Changing Norms in the United States for Resolving Custody Disputes Between a Parent and a Non-Parent

by
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I. Introduction

In the United States, a "parent" historically is a person who either has a genetic connection with a child or has adopted a child. This article discusses how various states decide a custody dispute between a legal parent and another person who is not a legal parent but who has a significant connection with the child. During the late twentieth century, many states adopted a strong parental presumption to resolve such custody disputes. Pursuant to the strong parental presumption, in a custody dispute between a parent and a third party, the parent is awarded custody unless the third party can establish that the parent is unfit or had abandoned the child.[1]

This strong parental presumption has more recently been increasingly criticized for a number of reasons in those situations where the third party contesting custody has established a strong bond with the child.[2] A number of states have modified the strong parental presumption referred to above in those situations where the third party desiring custody has become a "de facto parent" or "psychological parent" of the child.[3] This article will

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1 *See* Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J. L. & FAM. STUD. 71, 103 (2006).

2 *See generally* Anne L. Alstott, Anne C. Dailey & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. _____ (forthcoming 2022); Courtney G. Joslin & Douglas NeJaime, *How Functional Parenthood Functions*, _____ COLUM. L. REV. _____ (forthcoming 2023).

3 *See, e.g.*, Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children,* 47 FAM. L.Q. 1 (2013).

survey the various approaches that have been adopted in different states to govern custody disputes where the dispute is between a parent and a third party who could be described as a de facto parent or psychological parent. In this article, I am generally critical of proposals to abolish the parental presumption when the non-parent is a de facto parent.

These disputes commonly arise in three different scenarios. The first is when a romantic partner or stepparent lives with the parent and the child for a period and then the relationship ends. The second instance arises when the romantic partner or stepparent lives with the primary caregiver and his or her child for a substantial period and then the parent dies. The third situation arises when the parent leaves the child with a friend or a family member for a significant time period and then desires to have the child live with the parent again.

A number of cases involve custody disputes between lesbian couples when they break up. In many instances, one member of the couple is the birth parent and the other is not a legal parent, normally because she never adopted the child. These cases present more complicated issues and are not addressed in any detail in this article.[4] Part II of this article discusses the rationale for the strong parental presumption and how it can be rebutted. Part III discusses the compromise position where there is a parental preference unless compelling circumstances exist. Section IV describes jurisdictions where no parental presumption is applied in custody disputes between a parent and a defacto parent or psychological parent. Part V evaluates the strengths and weaknesses of the various approaches. Finally, Part VI discusses the extent to which parents' constitutional rights are impacted by these approaches.

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[4] There is a rich literature on this specific topic. *See generally* Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 Mo. L. Rev. 331 (2016); Colleen Marea Quinn, *Riding the Storm Out After the Stonewall Riots: Subsequent Waves of LGBT Rights in Family Formation and Reproduction,* 54 U. Rich. L. Rev. 733 (2020).

II. The Strong Parental Presumption

A. *Rationale for the Strong Parental Presumption*

The strong parental presumption in custody disputes between a "legal" parent and a non-parent is based on a few policy judgments. First, as a policy matter, courts generally express a desire to place a child with a legal parent rather than a third party. Most legal parents are genetically related to their child. As a result, compared to a non-parent, it is assumed that a parent on balance would have a stronger connection with, and interest in, the child. In addition, some commentators argue that a parent has a constitutional right to the custody of his or her child, unless it can be shown that placing the child with the parent presents a substantial risk of harm to the child.

B. *Rebutting the Strong Parental Presumption*

As a result of the strong parental presumption approach, the parent normally will prevail in any custody dispute with a non-parent. This is true even in circumstances where it might be clear that the non-parent desiring custody appears to be a "better" parent.[5] One way a third party can rebut the strong parental presumption is to show that something about the lifestyle or parental skills of the parent would present a significant risk of harm to the child if primary custody would be awarded to the parent. If the third party cannot establish this, however, under the strong parental presumption approach, the parent generally prevails. A best interest analysis is not conducted.

In a custody dispute between a parent and a non-parent, the Massachusetts Supreme Judicial Court applied a strong parental presumption. The court ruled that, to rebut the parental presumption, the other party had to show that the parent was unfit. The court stated that the inquiry should be whether the parent or parents are "unsuitable or ill-adapted to serve [as parent] under the existing circumstances."[6] The court discussed various situations where a parent might be considered unfit. Here the court

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5 *See* Lewelling v. Lewelling, 796 S.W.2d 164, 167 (Tex. 1990).

6 R.D. v. A.H., 912 N.E.2d 958, 966 (Mass. 2009)(*quoting* Hirshon v. Gormley, 82 N.E.2d 811, 813 (Mass. 1948)).

did not find that the parent was unfit, so custody was awarded to the parent.[7]

A Mississippi case involved a custody dispute between a father and a stepfather after the mother (who had primary custody of the child) died. To rebut the parental presumption in Mississippi, the third party must show that the parent abandoned the child, engaged in immoral behavior detrimental to the child, or is unfit. The stepfather could not prove any of those three things, so the court awarded custody to the father.[8] Note that when applying a strong parental presumption. it is not relevant whether in this situation the stepfather would be considered a better custodian of the child. The stepfather could not rebut the parental presumption based on factors accepted in Mississippi, so the parent was granted custody, without a best interest analysis.

A Utah case involved a custody dispute between a lesbian couple when their relationship ended. One of the partners was the birth mother, while the other had assumed a parenting role but had not adopted the child. When their relationship ended, the woman who was not the birth mother sued for visitation. The Utah Supreme Court applied the strong parental presumption approach, ruling that the court cannot apply a best interest analysis to the custody issue unless the court first finds the mother was unfit. Because the trial court made no such finding, the court dismissed the custody petition. The court declined to adopt the de facto parent or the psychological parent doctrine to allow the former partner to seek visitation.[9]

In a similar Louisiana case, a female partner lived with the birth mother and her child for four years but did not adopt the child. When the romantic relationship between the birth mother and her partner ended, the partner sued for visitation. The Louisiana Supreme Court ruled that, before a court could engage in a best interest analysis, the partner would have to show that placing the child with the birth mother would substantially harm the child.[10]

A Virginia court also applied a strong parental presumption approach to a dispute between a lesbian couple when their rela-

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7 *Id.* at 968.

8 Neely v. Welch, 194 So.3d 149, 158 (Miss. Ct. App. 2016).

9 Jones v. Barlow, 154 P.3d 808 (Utah 2007).

10 Cook v. Sullivan, 330 So.3d 152 (La. 2021).

tionship ended. During their relationship, one partner gave birth. The other actively parented the child, but did not adopt it. When they separated, the woman who was not the birth mother sued for custody. The court of appeals rejected the de facto parent concept, which will be discussed in more detail below, and found that there was no basis for rebutting the parental presumption. The court rejected the custody claim by the partner, concluding that she had not established that the birth mother was unfit or had abandoned or voluntarily relinquished the child, and found that there was no proof of any extraordinary reason for placing the child with anyone other than the birth mother.[11]

Note that, pursuant to the strong parental presumption approach, courts generally do not focus on whether the child has established a strong bond and a stable family situation with a third party, which would be disrupted by awarding custody to the parent.

In Texas, if there is a custody dispute between a parent and a non-parent, the parent is to be awarded custody, unless the third party can establish that such an award would "significantly impair the child's physical health or emotional development."[12] Texas courts have not agreed regarding what types of evidence can rebut this parental presumption. Some courts have focused upon whether there is something about the lifestyle of the parent or lack of parenting ability that would likely harm the child if the child would be placed with the parent. For example, one court stated that relevant evidence could include evidence of physical abuse by the parent, severe neglect, abandonment, drug or alcohol abuse, immoral behavior, parental irresponsibility, mental disorders, frequent moves, bad judgment, and an unstable, disorganized, and chaotic lifestyle.[13]

Other Texas courts have considered other types of evidence when deciding whether the third party has rebutted the parental presumption. In another Texas case,the dispute was between the child's mother and his stepmother.[14] As mentioned above, Texas generally applies the parental presumption.[15] In this case, the

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11 Hawkins v. Grese, 809 S.E.2d 441 (Va. Ct. App. 2018).

12 Tex. Fam. Code Ann. § 153.131 (West 2021).

13 *In re* S. T., 508 S.W.3d 482, 492 (Tex. App. 2015).

14 *In re* R.T.K., 324 S.W.3d 896 (Tex. App. 2010).

15 *See* Tex. Fam. Code Ann. § 153.131 (West 2021).

mother and the father divorced when the child was two years old. The father remarried when his child was three. After the divorce of the mother and the father, the child lived with the father (and, begining a year later, with his stepmother also). The father died when the child was nine. A custody dispute arose between the stepmother and the mother. The child testified that he wanted to keep living with the stepmother, and reacted very badly when temporarily placed with the mother. The trial court awarded primary custody to the stepmother, finding that placing the child with the mother would "significantly impair his emotional development"[16] (a finding that rebuts the parental presumption in Texas). This ruling was affirmed.

Note that the grounds accepted in this Texas case for rebutting the parental presumption had nothing to do with the parenting skills or lifestyle of the parent. The court focused upon whether placing the child with the parent would disrupt a stable family situation that had been established between the child and the third party. This is not generally accepted grounds for rebutting a strong parental presumption but, as will be seen below, would be accepted as a reason to rebut the parental presumption pursuant to other approaches toward this issue that have more recently been accepted. .

One way a third party can rebut the parental presumption under the strong parental presumption standard is to show that the parent "abandoned" the child. It frequently is not clear what needs to be shown to prove this. A few states have tried to clarify the standard. A Texas statute provides that there is no parental presumption if the parent has "voluntarily relinquished" actual care, control, and possession of the child to a non-parent for at least one year, and a portion of this period occurred within 90 days of the date of the filing of the custody petition.[17] A court concluded that this was established when the mother allowed the child to live with another family member for 14 months and gave the family member a power of attorney to enroll the child in school and to make medical decisions for the child.[18]

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16 *R.T.K.*, 324 S.W.3d at 903.

17 Tex. Fam. Code Ann. § 153.373 (West 2021).

18 *In re* S.A.H., 420 S.W.3d 911, 923-24 (Tex. App. 2014).

Similar to the Texas statute, a New York statute provides that the parental presumption does not apply if the parent voluntarily relinquishes the care and control of a child so that the child lives with a grandparent, and the voluntary relinquishment lasts for a "prolonged period," which is defined as at least 24 months.[19] A New York case considered what constitutes "voluntary relinquishment." In this case, the child lived with the grandparent, but the parent had some contact with the child. The parent signed three documents giving the grandparent the right to make certain decisions regarding the child. The court concluded that, because in this instance the grandparent was essentially acting as a parent with primary physical custody, a voluntary relinquishment under the statute had occurred, despite the fact that the parent had some contact.[20]

The Idaho Supreme Court similarly has held that if a parent voluntarily relinquished a child to third party for a "long term," this can be grounds to award custody to the non-parent.[21]

In contrast, in other states the parental presumption applies even in the face of proof of voluntary relinquishment. The Colorado Court of Appeals has stated that this result is mandated by the U.S. Supreme Court's opinion in *Troxel v. Granville*.[22]

III. The Compromise Position - Apply the Parental Presumption Unless Compelling Circumstances Exist

In some other states, in addition to the grounds for rebutting the parental presumption set forth above, the parental presumption can be rebutted if "compelling circumstances" justify it. To be able to rebut the parental presumption based on compelling circumstances, in some states the third-party challenger must establish that he or she is a de facto parent or a psychological parent.

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19 N. Y. Dom. Rel. Law § 72 (McKinney 2021).

20 Suarez v. Williams, 44 N.E.3d 915, 923 (N.Y. 2015).

21 Hernandez v. Hernandez, 265 P.3d 495, 500 (Idaho 2011) (citing Stockwell v. Stockwell, 775 P.2d 611, 614 (Idaho 1989)).

22 *In re* E.S., 264 P.3d 623, 628 (Colo. App. 2011) (citing Troxel v. Granville, 530 U.S. 57 (2000)).

A Pennsylvania case involved a custody dispute between a stepfather and the father. The father and the mother had a brief marriage and divorced when the child was one year old. The mother then married another man, who lived with the child since the child was a year old. The child developed a close relationship with the stepfather, referring to him as "daddy." Five years after the mother married the stepfather, the mother died of cancer.

A custody dispute arose between the stepfather and the father. There was expert testimony from two therapists recommending that the child live with the stepfather. The child expressed a wish to stay with the stepfather. The child (who was eight years old at the time of trial) and stepfather were living in Pittsburgh, and to live with his father he would need to move to New Jersey. The trial court concluded that, despite the parental presumption, even though it had not been established that the father was unfit, there were compelling reasons to award primary custody to the stepfather. The appellate court affirmed the award of custody to the stepfather.[23]

California has adopted a statute providing that, in a dispute between a parent and a non-parent, to obtain custody the non-parent must prove that placing the child with the parent would be detrimental to the child. The statute provides that this standard can be satisfied by showing that it would harm the child to remove him or her from a stable placement of the child with a person who had assumed the role of the child's parent.[24]

A South Carolina case involved a situation in which an unmarried woman gave birth to a child after a brief relationship with a man. The woman lived in Florida and sometimes went to South Carolina (where the father lived) so the father could spend time with the child. The woman's father provided financial support to both the mother and her child, as well as a place for them to live in Florida. The grandfather helped her care for the child when they were in Florida. The mother killed herself when the child was five. A custody dispute between her father and the child's father arose.

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23 Charles v. Stehlik, 744 A.2d 1255 (Pa. 2000).

24 CAL. FAM. CODE § 3041 (West 2022).

The court of appeals ruled that, despite the parental presumption, the presumption was rebutted in this case. The court found that the grandfather was the "de facto custodian" of the child under South Carolina law[25] because the child had lived with the grandfather for over half his life, the grandfather was the psychological parent, the grandfather had provided financial support, and he was actively a part of the child's daily care. In contrast, the father had very little contact with the child and provided limited financial support. Because the grandfather was a de facto custodian of his grandchild, he could rebut the parental presumption with proof of compelling circumstances. While the court ruled that the father was a fit parent, the court of appeals ruled that the grandfather had established such compelling circumstances, in light of the strong attachment the grandfather had with his grandchild.[26]

In a Nebraska case, the birth parents separated after they had lived together for seven or eight months after their child Destiny was born. After that, Destiny lived for periods with one or the other parent. In February 2014, during a period when the Destiny was living with her mother, the mother was incarcerated for drug activity. During the period of the mother's incarceration, Destiny stayed with Jo, a longtime family friend. When the mother was released from prison in late 2014, she allowed her daughter to keep living with Jo while the mother tried to create a more stable life. By the summer of 2017, the mother contacted Jo and told her that she was now in a position to take care of her daughter. At that time, Jo and Destiny had been living together for more than three years in Gretna, Nebraska, where the girl had many friends. The mother wanted her to relocate to Lincoln, Nebraska to live with her. Jo was concerned that such a move would be detrimental to the child. Destiny's father testified in the custody dispute that arose that Destiny wanted to stay with Jo in Gretna and graduate from the high that she had been attending. Destiny had attended a number of different schools in Lincoln when she was younger. A therapist who had counseled Destiny for a substantial period while she was living with Jo testified that Destiny's behavior significantly improved while she was

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25 S.C. Code Ann. § 63-15-60 (2021).

26 Alukonis v. Smith, 846 S.E.2d 600 (S.C. Ct. App. 2020).

living with Jo. The therapist also testified that, after she visited her mother during that period, she became more depressed and agitated. The therapist believed it was in Destiny's best interest to remain in Gretna with Jo. During the period Destiny lived with Jo, Destiny's grades in school also significantly improved.

The district court found that, at the time of trial, the mother was a fit parent, and that Jo stood in loco parentis to Destiny, because she had been assuming parental obligations for Destiny for a significant period. In such a situation, there was still a parental preference in favor of the mother. However, the district court concluded that, in this instance, Jo had established by clear and convincing evidence that it was in Destiny's best interest to remain with Jo, and awarded primary custody to Jo.

On appeal to the Nebraska Supreme Court, the court stated that, in a custody dispute between a fit parent and a third party, the parental preference should be rebutted only in an exceptional case. In such an exceptional case, the third party must prove that placing the child with the parent will cause serious physical or psychological harm to the child, or a substantial likelihood of such harm. Because the district court did not apply this standard, the district court's custody order was reversed, so the district court could reevaluate the case under the standard set forth by the supreme court.[27]

Colorado has adopted a rule that, in a custody dispute between a parent and a non-parent, the parent should prevail unless the non-parent can show that "special factors" are present that justify rebutting the parental presumption.[28] In Arizona, a non-parent may make a claim for custody over the objection of parent if the non-parent can show that (1) the claimant stands in loco parentis to the child, and (2) placing the child with the parent would be significantly detrimental to the child, and (3) there are other applicable circumstances (such as one parent is dead).[29] Even if the claimant can satisfy this standard, the parental pre-

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27 State *ex rel.* Tina K. v. Adam B., 948 N.W.2d 182 (Neb. 2020).

28 *In re* B. J., 242 P.3d 1128 (Colo. 2010); *In re* E.S., 264 P.3d 623 (Colo. 2011).

29 Ariz. Rev. Stat. Ann. § 25-409 (2013).

sumption must still be rebutted. In a few recent cases, grandparents have successfully done so.[30]

IV. Apply No Parental Presumption in a Custody Dispute Between a Parent and a De Facto Parent or Psychological Parent

New Jersey has announced a rule that, in a custody dispute between a parent and a non-parent, there is no parental presumption if the non-parent can show that he or she is a "psychological parent" of the child. If the non-parent can establish this, the issue becomes what custody placement would be in the child's best interest.[31] To prove that the person is a psychological parent, he or she must show that (1) the parent consented to, and fostered, the parent-like relationship between the child and the claimant, (2) the claimant and the child lived together in the same household, (3) the claimant assumed the obligations of parenthood by taking significant responsibility for the child's care, education, and development, without expecting compensation, and (4) the claimant has assumed a parental role for sufficient length of time to have established a bonded relationship with the child that is parental in nature.[32]

Under the New Jersey approach, the psychological parent is not considered a legal parent.[33] The designation as a psychological parent merely makes it easier for a court to award custody to that person. A number of other courts have granted non-parents visitation or custody when the court has found that the party was the de facto parent or a psychological parent.[34]

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30 *See* Chapman v. Hopkins, 404 P.3d 638 (Ariz. Ct. App. 2017); Bundy v. Alford, No. 1 CA–CV 16–0419 FC, 2017 WL 1325217 (Ariz. Ct. App. Apr. 11, 2017).

31 V.C. v. M.J.B., 748 A.2D 539, 554 (N.J. 2000).

32 *Id. at* 551 (citing *In re* Custody of H.S.H.-K, 553 N.W.2d 419, 421 (Wis. 1995)); *See also* P.B. v. T. H., 851 A.2d 780, 789-790 (N.J. Super. Ct. App. Div. 2004).

33 Tortorice v. Vanartsdalen, 27 A.3d 1247, 1251 (N.J. Super. Ct. App. Div. 2011).

34 *See* Jeff Atkinson & Barbara Atwood, *Moving Beyond* Troxel*: The Uniform Nonparent Custody and Visitation Act,* 52 FAM. L.Q. 479, 488 n.59 (2018).

In Washington, to be designated a de facto parent it must be established that the person (1) resided with the child in the same household for a significant period, (2) the person engaged in consistent caretaking for the child, (3) the person undertook full and permanent responsibilities for the child without the expectation of compensation, (4) the person held out the child as the person's child, (5) the person has established a bonded relationship with the child that is parental in nature, (6) the other parent fostered or supported the bonded relationship between the person and the child, and (7) continuing the relationship between the individual and the child is in the best interest of the child.[35] In Washington (as well as in Delaware, Maine, and Vermont, discussed below), if a person is found to be a de facto parent, this creates a legally recognized parent-child relationship. Because of this, in any dispute between a de facto parent and another legally recognized parent, there is no parental presumption.

Delaware has created a more streamlined set of requirements to be designated a de facto parent. In Delaware, it must be established that (1) the parent supported and consented to the establishment of a parent-child relationship between the person and the child, (2) the person has exercised parental responsibility for the child, and (3) the person has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.[36] Maine has also adopted a similar procedure for a person to be designated a de facto parent,[37] as has Vermont.[38]

In addition to the statutory acceptance of de facto parenthood in a number of states, the Maryland Court of Appeals has judicially adopted de facto parenthood as a way to create a legal parent-child relationship in Maryland.[39] To be designated a de facto parent the petitioning party must show that 1) the legal parent consented to, and fostered, the petitioner's parent-like relationship with the child, 2) the petitioner and the child lived together in the same household, 3) the petitioner as-

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35 WASH. REV. CODE § 26.26A.440 (2022); *See In re* Parentage of L.J.M., 476 P.3d 636 (Wash. Ct. App. 2020).

36 13 DEL. CODE ANN. tit. 13, § 8-201 (West 2021).

37 ME REV. STAT. ANN. tit. 19-A, § 1891 (2021).

38 VT. STAT. ANN. tit. 15C, § 501 (West 2022).

39 Conover v. Conover, 146 A.3d 433, 453 (Md. 2016).

sumed obligations of parenthood by taking significant responsibility for the child's care, and 4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded relationship that is parental in nature.[40]

The current draft of the Restatement of Children and the Law being prepared by the American Law Institute provides that, in a custody dispute between a third party and a parent, if the third party proves that he or she is a de facto parent of the child, the dispute should be resolved on a best interests basis.[41]

V. Discussion

Many states usually apply a parental presumption if there is a custody dispute between a parent and a non-parent. It was mentioned above that states disagree about how long a parent needs to "voluntarily relinquish" custody of a child to a third party before there should no longer be a parental presumption in a custody dispute.[42] In Texas, this occurs when a parent has left their child with another for more than one year,[43] while the rule in New York holds that this occurs after two years.[44]

The custody dispute in the famous case of *Painter v. Bannister*[45] arose when Harold Painter's wife and his daughter were killed in a car accident. Harold was in shock, and asked his former wife's parents to care for his son while Harold grieved, which the grandparents agreed to do. After about 18 months, when Harold had remarried, he informed his former in-laws that he was ready to resume caring for his son. The grandparents, who did not want to let Harold take his son, initiated a custody action and requested that they should be named primary custodians for their grandchild. Despite the fact that the court found Harold to be a fit parent, due to expert testimony and because the court perceived that the grandparents' household would much more stable than Harold's household, the Iowa Supreme

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40 Kpetigo v. Kpetigo, 192 A.3d 929, 936 (Md. Ct. Spec. App. 2018) (citing *In re* Custody of H.S.H.-K, 553 N.W.2d 419, 421 (Wis. 1995)).

41 *See* RESTATEMENT OF CHILD. AND THE LAW §§ 1.80-1.82 (AM. L. INST., Tentative Draft No. 2, Mar. 20, 2019).

42 *See supra* text accompanying notes 20-24.

43 TEX. FAM. CODE ANN. § 153.373 (West 2021).

44 N.Y. DOM REL. LAW § 72 (McKinney 2021).

45 Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966).

Court reversed the trial court and ruled that the grandparents should get custody of the seven-year-old boy.

A Texas court may well agree with the Iowa Supreme Court in such a situation. Because Harold had left his son with the grandparents for more than one year, the case would be decided on a best interests basis without a parental presumption. A New York court might reach the opposite conclusion, because Harold had not left his son for more than two years, so the parental presumption would still apply. For what it is worth, after four decades of teaching this case in my family law classes, most students seem to disagree with the Iowa Supreme Court and believe that the father should have received custody of the child.

It may be that students empathize with Harold Painter's situation and do not consider him in any way blameworthy. It is unclear how students would react if, instead of needing to grieve the death of his wife, he had placed the child with grandparents for 18 months so he could address some other problem, such as addiction to drugs.

The most controversial issue today regarding resolving a custody dispute between a parent and a non-parent arises when a parent has invited a new spouse or a boyfriend or girlfriend to live with the parent and his or her child, and after a significant period of living together the romantic relationship ends. What should happen if the stepparent or boyfriend or girlfriend sues for custody? As set forth above, in some states the dispute would be resolved on a best interests basis if the court finds that the person desiring custody is a psychological parent or a de facto parent.

I believe many parents likely would be shocked to learn that this rule exists in some states, and that it may well reflect the wave of the future.[46] When such an approach recently was suggested to a Virginia court, the court stated:

> [I]t would open a Pandora's box of unintended consequences to hold that a legal parent-child relationship is created simply by virtue of such factors as the amount of time a child spends with, or the strength of an emotional bond that exists between, another living in the same household. It is not hard to imagine profound consequences for society and the courts if a parent knows that an ex-wife, ex-husband, ex-boyfriend, ex-girlfriend, former nanny, au pair or indeed virtually anyone not re-

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46 *See generally* Atkinson & Atwood, *supra* note 34.

> lated to their child through biology or legal adoption, can be placed on equal footing as a biological or adoptive parent solely through a significant emotional bond with the child.[47]

The Virginia court seems to be exaggerating some possible ramifications of accepting a concept such as a de facto parent. Some courts have emphasized that, because of the various requirements for becoming a de facto parent, it should not be possible for neighbors, caretakers, baby sitters, nannies, au pairs, and family friends to become de facto parents.[48]

The concept of de facto parenthood certainly has received a great deal of scholarly attention during the past two decades.[49] While many scholars support the idea that, compared to most third parties, it should be substantially easier for a de facto parent to be able to obtain custody of a child despite the objection of a parent, it is not clear to this writer that the general public shares that view.

Assume that Harold Painter, instead of leaving his son with the Bannisters while he lived elsewhere, chose to come to live with his son in the Bannisters' home. I would argue that, in such a situation, there should be a parental presumption in any custody dispute between Mr. Painter and the Bannisters, even if the Bannisters became very involved with the care of their grandson while he was living with them. In contrast, proponents of the rights of de facto parents would argue that there should be no parental presumption if the grandparents lived with the grandchild for a substantial period and played a parental role, even if Harold was also simultaneously living with his son.

In my view, there should always be a parental presumption, except when a parent has placed the child in another household for a significant period. The New York standard that the parental presumption should be lost after letting a child live elsewhere for two years seems fair for this purpose. In all other custody disputes between a parent and a non-parent, there should be a parental presumption, which could be rebutted by showing that the parent is unfit or that other "compelling circumstances" exist.

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47 Hawkins v. Grese, 809 S.E.2d 441, 448. (Va. Ct. App 2018).

48 Rubano v. DiCenzo, 759 A.2d 959, 976 (R.I. 2000).

49 *See* Joslin & NeJaime, *supra* note 2, at 5, 37; *see* Gregg Strauss, *What Role Remains for De facto Parenthood?* 46 FLA. ST. U. L. REV. 909 (2019).

Consider a situation where a stepparent has been living with a parent and his or her child for a significant period and then the parent dies. In a custody dispute between the stepparent and the surviving parent, there would be a parental presumption. However, compelling circyumstances might exist if placing the child with the parent would require the child to change schools and move to another town, away from all of his or her friends and extracurricular activities. If the child is mature, the child's wishes could also be relevant to such a determination.

I believe that the standard proposed in this article is a compromise. It generally retains the parental presumption, but lets it be rebutted by showing that compelling circumstances exist.

VI. The Extent To Which a Parent's Constitutional Rights Impact These Issues

In *Troxel v. Granville*,[50] the court appeared to recognize a general right of parental autonomy for a fit parent to raise his or her child without intrusion by the state. To date, a number of state courts have held that this general principle of parental autonomy does not limit the ability of states to apply a principle such as de facto parenthood to make it easier for a non-parent to obtain custody over the objection of a parent. For example, while a North Carolina court recognized a general parental right of autonomy regarding his or her child, if the parent encourages a third party to establish a close parent-like relationship with the child, this reduces the parent's right to unilaterally sever the relationship between the child and the de facto parent.[51]

In such a situation, the New Jersey Supreme Court has stated that when a parent allows a third party to live with the parent and the child and

> allow[s] that party to function as a parent in the day-to-day life of the child; and to foster the forging of a parental bond between the third party and the child. In such circumstances, the legal parent has created a family with the third party and the child, and has invited the third party into the otherwise inviolable realm of family privacy. By virtue of her own actions, the legal parent's expectation of autonomous privacy in her relationship with her child is necessarily reduced

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50 Troxel v. Granville, 530 U.S. 57 (2000).

51 Mason v. Dwinnell, 660 S. E.2d 58, 69 (N.C. Ct. App. 2008)(citing Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006)).

> from that which would have been the case had she never invited the third party into their lives.[52]

The Maryland Court of Appeals also has held that it is not a violation of *Troxel* to allow a de facto parent to maintain a custody action against a legal parent, and cites decisions from other states allowing third-party de facto parents or psychological parents to contest custody over the objection of a legal parent.[53] So, it does not appear that courts have found it a violation of a parent's constitutional autonomy rights if ther state makes it easier for a de facto parent to obtain custody over the objection of a parent.

VII. Conclusion

Custody disputes are arising with some frequency between a parent and a non-parent, particularly when the non-parent has established a strong bond with a child. Perhaps the strongest cases are those in which the parent has voluntarily relinquished the child to another's care for a substantial period. In such a case, it is quite possible that the child has a stronger bond with the non-parent than the parent. In addition, where voluntary relinquishment has occurred, one could argue that the parent has abandoned the child.

The most controversial situation arises where the non-parent has lived with the parent and the child in a romantic relationship with the parent for a significant period and then the romantic relationship ends, after the non-parent has established a bond with the child. As discussed above, states disagree regarding whether the parental presumption should apply, and if it does, what the non-parent needs to show to rebut the presumption. I argued above that, even if the non-parent is a de facto parent, there generally should be a parental presumption, which could be rebutted by showing the parent is unfit or that other compelling circumstance exist.

While almost all states recognize that the U.S. Supreme Court in *Troxel* recognized a general right of parental autonomy, most courts to date do not find it a violation of *Troxel* if a court

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52 V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000).

53 Conover v. Conover, 146 A.3d 433, 445-446 (Md. 2016).

or legislature chooses to make it easier for a de facto parent or psychological parent to contest custody with a legal parent.