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Principles of the Law of Family Dissolution:
Analysis and Recommendations

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Rufus King: I'd like to take a minute to describe how the American Law Institute started the process of drafting these recommendations.

In my freshman year at the American Law Institute (I was then sitting on the Domestic One calendar in the Superior Court), it occurred to me that the ALI had done nothing to address the areas of family and domestic law. It also seemed to me that the kind of thoughtful discussion the Institute was known for, and its ability to draw leading scholars, practitioners, and judges, would make it an ideal place to engage in some thinking about those issues.

I learned that a white paper written in 1988 was circulating and that it outlined a possible project to address the law of family dissolution. The question was one of funding, so we asked around and found enough to get started. The project began with some unusual approaches. In the early discussions, there was an emphasis on underlying social theory. Lenore Whitesman, author of *Divorce in America*, was in the advisory group, so we talked about some of the broader issues that had been raised in that and similar work. Our notion was that before we tackled black letter law and commentary, we needed to establish a context for it. So we spent a lot of time early on discussing social theory, what worked and didn't work, and what problems arise from the breakup of families.

The second unusual aspect of the process was that, while state trial courts are where all the work on domestic relations law is occurring, the American Law Institute is not heavily populated with state trial judges. To address this, we needed to put together an advisory group of judges, many of whom were not members of the Institute. The challenge, then, was to find both judges and practitioners who were interested and committed. We didn't want Rolls-Royce-driving Park Avenue practitioners. We needed people who brought to disputes thoughtfulness and a commitment to resolution.

One final aspect was that the legal terrain was seen by those at the Institute as being very much in flux. Much of the law was subject to varying state rules. The child support guidelines had just been established and were still getting settled, so a restatement seemed beyond the reach of the project. We therefore settled on the notion of a Statement of Principles. That framework also gave us leeway to be aspirational where it seemed warranted. I think the product evidences that.

Our basic approach was to look at trends in decisions and try to come up with predictable rules that removed some of the almost unlimited discretion characterizing much of family law, where decisions ultimately come down to the "best interest" and "fair and reasonable under the circumstances" standards. These vague standards basically mean that it is a roll of the dice whenever parties do have to go to court.

A fundamental backdrop to our discussions was that over ninety percent of domestic relations disputes are settled, so that whatever rules we developed ought to apply only when the parties couldn't agree, and a great deal of deference should be shown to any agreement by the parties. This belief is reflected in the provision of the Principles subordinating all the rules therein to agreement of the parties.

Finally, there was an effort to look at the results of "best interest" inquiry, so that our results wouldn't be too far from what was in fact happening in current decisions around the country. We wanted to determine what "best interest" often means, then try to find a rule to capture that.

The project continued for a long period of time. We started in 1989 with the first appeals for funding and the organization of a reporter, some advisers, and the advisory group of judges. There was an evolution both of reporters and of some of the advisers—as we picked up interest along the way, we added advisors. At the beginning, we had virtually no member advisers, and by the end we had the long list of them that appears at the front of the report.

The discussions were extremely rewarding for the relatively young trial judge I was, as, I believe, they were for the other participants. We were walking on air. It was exciting to sit in a room with forty or fifty people who could discuss at such a high level and who had the ability to draw on experience and observations from all over the country. These meetings represented some of the highest-level discussions that I have ever been privy to.

We believe we have been able to identify some simplifying principles. In particular, there was an effort to do for alimony what child support guidelines had done for that field. We wanted to take the "dice roll" element out of alimony, give it some predictability, and establish guidelines for when it would occur, under what circumstances, and in what quantity. An important premise of the discussions was that the high level of conflict is itself a severely damaging consequence of family breakup. If our rules could improve predictability, and reduce the high level of conflict without upsetting the way that people ordinarily order their affairs, that was a valuable contribution.

The results are intended to guide both legislatures and courts. West Virginia has adopted some of the guidelines. We hope that more of the legislative provisions will be adopted in other states. At the least, the recommendations already share the excitement that all of us felt as we were discussing the provisions, and they have brought some careful thought to the field.

Jana Singer: The ALI Principles are massive, so Mitt and I decided to focus on the provisions that have to do with parents and children as opposed to the provisions that deal primarily with financial issues, although of course the two are intimately related. Within that cut, we wanted to look specifically at two related areas.

First, I will facilitate a discussion about Chapter 2 of the Principles, which addresses the allocation of custodial and decision-making responsibility. Second,

Mitt will lead a discussion about the way the ALI report expands definitions of parenthood.

I will start by describing two aspects of the ALI Principles on the allocation of custodial and decision-making responsibility for children that I consider innovative, significant and controversial. The first is the fact that Chapter 2 focuses significantly, if not primarily, on the process by which parenting disputes are resolved as opposed to the outcome, making the parenting plan the cornerstone of the process. This aspect is significant and promising although it raises a number of challenges in terms of implementation.

Second, to the extent that the Principles do focus on outcomes, they attempt to substitute the more backward-looking "approximation of past caretaking" standard for the prevailing "best interest" standard. The drafters hope that the approximation standard will be both more predictable than the wide-ranging, highly discretionary "best interest" standard, and at least as individualized.

I am generally supportive of both impulses, although I think that the drafters have underestimated the difficulty of implementing these innovations in the real world. I am very interested in hearing from Michael Lamb and Bruce Copeland about the apparent gap between the approximation standard and the literature about parent-child relationships.

Let me give a few words of background about each of those aspects, then open the topic for discussion.

First, let me describe the process focus. The drafters emphasized that a primary focus of Chapter 2 is on structuring a process to enable divorcing or separating parents to make decisions about their children, and to resolve disputes about how their children will be cared for after separation or divorce. As Judge King has mentioned, in this sense the Principles shift the focus of law reform efforts from the small percentage of cases that eventually will be decided by a judge after contested proceedings to the much larger percentage of cases that eventually will be

resolved by agreement of the parties. The Principles, in a manner unusual in major law reform efforts, emphasize the process by which parents bring these cases to court, and prioritize trying to help parents by giving them the tools and the structure with which to resolve the cases without having to appeal to a judicial decision maker. The drafters say eloquently that their approach is designed to transform family dissolution proceedings from win-lose battles over children into planning events in which roles for both parents and mechanisms for dealing with future conflict are established. The cornerstone of this planning process is the parenting plan, which the Principles define as a set of provisions for the allocation of custodial responsibility and decision-making responsibility and for resolution of future disputes.

A key assumption behind this parenting plan approach is that ordinarily each parent will continue to play a role in the child's life. That assumption is immediately apparent from the fact that the Principles replace the traditional term "custody" with the more inclusive term "custodial responsibility," which is used to encompass all forms of post-divorce caretaking arrangements.

The term "legal custody," which refers to physical custody and visitation, is similarly replaced by "decision-making responsibility." The report says that term better connotes the range of possible ways that parents may allocate decision-making responsibility for children after a divorce or separation.

Interestingly, the Principles include a presumption, albeit a weak one, in favor of joint future decision-making responsibility as long as both parents have been exercising a reasonable share of what the drafters call "parenting functions." These they define broadly to include more than caretaking functions; they include financial support as well. With respect to ongoing decision-making responsibility, as opposed to where the child will spend time and who will physically care for the child, the assumption is that

both parents will continue to play a role and exercise responsibility jointly.

ALI drafters acknowledge that changes in terminology alone cannot revolutionize the way custody allocations are viewed. They do hope and anticipate that this change in the terminology will contribute to a broad reconceptualization of the enterprise, shifting it from who will possess and control children to what adjustments in family roles will be most appropriate for them.

But the Principles do more than simply change the terminology, and the other changes are among the most significant and the most challenging. The Principles establish a detailed structure for using the planning process to make decisions about children. They require that anybody seeking a judicial allocation of responsibility for a child must file a proposed parenting plan. That plan must address how and where the child will be cared for, how decision-making responsibility will be allocated, and how future disputes about parenting issues will be resolved.

Parents can file the plan jointly, if it is feasible to do so, or they can each file their own plan. In addition, the plan must be supported by an affidavit that contains fairly detailed information about how caretaking responsibilities for the child have been divided for at least the past two years, as well as information about the child's school and extracurricular activities, and financial information. These requirements are significant because the drafters are attempting to focus parents not on their own attributes and the other's foibles, but on how their children have been cared for and what their children's needs and activities are going to be in the future. The drafters say that the parenting plans are designed to anticipate and address children's needs rather than leaving that task to the courts.

Another theme of the planning process is that, as Judge King suggested, it represents an attempt to shift not only *authority* to parents, which I think has been a strand in the existing law, but to shift

responsibility to parents. That shift is an important one, as well as one that is challenging to implement.

It is not only parents, though, who are required to file parenting plans. Judges also have to order parenting plans, so the ALI Principles say, after having considered the proposed parenting plan or plans which have been submitted to them. It is no longer sufficient for the court to say "custody to mom; reasonable visitation to dad" or "joint legal custody of four days with mom, five days with dad for physical care." Rather, a judicial order must either contain a detailed schedule or formula, or set out a method for determining such a schedule in sufficient detail so that it can, if necessary, be enforced in a subsequent proceeding. This represents a new and higher expectation for judges in many if perhaps not all jurisdictions.

One element that the parenting plan must include is a provision for the resolution of future disputes. Again, this is an attempt to make both parties and the court think prospectively, and includes a strong suggestion that the provision should specify something other than returning to court. The parents themselves are encouraged to set up a non-judicial mechanism for resolving future disputes, but perhaps more significantly, the court can order such a non-judicial mechanism even if the parents have not agreed to it. The review process for a decision in future dispute resolutions handed through the non-judicial mechanism is different depending on whether the parents have agreed to it, in which case it is reviewable only on very narrow grounds, or whether the court has imposed it, in which case it is subject to *de novo* review.

It is significant that the Principles enable a court that is resolving a parenting dispute to order the parties, before they return to the court, to go through an alternative dispute resolution procedure. This provision raises questions about whether it will create incentives for new services.

The Principles contain some very important limitations on this planning process when it is applied

to high conflict divorces. The drafters recognized that the parenting plan process is not appropriate for all families, and they therefore require courts to have in place a screening process for identifying and addressing domestic violence, child abuse, and serious parental impairment. Specifically, the Principles state that if either of the parents makes a request, or if the court on its own has received credible information, the court must determine whether a parent has abused or neglected a child, perpetrated domestic violence or abused drugs or alcohol in a way that interferes with caretaking functions. If so, the court is required to impose limits on the parenting plan that are reasonably calculated to protect the child, the child's parents, and other members of the household.

The Principles go even further, saying that a court should not allocate either custodial or decision-making responsibility to an impaired parent or to a parent who has engaged in domestic violence or child abuse without making specific written findings that the limits put in place are adequate to protect the child and the other parent from harm. Depending on the percentage of cases that fall into this category, which the statistics suggest is quite large, this requirement presents a major resource issue. It raises the question of whether the focus on planning is workable if such a large percentage of cases need even more and different attention.

The procedures for court approval of parenting plans negotiated by the parties also make special provisions for domestic violence and parental impairment. The ALI Principles require that a court ordinarily defer to the provisions of the parenting plan agreed to by the parties unless that would be harmful to the child, but under normal circumstances the court is not expected to hold a hearing to look at the issues of voluntariness and harm to the child. That represents a departure from the theoretical obligation of a judge to review parental agreements about children, and sounds again the theme of more deference to and empowerment of parents. However, in cases where there has been credible evidence of abuse

or domestic violence, the court has an obligation to hold a hearing to examine harm and voluntariness. Again it is a push-me-pull-me type of situation: the drafters want to defer to parents, and think there is good reason to give more deference than the law, in theory, does now, but they also recognize that there is a category, perhaps a very large category, of cases where deference is not appropriate.

The emphasis on process, which I have described, is of course linked to substance. The Principles recognize that not all parents will be able to negotiate a parenting plan, and that negotiations over post-divorce parenting, like other forms of legal negotiations, take place in the shadow of the law. So the Principles do address what the governing legal standard should be for allocating custodial and decision-making responsibility by developing the "approximation standard."

The comments section of the report includes a fairly strong critique of the prevailing "best interest" rule, a critique which many of us know and some of us have made ourselves. The rule is indeterminate, unpredictable, and susceptible to manipulation by parents and on the basis of judicial biases.

At the same time, the ALI drafters criticize the major alternatives to the best interest standard that had previously been proposed. They identify these as the presumption in favor of the primary caretaker and the presumption in favor of joint custody, and describe them as, among other things, insufficiently flexible to respond to a variety of family arrangements and an attempt to impose a single standard on all parents.

Their answer to these problems is the rule that they refer to as the "approximation of past caretaking" standard. They claim that this increases predictability while retaining individualization. The standard says that if there is no parental agreement, the court should allocate custodial responsibility (physical residential care) so that the proportion of time the child spends with each parent approximates the proportion of time each parent has spent performing

caretaking functions for the child prior to the parents' separation.

The ALI defines caretaking functions much more narrowly than it does parenting functions. Parenting functions were those which, when filled by a parent, led presumptively to a share of decision-making responsibility; they included financial support. Caretaking is focused more on providing direct care for the child—bathing, feeding, bedtime playing, discipline, arranging for the child's education, or directing or supervising the care provided by others. It is much more similar to the list of factors that went into the primary caretaker presumption. The drafters claim that the approximation standard is different from the primary caretaker presumption in a number of ways. First, it is not binary; that is, it does not say that one parent is or is not the primary caretaker and therefore does or does not get primary custody. It allows for a range of custodial arrangements, depending on the prior division of caretaking responsibilities.

The drafters also claim that the approximation standard does not attempt to impose a single standard on all families but rather draws on the families' own past history to find a solution with which to move forward. The standard assumes, controversially, that the division of past caretaking functions correlates well with more abstract and difficult measures associated with the children's best interests, such as the quality of the parents' emotional attachment to the child and the parents' respective parenting abilities.

Also, while the drafters do not say that there will never be disputes about past caretaking, they believe those are likely to be more concrete, more resolvable, and less damaging to the children than disagreements about each other's moral character or the quality of each other's relationship with the children. Interestingly, the drafters note that although the approximation standard is designed primarily to serve the child's interests, the emphasis on past caretaking roles will usually also comport with the parents' general notions of fairness.

Although this is the presumptive approach, the drafters provide for a departure from the approximation standard in a number of situations, again raising the question of whether the exceptions will swallow the rules. One exception is that if using the past caretaking standard would not allow each parent to have at least minimal post-dissolution involvement—enough time to develop a meaningful relationship with the child—the drafters suggest a presumptive floor of custodial responsibility for all parents who have exercised a reasonable share of the broader category of parenting functions. For example, in the case of a workaholic parent married to a homemaker spouse, the fact that the workaholic parent may have provided a very small percentage of the caretaking functions in the past would not preclude that parent from receiving a minimal amount of custodial time with the child.

The drafters also authorize departures from the approximation standard to achieve some other goals, among them accommodating the firm and reasonable preference of a child who reaches a specific age, maintaining a uniform rule of statewide application, and keeping siblings together.

Finally, the drafters acknowledge that if the court is unable to allocate responsibility based on past caretaking because the child is an infant, then the court should fall back on the more general best interest standard.

The approximation standard applies to physical, residential arrangements. The drafters addressed decision-making responsibilities separately. Regarding those responsibilities, there is a presumption, although not a strong one, of joint allocation of decision-making authority to legal parents or parents by estoppel who have been exercising a reasonable share of that broader category of parenting functions. The presumption can be overcome where there is a history of domestic violence or child abuse or, and this is why I find this presumption a weaker one, where the party opposing it can show that a joint allocation of decision-making is not in the child's best interests.

The two significant innovations of the ALI Principles which I have described present a number of issues for discussion. Perhaps most importantly, they envision an expanded and perhaps unfamiliar role for most courts, and certainly for most judges. Instead of being an umpire and a faultfinder, the court system under the Principles is a problem solver, or at least a facilitator of parental problem solving. And instead of issuing a fairly brief win-lose decision and washing his or her hands of the case, a judge is required to think deeply and very specifically, hopefully with some help from the parties, about what particular caretaking and decision-making arrangements will work for a particular family into the future. That is a role that, at least in my experience, many judges are uncomfortable with and perhaps not well trained for, and for which they may need a different orientation.

In addition to expecting more of judges, the ALI Principles expect much more of court systems as a whole, a fact the drafters acknowledge. They envision, for example, that the court might make forms available that could enable parents to check off boxes and fill in blanks without the need for lawyers. As many of you know very well, this is a lot more involved and complicated than it sounds. The drafters suggest as well that in more complicated cases, court-based assistance could be made available to parents. This is expensive and requires more court personnel. The drafters authorize but do not require courts to mandate a comprehensive range of services designed to inform parents about the effects of divorce and separation and to help them prepare a parenting plan and resolve parenting disputes.

These provisions raise issues about resources. There also may be particular challenges posed by two categories of cases; together these categories may swallow up the middle. The first category of cases are those in which litigants are not represented by counsel. In jurisdictions like Baltimore City and, I suspect, Washington, D.C., a substantial majority of family cases have at least one unrepresented party. The latest figures I have heard are an estimated 80 or

83 percent. In other words, all of this parental planning is expected to be undertaken by people who are not only emotionally and financially in difficult circumstances but who also lack the resources of attorneys.

At the other end of the spectrum are the really high conflict cases, which the ALI Principles do not address well at all. I will be very interested to hear your perspective on whether a planning and parenting plan focus process makes sense in the very high conflict cases.

Then there are the significant numbers of cases that involve violence or parental impairment and therefore fall outside the planning process. The Principles pay relatively little attention to those cases.

Finally, and in anticipation of our later session on the definition of a parent, the Principles also open the allocation of responsibility and the decision-making authority process to persons other than those who have traditionally been recognized as legal parents. As a result, a case may well not involve a bipolar legal dispute but a dispute involving multiple people with multiple parenting plans among them.

Those are the biggest challenges as I see them. I am interested in both the experience that I know a number of you have had with trying to implement ideas from the Principles, and also the extent to which your experience, practice, and knowledge of the social science evidence suggest that the Principles represent a useful step forward in trying to resolve this type of case.

Let me be provocative. Michael [Lamb], you suggested earlier that the social science evidence did not support the approximation standard. Can you elaborate?

Michael Lamb: If there is one fundamental thing the evidence has suggested about children's best interests, it is that, generally speaking, children do better if they have supportive relationships with both parents. That fundamental reality is true whether or not the parents continue to live together. There are two important words in that statement: *supportive*

and *both*. The generalization I just made does not mean that all relationships between parents and children are supportive. Obviously there is a significant number of cases where they are not, and children can sometimes do fine if they have a relationship with only one parent. But as a general starting point, the goal should be to find a way to keep both parents involved in the child's life after the parents' divorce. Given that starting point, I am not sure that the new standards you described are best.

As you said, the underlying assumption is that the division of prior care is a proxy measure for things such as the strength of parents' emotional ties, relative parental confidence, and parents' willingness to put the child's interests first. All three of those assumptions are not well supported. Interestingly, when you presented the first of those, you did not talk about the "strength" of the ties, but the "quality" of the ties, and those are not the same thing. One assumption that is well supported by evidence is that, on the whole, the more time a parent spends with the child, the stronger their relationship is. We also know that in general, around a third or 40 percent of parent-child relationships are insecure or of poor quality. That suggests that in order to judge which parent's relationship is the strongest simply by virtue of who spends more time with the child doesn't necessarily mean that we've identified the person who is most emotionally healthy and who best promotes the child's emotional health. That assumption is problematic.

The assumption that spending more time with the child means that an individual is more parentally confident is another one that is very difficult to support. The assignment of parenting responsibilities is not usually based on confidence; rather, it is based on a large number of decisions among the parties that have to do with their histories, their relative earning capacities, and their assumptions about gender roles. Usually, confidence at being a parent is not the first criterion that comes to mind, because parents often are actually quite confident when they first start parenting. To the extent that there is a correlation

between time and confidence, it is because parents become more confident as they go along.

Then there is the notion that a person's involvement is a proxy measure of his or her willingness to put the child's interest first. That is not a valid assumption and I think that there has been wild speculation about it.

Jana Singer: I interpret the Principles as adopting, to a large extent, your fundamental starting premise that children do best if they continue to have relationships with both parents. Furthermore, the Principles do so better than prior law, which was widely inconsistent about this matter.

Michael Lamb: I'm not sure that prior law is inconsistent. I'm not sure what we really know about the two-parent assumption either.

The Principles also assume that it is relatively easy to approximate degrees of parental involvement. Social scientists have spent forty years trying to measure that, and have found that it is very difficult to ascertain relative involvement. Even when they have found ways to measure it, these social scientists usually specify that "for the purposes of my research, this is what involvement is."

We also find that parental involvement can be incredibly unstable. Even when there is no divorce, parents do not maintain the same responsibilities over time. Little things happen to change that. For example, the birth of a sibling makes a tremendous difference to relative parental involvement. A parent could need to go to work, or parents' assumptions could change, or responsibilities could depend on whether or not shift work is available. It is very difficult to ask somebody, "What percentage of the child care are you doing?" He or she could respond, "You mean yesterday? You mean last year? You mean when the child was a baby?" Those might result in very different responses. The assumption that one can make an easy determination of past care is not supported.

We also have lots of data showing that once parents get divorced, they change what they do with their kids in the directions of both more and less

involvement, for many reasons. So the assumption that a past caretaking approximation is the best evidence of what can be possible in the future, and is the best way to promote the child's interests, is also problematic.

Jana Singer: Problematic compared to what? Your statements seem to be a perfect argument for the first goal of the Principles, which is to take these determinations out of the traditional courtroom and encourage parents to engage in a planning process that can change over time.

Michael Lamb: Currently, most of these decisions aren't made in the courtroom anyway. Most of them are made in the shadow of the law, based on what people think will happen if they go to court. Most of them aren't being judged by a judge.

Jana Singer: Yes, but we need a standard to make the shadow of the law, and the prevailing standard does not provide much of a legal backdrop.

Bruce Copeland: The shadow already exists. When most of these cases get litigated, the first action that the judge will take is to estimate what the respective parenting responsibilities have been. Certainly, the lawyers are going to argue that point. Who takes the kids to the doctor? Who arranges their social lives? People who want to litigate are on notice from their attorneys that this is how the game is played, at least initially. So I'm not sure the new ALI rule forces the court to look any more directly at that kind of data. It is the simplest way to resolve these cases, but the problem, at least in my experience, is that the cases that are litigated tend to involve a lot of other allegations which may or may not be true but which the court must consider in resolving the case. These considerations go far beyond the pure assessment of the respective amount of time that each parent has supposedly put into parenting.

Question: Is it your sense that moving away from a binary standard, which almost seems to be a zero sum proposition because the designation of a primary custodian carries such significance, could

lower the stakes and the intensity when people are disputing investigations?

Bruce Copeland: I deal with a very select group of high-conflict cases which are at the extreme of the continuum. In my view, that particular sub-group of cases is driven either by significant psychopathology in one or both of the parents, or by some set of allegations which lead a parent to litigate a case even if he or she has performed a relatively smaller share of the parenting. Those cases seem to have lives of their own. There are a number of alternative ways of resolving these cases that have arisen in some court systems, such as parenting programs and mandatory mediation, and they can help in some of the easier cases. I cannot see that this proposed rule will be particularly helpful in the really intractable cases.

Judith Bartnoff: In the District of Columbia, there is a very strong presumption in favor of joint custody. Joint custody as applied can mean a lot of different things: it can mean joint legal custody; it can mean joint physical custody; it can mean jointly allocated decision-making. For instance, in one case I told two parents, "You make the medical decisions, and you make the educational decisions, if you have to do it that way." A lot of what the ALI recommendations have done is put new labels on things that were already being done similarly. But we in the District of Colombia start with a presumption of joint custody, and that is a different way of thinking, which plays out in different ways.

As a judge, I think that one of the hardest things for these families is that they have very personal issues which they are asking a stranger to decide. A judge's response to that is pretty universal: to try to help them settle the issues.

A large part of what these Principles do is to provide a stronger framework for settlement in the custody arena, which is obviously a useful contribution. We have been pushing mediation for a long time. But the Principles are a way to focus people on what a settlement really looks like and what issues they need to deal with.

One reason I find the approximation of past care standard so problematic is that it runs contrary to the presumption of joint custody. The second reason is that, at least from what I have seen, parents' roles right after divorce are different than they were before. When parents are together, they make accommodations to one another about who does what because of how their family unit works. After they separate, that is different, and the basic assumption about what a parent did before does not necessarily carry over into what he or she does afterwards. You can see this even in the most practical matters. For example, if one parent had been working longer hours than the other and they had set up a schedule based on who could care for the kids from six to eight in the morning and who from six to eight in the evening, that arrangement clearly won't work if they are living in two separate households.

Often the parent who was not working or was the lesser wage-earner and therefore did more of the childcare was deferred to by the other parent because that was the most practical way to divide things up. It is very hard, in the middle of the conflict about financial issues, to separate out the responsibilities of one and the other, because there were a lot of tradeoffs.

I've also seen that the parent who has deferred to the other doesn't trust his or her (usually his but not always) parenting abilities. But when you alter parenting responsibilities to give both parents some real time with their children, and set up schedules that assign responsibility for real life as opposed to just weekends, that hesitant parent can discover his or her own competency as a parent.

My problem with the past caretaking approximation is that, however it is dressed up, it looks a lot like the old primary caretaker notion to me. Ultimately, we really have to look at the whole picture in a different way rather than simply keeping the caretaking part the same and doing the rest differently.

We have been experimenting. For example, we have arranged schedules where kids are with one parent every Monday and Tuesday, and the other parent every Wednesday and Thursday, and the parents alternate weekends. There are many variations, but the idea is that no one is a weekend mom or a weekend dad, and both get to have playtime with the kids. Kids can adjust to a lot: what they really want is to have both parents there. The challenge is that parents must adjust as well. The notion of using parenting plans to empower parents and have them make decisions makes a lot of sense to me. But then to go back to the approximation of past caretaking standard seems to me a step backward.

Bruce Copeland: Inherent in the approximation rule is that it will represent continuity for the child by setting up an arrangement that is consistent with what has happened in the past. But from what I have read, parents' prior level of involvement in the life of a child is not a very good predictor of involvement after separation and divorce. So the assumption that somehow the approximation standard represents continuity may not be the case.

Linda Delaney: If the goal is to stop exposing kids to conflict, the reality is that when people are separating and divorcing they will find conflict. When you have a traditional division of labor, with a breadwinner and a caretaker, then the marital contract itself assigns power in kids and in money. When parents are deeply disappointed and grieving, whatever the cause of the breakup, they turn for solace to those sources of power.

I haven't met many people who truly like the deal they've cut in the traditional division of labor. The approximation standard says that the way caretaking was divided in the past provides an indication of the willingness of each parent to put the child's interest first. From what I have seen in my work, that drives a stake in the heart of honest, caring, breadwinner parents. To say that this deal represents their sole contribution to these kids crushes them. When they have to go to back to their calendars and count every

basketball game, and every time coaching, and so on, the result is an unbelievably bizarre fight, and they will fight, because they're hurt. There are these intangible dynamics that need to be dealt with.

Sometimes a parent's lawyer will say to her, "Are you breaking up? It's the approximation rule. Whatever you do, don't give him any time with the children because we've got to prove that you've provided most of the care. We won't get to court for a year. Nobody has the energy to look back too far, but they will look back a year or so. We have to get you ready." That's how lawyers are.

Jana Singer: The Principles do say that we should look at care before the filing, but you're right, a parent may go to his or her lawyer long before filing.

Linda Delaney: Parents cannot make good decisions unless they spend a lot of time with their children as human beings. If we want joint decision-making by knowledgeable people, the quality of decisions correlates with the quantity of time that a parent spends with the kid. Parents have to know the human beings about whom they're making decisions, and that takes time.

Jane Murphy: I wanted to defend the approximation standard vigorously, though I feel a bit chastened after the previous comments. I continue to be surprised at how consistently practitioners, as well as others in the field, are against it. But if not that standard, then what? As Michael said, if we want to look at who has a better relationship and who put the child first, then those are not things that we can do consistently well with this standard. But any other option would require resources, and particularly experts, which are just out of the reach of most litigants and most court systems. Some here have raised the benefits of a joint custody presumption, but my experience with that has been negative as well.

For the first period after separation, the approximation standard reflects parents' judgments about what was in the best interest of the children for the period of time leading up to that point. It minimizes trauma to keep the arrangement in place

initially, while acknowledging that there will be developmental changes in the needs of children that can be reflected in altered parenting plans in the future. The approximation standard is a much better framework for developing a parenting plan, and a much better default position than the only alternative I see, which would be to get another rule—probably a joint custody presumption which, I think, flies in the face of parental experience.

Comment: Joint custody doesn't necessarily mean joint physical custody. Often the alternative to joint custody is sole custody. When I first started working with these cases, I thought joint custody was a terrible idea. But the longer I've been doing this, the more I think it is a good idea, that it really is the only way to get both parents involved.

Jane Murphy: I'm thinking of all the cases where there has been little or no involvement by the other parent. That is a lot of cases.

Comment: We don't apply the presumption in cases where there is violence, a significant impairment, or no relationship on the part of one parent.

Jane Murphy: But discerning those other circumstances requires either very good mediators or screeners, or a presentation of facts in court. In a setting where neither side is represented, or, worse, one side is represented and the other is not, there is no way to bring those facts before the court. There may be judges who can discern those circumstances without representation, but that is certainly not always true in our court. There are certain categories of parents who are very unprotected in a setting that presumes joint legal or physical custody and then lets them go to court without representation.

Pamela Ortiz: I concur in some ways with those who feel challenged by the approximation standard. I recall a meeting of our custody subcommittee a couple of years ago, when we were considering a version of the Principles in Maryland. It was a room full of professionals. Afterwards, we looked around the table

and asked, "Why are we considering this data, when none of us supports the approximation standard?"

Is there a consensus about whether or not we need to rely solely on traditional judicial discretion and decision-making? Either we resign ourselves to permitting judges to continue to exercise discretion, and agree that is the best way to reach decisions, or we need to offer some other rule. If not the approximation standard, then what would that rule be?

A third alternative that we have talked about in Maryland is whether we can impact the quality of decisions within something other than a statutory framework. One option would be to require more time spent with the family. In Maryland, one of the issues is who you put in the courtroom: who are the judges, who makes the decisions, and how are they trained? In Maryland we have instituted a family courtroom format, but we are unlikely ever to have a separate family court with a dedicated bench where judges do not rotate but develop an expertise in family law and are appointed from the family bench. We may not reach that, so we must do some training, and work with the statutory framework.

Is there a consensus that we need something more than the initial expression provided by the best interests standard?

Jana Singer: One of the things that makes me uncomfortable about moving away from the approximation standard is the idea, which Linda Delaney mentioned, about the deal struck in marriages and the ability to renegotiate that deal. A forward-looking standard, especially a joint custody presumption, seems to allow a parent who has been less involved with direct caretaking and more involved with economic support, but who is now unhappy with that deal because the marriage is breaking up, to start over and renegotiate that deal. That parent has the option of saying, "You know, that really isn't what is going to make me happy in the future. Let's do something different."

But for the other parent, who has chosen or been assigned the other end of the deal—that is, has

spent more time directly caring for the children and not developing economic potential, it is not easy to renegotiate that deal, especially given financial allocations at the time of divorce. Because that deal is gendered, these dynamics of renegotiation make me uncomfortable, unless I can be convinced that allowing parents to renegotiate in a way that maximizes both parents' ability to have close future relationships is really best for kids.

My reading of the social science evidence is a bit more mixed on that matter. I have a level of discomfort that one end can get renegotiated in a forward-looking way, but with the other end it is much harder to do that.

Richard Chused: There is a fundamental problem that has not yet been discussed in this forum. The ALI standards, and maybe even the best interest standard before it, collide with judicial structure in a way that often does not work out. Judicial structure in America is based on sides. It has to be bipolar in family law litigation as well. Linda, your comment about lawyers advising their clients that in the year before a case comes to trial they should get ready, spend a lot of time with their kids and so on is an example of side-taking. It is generated by the way in which the legal structure itself works.

Judges, for the most part, are passive. They gather information and make a decision one way or another. Sometimes it ends up with joint custody for the parents; sometimes it doesn't. But it gets resolved in a process in which people take sides.

The ALI standards and, I think, the best interests standards before them, are not really designed as side-taking standards. They're designed as standards trying to go towards child-focused outcomes, as Pamela mentioned. This process cannot be child focused, because the sides are the parents. The judicial structure, with tort law being imposed on family law, creates a baseline conflict that is not going to be resolved by the promulgation of a new family law standard for assigning custody. It can only be resolved at the same time that the structure in which we make

decisions itself is changed. There has to be some inquiry about moving to a system which is more like civil law, in which the courts are more interventionist, in which the lawyers, experts and others are presenting information for use by the court rather than taking sides, in which gamesmanship, discovery games and so on are heavily suppressed. I don't think the kind of standard the ALI is reaching for is workable without a dramatic restructuring of the court system.

Sanford Ain: That was very well said, and I agree with you from a practitioner's standpoint. At the beginning of this discussion, someone mentioned that it is important to have a discussion among policymakers. I view professors as policymakers, because when they teach family law and family law-related issues to future lawyers and legislators, those people ultimately make real changes. There have certainly been enormous inroads made during the time that I've been practicing family law, but to the extent that we sensitize new lawyers to these issues and convey the importance of focusing on change, real changes will be expedited.

Most cases, of course, settle. Interestingly, some of the approximation model is very frequently utilized in those cases because in settlements, and particularly those where lawyers treat the parties with a high level of respect and dignity, the process is less adversarial. The parties are then better able to settle and are more accommodating to one another, much as they were, and in some cases even better than they were, as parents who were married to one another. There is not the same sense of winning and losing.

I'm reminded of a client of mine, a fairly high-level government official, who was not going to settle for less than custody of his child. The process took a year and a half of slow and delicate hand-holding before we achieved a joint custodial arrangement. The arrangement has been in place for six or seven years since the divorce. He invited me to a family event a few months ago, and it was wonderful to see the man and his ex-wife and their teenage daughter enjoying a

family event together as if the parents were still married. That is very rare. This guy has thanked me, and has talked to other clients I have about the possibilities if one is willing to subordinate some of the hurt and angry feelings to what truly is in the best interest of the child. As a result, his own child has had the benefit of both parents throughout her formative years. When professors teach students, it may be helpful to make them understand that there are other ways to resolve these cases.

When people do go to court, the first level of defense against causing destruction to families is mediation. I believe strongly in mediation in these cases. The more training that mediators have in what social scientists, practitioners, and judges have learned about the effects on children of litigated cases, the more able they are to bring people to an agreement.

The shadow of the law is also important: what do people face if they do go to court? I was against the joint custody statute. I thought that it was destructive and silly, and that people agreed to it because they didn't know what else to do. I have come 180º on that issue. The statutory presumption of joint custody doesn't specify either physical custody or legal custody, so the decision has really been left to judicial interpretation. Where judges are willing to take the time to look into family dynamics and to try to put together an arrangement that is likely to best promote the interests of children, then starting with a presumption that both parents have an equal entitlement to spend time with the children engenders a different approach on the part of parents and the lawyers about what is going to happen in court. As a result, there is a greater likelihood of settlement because one person is not granted the enormous power over what frequently means the most to parents: their children. If we remove the power from the parent who has traditionally had principal custody, and tell the parties that judges are routinely giving both parents significant time with the children and significant input in decision-making, it creates a dynamic that enhances

the likelihood of settlement. Some people feel disenfranchised at the outset. In particular, the economically dependent spouse, who is frequently and traditionally the mother and wife, will say of her husband, "He has all the money, and now he's going to take my kids away from me." That is a very difficult conversation to have because, even though that is not necessarily the result, it is perceived that way at the outset.

With some training, understanding, and a willingness on the part of judges to take the initiative to look closely at situations and formulate decisions that are most likely to provide stability and a loving environment for children, and give children the benefit of both parents, the statute can actually work very well. I think it has already done a lot to help settle cases in the District.

Mitt Regan: I'd like to return to what Judge Bartnoff has experienced in D.C., the presumption of joint custody. My impression has been that a number of states that originally adopted that sort of presumption have backed away from it. The reasons are: (1) it takes a tremendous amount of cooperation to make this kind of arrangement work, (2) the bargaining dynamic it establishes has the potential to disfavor the parent, typically the woman, who has been the primary caretaker and who perceives a joint custody arrangement as a net loss. The threat even to request joint custody can provide significant bargaining leverage to the other parent, typically the father.

Judith Bartnoff: I don't know why the states that backed away have done so. The District of Columbia has not, though. The domestic relations statue has recently been cleaned up. Part of the reason D.C. has kept it is that it still has a lot of flexibility. The presumption is rebutted in cases of domestic violence. The presumption often has reduced conflict because there is an assumption of a continuing relationship. To the extent that our judges work hard to get people past their initial reactions, it actually works better now than it did before.

Bruce Copeland: The psychological literature about the tension created by shared custody in the presence of high levels of parental conflict is still getting fleshed out at this point. But there appears to be some percentage of cases, and the experts differ as to what percentage that is, where joint custodial arrangements seem to increase the amount of conflict between the parents concerned. That is one consideration.

Linda Delaney: To return to the bargaining dynamic issue, I think both genders, or both parties, take the power they got in the marital contract to the table and try to use it against each other. Sometimes it is impossible to reconcile what the two parties want based on their understanding of the martial contract and of what the kids need. It may not feel fair to the caretaker, the economically dependent spouse, who cut the deal and then has to understand what others think the kids need, namely, the involvement of both parents. The non-caretaker has not been the primary person engaged in parenting tasks, but when he or she does engage in those tasks, the parent-child relationship is enhanced and the child gets so much out of it. The parents' needs, and what they deserve for what they did in the marriage, is a separate discussion. Sometimes I think what the kids need is irreconcilable with what the parties want because of the contract getting broken for possibly unfair reasons.

Nancy Polikoff: I am surprised that there could be any discussion of the presumption of joint custody, especially the one in D.C., without talking about the fact that it was adopted only because of the fathers' rights movement. It was not passed because some neutral child center advocacy source decided that a presumption of joint custody was best for children, but rather after years and years of badgering on the part of fathers' rights organizations, long after other states started backing away from their joint custody presumptions.

I also disagree with the notion that the joint custody presumption is not a problem because the court can opt out in cases of domestic violence.

California, the state that started the movement, has years of records showing that some protection orders are now being litigated because the presence or absence of domestic violence is so important in a determination of custody.

I am also very reluctant to support a scheme at the time of divorce that is not rooted in an understanding of how gender continues to operate, and that fails to recognize the fact that thirty years after the birth of the modern feminist movement, for the most part, we still have women raising children during marriage rather than joint child rearing. That may not be a goal for many people, but it certainly was considered aspirational and, for the most part, it is not happening. What the ALI has done has, in some ways, represented an attempt to compromise. That is how I thought about it through all its drafts. They were looking at a situation of total judicial discretion, and if everybody trusted individual judges always to make great decisions with perfect information, we would not be here. Many feel strongly that that is not appropriate, either because of the quality of some judges or because of the lack of perfect information or anything approaching it. That is why nobody writes in favor of a pure best interests of the child standard.

Then we are left with all the available alternatives to best interests of the child. The criticisms of joint custody go only so far. The primary caretaker presumption died on a belief that it was really just a tender years presumption, though I disagreed. Everybody saw it as no more than a preference for mothers. They saw it as sex discrimination, which is a position people could have only in a profoundly gendered world. My commitment to the primary caretaker presumption was based on the theory that if we actually achieved more gender equality in marriages, it would not be a maternal presumption, and therefore it would be fine. But politically, those were the objections to the primary caretaker presumption.

The approximation of past care standard is essentially an attempt to say that we will not give all

custody to the primary caretaker, which is what the primary caretaker presumption did. Instead we are going to set up what is essentially shared custodial responsibility. As Judith Bartnoff said, it can't be six to eight in the morning in one parent's home and six to eight at night in the other, but we do the best we can. In that context, there is no reason other than power why the man you have described would be so profoundly distressed. He still has shared custodial responsibility. He may not get as much time as his former wife, but that is because he walks away with the higher income-earning capacity for the rest of his life, whether as a union laborer or a big downtown lawyer, because of the deal that was cut during the marriage. He still gets some time and legal say-so about his children. Is the arrangement going to be perfect? No, it's not going to be perfect. Is the person who did most of the childcare sometimes less capable? Yes. But if we are to have any rule at all that is not based on judicial discretion, you must come up with something and you look at everything that's available out there. I'm willing to go with this over the alternatives as essentially a kind of compromise in a very imperfect world.

Sue German: The cases that we are discussing, in which judges make decisions, are really only ten or fifteen percent of the total cases. In my Division we focus on the resources that we put towards helping people make their own decisions, and the parenting plans are one weapon in that arsenal. We offer training seminars and mediation, among other ways of helping, and the parenting plans are just another piece of that effort. It is important to remember that though the cases that come before the judges are important, they are certainly not all cases. So these types of resources are a good thing.

Rufus King: Jeff Hazard made a very interesting observation about alimony provisions, which though not directly on point has an implicit spillover into this discussion. The observation was that with alimony provisions it is really not a matter of compensation and how you can support somebody, but

one of allocation of losses. Any time there is a family breakup, it's a matter of losses. You take something that worked in one way, however badly, and now there is less: less support, less emotional time, more demands to earn a living, more financial obligations, and so on. With the ALI Principles, there was an implicit notion that, with courts everywhere and lawyers everywhere, a way to reduce the level of stress and level of damage from the fight would be to look at what people did when they didn't think anybody was looking. It is not a great approach; it is not perfect; but over thousands of cases it's probably the best place to end up.

I've been away from this for a long time, so I don't have any data, but I would say with no blushing at all that we in the District of Columbia have the finest court system in the country. I think that is probably true of the bar, and particularly of the domestic relations bar, as I recall from when I was working in that area. So joint custody might work here, even though it will not work in the average setting across the country, at least not yet. But as a general approach to bringing more predictability without taking away too much discretion, and giving deference to the parties' own decision-making, the primary caretaker rule does well. Its design was informed by those goals.

At the very end of this conversation, I'd like to tell you that some of these discussions sound familiar, and, if it's any consolation to you, they took the better part of ten years.

BREAK

Milton Regan: A legal parent of a child is basically a parent by biology or adoption. A parent by estoppel and a de facto parent of the child are both individuals who have resided with the child within the six month period prior to the filing, or who have consistently maintained or attempted to maintain a relationship with the child if the parties have separated.

Section 203 of the Principles defines a de facto parent as an individual other than a legal parent or

parent by estoppel who, for a significant period of time (not less than two years), has lived with the child primarily for reasons other than financial compensation (the nanny exception) and, having secured the agreement of a legal parent to form a parent-child relationship, regularly performed the majority of the caretaking functions for the child, or regularly performed a share of caretaking functions as least as great as that of the parent with whom the child primarily lived. An example of the kind of custodial arrangement that might result is one parent having the bulk of the physical custody of the child and a second parent's ex-spouse also having some portion of time. The putative de facto parent may not have performed a majority of the caretaking functions, but must have done at least as much as the person with the primary physical custody.

It is worth noting in passing how a de facto parent differs from a parent by estoppel. A parent by estoppel is, among other things, someone who has lived with the child for at least two years, holding and accepting full and permanent responsibilities as a parent pursuant to an agreement with the child's parent or, if there are two legal parents, both parents, when this is in the child's best interests. The paradigm case that the framers of the Principles have in mind is the stepparent situation. When a parent remarries, a stepparent enters the picture. There need not be an explicit agreement; the agreement to share the caregiving functions may be implicit. In that sort of situation parenthood by estoppel can be established.

There are a few differences to note about the treatment of de facto parents and parents by estoppel. First, the presumption of joint decision-making that we discussed earlier applies to the benefit of a legal parent and a parent by estoppel, but not, at least not explicitly, to a de facto parent. The comment does say that a de facto parent can receive joint decision-making responsibility, but the emphasis is clearly on either the legal parent or the parent by estoppel.

Second, there is a support duty on the part of the estoppel parent, but there is not necessarily one on the part of the de facto parent.

Third, the portion of Section 218 referring to allocation of responsibilities to those other than legal parents states that the court should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of those duties, unless the legal parent or parent by estoppel has not been performing a reasonable share of parenting functions, or the available alternatives would cause harm to the child. The court should limit or deny an allocation otherwise to be made if, given the number of other individuals to be allocated responsibility, the allocation would be impractical in light of the objectives of the chapter. The situation contemplated here is a parent remarrying, a stepparent sharing the caregiving functions or parental functions, then a divorce and perhaps the other parent remarrying, so there may be multiple potential claimants to the status of either de facto parent or parent by estoppel.

This is a bit of an oversimplification, but the Principles establish something of a hierarchy with a legal parent first, a parent by estoppel second and a de facto parent third.

The animating spirit underlying this provision is a desire to preserve some degree of continuity in the child's relationships with the adults who are meaningful in the child's life. It creates the possibility of multiple parental figures for the child: legal parent, parent by estoppel, and/or de facto parent.

Commentators have raised some questions that might be useful here. I should say that this discussion is not meant to be strictly segregated from what we talked about earlier this morning. In a sense this is all seamless, so feel free to continue the lines of discussion that we started earlier.

One question that I would like to address to the judges and practitioners in the room is what percentage of cases now involve what are in effect de

facto parent claims. There have been at least two state courts, Massachusetts and New Jersey, which have explicitly adopted de facto parent status. The matter arises, in particular, in the context of same sex couples, although not exclusively in that context.

Another issue is what this does to bargaining dynamics, since a large percentage of cases are settled. Does this create some bargaining leverage, given the relatively open-ended nature of the criteria for being designated a de facto parent? In addition, what might be the impact on what we traditionally think of as the non-custodial biological parent's contact with the child? There is obviously a finite amount of time to share. Before the de facto parent possibility arises, there are two biological parents who share contact with the child, in whatever proportion. The possibility of yet a third adult being designated as entitled to share some time with the child, implying that the time that the non-custodian biological parent has might be diminished, might well lead that parent to claim "Through no fault of my own, my time is being reduced."

Should de facto parents have some sort of support duty? There is no explicit provision in the Principles now that indicates that they do, although parents by estoppel do have such a duty.

The Principles draw a distinction between caretaking functions and parenting functions in awarding de facto parent status. In traditional gender terms, caretaking functions are those typically though not exclusively performed by women, whereas parenting functions are those performed by the main wage earner in the family. It is fairly clear that someone who performs the bulk of the parenting functions under the Principles would not have a basis for asserting de facto parent status, whereas someone who performs the bulk of the caretaking functions would. The emphasis seems to be on a direct personal relationship with the child and the continuity of that relationship.

Grandparents are for the most part conspicuously absent from the Principles' definitions of parents. They are mentioned in the comments here and there. In light of *Troxel v. Granville* and state responses to it, what will be the status of grandparents' ability to maintain contact with the children in the event that households split up?

Sandy Ain: Where are grandparents intended to fall within the definitions, if at all?

Mitt Regan: They are not intended to fall within a specific definition.

Nancy Polikoff: They do fall into Section 218. First, to clarify, stepparents are virtually never parents by estoppel. In some ways, they are more the paradigmatic de facto parent. A parent by estoppel is usually a man who thinks he is the father of his wife's children and is not, or a same sex partner where the couple has the child from birth or from a very young age and raises the child as two parents though obviously only one is the biological parent of the child or perhaps only one legally adopted the child.

The Principles' definition of "parent" was an attempt to identify who should get legally enforceable rights to children so that the possibility was not wide open to everybody. It should not be wide open to everybody. Judges should not be able to give custodial decision-making and caretaking responsibility to anyone who walks in the door. Given that, who should get it and under what circumstances? Grandparents do not appear very often because the ALI decided that they should not be placed in a special category.

Section 218-2A specifies that certain kinds of grandparents who have a significant relationship with a child can get some share of time with the child under limited circumstances. If one of the parents objects, that parent must be somebody who actually takes care of the child, not a parent who is not around very much. There must also be another legal parent or parent by estoppel who consents to the grandparent's getting time with the child. The circumstances are very limited. The decision that was made was not to consider grandparents as a special category or as third

parties and have courts give them visitation rights on a different basis than other people.

As the Principles are set up, there are legal parents, along with an equal category of same sex couples and men who thought they were biological parents of children either within or outside of marriage and raised them as their children. Then there are de facto parents, who are second class, and finally there are a few people under very limited circumstances who are third class, potentially including surrogate mothers or sperm donors, if there has been an agreement that those people can have limited rights to the child and can therefore fall under Section 218.

Jana Singer: To the extent that a state adopts these definitions, are they designed to replace existing grandparent visitation statutes?

Nancy Polikoff: They are a complete rejection of grandparent visitation statutes. They say that limited categories of people should get court-ordered visitation, and that grandparents or other relatives who have a significant relationship with the child under very limited circumstances may be among those people. But this is primarily a very pro-parent statute, and opens up the category of "parent" to some people who have not been in it before.

Mitt Regan: The focus is on performing parental functions, as opposed to a biological tie. It is possible also for a potential claimant to seek standing either as a de facto parent or as a parent by estoppel. I do not believe they are necessarily exclusive.

Catherine Ross: On the issue of grandparents, I read the Principles differently than Nancy has. I think that the drafters were very aware that each of the states has a grandparent visitation statute. *Troxel* did not answer the question of whether the statutes can stand if they are properly drafted. The limited question of grandparent visitation has already been handled. Because of the silence of the ALI Principles, I believe a grandparent who has functioned as a parent has the same standing as anyone else to be a de facto parent under this guideline and therefore would

perhaps have a stronger case if the parent who has not been taking care of the child reappears.

Nancy Polikoff: I agree with that.

Catherine Ross: Okay. I misunderstood you.

The second thing I'd like to address is that these standards are primarily focused on the problem of how to give privileges to competing adult claimants who want to parent a child. I would like to compare this briefly to the revisions of the Uniform Parentage Act (UPA) that were proposed by NCCUSL (National Conference of Commissioners on Uniform State Laws) two years ago. Those were designed to ensure, at least in theory, that all children have at least one parent assigned to them who will have responsibility for them and from whom they can claim material benefits.

When NCCUSL initially proposed the revisions, amazingly, they did a couple of things that were steps backward from the original. The first was that they eliminated from the definition of parent someone who had been living with the child for two years or more. After prolonged negotiations in which I was involved, they finally agreed to restore that language. I bring this up because it was rather amazing that these two groups (NCCUSL and ALI) were working in parallel and moving in such completely different directions. The ALI Principles were very useful when we sat down to talk with the commissioners about the children they were leaving out.

The UPA revisions also placed an amazing emphasis on marriage, but after we talked to them they agreed to some changes in language. Initially, they also seemed determined to eliminate all gay and lesbian parents, but they agreed to some language changes in that area as well. Within this broader philosophical discussion about the direction of current trends, I thought it was important to emphasize that there are still quite deep differences of opinion among both academics and practitioners about where we should be.

Jane Murphy: I agree on both points. But on the point of the Principles granting privileges of parenthood among the claimants, many cases with

which I have been involved deal not with competing claims by parents but with trying to find one parent who will accept responsibility. You can draw some support from the ALI Principles in that, more than from the UPA, but I guess they don't specifically address it.

During the break, some of us were discussing how to formulate a standard for a state under *Troxel*. I am surprised that the ALI Principles are this narrow, essentially suggesting that an individual does not have standing to seek visitation unless he or she has been in a parental role for an extended period of time. That is a major departure. As we struggled to create a reasonable standing statute now, something that the court can adopt, we wrestled with whether to go with the ALI definitions of parent by estoppel and de facto parent, or to include some people by virtue of status, not function. Those people would be grandparents or siblings. I am still trying to resolve that question. It is not just a question of what is in the Principles, but what is going to be palatable to a legislature that has for years privileged certain relationships without requiring parental functions and responsibilities.

David Meyer: It seems to me that grandparents are not specially privileged by the ALI approach, other than the one reference to possible access as a non-parent. It strikes me as one of the great virtues of the ALI approach that it premises access to the child on caregiving actually performed by a person, rather than on the label of grandparent or parent or whatever else. Grandparents as such are somewhat invisible in the ALI standards, but they are covered there just as anybody would be who had actually performed those roles.

Mitt Regan: The question is really at the discretion of the parents, legal parents or whatever parent has some sort of custodial responsibility, so a grandparent is much more at their mercy and will not necessarily have access. In cases of conflict, they don't receive any priority merely because of their biological relationship to the child.

Richard Chused: There's one characteristic in the standard, particularly in the Section 203 definitions, which I find utterly fascinating. There is a "you have to get out and be a parent" part of this. Spending time with the child sets the standard, in Parts III and IV. But at bottom, assuming people behave as reasonably decent human beings toward the child, the standards set up parenting by contract. An individual can contract with a previously recognized legitimate parent, biological or adopted, and thereby become a parent, assuming that with regard to this child he or she behaves as a decent human being over a reasonable period of time. This is really quite remarkable. Family law is becoming more contractual. Maybe this is the only way to handle a same sex couple relationship sensibly. Marriage has obviously been talked about as a contract for a long time.

In terms of the language, this really is a dramatic shift in the way we think about the meaning of a status called parent, that one can, in a sense, confer it on oneself without actually having a child. Biology and technology and developments of the last couple of decades are part of that shift. The emergence of same sex couples to a visible status is also part of it. It is a remarkable shift. I don't know if in hindsight the next generation will think this is a good way or a bad way of doing it, but maybe it's the only way.

Sandy Ain: Michael and Bruce, this statute suggests a much more limited role for grandparents. What does the research reflect as to the importance of involving extended family, including grandparents, in children's lives in the context of divorce, even over the objection of the biological parents?

Michael Lamb: There's very little research on grandparents except for one study of African-American families, where there is much more involvement of extended families in general.

Bruce Copeland: There is some research that might relate peripherally, which looks at the adjustment of children in the divorce context and shows that the existence of extended social supports seem to buffer the impact of divorce. To the extent that

grandparents or other extended family members are available and involved with the children, most kids seem to adjust better over time.

Rufus King: I'd be interested to hear from Judge Bartnoff about how common the issue is. When I was on the calendar, it was not a very common issue.

Judith Bartnoff: My experience has been that the issue does come up, but in somewhat odd contexts. First, it comes up in the adoption context. For example, a child may have been neglected and then raised and adopted by a grandparent or other relative. In the past, those situations would not have been adoptions. But the primary reason that they are adoptions now is the willingness to make those relatives foster parents for a brief period of time, at which point the federal adoption subsidies become available. In the District of Columbia, a guardianship statute now provides for the equivalent payments, but the money must be appropriated every year so it is not a sure thing. The adoption subsidy money is sure, though, so we are seeing many more family adoptions than we have seen before. I am convinced that is driving the increased number of adoptions, as well as the statutory push under these adoptions for families to close out these cases with permanency, which ends up meaning adoption.

Question: Would those have been custody cases in the past?

Judith Bartnoff: Yes, they would have been third party custody cases in the past, when the adoption subsidies were not as easily available. The money is really driving it. There were many instances where relatives did not want to adopt because they did not want to terminate the legal parental rights of their cousins, daughters, sisters.

Jana Singer: Just a point of clarification: the long-term family kinship placements are exempted from the Adoption and Safe Families Act provisions for mandatory permanency.

Judith Bartnoff: Yes, but there is still enormous fiscal pressure to have it done otherwise, and enormous pressure not to have those cases continue to

be in the court system. From what I have seen, a number of mothers (or fathers; this is not gender-based) are perfectly happy with the arrangement that is made with a maternal grandmother who is caring for the child. They don't want their children adopted, even if they don't have much of a relationship with them.

There also seem to be a number of cases where children are either in the neglect system or tangential to it; that is, one child in the family ended up in the custody of a relative, and the custody resolved a neglect case, so there are siblings in the neglect system but a particular child either never went into the neglect system or was in it only briefly before the case was resolved otherwise.

A number of cases involve custody disputes between a parent and a grandparent, and there are questions about what the appropriate standards should be in that circumstance. In my experience, these cases are often complicated because of alienation. The parent says, "I didn't know where the child was" or "They kept me from seeing the child."

Another common situation is where siblings have several fathers. One father wants to be involved with his child, but the kid would rather be with his or her other siblings. It gets complicated.

Jana Singer: I wanted to return to this idea of status versus function. The trend is away from status and towards function, and this part of the ALI Principles really emphasizes that trend. That makes sense when the question is whether status should be necessary to acquire access to children and other privileges. I understand why the answer is and should be no.

But I wonder if status is more important than the ALI Principles acknowledge, and whether an NCCUSL might not have been on to something on the issue of parental responsibility. I have been thinking about the marital presumption and disestablishment of paternity. I worry about disregarding marital status, in particular, but also other kinds of status,

such as grandparental, as sufficient bases for assigning parental responsibilities. I wonder if there is anything to be said for status in a system that has become much more one of non-exclusive parenthood, as Nancy discussed.

Take the circumstance where, for example, somebody has been married to a child's other parent. Should status, and in particular the status of the relationship to the other parent, be sufficient to ascribe responsibilities and perhaps to confer privileges as well, without the person having to prove that he or she also qualifies as a parent by estoppel? I don't know if there is any social science evidence that would bear on whether or not that is a necessary condition. This idea might put me back a generation, but I am uncomfortable with a complete move away from status to function.

Pamela Ortiz: What I like about de facto parenting and parenting by estoppel is that those concepts have the potential to preserve the child focus in decision-making. We, as parents, make choices all the time about who gets to play important roles in our children's lives. Sometimes we have to give something up in order for a child to have a relationship with a care provider or a relative. We have to make those connections happen, and provide them with time to flourish. When a divorce happens, sometimes people say, "Okay. All bets are off; we can change all our children's' relationships and the practical necessities of who cares for them and how." The only power a divorcing parent has is to say who is in charge now.

What I like about the ALI Principles' parenting definitions is that they take a step back and do not permit parents to manipulate their child's relationships to that child's detriment. The definitions say, "You chose this support person in your child's life. Now you must give your child some continuity." It lessens some of the tense disruption for the child. It also supports our efforts to promote an ecological kind of reform that keeps people connected to the support network that is so important. The goal is for parents not merely to resolve the conflict but to preserve

relationships and to preserve what enables this family to function.

Linda Delaney: I have an interesting case right now that addresses several of these issues, particularly parenting by contract. I represent the non-birth mother of a lesbian couple in the middle of a breakup. The child is only four months old, so in this particular case, as opposed to one involving a seven or eight year old child, the parents' rights and what they agreed on can be looked at more closely, because the developmental damage to a child in infancy is not as great. Assuming that my client has been accurate in her representations to me, she, the non-birth mother, was a full and complete partner in this arrangement, and the birth mother is losing interest in the relationship. There was no contractual agreement, but it seems to me that her relationship to the child should be preserved and accorded the same status as the birth mother. It would be unfair not to give her all the rights and the responsibilities attendant to the deal that they struck. Though the child is just four months old, they went through a very long, complicated, and thoughtful process to have that child.

Mitt Regan: I have a question to ask Nancy. I know you have given some thought to the domestic partnership provisions of these Principles. The situation Linda described is one in which there may be some sort of interaction between the two sets of provisions. Someone might qualify as a domestic partner, but that is a separate determination. How do you see the domestic partnership possibilities for same sex couples playing out at the same time as the de facto parent possibilities, if at all?

Nancy Polikoff: The two are separate, but I don't think that is a problem. It may be that they would both be applicable in many situations where the parent would fall within the definition of a domestic partner and therefore come under the property and support rules, and would also be a parent by estoppel, and so fall under the rules we have discussed. It is conceivable that it could be not that way, though, so it

is an independent inquiry. But I think often it would be both.

Mitt Regan: To what extent might domestic partner status be a basis for parental rights obligations?

Nancy Polikoff: One of the bases for getting parental time is the payment of child support, so the sections interact with each other. One follows from the other, no matter which one comes first. If you are a parent by estoppel, you have to pay child support. If you have to pay child support, you are a parent by estoppel. De facto parents fall in between. Linda's example raises a number of issues about what makes somebody a parent. Of course, a couple need never have been married and lived together, or they can be married and split up when the woman is pregnant, before the child is born. Parental rights flow from that regardless of attachment, which may not have happened yet. I think the ALI Principles essentially say that if you have a child who is less than two years old, and you have been living with the child since birth, and you have an agreement, then you've established parentage. It is a new way of thinking about what makes somebody a parent. If you find yourself thinking that biology has a role to play completely separate from function, and should be privileged, then it may not make as much sense as if you think that biology has a role and both intent and function also have a role.

Linda Delaney: What is interesting in this particular situation is that who was to be the birth mother was decided based purely on who was in the best medical condition. I don't have a volume of experience, but typically my way of looking at a case is to look at the attachment, the relationship that the kids have. But what is interesting to me about this case is that they did make a contract. It is not written, but they were very specific, and they have shared parenting for this gorgeous little girl for four months. Then there have been highly disruptive adult problems that have intervened. This woman is very vulnerable,

at least psychologically, because she was not the one who actually carried the child.

Nancy Polikoff: That situation is analogous to a couple that had a child through donor insemination because the husband was infertile, and then split up when the child was four months old. The child is not biologically related to the father, but legally it is clear that he is a parent, and he and the child get to have a whole lifetime of a parent-child relationship. You may simply have a biological parent and a non-biological parent. Forty years ago there was still some discussion about whether the husband, who is not the biological father, had full parental rights and responsibilities, but that discussion no longer exists. His lack of biology is trumped by the marital relationship and his consent in the insemination that produces the child.

So in your situation, Linda, you have the non-biology trumped by the consent in the insemination and the relationship between the parents which, although not marital, is still real. That child would not exist without that couple. The only reason that child was born was because those two people decided to have that child.

I think there is still some discomfort about the role of biology here, and perhaps we would say for the newborn, "Oh it's much less disruptive just to give the child to one parent, let that parent get on with her life without this other person there who isn't attached." But we don't say that when the parents are married to each other, even if there might be some theory in support of not burdening the child with split households at birth.

David Meyer: Nancy's comments illustrate nicely the extent to which the Principles are properly understood as a compromise. Much of the basis of parenthood is function, but part of it is status, in the sense of trying to achieve parity with the more conventional married couples who have done artificial insemination and in which the husband is being treated as the father. With the ALI rules, you get the same sort of parity, and it is based not, as Nancy points out, on the child rearing functions performed,

but on the status of having entered into an agreement with the biological parent.

To come back to Jana's question about whether the ALI should have gone further in conferring status-based access or privileges, I think the ALI had a good reason to compromise rather than go the full distance towards conferring parenthood based on marriage to a biological parent/stepparent. There are practical reasons not to, as you start having an expanding universe of potential parents and (although the ALI of course makes provisions, in Section 218) the impracticality of ten or twelve parents. Still, some effort to draw the line in the definitional stage is probably useful.

Judith Bartnoff: There is one other little wrinkle that troubles me a lot, because the current law sets limits to what a judge can do about who gets rights and who does not. For example, two parties get divorced; one of them had a child from a previous marriage and then they had a child together. I had a case, for example, where a woman's first husband died before the baby was born, and then she remarried. Part of the attraction of the wife to the second husband was his total willingness to be a dad to this instant family. They had another child, then they separated and now she doesn't want him to continue to have visitation with the first child, whom he considers his daughter. He would have adopted the child, but didn't because he wanted to give the child's grandparents more time to get used to the idea. What happens to the little girl who has had this man as a significant caretaker for several years? Her brother goes off to visitation, but she does not and I can't make that happen because she is not his daughter.

Nancy Polikoff: And you thought you didn't have room under D.C. law?

Judith Bartnoff: Right.

Nancy Polikoff: I think he's a parent by estoppel.

Judith Bartnoff: Not under D.C. law. By the time I was finished, she agreed to day visits but not

overnight visits, so we made some progress. But the point is, this isn't just a question of stepparents.

Nancy Polikoff: One of the things we've seen is that these Principles, even in their draft form, have had an impact in states where there is some flexibility. I think there is some flexibility in D.C. Part of the flexibility is in being able to define somebody as a parent, to say, essentially, that it's not about third parties, but about saying this person is a parent, and should have extensive visitation rights.

Joan Williams: I would like to take up Mitt's invitation to tie the two sessions together. I have been pondering something that Michael and a number of other people said in the context of the first discussion, that the best-case scenario in a divorce situation is to have the child sustain relationships with both parents in a positive way.

But I'm really struggling, as an outsider to the ALI Principles, with respect to custody. To pick up on something that Jana said, you often have a situation where one of the marital contract deals is kept: namely, in the ordinary context, that the father has an expectation that he'll have a sustained relationship with his kid, and that his dreams for a relationship with this child will survive divorce. That is a deal that is kept.

But there is another deal that is not kept upon divorce, the deal that the mother had, which is that she would trade economic stability in order to provide sustained, steady care for the child. Certainly it is not kept in most of family law, and my understanding is that it is not even kept under the ALI Principles.

The message that you convey to the child is that if an adult invests in caregiving, she does so in the context of acute economic vulnerability, and the law will not help. She is going to be judged as a caregiver even after divorce whether or not she graciously accepts that economic vulnerability in a context where the deal has been changed. Her relationship to economic security has not been changed. His relationship to caregiving, on the other hand, has. He has an infinite opportunity for redefinition, but she

does not. That is a very negative and frightening message to send to children, that we won't provide for children's care because we push our caregivers to the margins of economic life and leave them permanently vulnerable as a matter of the economy and as a matter of law.

The other message is that the way in which custody and economic stability are set up results in economically vulnerable caregivers. If you change the custody laws—I'm speaking of joint custody—you have economically vulnerable caregivers whose attachments to children and investments in children are not respected. That is an even more frightening message.

Mitt Regan: The question of economic vulnerability is an appropriate topic in itself for another session. It is tremendously rich and complicated. I see the ALI Principles, though, as more sensitive. The approximation standard recognizes that the lion's share of caregiving may have been undertaken by one of the parents and attempts to continue as much as can be determined what existed before, subject only to the rule that you can't provide the child with so little contact with the wage earner that the relationship cannot be sustained. At least with respect to investment, so to speak, in caregiving, I think the ALI Principles are arguably more sensitive than, say, a presumption of joint custody would be.

Rufus King: Though this may not address your level of concern, Chapter 5 does address compensation for loss of living standard due to having taken primary responsibility for child rearing.

Joan Williams: I do think ALI goes in the right direction in both of these issues, but I've heard a set of concerns with the direction that ALI took. That was what drove my comment.

Sue German: To go back to the definitions of parents that are provided, I think they are important because they acknowledge that families are not mom and dad and two children anymore. There are a lot of permutations of family. In Baltimore City, for instance, we frequently have a third party, either related to the child or not, raising a child because one

parent is incarcerated and the other has a substance abuse issue. At some point the parents may take the caretaking roles back, but the child has a serious relationship with the third party caregiver, and though that person will gladly let the parents assume responsibility, he or she still has a bond with the child. The Principles are an acknowledgment that families are not all the same.

Mitt Regan: Do the courts in Baltimore currently have any flexibility to acknowledge that?

Sue German: That depends on the judge.

Jane Murphy: They do. Currently, there is a different standard for visitation than there is for custody, which has a greater burden. Those labels are not part of the ALI Principles, so it is a little bit hard to adjust to a single standard for both as the Principles call for. I'm not sure that the best approach is to insist upon two years of living together as a parent in order to get some access after separation. If you are divorced and you choose that your husband not see the children again, that would be perfectly okay under the ALI principle if he had not lived with the children for two years. I'm not sure if the different standards for visitation versus custody may have some continuing value.

Comment: There is an out if you can prove harm to the child in that extreme circumstance.

Jana Singer: What is interesting and perhaps troubling here is that the decision to replace custody and visitation with allocation of custodial responsibility, which seemed to make sense in the divorce context, is now having unanticipated consequences in the third party context, where a more graduated system may make some sense.

Michael Lamb: I want to bring us back to what we really should be focusing on here: what will be best for this child and what will promote this child's welfare. I see these analyses here as particularly useful in turning attention to that, and in recognizing psychological parents and the role that multiple people can play in a child's life. It is important to remember, though, that the world that may exist out there is not

much like the world that's being discussed in this room. Seventy percent of the kids in this country have employed mothers, and roughly the same proportion of kids in two parent families have two employed parents, not one. For the most part, we are not dealing with situations of a simple choice between involvement and financial provision. It is also true that the vast majority of kids in two parent families have significant relationships with both parents, so it is rarely a situation where you try to choose between the parent and the provider. It is much more complicated than that.

I see the standards as an attempt to move us toward that, toward recognizing complexity. We don't move that way by thinking in terms of roles that may have existed forty years ago, when women stayed home with their kids and fathers went out to make money. That is not true of most of the families in this country. Most kids have relationships with two involved parents and have significant bonds with both of those parents. That is the reality one has to deal with. This suggests that both parents may have a variety of different roles, and most kids may have more than two relationships that we need to deal with if we're trying to promote the child's welfare.

Catherine Ross: I would like to return to Richard's point about the contractual aspects of these definitions. It is true that in family law we talk about a partnership model. But I was struck by the fact that the definitions for both parenting by estoppel and for de facto parenthood refer expressly to an agreement. They don't specify a written agreement or an oral agreement, so we may have some issues of proof. Does pillow talk count as an agreement?

And in the case where there are two legal parents, both parents need to have an agreement. What does this mean in the real world? Also, law professors, at least, like to pretend that legal rules have normative functions; they provide guidance for how people live their lives. Some of us are skeptical about that, but it is one of the afflictions we live with.

Let's discuss a classical divorce situation. One parent wants to remarry. Parent and prospective spouse, under the ALI terms, would then have to go to the other biological parent and say, "Here is how we would like to divide parenting responsibilities."

Even assuming there is no second legal parent who has to consent, the parent would have to say to the spouse formally, "If we get married, here is what I'm expecting you to do as a parent, but I don't want you to have any legal claim because of an emotional relationship with the child if something should disrupt our relationship."

This could either eliminate a number of pending marriages or discourage emotional investment by laying out the responsibilities or the limits to the benefits. In addition to having the two biological parents involved, we all want the adults in the home where the child is living to be invested in the child. We don't want to create excuses or legal reasons not to be, nor do we want to impose such a burden on parents and potential stepparents that it disrupts the relationship before it can even start.

The normative aspect of these requirements really concerns me. At the same time, I understand that the drafters were concerned that the biological parent not unwittingly transfer rights that he or she never intended to transfer. But let's say somebody goes to see Linda before entering into a marriage with somebody with children. I hate to think what the resulting bargaining would look like. That's a compliment to you, Linda; you would be doing your job. If you are the lawyer who says, "spend more time with kids," or "don't let him see the kids," what are you going to tell the prospective stepparent? I'm very concerned about the potential damage of this way of thinking about things.

Richard Chused: Jana's question about status is very interesting. Another reason we end up with the language we have is that the ALI was not in a position to confer same-sex unions on people who are not currently allowed to marry, or upon a larger class of

people, heterosexual couples who choose not to marry but still maintain family units. In both of those situations, there are nonetheless parent-child relationships of some sort established, and though the parties may not formally name themselves as parents, the ALI was not in a position to create civil union statutes, so in a sense they were almost forced to a non-marital baseline for determining parenthood. At the same time it does push the non-marital relationship button.

Jana asked a very good question about whether or not it would be wiser, in the long run at least, to talk or think about the relationship between status and parenthood and status in other contexts, tax law, inheritance and so on, and whether or not it is healthier to have a status which automatically triggers all sorts of legal rules, upon the establishment of a relationship of a certain length of time, for example, regardless of the gender of the parties involved and regardless of whether or not they formally undertake civil or religious marriage. In the long run, is that a wiser way to go than to try to pick these problems apart one at a time, with all of the potential unintended consequences of trying to pick them apart one at a time?

Pamela Ortiz: What Catherine was saying and what you just said is interesting from a policy perspective. The agreement requirement could have a chilling effect on the establishment of parent-child relationships. I hadn't even thought about that. We want children to have as many parent-child relationships, as many nurturing support relationships, as possible. It is not necessarily a bad thing to have many healthy parent-child relationships. I don't know how to get around that, because we do have to acknowledge that parents make choices about who their children will have the relationships with, and those people are not only legal parents.

Mitt Regan: This picks up on a very good point that Jana made. On the one hand, we have a set of Principles that purport to move away from categorical, binary classifications, and yet, by eliminating

visitation and creating these categories of custodial and decision-making responsibilities, the Principles may sacrifice some of the flexibility that a right like visitation provides. With visitation, there are gradations, hierarchies. And as Jana suggested, to the extent that you now have to present a parenting plan in order to be able to assume any sort of custodial responsibility, in some respects that magnitude of effort may be more significant than we want, or more threatening to parents who otherwise might be willing to sustain some sort of contact.

Jane Murphy: I'm switching back to the topic Joan raised, because I want to leave with an argument in favor of the approximation standard. The argument that I would make, and would hope to have social science back up, is that relationships in families are now complex. Most families have two working parents, and both are involved with their children in productive ways, so why not use that as a starting point for a relationship after a divorce or after separation? Why is there a need to reinvent a family after divorce? That is a very ambitious goal in such a strapped system, at least in terms of courts I interact with.

Joan Williams: I'd like to provide some counter data. The average father in the United States still earns almost 70 percent of the family income. Mothers earn roughly 60 percent of the wages of fathers. Mothers still do between 70 percent and 80 percent of the child care and two out of three mothers aged twenty-five to thirty-four work less than a forty hour week year round. It is interesting the way the imagery of equality plays out politically on a number of different sides, but the social science is complex.

Rufus King: The issue that is being grappled with here is the one of the non-traditional family. It was decided right at the outset that the dissolution of any family unit had to be addressed. You have hit on some of the issues that are troublesome about that.

The issue raised of the rights of an incoming stepparent is a troublesome one. At least in my experience, it has not been very common. This sort of inhibitor to a new relationship only arises after dad

and mom break up. By that time, in many family situations, one of them is out of the home anyway, so it is rare for there to be a situation in which there would be an inhibitor. The goal is to provide a starting place for how to deal with the relationships that evolve among the people who live with the child.