STAT. § 742.11(2) (describing presumption of parentage when wife and husband consent to assisted reproduction birth to wife with use of "donated eggs or preembryos").

111. *See, e.g.*, § 742.13(2), (6) (requiring that either or both intended mother, or father, must donate genetic material); N.H. REV. STAT. ANN. § 168-B:7.

112. *See, e.g.*, WASH. REV. CODE § 26.26.210 (2) (2017) (defining "surrogate gestation").

113. *See, e.g.*, Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 484 (Cal. Ct. App. 2005) (rejecting trial court's finding of "natural" fatherhood for donor of artificial insemination, even though donor had had consensual sex with mother).

114. *See, e.g.*, N.H. REV. STAT. ANN. § 168-B:2(III), (V)(d) (stating that a "child conceived through assisted reproduction" can have as a parent one who receives the child into the person's home and holds out the child as the person's own); UNIF. PARENTAGE ACT §§ 702–704 (UNIF. LAW COMM'N 2017) (proposing that while sperm donor is not necessarily a parent, he can be a parent where there is "the intent to be the parent" via "record" consent).

where the birth mothers are not married to others.[115] In contrast, for future pregnancies, births, and parentage, the intent of sperm donors at the time of sex for children born of consensual sex (e.g., not rape) is usually irrelevant to assessments of legal paternity for childcare and child support purposes.[116]

So, the contours of constitutional constraints on de facto parent childcare over an established parent's objections are difficult to define. Whatever those contours, there is little in current precedents indicating that existing childcare parents have constitutional claims undermining possible de facto parent child support orders upon entry of de facto parent childcare orders.

There are some additional constitutional law principles that help assess the constitutional interests of de facto childcare parents in avoiding child support to be paid to biological and/or formal adoptive parents. First, not all federal constitutional rights have the same or similar standards on waiver or loss of rights. Consider the explicit federal constitutional jury trial rights in criminal[117] and civil[118] cases. In criminal cases, district judges personally "must address" any defendants wishing to plead guilty or nolo contendere about "the right to a jury trial" to ensure an understanding of the right and a voluntary plea.[119] In civil cases, assuming there was no prelawsuit waiver of the jury trial right,[120] parties must "demand a jury trial" by "serving the

115. *See, e.g.*, Strauser v. Stahr, 726 A.2d 1052, 1056 (Pa. 1999) (finding no Pennsylvania due process rights for unwed biological fathers of children born of sex to women married to others where the marriages are intact). *But see* Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999) (en banc) (finding a state constitutional childcare interest for an unwed biological father though the birth mother is married to another).

116. Thus, beliefs by copulating men as to the impossibility of pregnancy (e.g., beliefs as to vasectomies or female birth control) usually do not eliminate their paternity opportunity interests under *Lehr v. Robertson*, 463 U.S. 248 (1983), or their child support obligations under state law, even where there were maternal deceptions about birth control, as in *Hughes v. Hutt*, 455 A.2d 623 (Pa. 1983), and *Faske v. Bonanno*, 357 N.W.2d 860 (Mich. Ct. App. 1984) (per curiam).

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

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

119. *See* FED. R. CRIM. P. 11(b)(1)(C), (b)(2). These rules are seemingly mandated by constitutional precedents, as shown in *Brady v. United States*, 397 U.S. 742, 748 (1970), which explains that a guilty plea must be a knowing, voluntary, and intelligent waiver of the Fifth Amendment constitutional right against self-incrimination and requiring that a court treat a guilty plea with care and discernment after confirming the defendant is aware of the consequences.

120. Unlike criminal jury trial rights, which seemingly are never waivable prelawsuit, even predispute waivers of civil jury trial rights are often sustained. *See, e.g.*, Integrated Glob. Concepts, Inc. v. j2 Glob., Inc., No. C-12-03434-RMW, 2013 WL 5692352, at *1–

other parties with a written demand" and "filing the demand" with the district court,[121] actions usually taken by nonparty lawyers.[122] While courts often overlook excusable errors or omissions by lawyers who do not properly demand the civil jury trial rights of their clients,[123] client waivers of jury trials are sometimes upheld if based on lawyer failures that are inexcusable[124] or that unduly prejudice a party opposing a late jury trial demand.[125] If, in fact, as with the jury trial, context is

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2 (N.D. Cal. Oct. 15, 2013) ("Nearly all states, except Georgia and California, allow contractual waiver of jury trials."). There is a dispute on whether state law determines the validity of a predispute civil jury trial waiver in a federal diversity action, where clearly the federal jury trial processes are employed when properly demanded. *See* AMEC Env't & Infrastructure, Inc. v. Spectrum Servs. Grp., Inc., No. 13-cv-04059-WHO, 2013 WL 6405811, at *3–4 (N.D. Cal. 2013).

121. FED. R. CIV. P. 38(b)(1), (2).

122. Comparably, state civil jury trial rights are waived by nonparty lawyers via acts involving either in court conduct or court filings. *See, e.g.*, Ladd v. Watkins & Vinson, 168 S.W. 138, 139 (Ark. 1914) (finding defendant waived a trial by jury even though lawyer was absent from courtroom when judicial inquiry on jury trial demands); Greene v. City of Chi., 382 N.E.2d 1205, 1207–09 (Ill. 1978) (finding a waiver of jury trial, though no party was inconvenienced or prejudiced by late jury trial demand, unless "good cause be shown for failure to comply with the statue" on allowing additional time for doing any act); Johnson v. Sabben, 282 N.E.2d 476, 479 (Ill. App. Ct. 1972) (affirming trial court's decision to deny plaintiff's late jury demand when counsel intentionally did not ask for jury after client demanded one).

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

124. *See, e.g.*, Daniel Int'l. Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1064 (5th Cir. 1990) (describing factors on utilizing discretion to try case by jury where jury demand was untimely include whether there will be a disruption in the court's and adverse party's schedule, prejudice to adverse party, the length of delay in filing the demand, and any reason for tardiness); Galella v. Onassis, 487 F.2d 986, 996 (2d Cir. 1973) (determining that untimely jury trial demand may only be overlooked with a showing of "cause beyond mere inadvertence"); Todd v. Lutz, 64 F.R.D. 150, 152 (W.D. Pa. 1974) (finding no excuses due to negligence, inadvertence, or lack of intent to waive).

125. *See, e.g.*, Baker v. Amtrak Corp., 163 F.R.D. 219, 221 (S.D.N.Y. 1995) (excusing late jury demand because, inter alia, personal injury cases are usually tried by a jury and there was a lack of prejudice to the adverse party). *Compare* Lum v. Discovery Capital Mgmt., L.L.C., 625 F. Supp. 2d 82, 84 (D. Conn. 2009) (finding no undue prejudice), *with* Hirschinger v. Allstate Ins. Co., 884 F. Supp. 317, 320 (S.D. Ind. 1994) (deciding there was no "strong and compelling" reason to deny untimely jury request offered without explanation or justification), *and* Synovus Trust Co., N.A. v. Honda

important in assessing parental childcare rights, and if there can be parental rights waivers, de facto parent laws may operate differently when a de facto parent is recognized due to household residence, a contract, or the establishment of a parental-like relationship.

Similarly, context can be important when assessing the limits on child support for de facto childcare parents. Consider that a speaker who defames a public figure can only be liable for defamation, per First Amendment precedents, if the speaker acted with "actual malice."[126] But, a speaker who defames a private figure can be liable for defamation without acting maliciously.[127] More relatedly, state laws now draw distinctions in child support duties between a sperm donor via consensual sex and a sperm donor via assisted reproduction.[128] Likewise, distinctions in child support duties can be made between possible de facto parent child caretakers who resided with the child only temporarily and potential de facto parents who developed parental-like relationships with the child, including identifying themselves as parents in their communities.

Unsurprisingly, constitutional rights sometimes can operate differently for men and women. Absent waiver, the federal due process constitutional interests of parents in the "care, custody, and control of their children" born as a result of consensual sex[129] are automatically recognized at birth for all women, but not for all men who engage in the related sex. Certain men, typically biological fathers who impregnate unwed women, may also need to form a "significant custodial, personal, or financial relationship" with the child to attain

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Motor Co., 223 F.R.D. 699, 701 (M.D. Ga. 2004) (determining any prejudice to opposing party could be minimized).

126. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (defining "actual malice" as a statement made with "knowledge that [the statement] was false or [made] with reckless disregard of whether [the statement] was false or not").

127. *See, e.g.*, Neely v. Wilson, 418 S.W.3d 52, 61 (Tex. 2013) (finding plaintiff did not need to prove actual malice to uphold a libel suit brought against media defendants in connection with a negatively investigative television broadcast).

128. Arguably, even sperm donors via "consensual" sex differ, as when there is or is not a certain form of statutory rape (e.g., an adult and a minor "willingly" engage in sex prompting birth). Rapists are less likely secure childcare interests than non-rapists. Incidentally, there also appear to be differences in childrearing opportunities for male and female rapists. *See, e.g.*, Jeffrey A. Parness, *Abortions of the Parental Prerogatives of Unwed Natural Fathers: Deterring Lost Paternity*, 53 OKLA. L. REV. 345, 360–67 (2000) (identifying differences between criminally prohibited and consensual sexual intercourse).

129. Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (plurality opinion).

federal constitutional childcare protection.[130] So women and men prompting births from sex differ in their childcare opportunities, as do criminal and civil case litigants with jury trial rights. For de facto parent child-caretakers, there is usually no sound reason to differentiate child support duties based on the sex of the parents.

B. Limits on Nonparent Child Support when Accompanied by Childcare

Unlike de facto childcare parentage, there is a major U.S. Supreme Court precedent limiting nonparental childcare orders over the objections of established legal parents. In *Troxel v. Granville*,[131] a 2000 U.S. Supreme Court decision, four justices determined in a plurality opinion that the liberty interest of parents "in the care, custody, and control of their children" (herein childcare interests) generally forecloses states from compelling requested grandparent childcare over current parental objections.[132] Yet, the same four justices recognized that "special factors," might justify judicial interference as long as the contrary contemporary wishes of parents were accorded "at

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130. Lehr v. Robertson, 463 U.S. 248, 262–63 (1983). Certain unwed fathers with such relationships can currently be foreclosed, however, if the mothers were married to other men in states with a conclusive (i.e., irrebuttable) presumption of paternity for husbands. Justice Scalia found states were free to give categorical preference to mothers' husbands in *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion). But Justice Stevens in *Michael H.* "would not foreclose" the possibility of childcare interests for such unwed fathers. *Id.* at 133 (Stevens, J., concurring). Four other Justices recognized federal constitutional childcare interests in such unwed fathers. *Id.* at 136 (Brennan, J., concurring). States now vary on whether to give similar categorical preferences to husbands. *See supra* note 100. These variations are permitted as the U.S. Supreme Court has recognized, to date, far broader state lawmaking discretion on questions of defining childcare parentage than on related privacy questions in such areas as abortion, same sex marriage, and sexual conduct. *See, e.g.*, Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965, 967–68 (2016) (questioning why states have such wide discretion with regards to defining constitutional child caretakers). So, childrearing opportunities and rights now operate differently interstate for different classes of unwed biological fathers.

131. 530 U.S. 57 (2000) (plurality opinion).

132. *Id.* at 65 (referring to childcare interests as "perhaps the oldest of the fundamental liberty interests recognized by this Court"); *see also id.* at 68–69 ("[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."). *See generally* Donald Leo Bach, *The* Rapanos *Rap: Grappling with Plurality Decisions*, 81 U.S.L.W. 468, 468–69 (Oct. 2, 2012) (discussing how to interpret plurality opinions).

least some special weight."[133] The plurality, and one concurring justice, while denying the requested grandparent childcare, reserved the question of whether any "nonparental" visitation, presumably encompassing not only grandparents, but also stepparents, siblings, and others,[134] must "include a showing of harm or potential harm to the child."[135] In his concurrence, 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."[136]

Justice Kennedy, in dissent, like Justice Souter, observed that a best interest standard might be constitutional where the nonparent acted "in a caregiving role over a significant period of time,"[137] suggesting

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133. *See Troxel*, 530 U.S. at 68, 70 ("[I]f a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination.").

134. *See, e.g.*, James W. v. Claudine W. (*In re* Marriage of W.), 7 Cal. Rptr. 3d 461, 464 (Cal. Ct. App. 2003) (applying *Troxel* analysis to stepparent visitation request).

135. *See Troxel*, 530 U.S. at 73 ("[W]e do not consider . . . whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting [nonparent] visitation."); *id.* at 77 (Souter, J., concurring); *see also* McGarity v. Jerrolds, 429 S.W.3d 562, 570–71 (Tenn. Ct. App. 2013) (establishing harm where it is required); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.18(2)(a)(i) (AM. LAW INST. 2000) [hereinafter 2000 ALI PRINCIPLES] (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, 18–23 (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).

136. *Troxel*, 530 U.S. at 76–78 (Souter, J., concurring) (stating that while not every nonparent should be capable of securing visitation upon demonstrating a child's best interests, perhaps a nonparent who establishes "that he or she has a substantial relationship with the child" should be able to petition if the state chooses). An exemplary statute is VA. CODE. ANN. § 20-124.2(B) (2017), which states that "[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 any other person with a legitimate interest." An illustrative case is *In re Parental Responsibilities of M.W.*, 292 P.3d 1158, 1159, 1161 (Colo. App. 2012), which employs COLO. REV. STAT. § 14-10-123(1)(c) (2017) to uphold standing of a former boyfriend of child's mother seeking allocation of parental responsibilities, and determined that a showing of the child's biological parents being unfit was unnecessary to allow former boyfriend's action to move forward.

137. *Troxel*, 530 U.S. at 98–99 (Kennedy, J., dissenting) (arguing that state courts should be entitled to employ a best interests standard over an "absolute parental veto"

that such a nonparent might even be afforded "de facto" parent status.[138] Also in dissent, Justice Scalia seemingly agreed, noting the need for both "gradations" of carefully crafted state law definitions of parents and nonparents.[139] 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,"[140] nonparents seeking childcare must be distinguished by whether there is a "presence or absence of some embodiment of family."[141] Thus, while important, current parental objections to nonparent childcare desires are not necessarily dispositive.[142]

Since *Troxel*, the U.S. Supreme Court has said little about nonparent childcare over the objections of established legal parents. It has not addressed issues like the special weight, special factors, harm or potential harm, de facto parenthood, children's fundamental liberty interests, or family-like bonds.[143] Post-*Troxel*, state legislatures have

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for cases where a third party has "developed a relationship with a child" and has acted as a caregiver for a "significant period of time").

138. *Id.* at 100–01 ("[A] fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a de facto parent may be another.").

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

140. *Id.* at 88 (Stevens, J., dissenting). *But see* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (noting that the Court had not "had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship"); *In re* Meridian H., 798 N.W.2d 96, 105–06 (Neb. 2011) (finding no recognition of a federal or state constitutional right to continuing sibling relationships with a sister upon the termination of parental rights regarding the sister, where the sister was placed in foster care and the two older siblings were adopted); Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 931 (2012) (urging courts, legislatures, and scholars pay better attention to "sibling relationships," concluding: "Family law's narrow focus on marriage and parenthood, inherited from the common law and then endlessly replicated without normative scrutiny, has constrained critical thinking in family law for too long").

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

142. Comparably, one parent's objection to placement for adoption is not always dispositive when the other parent agrees and placement clearly and convincingly serves the child's best interests. *See, e.g.*, *In re* C.L.O., 41 A.3d 502, 504 (D.C. 2012) (granting adoption of child despite noncustodial father's objection).

143. One distinguished scholar commented that the current status of grandparent visitation rights have been further muddied by the absence of a majority opinion in *Troxel*. In addition, the plurality opinion can be read in two ways: the first being a broad view reaffirming the fit parents' constitutional right to control the care of their child which would invalidate any visitation objection brought by grandparents, and the

refined their third-party childcare laws,[144] including crafting new special grandparent childcare statutes.[145] As state high courts have heard challenges to these nonparent childcare laws in the wake of *Troxel*,[146] state legislators and judges have expressed differing values when addressing what can justify judicial interference with parental "liberty interests" via court orders on third-party childcare over current parental objections.[147] Specifically, legislators and judges have crafted different standards on "harm or potential harm," "special factors," and "special weight." As the U.S. Supreme Court has recognized, the regulation of many aspects of domestic relations rests within the "virtually exclusive province of the States."[148]

Whatever the federal constitutional contours of nonparental childcare opportunities over parental objections, certainly there is little to date indicating parental childcare rights limit possible nonparental child support mandates directly related to court-recognized nonparental childcare. Reasonable conditions can attach to court-sanctioned

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second being a more narrow decision that allowed grandparent visitation under a particularly broad law, despite the parent being fit. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 833 (4th ed. 2011).

144. For a review of general third-party childcare statutes, see, e.g., Atkinson, *supra* note 135, at 18–23.

145. *See* Robyn L. Ginsberg, Comment, *Grandparents' Visitation Rights: The Constitutionality of New York's Domestic Relations Law Section 72 After* Troxel v. Granville, 65 ALB. L. REV. 205, 205–06 n.2 (2001) (listing various grandparent visitation statutes).

146. *See* Sonya C. Garza, *The* Troxel *Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927, 929 (2009) (reviewing post-*Troxel* state cases on the constitutionality of such statutes); Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 875–77 (2003) (exploring earlier review of such statutes).

147. *See, e.g.*, Atkinson, *supra* note 135, at 18 (demonstrating variations in, inter alia, laws on great-grandparents; burden of proof; and necessity to show harm). Interstate variations also appear for state law definitions of parents and for state laws on stepparent visitations. *See, e.g.*, *Parentage Law (R)Evolution*, *supra* note 45, at 752–63 (discussing parents); Jeffrey A. Parness, *Survey of Illinois Law: Stepparent Childcare*, 38 S. ILL. U. L.J. 575, 588–89 (2014) (discussing stepparents).

148. Sosna v. Iowa, 419 U.S. 393, 404 (1975) (upholding residency requirement for divorce petitioner). *But see* Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 798–815 (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.").

childcare exercised by nonparents, including certain required financial child support, as with providing food and shelter.

Beyond such in-care support, courts should be able to enforce agreements by nonparent child-caretakers to provide additional child support directly to parents. These agreements could continue to operate, depending on their terms, whether or not nonparent childcare continues. Such agreements may be independently executed between nonparents and parents, or constitute portions of larger agreements, like premarital or marriage dissolution pacts between parents. Clarification on how these agreements should operate would also provide some insight on how nonparent childcare rights affect nonparent child support obligations.

C. Limits on De Facto Parent or Nonparent Child Support when There Is No Accompanying Childcare

Financial child support obligations of eligible de facto parent and nonparent child-caretakers are unlikely to inhibit the superior parental rights of existing legal parents (who are also liable for such support) when there is no corresponding childcare.[149] Of course, child support obligations for de facto parents and nonparents do implicate their due process property interests. But at least some such duties can be rationalized as serving children's interests and as fair to the obligors, like Antonyio Johnson, such as when the obligors knowingly developed significant, if not parental-like, relationships with the children who reasonably became dependent on, if not reasonably anticipated, further support.[150] Thus, financial support duties are reasonable when obligors promised future support, even if there is no childcare by those obligors.

Whether there are one or two (or more) legal parents with child support obligations, child support assessments against new or earlier-recognized de facto parents do not require judicial recognitions of possible childcare interests involving custody, visitation, or the like. A

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149. *See* Bancroft v. Jameson, 19 A.3d 730, 750 (Del. Fam. Ct. 2010) (ruling that it was unconstitutional to designate one a "de facto" parent for childcare purposes where there are already two existing parents; any extension of "the sacred right of parenthood to more than two people dilutes the constitutional rights of the two parents"). Yet in Louisiana, childcare can be ordered for three parents. *See, e.g.*, T.D. v. M.M.M., 730 So. 2d 873, 877 (La. 1999) (allowing standing for court to determine more than two parents for a child), *abrogated by* 898 So. 2d 1260 (2005).

150. *Johnson I*, 617 N.W.2d 97, 100–01 (N.D. 2000) (finding the trial court erred in not recognizing Antonyio Johnson equitably adopted child (and his potential liability for financial child support obligations) after ten years of acting as a parent-like caregiver to child).

biological father already may be ordered to support a child for whom that father had, or currently has, no childcare standing.[151] Thus, a biological father of a child born of sex can have child support obligations where he never developed a relationship with the child prompting childcare opportunities,[152] or when he developed a parent-child relationship, but later abandoned the child.[153] A late-arriving biological father who first obtains a childcare order long after birth can have retroactive support duties for the time he was unaware of his fatherhood.[154] Similarly, one who attained de facto parent status for childcare purposes, but later abandoned the child, might still be liable for child support.[155] Further, one who could have attained de facto parent childcare, but never sought it, might be liable for child support, as when a female spouse or partner of a birth mother earlier agreed to co-parent a child born of assisted reproduction but later declined to

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151. *See, e.g.*, Still v. Hayman, 794 N.E.2d 751, 756 (Ohio Ct. App. 2003) (affirming that being a biological father is enough to support a childcare obligation even though the birth mother told the man he was not the child's father).

152. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 262 (1983) (holding that the Constitution requires a state to consider a biological father's opinion only when it is in the child's best interest and he has been active in the child's life); *see also* N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004) (rejecting a biological father's due process claim because there is no fairness requirement in child care proceedings); *Still*, 794 N.E.2d at 754 (noting that child care support matters are independent from visitation and custody disputes); Commonwealth *ex rel.* Zercher v. Bankert, 405 A.2d 1266, 1269 (Pa. Super. Ct. 1979) ("Generally, matters of support are separate and independent from problems of visitation and custody, and ordinarily a support order must be paid regardless of whether the wife is wrongfully denying the father's right to visitation.").

153. *See, e.g.*, *In re* H.S., 805 N.W.2d 737, 745 n.4 (Iowa 2011) (highlighting that some states allow the continuation of a child support obligation past the termination of parental rights).

154. *See, e.g.*, TEX. FAM. CODE ANN. § 154.131 (West 2014) (listing the factors to be employed in ordering such support). Biological dads can also owe child support to adult children via orders of retroactive support, even when the dads reasonably thought they had settled their obligations in earlier child support cases brought by the birth mothers on behalf of the children. *See* Knapp v. Bayless, No. 00CA008796, 2006 WL 2466597, at *9 (Ohio Ct. App. Aug. 28, 2006) (describing a situation where a birth mother was no longer in privity with her child after she settled and during such proceedings did not consider the child's best interests during the settlement process).

155. *See, e.g.*, State of Kansas/State of Iowa *ex rel.* Sec'y of Soc. & Rehab. Servs. v. Bohrer, 189 P.3d 1157, 1159–60 (Kan. 2008) (holding a father responsible for funds expended on behalf of his child even when the child now has a separate permanent guardian). Consider as well a possible child support order against a former lesbian partner of a birth mother where the former partner initially, but not later on, assumed a presumed second parent status by undertaking both childcare and child support.

pursue childcare when the couple's relationship ended.[156] To be fair, usually there should be no involuntary child support obligations for those who some may have viewed as parental figures, but who never had the possibility to attain de facto childcare parent status, like those living with a single custodial parent for some duration and, during the residence, merely volunteered certain assistance out of "kindness."[157]

Some nonparents are not like biological, adoptive, or eligible de facto parents who are eligible for but do not seek childcare. Nonparents may be eligible for childcare orders over the objections of established parents even when none of the following situations exist: they have not developed parental-like relationships with the children, have not necessarily assumed open-ended financial commitments to the children on which the children and their parents have depended, and have not been generally viewed in the community as being financially responsible for the children (as occurs when nonparents have resided with children and held out the children as within their core or nuclear family). Thus, because of their substantive due process interests, some nonparents who are eligible for third-party childcare, but who have not pursued such childcare, should not be available for court-ordered involuntary child support. Such nonparents include grandparents in whose home their child and grandchild resided for some extended time.[158]

A different question is whether nonparents eligible for childcare, who pursued childcare over established parent objections but were denied, should be available for involuntary child support paid to the established parents. Here we also believe the answer should (often) be no. Constitutional constraints on unwanted and unexpected financial obligations can sometimes outweigh the best interest of children. Initial child support orders can prompt "lifelong"[159] financial and personal impacts on the obligors. Generally, there should be no court-

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156. *See, e.g.*, Chambers v. Chambers, No. CN99-09493, 2005 WL 645220, at *1–2 (Del. Fam. Ct. Jan. 12, 2005) (holding that a former lesbian partner must pay child support although they did not fall into the statutory definition of a parent), *abrogated by* Bancroft v. Jameson, 19 A.3d 730 (2010).

157. Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005) (recognizing that in *Nicholas H. v. Kimberly H.*, 46 P.3d 932 (Cal. 2002), the court cautioned against assuming that every man who lives with a woman when she is pregnant and after the child is born necessarily becomes a presumed father of the child).

158. *See supra* notes 74–77 (highlighting special New York, Alaska, Georgia, and North Dakota grandchild visitation laws).

159. *See* Rivera v. Minnich, 483 U.S. 574, 584 (Brennan, J., dissenting) ("Most of us see parenthood as a lifelong status whose responsibilities flow from a wellspring far more profound than legal decree.").

compelled support by grandparents who simply opened their homes to their children and grandchildren, but were later denied third-party visitation after the children and grandchildren relocated. By contrast, child support should be possible for some grandparents who were denied third-party visitation over the objections of the established parents, as where the grandparents had developed relationships similar to "parent-child" relationships which were later abandoned by the grandparents,[160] or when the grandparents served as "primary" caretakers for some extended time with promises of continuing care and/or financial support, but later voluntarily abandoned the caretaking and support, leaving the child in dire straits.[161]

Due to their substantial interference with individual rights and familial relations, court orders directing nonconsenting de facto parents or nonparents to provide support without also recognizing accompanying childcare by the obligors should carry a high burden of proof. Though only money may be involved, the financial obligations of child support should differ significantly from other financial obligations arising from court judgments.[162]

As noted, de facto parents or nonparents with no (current) childcare may be obligated to pay child support to the childcare parents via agreements. Such agreements may be independently made with a childcare parent or with all childcare parents, or may be concurrently made with other agreements, like those between childcare parents involving premarital, midmarriage or marriage dissolution pacts.[163]

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160. *See, e.g.*, WIS. STAT. § 767.43 (1) (2017) (detailing third-party visitation requirements).

161. *See, e.g.*, S.D. CODIFIED LAWS § 25-5-29 (2013) (listing third-party visitation rights).

162. *See Rivera*, 483 U.S. at 583–84 (Brennan, J., dissenting) ("The financial commitment imposed upon a losing defendant in a paternity suit is thus far more onerous and unpredictable than the liability borne by the loser in a typical civil suit."); *see also* Little v. Streater, 452 U.S. 1, 14 (1981) (holding that under the Due Process Clause, indigent defendants have the right to government-paid blood grouping tests when sued for child support to "help to insure the correctness of paternity decisions").

163. *See, e.g.*, Fraizer v. Goudschaal, 295 P.3d 542, 545–46 (Kan. 2013) (upholding same sex couple's co-parenting agreement); *see also In re* Marriage of Purcell, 825 N.E.2d 724, 728–29 (Ill. App. Ct. 2005) (holding that a birth mother's earlier joint-parenting agreement with her husband was still enforceable even after lack of biological ties was proven); C.O. v. W.S., 639 N.E.2d 523, 524 (Ohio Com. Pl. 1994) (establishing paternity rights for a sperm donor).

V. DE FACTO PARENT CHILD SUPPORT: CURRENT LAWS, MODELS AND PRINCIPLES

State laws on when and where those actually or possibly classified as de facto parents are eligible for child support are numerous and lack uniformity. While lawmakers must ultimately establish the child support norms within their own borders, there are several uniform laws on parentage, childcare, and child support which demonstrate some consensus. It is instructive then to look at model rules and principles against the backdrop of variability among state laws.

A. Current State Laws

As noted, de facto childcare parentage arises in American states under differing names, with differing imprecise standards, and through differing lawmakers. Regardless of these differences, de facto parents often stand in parity with other childcare parents recognized under precise standards, which includes birth mothers, acknowledged biological fathers, and those who formally adopt children. At least some de facto parents seemingly have child support duties to their children like other legal parents. Thus, in Delaware, once de facto parentage[164] or presumed parentage[165] is established under imprecise legal norms, the "parent-child relationship . . . applies for all purposes, except as otherwise specifically provided."[166] And in Maine, once a court adjudicates "a person to be a de facto parent,"[167] the person is a parent "for all purposes, except as otherwise specifically provided."[168] In some states explicit support statutes seemingly are required.[169]

Final child support orders can be secured from those established as de facto parents, whether or not they seek childcare orders.[170] Interim child support orders, however, may not be comparably available

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

165. § 8-204(a)(5).

166. § 8-203; *see also* § 501(a) ("[D]uty to support a child under the age of 18 . . . rests primarily upon the child's parents.").

167. ME. REV. STAT. ANN. tit. 19-A, § 1891(1) (2016).

168. § 1853.

169. *See, e.g.*, Price v. Price, No. W2012-01501-COA-R3-CV, 2013 WL 1701814, at *2 (Tenn. Ct. App. Apr. 19, 2013) ("[A]ny obligation to pay child support must arise from Tennessee's statutes.").

170. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) (en banc) (authorizing a court to consider an award of parental rights based on the best interest of the child). *But see, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005) (finding that de facto parents that voluntary accept obligations of parenthood can be liable for childcare orders).

against all alleged de facto parents. Thus, in Maine, interim child support orders are statutorily available against those "[p]etitioning to have parentage adjudicated," which include alleged de facto parents seeking childcare orders.[171] Yet there, interim orders are not statutorily available against alleged de facto parents pursued for child support by others, including by legal parents.[172] Elsewhere, interim child support from alleged de facto parents, as during divorce proceedings, are available.[173] In some locales, temporary child support orders during a divorce proceeding seemingly are available against imprecisely defined parents, who will not be responsible for permanent support payments because the parentage norms are more stringent.[174]

Cases differ on whether, and, if so, how far, child support duties can arise from common law doctrines untethered to any statutes.[175] Judicial reluctance can arise not only where common law de facto parent childcare doctrines are rejected on separation of powers grounds, but also where there are statutes on de facto parent childcare that are silent on de facto parent child support. Conceivably, common law de facto parent child support orders benefitting, for example, biological parents who share in childcare might be limited to settings where there is actually exercised de facto parent childcare.[176]

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171. ME. REV. STAT. ANN. tit. 19-A, § 1840(1)(B).

172. § 1840(1). Of course, it is possible common law support duties might be recognized. *Compare, e.g.*, Dep't of Healthcare & Fam. Servs. *ex. rel.* Nieto v. Arevalo, 68 N.E.3d 552, 564 (Ill. App. Ct. 2016) (considering Illinois's procedural and substantive law, the trial court properly looked to state statutes, because there is no blanket common-law duty of support), *with* Wright v. Wright, 164 A.2d 317, 319 (Del. 1960) (stating that statutes were not intended to abrogate or modify the civil liability of a father to support his children during their minority), *and* Ruben v. Ruben, 461 A.2d 733, 735 (N.H. 1983) ("At common law there was no obligation to support a stepchild, and only recently has such an obligation been imposed by statute in a few jurisdictions.").

173. Whitlock v. Iowa Dist. Ct., 497 N.W.2d 891, 894–95 (Iowa 1993) (requiring former stepfather to pay temporary child support while the dissolution case proceeded).

174. *See, e.g.*, Miller v. Miller, 478 A.2d 351, 359 (N.J. 1984) (noting that the norms on a "*pendente lite*" child support order against a stepfather are different, and easier, than norms for "permanent support").

175. *Compare, e.g.*, *Wright*, 164 A.2d at 319 (considering legislative intent, common law support duties of a husband can reach beyond statutes), *with* Dep't of Healthcare & Fam. Servs. *ex rel.* Nieto, 68 N.E.3d at 560–61 (holding that, in Illinois, there is no blanket common law action for child support where a child is born of sex, though there are such claims in artificial insemination cases), *and* Bowden v. Korslin, No. 2011AP2660, 2013 WL 4746428, at *10 n.3 (Wis. Ct. App. Sept. 5, 2013) (finding no child support flowing from equitable parent to biological parent).

176. *See, e.g.*, 2017 UPA § 609(a) (UNIF. LAW COMM'N 2017) (stating that an adjudication of de facto parentage can only be pursued in court by one seeking de facto parent status).

Unfortunately, there are few pre-birth opportunities for unwed expectant mothers to establish prospective parentage in expectant biological fathers to secure pregnancy-related financial support that would promote live and healthy births.[177] The unavailability (including prohibitive cost) of pre-birth genetic testing where alleged male parentage is founded on consensual sex should not foreclose such opportunities. Pre-birth voluntary paternity acknowledgements (where available) signed by unwed mothers and fathers typically do not require testing.[178] While post-birth child support orders can operate retroactively so as to encompass, for example, the medical expenses attending pregnancy and birth,[179] sound public policy favors at least some opportunities for pre-birth child support orders, as money is often much needed by expectant mothers and its receipt will promote the birth of healthier babies to healthier mothers.

In Hawaii, a voluntary paternity acknowledgment may be returned prior to a child's birth.[180] This opportunity for a pre-birth paternity designation makes sense even though a later live birth is uncertain. In the time prior to a live birth where a man believes he is the biological father, this designation allows him to protect his hearing rights in any later adoption cases pursued by third parties. Unwed pregnant women will be more assured that paternal child support, and perhaps childcare, will follow live births and that pregnancy support will be provided by prospective biological fathers.[181] Unwed prospective biological fathers can establish their paternal rights even if their unwed pregnant girlfriends later leave them during pregnancy or post-birth for new partners.

Where pre-birth pregnancy support orders are unavailable, there can be later court orders assessing the costs of an earlier pregnancy. Such orders should be available even when no live birth ensues, especially (but perhaps not only) if later birth is not foreclosed by a legal abortion. In 2014, the Indiana Court of Appeals recognized that where the State expended funds for medical assistance afforded a

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177. *See, e.g.*, CAL. FAM. CODE § 7633 (West 2013) (allowing for parentage determinations to be brought before the birth of the child although enforcement will be stayed until after the child's birth).

178. *See* Jeffery A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 64 (2010) (explaining that states typically do not require testing for paternity acknowledgments).

179. *See, e.g.*, N.C. GEN. STAT. § 49-8(4) (2015).

180. HAW. REV. STAT. ANN. § 584-3.5 (LexisNexis 2015).

181. *See* Ronald Mincy et al., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 611, 611 (2005).

pregnant woman, it could recoup those costs after birth from the prospective biological father even when the pregnancy ended in stillbirth.[182] Some post-pregnancy monetary recovery should also be available to women who do not receive state aid during pregnancy.

Both pre-birth and post-birth pregnancy support orders against de facto parents are far more difficult to obtain than pregnancy support orders against biological parents, actual or presumed (as with men or women married to expectant mothers during pregnancies). Conceivably, one could reside with a pregnant woman long enough during her pregnancy while holding out her unborn child as one's own to qualify for pre-birth de facto parent status, so that upon discontinuance of the residence during pregnancy, support could be ordered pre-birth or post-birth (to apply retroactively). Comparably, but far more likely, one could be a pre-birth or post-birth de facto parent with pregnancy support duties via intended parentage laws, especially in assisted reproduction settings, as with female partners who contribute no genetic material while their mates conceive and then bear children they earlier agreed to raise jointly.

The recent surge in new de facto parent childcare laws, both via statutes and judicial precedents, clearly have undermined—if not more directly negated—earlier precedents on child support through the equitable estoppel doctrine.[183] Often the doctrine would not allow a child support order against one who is now covered by de facto parent laws.

Equitable estoppel could be used both affirmatively and defensively. It could be used affirmatively, as by stepparents, to establish childcare interests or child support duties over the objections of their former partners—the natural parents who are estopped.[184] Alternatively, it could be used defensively, as by stepfathers, to counter requests by birth mothers for post dissolution child support orders.[185] Currently, there is no major precedent on how the more expansive de facto parent laws have superseded the equitable estoppel doctrine.

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182. J.W. v. C.M., 9 N.E.3d 202, 208 & n.3 (Ind. Ct. App. 2014) (explaining that the state could not pursue alleged unwed biological father in paternity where there were no state funds expended, even when the prospective mother and her family members wished to establish paternity "for purposes of closure, respect, and learning the truth").

183. *See* William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. LEGIS. 263, 270 (2010).

184. *See, e.g.*, *In re* Marriage of Gallagher, 539 N.W.2d 479, 480 (Iowa 1995) (preventing birth mother from denying equitable parenthood in her former spouse).

185. *See, e.g.*, Jefferson v. Jefferson, 137 S.W.3d 510, 512 (Mo. Ct. App. 2004) (denying wife's petition for equitable parent-child relationship because husband showed no equitable estoppel).

Equitable estoppel precedents typically recognize only limited opportunities for child support orders against soon-to-be ex-stepparents, especially those who will not continue their stepparent-stepchild relationships following divorce. These limitations are illustrated by a precedent recognizing former stepparent child support only where the stepparent engaged in "fraudulent activity" or there was "unusual hardship to the child if the support obligation were not imposed."[186] Another even more restrictive precedent demanded that a stepparent "actively" interfered with the child's support from a natural parent.[187] Yet another case required that support be available only if there was an "unequivocal representation of intent to support the child," together with "reliance" by a natural parent and "detriment to the natural parent or child."[188]

While equitable estoppel precedents on child support are scarce, these precedents are superseded in states with broader de facto childcare parent laws. Such laws apply, for example, when stepparents hold out children as their own while receiving them in their homes, thus attaining de facto childcare parent status designated as on par with natural or adoptive parent status.[189]

B. Models and Principles

When assessing possible child support for de facto parents (and for nonparents, including stepparents and grandparents), American state lawmakers often look to the models (e.g., proposed statutes) and principles (e.g., best practices guidelines) of prominent advisory groups like the ALI and the NCCUSL. Both legislatures and courts have followed their advice in interpreting and/or reforming existing state laws on child support obligations.

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186. Weinand v. Weinand, 616 N.W.2d 1, 7–8 (Neb. 2000) (holding that an ex-husband was not obligated under Nebraska law to pay child support for ex-wife's child).

187. Miller v. Miller, 478 A.2d 351, 359 (N.J. 1984) (finding that a natural father was not required to pay child support for his two daughters because the children's stepfather actively prevented him from providing support).

188. Ulrich v. Cornell, 484 N.W.2d 545, 548 (Wis. 1992) (explaining that a husband is not precluded from denying responsibility to support his stepson after separation from natural mother despite hiring an attorney who handled the termination of his parental rights and initiated adoption proceedings).

189. *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-203 (2009) (stating that presumed parenthood "applies for all purposes"); *see also* § 8-204(a)(5) (noting that a presumed parent can be someone who resides with a child while holding out the child as one's own).

1. American Law Institute

The ALI, via its Principles of the Law of Family Dissolution, lays out the important factors for determining when parents are potentially responsible for court-ordered child support.[190] The ALI objectives on child support involve both economic and noneconomic policies. Thus, the ALI posits that while "[s]ociety has an interest in not being called upon to support children whose parents have adequate resources," the state should provide support where needed to prevent "a grievous harm to children [and] an unwise underinvestment in a vital social resource."[191] Further, the ALI child support principles seek to ensure that a child has "a minimum decent standard of living" and does "not suffer loss of important life opportunities," while at the same time not "impoverishing either parent" or creating "undue hardship[s] to themselves or their other dependents."[192]

As to the (actual or potential) parents, the Principles are expansive. The definition of a parent, utilized during judicial assessments allocating "custodial and decision-making responsibility for . . . child[ren]" whose parents do not live together,[193] includes a "legal parent," an individual defined as a "parent under other state law"; a "parent by estoppel," an individual, "though not a legal parent," who is obligated to pay child support or who lived with the child while "accepting full and permanent responsibilities as a parent"; and a "de facto parent," an "individual other than a legal parent or a parent by estoppel," who for a "significant" time lived with the child and either formed "a parent-child relationship" with "the agreement of a legal parent" or regularly performed "caretaking functions."[194]

While the Principles chiefly focus on the child support obligations stemming from legally recognized and exercised childcare parentage, there is also some recognition of the possibility of child support obligations of persons who were eligible for, but did not seek, parental childcare status. The Principles recognize child support can extend beyond (actual or presumed) biological or adoptive parents to persons "defined as a parent under state law."[195]

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190. 2000 ALI PRINCIPLES, *supra* note 135.

191. *Id.* § 3.04 cmt. b.

192. *Id.* § 3.04(1)–(2) (weighing the interests of the child, the parents, and society so that all interested parties are satisfied with a child support decision).

193. *Id.* § 2.01.

194. *Id.* § 2.03(1)(a)–(c) (emphasis omitted).

195. *Id.* §§ 3.01, 3.02(1)(a) (discussing the principles governing a parent's child support obligation and defining a parent).

In contrast to the Principles, the ALI has not yet discussed child support in its 2016 ALI Restatement draft.[196] Here, the ALI expands upon the economic purpose for child support laid out in the Principles, saying child support directs children toward "self-sufficiency"[197] and "financial security"[198] by the time a child becomes an adult.[199] Support must be "reasonable," so that if "a parent can afford a necessary expense, the parent is obligated to pay for it."[200] The 2016 ALI Restatement draft makes clear that any obligation to provide "economic support exists even if the parent does not maintain a relationship with the child."[201] The draft has yet to address de facto parent or nonparent child support.

2. *National Conference of Commissioners on Uniform State Laws: Uniform Parentage Acts*

NCCUSL approved the 2017 Uniform Parentage Act[202] to replace the 2002 Uniform Parentage Act (UPA)[203] (which replaced the 1973 UPA). Tracking the evolution of the UPA demonstrates how NCCUSL has changed its views on parentage, specifically in regard to presumed and de facto childcare parentage as opposed to biological or adoptive childcare parentage. Of course, childcare parentage has implications for child support.

a. 1973 Uniform Parentage Act

In 1973, NCCUSL approved the first UPA. It defines the legal parent-child relationship between adults and children, with the relationships sometimes conferring "rights" and/or imposing

196. RESTATEMENT OF CHILDREN AND THE LAW xi (AM. LAW INST., Preliminary Draft No. 2, 2016) ("The Section on parents' duty to provide economic support is relatively straightforward and requires little discussion. It largely tracks Sections covering this material in the Principles of the Law of Family Dissolution.").

197. *Id.* § 2.1 cmt. d.

198. *Id.* § 2.1 cmt. e.

199. *See id.* § 2.1(b) (defining an adult as eighteen years old for high-school graduates, or up to twenty-one years old for those who have not graduated high-school); *see also id.* § 2.1(c) ("A court may order a parent to provide economic support to an adult child enrolled in an institution of higher education or vocational training until the adult child reaches age [twenty-three].").

200. *Id.* § 2.1 cmt. c.

201. *Id.* § 2.1 cmt. g.

202. 2017 UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017).

203. UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2002).

"obligations."[204] The 1973 UPA narrowly defines the parent-child relationship, focusing on biological or adoptive ties.[205] It makes no explicit reference to de facto parent, stepparent, grandparent, or other nonbiological or nonadoptive parentage. Even so, there are instances where nonbiological or non-formal adoptive parents can not only secure parental rights, but also be assessed parental obligations.

Under the 1973 UPA, a man is presumed to be a biological parent when he has been married to the biological mother of the child and "the child is born during the marriage,"[206] or when he and the biological mother attempted to marry each other "before the child's birth."[207] Further, a presumption of paternity arises upon certain affirmative acts taken by a presumed father after a child is born, including marriage,[208] holding the child out as one's own,[209] and acknowledging paternity in writing.[210] With such actions, assuming paternity is not later overcome, a man with no biological ties to a child can be a child's legal parent. Certain parties can bring actions to determine parentage, including an "interested party,"[211] a grandparent,[212] or one pursuing enforcement of an agreement to provide child support.[213] Such actions clearly include a proceeding seeking child support. For example, the 1973 UPA declares a paternity suit can

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204. UNIF. PARENTAGE ACT § 1 (UNIF. LAW COMM'N 1973).

205. *Id.* § 3 (explaining that "[t]he parent and child relationship between a child and" either "the natural mother," "natural father," or "an adoptive parent" will be established through the act, but these are the only three adults who are recognized as parents under the 1973 UPA).

206. *Id.* § 4(a)(1).

207. *Id.* § 4(a)(2).

208. *Id.* § 4(a)(3) (noting that such affirmative acts may include a paternity acknowledgment, a birth certificate recognition, or a written promise or court order to support the child).

209. *Id.* § 4(a)(4) (requiring receipt of "the child into his home" as well).

210. *Id.* § 4(a)(5) (noting that filing with a state, either a court or a Vital Statistics Office, is an affirmative act creating a presumption of paternity).

211. *Id.* § 6(b) (directing that "[a]ny interested party may bring an action at any time for the purpose" of proving or rebutting a presumption of paternity in § 4).

212. *Id.* § 6(c) (stating that a "personal representative or a parent" of a deceased natural parent may bring an action to prove or rebut a paternity presumption).

213. *Id.* § 22(a). "Any promise in writing" to provide support which grows out of "a supposed or alleged" father and child relationship does not require consideration and is enforceable; for us such agreements include pacts between a birth mother and a grandparent (i.e., the parent of a "deadbeat" father), a live in boyfriend who alleges paternity, or an ex-husband. *Id.*

prompt a settlement involving "a defined economic obligation . . . in favor of the child" by a man who is not "determined" to be the legal father.[214]

Paternity presumptions arising from residency and holding out children as one's own provide significant opportunities for child support from those with no biological or formal adoptive ties. Such presumptions arise under the 1973 UPA when a man, "while the child is under the age of majority, . . . receives the child into his home and openly holds out the child as his natural child."[215] Here, there is no specific requirement that such a presumed parent, or another parent—typically a birth mother—have any reason to believe the man is, in fact, the natural father.[216] Equality principles, as well as public policy, should extend this presumption, where it is used, to a woman who comparably resides with and holds out a child,[217] assuming a lack of biological ties does not always overcome the presumption.

Further, paternity presumptions arising from written acknowledgments provide at least some opportunities for child support without biological or formal adoptive ties. Acknowledgments, at least in the 1970s, were typically undertaken by men who proclaimed natural ties to children born of sex.[218] Yet, because genetic testing was not required, both men who were mistaken about their natural parentage and those who misrepresented possible natural ties could still become presumed childcare parents. Despite proof that a man lacked natural ties, courts overriding these acknowledgments were inconsistent and uncertain.[219]

Differing paternity establishment norms for artificial insemination births were contemplated under the 1973 UPA. The Act invited state legislators to craft such norms,[220] though it provided a model for births undertaken by married, opposite sex couples.[221] That model

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214. *Id.* § 13(a)(2).
215. *Id.* § 4(a)(4).
216. *Id.* § 4 cmt.
217. *See* Henderson v. Adams, 209 F. Supp. 3d 1059, 1076 (S.D. Ind. 2016) (relying on equal protection to overturn Indiana statutes that discriminated against same-sex married women); *see also In re* Guardianship of Madelyn B., 98 A.3d 494, 501 (N.H. 2014) (relying on the public policy underlying the statute to grant same-sex married women the same presumption as men).
218. *See* UNIF. PARENTAGE ACT § 4 (a)(5) (UNIF. LAW COMM'N 1973).
219. *See* Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 Fam. L.Q. 35, 37 (2003).
220. *See* UNIF. PARENTAGE ACT § 5 (UNIF. LAW COMM'N 1973).
221. *Id.* § 5(a).

recognized the parentage of a husband whose wife delivered a child born with the sperm of another man.[222]

The 1973 UPA does not broadly address de facto childcare parentage. Thus, adults who for some time performed parental functions but then lost or ended their relationship with the biological or adoptive childcare parents would have no opportunity for childcare, and likely no child support duty absent contracted obligations. Because the 1973 UPA did not expressly recognize either the parental-like acts of many nonbiological and nonadoptive child-caretakers or many other forms of intended parentage, especially in assisted reproduction settings, NCCUSL later decided it needed to expand the scope of parental childcare interests.[223]

b. 2002 Uniform Parentage Act

In 2000, with amendments in 2002, NCCUSL updated the 1973 UPA to recognize additional nonbiological and nonadoptive legal parents.[224] The 2002 UPA focused primarily on parentage in assisted reproduction settings. Outside of assisted reproduction, biology (actual or presumed) and formal adoption remained significant methods by which adults would become legal parents. Provisions on marital paternity presumptions and paternity acknowledgments remained.[225] Yet, unlike the 1973 UPA, the 2002 UPA no longer presumed "natural" ties in these provisions, presumably meaning the parentage of husbands and acknowledging fathers with no biological ties might be more difficult to overcome.[226]

As noted, the 1973 UPA included very little on assisted reproduction.[227] By 2000, assisted reproduction practices had become more available, drawing the attention of NCCUSL.[228] The 2002 UPA

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222. *Id.* § 5(a)–(b) (noting that "consent" of husband is required as well as the "supervision of a licensed physician").

223. *See* UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM'N 2002).

224. *Id.* With changes in state law, the new UPA seeks "to clarify the participants in determinations of parentage and adapt the Act to recent scientific developments . . . while eliminating the ambiguous term 'natural'" and to expand potential parents who are involved in assisted reproduction and surrogacy. *Id.*

225. *Id.* § 201(b)(1)–(2).

226. *Compare* UNIF. PARENTAGE ACT § 4(a) (UNIF. LAW COMM'N 1973), *with* UNIF. PARENTAGE ACT § 204(a) (UNIF. LAW COMM'N 2002).

227. *See* UNIF. PARENTAGE ACT § 5 cmt. (UNIF. LAW COMM'N 1973) ("This Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination.").

228. *See* UNIF. PARENTAGE ACT § 7 cmt. (UNIF. LAW COMM'N 2002) (discussing the development of assisted reproduction and how it now requires analysis).

distinguishes anonymous or charitable sperm donors[229] from donors providing genetic materials with parental intentions.[230] As long as a donor signed a consent to the assisted reproduction indicating parental intentions and did not rescind that consent, the donor is presumed to be the parent of any resulting child.[231] However, where a donor's intentions on parentage have changed, the 2002 UPA makes it clear that the lack of parental intent, rather than genetics, governs, though the result may be that the child has only one legal parent.[232] Throughout the 2002 UPA, intent is the key factor when determining childcare parentage for children born of assisted reproduction.

Article 3 of the 2002 UPA provides greater detail in the efforts that are necessary to establish presumed paternity through the Voluntary Acknowledgment of Paternity.[233] As with the 1973 UPA, as long as acknowledgments go unchallenged and unrescinded,[234] men that sign acknowledgments are deemed legal fathers of children born of sex, even if there are no actual biological ties.[235] While this opens the door to some nonbiological, nonadoptive parents, as did the aforementioned elimination of the "natural" ties presumption,[236] generally the 2002 UPA

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229. *Id.* § 702 ("A donor is not a parent of a child conceived by means of assisted reproduction."); *id.* § 702 cmt. (explaining that § 702 "shields all donors, whether of sperm or eggs . . . from parenthood" where the donor and the biological parent have no intention of being the child's parent).

230. *Id.* § 703 cmt. (emphasizing that due to the high increase in assisted reproduction technology (ART) "it is crucial to clarify the parentage of all of the children born as a result" of ART); *see also id.* § 704 (noting that consent by a man and/or woman intending to be the parents of an ART child must make an officially signed record, although failure to do so immediately does not bar a finding of paternity when residence with the child and "openly [holding] out the child as [his or her] own" are established).

231. *Id.* §§ 703–706.

232. *Id.* § 706 cmt. ("[T]he child will have a genetic father, but not a legal father. In this instance, intention, rather than biology, is the controlling factor [in establishing legal parentage].").

233. *See id.* § 302 (discussing acknowledgement of paternity).

234. *See id.* § 307. A man may rescind his acknowledgment of paternity within sixty days of filing. *Id.* § 307(1). If a man rescinds after sixty days, he must demonstrate fraud or duress, and file for rescission within two years of the original acknowledgment. *Id.* § 308(a).

235. *See id.* § 305(a)–(b) (noting that "a valid acknowledgment of paternity" properly filed is the same as "an adjudication of paternity of a child"; conversely, a valid acknowledgment of paternity in combination with a denial of parentage by the presumed father is "equivalent to an adjudication of the nonpaternity" of the presumed father).

236. *See supra* note 99.

perpetuates the genetic relationship norm. The 2002 UPA seeks to bar adult men who have no genetic ties to children from acknowledging paternity[237] "to avoid a possible subversion of the requirements for an adoption."[238] A nonparent, including a stepparent, who was not in a marital relationship with a birth mother, either before or immediately after birth, had few avenues to legal parentage outside of formal adoption.[239] Lack of legal parent opportunity exists even where the nonparent performed all the functions of a parent in settings where both the nonparent and child each consider they are in a parent-child relationship.[240] In other words, child support orders against those we now call de facto parents remained generally unavailable.

Beyond acknowledgements, available options for nonbiological and nonadoptive child support parentage for children born of sex to others included in 2002, as in 1973, parentage presumptions arising from residencies with children while holding them out as their own. The 2002 provisions, however, differed significantly from the 1973 provisions. They more stringently demanded not only residing in the same household, but also holding out "for the first two years of the child's life."[241] Consequently, one major avenue to de facto parent child support was narrowed.

As to parentage for those with no biological or formal adoptive ties in artificial insemination settings, as noted, the 2002 UPA goes where the 1973 Act did not go, focusing on parental intentions. For example, it allows wed and unwed couples to undertake intended parentage for a woman who gives birth and a man who was not the sperm donor.[242] As to births to married women, husbands who did not provide sperm may only contest their presumed paternity in limited settings.[243]

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237. UNIF. PARENTAGE ACT § 302 cmt. ("A would-be 'father' whose parentage of a child has been excluded by genetic testing may not validly sign an acknowledgment once that fact has been established.").

238. *Id.*

239. *See id.* § 204(a)(5) (recognizing that a man may be a presumed father if he resides in the same household as the child for the first two years of the child's life).

240. *See id.* § 201 (noting that nonparents can establish a parent-child relationship through adoption of the child or by consent to assisted reproduction).

241. *Id.* § 204(a)(5).

242. *Id.* §§ 703–704 (discussing consent requirements).

243. *Id.* § 705(a) (stating that a husband can only challenge paternity if he moves to adjudicate paternity within two years of the child's birth and the court finds he did not consent to assisted reproduction).

Further, the 2002 UPA allows "intended" parentage for a couple[244] employing a gestational mother who agrees to relinquish "all rights and duties" of parentage otherwise following an "assisted reproduction" birth.[245] These intentions, unlike artificial insemination of a woman who intends to keep her child, must be validated through a preconception judicial authorization process.[246]

The availability of challenges to earlier voluntary parentage acknowledgments under the 2002 UPA raises some interesting questions involving child support. For instance, an acknowledgment is void if there is another known presumed father, "unless a denial of paternity [is] signed," which offers a way for a presumed marital father to make way for the acknowledging father since the child cannot have two legal fathers under the 2002 UPA.[247] While a presumed marital father can abandon parental rights to a child, thus allowing the parental rights to apply in favor of another man, the 2002 UPA does not address whether such abandonment nevertheless requires the man denying paternity to continue to be eligible for child support.[248] Further, while the 2002 UPA implies that a denial of paternity by a presumed marital father has the effect of complete nonparentage, this is only true if there is a valid voluntary acknowledgment filed by another man.[249] The 2002 UPA does not address what happens where a presumed marital father waives paternity in favor of one undertaking a voluntary acknowledgment that is later successfully rescinded or challenged. Here, a presumed parent who was at one time free and clear of child support might now be reestablished as a presumed parent.

After 2002, there were major developments in both human reproductive technologies and in same sex marital and marital-like relationships.[250] New parentage norms were again deemed warranted.

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244. *Id.* § 801(a) (explaining that a "prospective gestational mother . . . and the intended parents" may create a gestational agreement).

245. *Id.* § 801(a)(2).

246. *Id.* §§ 801(c), 803(a).

247. *Id.* § 302(b)(1).

248. *See id.* § 302(b) (discussing voiding of paternity acknowledgements). This gap in the UPA is particularly problematic when a biological mother who is married to one man conceives a child with another man, thereby making the spouse the presumed father. In this scenario, the spouse could deny paternity and be free of all child support obligations; otherwise, the spouse would be required to provide child support to his presumed child.

249. *Id.* § 305(b).

250. *See* Malini Sangha, *Assisted Reproductive Technologies*, 6 GEO. J. GENDER & L. 805, 806 (2005) (describing ART procedures (e.g., in vitro fertilization, gamete

c. 2017 Uniform Parentage Act

Like the 1973 and 2002 UPAs, the 2017 UPA lays out de facto childcare parentage norms in both general and in specific instances.[251] However, the 2017 UPA identifies genetic and nongenetic de facto parental relationships within a broader framework.[252] It includes women as well as men as possible presumed parents.[253] It defines (and distinguishes) de facto parentage based on more expansive adult-child relationships and intentions as distinct from biology or adoption.[254] The broader focus was prompted by changes both in available human reproduction technologies and family structures.[255]

As with the 2002 UPA, the 2017 UPA identifies scenarios where parentage results from assisted reproduction. Unlike its predecessor, the 2017 UPA is more diligent about keeping the donor and parentage language gender neutral, recognizing the increasing likelihood that assisted reproduction is used by same-sex couples.[256] Going further, the 2017 UPA lays out parentage norms when a child is born to a surrogate,[257] whether gestational[258] or genetic.[259] Its coverage of both gestational and genetic surrogacy agreements extends the 2002 UPA policy favoring intentional parentage over genetic parentage in assisted reproduction settings.

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intrafallopian transfer, and zygote intrafallopian transfer), artificial insemination, and surrogacy and noting that the use of such technologies increased significantly after 1996).

251. *See* 2017 UNIF. PARENTAGE ACT prefatory note (UNIF. LAW COMM'N 2017).

252. *Id.*

253. *Id.* § 204(a); *id.* § 204, cmt. (noting that the change is meant to apply the parentage presumptions equally to men and women).

254. *Id.* § 102(3) (defining "[a]lleged genetic parent"); § 102(13) (defining "[i]ntended parent").

255. *See id.* prefatory note (outlining the social and technological changes prompting updates to the UPA); *see also* Harry L. Tindall & Elizabeth H. Edwards, *The 2017 UPA: Strengthening Protections for Children and Families*, FAM. ADVOC., Spring 2017, at 30–31 (explaining that the 2017 UPA would recognize changes in marital law by changing Act to reflect children of same sex marriages).

256. *See* 2017 UNIF. PARENTAGE ACT art. 7, cmt. (noting that 2017 UPA Article 7 is to be updated "so that it applies equally to same-sex couples").

257. *Id.* § 809.

258. *Id.* § 801(2) (noting that a gestational surrogate is "not an intended parent" and shares no biological, parental ties to the intended child, but carries the genetic child of one or two other people).

259. *Id.* § 801(1) (explaining that a genetic surrogate is not an intended, legal parent, but is one of the genetic parents of the child).

The 2017 UPA continues earlier parentage policies by allowing nonbiological and nonadoptive adults to become presumed (though not "natural") parents in several ways. A stepparent will be a presumed parent if the stepparent is married to the "woman who gave birth to the child" and "the child is born during the marriage."[260] Moreover, there is presumed parentage for a stepparent who marries the "woman who gave birth" after the birth if the stepparent "asserted parentage of the child" on an official record.[261] Finally, if a nonparent lived "with the child for the first two years of the life of the child . . . and openly held out the child" as one's own, the nonparent is presumed to be the child's parent, even if this nonparent was never married to the legal parent.[262] Implicit in this last presumption is the nonparent's affirmative assertion that the nonparent will support the child, even though there may be no biological ties. These parental presumptions may be rebutted.[263]

The 2017 UPA departs significantly from earlier UPAs by expressly recognizing a de facto childcare parent.[264] To establish standing as a de facto parent, one must demonstrate, inter alia, residence with the child "as a regular member of the child's household for a significant period"; "consistent caretaking of the child"; no expectation of financial benefit arising from parentage; and a parental relationship with the child "fostered or supported" by "another parent."[265] Once recognized, de facto parents seemingly stand on equal footing with other individuals—beyond birth mothers—when there are "competing claims of . . . parentage."[266] Yet here, unlike presumed parentage which may be initially sought by alleged presumed parents or others, only alleged de facto parents can pursue judicial determinations of de facto childcare parentage.[267] So the opportunities for child support orders

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260. *Id.* § 204(a)(1)(A).
261. *Id.* § 204(a)(1)(C).
262. *Id.* § 204(a)(2).
263. *Id.* § 204(b).
264. *Id.* § 609(c) (discussing the rules related to standing of de facto parentage).
265. *Id.* § 609(d)(1)–(6).
266. These competing claims are to be adjudicated pursuant to the best interests of the child, *id.* § 613(a), with a possible determination of only "two parents," *id.* § 613(c) alternative A, or "more than two parents," *id.* § 613(c) alternative B.
267. *See id.* § 602(1)–(5). Birth mother, alleged presumed parent, child-support agency, child, and alleged genetic parent can each sue to determine presumed parentage. *Id.* Determination of de facto parentage "commenced only by an individual who . . . claims to be a de facto parent." *Id.* § 609(a). *But see id.* § 203 (stating that parentage under the act "applies for all purposes, except as otherwise provided by law of this state other than this [act]").

against presumed and de facto parents vary greatly, and, in our view, unreasonably.[268] Why should one residing with and holding out a child for two years be suable for child support, whereas one who developed a "parental" relationship over a much longer period cannot be sued?

VI. NONPARENT CHILD SUPPORT: CURRENT LAWS, MODELS AND PRINCIPLES

Often stepparents, grandparents, or others can be recognized as de facto parents by courts. Where such possible parents remain nonparents under law, as noted earlier, they can still have childcare opportunities.[269] Additionally, third parties who were never eligible for de facto parentage can also have childcare opportunities.[270] When such opportunities are seized, of course these caretakers must provide support for the children while in their care. Usually, however, there are no additional child support duties, like payments to established legal parents for additional child support, which attach to nonparent childcare orders.[271] Child support payments may be ordered to be paid by a noncustodial parent to a nonparent who is caring for the parent's child.[272]

While not customary, child support might be ordered to be paid directly to a legal parent by a nonparent who secures a childcare order. A nonparent eligible for, but without, de facto childcare parent status is often more likely susceptible to a support order over objections than is a nonparent never eligible for de facto childcare parent status.[273] De facto childcare parentage norms, as earlier noted, more frequently include direct and indirect (i.e., acts in a parental-like way) requisites on earlier financial contributions to child welfare.[274]

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268. Once established, both presumed and de facto parentage apply for "all purposes" unless otherwise provided. *See id.* § 203.

269. *See infra* Part VII (explaining, for example, that the NCCUSL recognizes a nonparent, under certain criteria, as a de facto or presumed parent).

270. *See, e.g.*, NONPARENTAL CHILD CUSTODY & VISITATION ACT § 112 (UNIF. LAW COMM'N, Draft for Discussion, 2017) (explaining that a court can grant custody to a nonparent if the nonparent acted as consistent caretaker and has substantial relationship with the child).

271. *But see* N.D. CENT. CODE § 14-09-09 (2009) (noting that child support continues for stepparent after marriage dissolution if stepchild remains "in the stepparent's family").

272. *See, e.g.*, Burak v. Burak, 150 A.3d 360, 385 (Md. Ct. Spec. App. 2016) (finding that divorcing parents may be ordered to pay support to grandparents who secured custody), *rev'd*, 168 A.3d 883 (Md. 2017).

273. *See supra* note 116.

274. *See supra* note 111.

Objections to court-ordered child support are far less available to nonparents who agreed to assume support duties along with the legal parents. Such pacts may have prompted legal parents to withdraw their objections, or to fail to object, to court-ordered nonparent childcare orders.

Not all eligible stepparents, grandparents or other nonparents (whether or not possible de facto parents) seize their childcare opportunities. Their failure to do so does not preclude child support orders directed at them. These orders are sometimes, but not always, as with certain stepparents or grandparents, founded on agreements.[275] These support orders are distinct from any such orders against those nonparents who were childcare parents at one time, but whose childcare interests were terminated,[276] or otherwise ended.[277] They are also distinct from support orders against unwed biological fathers whose sex with birth mothers prompted births, where the men failed to ever qualify as childcare parents due to their failures to seize their childcare opportunities in a timely fashion.[278] Additionally, these support orders are distinct from child support orders directed at nonparents who never were or could be legal parents, and who never were or could be eligible even for third-party childcare orders. Such nonparent support orders might be founded on the nonparent agreements to assume child support responsibilities.

In the following paragraphs we consider the models, principles and current laws on nonparent child support. We examine separately possible support from stepparents, grandparents, and other nonparents. We do not address unwed biological fathers who never became childcare parents to children born from sexual intercourse.

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275. 2000 ALI PRINCIPLES, *supra* note 135, §§ 3.10, 3.13 (recommending adoption of parental agreement terms for a child-support award).

276. *See Ex parte* M.D.C., 39 So. 3d 1117, 1132 (Ala. 2009) (concluding a father's obligation to pay child support was not extinguished under the Child Protection Act when his parental rights were terminated).

277. Consider a situation in which a child support order against a man whose earlier voluntary paternity acknowledgement ("VAP") was effectively challenged and where child support duties may continue despite lack of any childcare acts. *See In re* T.M.S., No. W2012-02220-COA-R3-JV, 2013 WL 3422975, at *5–6 (Tenn. Ct. App. July 8, 2013) (failing to reach the issue regarding the effect of disestablished paternity per VAP challenge as there was no evidence in the record of a VAP); *see also* Price v. Price, No. W2012-01501-COA-R3-CV, 2013 WL 1701814, at *3 (Tenn. Ct. App. Apr. 19, 2013) (finding no VAP on record in the case).

278. *See* Lehr v. Robertson, 463 U.S. 248, 262, 265 (1983) (stating that American states can deny federal constitutional childcare interests to an unwed biological father with no "significant custodial, personal, or financial relationship" with his biological child born of sex).

A. Stepparent Child Support

Stepparents often meet every substantive requirement of a legal parent, while not recognized as such. While this is not always the case, in most instances states recognize the role of a stepparent on the same grounds as a legal parent, and will therefore grant parental rights to stepparents ranging from de facto parentage to visitation rights. The variety of state laws on stepparent childcare and child support further demonstrate the importance of uniform principles to guide application.

1. Models and Principles

There are some model laws and proposed principles on the child support duties of stepparents, either current or former, where there are no accompanying stepparent childcare orders. NCCUSL's 1983 Uniform Premarital Agreement Act (UPAA) speaks to the possibility that prospective spouses[279] will agree on "personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."[280] NCCUSL's 2012 Uniform Premarital and Marital Agreements Act (UPMAA) covers agreements by prospective spouses, as well as current spouses who "intend to remain married," that are not in violation of public policy or a statute imposing a criminal penalty.[281] The UPMAA recognizes there can be contractual terms on "custodial responsibility,"[282] which certainly contemplates some level of child support when childcare is undertaken upon judicial approval, which is always needed although there is a contract.[283] Additionally, the UPMAA expressly recognizes that it supplements, and does not displace, the "principles of law and equity"[284] and that any pacts cannot "adversely affect[] a child's right to support."[285] The accompanying comment to § 10 recognizes "a long-standing consensus that premarital agreements . . . cannot limit the amount of child support

279. UNIF. PREMARITAL AGREEMENT ACT § 1(1) (UNIF. LAW COMM'N 1983) (defining "premarital agreement" as "an agreement between prospective spouses made in contemplation of marriage").

280. *Id.* § 3(8).

281. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 2(2) (UNIF. LAW COMM'N 2012).

282. *Id.* § 10(a). Though such terms are not "binding on the court." *Id.* § 10(c).

283. *See id.* § 10(b) (describing criteria to be used when finding agreement is "not enforceable"); *id.* § 10(a) (noting custodial responsibility pacts can involve "physical or legal custody, parenting time, access, visitation, or other custodial right or duty with respect to a child").

284. *Id.* § 5.

285. *Id.* § 10(b)(1).

(though an agreed *increase* of child support may be enforceable)."[286] A child is unlikely to be adversely impacted by increased support, especially when a judicial review of any promised childcare occurs. The 2012 UPMAA does not speak directly to contracts regarding "personal rights and obligations" while the 1983 UPAA does address contractual rights.[287]

NCCUSL's 1970 Uniform (now Model) Marriage and Divorce Act (MMDA) speaks to child support orders against "either or both parents owing a duty of support."[288] It "does not set forth the conditions under which a parent owes a duty of support to a child," though it does address the "[p]rinciples affecting duties of support."[289] While the Act's custody section recognizes "intervention" of interested parties beyond parents, guardians, and custodians,[290] it does not speak to intervention or joinder of parties for child support determinations.[291] As with premarital and midmarriage pacts, the MMDA is silent on marriage dissolution pacts addressing stepparent child support.

By contrast the 2016 ALI Restatement draft recognizes "a narrow exception" to the general rule that "only legal parents owe a duty of economic support" to children.[292] It declares that child support can be imposed upon "a person other than a legal parent,"[293] seemingly including a present or former stepparent. Support follows from the person's conduct which equitably estops a denial of support responsibility.[294]

The earlier 2000 ALI Principles of the Law of Family Dissolutions spoke less narrowly. There, a parental support obligation of "a person who may not be the child's parent under state law" was recognized

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286. *Id.* § 10 cmt.

287. *See* UNIF. PREMARITAL AGREEMENT ACT § 3(8) (UNIF. LAW COMM'N 1983).

288. UNIF. MARRIAGE & DIVORCE ACT § 309 (UNIF. LAW COMM'N 1970).

289. *Id.* § 309 cmt.

290. *Id.* § 401(e).

291. *Id.* § 309.

292. RESTATEMENT OF CHILDREN AND THE LAW (AM. LAW INST., Preliminary Draft No. 2, 2016) § 2.1 cmt. h (stating that such nonparent support operates for persons whose "conduct equitably estops them" (citing DEL. CODE ANN. tit. 13, § 501(b) (1995)). Where parents cannot "provide a minor child's minimum needs, a stepparent or a person who cohabits in the relationship of husband and wife with the parent" has a support duty, but "only while the child makes residence with such stepparent or person and the marriage or cohabitation continues". DEL CODE ANN. Tit. 13, § 501(b); *see also* 2000 ALI PRINCIPLES, *supra* note 135, § 3.24 (describing duration of child-support obligation).

293. RESTATEMENT OF CHILDREN AND THE LAW § 2.1 cmt. h.

294. *Id.*

where prior affirmative conduct estops a denial of a support obligation.[295] Seemingly, this includes a stepparent, whether or not ever eligible to seek childcare parentage. Here, estoppel extends to a person who had "an explicit or implicit agreement," or otherwise undertook, "a parental support obligation to the child";[296] the child was born during the person's marriage to or cohabitation with the child's parent;[297] or the person and the child's parent agreed to conceive a child and, as parents, to "share responsibility for raising the child."[298]

As noted, NCCUSL holds that a nonparent meeting certain criteria can be a presumed or de facto parent, each a legal parent.[299] Addressing only those who are nonparents, in 2017, NCCUSL completed a draft of a new model law, the Nonparent Child Custody and Visitation Act (NPCCVA).[300] This act addresses nonparental childcare interests, including stepparent interests. Within its definition, a nonparent expressly includes "an individual other than a parent."[301] Throughout the act, the relationship between the nonparent and the child is measured and balanced against the interests of parents. Via the draft and its comments, the NCCUSL has identified certain distinguishing principles for determining whether a "substantial relationship"[302] rises to the level that a court should have discretion to grant nonparent childcare over parental objections. One such principle specifies that while a person with a relationship solely with the parent will not be considered,[303] the NPCCVA stresses the importance of relationships with children over biological ties.[304] An

295. *See* 2000 ALI PRINCIPLES, *supra* note 135, § 3.03(1).

296. *Id.* § 3.03(1)(a).

297. *Id.* § 3.03(1)(b).

298. *Id.* § 3.03(1)(c).

299. *See* UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017).

300. NONPARENTAL CHILD CUSTODY & VISITATION ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW, Draft for Discussion, 2017).

301. *Id.* § 102(10).

302. *Id.* § 102(18) (defining "substantial relationship" as a "familial or other relationship in which a significant emotional bond exists between a nonparent and a child").

303. *See id.* § 106(a)(2) (requiring a substantial relationship with a child to have standing to file for custody or visitation). This would remove any boyfriend, girlfriend, spouse, or other partner of the parent who makes no effort to act as a caretaker for the child.

304. *Id.* § 106(a)(1)–(2). Standing to pursue custody or visitation is based on the nonparent's relationship with the child; biology is not mentioned, even when a nonparent seeks visitation or custody.

actual beneficial relationship is integral,[305] as are the best interests of the child.[306] While the NPCCVA chiefly focuses on childcare by way of custody or visitation, it speaks at least indirectly to child support. Thus, nonparent childcare orders necessarily involve some nonparent child support duties. As to whether nonparents may be ordered to pay support beyond that provided during childcare, even where there is nonparental childcare, NPCCVA is silent.

2. Current Laws

Given these models and principles on nonparent child support by stepparents, we now consider current stepparent child support laws. We explore, separately, support orders based on premarital, midmarriage, and marriage dissolution agreements, on other agreements, and on circumstances involving no agreements.

a. Premarital, Midmarriage, and Marriage Dissolution Child Support Agreements

Stepparents may be subject to child support orders tied to earlier formal premarital, midmarriage, or marriage dissolution agreements. Stepparents herein include the future, current, or former spouses of childcare parents who cannot be potential or actual de facto parents, as where children already have two biological or adoptive childcare parents in states that foreclose more than two childcare parents at any one time. The factual context for these agreements will often differ. For example, only marriage dissolution agreements can be easily incorporated into court judgments, making their enforcement available through contempt proceedings.[307] Premarital agreements, by contrast, are typically undertaken during happy times, when people look forward to marital bliss, while midmarriage agreements often are undertaken to save failing marriages. These distinctions should inform state laws, which should also be guided by the previously noted NCCUSL model laws, including the 1983 UPAA, the 2012 UPMAA, and the 1970 MMDA.

Statutes and common law precedents on stepparent child support arising from formal premarriage or midmarriage contracts seem quite scarce. More common, perhaps, are stepparent child support pledges

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305. *See id.* § 107 (considering factors such as the length of physical residence of nonparent and child, regularity of contact, willingness of caretaking, and other parental acceptance of nonparent caretaking).

306. *Id.* § 112(a)(1)(c), (a)(2) (directing that courts should consider if granting custody or visitation "is in the best interest of the child").

307. *See* Lester v. Lester, 658 P.2d 915, 915 (Idaho 1983).

incorporated into marriage dissolution decrees.[308] Here, even without explicit statutory obligation, stepparents sometimes voluntarily assume continuing stepchild support duties. Such support is more likely assumed where legal parents agree to continuing childcare opportunities for (soon-to-be former) stepparents who otherwise have no standing to seek court-ordered childcare.[309]

b. Other Child Support Agreements

Stepparents often are not potential or actual de facto parents. Yet these stepparents may nevertheless be subject to child support orders over their objections where support is tied to earlier, informal agreements that are not governed by any state laws on formal premarital, midmarriage, or marriage dissolution pacts. Consider, for example, a future spouse who pledges orally that any of the stepchildren in the marriage who attend parochial schools will have their educational expenses paid by the stepparent from his or her assets. Comparably, during an ongoing marriage, especially at a time when marriage dissolution is seriously contemplated, a stepparent may make oral promises on matters like assumption of expenses for a stepchild's summer camp (perhaps to allow the married couple more time to work out their differences).

Again, as with formal stepparent child support contracts, statutes on informal premarital or midmarriage pledges of stepparent child support are scarce. Yet there are precedents recognizing that informal, even implicit, pledges by stepparents during marriage to support their spouses' children (perhaps indefinitely) can lead to stepparent child support orders entered during marriage dissolution proceedings.[310] Here the doctrine of equitable estoppel is sometimes employed to deny a stepparent the opportunity to challenge a child support request

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308. *See* 2000 ALI PRINCIPLES, *supra* note 135, § 3.03 cmt. b (AM. LAW. INST. 2000) ("[S]tate law and these Principles impose no continuing duty of child support on a stepparent.").

309. John C. Mayoue, *Stepping in to Parent: The Legal Rights of Stepparents*, FAM. ADVOC., Fall 2002, at 36, 38–39 (citing Weinard v. Weinard, 616 N.W.2d 1, 3 (Neb. 2000)) (discussing a case where a stepfather continued voluntarily child support contributions in conjunction with continued visitation after separation from the child's mother).

310. *See* Deborah H. Bell, *Child Support Orders: The Common Law Framework—Part II*, 69 MISS. L.J. 1063, 1073 (2000) (explaining support duties have been imposed on stepparents "on the basis of implied or express contract").

by an established legal parent soon to be, or now, an ex-spouse, where the stepparent earlier pledged to provide continuing stepchild support.[311]

c. Child Support Orders With No Child Support Agreements

Stepparents often are not potential or actual de facto parents. Yet these nonparent stepparents may nevertheless be subject to child support orders untethered to any earlier formal or informal agreements. As noted earlier, the 2016 ALI Restatement draft recognizes such possible orders could be founded on equitable estoppel grounds which need not always involve earlier support promises.[312] The earlier 2000 ALI Principles elaborated on such estoppel, indicating it may be founded not only on an undertaking of a child support obligation,[313] but also on cohabitation with a child's parent when the child is born.[314]

Here, unlike child support agreements, state lawmakers have discussed stepparent child support without earlier agreements. Some states reject stepchild support obligations during marriage.[315] Other states categorically end any support obligations of a stepparent upon dissolution of the marriage to the child's legal parent.[316] For instance, the Supreme Court of New Jersey stated, "New Jersey has no statutory requirement imposing a duty of support on a stepparent for his or her spouse's children by a former marriage. Nor did the common law impose a legal obligation on a stepparent to support the children of

311. 2000 ALI PRINCIPLES, *supra* note 135, § 3.03(1) (noting that a court may in estop a nonparent from denying a "parental support obligation" if there was prior affirmative conduct, including "an explicit or implicit agreement").

312. *See* RESTATEMENT OF CHILDREN AND THE LAW § 2.1 cmt. h (AM. LAW INST., Preliminary Draft No. 2, 2016).

313. *See* 2000 ALI PRINCIPLES, *supra* note 135, § 3.03(1)(a) (explaining that estoppel may arise when a nonparent assumes a parental support obligation to the child).

314. *See id.* § 3.03(1)(b). As to marriage, any estoppel would seemingly yield to the prevailing marital parentage presumption. As to cohabitation at the time of birth of one later a stepparent, we find that generally applications of an estoppel doctrine untethered to any agreement would be unfair.

315. *See, e.g.*, Klipstein v. Zalewski, 553 A.2d 1384, 1387–88 (N.J. Super. Ct. Ch. Div. 1988) (stating that in the absence of equitable estoppel, a stepparent has no duty to support a stepchild).

316. *See, e.g.*, Ruben v. Ruben, 461 A.2d 733, 735 (N.H. 1983) ("At common law there was no obligation to support a stepchild, and only recently has such an obligation been imposed by statute in a few jurisdictions. The majority of those jurisdictions imposing an obligation . . . have held that . . . once the marriage is dissolved the stepparent relationship ceases and with it the obligation to support the stepchild." (citations omitted)).

his or her spouse by another party."[317] In Nebraska, a person's failure to provide for a "dependent stepchild is a Class I misdemeanor,"[318] seemingly excluding failures as to former stepchildren. In the District of Columbia, "[a] stepparent is not required . . . to support his or her stepchildren," but is legally responsible for spousal support.[319] In Iowa, courts have ordered temporary child support from a stepparent to a stepchild while the trial court determined whether an equitable adoption had occurred, even though Iowa courts are statutorily proscribed from ordering support from former stepparents on a *permanent* basis.[320] And in Tennessee, there is no postdivorce child support obligation of a former stepparent even if the stepparent earlier sought termination of a legal parent's childcare rights in contemplation of an adoption which never occurred.[321]

In South Dakota, "[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."[322] But, "[e]ven one who accepts the responsibility for a child as in loco parentis cannot be required to furnish support for the child subsequent to the dissolution of the marriage."[323] In New Hampshire, "absent a valid adoption, a stepparent's duty to support a stepchild . . . ceases because

317. Miller v. Miller, 478 A.2d 351, 355 (N.J. 1984).

318. NEB. REV. STAT. § 28-705(5) (2008).

319. D.C. CODE § 4-205.22(a) (2001); *see also* Long v. Creighton, 670 N.W.2d 621, 628 (Minn. Ct. App. 2003) ("No case law or statute imposes a legal duty upon a new spouse to provide support for his or her step-children."). *But see* § 4-205.22(b)(1) (requiring that the stepparent's income be considered when determining public assistance eligibility for a child who lives with a parent and stepparent).

320. *Cf.* Whitlock v. Dist. Court of Fayette Cty., 497 N.W.2d 891, 894–95 (Iowa 1993) (stressing that the ruling was solely temporary and investigatory and that such orders are ones "of necessity," which are "based on preliminary information that may or may not be substantiated on further hearing").

321. *Compare* Braun v. Braun, No. E2012-00823-COA-R3-CV, 2012 WL 4563551, at *3 (Tenn. Ct. App. Oct. 2, 2012) (declaring that in Tennessee only natural parents or parents by adoption may be required to pay child support), *with* Frye v. Frye, 738 P.2d 505, 506 (Nev. 1987) (per curiam) (finding where there is a promise to adopt, the court may apply equitable adoption, and require child support as the remedy).

322. S.D. CODIFIED LAWS § 25-7-8 (2013).

323. E.H. v. M.H., 512 N.W.2d 148, 149–51 (S.D. 1994) (rejecting any child support based on the relationship between the stepfather and stepchildren since granting support on this basis would discourage "stepparents from establishing close and loving relationships with the stepchildren, and, in a sense, reward the stereotypical wicked stepparent for refusing to show love and support for them during the marriage" (citation omitted)).

the stepparent relationship ceases upon dissolution of the marriage."[324] In Washington, while the "expenses" of current stepchildren are chargeable upon the property of either spouses, or both domestic partners, or either of them, and they may be sued jointly or separately, "[t]he obligation to support stepchildren shall cease upon the entry of a decree of dissolution, decree of legal separation, or death."[325]

Elsewhere, stepchild support obligations only arise during marriage under certain circumstances, such as living in the same residence. In North Dakota, stepparents are "not bound to maintain the spouse's dependent children . . . unless the child is received into the stepparent's family."[326] In Missouri, "[a] stepparent shall support his or her stepchild to the same extent that a natural or adoptive parent is required to support his or her child, so long as the stepchild is living in the same home as the stepparent."[327]

For some current stepparents, child support is dependent upon a lack of financial resources available to the legal parents. In Vermont, stepparents have a duty to support stepchildren if they reside in the same household and if the financial resources of the parents are "insufficient to provide the child with a reasonable subsistence."[328] In Hawaii, "[a] stepparent who acts in loco parentis" is bound to support the child "during the residence of the child with the stepparent," but only "if the legal parents desert the child or are unable to support the child, thereby reducing the child to destitute and necessitous circumstances."[329] In Kentucky, child support arises for a "stepparent of any child who is an applicant or recipient of public assistance."[330] In New York, stepparents of "sufficient ability" are responsible for the support of a child under twenty-one who, inter alia, is "a recipient of

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324. *See* Ruben v. Ruben, 461 A.2d 733, 735 (N.H. 1983) (citing N.H. REV. STAT. ANN. §§ 546-A:1 to 546-A:12).

325. WASH. REV. CODE ANN. § 26.16.205 (West 2016) (explaining that petitions for marriage dissolution or legal separation, once filed, can prompt the termination of the obligation of a stepparent to support a stepchild; dissolution decrees involving marriage or legal separation or death ends the stepchild support obligation); *cf.* OR. REV. STAT. § 108.045 (2007) (paralleling Washington's statute).

326. N.D. CENT. CODE § 14-09-09 (2009) (requiring that support continues "during the marriage" and thereafter if the stepchild remains "in the stepparent's family").

327. MO. REV. STAT. § 453.400(1) (2016); *see also id.* § 453.400(4) (clarifying that the statute does not grant a stepparent "any right to the care and custody of a stepchild").

328. *See* VT. STAT. ANN. tit. 15, § 296 (2010) (explaining that this duty lasts as long as the relevant "marital bond . . . shall continue").

329. HAW. REV. STAT. § 577-4 (2016).

330. KY. REV. STAT. ANN. § 205.310 (West 2006).

public assistance or care . . . or . . . in an institution in the department of mental hygiene."[331]

As for former stepparents, there are few laws on child support orders against objecting former stepparents who undertook no agreements, pledges or the like. In North Dakota, once a stepparent "receives" their spouse's dependent children into their family, the stepparent is liable to support the children both during the marriage and after its termination if the children remain part of the stepparent's family.[332]

B. Grandparent Child Support

It is rare to find state laws that explicitly reference financial obligations of a grandparent for a grandchild, but grandparent support does sometimes arise. Current laws requiring some, including grandparents, to provide child support, as well as the model laws, are careful to specify both equity and estoppel interests when grandparent support is at issue.

1. Models and Principles

Model laws and proposed principles generally do not speak directly to grandparent child support duties. The 1983 UPAA does not address the parties who may execute premarital agreements beyond "prospective spouses."[333] In such agreements, "any" matter not specifically addressed in the UPAA may be added, "including . . . personal rights and obligations," as long as it is "not in violation of public policy or a statute imposing a criminal penalty."[334] As to what matters may be specifically addressed, a comment indicates that the references "are intended to be illustrative, not exclusive."[335] For us, the 1983 UPAA presents no barrier to those beyond "prospective spouses," including grandparents, becoming parties to an otherwise valid premarital agreement, though the requisites for contract validity under the 1983 UPAA would likely not apply, or would apply differently.[336]

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331. N.Y. FAM. CT. ACT § 415 (McKinney 2017); *see also* Eckhardt v. Eckhardt, 323 N.Y.S.2d 611, 611 (N.Y. App. Div. 1971) (stating the duty to support a stepchild ends upon divorce).

332. *See* N.D. CENT. CODE § 14-09-09 (2009).

333. *See* UNIF. PREMARITAL AGREEMENT ACT § 1(1) (UNIF. LAW COMM'N 1983).

334. *See id.* § 3(a)(8).

335. *See id.* § 3 cmt.

336. For example, the 1983 UPAA allows an agreement to be "enforceable without consideration." *Id.* § 2. And it only allows an agreement to be "effective upon marriage," and tolls "[a]ny statute of limitations" applicable to the signing spouses during their marriage. *See id.* §§ 4, 8.

The 2012 UPMAA likewise fails to directly address nonspousal parties to any contract. It expressly covers only premarital pacts between "individuals who intend to marry" and marital pacts "between spouses who intend to remain married."[337] But here too, there is no express barrier to pacts involving promises by others, including grandparents, who pledge grandchild support. And the Act expressly recognizes such pacts can address "custody, . . . access, [or] visitation . . . with respect to a child."[338]

The 1974 Uniform Marriage and Divorce Act (UMDA), later amended and retitled in 1996 as the Model Marriage and Divorce Act, expressly applies only to settlements of "disputes that have arisen between parties to a marriage."[339] Yet the UMDA recognizes that in a marriage dissolution or legal separation proceeding, a court "may join additional parties proper for the exercise of its authority to implement" the relevant statutes.[340] As to child support orders, the UMDA speaks only to orders against "either or both parents owing a duty of support."[341] Again, grandparent support promises are not explicitly barred.

By contrast, the 2016 ALI Restatement draft recognizes a "few narrow exceptions" to the general rule that "only legal parents owe the duty of economic support" to children.[342] In its earlier Principles of the Law of Family Dissolution in 2000, the ALI exceptions were not as narrow. There, the ALI spoke to a "parental support obligation" of "a person who may not be the child's parent under state law" where prior affirmative conduct estops a denial of the obligation.[343] Estoppel included instances where a person had "an explicit or implicit

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337. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 2(2), (5) (UNIF. LAW COMM'N 2012).

338. *See id.* § 10(a).

339. *See* UNIF. MARRIAGE & DIVORCE ACT § 102(3) (UNIF. LAW COMM'N 1970).

340. *See id.* § 303(b), (f). Such joinder, for example, seemingly is needed when a court order is sought "restraining any person from transferring, encumbering, concealing, or otherwise disposing of any property except in the usual course of business or for the necessities of life." *See id.* § 304(b)(1).

341. *Id.* § 309.

342. *See* RESTATEMENT OF CHILDREN AND THE LAW § 2.1 cmt. h (AM. LAW INST., Preliminary Draft No. 2, 2016). The accompanying Reporter's note to Comment (h) says such nonparent support operates for persons whose "conduct equitably estops them." *Id.* § 2.1 cmt. h (citing DEL. CODE ANN. tit. 13, § 501(b) (1995)) (stating that where parents cannot "provide a minor child's minimum needs, a stepparent or a person who cohabits in the relationship of husband and wife with the parent" has a support duty, but "only while the child makes residence with such stepparent or person and the marriage or cohabitation continues").

343. 2000 ALI PRINCIPLES, *supra* note 135, § 3.03(1).

agreement" or otherwise undertook an assumption of "a parental support obligation to the child";[344] the child was born during the person's marriage to or cohabitation with the child's parent;[345] or the person and the child's parent agreed to conceive the child and to undertake as parents shared responsibility for the child.[346] We find that in limited settings, a grandparent could be responsible, per the 2000 Principles, for a "parental support obligation," encompassing circumstances where the grandparent was or was not ever eligible to be deemed a childcare parent.[347]

2. Current Laws

With these models and principles on nonparent child support by grandparents in mind, we now look to the current laws on court-ordered grandchild support, where the obliged grandparent has not been deemed a childcare parent. We explore separately orders based on premarital, midmarriage, and marriage dissolution agreements, other agreements, and circumstances involving no agreements.

a. Premarital, Midmarriage, and Marriage Dissolution Child Support Agreements

Grandparents, herein the parents of children who are now, or were once, or were or are now eligible to be, legal parents may not themselves be potential or actual de facto parents. Yet these nonparent grandparents could nevertheless be subject to grandchild support orders tied to earlier promises within premarital, midmarriage, or marriage dissolution agreements. We find no current laws specifically addressing grandparent agreements on grandchild support.

Generally, premarital and mid-marriage pacts should operate under comparable standards, which are at times (especially in the premarital setting) guided by the 1983 UPAA, if not the 2012 UPMAA. Generally, marriage dissolution pacts operate under different standards, often derived from the 1970 UMDA.[348] Within these model laws, we glean little direct support for enforcing grandparent child support

344. *Id.* § 3.03(1)(a).
345. *Id.* § 3.03(1)(b).
346. *Id.* § 3.03(1)(c).
347. *See id.* § 3.03 (noting that agreeing or undertaking the obligation, cohabitating with the grandchild, or agreeing to share responsibility would make a grandparent liable for a parental support obligation).
348. *See generally* UNIF. MARRIAGE & DIVORCE ACT §§ 301–316 (UNIF. LAW COMM'N 1970) (discussing marriage dissolution generally).

agreements. Thus, the 2012 UPMAA speaks to premarital and midmarriage agreements "between spouses" or between "those who are about to become spouses."[349] Yet it also recognizes that its provisions are supplemented by "principles of law and equity" outside of the UPMAA.[350] We posit that law and equity would support enforcement of at least some grandchild support promises, such as pledges to pay for college tuition or piano lessons.

b. Other Child Support Agreements

Grandparents often are not potential or actual de facto parents. Yet such grandparents might nevertheless be subject to child support orders tied to earlier agreements that are not within premarital, midmarriage, or marriage dissolution pacts. The 1973 UPA, for example, recognized the enforceability of a written promise to furnish child support "growing out of a supposed or alleged father and child relationship," where consideration was not required.[351] For us, grandparents whose sons had children born out of wedlock should often be responsible for their grandchild support promises, including those made in the hope of securing greater (or at least some) grandparent-grandchild interactions, as when birth mothers maintain exclusive, or primary, child custody.

c. Child Support Orders With No Child Support Agreements

Nonparent grandparents may also be subject to child support orders untethered to any earlier agreements. Current grandparents may be liable to provide support for grandchildren when the custodial parents lack the means to provide for the children or when parents are minors. For example, Louisiana requires grandparents "to provide for their needy descendants . . . limited to the basic necessities of food, clothing, shelter, and health care."[352] However, such orders should be "used sparingly and as a last resort; and only when attempts at parental

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349. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT prefatory note (UNIF. LAW COMM'N 2012).

350. *Id.* § 5.

351. UNIF. PARENTAGE ACT § 22(a) (UNIF. LAW COMM'N 2002).

352. LA. CIV. CODE ANN. art. 237 (2016); *see also* Landeche v. Airhart, 372 So. 2d 598, 599–600 (La. Ct. App. 1979) (stating that "[Louisiana] courts have recognized that the duty of a grandparent under Civil Code Article [237] extends only to needy descendants," which include grandchildren whose parents still provide support).

support have been exhausted."[353] Wisconsin similarly requires grandparents to provide support for grandchildren when the grandchild's parent is a "dependent person under the age of [eighteen]."[354] In New Jersey, "in the absence of a statute," unless the grandparent acts in loco parentis the grandparent "cannot be compelled to support the offspring of his unemancipated child"; however, a grandparent can be required to supplement child support when the grandparent directly limits the unemancipated child from raising income which could be paid toward child support.[355] In Connecticut, a court may order a "relative or relatives to contribute to . . . support" for a child who is a ward of the state.[356] Applications of these and similar statutes to former grandparents present challenging questions, as do applications to great-grandparents, whether current or former. Ultimately, the existence of childcare opportunities to grandparents cannot, by itself, prompt grandparents to pay grandchild support directly to the legal parents.

C. Other Nonparent Child Support

Similar to grandparents, state laws and models generally do not explicitly address child support duties of nonparents and only reference family or marital relationships. However, the recent 2016 ALI Restatement drafts contain some exceptions that may provide for the possibility that nonparents, beyond grandparents and stepparents, pay child support through equitable estoppel.

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353. *See* Banquer v. Banquer, 554 So. 2d 790, 792–93 (La. Ct. App. 1989) (requiring alimentary support when (1) children are sufficiently needy and (2) any grandparent has the financial ability to pay the support).

354. WIS. STAT. § 49.90(1)(a)(2) (2015); *cf.* N.C. GEN. STAT. 50-13.4(b) (2016) ("[P]arents of a minor, unemancipated child who is the custodial or noncustodial parent of a child shall share . . . [with the child's parents] primary liability for their grandchild's support with . . . the court determining the proper share, until the minor parent reaches the age of [eighteen] or becomes emancipated.").

355. A.N. *ex rel.* S.N. v. S.M., 756 A.2d 625, 628 (N.J. Super. Ct. App. Div. 2000) (explaining that the grandfather had prohibited his son to work, thereby reducing the income the son had to pay child support). Since the grandfather had limited the "potential earnings," he would have to pay that difference between actual and potential income. *See id.* at 641 ("The potential earning capacity of an individual, not his or her actual income, should be considered when determining the amount a supporting party must pay."(quoting Halliwell v. Halliwell, 741 A.2d 638, 641 (N.J. Super. Ct. App. Div. 1999))).

356. CONN. GEN. STAT. § 46b-215(8)(B) (2015).

1. Models and Principles

Model laws and proposed principles generally do not speak to the child support duties of nonparents beyond stepparents and grandparents. As noted, the 1983 UPAA does not address the parties who may execute premarital agreements, where the agreements can address "personal rights and obligations," beyond "prospective spouses."[357] For us, the 1983 UPAA presents no barrier to nonparents, like aunts or siblings, committing to child support via premarital agreements, though the contract requisites under the 1983 UPAA may not be fully applicable, or apply differently.[358]

The 2012 UPMAA likewise fails to address directly nonspousal parties, as it expressly covers only premarital pacts between "individuals who intend to marry" and marital pacts "between spouses who intend to remain married."[359] Again, we find no bar to inclusion of nonparent child support promises.

The 1970 UMDA expressly applies only to settlements of "disputes that have arisen between parties to a marriage."[360] Yet it recognizes that in a marriage dissolution or legal separation proceeding, a court "may join additional parties proper for the exercise of its authority to implement" the relevant statutes.[361] As to child support orders, the UMDA speaks only to orders against "either or both parents owing a duty of support."[362] Here again, pledges of nonparent support might be added to contracts,[363] where no consideration may be necessary for enforcement.

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357. UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8) (UNIF. LAW COMM'N 1983) (stating that parties may contract for nearly any premarital matter as long as the personal rights and obligations do not undermine "public policy," including a "statute imposing a criminal penalty").

358. For example, the 1983 UPAA allows an agreement to be "enforceable without consideration," to be "effective upon marriage," and to toll "any statute of limitations" applicable to the signing spouses during their marriage. *Id.* §§ 2, 4, 8. A nonparent, non-spouse agreement to support may not be dependent upon a later marriage if it is severable.

359. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 2(2), (5) (UNIF. LAW COMM'N 2012).

360. UNIF. MARRIAGE & DIVORCE ACT § 102(3) (UNIF. LAW COMM'N 1970).

361. *See id.* § 303(b), (f). Such joinder, for example, seemingly is needed when a court order is sought "restraining any person from transferring, encumbering, concealing, or otherwise disposing of any property except in the usual course of business or for the necessities of life." *Id.* § 304(b)(1).

362. *Id.* § 309.

363. *See id.* (setting forth the factors which the court should consider when determining the amount of support to be paid).

By contrast, the 2016 ALI Restatement draft recognizes a "few narrow exceptions" to the general rule that "only legal parents owe the duty of economic support" to children.[364] Within the ALI's 2000 Principles, these exceptions were not as narrow as they became in the 2016 ALI Restatement draft. In 2000, the ALI spoke to a "parental support obligation" of "a person who may not be the child's parent under state law" where prior affirmative conduct estops a denial of the obligation.[365] Estoppel included a nonparent who had "an explicit or implicit agreement" on, or who otherwise undertook, "a parental support obligation to the child."[366] For us, estoppel could apply to aunts, siblings, and others (beyond stepparents and grandparents) who agreed to provide child support, be it via regular payments or a creation of a college expense fund.

2. Current laws

Given these models and principles on nonparent child support extending beyond stepparents and grandparents, we now consider the current laws on such support. We explore separately orders based on premarital, midmarriage, and marriage dissolution agreements, other agreements, and circumstances involving no agreements.

a. Premarital, Midmarriage, and Marriage Dissolution Child Support Agreements

Beyond stepparents and grandparents, other relatives and some nonrelatives are potential, or are then actual, de facto parents. When these nonparents have not attained, or are not eligible for, de facto parentage, they may nevertheless be subject to child support orders tied to their earlier agreements in premarital, midmarriage, or marriage dissolution pacts.

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364. RESTATEMENT OF CHILDREN AND THE LAW § 2.1 cmt. h (AM. LAW INST., Preliminary Draft No. 2, 2016). The accompanying Reporter's Note to Comment (h) says such nonparent support operates for persons whose "conduct equitably estops them." *Id.* § 2.1 cmt. h, note.

365. *See* 2000 ALI PRINCIPLES, *supra* note 135, § 3.03(1).

366. *See id.* § 3.03(1)(a). Estoppel conceivably could prompt child support under the Principles for nonparents, beyond stepparents and grandparents, including aunts, uncles or siblings who cohabited with the child's parent when the birth occurred, or agreed to "share responsibility for raising the child" conceived as a result of an agreement wherein nonparent would be "a parent to the child." *Id.* § 3.03(1)(b)–(c).

b. Other Child Support Agreements

Nonparents, beyond stepparents and grandparents, may also be subject to child support orders tied to earlier agreements outside of premarital, midmarriage, and marriage dissolution pacts. For example, in Illinois there are common laws claims against some nonparents for child support for children born of assisted human reproduction on theories of oral contract or promissory estoppel.[367]

c. Child Support Orders With No Child Support Agreements

Nonparents beyond stepparents and grandparents are infrequently subject to child support orders untethered to any earlier agreements. Under common law in Kentucky, nonparents do not have a legal duty to support or care for their domestic partner's children, except when they stand in loco parentis.[368] In Pennsylvania, the high court refused to expand the definition of one liable for child support to a sperm donor who was personally known to the birth mother and her family, based on the fact that the sperm donor and mother "agreed to an arrangement that to all appearances was to resemble . . . a single-parent arrangement effectuated through the use of donor sperm secured from a sperm bank."[369]

Yet there are some nonparents who can be child support obligors in the absence of agreements beyond nonparents standing in loco parentis such as in Kentucky. For example, in West Virginia a trial court can continue a one-time parent's child support obligation even though parental childcare rights were ended due to abuse or neglect.[370] Comparably in Alabama, child support continues for a parent whose childcare interests were ended under the Child

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367. *See In re* Parentage of M.J., 787 N.E.2d 144, 152 (Ill. 2003) (holding that the Illinois Parentage Act does not preclude claims based on oral contract or promissory estoppel). Such claims have not yet been extended to births resulting from sex. *See* Dep't of Healthcare & Family Servs. v. Arevalo, 68 N.E.3d 552, 560–61 (Ill. App. Ct. 2016). Elsewhere, there are seemingly no such common law claims. Bowden v. Korslin (*In re* Placement of A.M.K.), No. 2011AP2660, 2013 WL 4746428, at *1 (Wis. Ct. App. Sept. 5, 2013) (failing to indicate how child was conceived during "committed" lesbian relationship).

368. Staples v. Commonwealth, 454 S.W.3d 803, 813 (Ky. 2014).

369. Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007) (analogizing the relationship to a clinical, anonymous sperm donation since both parties fully intended the mother to be sole parent). The dissent criticized this distinction, stating, "Referring to Joel McKiernan as 'Sperm Donor' does not change his status—he is their father." *Id.* at 1249 (Eakin, J., dissenting).

370. *See In re* Stephen Tyler R., 584 S.E.2d 581, 581, 600 (W. Va. 2003).

Protection Act.[371] In Michigan, child support can continue, in the absence of an adoption, for a parent who voluntarily ended his or her parental rights.[372] These obligations to provide child support without parental rights to childcare stem from the principle that society should not be called upon to support a child when parents have the financial means to do so, which extends to nonparents or former parents in these cases. This anomaly of child support responsibilities absent childcare rights is further evidence of the need for clarification on the rights of de facto and nonparents in child support inquiries.

VII. NEW CHILD SUPPORT DUTIES FOR DE FACTO PARENTS AND NONPARENTS?

As evidenced by our review of current childcare laws, the evolution of the NCCUSL's UPAs, NCCUSL's 2017 NPCCVA proposal, and the 2000 ALI Principles, there are increasing opportunities and calls for de facto parent and nonparent court-ordered childcare, at times, over the objections of established legal parents. To date, scant attention has been paid to any child support duties for these actual or potential child caretakers, whether or not they did or might pursue via court-order, or just continue or pursue or discontinue childcare without court sanction. Further, little attention has been directed to possible child support from nonparents (beyond unwed biological fathers who failed to grasp childcare parentage) who never had childcare opportunities. Such possible duties require exploration.

The challenges for American state lawmakers are well illustrated by the Johnson case, wherein Madonna was awarded $500 a month which was intended to be child support for Jessica, whom Antonyio was deemed to have equitably adopted under North Dakota law due to his (parental-like) actions toward Jessica in Pennsylvania, New Jersey, Florida and/or Kentucky.[373] The North Dakota Supreme court applied North Dakota child support guidelines though Jessica never lived

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371. *See Ex parte* M.D.C., 39 So. 3d 1117, 1133 (Ala. 2009) ("To hold otherwise would reward the most egregious cases of parental abuse and neglect by that parent's not having the burden of paying child support.").

372. *See* Evink v. Evink, 542 N.W.2d 328, 331 (Mich. Ct. App. 1995); *see also* State v. Fritz, 801 A.2d 679, 685 (R.I. 2002) (stating that parents should not be able to avoid child support obligations by voluntarily terminating parental rights). *But see* State Dep't of Human Servs. *ex rel.* Overstreet v. Overstreet, 78 P.3d 951, 954 n.3 (Okla. 2003) (concluding that child support obligations continue after parental rights have been terminated).

373. *See Johnson I*, 617 N.W.2d at 113, 116 (Sandstrom, J., dissenting).

there.[374] The support order covered Jessica's needs from the start of the first trial, April 1999; was founded on Antonyio's equitable adoption parentage; and was necessary because of Madonna's need for child support for Jessica, who Madonna was raising in Kentucky, perhaps along with Jessica's natural parents (whose parental rights seemingly had never been terminated).[375]

In considering how to address a Johnson or a similar case scenario in their own state, American state lawmakers will need to examine, at a minimum, the following questions on child support.[376] First, is child support ever available from an eligible de facto parent who never seeks a childcare order, when there is no indication that the child has a great need for additional support or will ever be dependent upon public assistance should such support not be available?[377] Recall that the 2017 UPA only allows an alleged de facto parent to seek de facto parent status, meaning neither a Madonna nor a Jessica could sue Antonyio for support under 2017 UPA if Antonyio did not seek such status. Yet the 2017 UPA does allow a birth mother, the state, a child, and others to seek to establish "presumed" parentage, which, once established, operates for all legal purposes.[378] Antonyio was not a presumed parent under the 2017 UPA, as Madonna did not bear Jessica and Antonyio did not reside with Jessica from the time of her birth.[379] We see no reason to distinguish between those who, while establishing parental-like relationships with children, do or do not hold out children as their own for the first two years.

Second, if child support is available, which state's or states' child support guidelines should be utilized when the acts prompting de facto parentage, the de facto parent's current residence, and the child's current residence are all situated in different states? It may be that the choice of law guidelines in the court adjudicating a child support request may require differentiation between the choice of law on

374. *See id.* at 112.

375. *See id.* at 117.

376. Of course, such examinations will often be preceded by inquiries into equitable adoption, or other de facto childcare parent, laws and into choice of law principles guiding courts confronting such childcare parent issues when children and their nonparental caretakers earlier resided in several different states (and/or nations).

377. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 670 (Ca. 2005) (consenting to the creation of a child cannot create a temporary relation to be assumed and disclaimed at will).

378. *See* 2017 UNIF. PARENTAGE ACT § 609(a) (UNIF. LAW COMM'N 2017).

379. *See Johnson I*, 617 N.W.2d at 106 (majority opinion) (finding the Uniform Parentage Act did not apply to the circumstances in the case).

establishing parentage, on recognizing a child support duty for the particular form of established parentage, and on the possible levels or types of support available.[380] Recall that in *Johnson I*, the child support calculation standard of North Dakota was used for a child living outside of North Dakota, when the child supporter had equitably adopted the child through acts occurring outside of North Dakota.

Third, where de facto parent child support—independent of any support provided during childcare—is possible, should the support guidelines be comparable to those applicable to natural, marital, presumed, acknowledged, and/or formal adoptive parents? Thus, for example, is a childcaring de facto parent comparable to a childcaring natural parent? Is a nonchildcaring nonparent comparable to a nonchildcaring natural parent? In *Johnson I*, seemingly it was easy to compare Antonyio as a nonchildcaring de facto parent and as a nonchildcaring natural parent for applying child support obligations.

Fourth, where de facto parent child support—independent of any support provided during childcare—is possible, should the support guidelines for all de facto parents be the same, or should, for example, stepparents, grandparents, and/or live-in significant others be treated differently, whether or not all are or could be de facto parents under similar standards? Recall that de facto parent childcare norms differ, e.g., for grandparents and stepparents in some American states.

Fifth, should the child support guidelines ever differentiate between two or more subclasses of certain de facto parents, as between grandparents with or without biological ties, as is done in at least some nonparent grandparent childcare settings, or as between stepfathers who are or are not biologically-tied? A natural father may only be able to become a childcare parent via formal adoption or de facto parentage. This situation arises where he has sired, via sex, a child with an unmarried woman, then failed to assume parental responsibility for his child promptly after birth. Additionally, he must thereafter sufficiently have acted in parent-like ways with his natural child to prompt de facto parentage. Of course, natural stepfathers typically need not achieve de facto childcare parent status to trigger possible child support since state laws generally recognize child support duties for natural parents who have no childcare rights.[381]

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380. *See, e.g.*, *Elisa B.*, 117 P.3d at 669 (recognizing the value in having two parents rather than one).

381. *See supra* note 183 and accompanying text.

Finally, American state lawmakers should consider whether nonparents (i.e., not natural, adoptive, presumed, acknowledged or de facto parents) should ever be responsible for court-ordered child support paid to a childcare parent or to childcare parents. Where available, should such support be possible only if the nonparents have court-ordered childcare over parental objections? If the nonparents agreed to support? If the nonparents were eligible for, but failed to pursue, third-party childcare orders? Here, as with de facto parents, laws might distinguish between classes of nonparents, like stepparents and grandparents, as is now done in some state third-party childcare laws, or even between classes of grandparents, like those who are and who are not biologically tied.

Besides considering these questions, American state lawmakers will need to reexamine child support precedents predating the surge in de facto parent and nonparent childcare laws. Earlier cases often utilized equitable estoppel principles.[382]

Certainly, older equitable estoppel cases, which recognized limited child support duties for former stepparents with no biological or formal ties who otherwise failed to satisfy precise parentage norms (as with marital parentage presumptions or VAPs), must be reconsidered in light of increasing imprecise parentage norms. For example, one precedent required former stepparent child support be founded on his or her "fraudulent activity" or "unusual hardship to the child if the support obligation were not imposed."[383] Another permitted former stepparent support only if "a stepparent by his or her conduct actively interferes with the children's support from their natural parent that he or she may be equitably estopped from denying his or her duty to support the children."[384] A third precedent allowed stepparent support only if there had been "an unequivocal representation of intent to support the child."[385] Today, explicit de facto parentage laws go far beyond these cases in recognizing stepparents are on equal footing with other legal parents in childcare settings. These laws

382. *See, e.g.*, Klipstein v. Zalewski, 553 A.2d 1384, 1387–88 (N.J. Super. Ct. Ch. Div. 1988) (stating that in the absence of equitable estoppel, a stepparent has no duty to support a stepchild).

383. *See* Weinand v. Weinand, 616 N.W.2d 1, 7–8 (Neb. 2000) (deeming the ex-husband a stepfather because he had no biological ties).

384. Miller v. Miller, 478 A.2d 351, 359 (N.J. 1984) (finding possible support from former stepfather of children born to his ex-wife during an earlier marriage).

385. Ulrich v. Cornell, 484 N.W.2d 545, 549 (Wis. 1992) (requiring reliance on the representation by the legal parent and resulting detriment to that parent).

should prompt broader possible child support duties for stepparents meeting imprecise childcare parentage norms.

As to a husband whose marital parentage presumption had been rebutted, one precedent held there could never be post-divorce child support for this now stepfather "[i]n the absence of a formal adoption."[386] Another recognized possible support, but only if there had been "an unequivocal representation of intent to support the child; . . . reliance . . . by the natural parent . . . [;] and detriment to the natural parent or child."[387] Again, today, de facto parentage laws are extended to many more husbands whose wives gave birth during marriage.

Earlier precedents narrowly recognizing possible child support for ex-stepparents, including ex-husbands, must be reexamined. Reexamination is needed where those same one-time parents fall within de facto (and comparable) childcare parentage laws. Where childcare is sought, as well as where childcare is possible but not pursued, some possible child support duties by ex-stepparents to natural or adoptive parents seem appropriate. De facto childcare parent status, once achieved, is typically said to stand on equal footing with natural or formal adoptive parent status. However child support guidelines should not be comparable for all child support parents. The older equitable estoppel cases teach that de facto parent child support today might be limited to the support that was expressly (and sometimes implicitly) promised.

By comparison, at least in the absence of promised future child support, older equitable estoppel cases do not recognize even narrow realms of grandparent support duties for grandchildren. The emerging third-party (or nonparent) childcare laws do not open the door widely to such child support duties, at least where there are no grandparent childcare orders over parental objections and no earlier grandparent promises as to future grandchild support.

CONCLUSION

Notwithstanding the rights of birth, marital, biological, and adoptive parents involving the care, custody, and control of their children, childcare interests are increasingly recognized in the United States for de facto parents as well as for nonparents, including grandparents and stepparents. These enhanced childcare interests have not yet prompted serious

386. Price v. Price, No. W2012-01501-COA-R3-CV, 2013 WL 1701814, at *3 (Tenn. Ct. App. 2013).

387. A.M.N. v. A.J.N., 414 N.W.2d 68, 71 (Wis. Ct. App. 1987).

considerations of new child support duties. It is time to explore such duties with a view to expanding child support obligors in order to serve the best interests of children. It is also time to explore how child support duties should be recognized for those who agree, expressly or implicitly, to provide future child support, even, at times, where they never undertake, or discontinue, childcare for the children they promised to support.