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The New “Extended Family” —  
“De Facto” Parenthood and Standing  
Under Chapter 2\*

*Gregory A. Loken\*\**

Can parental rights—and, by implication, children—be acquired by adverse possession? More concretely, as now proposed by the American Law Institute, should ex-stepparents, ex-live-ins, and other adults who have shared living quarters with a parent and a child for two years have the right to litigate custodial rights with the natural parents?

Given the importance of the family as the repository of many of our deepest hopes for happiness—and what Justice Blackmun called the “vital interest in preventing the irretrievable destruction of . . . family life”<sup>1</sup>—it may not seem to be a cause for celebration that the American Law Institute has found it necessary to promulgate the comprehensive *Principles of the Law of Family Dissolution* (the “Principles”), which, among other proposals, offer strong protection for the rights of “de facto” parents.<sup>2</sup> But the *Principles* are a welcome document. In the face of growing chaos in judicial and legislative approaches to family problems, especially those involving allocation of responsibility for children,<sup>3</sup> it offers an opportunity for clarity

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1. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

2. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft no. 4, 2000) (approved May 15–18, 2000, scheduled for publication in 2001) [hereinafter PRINCIPLES (Tentative Draft No. 4)] and PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 3, pt. I, 1998) [hereinafter PRINCIPLES (Tentative Draft No. 3, pt. I)].

3. In the past thirty years at least eight different presumptions for determining child custody have prevailed in statutes and case law, often in combination with each other and a variety of other criteria: (1) the now generally abandoned “tender years” doctrine, which gave strong preference to maternal custody of pre-adolescent children, see, e.g., *Silvestri v. Silvestri*, 309 So. 2d 29 (Fla. Dist. Ct. App. 1975); (2) the general “best interests” test, which requires a court to determine in which placement a child is most likely to flourish, with several factors

and synthesis. And in its bold attempt to reformulate—really to revolutionize—the law of child custody, it evidences a deep commitment to the protection of children in circumstances where traditional family structures are absent or in disarray.

The custodial principles contained in the ALI's new document are, of course, not the only radical proposals it encompasses.<sup>4</sup> But chapter 2 of the new document—"Principles Governing the Allocation of Custodial and Decisionmaking Responsibility for Children"<sup>5</sup>—is arguably the most crucial component of a new vision of the family offered by the *Principles*. For it is in this section that the drafters outline who will have power over the lives of children, and propose an important new category of nonbiological but legal par-

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usually listed as "relevant" but not dispositive, see UNIF. MARRIAGE & DIVORCE ACT § 401, 9A U.L.A. 263–64 (1998); (3) the "primary caretaker" presumption, which awards custody to the parent who had spent most time meeting the child's physical and developmental needs, and which seemed to gain ground rapidly since its first adoption in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981), only to fall from favor in many states, including West Virginia, which eliminated it in 1999, 1999 W. Va. Acts, 2d. Extra. Sess., Ch. 10 (codified at W. VA. CODE ANN. §§ 48-11-101 to -11-604 (1999)); (4) a now widely favored presumption in favor of joint custody, which in theory, though often not in practice, gives equal custodial responsibility to each parent, with some states subordinating this to the general "best interests" test, PETER N. SWISHER ET AL., FAMILY LAW: CASES, MATERIALS AND PROBLEMS 1169–70 (1998); (5) the "approximation" standard adopted by chapter 2, and recently by West Virginia, W. VA. CODE ANN. § 48-11-206(a) (1999) (requiring courts to "allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation"); (6) a presumption *against* awarding custody to a parent who has engaged in domestic abuse, see, e.g., *In re Heather*, 60 Cal. Rptr. 2d 315 (1996); (7) a presumption against awarding custody to a parent involved in acts considered to involve moral turpitude, especially sexual promiscuity or homosexuality, see Linda D. Elrod et al., *A Review of the Year in Family Law: Children's Issues Dominate*, 32 FAM. L.Q. 661, 682–84 (1999); and (8) a presumption *in favor* of parents who show the "ability . . . to allow an open and loving frequent relationship between the child and the other parent," ALASKA STAT. § 25.24.150(c)(6) (2000). For a recent overview of state statutes and the factors they list for custody determinations, see Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: A Search for Definitions and Policy*, 31 FAM. L.Q. 613, 661 (1998).

4. Indeed, in announcing final adoption of the *Principles*, the ALI itself referred to the "controversial chapters on domestic partners and on the effect to be accorded prior agreements between the partners upon dissolution of their relationship." *Institute Gives Final Approval to Family Dissolution and Transnational Insolvency Projects*, A.L.I. REP. (Summer 2000), available at <http://www.ali.org> (last visited Jan. 3, 2001). Because of the interaction of the domestic partnership proposals in *Principles* with those regarding child custody, see *infra* notes 42–68 and accompanying text, this paper argues that the controversy is warranted.

5. Chapter 2 appeared in original, tentative form in PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, with additions and revisions to the sections of most relevance here in PRINCIPLES (Tentative Draft No. 4), *supra* note 2. All citations of sections of chapter 2 will be to their appearance in PRINCIPLES (Tentative Draft No. 4) unless otherwise noted.

ent—the “de facto parent.” Outside intact biological families—and occasionally even within them—this new legal term of art promises to have sweeping importance. De facto parenthood creates a new kind of “extended family” for children, one in which three, four, or more adults may have status as one type or another of rights-holding parent. As such, the concept deserves careful scrutiny—at first, as here, on its own terms and later in the full context of the contentious public debate over the extent to which traditional family structures must yield to new policy priorities and empirical understandings.

This article will urge rejection of the de facto parenthood provisions of chapter 2, while acknowledging that such informal caretaking relationships can acquire serious, even fundamental importance for a child.<sup>6</sup> Instead, it will examine the relationship between that category and what the drafters identify as the two central priorities of their enterprise: (1) “to provide determinate and predictable outcomes [in custody cases] that benefit children in the vast majority of cases,” and thus prevent “unnecessary litigation, the hiring of expensive experts, and strategic or manipulative behavior by parents,”<sup>7</sup> all while (2) serving the “*individualized . . . interests of individual children.*”<sup>8</sup> Part I will briefly describe the structure of chapter 2’s approach to allocations of “custodial responsibility” over children. Part II will outline the importance, recognized by the drafters, of limitations on *standing* in disputes over children and examine the structure of section 2.04, which essentially limits standing to persons fitting into one of the defined categories of “parent,” including “de facto parent,” in section 2.03. Part III will examine section 2.03’s definition of “de facto parent” and argue that its indeterminacy creates an enormous potential for manipulative litigation, unfair bargaining, and interference with parent-child relationships—especially in con-

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6. The most influential, early explication of the theory of nonexclusive parenthood on the concept of de facto parenthood is found in Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984). See also Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045 (1996); John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351 (1998); Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769 (1999).

7. Katharine T. Bartlett, *Reporter’s Memorandum to the Members of the Institute, PRINCIPLES* (Tentative Draft No. 3, pt. 1), *supra* note 22, at xxiii.

8. *Id.*, *Introduction*, at 1.

junction with the principles of chapter 6<sup>9</sup> regarding domestic partners. Part IV will briefly contrast the broad new custodial privileges chapter 2 proposes granting to “de facto” parents with the sharp curtailment it would impose on the rights of the *biological* extended family, especially grandparents—despite what seem to be that latter group’s smaller (or even nonexistent) incentives to engage in strategic use of child custody litigation. Finally, Part V will question the reasonableness of the exclusion in section 2.04 of standing for *children themselves* in the process of determining which relationships will benefit them as they grow toward their own autonomy, and suggest that giving children standing in custody disputes to seek continued access to de facto parents and other adults would be a far less dangerous approach to preserving their extended “family” than that contained in chapter 2.

#### I. THE STRUCTURE OF CHAPTER 2’S CUSTODY RULES

Chapter 2 seeks to establish “[p]rinciples governing the allocation of custodial and decisionmaking responsibility for a minor child” in all circumstances “when the [child’s] parents do not live together,” and in some when they do.<sup>10</sup> Foremost among those principles is the requirement that courts should honor parental agreements concerning custody,<sup>11</sup> which fits together with the general preference in the *Principles* for encouraging settlement of disputes through private agreement.<sup>12</sup> Under section 2.07, a court is permitted to reject a custody agreement only if it is “not knowing or voluntary” or “would be harmful to the child”—and then the court is required to give the parents another opportunity to negotiate an agreement.<sup>13</sup> There is no requirement, moreover, that parents produce evidence of voluntary, good faith negotiation or of the agree-

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9. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, at 1–60.

10. PRINCIPLES (Tentative Draft No. 3, pt. 1), *supra* note 2, § 2.01, at 17. Even if a child’s parents are living together, chapter 2 authorizes judicial intervention when “the circumstances underlying a child’s residence with a de facto parent substantially change.” *Id.* § 2.01(2). For a discussion of the concept of “de facto” parenthood and its relationship to litigation over children, see *infra* text accompanying notes 27–67.

11. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.07, at 246–47.

12. Outside of the child custody area, the *Principles* require courts to honor private agreements, with strictly limited exceptions, regarding child support, *id.* § 3.11, property division, *id.* § 4.01, compensatory payments, *id.* § 5.01, and premarital and marital agreements, *id.* § 7.03.

13. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.07, at 246–47.

ment's benefit for their child except where the court has somehow received "credible information" of domestic or child abuse.<sup>14</sup> As the drafters admit, section 2.07 "requires greater deference" to custody agreements than does the prevailing law of most jurisdictions.<sup>15</sup>

Where parents fail to agree, chapter 2 authorizes broad judicial involvement to establish and enforce a "parenting plan" for each child—that is, "an individualized and customized order" that specifies "in some detail" the times when each parent will have responsibility for the child and the allocation between the parents of authority to make decisions on such matters as health care and education.<sup>16</sup> In a sharp break with current legal terminology, chapter 2 abandons all distinctions between "custody" and "visitation," merging them into the term "custodial responsibility,"<sup>17</sup> and so makes litigation over the parenting plan the sole forum for any disputes over claims to continuing contact with a child.<sup>18</sup>

To achieve reasonably predictable results in disputes over custodial allocations in the parenting plan, section 2.09 declares that "the court should be required to allocate custodial responsibility so that

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14. *Id.* The court is permitted, "on any basis it deems sufficient," to conduct an evidentiary hearing on the agreement's compliance with the knowing, voluntary, and no-harm-to-the-child standards, but such a hearing is mandatory only if "credible information" of either child abuse or domestic abuse is presented to the court. *Id.* § 2.07(2). In a comment, the drafters appear thoroughly reconciled to the prospect that very few evidentiary hearings will result from this grant of discretionary review, on the grounds that courts seldom have sufficient resources to conduct many such hearings and that such hearings are of dubious value outside cases of child or domestic abuse. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.07 cmt. a, at 80–81.

15. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.07 cmt. a, at 80–81. The Reporter acknowledges that, in contrast to section 2.07, the "general rule is that courts are not bound by parental agreements regarding the custody of children, on the grounds that while parents can bargain [a]way their own rights, they cannot bargain away those of their children, which the court has an obligation to protect. *Id.* § 2.07 Reporter's Notes cmt. a, at 85. A recent study of actual outcomes in custody cases found that in 134 of the 705 cases where the parents appeared to agree on a custodial arrangement the decree provided for a different outcome. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 103 (1992).

16. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, *Introduction*, at 8–9. The components of the "parenting plan" are set forth in section 2.06(3). *Id.* at 64–66.

17. *Id.* at 9. Thus, "custodial responsibility" is defined as "physical custodianship and supervision of a child," which "usually includes, but does not necessarily require, residential or overnight responsibility." *Id.* § 2.03(4), at 37–38. This article will follow that practice by using "custody" to encompass traditional rights to both custody and visitation.

18. Third parties can also apparently obtain custodial rights under a "parenting plan" to which all parents have agreed. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.07, at 246–47.

the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation"<sup>19</sup>—called the “approximation standard” by Elizabeth Scott, who first proposed it in 1992.<sup>20</sup> The approximation standard, according to a comment to section 2.09, “assumes that the division of past caretaking functions correlates well with other factors associated with the child’s best interests, such as the quality of each parent’s emotional attachment to the child and the parents’ respective parenting abilities,” and that such functions provide a “more objective” guide to judicial decision.<sup>21</sup> Nevertheless, as “caretaking functions” are defined in chapter 2, they do not always easily admit of concrete determination. They include not merely functions, such as feeding and bathing, that “meet the daily physical needs of the child,” but also less tangible functions such as “direction of the child’s various developmental needs,” “discipline, instruction in manners,” and “the development and maintenance of appropriate interpersonal relationships with peers, siblings, and adults.”<sup>22</sup> As Professor Scott conceded while introducing the “approximation” concept, “[t]ranslating evidence about past parental care and responsibility into a plan for future custody will often be a formidable task that is prone to error.”<sup>23</sup>

Moreover, this “objective” standard is nevertheless subject to a

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19. *Id.* § 2.09(1), at 247.

20. Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 630–43 (1992).

21. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.09 cmt. b, at 113. In contrast to chapter 2, however, Scott grounds her support for an “approximation” approach explicitly on the likelihood that it best reflects “the parents’ true preferences” for custody, which makes it “the best predictor of the future stability of custody arrangements.” Scott, *supra* note 20, at 637.

22. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.03(6), at 38–39. This is not by any means intended as a criticism of the standards, which are far more specific than the traditional “best interests” approach, and which largely track the factors used in the “primary caretaker” standard first adopted by a court in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). They find support, too, in the theory of “psychological parenthood” first advanced by Goldstein, Freud, and Solnit in the 1970s. JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD* 11–13 (1996). For a discussion of the ways in which the chapter 2 standards are in tension with the original theory of “psychological parenthood,” see *infra* text accompanying notes 74–77.

23. Scott, *supra* note 20, at 639. Scott also acknowledges the possibility of “predivorce behavioral effects” of an approximation standard, caused by parents contemplating divorce deciding to “behave in a way that exaggerates their participation in their child’s life.” *Id.* at 639 n.75.

series of exceptions that vary widely in their potential to affect predictable decision making—ranging on the one hand from recognition of written post-separation agreements and deference to “the firm and reasonable preferences of a child who has reached a [legally specified] age” to, on the other, avoidance of “extremely impractical” allocations or adjustments in custodial allocations to reflect “a gross disparity in the quality of the emotional attachment between each parent and the child.”<sup>24</sup> Finally, and perhaps most dangerous of all to the quest for objectivity, the parenting plan must ultimately “permit the child to have a relationship with each parent.”<sup>25</sup> What, for example, does “relationship” mean? Is it to be the subject of (often conflicting) expert testimony?

## II. STANDING UNDER CHAPTER 2

Even the best standards for allocating custody, though, can be manipulated in litigation, and the last decade has brought increasing recognition of the role that *standing* plays in protecting crucial family interests.<sup>26</sup> Liberal standing rules encourage, or at least tolerate,

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24. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.09(1), at 248. Exceptions to the past caretaking standard are also provided to “keep siblings together when . . . necessary to their welfare,” to recognize pre-separation agreements “that would be appropriate to consider in light of the circumstances as a whole,” to remedy “gross disparit[ies]” in “each parent’s demonstrated ability or availability to meet the child’s needs,” to accommodate a parental relocation, and “to avoid substantial and almost certain harm to the child.” *Id.* at 248–49.

25. With respect to a “legal parent or a parent by estoppel who has performed a reasonable share of parenting functions,” the parenting plan must presumptively provide each such parent a share of custodial time at least equal to a statewide minimum standard. *Id.*

26. See, e.g., Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319, 365–69 (1994) (arguing that visitation standards are a separate question from questions of standing); Lawrence Schlam, *Third-Party Standing in Child Custody Disputes: Will Kentucky’s New “De Facto Guardian” Provision Help?*, 27 N. KY. L. REV. 368, 405 (2000) (arguing for “child-oriented” approach to third-party standing); see also *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (O’Connor, J., plurality opinion) (“[T]he burden of litigating a domestic relations proceeding can itself be ‘so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make basic determinations for the child’s welfare becomes implicated,’” (quoting *Troxel*, 530 U.S. at 101 (Kennedy, J., dissenting))); *Castagno v. Wholean*, 684 A.2d 1181 (Conn. 1996) (construing open-ended visitation statute to require prior family disruption before third parties have standing to seek visitation). In many ways, the most powerful statement of the dangers posed by indeterminate standing requirements in custody actions remains. *Garska v. McCoy*, 278 S.E.2d 357, 359–62 (W. Va. 1981) (noting that “it is likely that the primary caretaker will have less financial security than the nonprimary caretaker and, consequently, will be unable to sustain the expense of custody litigation”).

more frequent litigation, and as Catherine Bostock has explained, custodial litigation may directly harm children by exposing them to acrimony, stress, and conflicts of loyalty—as well as the danger of biased or subjective decision making under vague standards.<sup>27</sup> For the custodial parent forced to defend an action for custody, such a suit means heavy distraction and significant costs.<sup>28</sup> Thus, the custodial mother in *Troxel v. Granville*<sup>29</sup> had to hire two expert witnesses in defending against the grandparents' visitation petition,<sup>30</sup> and ultimately had to file an affidavit of "financial need" to seek reimbursement of her attorney's fees.<sup>31</sup> Commentators have long recognized the ugly possibility that, in the face of such costs, a parent might feel constrained to make concessions in the division of marital property or child support in order to avoid the risk of losing custody rights.<sup>32</sup>

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27. Bostock, *supra* note 26, at 365–68. While the standards of chapter 2 certainly are more definite than the traditional "best interests" standard to which Bostock referred, the drafters seem freely to acknowledge that some custodial disputes are bound—even under the new standards—to have "poor" results. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, *Introduction*, at 16.

28. Thus, in a 1988 survey, Donald H. Stone documented that the median attorney's fee for representation of a parent in a contested child custody case was in excess of \$3000. *Just Molly and Me and Baby Makes Three—Or Does It? Child Custody and the Live-In Lover: An Empirical Study*, 11 PACE L. REV. 1, 49–51 (1990). Expert testimony, so integral to contesting many elements of a custody claim, significantly adds to the expense.

29. 530 U.S. 57 (2000).

30. *In re Troxel*, 940 P.2d 698, 699 (Wash. Ct. App. 1997).

31. *In re Custody of Smith*, 969 P.2d 21, 31 (Wash. 1998), *aff'd*, 530 U.S. 57 (2000) (remanding for consideration of the application). See also *Troxel*, 530 U.S. at 75 (O'Connor, J., plurality opinion) (noting that "the litigation costs incurred by Granville on her trip through the Washington court system and to this Court are without a doubt already substantial").

32. The potential for such tradeoffs was first shown in Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). The dangers of strategic use of custody rules to disadvantage the parent with the strongest interest in keeping custody was more specifically developed in Scott, *supra* note 20, at 643–56, which relies on the insights of game theory. The Reporter for chapter 2 acknowledges this "concern" and cites a survey of attorneys in which almost half acknowledged that they had "represented female clients who conceded property rights in order to avoid a child-custody dispute." PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.07, Reporter's Notes cmt. a, at 85. To be sure, one important California study found no evidence of tradeoffs between custody arrangements and child support awards. MACCOBY & MNOOKIN, *supra* note 15, at 154–59. Yet, that study does little to undermine the general perception that custody tradeoffs exist, for they would be far more likely to affect marital property and alimony awards than child support amounts—which are generally subject, as in California, to rigid statewide formulas. See *id.* at 157 (citing child support schedules as "likely" explanation for lack of evidence of strategic behavior). See also Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On Dividing the Child*, 92 MICH. L. REV. 1808, 1838 (1994) (arguing that

Chapter 2 attempts to address these concerns in section 2.04, which establishes the boundaries of standing to initiate and to intervene in actions over custodial responsibility. Standing to *initiate* an action is limited to a “legal parent,” a “parent by estoppel,” a “de facto parent,” a “biological parent” who is no longer a “legal parent” but who has reserved some parental rights under an agreement with a “legal parent,” and any person previously given responsibility for the child under an existing court-approved parenting plan.<sup>33</sup> As will be explained in the next section,<sup>34</sup> all of these labels for “parent” are terms of art carefully defined by section 2.03. Standing to *intervene* in an already-initiated action is limited to those various types of “parents,” and to other individuals or public agencies, “[i]n exceptional cases” if the court determines the intervention is “likely to serve the child’s best interests.”<sup>35</sup>

As will shortly appear, this approach to standing represents at once a dramatic expansion and a sharp contraction of existing standing rights in child custody cases. Stepparents, live-in sexual partners, and even roommates may be able plausibly to advance claims to “de facto” parenthood that will permit them to initiate custody litigation with a natural parent. Moreover, because of the presumption that custodial allocations will substantially mirror prior caretaking behavior, these putative “de facto” parents will have standing to pursue not just classic visitation rights, but virtually coequal physical custody. On the other hand, grandparents, who have won the right in virtually every state to petition for visitation at least under some circumstances,<sup>36</sup> would be precluded from initiating such a proceeding in court and would be able to intervene in ongoing custody proceedings only in “exceptional cases.” That these procedural changes are bold, even momentous, is hardly in doubt. Whether they are consistent with the central purposes of standing requirements—protection both of children and of legitimate interests in family autonomy—is an entirely different matter.

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the Maccoby & Mnookin study does not contradict the notion that “bargaining in the shadow of the law” characterizes marital dissolutions).

33. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.04(1), at 232–33.

34. See *infra* text accompanying notes 40–53.

35. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.04(2), at 233.

36. See *infra* text accompanying notes 67–90. *Troxel v. Granville*, 530 U.S. 57, 73 (2000) (O’Connor, J., plurality opinion). For an overview and analysis of the statutes, see Bostock, *supra* note 26, at 331–47.

## III. STANDING AND THE NEW EXTENDED FAMILY

One of the most appealing features of chapter 2 is that it recognizes, both in principle and in concrete application, the quite incontrovertible fact of modern life that “children are often cared for by adults who play very significant roles without replacing their legal parents.”<sup>37</sup> Just so the Supreme Court plurality in *Troxel v. Granville* described the “changing realities of the American family” in which “grandparents and other relatives undertake duties of a parental nature” and state laws attempt to “ensure the welfare of the children [in such households] . . . by protecting the relationships those children form with such third parties.”<sup>38</sup> In that case, a clear majority of the Court seemed to suggest that states may constitutionally grant legal protection to such relationships—through, for example, carefully limited grandparent visitation statutes—even over parental objections.<sup>39</sup>

Even against this background, though, chapter 2’s protection of third-party rights in children is strikingly broad. For, as the term “parent” is defined in section 2.03, it includes not only a “legal parent” (that is, a person holding parental status on traditionally recognized grounds),<sup>40</sup> but also a “parent by estoppel”<sup>41</sup> and a “de facto

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37. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, *Introduction*, at 6.

38. 530 U.S. 57, 64 (2000) (O’Connor, J., plurality opinion). Fully 5.5% of children were living with grandparents, most of them in grandparent-supported homes, in 1997, up from 3.2% in 1970. KEN BRYSON & LYNNE M. CASPER, CENSUS BUR., U.S. DEP’T OF COMMERCE, CORESIDENT GRANDPARENTS AND GRANDCHILDREN 1–3, P23–198 (1999).

39. *Troxel*, 530 U.S. at 73 (noting that “we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter”), *id.* at 88 (Stevens, J., dissenting) (arguing that “children have . . . interests” in “family-like bonds” with nonparents that must be “balanced in the equation”), *id.* at 100–01 (Kennedy, J., dissenting) (arguing against facial invalidation of visitation statute, and concluding, “in short, 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”).

40. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.03(1)(a), at 201–03 (defining a “legal parent” as “an individual who is defined as a parent under other state law”) To this reader, the use of the term “legal parent” seems to invite unnecessary confusion, since chapter 2 proposes to give powerful “legal” status to “parent[s] by estoppel” and “de facto” parents as well as “legal” parents.

41. *Id.* § 2.03(1)(b), at 201–02 (defining a “parent by estoppel” to be, in summary, an individual who has been induced to believe in his paternity through representations of the mother and assumed parental responsibilities in reliance on that belief, or an individual who assumed “full and permanent” parental responsibilities for a child, including child support, pursuant to an agreement with the child’s legal parents and lived with the child for a significant period).

parent.”<sup>42</sup> Each of these additions proposes an extraordinary shift in legal paradigms of parenthood,<sup>43</sup> but because the “de facto” parenthood category is of most practical relevance in debating the scope of *standing* in child custody litigation,<sup>44</sup> it is that category which warrants immediate attention here.

#### A. Defining “De Facto” Parenthood

From the perspective of litigation, chapter 2 defines “de facto parent”<sup>45</sup> to establish four elements for an individual plausibly to claim such status as against a biological or other “legal” parent: (1) residence with a child for at least two years, (2) a motivation “primarily other than financial compensation,” (3) *either* “the agreement of a legal parent” *or* the “complete failure . . . of any legal parent to perform caretaking functions,”<sup>46</sup> and (4) having “regularly per-

42. *Id.* § 2.03(1)(c), at 202–03.

43. Thus, it is plain from the text and commentary to sections 2.03 and 2.21 that chapter 2 contemplates the possibility that children will have three, four, or even more “parents.” See, e.g., *id.* § 2.21 cmt. b, illus. 4, at 257–58 (discussed *infra* at text accompanying notes 64–65). This is in sharp contrast with what the drafter of chapter 2 earlier recognized as the “exclusive status” of parenthood, accepted in the American legal tradition “with few exceptions,” in which at most two adults could share at any one time. Bartlett, *supra* note 6, at 879–86.

44. It is of course true that a “parent by estoppel” has standing to litigate custody with a biological parent, PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.04(b), at 232, but many persons fitting that definition, especially husbands of women who conceive a child extramaritally, already have such standing, see CAL. FAM. CODE. § 7551 (West 1997) (granting putative fathers limited right to seek blood tests to prove paternity), and in any case, a natural parent who has defrauded another into believing in his parenthood, or who has formally agreed to accept co-parenting with another, is hardly an attractive target for sympathy in facing subsequent litigation costs and anxieties.

45. Chapter 2 defines a de facto parent to be:

an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,

(i) lived with the child and,

(ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,

(A) regularly performed a majority of the caretaking functions for the child, or

(B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.03(c), at 202–03.

46. *Id.* The use of “any” in this last phrase seems to this reader needlessly ambiguous. Does it mean that where “any” *one* of the child’s biological parents had abandoned her, a claimant to de facto parenthood living with the deserted, functioning parent could dispense with the need to show that that parent had agreed to the formation of a parent-child relationship? Comment c(iii) to section 2.03 describes the section as permitting de facto status in the

formed a share of caretaking functions at least [equal to] . . . that of the parent with whom the child primarily lived.”<sup>47</sup> A comment to section 2.03 describes these requirements as “strict, to avoid unnecessary and inappropriate intrusion into the relationships between legal parents and their children.”<sup>48</sup>

But how strict are they really, especially when considered in the context of *standing*, prior to all the litigation costs and strains that can so burden parental autonomy? When sections 2.03 and 2.04 are read together, they seem to open the courthouse door to custodial claims to de facto parenthood by a broad array of people who have cared for, or lived in the same household with, a child. Most crucially, absent clear evidence of a “primarily” financial motive,<sup>49</sup> anyone who shared the same household with a biological parent and her child for a period longer than two years would almost certainly be able to threaten a suit for partial custody that would survive a motion to dismiss, or even summary judgment. The necessary vagueness in the description of many of the “caretaking functions,”<sup>50</sup> combined with the vagaries of witnesses and judges, would force any such biological parent to take the threat of such litigation very seriously.

Even the requirement that the applicant for “de facto” parenthood show “the agreement of a legal parent”<sup>51</sup> will do little to screen claims at the level of standing. It is noteworthy that, in contrast to parents by estoppel, who must show that they assumed a parental role pursuant to an agreement with *both* legal parents (if there are

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absence of an agreement only “when there has been a total failure or inability by *the* legal parent to care for the child.” PRINCIPLES (Tentative Draft No. 4), *supra* note 2, at 223 (emphasis added). However, this does not clearly explain what happens when there are *two* legal parents.

47. *Id.* § 2.03(c), at 202–03.

48. *Id.* § 2.03 cmt. c, at 219; *cf.* Shapiro, *supra* note 6, at 776–82 (arguing that chapter 2’s de facto parenthood standards are *too* strict because they will “exclude many, if not most, stepparents” and many lesbian and gay parents).

49. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.03(c)(ii), at 202–03. Many paid residential caretakers—such as classic “nannies”—would be excluded from standing under the test of “reasons primarily other than financial compensation.” *Id.* But relatives or close friends who care for a child, even if paid, might plausibly argue that their motivation was not “primarily” financial. Moreover, roommates whose basis for a relationship *with a parent* is primarily financial (e.g., rent sharing) might persuasively argue that later they undertook care of the parent’s child out of kindness or fondness, not for financial reasons. In any event, if it is protection of the *child’s* crucial relationships that is at the heart of the de facto parenthood proposals, it is difficult to understand this “financial reasons” exception—for how many small children know or understand the difference between paid and unpaid care?

50. *See supra* text accompanying notes 21–22.

51. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.03(c)(ii), at 202.

two),<sup>52</sup> de facto claimants need only show the consent of one. Further, that agreement, according to the comment, “may be implied by the circumstances,” and the requirement is meant only to screen out relationships that arise “by accident, in secrecy, or as a result of improper behavior.”<sup>53</sup> Biological parents who choose to live with their children in the same household with other adults may very well find themselves saddled with co-parenting relationships they never fully anticipated.

That both stepparents and “domestic partners” as defined in chapter 6<sup>54</sup> would frequently qualify for status as de facto parents is a fact which the comments and illustrations to chapter 2 make very clear.<sup>55</sup> Indeed, the “joint assumption of parental functions toward a child” is one of the key indicators under chapter 6 as to whether a couple “shared life together” and so qualified as “domestic partners.”<sup>56</sup> Any litigant seeking a property settlement under chapter 6 would thus have every incentive to make allegations that would coincidentally support a claim for de facto parenthood and custodial rights. It is one of the remarkable oddities of the *Principles* that the drafters suggest a “cohabitation period” of *three* years for a presumption of domestic partnership to arise,<sup>57</sup> but set a minimum of only *two* years for a claimant to de facto parenthood of another’s child<sup>58</sup>—without any explanation as to why a housemate should be enabled more easily to intrude on the parent-child relationship than on the property interests of a biological parent.<sup>59</sup>

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52. *Id.* at 201–02. Thus, a noncustodial biological father “who acknowledges the stepfather’s role but who continues to exercise his own parental rights and responsibilities has not agreed to the formation of a parent [by estoppel] status by the stepfather.” *Id.* § 2.03 cmt. b(iv), at 216.

53. *Id.* § 2.03 cmt. c(iii), at 223. Nor, it appears, must the claimant show a specific agreement by the biological parent to assuming the legally protected role of “de facto parent,” but only that the “relationship to the child has arisen with knowledge and agreement of the legal parent.” *Id.*

54. *Id.* § 6.03, at 14–49.

55. See PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.03 cmt. b(iii), illus. 9, at 44–45 (committed same-sex relationship); PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.21 cmt. b, illus. 1, at 255 (stepparent).

56. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 6.03(7)(l), at 14–17.

57. *Id.* § 6.03 cmt. d, at 21–23.

58. *Id.* § 2.03(c), at 202.

59. While of course this distinction might be justified on the ground that protecting children’s relationship interests is more important than a partner’s property interests, or that a child’s sense of time is different, it nevertheless creates seriously perverse incentives for partners who have lived with a parent and child more than two, but less than three, years. Because

*B. Empowering “De Facto” Parents.*

To make matters more frightening for the biological custodial parent, the *extent* of the custody claim that an ex-spouse or housemate can plausibly make goes far beyond traditional boundaries of visitation. For, in order to allege de facto parenthood, the former partner must allege that she shared at least equally in “caretaking functions.” But such an assertion in turn would support, under the qualified mirror-the-past allocation standard of section 2.09, a grant of almost half the custodial time to the “de facto” parent.<sup>60</sup> Elsewhere, in section 2.21, chapter 2 does establish a presumption that a biological parent should receive “the majority of custodial responsibility” over a de facto parent, but then withholds the benefit of this rule in the rather easily litigated cases where the biological parent is unfit or “has not been performing a reasonable share of parenting functions,” or where the result would “cause harm to the child.”<sup>61</sup> And even with the full benefit of the presumption, the biological parent is apparently entitled only to a “majority” of custodial time—which could mean custodial rights for the ex-housemate of forty-nine percent.

Likewise, for the biological parent who does *not* have primary custody of a child while the child’s other biological parent is living with a new partner, a claim for de facto parental status by the stepparent or partner will carry severe risks of diminished access to the child. As noted above, upon dissolution of her second marriage the mother who already held primary custody can at least expect to retain a “majority” of custodial responsibility. But no such protection exists in section 2.21 for the nonprimary custodial parent. Thus, the biological father might see his share of custodial responsibility cut in half to accommodate the new de facto parent.<sup>62</sup> Thus, in one of the

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property division may not be sought directly, a “de facto” parent custody claim will be the sole leverage available to the partner as against the parent in seeking a voluntary settlement.

60. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.09(1), at 108. As noted above, *see supra* text accompanying note 17, chapter 2 would abolish all distinctions between rights to “custody” and to “visitation,” and the possibility of an award of nearly half of a child’s time to a de facto parent shows the significance of conflating the terms. *See also infra* text accompanying note 103 (discussing importance of ending distinction between custody and visitation with respect to rights of grandparents).

61. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.21(1)(a), at 252. *See id.* cmt. b, illus. 1, at 255 (stepparent could be allocated a “co-equal share” or a “smaller share” with biological parent after divorce).

62. *See id.* cmt. b, at 255–56. To cut down the rights of a biological parent under a

illustrations to section 2.21, a biological noncustodial father begins with one and one-half days per week of custodial responsibility after his divorce from the biological mother.<sup>63</sup> After her marriage to a second husband breaks up, the biological father and stepfather are allocated alternating weekends, thus reducing the biological father's custodial time from about six to about four days per month.<sup>64</sup> And this reduction may be repeated because chapter 2 places no absolute limit on the number of de facto parents a child can have, other than to say that an allocation of custodial rights to such a claimant should be denied when it "would be impractical in light of the objectives of this Chapter."<sup>65</sup>

The Reporter for chapter 2 acknowledges evidence supporting the "possibility of strategic behavior in requesting custody"<sup>66</sup> and recognizes the insightful observation of the West Virginia Supreme Court in *Garska v. McCoy* that unpredictability in custody battles

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previously established "parenting plan" might seem to require satisfying section 2.18, which demands for modification of a plan the showing "that a substantial change has occurred in the circumstances of the child or of one or both parents" along with a showing "that a modification is necessary to the child's welfare." PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.18, at 310. Section 2.18 makes clear that a parent's *entry* into marriage or cohabitation with a nonparent does not qualify as a "substantial change," *id.* cmt. f, at 318, but whether *divorce* or *separation* from a stepparent or partner would qualify as such a change is not made clear. Yet this ambiguity may be unimportant because section 2.21 authorizes allocations of custodial responsibility to de facto parents without any reference to the modification standards of section 2.18. The most plausible reading of section 2.21, therefore, seems to make awards of custodial responsibility to de facto parents immune from the requirements normally associated with modifications. *Cf.* PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.21 cmt. b, illus. 1, at 254–55 (making no reference to possible rights of biological mother in suggesting that stepmother may be allocated "co-equal" custody rights with biological father).

63. *Id.* § 2.21 cmt. b, illus. 4, at 257–58.

64. *Id.* The illustration does not indicate by what process this change in the biological father's custodial rights occurred, so it need not necessarily be read to suggest that the father would have no right to fight for preservation of his full, previously established time. Nonetheless, given the difficulties of splitting custody among two, let alone three or more parties, while still preserving some stability in a child's life, it does seem highly likely that the time allotted to the primary custodial parent (in this illustration "each weekday") would remain fairly constant, while the minority of time given over to secondary custodians would be subdivided with each new participant.

65. *Id.* § 2.21(b), at 252. *See also id.* cmt. b, illus. 4, at 257–58 (noting that where a child already had two "legal" parents, one de facto parent exercising custodial responsibility, and a second de facto parent now making a claim to custody, a "court *may* determine that allocating custodial responsibility to four different adults now living in four different households is impractical and contrary to [the child's] interests" (emphasis added)).

66. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.02, Reporter's Notes cmt. c, at 32–33.

breeds the “irresistible temptation to trade the custody of the child in return for lower alimony and child support payments.”<sup>67</sup> Yet the chapter’s recognition of broad standing rights for claimants to de facto parenthood, combined with the substantial widening of the range of potential claims for property in chapters 4, 5, and 6, threatens just this kind of poisonous strategizing. Why not suggest, in negotiations over property or compensatory payments, that the former stepparent or roommate is seriously considering a custody claim? Just the fear of protracted litigation—not to mention the vastly heightened potential for losing exclusive custody at the end—may well be enough to lubricate agreement on other issues. Even the other biological parent, the one *not* involved in the dissolution, may be forced to consider trading off some financial contribution to the dissolving partners in order to preserve the full extent of her custodial privileges—or worse, to consider resorting to expensive and harmful litigation to challenge the de facto parent’s claim. To make matters worse, the strong deference that chapter 2 imposes on courts with respect to parental agreements<sup>68</sup> means that strategic behavior is even more likely than under current law to go undetected by the court issuing the final decree.<sup>69</sup>

For the ex-partner of a biological parent, then, the benefits of bringing a plausible claim to de facto parenthood will be tempting, and, as it turns out, the costs will be minimal. That is because chapter 3 of the *Principles* imposes no child support obligation whatsoever on de facto parents, which is in sharp contrast with its full imposition of such an obligation on all biological parents and “parents by estoppel.”<sup>70</sup> A successful de facto claimant could thus achieve the

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67. 278 S.E.2d 357, 360 (W. Va. 1981), cited in PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.02, Reporter’s Notes cmt. c, at 32. For a fuller development of this problem, see Scott, *supra* note 20, at 643–56.

68. See *supra* text accompanying notes 11–15.

69. While section 2.07(1)(a) does allow a court to refuse to enforce an agreement if it is “not knowing or voluntary,” the section appears strongly to discourage routine evidentiary inquiries on that subject. See *supra* text accompanying notes 11–15. Indeed, it is difficult to see how a parent forced to concede property rights to keep custody would gain much by exposing the other party’s strategic behavior to the court because such behavior is *not* one of the factors that a court is permitted to take into account in allocating custodial responsibility under section 2.09(1). PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.09(1), at 247–50. Perhaps of some concern, too, is the use of the conjunction “or” instead of “and” between “knowing” and “voluntary” in section 2.07; need only one of those two mental states be shown?

70. *Id.* §§ 3.01A–3.02A, at 277–96. Strangely, and perhaps because the final revised

right to have custody of the child nearly half the time with no danger of facing a child support award. In cases where a de facto claimant has higher income than the biological parent, this would provide a particularly lucrative shield against the substantial support award he would face under the income formula approach of chapter 3.<sup>71</sup> Step-parents and partners with greater resources than the biological parent are thus free to exploit all the advantages such resources give to litigants, with no concern about facing a long-term financial obligation to the child caught in the middle.<sup>72</sup> Finally, the disparity of support obligations between de facto parents and parents by estoppel might well have the unfortunate unintended consequence of discouraging parties from seeking the latter status, which involves taking full responsibility for the child.<sup>73</sup> Because of the substantial overlap in qualifications between the two categories,<sup>74</sup> why not instead seek the free ride of de facto parenthood?

All these practical concerns with the combined effect of chapter 2's standing and de facto parenthood provisions might seem tolerable if, in the clear majority of cases, children were likely to benefit from them. But, of course, if de facto parenthood claims are frequently made only as *threats* to cow a biological parent into a favorable dissolution settlement, children will receive only a lower stan-

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version has yet to be published, the comments to these sections do not clearly cross-reference the de facto parenthood provisions of chapter 2. Still, they make it clear that a "caretaker," even one who has "primary residential responsibility" for a child, "ordinarily has no duty to support the child." *Id.* § 3.02 cmt. g, at 281. This becomes stranger still given the commitment of chapter 3, in the words of its reporter, to "treat[] each parent as both a payor and a payee of child support," with support obligations linked to the amount of time a child resides with each parent. Grace Ganz Blumberg, *Balancing the Interests: The American Law Institute's Treatment of Child Support*, 33 FAM. L. Q. 39, 83-84 (1999); see also PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 3, pt. II, 1998) § 3.14 cmt. f, at 115 [hereinafter PRINCIPLES (Tentative Draft No. 3, pt. II)] ("The logic of child support calculation under . . . the ALI formula . . . requires that total child expenditure be calculated and then apportioned between the parties according to their respective percentages of residential responsibility.").

71. Chapter 3 calls for adoption of a child support formula that tends to equalize the incomes of the two parties. *Id.* § 3.05 cmt. b, at 24-26. Even in cases where parents are sharing equal residential responsibility, one may still have to pay support to the other to equalize the child's standard of living in the two residences. *Id.* § 3.14(3), at 311; *id.* § 3.14 cmt. f, at 115-16.

72. This is a more severe version of the problem created by grandparent visitation suits where "parents lose power and gain no right to support." Bostock, *supra* note 26, at 321.

73. PRINCIPLES (Tentative Draft No. 3, pt. II), *supra* note 70, § 3.02A, at 282-83.

74. Compare PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.03(b), with PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.03(c).

dard of living while gaining no continued contact with the former stepparent or domestic partner. The very use of such a threat, indeed, might be expected to lead a biological parent who had been forced into such a trade-off to cut off, as much as possible, all future contact between the child and the former spouse.

And while it is beyond the scope of this article to debate the theory of de facto parenthood on which these portions of chapter 2 rest, it is at least important to note that the concept is not one that has been established with any clear degree of scientific certainty or judicial consensus. It builds, of course, on the notion of “psychological parent” developed by Goldstein, Freud, and Solnit in the 1970s, but goes far beyond it.<sup>75</sup> For Goldstein and his colleagues explicitly declared, then and subsequently, that when two “parents” of a child divorce or separate, “[t]he noncustodial parent should have no legally enforceable right to visit the child . . . .”<sup>76</sup> In her scholarship, Professor Bartlett, the Reporter for chapter 2, has of course acknowledged both this primary debt and this last disagreement, and has provided powerful arguments for the contrary view.<sup>77</sup> Still, empirical support for *either* view must be regarded as thin, and chapter 2 cites virtually none in support of its sweeping proposal to give custodial standing to stepparents or partners who have resided with a child for as little as two years.<sup>78</sup>

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75. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 9–28 (1979). Goldstein and his colleagues identified, as a particularly important example of a “psychological parent,” situations where “a parent, without resort to any legal process, leaves his or her child with a friend or relative for an extended period of time.” *Id.* at 27. At no point in their account, even as revised in the mid-1990s, see GOLDSTEIN, *supra* note 22, at 8–16, do they suggest that a “psychological parent” relationship will arise when a biological parent shares living quarters with a stepparent or domestic partner.

76. GOLDSTEIN, *supra* note 75, at 37–39; see also GOLDSTEIN, *supra* note 22, at 23–27 (reaffirming and explaining previous view).

77. Bartlett, *supra* note 6, at 944–61. In her view favoring a “non-exclusive” approach to parenthood, of course, Professor Bartlett has received substantial support from commentators. See, e.g., Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957 (1999) (reviewing interdependency theory and its inconsistency with traditional notions of exclusive parenthood); Kaas, *supra* note 6, at 1094–95 (proposing a statute that would give partners with whom a biological parent had “created a family” equal preference to custody of a child). My own scholarship supports some legal recognition of the rights of *adolescents* to maintenance of adult relationships beyond the nuclear family but would not necessarily limit such recognition to situations where the adult had lived with the adolescent. Gregory A. Loken, “*Thrownaway*” *Children and Throwaway Parenthood*, 68 TEMP. L. REV. 1715, 1754–59 (1995).

78. Chapter 2’s introduction devotes less than two pages to the issue, and cites only the Reporter’s own scholarship published in 1984. PRINCIPLES (Tentative Draft No. 3, pt. I), *su-*

Case support is equally thin.<sup>79</sup> Indeed, cases that have persuasively used a “psychological parent” approach to give a third party visitation or custody have often involved such clear-cut parental default, or such a clear prior agreement by the parent to give near-exclusive parental status to the third party, that they would fall into the category of parent by estoppel as defined by chapter 2.<sup>80</sup>

There is, then, much to lose in the formulation of de facto parenthood provided by chapter 2, while the extent of the gain is highly contestable. What is gained in predictability through adoption of the “approximation” standard is lost through expansion of the *number* of potential claimants. Opportunities and, more importantly, incentives for abuse of such custody claims are enormous, and the threat to the security of parent-child relationships—especially those between children and their noncustodial biological parents—is severe. It seems fair, in the end, to call this proposal radical, even courageous, and to believe at the same time that the change it promises is anything but progressive.

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*pra* note 2, *Introduction*, at 6–7. In a recent article, Karen Czapinskiy found that only eight states have legislation that explicitly authorizes stepparent visitation. Czapinskiy, *supra* note 77, at 969 n.23.

79. Only one case, *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), is cited, and the Reporter’s Note concedes that its approach to de facto parenthood only “approximates” that of chapter 2. That case, in fact, authorized only *visitation* rights for the former partner, and specifically rejected a claim for substantial custody such as is provided for “de facto” parents in chapter 2. *Id.* at 423. Because the child was the product of artificial insemination, *id.* at 421, that case did not involve questions of how to preserve the custodial interests of the biological father. See *supra* text accompanying notes 61–65. There is, of course, very substantial, even a clear majority of, authority contrary to chapter 2’s position on this point. See, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (denying claim of standing to seek visitation made by natural mother’s lesbian companion who shared custodial responsibilities for child for over two years, and whom the child called “Mommy”); Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 60–71 (1984) (reviewing traditional refusal of law to give ongoing custodial or visitation rights to stepparents after divorce). *But see* *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992), *cert. denied*, 827 P.2d 837 (N.M. 1992) (granting former lesbian partner standing to pursue custody and visitation).

80. See, e.g., *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976) (child left with caretaker right after birth for several years); *Hawkins v. Hawkins*, 430 N.E.2d 652 (Ill. App. Ct. 1981) (child had lived exclusively with maternal grandparents for significant period of time after mother had been murdered). Because the parent by estoppel provisions were only added in the last draft of chapter 2, it is possible that the drafters were unable to give adequate reflection as to how the availability of this status might diminish the need for a separate de facto status.

## IV. GRANDPARENTS AND STANDING UNDER CHAPTER 2

Yet, however daring chapter 2 may appear in what it overtly proposes regarding the custodial rights of stepparents and partners, its silence in another area is even more startling. For, without ever clearly saying that it is doing so, and without justifying its approach, chapter 2 would apparently sweep away the standing of grandparents, recognized in virtually every state,<sup>81</sup> to petition the court for visitation with their grandchildren whenever both of the child's parents are alive but not living together. Again substantive debate over the underlying policy choice of the drafters is beyond the reach of this article, but when the resulting positions of the "new" and the biological extended families are compared, the coherence of chapter 2's overall approach to custody seems seriously compromised.

An early comment in chapter 2 appears ready to dodge the issue of grandparent visitation altogether, by declaring that the chapter "does not cover challenges by third parties to the authority of legal parents living together, or to the authority of . . . the child's only parent."<sup>82</sup> Thus, as an illustration makes plain, its provisions are inapplicable to one of the usual situations in which grandparents seek visitation—when one of the child's parents has died.<sup>83</sup> Nor would chapter 2 be applicable to support or deny a grandparent's claim to visitation against "two parents living together."<sup>84</sup> On the strength of the inapplicability of its provisions to the "intact one- or two-parent family," the comment provides the rather tepid assurance that "[g]randparent visitation' is not necessarily inconsistent with the provisions of chapter 2."<sup>85</sup>

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81. See Czapanskiy, *supra* note 77, at 968 n.22 (citing legislation in forty-nine states that provides for grandparent visitation); Elrod & Spector, *supra* note 3, at 665 (tbl. 6) (same, with forty-nine states providing specifically for grandparent visitation in cases involving divorce of grandchild's parents); see also Castagno v. Wholean, 684 A.2d 1181, 1185 n.4 (Conn. 1996) (reviewing state statutes and finding that "the majority specifically requires that certain threshold conditions be present before a grandparent may seek court intervention," with virtually all statutes covering cases of dissolution of marriage). For a careful overview and analysis of the statutes, see Bostock, *supra* note 26, at 331–41. Several European countries recognize grandparent visitation rights, but the European Court of Human Rights recognizes them in only limited circumstances. See Christa Wiertz-Wezenbeek, *Visitation Rights of Nonparents and Children in England and the Netherlands*, 31 FAM. L.Q. 355 (1997).

82. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.01 cmt. b, at 18.

83. *Id.* § 2.01 cmt. b, illus. 3., at 19.

84. *Id.* § 2.01 cmt. b, illus. 1, at 18–19.

85. *Id.* § 2.01 cmt. b, at 18.

Only short reflection, though, reveals that this concession is of very limited value. For most states do not in fact permit grandparents to sue for visitation as against intact two-parent families.<sup>86</sup> In addition, several state courts have declared unconstitutional visitation statutes that permit interference with an intact family.<sup>87</sup> It is true, of course, that grandparents typically do have standing to seek visitation after the death of a parent, but it is also true that children living with a widowed parent are far fewer in number than those living with a divorced, separated, or never-married parent.<sup>88</sup> And it is equally clear that chapter 2 *does* cover all visitation claims in the context of dissolution of a marriage or domestic partnership, or indeed in any context where both parents are alive but not living together<sup>89</sup>—situations which most grandparent visitation statutes do cover.

Section 2.04's standing provisions do not mention grandparents or biological extended family members at all, but instead simply limit the right to petition for custodial allocation to the three varieties of "parent" described above.<sup>90</sup> A grandmother who could show that she had lived with a child for at least two years and had shared at least equal caretaking responsibility with a parent during that period could of course petition, like a stepparent, for de facto parental status. Otherwise, though, she would simply be one of the "other individuals" who may be permitted to intervene in dissolution actions already begun—and then only in "exceptional cases."<sup>91</sup> The term "excep-

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86. Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1334 (1994).

87. See, e.g., *Hoff v. Berg*, 199 ND 115, 595 N.W.2d 285 (N.D. 1999) (declaring grandparent visitation statute unconstitutional because of statutory presumption in favor of visitation); *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995), *cert. denied*, 516 U.S. 942 (1995) (declaring grandparent visitation statute unconstitutional except where "harm" to child can be shown from denial of visitation); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993) (same).

88. As of March 1998 there were 2,757,000 children living with a widowed parent, compared with 16,264,000 living with a divorced, separated, or never-married parent. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORT P20-515, tbl. 10 (Mar. 1998) available at <http://www.census.gov/prod/3/98pubs/p20-515u.pdf> (visited Jan. 24, 2001).

89. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.01 cmt. b, at 18; PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.04 cmt. g, illus. 9, at 241.

90. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.04(1), at 232–33.

91. *Id.* § 2.04(2), at 233; see *id.* § 2.04 cmt. g, at 240–41. Intervention is only permitted if that will "serve the child's best interests." *Id.* § 2.04(2). Grandparents (and relatives) do receive some special mention later as third parties who may be allocated some custodial responsibility if "a legal parent or parent by estoppel consents to the allocation." *Id.* § 2.21(2), at

tional cases,” of course, is one that has been read very narrowly in custodial cases.<sup>92</sup>

Most significantly, what about the common family situation in which the biological parents never formed a marriage or domestic partnership?<sup>93</sup> These are circumstances in which grandparents frequently play an extremely important role, but one that would fall short of *de facto* parenthood.<sup>94</sup> In such cases, there will be no dissolution action in which a grandparent can intervene, and section 2.04 could not be clearer in denying the right of such a nonparent to initiate an action.<sup>95</sup> Why deny grandparents the right to seek visitation in circumstances of illegitimacy or divorce while leaving the visitation right intact for bereavement?<sup>96</sup> Isn't the grandparent arguably as im-

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252–53. This amounts to very little, in part because of course such a parent could informally permit access to the child during her custodial periods, in part because it gives veto power to the other parent or parents, and finally because grandparents remain barred under section 2.04 from petitioning a court for any access.

92. See, e.g., *In re Michael B.*, 604 N.E.2d 122, 131–32 (N.Y. 1992) (refusing to apply “extraordinary circumstances” test in context of state foster care placement); *Dickson v. Lascaris*, 423 N.E.2d 361, 363–64 (N.Y. 1981) (limiting concept to “narrow situations” such as “actual abandonment” of a child by a parent). All that chapter 2 offers to define “exceptional cases” is an illustration involving a dissolution in which the parents are “fighting over who should have primary custodial responsibility . . . [and] drawing the children into the conflict and attempting to enlist their support against one another,” in which case a grandparent could be permitted to intervene “to help moderate the conflict and protect the children from it.” PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.04 cmt. g, illus. 9, at 241. This seems to suggest that some significant parental fault may need to be shown as a prerequisite to standing, which would drastically limit the ambit—and attractiveness—of visitation actions by grandparents.

93. Thus, in 1998 there were 3.1 million children living with their never-married fathers, and 6.7 million living with their never-married mother. CENSUS BUREAU, *supra* note 85, at 92 tbl. 10.

94. So, for example, grandparents provide about sixteen percent of preschooler child care for employed mothers in this country. CENSUS BUR., U.S. DEP'T OF COMMERCE, WHO'S MINDING THE KIDS, SB/94-5 (1994).

95. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.04 cmt. g, at 240.

96. Indeed, it seems much more likely that grandparents, and through them their grandchildren, will more often *need* legal recourse for visitation rights where their son or daughter has been through an adversarial divorce proceeding with the custodial parent. Thus, in *Troxel v. Granville*, 530 U.S. 57 (2000), the mother had voluntarily given substantial visitation opportunities to the parents of her deceased husband prior to their action seeking even greater access—a factor weighed by the plurality in holding that the visitation petition intruded on the mother's constitutional rights. *Id.* at 71. The early, kind actions of the mother in *Troxel* may be fairly typical of bereaved parents, whose grief may bind them even closer to their deceased spouse's parents. A recent survey of state statutes found, in fact, that more states (forty-nine) permit grandparents to seek visitation in the context of divorce than in cases of parental death (forty-four). Elrod & Spector, *supra* note 3, at 665 tbl. 6.

portant in either case, as now perhaps providing the only available access to the history, values, and traditions of that side of the family?<sup>97</sup> Might not the presence of a grandparent often be more important to a child who *never* knew her father, or whose father has divorced and deserted her, than to one who enjoyed the benefit of a now deceased but loving father?<sup>98</sup> There may be an underlying rationale for this strange distinction, but it remains entirely unexpressed and undeveloped.<sup>99</sup>

Equally strange, though, is the failure to explain why divorced stepparents should have the right to petition for very substantial custodial rights and grandparents cannot petition under most circumstances for even limited visitation. It is the former, not grandparents, who will already be the opposing party in a court proceeding. It is the divorcing stepparent, not a grandparent, who has something to gain in negotiations over property division by waving the red flag of custody litigation. And it is custodial rights in the stepparent, not visitation rights in a grandparent, that are most likely to compromise the existing relationship between the child and his noncustodial biological parent. Finally, it is stepparents and domestic partners, not grandparents, who are more likely to have engaged in abuse of the custodial parent or the child<sup>100</sup>—a fact of particular relevance given

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97. In this respect, grandparent visitation statutes may simply have brought a child's right to his intangible, personal inheritance from each side of his family in line with his rights regarding inherited property. Thus, it has never been possible for a parent, without court approval, to disclaim or renounce a bequest to her child. See UNIF. PROBATE CODE § 5-407(c), 8 U.L.A. 386-87 (1998). For a sensitive exploration of the evidence, pro and con, concerning the role of grandparents in children's lives, see generally Czapanskiy, *supra* note 86.

98. Indeed, where a noncustodial parent is alive but not around, a relationship with that parent's parents may keep open channels of communication, and ultimately of reconciliation, that would otherwise be closed. In a recent article, I argued that a grandparent's love for grandchildren is a crucial component of parents' moral duties to care for and nurture their children. Gregory A. Loken, *Gratitude and the Map of Moral Duties Toward Children*, 31 ARIZ. ST. L.J. 1121, 1187-95 (1999). By staying in touch with their grandchild, grandparents may have greater moral force in calling their son or daughter back to a sense of responsibility for the child.

99. Neither the comments nor the Reporter's Notes to this section specifically mention or discuss the widespread application of grandparent visitation statutes in circumstances involving divorce or unmarried parenting. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.04, at 232-46.

100. For an overview of the statistics on abuse of children by relatives versus nonrelatives, and an argument that the greater risk of abuse at the hands of adults without a biological link to the child is rooted in evolutionary development, see Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1207-36 (1997). Jones argues that child protective procedures should conceivably be modified to weigh

chapter 2's laudable recognition of domestic or child abuse as a factor permitting a court to reduce or deny custodial privileges to the abuser.<sup>101</sup> Over one million children in this country live with at least one grandparent and no parent;<sup>102</sup> the number living only with a stepparent is surely geometrically smaller. The drafters of chapter 2 are simply silent in the face of these anomalies.

The awkwardness of chapter 2 regarding grandparent rights may partially be the result of the choice early on to conflate traditional notions of custody and visitation into the general term "custodial responsibility."<sup>103</sup> While permitting great elegance of language throughout chapter 2, this general phrase does not permit nuances that the traditional terms embody and the grandparent *visitation* statutes exploit. The very fact that grandparents cannot possibly achieve full or joint physical custody under those laws makes their application, however controversial, limited in its potential for harm to parental autonomy. "Custodial responsibility," because so much broader in its potential application, *does* seem in general a right we

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stepparenthood more heavily as a risk factor for abuse, and "establishing a stronger preference for the biological parent in child custody actions." *Id.* at 1234–35. For an influential case that put great emphasis on the "biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity," and could "ease the painful transition" after the death of a parent, see *Mimkon v. Ford*, 332 A.2d 199, 204–05 (N.J. 1975). See also Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 268–69 (2001) (finding that "the evidence is legion that stepfathers represent a greater portion of [sexual] abusers than their incidence in the general population").

101. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.13, at 210–12.

102. KEN BRYSON & LYNNE M. CASPER, CENSUS BUR., U.S. DEP'T OF COMMERCE, CORESIDENT GRANDPARENTS AND GRANDCHILDREN 6 tbl. 2, P23–198 (1999) (showing 598,000 grandchildren living with both grandparents and no parent and 669,000 living with the grandmother only and no parent). The percentage of children living only with grandparents increased from 1.3 percent in 1992 to 1.8 percent in 1997. *Id.* at 1. Of course, grandparents in that situation would often qualify for de facto parental status under the rubric of chapter 2, which must be counted against the loss for other grandparents of legal standing under section 2.04. Yet somehow it seems unlikely that the majority of grandparents caring for their children's children *want* full parental status—but instead find themselves forced into the role, with, as one study puts it, "a strong preference for informal kinship care." Beatrice Yorker et al., *Custodial Relationships of Grandparents Raising Grandchildren: Results of a Home-Based Intervention Study*, JUV. & FAM. CT. J., Spring 1998, at 15, 20; see also *id.* at 16–18 (summarizing studies showing that grandparents typically assume parental role only after previous child abuse, neglect or substance abuse by parent, and then face substantial stress and difficulties in the new role).

103. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.03(4), at 37–38. See *supra* text accompanying notes 17–18. For a discussion of the awkwardness of awarding substantial *custodial* as opposed to *visitation* rights to de facto parents, see *supra* text accompanying notes 60–61.

would not want grandparents to have standing to seek. But that very breadth contains similar dangers for the proposed status of de facto parenthood, which would ultimately be much less threatening to core parent-child relationships if it gave less disruptive power to those who achieved it.

A child, if she is lucky, receives over the course of her childhood the love and support of many adults outside her nuclear family, but this evolving, often makeshift extended family is usually rooted in the love those adults feel for the child's parents. If it is desirable, as chapter 2 declares, to give standing in custody litigation to those whose love for the parent was sexual, why not give similar rights to those, like grandparents, uncles, and aunts, whose love for the parent is of longer duration and, all too often, of greater durability? Chapter 2's unstated but unmistakable preference for the romantic over the biological extended family is mysterious and ultimately perverse.

#### V. STANDING AND REPRESENTATION RIGHTS OF CHILDREN

The very fact, however, that reasonable minds can differ over the categories of adults who should have access to custody litigation and that every child caught up in such litigation faces serious dangers from an erroneous outcome, leads to one final puzzle with the standards of chapter 2. Why, in this perilous arena, is the child herself not entitled to representation and a voice? Although chapter 2 would permit the court to consider the "firm and reasonable preferences" of an older child regarding a custodial allocation,<sup>104</sup> it does not give children a right to participate in custodial proceedings as a party,<sup>105</sup> and is virtually silent as to their rights to legal representation.<sup>106</sup> This

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104. PRINCIPLES (Tentative Draft No. 4), *supra* note 2, § 2.09(b), at 248.

105. *Id.* § 2.04, at 232–33 (allowing intervention by nonparents only in "exceptional cases").

106. Under the *Principles*, the court "[i]n its discretion . . . may appoint a lawyer to represent the child," but only if it would be "helpful" to do so, and only "if the child is competent to direct the terms of the representation." PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.15(3), at 289. Likewise, the court has the discretion to "appoint a guardian ad litem to represent the child's best interests." *Id.* § 2.15(2). But the *Principles* give no guidance as to what circumstances would clearly call for such appointments, and the comments give prominence to the "significant difficulties" such appointments may present. *Id.* § 2.15 cmt. b, at 291–92. Moreover, simply being represented in the litigation does not give the child "standing" to raise claims for an adjustment of custodial rights, whether in favor of a biological or a de facto parent. Even fully represented children are not "parties" to the action under section 2.04. See *supra* text accompanying notes 33–35.

is surprising, for while legal representation of small children in custodial battles is of debatable merit,<sup>107</sup> Chapter 2's substantial broadening of the potential claimants to custody increases the stakes for the child in such battles.<sup>108</sup> The chance it creates for a child to live with a nonrelative no doubt means that in some cases it will be easier to reach a result that comes closer than present law allows to meeting the child's "best interests." But if there are more princes now available to the child, there are also more frogs. And, as outlined above, the risks of the property/custody trade-offs in private dissolution agreements rise substantially through the inclusion of stepparents and domestic partners among the players, and are amplified further by chapter 2's strong requirement that judges defer to private custody agreements. Even if a child's voice cannot always prevail in a proceeding of such moment, she at least ought to have standing to raise it.<sup>109</sup> Otherwise, how will the "*individualized* . . . interests of

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107. Compare GOLDSTEIN, *supra* note 22, at 141 (arguing that legal representation should be provided for a child when her parents commence a custody battle in court because she "then requires representation independent of her parents' to assure that her interests are treated as paramount in determining who shall have custody"), and Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1583-86 (1996) (arguing for appointment of counsel for children in contested custody disputes) with AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, REPRESENTING CHILDREN: STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM IN CUSTODY OR VISITATION PROCEEDINGS 9-12 (1994) (rejecting the idea that lawyers should be appointed for children in custody actions because such disputes are "private" and such representation is likely to create delays and additional costs) and Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1424-28 (1996) (rejecting idea that counsel should be appointed for "young children" in custody and visitation cases); see also *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1323 (1996) (listing under "recommendations for further study" whether "there should be mandatory appointment of counsel for children in disputed custody and visitation cases, and based upon what criteria").

108. A particularly curious component of the *Principles'* justification for rejecting a general duty of appointment of an attorney or guardian ad litem is the fear that "appointment of an advocate for the child can constitute undesirable and inappropriate intrusions on the authority of parents." PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.15 cmt. b, at 291. This, in a document providing full standing in custody litigation to stepparents and long-term roommates!

109. Thus, even the American Academy of Matrimonial Lawyers, which opposes "routine" appointment of counsel or guardians ad litem in custody cases, recommends appointment when a court considers it "necessary in light of the particular circumstances of the case." STANDARDS FOR ATTORNEYS AND GUARDIANS AD LITEM, *supra* note 107, at 9. Even in traditional two-parent divorce cases a leading researcher found a "troubling divergence between the wishes and attitudes of the children and their parents in regard to the divorce" that persisted for years after the process was complete. JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP 305 (1996).

individual children,”<sup>110</sup> purportedly a cornerstone of chapter 2’s approach, be realized?

If the child at the center of the custody battle is given standing to intervene, moreover, the need to give de facto parents the automatic right to litigate custody is likely to disappear. For the de facto parent-child relationship, if it exists at all, is two-sided, and it is the *child’s* loss of continuity that we fear. As Justice Brennan noted in *Smith v. Organization of Foster Families for Equality and Reform*, if a foster parent “does not care enough about the child” to request a preremoval hearing, “it is difficult to see what right or interest of the foster child is protected by holding [such] a hearing.”<sup>111</sup> Conversely, if a child does not care enough about a relationship with an adult who is not her biological parent to raise a claim seeking to preserve the relationship, it is hard to see the point of permitting that adult to complicate the custody proceeding with a de facto parenthood claim.

Of course it is not a simple matter to determine what a child really “cares about,” and adult litigants can to some extent illuminate that issue.<sup>112</sup> But courts could protect the interests of children in this area with far less danger to other important interests if they adopted three relatively modest reforms: (1) screening custody cases early to determine those in which a protected de facto parent-child relationship might exist,<sup>113</sup> (2) where such screening suggests the need for it, appointing a guardian ad litem or attorney for the child to investigate and evaluate the nature of the relationship, and finally (3) granting standing to the child through her representative to advocate for preservation of important relationships with nonbiological parents in ongoing custody litigation.<sup>114</sup> A guardian ad litem or child’s attor-

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110. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, *Introduction*, at 1.

111. 431 U.S. 816, 850–51 (1977).

112. Thus, Justice Brennan noted for the Court in *Smith* that foster parents could have a legitimate role in helping a court determine what are “the rights and interests” of the children affected. *Id.* at 841 n.44. Their standing, however, was, in the Court’s view, merely a “prudential” matter, while, by contrast, the appointment of independent counsel for the children—“so that the court could have the benefit of an independent advocate for the welfare of the children, unprejudiced by the possibly conflicting interests and desires of the other parties”—was described in terms much closer to mandatory in character. *Id.*

113. Under the *Principles*, preliminary screening already appears to be required if a court receives “credible information” that child abuse, domestic abuse, drug abuse, or persistent interference with custodial rights has occurred. PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, § 2.13, at 210.

114. Thus, children with putative de facto relationship claims would thus receive the right, under section 2.04, “to be notified of and participate as a party in an action filed by an-

ney, even if misguided in urging preservation of a de facto relationship, will have none of the financial or personal motives to litigate the issues that can enter the arena if the putative de facto parents are themselves given standing to raise custodial claims.<sup>115</sup> Limiting standing for de facto parenthood claims to the children involved in such relationships would provide the most direct, and least dangerous, approach to discovering their best interests—the goal, in the end, of all custody principles.<sup>116</sup>

## VI. CONCLUSION

The standing principles of chapter 2 thus present, on this early reading, a substantial conundrum. Individuals whose only connection to the child is rooted in a now failed love for the child's parent will have license to pursue in court virtually unlimited custodial privileges regarding the child, even in the face of knowledge that some significant part of that litigation, or its threat, will be purely strategic. Those who succeed in their claims will become de facto parents, part of a new extended family for the child, a family that can continue to grow as the custodial parent moves on to other loves. As it wins new shares of the child's limited time, this new extended family can crowd the custodial rights of the noncustodial biological parent. In the meantime, some voices of the traditional extended family will be silenced. Grandparents who have not lived with a child will not be able to seek visitation, or indeed any other role in the child's life, except in the rare circumstance of a parent's death. They will be able to pass on family property to the child, but will have no standing to bestow family stories or a sense of belonging. Nor will the child, the

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other." PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, at 55. Permitting children to *initiate* a proceeding for a custody change, absent parental abuse or neglect, arguably carries too many risks of family disruption to justify its adoption. *Cf. Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Dist. Ct. App. 1993) (reversing a lower court order giving an adolescent standing to pursue a termination of parental rights petition); see generally Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 400-09 (1997) (discussing *Gregory K.* and other cases in which children have sought standing to pursue custodial claims). But see George H. Russ, *Through the Eyes of a Child: A Child's Right to Be Heard*, 27 FAM. L.Q. 365 (1993) (arguing for broad recognition of standing rights for children in custody cases).

115. See *supra* text accompanying notes 66-73.

116. "There is consensus on the general principle that the law [of child custody] should seek to promote the child's best interests." PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 2, *Introduction*, at 3.

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*New Extended Family*

potential pawn in dissolution battles, typically be allowed to put forward claims on her own behalf or have independent representation to ensure that any agreement reached by the parents protects her interests.

Nothing could be clearer from chapter 2 than its passionate commitment to addressing family disarray in a manner that furthers children's interests and welfare, in part by broadening the conception of the family that is available to them. But the law, unfortunately, is a dangerous tool, not easily refitted to unfamiliar projects. It may be that chapter 2's conception of de facto parenthood—and, consequently, the new extended family—has merit. As currently conceived, though, its interaction with crucial standing principles does not.

