AUNT BEE AS MOM, STEPMOM, OR GRANDMOM?

*Jeffrey A. Parness**

The long-running—and often the most watched[1]—1960s television program *The Andy Griffith Show* featured Sheriff Andy, his son Opie, and his Aunt Bee, who lived with and cared for them.[2] During the show, neither Andy nor Bee were married, nor were they intimate with anyone.[3] Opie had no mother, nor any man or woman apart from Bee who regularly aided Andy in his upbringing.

If Andy and Bee had a falling out in the 1960s, Opie would have lived with Andy and would have seen Bee only as Andy determined. As a nonparent, Bee typically would have had no standing to seek court-ordered childcare as might a stepparent or a grandparent. Andy would have had superior parental rights even if Bee could have provided Opie with a much better home or much-needed guidance.[4]

Today, while few states have special childcare statutes for aunts, uncles, or cousins, emerging statutes and common law rulings are

* Professor Emeritus, Northern Illinois University College of Law.

1. *See* RICHARD KELLY, THE ANDY GRIFFITH SHOW 3 (rev. ed. 6th prtg. 1988) (discussing the show's consistent ratings success).

2. In the first episode, Andy tells Opie that Andy and some of his relatives were raised by Bee. *The Andy Griffith Show: The New Housekeeper* (CBS television broadcast Oct. 3, 1960). Bee was the aunt of Andy, a widower, and cared for Opie on the show when he was between six and fourteen years old. *See* KEN BECK & JIM CLARK, MAYBERRY MEMORIES: THE ANDY GRIFFITH SHOW PHOTO ALBUM 1 (2000). In the show's spinoff, *Mayberry R.F.D.*, Andy marries his longtime girlfriend Helen and Bee moves in with a farmer and his young son. *See* KELLY, *supra* note 1, at 227. Bee has been described as Andy's live-in housekeeper who basically became Opie's surrogate mother and grandmother, serving "as a sort of mother-aunt-wife . . . look[ing] after [Andy's] home, son, and stomach." BECK & CLARK, *supra*, at 59; KELLY, *supra* note 1, at 46.

3. *See* KELLY, *supra* note 1, at 46 ("[Andy and Bee] cared for each other . . . but there was not a strong emotional tie between them. Both characters, but especially Aunt Bee, kept a tight rein on their feelings in favor of domestic and social propriety.").

4. *Cf. In re* Miller, 3 Cal. Rptr. 450, 454 (Dist. Ct. App. 1960) ("Where a parent . . . is in a position to take the child and is not shown to be unfit the court may not award custody to strangers merely because it feels that they may be more able to provide financial, educational, social or other benefits.").

beginning to recognize childcare opportunities for de facto parents[5] and childcare-favored nonparents who are neither biological nor adoptive parents. These individuals sometimes encompass Aunt Bee and more often include former stepparents and grandparents.

At times, the benefits of expanded parentage and nonparent childcare orders over parental objection are clear: Opies need Aunt Bees, and Aunt Bees need Opies. Andy clearly invited Bee to help rear Opie. In the event of a falling out, any newfound displeasure Andy had with Bee would probably have nothing to do with Bee's care of—or love for—Opie. Allowing courts to order continuing contact between Bee and Opie on Bee's request and over Andy's objection in order to serve Opie's interests seems quite sensible. Absolute parental veto power over second parents and nonparents who seek childcare orders is often not what is best for children. Kids today live in a society in which, as Justice Kennedy observed in *Troxel v. Granville*, "the conventional nuclear family . . . is simply not the structure or prevailing condition in many households."[6]

State lawmakers now regularly debate the merits of absolute parental veto power and the circumstances for new parent and nonparent childcare standing when parental authority is necessarily limited. The trend clearly favors recognizing more new parents and more new childcare-favored nonparents. Yet there are limits to reforms, as superior parental rights have federal constitutional protection.[7] The extent of such protection, however, remains unclear, leaving state lawmakers with broad discretion. Many state lawmakers have exercised this discretion by deeming parental consent to—or allowance of—nonparent childcare over some significant period of time to constitute a waiver of superior parental rights.[8]

5. De facto parent: "An adult who (1) is not the child's legal parent, (2) has, with consent of the child's legal parent, resided with the child for a significant period, and (3) has routinely performed a share of the caretaking functions at least as great as that of the parent who has been the child's primary caregiver without any expectation of compensation for this care." BLACK'S LAW DICTIONARY (9th ed. 2009).

6. Troxel v. Granville, 530 U.S. 57, 98 (2000) (Kennedy, J., dissenting).

7. *See id.* at 66 (plurality opinion) ("[I]t cannot . . . be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

8. Regarding new parents, see, for example, DEL. CODE ANN. tit. 13, § 8-201 (2009) (allowing the family court to grant de facto parent status when a person has "had the support and consent of the child's parent"). Regarding nonparents, see, for example, *In re* Mullen, 953 N.E.2d 302, 305–06 (Ohio 2011) (explaining that voluntary shared-custody agreements between parents and nonparents are valid and

The breadth of legal options available to state lawmakers is exemplified by the current controversies in Illinois's legislature and courts. Traditionally, Illinois statutes only recognized as parents those with biological or adoptive ties.[9] Today the Illinois General Assembly is considering two separate bills emanating from its own Family Law Study Committee, which include proposed amendments to both the Marriage and Dissolution of Marriage Act (PIMDMA)[10] and the Parentage Act (PIPA).[11] Within the courts there are also considerations of whether intent to adopt, without formal adoption, can lead to parentage designations in childcare cases just as it does in probate proceedings.[12]

PIMDMA originally recognized two classes of parents with standing to seek allocations of parenting time: legal parents, whose ties are "biological or adoptive," and equitable parents, whose ties involve, *inter alia*, step-parenthood or residence with a child while holding oneself out as the child's parent under an agreement with the child's legal parent or parents.[13] PIPA recognized parentage, *inter alia*, in an individual who, "for the first 2 years after the birth of a child," "resided in a household with the child," openly held the child out as his or her own while the child had only one parent under law, and that parent consented to the holding out.[14]

Outside of Illinois, there is a broad range of statutory state laws on parentage; some, but not all, are guided by biological or adoptive ties. An example of a more expansive law is the Delaware statute allowing judicial recognition of de facto parent status for one who had "a parent-like relationship" with a child with "the support and consent of the child's parent," exercised "parental responsibility," and "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."[15] A more narrow

enforceable). However, when there are already two recognized parents, consent leading to third-parent recognition is unlikely. *See, e.g.*, Bancroft v. Jameson, 19 A.3d 730, 749–50 (Del. Fam. Ct. 2010) (refusing to grant de facto parent status to a boyfriend when the mother and father both remained fit parents).

9. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 45/2 (West 2009).

10. H.R. 1452, 98th Gen. Assemb., Reg. Sess. § 5-15 (Ill. 2013). "PI" in the PIMDMA acronym stands for "Proposed Illinois."

11. H.R. 1243, 98th Gen. Assemb., Reg. Sess. §§ 101, 977 (Ill. 2013). "PI" in the PIPA acronym stands for "Proposed Illinois."

12. *See* DeHart v. DeHart, 986 N.E.2d 85, 100 (Ill. 2013).

13. Ill. H.R. 1452 § 5-15, at § 600.

14. Ill. H.R. 1243 § 204(a)(5), (b)(5).

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

statute—at least in some ways—operates in the District of Columbia, where a de facto parent can seek third-party custody only if the petitioner lived with the child since birth, or in the same household with the child for at least ten of the last twelve months.[16] In Arizona, a person who has standing "in loco parentis to the child"—meaning the person "has been treated as a parent by [the] child and . . . has formed a meaningful parental relationship with [the] child for a substantial period of time"—can seek "legal decision-making authority or placement of the child."[17]

In the courts, the Illinois Supreme Court recently asked two intermediate appeals courts to reconsider decisions denying de facto parent status to men who were neither biological nor adoptive parents, but who acted as fathers.[18] One man was an unwed father,[19] and the other was a former stepfather.[20] Each man sought childcare when their intimate relationships with the mothers ended.[21] The remands were ordered[22] because the high court, in an unrelated probate case, had recently held that a child could recover as an heir to a decedent if the decedent held out the child as his own, if there was a parental-like relationship between the decedent and child, and if the decedent had intended to adopt the child but never did.[23] If the probate approach is followed in childcare settings in Illinois, the new parentage recognition would, in many ways, be narrower than in Delaware and the District of Columbia.[24]

Comparably, outside Illinois there is a broad range of judicial precedents on parentage going beyond biology and formal adoption. For example, under Wisconsin case law, while there is no equitable-parent doctrine, the equitable-estoppel doctrine can operate in childcare disputes involving nonparents when children would otherwise be harmed.[25] In Washington, a de facto parentage precedent requires, *inter alia*, parental

16. D.C. CODE §§ 16-831.01(1), .03(a) (LexisNexis Supp. 2012).

17. ARIZ. REV. STAT. ANN. §§ 25-401(1), 25-409(A)(1) (Supp. 2012).

18. *See* Mancine v. Gansner, 992 N.E.2d 1 (Ill. 2013) (mem.); *In re* Parentage of Scarlett Z.-D., 992 N.E.2d 3 (Ill. 2013) (mem.).

19. *In re* Parentage of Scarlett Z.-D., 975 N.E.2d 755, 757 (Ill. App. Ct. 2012).

20. *In re* Marriage of Mancine, 965 N.E.2d 592, 594–95 (Ill. App. Ct. 2012).

21. *Id.* at 595; *In re Parentage of Scarlett Z.-D.*, 975 N.E.2d at 757.

22. *In re Parentage of Scarlett Z.-D.*, 992 N.E.2d at 3; *Mancine*, 992 N.E.2d at 1.

23. DeHart v. DeHart, 986 N.E.2d 85, 103 (Ill. 2013).

24. For example, unlike the Delaware and District of Columbia standards, the Illinois probate approach requires an intent to adopt. *Id.*

25. *See* Randy A.J. v. Norma I.J., 677 N.W.2d 630, 641–42 (Wis. 2004).

consent and a "bonded, dependent relationship parental in nature."[26]

The breadth of state discretion on nonparents, not ever recognized as parents, who can seek childcare orders over parental objection is exemplified in both grandparent and stepparent visitation statutes. Such laws sometimes go too far, such as the former Washington statute overturned in *Troxel* that allowed court visitation orders "for any person when visitation may serve the best interest of the child."[27] Yet many stepparent and grandparent visitation laws have been upheld.[28] Some are quite broad while others are very narrow.[29]

Special grandparent and stepparent visitation laws need not be used when parenthood is possible for grandparents or stepparents. For example, the original PIMDMA proposal recognized childcare opportunities in former stepparents as parents if they resided with children while holding the children out as their own with parental agreement.[30] The PIPA proposal recognized former stepparents as parents only if they both resided with the child and held the child as their own with parental consent for the first two years after birth.[31]

As to special visitation standing for grandparents, the current Illinois statute authorizes visitation orders for grandparents and great-grandparents for "a minor child, who is one year old or older," "if there is

26. *In re* Parentage of L.B., 89 P.3d 271, 285 (Wash. Ct. App. 2004).

27. Troxel v. Granville, 530 U.S. 57, 61, 73 (2000) (citing WASH. REV. CODE § 26.10.160(3) (1994)); *see also* HAW. REV. STAT. § 571-46(a)(2) (2006) ("Custody may be awarded to persons other than the father or mother whenever the award serves the best interest of the child."); *id.* § 571-46(a)(7) ("Reasonable visitation rights shall be awarded to . . . any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child."); N.C. GEN. STAT. § 50-13.2(b1) (2011) ("An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate."); OR. REV. STAT. ANN. § 109.119(1), (10) (West Supp. 2013) (permitting any person—including a stepparent or grandparent—"who has established emotional ties creating a child–parent relationship or an ongoing personal relationship with a child" to petition for custody if the child–parent relationship has existed for six months before filing, or the ongoing relationship has had "substantial continuity for at least one year").

28. *See, e.g.*, Herndon v. Tuhey, 857 S.W.2d 203, 209 (Mo. 1993); R.T. v. J.E., 650 A.2d 13, 15–16 (N.J. Super. Ct. Ch. Div. 1994).

29. *Compare* HAW. REV. STAT. § 571-46(a)(2), *with* OR. REV. STAT. ANN. § 109.119(1), (10).

30. *See* H.R. 1452, 98th Gen. Assemb., Reg. Sess. § 5-15, at § 600 (Ill. 2013).

31. H.R. 1243, 98th Gen. Assemb., Reg. Sess. § 204(a)(5), (b)(5) (Ill. 2013).

an unreasonable denial of visitation by a parent"[32] and one of several other conditions exists: there is an ongoing dissolution or custody dispute, and at least one of two parents does not object to grandparent visitation;[33] "the child is born out of wedlock [and] the parents are not living together;"[34] or "a parent has been incarcerated in jail or prison."[35] In assessing visitation petitions, "there is a rebuttable presumption that a fit parent's actions . . . are not harmful to the child's . . . health," with the burden on the petitioner to prove the parent's actions are harmful.[36] Other states afford grandparents broader childcare opportunities.[37]

As to special visitation standing for stepparents, the current Illinois statute authorizes childcare orders for former stepparents who, *inter alia*, lived with children for at least five years, if the children are at least twelve years old.[38] By contrast, in Delaware a stepparent residing with a "custodial or primary placement parent" can seek "permanent custody or primary physical placement" if the primary placement parent dies or is disabled, even if there is a surviving fit, natural parent.[39]

The breadth of state discretion on nonparents, such as grandparents and stepparents, who can seek childcare orders over parental objection is also exemplified in state custodian laws. For example, Aunt Bee would have standing in Kentucky, as did Aunt Jerri in the *Hicks v. Halsey* case.[40] There, a child's maternal aunt gained custody as a de facto custodian because she had served as the "primary caregiver for, and financial supporter" of her nephew who had resided with her for at least six months when the nephew was under three years of age.[41] Aunt Jerri had earlier

32. 750 ILL. COMP. STAT. ANN. 5/607(a–3), (a–5)(1) (West Supp. 2013).

33. *Id.* 5/607(a–5)(1)(B).

34. *Id.* 5/607(a–5)(1)(D)–(E).

35. *Id.* 5/607(a–5)(1)(A–15).

36. *Id.* 5/607(a–5)(3).

37. *See generally* Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 3, 20–23 (2013) (providing a general review of statutes).

38. 750 ILL. COMP. STAT. ANN. 5/607(b)(1.5)(A)–(B).

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

40. *See* Hicks v. Halsey, 402 S.W.3d 79, 83 (Ky. Ct. App. 2013).

41. *Id.* at 80–81 (quoting KY. REV. STAT. ANN. § 403.270(1)(a) (LexisNexis 2010)); *see also* S.C. CODE ANN. § 63-15-60(A)(1) (2010). If the child is over three, the de facto custodian threshold is different. *See* KY. REV. STAT. ANN. § 403.270(1)(a) (requiring one-year residence or placement by the Department for Community Based Services); S.C. CODE ANN. § 63-15-60(A)(2) (requiring only one-year residence, with no placement alternative).

been appointed her nephew's guardian, which was said to involve only "custody" of a ward and was "not necessarily the same as legal custody."[42] In Kentucky, grandparents have also been recognized as de facto custodians.[43] In Nevada, custody may be awarded to "any person other than a parent, without the consent of the parents," if "an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child."[44] Custodian laws can supplement any special laws on grandparents and stepparents.[45]

So what of Aunt Bee today? Might she be designated a de facto parent? If not, should she at least merit nonparent visitation opportunities, via special statutes as with grandparents and former stepparents, or via general statutes as with Kentucky de facto custody? Bee lived with Andy and Opie, and acted in many ways as Opie's mom.[46] If she and Andy had a falling out, Bee would remain a family member, unlike a former stepparent—and even former stepparents sometimes, and more and more frequently, have childcare standing.[47] Bee always acted with Andy's consent, which can be viewed as a waiver of Andy's superior parental rights.[48] Why not treat Aunt Bee like a mom with no biological or adoptive ties, or like a stepmom or a grandmom? Should Andy always be empowered to negate the relationship between Opie and Aunt Bee regardless of the harm to Opie, and to Aunt Bee? Although Andy could have negated the relationship between Bee and Opie in the 1960s, today he should not have absolute power to do so.

42. *Hicks*, 402 S.W.3d at 83.

43. *See* J.L.A. v. S.C., Nos. 2012-CA-000758-ME, 2012-CA-000937-ME, 2013 WL 843815, at *4 (Ky. Ct. App. Mar. 8, 2013). *But see* Brumfield v. Stinson, 368 S.W.3d 116, 118–19 (Ky. Ct. App. 2012).

44. NEV. REV. STAT. § 125.500(1) (2011).

45. *See* Atkinson, *supra* note 37, at 8, 20–23 (listing the states that allow "any person" to petition for custody, and noting many of those states also have specific provisions for other categories of people).

46. *See* KELLY, *supra* note 1, at 46.

47. *See, e.g.*, Slack v. McKown, No. 2011-SC-000511-MR, 2012 WL 1943697, at *1–2, *4 (Ky. May 24, 2012).

48. *See* DEL. CODE ANN. tit. 13, § 8-201(c) (2009) (stating consent may allow the Family Court to grant de facto parent status).