

FORMALITIES FOR INFORMAL ADOPTIONS

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I. INTRODUCTION

Until recently in the United States, legal parentage, prompting both childcare opportunities and child support obligations, chiefly arose within opposite sex marriages and from state-supervised formal adoptions.¹ The sex had to be consensual,² and the adoptions had to meet varying statutory requirements—birth parent consent or governmental proceedings to terminate birth parents’ interests and state inquiries into the suitability of the prospective adopters.³ When children were born of sex outside of marriage, their natural parents were typically noted on the birth certificates, again prompting childcare and child support.⁴

Legal parentage has evolved swiftly since the 1990s to reflect changes in both human reproductive technologies and social conduct.⁵ Today, assisted reproduction may lead to single parents, same sex parents, or birth mothers (i.e., gestational carriers) who never contemplated parenthood.⁶

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¹ See Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2042–43 (2014).

² See *id.* at 2042.

³ See generally UNIF. ADOPTION ACT (1994), 9 U.L.A. 11 (1999).

⁴ See UNIF. PARENTAGE ACT (amended 2002) § 201, 9B U.L.A. 24 (Supp. 2014).

⁵ See *id.* at art. 7, introductory cmt., 9B U.L.A. 73 (Supp. 2014) (explaining that the development of assisted reproductive technology in the past thirty years has “enabled childless individuals and couples to become parents”). See also Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 618–19 (2009) (explaining how today’s parentage laws partially originated from demographical changes: “In 1970, about 10% of all children were born to unmarried women; by 2000, about one-third were.”).

⁶ See Lauren Gill, Note, *Who’s Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1735, 1742 (2013) (explaining how the law has not developed at the same speed as recent medical advances and social changes; and, how sperm donor agreements are not always enforceable and may result in conflicting parentage claims). See also UNIF. PARENTAGE ACT art. 7, 9B U.L.A. 73

(continued)

Social conduct today produces many more children born of non-martial sex, whose natural fathers are neither listed on birth certificates nor attain parenthood under law.⁷

These changes have prompted new avenues of legal parentage which involve neither sex nor formal adoption. These avenues may be statutory or common law. They go by varying names, including “de facto parenthood,” “presumed parentage,” and “equitable adoption.”⁸ Herein, they are collectively referred to as informal adoptions. Parenthood usually results for those who become second (or occasionally third) parents to children with existing and continuing parents.⁹

Informal adoptions typically arise for those who have acted in a parental manner for some time.¹⁰ While both children and their existing parents frequently benefit from informal adoptions, this is not always true.¹¹ For example, children may gain love and financial support while

(Supp. 2014) (explaining the various types of parents which can result from children of assisted reproduction); § 201, 9B U.L.A. 24 (Supp. 2014); § 809, 9B U.L.A. 90 (Supp. 2014) (explaining how if a gestation agreement is invalidated, the birth mother becomes the legal parent).

⁷ See Harris, *supra* note 5, at 618. See also Gill, *supra* note 6, at 1745–46 (explaining that a father’s biological ties to a child are not always dispositive with regards to determining parentage and that courts today are more accepting of nontraditional families).

⁸ See generally UNIF. PARENTAGE ACT § 204, 9B U.L.A. 27 (Supp. 2014) (describing various ways by which a man may be presumed to be the parent of a child). See also Gill, *supra* note 6, at 1745 (describing how the law now recognizes “de facto parenthood” as a factor other than biological ties in order to determine parental rights); Adam Stephenson, *Arizona Juvenile Law Legal Research: Resources and Strategies*, 2 PHOENIX. L. REV. 193, 266–67 (2010) (referring to the doctrine of “equitable adoption”).

⁹ See Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 421–22 (2013) (explaining how formal parenthood has begun to breakdown and how “unrelated third parties” who are “significant caregivers” are becoming recognized as functioning parents).

¹⁰ See *id.* at 422–23 (explaining how functioning parents act in parental roles by performing duties such as caregiving, providing emotional and financial support, and providing education, medical support, and guidance).

¹¹ See *id.* at 438–40 (explaining how children benefit from informal adoptions by receiving care from their long-term care givers and how formal parents benefit from informal adoptions by having additional help for child care). But see *id.* at 440, 446 (describing how informal parenthood can potentially infringe on parental privacy, and how recognizing informal parenthood creates a hierarchical structure of parenting rights amongst the respective parents).

simultaneously their parents may see their superior parental rights diminish.

Beyond parental acts, state laws governing informal adoptions vary widely.¹² Some state laws require existing parents to explicitly consent to shared childcare,¹³ while others require informal adopters to act parentally over a specified period of time.¹⁴ Still others require a specified period of shared residence.¹⁵ This Article will suggest that these types of additional requirements inadequately protect the interests of children, existing parents, informal adopters, and the public at large.¹⁶ Perhaps not every interested party can be made happy, but a better job can be done in balancing competing interests.

After reviewing the relevant technology and changes in conduct, as well as the state laws governing informal adoption, this Article will suggest some additional formalities that would more adequately balance the legitimate competing interests.¹⁷

¹² See, e.g., ALA. CODE § 26-17-204 (LexisNexis 2009); DEL. CODE ANN. tit. 13, § 8-201 (2014); D.C. CODE § 16-831.01–02 (2001); NEV. REV. STAT. ANN. § 126.051 (LexisNexis 2010); TENN. CODE ANN. § 36-2-304 (2014).

¹³ See, e.g., TENN. CODE ANN. § 36-2-304 (allowing a biological father to rebut an informal father's rights by establishing his parentage).

¹⁴ See, e.g., DEL. CODE ANN. tit. 13, § 8-201 (allowing a person to establish “de facto parent status” by performing various parental activities for “a length of time sufficient to have established a bonded and dependent relationship with the child”); D.C. CODE § 16-831.01 (describing how a “de facto parent” is an individual who takes on full responsibility for the child and holds himself out as the child's parent); § 16-831.02 (allowing a third party to file for custody of a child when the individual has assumed enumerated parental duties); NEV. REV. STAT. ANN. § 126.051 (finding a presumption of paternity when a man has, among other things, received the child into his home, held the child out to be his own, and provided emotional and financial support for the child).

¹⁵ See, e.g., NEV. REV. STAT. ANN. § 126.051 (finding a presumption of paternity when a man cohabited with the mother for six months before conception and continued to cohabit throughout the time of conception); D.C. CODE § 16-831.01 (establishing a “de facto” parenthood when a man has lived with the child for at least ten of the twelve months before filing for custody); § 16-831.02 (allowing a third party to file for custody of a child when he has lived in the same household as the child for at least four of the six months before filing for custody).

¹⁶ See *infra* Part IV.

¹⁷ See *infra* Part V.

II. TECHNOLOGY AND SOCIAL CONDUCT CHANGES

Aside from formal adoption, legal parentage in the United States during the 1990s mainly arose from consensual sex and led to childcare opportunities and child support obligations for women who gave birth, as well as for married men via a statutory presumption of natural ties.¹⁸ For unmarried parents, the birth mother was a legal parent for all purposes.¹⁹ The biological father was only deemed an automatic legal parent for child support purposes.²⁰ If the unwed father wished to raise the child, with or without the birth mother, he generally had to form a “significant custodial, personal, or financial relationship” with the child.²¹ For a birth mother married to a man other than the biological father, the biological father could be pursued for child support if the husband’s paternity was disestablished.²² The unwed biological father of a child born of adultery might also be able to seek a childcare order from a court if the husband’s paternity was disestablished.²³

At birth, or long after, legal parentage prompting childcare and child support could arise from formal adoptions by heterosexual couples who are

¹⁸ See Aviel, *supra* note 1, at 2042.

¹⁹ See *id.* at 2043.

²⁰ See Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 6–8 (2004).

²¹ See *Lehr v. Robertson*, 463 U.S. 248, 267–68 (1983). Such a formation was necessary for the unwed biological father to have a right to voice his opinion, via his federal constitutional liberty interest, in the proposed adoption of his offspring. *Id.* at 261–63, 267–86. Formation is often required under state paternity and adoption laws, though it is not always necessary, as the United States Supreme Court has not demanded that such formation precede any state law recognition of parental rights. Compare, e.g., *Callender v. Skiles*, 591 N.W.2d 182, 190–92 (Iowa 1999) (highlighting a more sympathetic approach to unwed biological fathers under Iowa constitutional due process than under federal constitutional due process and *Lehr*), with *Baby Girl S.*, 407 S.W.3d 904, 913–915, 918 (Tex. Ct. App. 2013) (in some states, maternal concealment of pregnancy will not excuse an unwed biological father who wishes to claim paternity to the child from having to form a “significant custodial, personal or financial relationship” with the child in a timely fashion).

²² See Harris, *supra* note 5, at 632–33.

²³ *Id.* However, if the birth mother was married, her spouse’s continuing childcare might foreclose the *Lehr* opportunity interest in forming a relationship with the child under state law. *Michael H. v. Gerald D.*, 491 U.S. 110, 118–19, 123–25, 130 (1989) (California law had a conclusive presumption of paternity in husband, foreclosing unwed biological father from challenging husband’s paternity where the married couple remained an intact family).

biologically unrelated²⁴ or by relatives of the birth parents.²⁵ In both settings, potential adopters would have to petition the state, which would approve or deny the petition after termination of and an investigation into the rights of the birth parents.²⁶

Recently, legal parentage for the purposes of childcare and child support has surfaced in other ways.²⁷ With assisted human reproduction, two women can be legal parents at birth in some states.²⁸ Same sex couples and single persons can also now formally adopt in some states.²⁹ Further, legal parentage can arise from informal adoptions long after birth where the new parents need not ask the state for approval, but simply must establish some form of de facto parent status,³⁰ usually encompassing the formation of parental-like relationships with the children.³¹

²⁴ See Aviel, *supra* note 1, at 2042–43.

²⁵ See *id.*, at 2044 (“[A] key inquiry [to traditional parentage] is whether the petitioner is a relative of the child in question; nearly every state allows grandparents to seek visitation in some form, although some require the grandparent to first demonstrate that there is a custody case currently pending or that there has been a disruptive event in the family, such as a death or a divorce.”).

²⁶ See, e.g., *id.*; Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 15 & n.85 (2013).

²⁷ See Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 246 (2009).

²⁸ See *id.*

²⁹ See *id.* at 212–14.

³⁰ Parentage terms comparable to de facto parenthood include equitable adoption, paternity presumption, parenthood by estoppel, *in loco parentis*, and equitable parent. See discussion *infra* Part III; Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 291–93 (2001). Incidentally, the same term can have different meanings from state to state, as with de facto parent which (perhaps surprisingly) sometimes encompasses a parent on par with a birth or formal adoptive mother or father as well as a nonparent who has third-party standing to seek a childcare order over parental objection. Compare, e.g., DEL. CODE ANN. tit. 13, §§ 8-201(a)(4) (2014) (mother); (b)(6) (father); (c)(1); (c)(3) (de facto parenthood is on equal footing with biological or adoptive parenthood where one had a “parent-like relationship” and “acted in a parental role”), with D.C. CODE § 16-831.01 (2001) (de facto parent can seek “third-party custody if he or she lived with a child since birth). As well, different terms can have comparable meanings. Compare, e.g., DEL. CODE ANN. tit. 13, §§ 8-201(a)(4) (mother); (b)(6) (father); (c)(1); (c)(3), with ALA. CODE § 26-17-204(a)(5) (continued)

New forms of legal parentage have arisen due to changes in both assisted reproductive technologies and human conduct. In responding to such changes, state lawmakers strived to accommodate the interests of current parents, possible new parents, children, related family members, and the state by focusing mainly on the conduct of the existing and would-be parents. Unfortunately, many Americans remain unfamiliar with the changing parentage laws, though they are quite aware of the technology and human conduct changes prompting these new laws.³²

There have been two major technological advances that have prompted changes to parentage laws operative at birth and sometime after. One such advance involves the availability to determine male biological parentage through testing that is reliable, available at low-cost, and minimally intrusive.³³ Soon, at home and pre-birth testing may be generally available.³⁴ Better testing has prompted more paternity establishments for unwed biological fathers and more paternity disestablishments by husbands who were presumptive legal fathers due to their marriages to birth mothers.³⁵

The second technology advance involves the availability of more reliable, less costly, and readily accessible processes for assisted human reproduction (AHR).³⁶ Increasingly, doctors are unnecessary so that parentage for couples, as well as for singles, can be planned privately

(LexisNexis 2009) (“presumed” parent if one develops “a significant parental relationship with the child” involving emotional and financial support).

³¹ See Ramsey, *supra* note 30, at 292.

³² See, e.g., June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L.Q. 219, 219–21 (2011); Andrew Pollack, *Before Birth, Dad’s ID*, N.Y. TIMES, June 18, 2012, at B1 (discussing the availability of blood tests to determine paternity).

³³ See Pollack, *supra* note 32.

³⁴ See *id.*; Xin Guo, Philip Bayliss, Marian Damewood, John Varney, Emily Ma, Brett Vallecillo, & Ravinder Dhallan, Letter to the Editor, *A Noninvasive Test to Determine Paternity in Pregnancy*, 366 N. ENG. J. MED. 1743, 1743–45 (2012), available at <http://www.nejm.org/doi/full/10.1056/NEJMc1113044>.

³⁵ Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, CTR. FOR LAW AND SOC. POL’Y, 1, 3, <http://www.clasp.org/resources-and-publications/publication-1/0111.pdf>.

³⁶ Willem Ombelet & Johan Van Robays, *History of Human Artificial Insemination, FACTS, VIEWS & VISIONS IN OBGYN*, Monograph: 1-5, (2010), http://www.fvvo.be/assets/97/13-Ombelet_et_al.pdf.

without sex.³⁷ Births employing surrogates can now even be planned so that one or both of the intended parents contribute no genetic material.³⁸

As for human conduct, there has been a significant rise in births to unwed mothers arising from sex.³⁹ Many of these mothers, at birth or thereafter, either choose or are compelled to raise their children alone.⁴⁰ These mothers often have children with no fathers listed on their birth certificates⁴¹ or with fathers who fail to ever attain parental childcare status. In addition, there are increasing numbers of single parent adoptions.⁴² As a result, there is an increasing likelihood that intimate

³⁷ See, e.g., Gill, *supra* note 6, at 1719–25 (discussing the history of AHR and the recent growth in free private sperm donation); *A.A.B. v. B.O.C.*, 112 So. 3d 761 (Fla. Dist. Ct. App. 2013) (analyzing increasing AHR on a “do-it-yourself” basis, thus making governmental regulation more difficult).

³⁸ Paula Amato et al., *Consideration of the Gestational Carrier: A Committee Opinion*, 99 FERTILITY AND STERILITY 1838, 1838 (2013).

³⁹ See Katherine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 652 n.9 (2008); Elizabeth Wildsmith, Nicole R. Steward-Streng & Jennifer Manlove, *Childbearing Outside of Marriage: Estimates and Trends in the United States*, CHILDREN (Nov. 2011), http://www.childtrends.org/wp-content/uploads/2013/02/Child_Trends-2011_11_01_RB_NonmaritalCB.pdf (“In 2009, 41 percent of all births (about 1.7 million) occurred outside of marriage, compared with 28 percent of all births in 1990 and just 11 percent of all births in 1970.”). While there have been increases for all racial groups, the numbers for black birth mothers are highest. Gregory Acs, Kenneth Braswell, Elaine Sorenson & Margery Austin Turner, *The Moynihan Report Revisited*, THE URBAN INSTITUTE, 4 (2013), <http://www.urban.org/UploadedPDF/412839-The-Moynihan-Report-Revisited.pdf> (“[During the] early 1960s, about 20 percent of black children were born to unmarried mothers, compared with 2 to 3 percent of white children. By 2009, nearly three-quarters of black births and three-tenths of white births occurred outside marriage. Hispanics fell between whites and blacks and followed the same rising trend . . .”).

⁴⁰ *Id.* In 1960, “20 percent of black children lived with their mothers but not their fathers; by 2010, 53 percent of all black children lived in such families. The share of white children living with their mothers but not their fathers climbed from 6 percent in 1960 to 20 percent in 2010.” *Id.* Hispanics were in between. *Id.* “The bulk of the increase in the share of kids in ‘mother, no father’ families occurred by 1990; the growth has largely moderated over the past two decades.” *Id.* See also Atkinson, *supra* note 26, at 1–2 n.3 (explaining that in 2012, almost 18 million children were living with their mother only).

⁴¹ See, e.g., Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 UNIV. OF BALT. L. REV. 53, 54–55 (2010).

⁴² *How Many Singles Seek to Adopt?*, ADOPTION.COM, <http://statistics.adoption.com/information/adoption-statistics-single-parents.html> (last visited Nov. 3, 2014).

partners or family members will develop parental-like bonds with children long after birth. Further, there are increasing numbers of stepparents who help raise their partners' children, as well as increasing numbers of wed and unwed same-sex couples raising children.⁴³ As Justice Stevens observed, there is an "almost infinite variety of family relationships that pervade our everchanging society."⁴⁴

Amidst these changes in technology and human conduct, many state parentage laws have remained unchanged. The public policies of both federal and state governments in the United States, however, have long supported accurate, informed, and conclusive legal designations of at-birth parenthood for children born of consensual sex.⁴⁵ Thus, there is overwhelming support within written laws, as well as within public sentiment, for a single female mother and a single male father to be designated under law at birth for every child born of sex.⁴⁶ Parentage designations at birth are important to people, as well as governments. As to people, a 1992 federal study nicely summarized:

Parentage determination does more than provide genealogical clues to a child's background; it establishes fundamental emotional, social, legal and economic ties between parent and child. It is a prerequisite to securing financial support for the child and to developing the heightened emotional support the child derives from enforceable custody and visitation rights. Parentage determination also unlocks the door to government provided dependent's benefits, inheritance, and an accurate medical history for the child.⁴⁷

⁴³ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 63–64 (2000) ("While many children have two married parents and grandparents who visit regularly, many other children are raised in single-parent households Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing.").

⁴⁴ *Id.* at 90 (Stevens, J., dissenting). See also *id.* at 63 (O'Connor, J.) (noting that "it [is] difficult to speak of an average American family").

⁴⁵ Jeffrey A. Parness, *No Genetic Ties, No More Fathers: Voluntary Acknowledgement Rescissions and Other Paternity Disestablishments Under Illinois Law*, 39 J. MARSHALL L. REV. 1295, 1295 (2006).

⁴⁶ See, e.g., OHIO REV. CODE ANN. § 3111.64 (West 2011).

⁴⁷ U.S. COMM'N ON INTERSTATE CHILD SUPPORT, "Supporting Our Children: A Blueprint for Reform," at 120 (1992).

As for governments, dual parentage policies—at the very least—promote financial support and compassion for children and help secure their well-being.⁴⁸ Not surprisingly, there are occasionally exceptions to these policies, such as incest, rape, or sex with the young.⁴⁹

States have sought to implement dual parentage policies for children born of sex.⁵⁰ Maternity, for birth mothers, arises when the birth mother's name is recorded.⁵¹ As for fathers, a section of the California Family Code is exemplary, stating:

There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivor benefits, military benefits, and inheritance rights. Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development.⁵²

Yet California is one of only a few American states that expressly recognizes that there can occasionally be three parents under law at the same time.⁵³

⁴⁸ See CAL. FAM. CODE ANN. § 7570(a) (West 2014).

⁴⁹ *Like Father, Like Child: The Rights of Parents in Their Children's Surnames*, 70 VA. L. REV. 1303, 1306 (1984).

⁵⁰ James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 860 (2003).

⁵¹ *Id.* at 859–60.

⁵² CAL. FAM. CODE ANN. § 7570(a).

⁵³ *Id.* § 7612(c) (with a birth mother and two presumed fathers, for example, there is no need to choose one parent from the two presumed fathers where the making of such a choice “would be detrimental to the child”). Compare *T.D. v. M.M.M.*, 730 So. 2d 873 (La. 1999) (dual paternity for a child already with a mother for both childcare and child support purposes), and *Smith v. Cole*, 553 So. 2d 847, 851 (La. 1989), with *C.G. v. J.R. and J.R.*, 130 So. 3d 776, 782 (Fla. Dist. Ct. App. 2014) (“There is no support in Florida law for the proposition that H.G.-R. [a child] is entitled to have two legally recognized fathers,” as well as a legal mother, where neither alleged father “abandoned the child” and each demonstrated “a strong desire to be a part of the child’s life” and “the ability to care for the child”).

While changes in technology and human conduct have not eliminated most public policies promoting dual parentage at birth for children born of sex, these changes have prompted new laws on parentage. New laws are demanded by new technologies allowing children to be born without sex. Some old laws require reformulations as human conduct now prompts more births to unwed mothers;⁵⁴ more cohabitating families with children outside of marriage;⁵⁵ and more families headed by same-sex couples.⁵⁶

III. INFORMAL ADOPTION LAWS

Informal adoption laws generally recognize legal parentage for those not biologically tied, actually or presumptively, via marriage, to children at birth,⁵⁷ those not tied to children at birth via pre-birth consents to parentage, and those not tied to children at birth or thereafter via state-supervised formal adoptions.⁵⁸ Informal adoptions may arise through statutes or precedents,⁵⁹ and informal adopters may be men or women.⁶⁰ While conduct prompting an informal adoption may have begun before a child's birth, typically an informal adoption arises and is recognized in court long after birth for conduct primarily occurring after birth.⁶¹ Most often, an informal adoption is judicially recognized either when a single parent seeks child support from an alleged informal adopter or when a child caretaker seeks parental status so as to continue to child rear over a single parent's objection.⁶² In most settings, a romantic relationship (and perhaps a marriage) has ended between the single parent and the alleged

⁵⁴ Rachel M. Shattuck & Rose M. Kreider, *Social and Economic Characteristics of Currently Unmarried Women with a Recent Birth: 2011*, AM. COMMUNITY SUR. REP., 1 (May 2013), <http://www.census.gov/prod/2013pubs/acs-21.pdf>.

⁵⁵ *Id.*

⁵⁶ Elisa Rosman, *Adoptions by Same-Sex Couples Still on the Rise*, ADOPTIVE FAMILIES (Nov. 3, 2014, 3:30 PM), <http://www.adoptivefamilies.com/articles.php?aid=2321/>.

⁵⁷ Occasionally, a man biologically tied to a child may also be deemed to have adopted the child informally, such as when a husband attains legal fatherhood via a marital presumption due to (actual or presumed) biological ties and due to his holding out a child as his own. *See, e.g., In re Jesusa V. v. Heriberto C.*, 85 P.3d 2, 7 (Cal. 2004).

⁵⁸ *See id.* at 12. *See also* Mary P. Bryn & Steven H. Snyder, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 651 n.79 (2005).

⁵⁹ *See In re Jesusa V.*, 85 P.3d 2 at 14.

⁶⁰ *See* DEL. CODE ANN. tit. 13, § 8-201 (2014).

⁶¹ *See* DEL. CODE ANN. tit. 13, § 8-201(c).

⁶² *See Jesusa V.*, 85 P.3d 2 at 12 (“[B]iological paternity by a competing presumed father does not necessarily defeat a nonbiological father’s presumption of paternity.”).

second parent.⁶³ Much conduct that might lead to a judicially-recognized informal adoption is never litigated, such as when non-marital family and romantic relationships between adults change and parents and other child caretakers simply move in different directions without lawsuits.

Informal adoption laws differ from marital and quasi-marital—domestic partnerships and civil unions—presumption laws wherein legal parentage at birth is recognized for the state-recognized spouses/partners of birth parents (usually childbearing women, but also perhaps men or women individually employing surrogates).⁶⁴ For marital and quasi-marital parentage presumptions, post-birth non-marital conduct is usually not relevant.⁶⁵ Similarly, informal adoption laws differ from laws recognizing or presuming legal parentage at birth arising from pre-birth consent—actual⁶⁶ or presumed⁶⁷—to parentage.

Informal adoption laws also differ from so-called third-party standing laws wherein those who have acted in parental ways, beginning perhaps pre-birth but extending for some time after birth, can acquire childcare interests, like child visitation, but no parental status.⁶⁸ Special third-party standing laws can solely address either grandparents or stepparents,⁶⁹ or

⁶³ *Id.* at 6–7.

⁶⁴ See, e.g., Jeffrey A. Parness & Zachary Townsend, *Procreative Sex and Same Sex Parents*, 13 GEO. J. GENDER & L. 591, 602 (2012) (reviewing applicability of marital paternity presumptions to all state-recognized partners of birth parents).

⁶⁵ Occasional post-birth marital conduct can prompt a presumption of parentage for the non-birth spouse or partner, especially when marriage to a birth parent occurs within a certain time after a child is born to the birth parent and other parental conduct is undertaken. See, e.g., DEL. CODE ANN. tit. 13, § 8-204(a)(4) (2014) (post-birth marriage and written assertion or promise regarding parentage).

⁶⁶ See, e.g., *id.* § 8-304(b) (“An acknowledgment of paternity . . . may be signed before the birth of the child.”); *id.* § 8-305(a) (“[A] valid acknowledgment of paternity . . . is equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all of the rights and duties of a parent.”).

⁶⁷ See, e.g., *Wendy G-M v. Erin G-M*, 985 N.Y.S.2d 845, 845–46, 853, 859 (Sup. Ct. 2014) (analyzing a common law rebuttable presumption that a female spouse of birth mother is the second parent at birth of a child conceived from artificial insemination because of her consent to assisted reproduction).

⁶⁸ See Atkinson, *supra* note 26, at 2–3 (as opposed to informal adopters).

⁶⁹ See *id.* at 2–3, 7 (discussing special grandparent and stepparent third-party child care standing laws). See also Jeffrey A. Parness, *Stepparent Childcare in Illinois*, 38 S. ILL. U. L.J. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2398068.

they can address simultaneously both grandparents and stepparents.⁷⁰ Additionally, these laws can more generally address all who have acted in parental ways.⁷¹ So, third-party standing may be recognized for one with

⁷⁰ See Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 75 (2008).

⁷¹ General third-party childcare standing is exemplified in Oregon where “any person . . . who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition” for a childcare order. OR. REV. STAT. § 109.119 (2013). But such an order only follows the rebuttal of a presumption “that the legal parent acts in the best interest of the child,” where the court “may consider” whether the “legal parent has fostered, encouraged or consented to the relationship.” *Id.* The Oregon presumption can be overcome by a preponderance of the evidence where “a child-parent relationship exists.” *Id.* But clear and convincing evidence is needed where “an ongoing personal relationship exists.” *Id.*

In Montana, a nonparent who “has established . . . a child-parent relationship” with a child can obtain either “a parental interest” in the child or “visitation” with the child, each dependent upon a judicial finding of the child’s best interests, when clear and convincing evidence demonstrates “the natural parent has engaged in conduct that is contrary to the child-parent relationship.” MONT. CODE ANN. § 40-4-227 (2013). Contrary conduct includes “voluntarily permitting a child to remain continuously in the care of others for a significant period of time so that the others stand in loco parentis to the child.” *Id.* Here, there may be no actual consent by the first parent to second parent status. The statutory language, “conduct . . . contrary to the child-parent relationship,” seems ill-advised because relevant conduct includes acts undertaken to benefit the child and thus the child-single parent relationship. *Id.*; see generally *In re M.M.G.*, 287 P.3d 952 (Mont. 2012); *In re L.F.A.*, 220 P.3d 391 (Mont. 2009); *Kulstad v. Maniaci*, 220 P.3d 595, 609 (Mont. 2009) (in loco parentis status obtainable though nonparent did not act “as a parent to the exclusion of the natural parent”). But see MONT. CODE ANN. § 41-3-102(1)(a)(i) (2013) (the Montana statute on terminating parental rights that requires child abandonment, defined as “leaving the child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future”).

In Ohio, a parent is bound to a voluntary permanent shared custody agreement with a nonparent, shown by “words or conduct,” by which the parent purposefully relinquishes “some portion of the parent’s right to exclusive custody” of a child. *Rowell v. Smith*, No. 12AP-802, 2013 WL 2404814, at *27-28, 67 (Ohio Ct. App. May 30, 2013) (agreement is enforced when child’s best interest is served). By comparison, an Idaho statute provides a bit more, though not absolute, protection of a parent’s superior rights vis-à-vis a nonparent: “In any case where the child is actually residing with a grandparent in a stable relationship, the court may recognize the grandparent as having the same standing as a parent for evaluating what custody arrangements are in the best interests of the child.” IDAHO CODE ANN. § 32-717(3) (2014) (upheld upon an attack under *Troxel v. Granville*, 530 U.S. 57
(continued)

no state-recognized ties between the third party and the parent or child, as with an unwed single parent's former romantic partner.⁷² Often, general third-party standing laws are applied to stepparents or grandparents.⁷³ The following sections include some exemplary state informal adoption laws that go beyond third-party childcare standing laws by permitting courts to recognize new parentage under law.

A. *De Facto Parenthood*

In the District of Columbia Code, de facto parenthood requires residency, with the single parent's "agreement," in the same household since the time of the child's birth or adoption, or for at least ten of the twelve months preceding the nonparent's petition for de facto parent status.⁷⁴ A relevant Delaware statute does not mention residency at all, permitting de facto parenthood for a second parent if one exercised "parental responsibility" and served in a "parental role" so that "a bonded and dependent relationship" that is "parental in nature" developed, although this must be done with "the support and consent of the child's parent."⁷⁵

De facto parenthood per common law can be comparable. In Washington, a former female domestic partner of a birth mother had a common law de facto (or psychological) parental claim if the partner shared a residence, the mother consented to the partner's developing a parental relationship, there was no financial consideration by the partner,

(2000)). See also *Hernandez v. Hernandez*, 265 P.3d 495, 496 (Idaho 2011) (Two children lived with maternal grandparents only for about seven years, when parents agreed to switch primary custody per court order from mother to father—who at that point had had no physical contact with the children for about six years).

⁷² See *In re L.F.A.*, 220 P.3d at 392–93, 395.

⁷³ *Gupta-Kagan*, *supra* note 70, at 75.

⁷⁴ D.C. CODE §§ 16-831.01(1)(B)(i), 16-831.03 (2001) (noting a de facto parent can seek third-party custody).

⁷⁵ DEL. CODE ANN. tit. 13, § 8-201(c)(1)–(3) (2014). This statute has been read not to permit de facto parentage for a third parent. *Bancroft v. Jameson*, 19 A.3d, 730, 750 (Del. Fam. Ct. 2010) (statute is overbroad and violative of due process privacy interests of fit mother and fit father when it allows another person to be a third parent). Once recognized, a de facto parent became equal to a biological or adoptive parent. *Smith v. Guest*, 16 A.3d 920, 931–32 (Del. 2011).

and, a “bonded, dependent relationship parental in nature” existed between partner and child.⁷⁶

B. Presumed Parents

Whether or not de facto parentage is recognized, an informal adoption can also arise from presumed parentage. Whether or not such a presumption is rebuttable once established, it surely cannot always be challenged on the grounds of the absence of natural ties to be presumed and founded on the probability of a biological connection, like a marital presumption for husbands.⁷⁷

In Delaware, a “man is presumed the father of a child if . . . for the first 2 years of the child’s life, he resided in the same household with the child and openly held out the child as his own.”⁷⁸ Other state presumed parent statutes operate like the Delaware presumed parent statute, while still others operate like the Delaware de facto parent statute.⁷⁹ As in Delaware, presumed parentage arises in New Mexico,⁸⁰ North Dakota,⁸¹ Oklahoma,⁸² Texas,⁸³ Washington,⁸⁴ and Wyoming⁸⁵ for those who establish residency

⁷⁶ *In re* Parentage of L.B., 89 P.3d 271, 271, 273–74, 282 (Wash. Ct. App. 2004). See also *In re* Custody of B.M.H., 315 P.3d 470, 472, 475 (Wash. 2013) (former stepparent can be de facto parent); *In re* Custody of A.F.J., 314 P.3d 373, 373, 377–78 (Wash. 2013) (former partner was also a foster parent).

⁷⁷ See DEL. CODE ANN. tit. 13, § 8-204(a)(1) (2014).

⁷⁸ *Id.* at § 8-204(a)(5).

⁷⁹ See, e.g., N.M. STAT. ANN. § 40-11A-204 (LexisNexis Supp. 2012).

⁸⁰ *Id.* § 40-11A-204(A)(5) (using the same language as in Delaware).

⁸¹ N.D. CENT. CODE § 14-20-10(1)(e) (2009) (using the same language as in Delaware).

⁸² OKLA. STAT. ANN. tit. 10, § 7700-204(A)(5) (West 2009) (using the same language as in Delaware).

⁸³ TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2014) (“A man is presumed to be the father of a child if . . . he continuously resided in the household in which the child resided and he represented to others that the child was his own [during the first two years of the child’s life].”).

⁸⁴ WASH. REV. CODE § 26.26.116(2) (West, Westlaw through all 2014 legislation and Initiative Measures 594 (2015 c 1) and 1351 (2015 c 2)) (A person is presumed the parent of a child if, for first two years of the child’s life, he resided in “same household with the child”).

⁸⁵ WYO. STAT. ANN. § 14-2-504(a)(v) (2013) (A man is presumed to be the father of a child if “for the first two (2) years of the child’s life, he resided in the same household”).

in the first 2 years and hold out children as their own.⁸⁶ The demands of any single parent's support or consent are unclear.

There is no timed residency requirement on presumed parentage elsewhere. In Alabama, presumed parentage arises for a man who receives the child into his home and openly holds out the child as his natural child, or otherwise openly holds out the child as his natural child and establishes a significant parental relationship with the child, including emotional and financial support.⁸⁷ There is sometimes presumed parentage for a man who simply receives a child into the home and holds the child out as his own.⁸⁸ Here, a single parent is afforded fewer safeguards of her superior childrearing rights. In New Jersey, for example, a man with no biological or formal adoptive ties can be "presumed to be the biological father of a child," on equal footing with the birth mother if he "openly holds out the child as his natural child" and either "receives the child into his home" or "provides support for the child."⁸⁹

C. Other Informal Adoption Laws

Beside certain de facto and presumed parents, there are other informal adopters gaining parental status through principles such as equitable

⁸⁶ At times, not holding out a child as one's own is used to rebut, rather than establish, presumed parentage. *See, e.g.,* DeBoer v. DeBoer, 822 N.W.2d 730, 733–34 (S.D. 2012) (citing TEX. FAM. CODE ANN. §§ 160.204(a)(4), 160.607(b)(2) (West 2003)) (A presumption of paternity in which a man "married the mother of the child after the birth of the child" may be rebutted by evidence the presumed parent "never represented to others that the child was his own.").

⁸⁷ ALA. CODE § 26-17-204(a)(5) (LexisNexis 2009).

⁸⁸ Compare CAL. FAM. CODE § 7611(d) (West 2014), COLO. REV. STAT. § 19-4-105(1)(d) (2014), MINN. STAT. ANN. § 257.55(d) (West 2007), NEV. REV. STAT. ANN. § 126.051(1)(d) (LexisNexis 2010), and TENN. CODE ANN. § 36-2-304(a)(4) (2014), with MASS. ANN. LAWS ch. 209C, § 6(a)(4) (LexisNexis 2011) (a man is presumed to be a father if "he, jointly with the mother, received the child into their home and openly held out the child as their child"). Presumed parentage may not operate comparably in all settings where parentage is important. *See, e.g., In re Brianna M.*, 163 Cal. Rptr. 3d 665 (Ct. App. 2013) (holding that father's presumed biological paternity was not relevant in dependency proceeding). While some presumed parentage statutes recognize only men as possible second parents, women have attained parentage under such statutes because courts read the laws in gender-neutral ways. *See Elisa B. v. Superior Court*, 117 P.3d 660, 666–67 (Cal. 2005).

⁸⁹ *See* N.J. STAT. ANN. §§ 9:17-40, 9:17-43(a) (West 2013) (stating "[t]he parent and child relationship extends equally to every child and every parent," so there is no statutory need for the single parent's consent).

parenting.⁹⁰ As with de facto and presumed parent laws, these other laws, chiefly arising since the 1990s, now allow intimate partners of single birth mothers to morph into second (or third) parents on equal footing with the birth mothers.⁹¹ They also allow family members of single birth mothers, or others who may reside with single mothers and help to raise their children.⁹² Though occurring less frequently, intimate partners of single male parents or others associated with single fathers can also morph into parenthood.⁹³ Grandparents are often non-intimate partners who sometimes morph into parenthood.⁹⁴

Precedents have occasionally recognized informal adoptions via a psychological parent doctrine. For example, in 2008 the South Carolina Supreme Court in *Marquez v. Caudill*,⁹⁵ adopting a Wisconsin high court analysis, determined that a nonparent was eligible for psychological parent status if a four-prong test was met.⁹⁶ This test included the requirements that the petitioning alleged parent show: (1) the biological or adoptive parents consented to and fostered the petitioner's formation and establishment of a parental relationship with the child; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support without expectation of financial compensation; and (4) the petitioner was in a parental role long enough to have

⁹⁰ See, e.g., *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987) (holding that equitable parents exercise all rights and responsibilities of natural parents); cf. *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 642–43 (Wis. 2004) (rejecting the equitable parent doctrine as “too indistinct,” while allowing equitable estoppel to bar birth mothers from challenging paternity of certain men, such as a birth mother's former husband whose marital presumption was sought to be rebutted).

⁹¹ *Marquez v. Caudill*, 656 S.E.2d 737, 743 (S.C. 2008) (noting that “states have expanded the definition of psychological parent”).

⁹² *Id.*

⁹³ *Id.* at 743–44.

⁹⁴ See *In re Guardianship and Estates of Vaughan*, 144 Cal. Rptr. 3d 216, 218, 228 (Ct. App. 2012) (remanding to the trial court to determine whether the birth mother showed that custody with the child's grandparents was not in the best interest of the children by a preponderance of the evidence). See also, e.g., CAL. FAM. CODE § 3041(c) (West 2004).

⁹⁵ 656 S.E.2d. 737 (S.C. 2008).

⁹⁶ *Id.* at 743–44 (citing *In re Custody of H.S.H.–K.*, 533 N.W.2d. 419, 435–36 (Wis. 1995)).

established a bonded, dependent relationship that is parental in nature with the child.⁹⁷

In 2009, a federal appeals court highlighted the Mississippi Supreme Court's long recognized holding that a person standing "in loco parentis,"⁹⁸ that is, "one who has assumed the status and obligations of a parent without a formal adoption," has the same "rights, duties and liabilities" as a natural parent.⁹⁹

Informal adoptions may also arise from precedents recognizing co-parenting contracts made with single parents (or in a few states, with two parents). The American Law Institute (ALI) Restatement on Contracts (Second) says: "A promise affecting the right of custody of a minor child is unenforceable on grounds of public policy unless the disposition as to custody is consistent with the best interest of a child."¹⁰⁰ The Uniform Premarital and Marital Agreements Act,¹⁰¹ approved in July 2012, expressly recognizes there may be agreements on "custodial responsibility," which, though not binding on the courts, can provide guidance to the courts in order to promote "stability and permanence in family relationships."¹⁰² By allowing "intended parents to plan for . . . their child" while reinforcing "the expectations of all parties to the agreement," there is a reduction in "contentious litigation that could drag on for . . . several years of the child's life."¹⁰³

⁹⁷ *Id.*

⁹⁸ *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 183 (5th Cir. 2009) (citing, *inter alia*, *Farve v. Medders*, 128 So. 2d 877, 879 (Miss. 1961)).

⁹⁹ *Id.*

¹⁰⁰ RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981). *See also In re F.T.R.*, 833 N.W.2d 634, 651, 653 (Wis. 2013) (holding that a parentage agreement involving a surrogate cannot be enforced solely because it contemplates a voluntary termination of birth mother's parental rights and that child custody and placement should be determined by the terms of the agreement unless enforcement is contrary to the best interests of the child); *Baker*, *supra* note 20, at 1. *See generally* Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 *BYU. J. PUB. L.* 245 (2011) (discussing the emerging importance of parentage pacts).

¹⁰¹ UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 10(a) & cmt., 9C U.L.A. (2012).

¹⁰² *Id.*

¹⁰³ *Id.* *See also, e.g., In re F.T.R.*, 833 N.W.2d at 652 (analyzing guidance found in a contract involving a dispute between intended parents and contracting surrogate and her husband). Seemingly, once guidance is sanctioned, there are differing possible levels of deference to contractual terms. *See, e.g., id.* at 653 (the majority allowed contract enforcement unless enforcement would be "contrary to the best interests" of the child); *Id.* at 659, 665 (Abrahamson, C.J. dissenting) (finding the majority's holding "overly broad,"
(continued)

Enforceable co-parenting pacts involving existing children are sometimes found in marriage dissolution orders when a parent and stepparent with no biological ties or formal adoption agree to joint custody, as well as in regular stepparent monetary payments to the parent serving the child's interests.¹⁰⁴ Should the parent later challenge the stepparent's continuing interest in childcare, a parent may be estopped, even when the statute on nonparent childcare standing was not followed.¹⁰⁵ Here, the stepparent would effectively become an informal adoption parent.

IV. SOME DIFFICULTIES IN CURRENT INFORMAL ADOPTION LAWS

The varying forms of informal adoption often present difficulties for the existing parent whose child is informally adopted or for the new parent who is informally recognized. For each, there are federal constitutional interests meriting respect.

State informal adoption laws leading to court-ordered childcare for a newly-recognized parent over an existing parent's objections must not infringe upon any existing parent's federal constitutional childrearing interests. In *Troxel v. Granville*,¹⁰⁶ four United States Supreme Court Justices determined that the long-recognized "liberty interests of parents in the care, custody, and control of their children"¹⁰⁷ (herein childcare interests) generally forbid states from compelling grandparent visitation

urging courts to follow statutory guidelines on childrens' best interests to resolve disputes between contracting parties). See generally Dana E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210 (2012) (discussing the benefits of recognizing early intentions on parentage, such as pre-birth declarations). Intent, as opposed to marital presumption, biology, or functional theories, facilitates family planning and should especially be available for establishing legal parentage in assisted reproduction settings. *Id.*

¹⁰⁴ *In re Marriage of Schlam*, 648 N.E.2d 345, 347, 350–51 (Ill. App. Ct. 1995) (birth mother was estopped from challenging former husband's childcare standing twenty-seven months after a joint custody order was entered). Cf. *In re Marriage of Engelkens*, 821 N.E.2d 799, 806 (Ill. App. Ct. 2004) (providing no estoppel to challenge former stepparent's childcare standing where an earlier agreement on visitation was "gratuitous" and part of a "temporary order," and where there was no detrimental reliance by former stepparent).

¹⁰⁵ *In re Marriage of Schlam*, 648 N.E.2d at 349–50.

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

¹⁰⁷ *Id.* at 62. These liberty interests had earlier commanded majority support on the U.S. Supreme Court. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

over parental objections.¹⁰⁸ Yet, the justices recognized that “special factors”¹⁰⁹ might justify judicial interference as long as a parent’s “contrary wishes” were accorded “at least some special weight.”¹¹⁰ The plurality, alongside one concurring justice, reserved the question of whether any “nonparental” visitation order must “include a showing of harm or potential harm to the child.”¹¹¹ The concurring justice did hint, however, that at least some non-parental 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.”¹¹²

In dissent, Justice Kennedy, similar to the concurring justice, observed that a best interests standard might be constitutional where the nonparent acted “in a caregiving role over a significant period of time,”¹¹³ hinting that

¹⁰⁸ *Troxel*, 530 U.S. at 68–69 (O’Connor, J, joined by Rehnquist, C.J., Ginsburg, J., and Breyer, J.) (“[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.”).

¹⁰⁹ *Id.* at 68.

¹¹⁰ *Id.* at 70 (plurality opinion) (“[I]f a fit parent’s decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent’s own determination.”). See *In re H.A.*, No. 25832, 2013 WL 6576528 (Ohio Ct. App. Dec. 13, 2013) (“special weight” case rejecting mother’s objections to maternal grandmother’s visitation because her objections were founded solely on her soured relationship with her own mother).

¹¹¹ *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) (“[T]here is no need to decide whether harm is required . . .”).

¹¹² *Id.* at 76–77 (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).

¹¹³ *Id.* at 98–99 (Kennedy, J., dissenting) (citations omitted) (“Cases are sure to arise . . . in which a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child which is not necessarily subject to absolute parental veto In the design and elaboration of their visitation laws, States may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances.”).

such a nonparent might even be afforded “de facto” parent status.¹¹⁴ In a second dissent, Justice Scalia noted the possibility of both “gradations” of nonparents¹¹⁵ and carefully crafted state law definitions of parents.¹¹⁶ In a third dissent, Justice Stevens posited that nonparents seeking visitation must be distinguished by whether there is a “presence or absence of some embodiment of family.”¹¹⁷

So, parental objections to the informal adoptive parent, as well as grandparent, childcare—parenting time, visitation, custody, and the like—are not always dispositive.¹¹⁸ Yet, because the U.S. Supreme Court has said little about nonparent childcare and nothing about informal adoption via carefully crafted state law definitions of parents since *Troxel*, there is much uncertainty.¹¹⁹ While some state legislatures have extensively

¹¹⁴ *Id.* at 100–01 (Kennedy, J., dissenting) (“[A] fit parent’s right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a *de facto* parent may be another.”).

¹¹⁵ *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.”).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 88 (Stevens, J., dissenting).

¹¹⁸ 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).

¹¹⁹ One distinguished commentator described *Troxel* this way:

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

refined their grandparent visitation statutes since *Troxel*,¹²⁰ many have not fully addressed the limits on childcare by nonparents who may become informal adopters. Without statutes, judges are left to resolve the import of a “caregiving role over a significant period of time” by a nonparent.¹²¹

Whether by statute or precedent, informal adoption laws under *Troxel* seek to avoid federal constitutional concerns about an existing parent’s actual “contrary wishes” involving a nonparent’s future childcare by expressly or implicitly recognizing that the existing parent’s earlier consent to actual childcare by the nonparent carries over.¹²² At the very least, informal adoption laws carry sufficient “special weight” so that the child’s best interests dominate when the nonparent could morph into a parent on par with the parentage of the existing parent.¹²³ Express recognition of consent guides Delaware de facto parenthood, where the nonparent must serve in a parental role with the support and consent of the child’s existing parent.¹²⁴ At best, an implicit recognition of an existing parent’s earlier consent to a nonparent’s childcare guides Delaware “presumed” parentage where a “man is presumed the father . . . if . . . for the first 2 years . . . he resided in the same household . . . and openly held out the child as his own.”¹²⁵ Even more troubling is the implicit recognition of an existing parent’s earlier consent to a nonparent’s future childcare that guides New Jersey “presumed” parentage.¹²⁶ Such parentage stands on equal footing

¹²⁰ See Robyn L. Ginsberg, *Grandparents’ Visitation Rights: The Constitutionality of New York’s Domestic Relations Law Section 72 After Troxel v. Granville*, 65 ALB. L. REV. 205, 205 n.2 (2001) (addressing grandparent rights statutes). See also Sonya C. Garza, *The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927, 940 (2009) (addressing grandparent rights state cases). Some grandparent childcare statutes may only apply to certain, not all, grandparents. See, e.g., *Porter v. Hill*, 836 N.W.2d 247, 251 (Mich. Ct. App. 2013) (citing MICH. COMP. LAWS § 722.27b(5)) (urging statutory amendment so that parental rights termination could not arise due to abuse or neglect).

¹²¹ See *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting).

¹²² *In re H.A.*, No. 25832, 2013 WL 6576528, at *3 (Ohio Ct. App. Dec.13, 2013).

¹²³ *Id.*

¹²⁴ DEL. CODE ANN. tit. 13, § 8-201(c) (2014). See also *Smith v. Guest*, 16 A.3d 920, 931 (2011) (showing that a lesbian partner to an adoptive mother has “co-equal” fundamental parental interest and a de facto parent is on equal footing with a biological or formal adoptive parent).

¹²⁵ DEL. CODE ANN. tit. 13 § 8-204(a)(5) (2014).

¹²⁶ N.J. STAT. ANN. §§ 9:17-40, 9:17-43(a)(5) (West 2013).

with an existing parentage where the presumed parent must only hold out the child as one's "natural child" and provide "support" for the child.¹²⁷

State informal adoption laws leading to court-ordered child support for a newly-recognized parent over that new parent's objections also must not infringe upon the new parent's federal constitutional substantive due process interests.¹²⁸ Child support orders against informal adopters are particularly troublesome when unaccompanied by any standing for childcare. As the Delaware Code recognizes, once de facto parentage is established, the de facto parent should be in the same position as the birth or formal adoptive parent.¹²⁹ Further, child support orders are troublesome when an informal adoptive parent is obligated to provide support but never actually contemplated this requirement, especially after he or she ceased to live with, or is otherwise disconnected from, the existing parent or parents.

Yet, child support orders have never required those obligated to pay to have either future parent-child intentions or future childcare opportunities.¹³⁰ Thus, failed condoms, maternal deception about female birth control, and mistakes about male sterility have never excused natural fathers from child support duties for their children born of sex.¹³¹ Some financially obligated natural fathers never, nor will ever, have childcare opportunities, such as men who sire children from sexual assaults¹³² and men whose parental rights are terminated shortly after birth.¹³³ Similarly,

¹²⁷ *Id.*

¹²⁸ *See, e.g.,* *Pena v. Mattox*, 84 F.3d 894, 898 (7th Cir. 1996).

¹²⁹ DEL. CODE ANN. tit. 13, § 8-203 (2014).

¹³⁰ *See, e.g., In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) (noting that "an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child"); *Danelz v. Gayden*, No. W2012-01667-COA-R3-JV, 2013 WL 1190818, *12 (Tenn. App. Mar. 25, 2013) (holding that an adult child can sue the biological father for child support arrearages though mother's husband raised and supported the child; biological father's argument that "there is 'inherent inequity' in requiring him to pay. . . when he was not notified that he might be Jordan's father and was deprived of the . . . opportunity to establish a relationship with the child" is only relevant to the amount of support that may be ordered).

¹³¹ DEL. CODE ANN. tit. 13, § 8-203.

¹³² *See, e.g., Pena*, 84 F.3d at 899 (holding that a male statutory rapist has "no constitutionally protected interest in the offspring of his relationship," even though it was consensual); *Phillip E.K. v. Sky M.L.*, 936 N.Y.S.2d 859, 863-64 (Fam. Ct. 2011) (finding no protected parental interest for nineteen-year-old male who impregnated a fourteen-year-old female if child's best interests would not be served).

¹³³ Not all states, however, allow for a continuing child support obligation after a parental rights termination. *See, e.g., In re H.S.*, 805 N.W.2d 737, 745 n.4 (Iowa 2011)

(continued)

non-adopting stepparents sometimes have child support duties arising solely from their marriage to the parent, who, unlike some childcare opportunity settings, need not be a single parent.¹³⁴ Thus, there can be three parents for child support purposes, though there may be only two parents for childcare purposes.

There are some federal constitutional due process limits on child support obligations of informal adopters, albeit unclear.¹³⁵ That said, state lawmakers may impose additional fairness requirements that are independent of any federal constitutional mandates. Childcare opportunity and mens rea requirements would be fair to informal adopters saddled with child support, especially where such requirements survive familial romantic breakups or intrafamily spats.

V. NEW FORMALITIES FOR INFORMAL ADOPTIONS

Establishing additional formalities can mitigate difficulties with current informal adoption laws. The superior childrearing interests of existing parents, along with the due process interests of informal adopters subject to new child support obligations, merit more significant protection. Additional formal norms for legal parentage through informal adoptions will better promote a child's best interests, as well as governmental interests in promoting loving and stable family relationships.

A. Shared Legislative and Judicial Authority

States should recognize the inevitability that informal adoption law reform must be undertaken jointly by the General Assembly and the courts, ideally with the proper boundaries of lawmaking authority at least somewhat delineated. Childcare and child support issues have always required individualized, fact intensive judicial inquiries heavily guided by statutory norms, because there is less inherent judicial authority than, for

(illustrating how some states continue support duties). *See also In re C.N.*, 839 N.W.2d 841, 846 (N.D. 2013) (continued child support after parental rights ended for incarcerated father).

¹³⁴ *See, e.g.*, OR. REV. STAT. § 108.045 (2013) (The “expenses of the family and the education” of stepchildren are “chargeable upon the property of both husband and wife.”). *Cf.* DEL. CODE ANN. tit. 13, § 501(b) (2014) (“Where the parents are unable to provide a minor child’s minimum needs, a stepparent . . . shall be under a duty to provide those needs.”).

¹³⁵ *See Phillip E.K.*, 936 N.Y.S.2d at 864.

example, there is with tort issues that are significantly immunized from statutory directives due to jury trial rights.¹³⁶

Unfortunately, both with children born of assisted reproduction and children born of sex, legislators have often been too silent on the substantive legal norms and the role of trial courts in developing and implementing informal adoption laws. While examining a gestational surrogacy contract, a California appellate court said:

Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations) and—as now appears in the not-too-distant future, cloning and even gene splicing—courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts would still be called upon to decide who the lawful parents are and who—other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away. Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme . . . Or, the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques.¹³⁷

Pleas for General Assembly action on parentage are not limited to children born of assisted reproduction. Legislative inaction prompts too many uncertainties and differing judicial reactions for children born of sex. In a 2014 parentage dispute over a child born of sex to an unwed mother, the Maine Supreme Court said:

¹³⁶ See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998); *Pitts v. Moore*, 90 A.3d 1169, 1176–77 (Me. 2014); Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2012-2013: A Banner Year for Same-Sex Couples*, 47 FAM. L.Q. 505, 516, 538 (2014). Often the distinction is drawn between statutory and common law causes of action.

¹³⁷ *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 293.

Parenthood is meant to be defined by the Legislature, steeped as it is in matters of policy requiring the weighing of multiple viewpoints . . . Although we have been discussing de facto parenthood for almost thirteen years, there is currently no Maine statutory reference to de facto parenthood. We take this opportunity to again emphasize that, given the evolving compositions of families and the need for a careful approach, this issue would be best addressed by the Legislature.

In the absence of Legislative action in such an important and unsettled area, however, we must provide some guidance to trial courts faced with de facto parenthood petitions¹³⁸

Also in 2014, the Vermont Supreme Court declined to formulate a non-statutory de facto parent doctrine.¹³⁹ The majority reaffirmed that “the Legislature is better equipped” while noting that some other state courts have declined to fill the “perceived vacuum.”¹⁴⁰ However, one concurring justice indicated that his patience with General Assembly inaction was wearing thin, commenting:

I admit that I find it more difficult to favor legislative action over judicial action in the face of years of legislative inaction. I can think of no subject that is in greater need of legislative action than this one — defining who may be considered a parent for purposes of determining parental rights and responsibilities and parent-child contact. While I am voting with the majority in this case, our responsibility to protect the best interests of the child will become only more challenging as the changing nature of families presents circumstances that are well outside the contemplation of our now archaic and inadequate statutes. I recognize that there may come a tipping point where judicial action to define rights and responsibilities beyond those of biological parents and

¹³⁸ *Pitts*, 90 A.3d at 1176–77.

¹³⁹ See *Moreau v. Sylvester*, 95 A.3d 416, 423 (Vt. 2014).

¹⁴⁰ *Id.* at 424–25 (quoting *Titchenal v. Dexter*, 693 A.2d 682, 689 (Vt. 1997)) (internal quotation marks omitted).

marital partners becomes unavoidable. I would rather that the Legislature act before we see that day.¹⁴¹

Courts face a particular challenge in dealing with gaps in parentage statutes. When legislation fails to account for all human conduct which could lead to parentage, courts are in a quandary.¹⁴² Here, there is often an absence of explicit statutory directives, such as language indicating that only certain acts should lead to parentage under law. If relevant legislative history provides few or no indications of legislative intent, courts may refuse to act, encouraging General Assembly action. Contrarily, courts may choose to act, perhaps indicating that their guidance will be short-lived if legislators fill the gaps later.

Consider the Illinois assisted reproduction statute operating outside of gestational surrogacy.¹⁴³ It speaks directly to a “husband and wife” who request and consent to her insemination “under the supervision of a licensed physician.”¹⁴⁴ If the semen donor is not the husband, he is not to be “treated in law” as the “natural father.”¹⁴⁵ The gaps become obvious when considering the following questions: What if assisted reproduction is employed by a woman within a same sex relationship? What if it is employed by a woman living with her boyfriend who is the semen donor? What about a woman who procures semen from a friend who she promises not to pursue for child support and who, himself, promises not to pursue a childcare order over the woman’s objection? Or, what if assisted reproduction is employed by a husband whose semen is used to prompt a birth to his wife without physician supervision?

Consider, as well, the Illinois marital presumption of paternity for the husband whose wife bears a child “born or conceived” during the marriage.¹⁴⁶ Again, there are obvious gaps. For example, the statutes are

¹⁴¹ *Id.* at 430 (Dooley, J., concurring).

¹⁴² *See, e.g., In re Marriage of Simmons*, 825 N.E.2d 303, 311–12 (Ill. App. Ct. 2005) (determining that the Illinois Parentage Act does not apply to “transsexual males who have signed artificial insemination agreements as husbands in an invalid same-sex marriage”); *J.F. v. D.B.*, 879 N.E.2d 740, 741 (Ohio 2007) (assessing public policy on gestational surrogates where legislation was silent); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 968–70 (Vt. 2006) (addressing assisted reproductive technologies not covered by legislation).

¹⁴³ 750 ILL. COMP. STAT. ANN. 40/3 (West 2009).

¹⁴⁴ *Id.* 40/3(a).

¹⁴⁵ *Id.* 40/3(b).

¹⁴⁶ *Id.* 45/5(a)(1).

ambiguous as to situations where a woman is married to another woman who bears a child while so married. The Illinois General Assembly enacted laws in 2014 permitting same sex marriages.¹⁴⁷

What if a wife is pregnant during her marriage to her husband, though the child was not “born or conceived” during the marriage?¹⁴⁸ Equal protection may call for similar treatment of opposite sex couple and same sex female couples, but would equality principles also dictate similar treatment for spouses married during a pregnancy but unmarried at conception and at birth?

As with interstate statutory variations on informal adoption norms, there are interstate variations in the roles played by state courts in formulating the norms outside of state constitutional law demands. The respective roles of legislators and judges should be better defined by General Assemblies. A guiding provision of the New Mexico Uniform Parentage Act on surrogacy pacts provides exceptional guidance:

A. The New Mexico Uniform Parentage Act [40-11A-101 NMSA 1978] does not authorize or prohibit an agreement between a woman and the intended parents:

(1) in which the woman relinquishes all rights as the parent of a child to be conceived by means of assisted reproduction; and

(2) that provides that the intended parents become the parents of the child.

B. If a birth results pursuant to a gestational agreement pursuant to Subsection A of this section and the agreement is unenforceable under other law of New Mexico, the parent-child relationship shall be determined pursuant to Article 2 [40-11A-201 NMSA 1978] of the New Mexico Uniform Parentage Act.¹⁴⁹

The guiding provision on surrogacy in Delaware strikes a quite different, but nevertheless quite certain, balance:

This chapter authorizes an agreement between a woman and another person, an unmarried couple, or a

¹⁴⁷ See *Freedom to Marry: Illinois*, FREEDOM TO MARRY, <http://www.freedomto marry.org/states/entry/c/illinois> (last visited Nov. 27, 2014).

¹⁴⁸ See 750 ILL. COMP. STAT. ANN. 45/5(a)(1) (West 2009).

¹⁴⁹ N.M. STAT. ANN. § 40-11A-801 (LexisNexis 2012).

married couple in which the woman relinquishes all rights as a parent of a child conceived by means of assisted reproduction, and which provides that the person or married or unmarried couple become the parents of the child. If a birth results under such an agreement and the agreement is unenforceable under the law of this State, the parent-child relationship is determined as provided in subchapter II of this chapter.¹⁵⁰

B. Consent

Actual or implied consent by existing parents to earlier nonparent childcare is seemingly key when their later childcare decisions may be overridden by court orders deeming nonparents to be informal adopters. Judges acting in a child's best interests may not simply overcome superior parental rights.¹⁵¹ They may be overcome, however, when there is parental consent to a later informal adoption by a newly-recognized parent with equal childcare opportunities as an existing parent. Here, certain forms of consent may suffice.

The once suggested Illinois Supreme Court standard is exemplary of a rather demanding actual consent requirement to a later informal adoption.¹⁵² It states that a nonparent is only eligible to be an informal adopter after the nonparent is shown to have a directly expressed subjective intent to formally adopt, the nonparent held out the child as his or her own, and the nonparent formed a close and enduring familial relationship with the child.¹⁵³

The actual consent to de facto parenthood in Delaware is a bit less demanding, only requiring the nonparent seeking childcare to have exercised "parental responsibility," served in a "parental role," and

¹⁵⁰ DEL. CODE ANN. tit. 13, § 8-103(d) (2014).

¹⁵¹ See Lawrence Schlam, *Third-Party "Standing" and Child Custody Disputes in Washington: Non-Parent Rights—Past, Present, and . . . Future?*, 43 GONZ. L. REV. 391, 400 (2007–08).

¹⁵² *DeHart v. DeHart*, 986 N.E.2d 85, 103–04 (Ill. 2013) (discussing the standard for an alleged nonbiological child who was never formally adopted but is sought to recover from the estate of a decedent who sought to be deemed an informal adopter; on remand, this standard was suggested by the high court as a possible standard for cases involving either a former husband or a former boyfriend who sought childcare after a romantic relationship with a formal adoptive mother ended).

¹⁵³ *Id.* See also *Mancine v. Gansner*, 992 N.E.2d 1, 1 (Ill. 2013) (former husband); *In re Parentage of Scarlett Z.-D.*, 992 N.E.2d 3, 3 (Ill. 2013) (former boyfriend).

developed “a bonded and dependent relationship” with the child that is “parental in nature,” all with “the support and consent of the child’s parent.”¹⁵⁴

Two New Jersey presumed parent laws reflect rather weak forms of implied consent by an existing parent to a nonparent’s later childcare over that existing parent’s objection.¹⁵⁵ The stronger of the two allows presumed parenthood, on equal footing with a birth or formal adoptive parent, to arise for a man who openly held out a child as his “natural child” and received that child “into his home.”¹⁵⁶ The weaker of the two allows similar presumed parenthood for a man who openly held out a child as his “natural child” and provided “support for the child.”¹⁵⁷

As for overriding an existing parent’s objection to an informal adoption in a childcare dispute, the Delaware de facto parent statute strikes the proper balance.¹⁵⁸ More should be demanded than simply undertaking household chores.¹⁵⁹ However, a subjective intent to adopt is too rigorous, because formal adoption is often not considered only because an existing second parent’s child support obligations would have to be ended.

Actual or implied consent by third parties to undertaking earlier child support, if not to continuing or indefinite child support, also seems imperative when child support is sought from these new informal adopters later, typically after their relationships with existing parents, or perhaps their children, sour. But again, if needed, what forms of consent will suffice?

Some form of consent seems necessary because informal adopters are not like child-support-obligated unwed fathers whose sex prompts an unplanned childbirth, even a childbirth initially deemed impossible.¹⁶⁰

¹⁵⁴ DEL. CODE ANN. tit. 13, § 8-201(c) (2014).

¹⁵⁵ N.J. STAT. ANN. §§ 9:17-40, 9:17-43(a)(4) (West 2013).

¹⁵⁶ N.J. STAT. ANN. §§ 9:17-40, 9:17-43(a)(4).

¹⁵⁷ N.J. STAT. ANN. §§ 9:17-40, 9:17-43(a)(5).

¹⁵⁸ DEL. CODE ANN. tit. 13, § 8-201.

¹⁵⁹ See, e.g., David D. Meyer, *What Constitutional Law Can Learn From the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075, 1077, 1084–85, 1099–1103 (2001) (many read *Troxel* as placing “in doubt” informal adoption laws based on nonparent doing household chores and residing with child for some time, but author reads *Troxel* as “containing seeds of constitutional doctrine quite favorable” to such informal adoptions).

¹⁶⁰ See, e.g., *N.E. v. Hedges*, 391 F.3d 832, 834 (6th Cir. 2004) (“Reproduction and child support requirements occur without regard to the male’s wishes or his emotional attachment to his offspring.”); *In re Parentage of M.J.*, 787 N.E.2d 144, 151 (Ill. 2003).

As to the form of consent, it should depend somewhat upon the time that the relationship between the alleged informal adopter and the child began. If there were pre-birth acts, such as when the alleged informal adopter helped arrange a birth mother's pregnancy or a single parent's formal adoption, parentage seems quite possible. If there are only post-birth acts, as when the alleged informal adopter only lived briefly with an existing parent and child and supported the child out of "kindness," parentage seems far less possible.¹⁶¹ In the former setting, there is only one legal parent contemplated at the time of birth, and he or she may have undertaken parenthood only because of the expected parental support of the alleged informal adopter, as well as because of the lack of another child supporter. By contrast, in the post-birth setting there are often two existing parents, each liable for child support, at the time the alleged informal adopter first connects with the child.¹⁶² Even if there is a single parent under law with whom the alleged informal adopter cohabits, there is clearly a difference between residing with a spouse and residing with a boyfriend or girlfriend. A stepparent knowingly acquires the denomination as a type of parent within the community, which is different from a boyfriend or girlfriend whose friends and neighbors typically do not view a romantic partner of an existing single parent as a second parent, at least initially.

Of course, a grandparent or other family member who cares for a child is even less often viewed in the mirror and in the community as the equivalent of a parent.¹⁶³ This should make this grandparent or other family member less susceptible to later mandatory child support obligations via an informal adoption than a stepparent, especially where state law provides that the stepparent has a support duty for a stepchild

¹⁶¹ *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (alleged presumed parentage for one involved prebirth who helped arrange pregnancy differs from alleged presumed parentage for one who only cohabited with an existing parent and child after the child's birth and supported the child during that time out of "kindness").

¹⁶² *Id.* at 665.

¹⁶³ BEATRIZ CARLINI-MARLATT, GRANDPARENTS IN CUSTODIAL CARE OF THEIR CHILDREN 15 (2005).

even without a formal adoption,¹⁶⁴ which sometimes continues even after a marriage to the parent is dissolved.¹⁶⁵

C. *Personal Attributes*

At least for alleged informal adopters seeking childcare standing, certain personal attributes should be required to protect children. An easy starting point is for legislators and judges to establish the same personal attributes for informal adopters that already exist for formal adopters. Thus, those convicted of child molestation, along with those whose parental rights involving other children were recently terminated on egregious grounds, should be ineligible to adopt informally if they are ineligible to adopt formally.

Though useful, these prerequisites are insufficient. Non-disqualifying prior bad acts by a prospective formal adopter that aren't automatic disqualifiers can still be considered by judges, who will determine whether to grant formal adoptions. And those acts may only come to light because of an earlier, required governmental investigation.¹⁶⁶ Prior bad acts by a prospective informal adopter are not state-investigated.¹⁶⁷ An existing parent, without the resources and tools available to the government, may be unaware of the questionable background of someone, especially one who is not a preexisting family member, like a new romantic partner, who is developing a parental relationship with his or her child.

What additional personal attributes, beyond those mandated for formal adoptions, might be required for alleged informal adopters seeking childcare standing? Some required attributes might be borrowed from

¹⁶⁴ See, e.g., DEL. CODE ANN. tit. 13, § 501(b) (2014) (where parents are unable to support, a stepparent has a duty to provide "a minor child's minimum needs" while the marriage continues); IOWA CODE ANN. §§ 252A.2, 252A.3 (2008) (spouse is liable for support of stepchild).

¹⁶⁵ See, e.g., *Duffey v. Duffey*, 438 S.E.2d 445, 448 (N.C. Ct. App. 1994) (per N.C. Stat. 50-13.4(b), stepparent child support obligation, though secondary, continues after marriage dissolution where stepparent stood in loco parentis and voluntarily assumed the obligation of support in a writing, as in a marriage separation pact).

¹⁶⁶ *Adoption Procedures*, NOLO, <http://www.nolo.com/legal-encyclopedia/adoption-procedures-30201.html> (last visited Nov. 28, 2014).

¹⁶⁷ See Craig W. Chistensen, *If not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage,"* 66 *FORDHAM L. REV.* 1699, 1768 (1998) (arguing artificial insemination, a form of assisted reproduction, does not require home studies like its formal adoption counterpart).

third-party standing laws involving child visitation opportunities, benefitting people such as grandparents and stepparents.

The Illinois statutory limits on third-party child visitation orders are illustrative of personal attribute limits on court-ordered childcare by a nonparent (including a grandparent, sibling, and stepparent).¹⁶⁸ They deny opportunities for “visitation rights” to nonparents “incarcerated or . . . on parole, probation, conditional discharge, periodic imprisonment or mandatory supervised release” due to convictions for criminal offenses “involving an illegal sex act perpetuated upon a victim less than 18 years of age.”¹⁶⁹

Outright bans on informal adoptions for childcare standing seem appropriate for some otherwise eligible for formal adoptions. For example, those who had parental rights terminated on child abandonment or neglect grounds and those criminally convicted of crimes against children should not be informal adopters, and thus should become parents only after formal adoption processes.

D. Child's Best Interests

At least for alleged informal adopters seeking judicial recognition of childcare standing for a child with no other legal parent, an individualized judicial assessment of a child's best interests should be required, and recognition should be denied if not in the child's best interests. Such a requirement would differ from other best interest assessments, such as when divorcing parents disagree about child custody and visitation.

Best interest determinations should be undertaken, for example, when both legal parents are deceased. Consider a birth mother who dies while living with her minor child and her romantic partner. Judicial oversight is needed to insure, among other things, that the partner seeking an informal adoption was not motivated by greed, because both the decedent's estate and the minor child may recover if the death was caused by a third party. The best interests hearing, extending beyond the partner's earlier residence with the deceased legal parent and child, would allow maternal grandparents and other family members of the decedent to have a louder voice to influence the child's future care.

¹⁶⁸ 750 ILL. COMP. STAT. ANN. 5/607(e) (West 2009).

¹⁶⁹ *Id.*

VI. CONCLUSION

Changes in both social conduct and human reproductive technologies have prompted since the 1990s new avenues of parentage involving neither procreative sex nor formal adoption.¹⁷⁰ The varying informal adoption processes (including de facto parentage, presumed parentage, and equitable adoption) pose difficulties for existing parents and for newly-recognized parents, as well as for the adopted children and their extended family members and communities. Superior parental rights of existing parents must be respected, as must the due process rights of informal adopters. A child's best interests must also be preserved and advanced within the confines of the individual rights of adults.

Further formalities for informal adoptions are needed to secure the profound advantages of certainty and stability for the newer "range of family relationships."¹⁷¹ There must be more formality through better delineations of the responsibilities of state legislators and judges who will inevitably share authority regarding informal adoption laws. There is a deep need for more concrete requirements on consents to informal adoptions by both existing parents and informal adopters, clearer mandates on those ineligible to childcare as informal adopters, and enhanced roles for judges analyzing children's best interests, especially when existing parents die and informal adoptions are sought for childcare purposes.

¹⁷⁰ Gill, *supra* note 6.

¹⁷¹ Aviel, *supra* note 1, at 2003, 2064 ("There are reasons to preserve the certainty, stability, and exclusivity that compose the parental prerogative in a formalist regime even as we reject the hetero-normativity and bio-normativity of previous frameworks.").

