

# EXPANDED STEPPARENT AND GRANDPARENT THIRD PARTY CHILDCARE IN ILLINOIS

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## I. INTRODUCTION

Recognizing the need for reforms involving, *inter alia*, parental and third party childcare interests, the Illinois General Assembly created a study committee, resulting in several proposed amendments to the Illinois Parentage Act and to the Illinois Marriage and Dissolution of Marriage Act [hereinafter MDM]. After several years of debate and amendment, the Parentage Act<sup>1</sup> and MDM Act<sup>2</sup> reforms were enacted in 2015. Unfortunately, the recent changes, and earlier proposals arising from the study, insufficiently address the inadequacies of the current regimes on third party childcare, especially childcare opportunities for stepparents and grandparents. This is especially problematic since there are few, if any, opportunities for Illinois stepparents and grandparents to become parents in the absence of formal adoption.<sup>3</sup> General Assembly action is warranted.<sup>4</sup>

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1. The Illinois Family Law Study Committee's work led to HB 6191, (introduced May 31, 2012), which included a Proposed Illinois Parentage Act of 2012. H.B. 6191, 97th Gen. Assemb., Reg. Sess. (Ill. 2012) [hereinafter HB 6191]. One 2013 Proposed Illinois Parentage Act (as originally introduced on Feb. 1, 2013) appears in HB 1243, H.B. 1243, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) [hereinafter HB 1243]. The new 2015 Illinois Parentage Act (as originally introduced on Feb. 6, 2015) appears in HB 1531, and is embodied in Public Act 099-0085. H.B. 1531, 99th Gen. Assemb., Reg. Sess. (Ill. 2015) [hereinafter HB 1531].
2. The Illinois Family Law Study Committee's work led to HB 6192, (introduced May 31, 2012), which included proposed changes to a variety of Illinois statutes governing family matters, including the Marriage and Dissolution of Marriage Act, the Alienation of Affections Act, and the Domestic Violence Act. H.B. 6192, 97th Gen. Assemb., Reg. Sess. (Ill. 2012) [hereinafter HB 6192]. The major proposed changes are described in Adam W. Lasker, *Is family-law overhaul on the way?*, 100 ILL. B.J. 458 (2012). One set of 2013 proposed changes to the MDM (as originally introduced on Jan. 9, 2013) appear in SB 0010. S.B. 0010, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) [hereinafter SB 0010]. The 2015 changes to the MDM (as originally introduced on Jan. 15, 2015) appear in SB 0057 and is embodied in Public Act 099-0090. S.B. 0057, 99th Gen. Assemb., Reg. Sess. (Ill. 2015) [hereinafter SB 0057]. The 2015 proposed changes to the MDM offered (on Feb. 27, 2015) by the sponsor (Representative Kelly Burke) of earlier proposals founded on the committee's study focused primarily on childcare guidelines for established parents, with nothing said about new forms of parentage or third party childcare. H.B. 3982, 99th Gen. Assemb., Reg. Sess. (Ill. 2015).
3. *In re* Parentage of Scarlett Z.D., 2015 IL 117904, ¶68 (leaving any "equitable adoption" [or de facto parent or comparable parentage doctrine] to the Illinois General Assembly which has not been inclined to act). See, e.g., Jeffrey A. Parness, *Kids as Parental Property*, \_Illinois Bar Journal (forthcoming 2015). Even with new, expanded parental status opportunities, stepparent and grandparent third-party childcare reforms would still be needed because, e.g., the two parent

## II. PRE-2015 THIRD PARTY CHILDCARE IN ILLINOIS

### A. Stepparent Childcare

In Illinois, the “liberty interests of parents” are reflected in the “superior rights doctrine,” which holds that parents have superior rights regarding the care of their children.<sup>5</sup> This doctrine was incorporated into Illinois statutes on court-ordered third party childcare over parental objection upon request by a nonparent, including a stepparent and a grandparent.

One pre-2015 Illinois statute on stepparent childcare authorized childcare by way of “reasonable visitation” if the “parent is deceased or is disabled and is unable to care for the child” and the stepparent continuously lived for at least five years with the parent and child, who was at least 12 years old.<sup>6</sup> This statute also required the child’s desire to “have reasonable visitation with the stepparent” and the promotion of “the best interests and welfare of the child.”<sup>7</sup>

Third party stepparent childcare, by way of “child custody,” was also statutorily authorized before 2015 in Illinois for a “stepparent” if the child is at least 12 years old; the custodial parent and stepparent were married for

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limit for any one child will likely survive and because courts will be disinclined to terminate existing parental rights, even if poorly exercised, since continuing child support obligations are important.

4. This article urges new, and separate, legislative initiatives on stepparent and grandparent third party visitation. Others have suggested a single statute should encompass all third-party childcare requests. *See, e.g.*, Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 25–34 (2013) (ABA committee’s draft legislation, entitled, “Model Third-Party Child Custody and Visitation Act”). At least in Illinois, new common law initiatives are unavailable given judicial deference to legislative prerogatives, as in the de facto parent setting, *supra* note 3. Legislation must be carefully crafted, as General Assembly recognitions of third party childcare standing are strictly (i.e., narrowly) read. *See, e.g.*, *Stone v. Stone*, 774 S.E.2d 681, (Ga. 2015) (denying joint custody for both parent and grandparent regardless of child’s best interests).
5. *See, e.g.*, *In re Parentage of Scarlett Z.D.*, 2015 IL 117904, ¶ 59 [hereinafter *Scarlett Z.D.*]; *In re Marriage of Mancine*, 2012 IL App (1st) 111138, ¶ 15 [hereinafter *Mancine*] (citing *In re R.L.S.*, 218 Ill. 2d 428, 434, 844 N.E.2d 22 (2006) [hereinafter *In re R.L.S.*]). Before *Troxel v. Granville*, 530 U.S. 57 (2000) (recognizing that in most instances, parents had final say, per the federal Constitution, on grandparent-grandchild visits) parental rights to child rear in Illinois, when challenged by nonparents, were seemingly less superior. *See, e.g.*, *Cebzynski v. Cebzynski*, 63 Ill. App. 3d 66, 67, 379 N.E. 2d 713, 714 (1st Dist. 1978) (finding both stepmother and natural mother were fit parents after father’s death, and upholding trial court grant of joint and mutual custody in both mothers, with actual physical custody to stepmother alone and with visitation rights to natural mother).
6. 750 ILL. COMP. STAT. 5/607(b)(1.5) (2015) (Where the stepparent was married to a parent who had custody and died, the stepparent may be able to obtain guardianship of the child’s person and estate, over the other parent’s objection.) 755 ILL. COMP. STAT. 5/11-5(a) (2015) (rebuttable presumption of childcare by surviving parent), applied in *In re A.W.*, 2013 IL App. (5th) 130104 (sufficient allegations on presumption’s rebuttal so that a hearing was required).
7. 750 ILL. COMP. STAT. 5/607(b)(1.5) (2015).

at least 5 years while the child resided with them; “the custodial parent is deceased or is disabled and cannot perform” parental “duties;” “the stepparent provided for the care, control, and welfare to the child prior to the initiation of custody proceedings;” the “child wishes to live with the stepparent;” and, it is the child’s “best interests and welfare . . . to live with the stepparent.”<sup>8</sup> The same statute also allowed child custody pursuit by a stepparent who qualifies as a “person other than a parent . . . only if he [i.e., the child] is not in the physical custody of one of the parents.”<sup>9</sup>

When a custodial parent died, another pre-2015 Illinois statute facilitated more opportunity for grandparent custody than for stepparent custody, at least for the parents of the child’s deceased parent. The aforementioned requirements for stepparent custody did not apply to these grandparents, who could seek custody of their grandchildren as long as the “surviving parent” was in state or federal custody or “had been absent from the marital abode for more than one month without the deceased spouse knowing his or her whereabouts.”<sup>10</sup> So only stepparents were ineligible for custody of children under 12 and of children for whom they child-cared for less than 5 years, regardless of the children’s best interests. Grandchildren could sometimes be placed in grandparent custody to the clear detriment of a child and stepparent. A lack of biological ties could trump serving a child’s best interests.

Beyond these statutes there was very limited Illinois common law precedent before 2015 supporting third party stepparent childcare.<sup>11</sup> One case recognized a former stepparent’s contractual right to child rear over parental objection via the equitable estoppel doctrine. The right could be exercised where there was harm to the child; an earlier agreement by the parent to allow a former stepparent an opportunity for child visitation; reasonable reliance by the former stepparent on the agreement; and, a detrimental “change” to the former stepparent’s position as a result of the agreement.<sup>12</sup> Another case recognized that a widowed stepparent could seek a guardianship of a stepchild, the deceased spouse’s natural child, over the other natural parent’s objection if the stepparent demonstrated, by a preponderance of the evidence, that the living parent was unwilling or

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8. 750 ILL. COMP. STAT. 5/601(b)(3) (2015).

9. *Id.* at 601(b)(2).

10. *Id.* 601(b)(4).

11. There seems little room for further common law development given the Illinois Supreme Court’s deference to the General Assembly (where there can be a full “policy debate”) on issues of de facto parentage. Scarlett Z.D. 2015 IL 117904, ¶ 68.

12. *In re Marriage of Engelkens*, 354 Ill. App. 3d 790, 797, 821 N.E.2d 799, 806 (3d Dist. 2004) [hereinafter Engelkens]. Equitable estoppel is more readily available when the agreement becomes part of a court order, as in *In re Marriage of Schlam*, 271 Il. App. 3d 788, 792, 648 N.E.2d 345, 348 (2d Dist. 1995) [hereinafter Schlam].

unable “to make and carry out day-to-day childcare decisions concerning the minor.”<sup>13</sup>

Relatedly, if a parent was to place a child for adoption a day, a week, or a month after a divorce, a former stepparent often would not receive any notice of the adoption placement. Yet notice was required to any person “who was openly living with the child or the child’s mother at the time the proceeding is initiated” and who was “holding himself out to be the child’s father.”<sup>14</sup> So, if post dissolution a parent had a new, cohabitating intimate partner, that partner might have had standing, but there was no standing for the fit and loving former stepparent. Here too, as in death, a special statute should have protected certain long-established and loving relationships between stepparents and their stepchildren.

In summary, before 2015, childcare decisions in Illinois were generally left to “natural or adoptive parents”<sup>15</sup> regardless of their earlier accessions to stepparent childcare and regardless of the best interests of their children.<sup>16</sup>

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13. *In re A.W.*, 2013 IL App (5th) 130104, ¶¶ 12–14 (employing 755 ILL. COMP. STAT. 5/11-5 (b) (2015)). For an argument that Illinois common law should recognize childcare interests in nonbiological and nonadoptive child caretakers whose same sex couple relationships are dissolving, see, Desiree Sierens, *Protecting the Parent-Child Relationship: The Need for Illinois Courts to Extend Standing to Non-Biological Parents in Regard to Visitation Proceedings*, 25 N. ILL. U. L. Rev. 483 (2005).

14. 750 ILL. COMP. STAT. 50/7C(e) (2015) (notice). See also, 750 ILL. COMP. STAT. 50/7(f) (2015) (notice required to one “identified as the child’s father by the mother in a written, sworn statement”). As to the need for a former stepparent’s consent to any later adoption by another, consider 750 ILL. COMP. STAT. 50/8(b)(vi) (2015) (consent to adoption of child over six months required of “father” who “openly lived with the child” and “openly held himself out to be the father of the child”) and 750 ILL. COMP. STAT. 50/8(a)(2) (2015) (consent not required, however, when the father is neither “the biological or adoptive father of the child”).

15. 750 ILL. COMP. STAT. 45/2 (2015) (Illinois Parentage Act of 1984). While certainty seemingly is promoted, it comes at the expense of children’s and adults lived experiences and legitimate expectations, creating a new class of illegitimate children. Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL’Y & L. 623 (2012).

16. On the cost of recognizing such parental authority, see, e.g., *T.M.H. v. D.M.T.*, 79 So. 3d 787, 804-805 (Fla. Dist. Ct. App. 5th 2011), a case involving possible future child rearing by a woman who provided her ova to her lesbian partner so both women could child rear; a concurring opinion declared:

I write . . . to highlight the unfortunate absence of an important consideration that should inform our decision in cases such as this. Yes, I know, as did the able trial judge, that the best interests of the child is ordinarily not the test to be applied. . . I think we need to find a way to redirect our focus in cases of this kind so that best interests becomes part of the decisional matrix. Surely we have to make room for that factor in the crucible. Exploring the parental rights of one litigant or the other should not be the end of our deliberations. In the final analysis, we still ought to come to grips with what is best for the child. Here, having two parents is better than one.

## B. Grandparent Childcare

There was also in Illinois before 2015 a statute recognizing “visitation rights” for grandparents, regardless of their earlier childcare, where a single parent dies or both parents die.<sup>17</sup> Visitation ensued unless it was shown that “such visitation would be detrimental to the best interests and welfare of the minor.”<sup>18</sup> Other relatives, and those “having an interest in the welfare of the child,” could also seek visitation.<sup>19</sup> It made little sense to reference explicitly grandparents, and not stepparents, since the latter were often, and more, likely to have assumed parental-like roles.

Further, there was in Illinois prior to 2015 a statute allowing grandparents, great-grandparents, and siblings (including stepbrothers and stepsisters) to petition for visitation with a minor child who was one year or older, if there was “an unreasonable denial of visitation by a parent” and the child’s other parent was “deceased or . . . missing for at least 3 months,” or the child was born out of wedlock to parents who are not living together.<sup>20</sup> Again, it made little sense to favor grandparents and stepsiblings—who more often never acted as parents—over stepparents, who often acted as parents. A separate provision allowed grandparent visitation orders where parental objections “are harmful to the child’s mental, physical or emotional health.”<sup>21</sup>

As with stepparents, there was very limited pre-2015 common law precedent supporting third-party grandparent childcare. Like stepparents,<sup>22</sup> grandparents could secure standing to pursue childcare later over parental objection if the parents were equitably estopped due to their earlier consent—especially if the consent was incorporated into a court order—as long as there were no “changed circumstances.”<sup>23</sup>

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17. 755 ILL. COMP. STAT. 5/11-7.1 (2015) (unless the child has been adopted, though yet, grandparent visitation could be ordered where adoption is by “a close relative”).

18. *Id.* (unless the child has been adopted; yet nonparent visitation may be ordered where adoption was by “a close relative”).

19. *Id.* (statute also recognizes “reasonable visitation rights may be granted to any other relative of the minor or other person having an interest in the welfare of the child”). New grandparent visits could also arise upon the death of a parent when the grandparents had earlier secured visits during a marriage dissolution proceeding and later seek to modify the divorce court order. *See, e.g., Moreno v. Perez*, 363 S.W.3d 725 (Tex. App. 2011). As well, grandparents, upon the death of parents, can easily acquire custody of their grandchildren via guardianship appointments when the deceased parents provided for such custody in written instruments. *See, e.g., UTAH CODE ANN. § 75-5-202.5* (LexisNexis 2015) (no notice required to anyone before appointment becomes effective), applied in *In re A.T.I.G.*, 293 P.3d 276 (Utah 2012).

20. 750 ILL. COMP. STAT. 5/607 (a-3), (a-5)(1)(A-5), (a-5)(1)(E) (2015).

21. *Id.* at 607(a-5)(3) applied in *Flynn v. Henkel*, 227 Ill. 2d 176, 177, 880 N.E.2d 166, 167 (Ill. 2007) and *In re Anaya R.*, 2012 IL App (1st) 121101.

22. *Supra* note 12.

23. *See, e.g., In re M.M.D.*, 213 Ill. 2d 105, 108–09, 820 N.E.2d 392, 395-96 (Ill. 2004) (consolidated cases involving maternal grandparents seeking guardianship of deceased daughter’s child with

### III. THE 2015 STATUTE ON THIRD PARTY CHILDCARE

The 2015 changes to the MDM Act recognize “visitation”<sup>24</sup> opportunities for “step-parents”<sup>25</sup> and other nonparents, including grandparents.<sup>26</sup> Such opportunities could only be pursued, however, “if there has been an unreasonable denial of visitation by a parent and the denial has caused the child undue mental, physical, or emotional harm,”<sup>27</sup> with the burden on the petitioner to show such unreasonableness and harm.<sup>28</sup> Further, such opportunities can only be pursued by non-parents, including stepparents and grandparents, under certain conditions, including where a child’s parent is deceased or missing;<sup>29</sup> a parent is incompetent;<sup>30</sup> a parent is incarcerated;<sup>31</sup> the parents are separated or divorced and at least one parent does not object to nonparent visitation;<sup>32</sup> or the parents are unwed and not living together where their parentage has been legally established.<sup>33</sup> Thus, strong and beneficial stepparent-stepchild and grandparent-grandchild familial relationships are now subject to parental veto as long as there is no “undue” harm to the children. This is true even where the children are themselves well-adjusted and capable of weathering storms due to the guidance of their stepparents or grandparents and where longstanding relationships were invited and supported by the parents who now act unreasonably in denying visitation by ending loving relationships they long encouraged.<sup>34</sup> Superior parental rights here run amok.

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unwed biological father wherein parties had earlier agreed to a consent order awarding permanent custody to father and recognizing for the grandparents “specific and detailed visitation rights, telephone access to the child, information about the child’s education and medical care, and authorization to speak with child’s teachers, school personnel, counselors and physicians”). A comparable case outside of Illinois is *Evans v. Sangster*, 768 S.E. 2d 278 (Ga. Ct. App. 2015) (order in a dissolution case).

24. SB 0057, at 602.9 (a)(4) (defined as “in-person time spent” with a child, including “electronic communication,” defined in 602.9 (a) (1)).
25. *Id.* at 602.9 (a) (3) (defined as “a person married to a child’s parent, including a person married to the child’s parent immediately prior to the parent’s death”).
26. *Id.* at 602.9 (a)(4) (“visitation” between a child and the child’s grandparent, great grandparent, sibling or any other person designated by a deployed military parent “to exercise reasonable substitute visitation in the best interests of the child,” per 602.7 (e)).
27. *Id.* at 602.9 (c)(3).
28. *Id.* at 602.9 (c)(4).
29. *Id.* at 602.9 (c)(1)(A).
30. *Id.* at 602.9 (c)(1)(B).
31. *Id.* at 602.9 (c)(1)(C).
32. *Id.* at 602.9 (c)(1)(D).
33. *Id.* at 602.9 (c)(1)(E).
34. The proposed amendments 2012 to the Illinois MDM Act arising from the General Assembly study would have allowed many former stepparents to be eligible for “an allocation of parenting time” if the relationships between the parents and stepparents ended. HB 6192, at 750 ILCS 5/601.2(b)(3). The Proposed MDM Act of 2012, however, recognized limited standing for current and former stepparents, as equitable parents, who child-cared to seek an “allocation of parental responsibilities.” Such standing depended upon the death or disability of a legal parent.

A different set of proposed changes to the MDM Act in 2015 would have differentiated between third party childcare opportunities for grandparents and stepparents.<sup>35</sup> While it would have continued the very limited recognition of third party stepparent childcare,<sup>36</sup> it would have expanded significantly “reasonable visitation rights” involving third party grandparent childcare.<sup>37</sup> In particular, grandparent visitation would be sanctioned for a child in a “dual parent household if there is an unreasonable denial of visitation by a parent and a grandparent has maintained a significant beneficial relationship with the child” for at least 12 months “immediately preceding the severance of that relationship by the parent.”<sup>38</sup> Here again a lack of biology can trump serving the child’s best interests, as grandparents, but not stepparents, are usually biologically tied.

#### IV. NEW ILLINOIS LAWS ON THIRD PARTY CHILDCARE

##### A. Stepparent Childcare

How might Illinois third party stepparent childcare laws be improved? One method involves extending opportunities for continuing stepparent-stepchild relationships post dissolution in order to serve the best interests of the children. Court orders on post dissolution stepparent childcare, of course, must respect each adoptive or biological parent’s superior rights. Therefore, any such order should require more than “a thinned-out conception” of a former stepparent as a child caretaker.<sup>39</sup> But such an order need not always be preceded by a finding of five years of residency, a

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HB 6192, at 750 ILCS 5/601.2(b)(2). The 2012 proposal recognized both a legal parent, defined as “a biological or adoptive parent,” HB 6192, at 750 ILCS 5/600, and an “equitable parent,” defined as one who is not a legal parent, but who is obligated by court order to pay child support; is a stepparent; lived with the child for at least two years and reasonably believed he or she was “the child’s biological parent;” or, “lived with the child since the child’s birth or for at least 2 years, and held himself out as the child’s parent . . . under an agreement with the child’s legal parent” or legal parents. HB 6192, at 750 ILCS 5/600.

35. H.B. 1414, 99th Gen. Assemb., Reg. Sess. (Ill. 2015) (as originally introduced on Feb. 6, 2015) [hereinafter HB 1414].

36. HB 1414, at 750 ILCS 5/607 (b)(1.5).

37. *Id.* at 607 (a-5) (1.5).

38. *Id.* A presumption of “a significant beneficial relationship” arises, *inter alia*, when the child resided continuously with the grandparent for at least half a year within the past year (“with or without the current custodian present”); when the grandparent was the “primary caretaker” for at least 6 months; or when the grandparent had “frequent or regular contact or visitation with the child throughout the past year.

39. Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute’s Treatment of DeFacto Parents*, 38 HOFSTRA L. REV. 1103, 1109 (2010) (warning against “a thinned-out conception of parenthood” that is “primarily a function of co-residence” and that “would give former live-in partners access to a child” even when opposed by the legal parent, “nearly always a child’s mother”), employed in *In re B.M.H.*, 179 Wash. 2d 224, 257, 315 P.3d 470, 486 (2013) (Madsen, C.J., concurring in part and dissenting in part).

finding that the child is at least 12, or a finding of parental absence or incapacity. And it need not always be accompanied by a finding of detriment to the child if stepparent childcare is ended, at least where each adoptive or biological parent earlier strongly supported a parental-like role for the stepparent.<sup>40</sup> Such earlier support can be deemed to constitute a ceding of, or a form of consent to, a later diminishment of superior parental rights.<sup>41</sup>

Another method for expanding stepparent childcare opportunities, regardless of whether a former stepparent generally has childcare opportunities in a former stepchild upon dissolution, involves childcare opportunities when a single parent, either then married or once married to a stepparent, dies.<sup>42</sup> Here there would be no preexisting parent with superior parental rights.<sup>43</sup> And here, a child's best interests often would be well served by continuing or renewing third party stepparent childcare. Such special stepparent childcare standing could be made contingent upon a single parent's death where the stepparent had a "substantial relationship" with the stepchild<sup>44</sup> and where the child's best interests would be served.<sup>45</sup>

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40. See FLA. STAT. §752.001(3) (2015) (no grandparent visitation unless otherwise "there is significant harm to the child").

41. Thus, a parent's current wishes need to be accorded less "special weight" when preceded by that parent's earlier longstanding wishes for strong and loving stepparent-stepchild relations, especially where the parent's support for such relations continued for at least some time after the relationship between one parent and the stepparent soured. See, e.g., *Middleton v. Johnson*, 633 S.E. 2d 162, 168-9 (S.C. Ct. App. 2006) (a single parent "cannot maintain an absolute zone of privacy [around his or her child] if he or she voluntarily invites a third party to function as a parent to the child"). See, generally, Jeffrey A. Parness, *Constitutional Constraints on Second Parent Laws*, 40 OHIO N.U. L. REV. 811 (2014) (demonstrating how such adoptive or biological parent support similarly allows, e.g., a former stepparent to be designated a second parent) [hereinafter *Constitutional Constraints*]. Concededly, where there are two parents, the parent not personally involved with the stepparent (as by marriage) will have his/her wishes adjudged a bit differently than the involved parent. And, concededly there may be 2 parents and 2 stepparents vying simultaneously for childcare opportunities for a single child. Any such stepparent childcare disputes are not that different from disputes in third party settings between 2 parents and 2 sets of grandparents except it is more likely that stepparents acted in parental-like roles than grandparents.

42. Compare MONT. CODE ANN 40-4-221 (2015) and MONT. CODE ANN. 40-4-211(6) (2015) (upon death of "a parent," a nonparent who had established with the child a child-parent relationship can seek "a parenting plan hearing") with COLO. REV. STAT. ANN. § 14-10-123(1)(c) (West 2015) (nonparent can seek "allocation of parental responsibilities" if nonparent "has had the physical care of a child" for more than 182 days, as long as action is commenced within 182 days "after termination of such physical care").

43. See, e.g., *In re A.P.P.*, 251 P.3d 127, 129 (Mont. 2011) (parental interest recognized in stepfather after child's mother died, where substantial evidence established that father "engaged in conduct contrary to the child-parent relationship").

44. *Troxel v. Granville*, 530 U.S. 57, 76-77 (2000) (Souter, J., concurring in the judgment).

45. Comparably, at times when a parent places a child for adoption with a certain couple, that parent can later seek renewed custody if the adoption fails. Here the termination of parental rights is contingent. See, e.g., *A.D.R. v. J.L.H.*, 994 So.2d 177 (Miss. 2008). As well when a designated adopting person or couple (like the grandparents) die, at times a parent may not be able to resurrect fully her superior rights, but might be given an opportunity to reclaim custody, as upon a



Such third party stepparent childcare seemingly could be sought when, for example, a deceased's parent's sibling formally adopts his/her nephew/niece. Such third party childcare, of course, differs from parental childcare, as when a stepparent formally adopts his/her deceased spouse's child.

Of course, when a parent dies and the other parent (natural or adoptive) secures custody, a stepparent could also be afforded third-party childcare opportunities, as when the stepparent stood *in loco parentis*.<sup>46</sup> Here, of course, superior parental rights must be accommodated.

In Illinois, upon a single parent's death, "a person other than a parent" can seek custody of a child who "is not in the physical custody of one of his parents."<sup>47</sup> There is today no special statute (or presumption) favoring a present or former stepparent<sup>48</sup> even though a stepparent is far more likely to have developed a parental-like relationship with the child than any other third party (who, unfortunately, may be significantly motivated by the monetary awards potentially available in a wrongful death or survival action involving the parent's death).<sup>49</sup>

Another method for expanding third party stepparent childcare involves General Assembly adoption of a portion of the recently-revised Uniform Premarital and Marital Agreements Act. The Act recognizes the need for judicial deference to premarital and mid-marriage pacts between parents and stepparents on future stepparent childcare if parental death or

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showing by clear and convincing evidence that custody is in the child's best interests. *See, e.g.*, *D.M. v. D.R.*, 62 So. 2d 920 (Miss. 2011).

46. *See, e.g.*, *McKenzie v. Moore*, 453 S.W. 3d 686 (Ark. App 2015) (stepmother obtained child visitation as she established "*in loco parentis*" over natural mother's objection after father died).

47. 750 ILL. COMP. STAT. 5/601(b)(2) (2015).

48. *See, e.g.*, 755 ILL. COMP. STAT. 5/11-3(a), 11-5(a), 11-5(a-1), 11-5(b) (2015) (guardianship qualifications when legal parents are not available include a "best interest" test and no preference for a former stepparent, or "de facto" parent, with perhaps some preference for one who is designated in writing by a parent or parents as a guardian should the parent or parents die). Any special statute need not necessarily grant standing to a former stepparent to seek a childcare order; it may grant simply a right to be heard, with an opportunity to seek standing later in order to pursue renewed custody/visitation. *Compare* 755 ILL. COMP. STAT. 5/11 (2015) with 705 ILL. COMP. STAT. 405/1-5(2)(a) (2015) (any "relative caregiver" "has the right to be heard" in a child neglect and shelter proceeding, though not the right to be a party, *with* 705 ILL. COMP. STAT. 405/1-5(1) (2015)). For a review of American state laws on parental testamentary appointments of child guardians, *see* Alyssa A. DiRusso and S. Kristen Peters, *Parental Testamentary Appointments of Guardians for Children*, 25 QUINNIPIAC PROB. L.J. (2012) (urging statutory reforms so that parental wishes will more likely be followed). Not only is there no special statute on former stepparents, but also there are times when former stepparents seem excluded from possible consideration for undertaking the care of a former stepchild. *See, e.g.*, 20 ILL. COMP. STAT. 505/7(b) (2015) (Department of Children and Family Services may consider a child's placement with a relative, who includes "the child's step-father, step-mother or adult step-brother or step-sister," but not a former step-father or step-mother).

49. Fortunately, at times, third party visitation issues are resolved by reference to, *inter alia*, "the motivation of the adults in either prohibiting or pursuing visitation." *Waddle v. Waddle*, 447 S.W.3d 653, 655 (Ky. Ct. App. 2014) (citing *Walker v. Blair*, 382 S.W.3d 862, 871 (Ky. 2012)).

disability, or even a marriage dissolution, ensues. The Uniform Act, promulgated in July 2012 by the National Commissioners on Uniform State Laws, expressly recognizes pacts on “custodial responsibility” between parents and either future or current stepparents, with the pacts serving as “guidance” for courts who maintain ultimate decision making authority over childcare disputes.<sup>50</sup>

#### B. Grandparent Childcare

How might Illinois third party grandparent childcare laws be improved? Improvements could come via statutory approaches akin to, but somewhat different from, the aforementioned suggestions on expanding third party stepparent childcare. As with stepparents, parental acquiescence in the development of strong bonds between grandchildren and grandparents should be considered, as should the children’s best interests and the effects on superior parental rights of any court-ordered grandparent childcare over parental objections. And, as with stepparents, premarital and mid-marriage agreements on future grandparent childcare should guide, to some extent, trial courts.

Differences between stepparents and grandparents are warranted, however, because far more stepparents than grandparents act as quasi-parents upon the express or implied acquiescence of parents. As well, upon marital dissolutions involving parents and stepparents, grandparents, though not stepgrandparents, remain commonly recognized family members for the affected children. This suggests for some the import of the traditional distinctions between blood and nonblood relatives.<sup>51</sup>

### V. CONCLUSION

Recent childcare reforms embodied within the 2015 Illinois Parentage and Marriage Dissolution Acts fail to address anew stepparent and grandparent third party childcare. This is especially problematic as there are limited opportunities for parental status under Illinois law for stepparents and grandparents who provide significant childcare clearly beneficial to children. General Assembly action is warranted via new, separate statutes on stepparent and grandparent third party childcare.<sup>52</sup>

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50. The Act’s provision on “custodial responsibility” is reviewed in Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GA. ST. U. L. REV. 343 (2015).

51. As well, some would see differences between grandparents whose grandchildren were or were not formally adopted by the children of the grandparents.

52. New statutes recognizing expanded stepparent and grandparent third party childcare should delegate broad discretion to Illinois circuit judges regarding childcare orders. Explicit norms on, for example, “reasonable visitation,” are difficult to craft as there is a “uniqueness that persuades family units.” *In re Visitation of L-A.D.W.*, 38 N.E.3d 993 (Ind. 2015).