

Illinois Childcare Parentage Law (R)Evolution

*Jeffrey A. Parness**

State childcare parentage laws, that is, laws designating parents for custody, visitation, parental responsibility allocation, parental decisionmaking and/or support purposes, have evolved dramatically in the past half century. The (r)evolution is due to major changes in both reproductive technologies and human conduct. Yet the (r)evolution is incomplete.

The (r)evolution is especially incomplete in Illinois. Recent statutory amendments in Illinois chiefly reflect the work of the National Conference of Commissioners on Uniform State Laws in its 2000 model Uniform Parentage Act, not its 2017 Uniform Parentage Act. The latter better addresses the effects on childcare parentage of the changes in both reproductive technologies and human conduct. As well, the latest Illinois statutes do not reflect the NCCUSL's 2018 model Uniform Nonparent Child Custody and Visitation Act which also address the changes in the ways in which American families are formed and reformed by expecting and existing legal parents. Finally, the 2019 draft of the American Law Institute Restatement of the Law on Children and the Law has only recently been available to Illinois lawmakers.

Any (r)evolution in Illinois childcare parentage laws should not be fully fueled by the NCCUSL or ALI pronouncements. While a few other states have substantially embraced the 2017 UPA, it embodies certain public policy choices over which lawmakers can quite reasonably differ. As well, the 2017 UPA presents significant constitutional challenges.

Parentage law (r)evolution in Illinois is chiefly the responsibility of the General Assembly. When asked to develop broad childcare parentage norms, the Illinois Supreme Court unanimously deferred, finding the complex issues merit broad "policy debate" in the General Assembly.

Illinois legislators will be challenged when contemplating new parentage laws. The laudable goals of promoting certainty, recognizing the import of

* Emeritus Professor, Northern Illinois University College of Law; B.A., Colby College; J.D., The University of Chicago. In the interest of full disclosure, readers should know that Professor Parness did participate in some discussion and did provide some testimony when some of the recent Illinois childcare parentage law amendments discussed herein were enacted. Thanks to Deven Tlanda, 3L at NIU College of Law, for his assistance.

blood ties, furthering children's best interests, respecting family members' wishes, protecting parental rights, and enhancing public welfare often cannot be simultaneously pursued. Yet the General Assembly must act. Neither Congress nor the United States Supreme Court is likely to soon demand more national uniformity on parentage. Thus, as with many other family law matters (like marriage dissolution, heirs in probate, and standing to sue in tort), lawmaking on childcare parentage will substantially remain for state lawmakers.

This Article first briefly notes some recent significant changes in technology and human conduct impacting legal parentage. Then it examines the federal constitutional boundaries on state childcare parent laws. Next it explores the diverse array of models, statutes and precedents on childcare parentage now operating outside of Illinois. Then it looks at current Illinois parental childcare laws. Finally, the Article elaborates on some of the key questions facing Illinois legislators when considering new childcare parentage norms.

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INTRODUCTION

State childcare parentage laws, that is, laws on those who are parents for custody, visitation, parental responsibility allocation, and/or parental decision-making purposes, have evolved dramatically in the past half-century.¹ The (r)evolution was fueled by major changes in both reproductive technologies and human conduct. Yet this (r)evolution is incomplete.

The (r)evolution is especially incomplete in Illinois. Recent statutory amendments chiefly reflect the work of the National Conference of Commissioners on Uniform State Laws (NCCUSL) in its 2000 model Uniform Parentage Act (2000 UPA),² not its 2017 model Uniform Parentage Act (2017 UPA) which better addresses the effects on childcare parentage of the changes in both reproductive technologies and human conduct.³ As well, the latest Illinois statutes do not reflect the NCCUSL's 2018 model Uniform Nonparent Child Custody and Visitation Act (2018 UNCVA), which also addresses the changes in the ways in which US

1. The Illinois Marriage and Dissolution of Marriage Act (IMDMA) no longer speaks of parental custody and visitation. Rather, it speaks of parental responsibility allocation, which may or may not include parental decision-making authority, but which does include "parenting time." 750 ILL. COMP. STAT. 5/602.5, 602.7, 602.8 (2020). Herein, the term childcare parentage usually excludes child support parents. Elsewhere, the phrase "childcare parent" might be reasonably utilized to encompass not only custody, visitation, parental responsibility allocation, and parental decisionmaking, but also child support.

2. See generally UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2000, amended 2002). The UPAs, and accounts of their adoptive states, are available at the Uniform Law Commission (ULC) website. *Home*, UNIF. LAW COMMISSION, www.uniformlaws.org [<https://perma.cc/5RL2-XQ4C>].

3. For a review of the 2017 UPA, its predecessors, which include both the 2000 and 1973 UPAs, and the goals behind the 2017 model, see Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J.F. 589, 597–99 (2018). Those versions of the UPA are available on the ULC website. UNIF. LAW COMMISSION, *supra* note 2.

families are formed and reformed.⁴ Further, the 2019 draft of the American Law Institute (ALI) *Restatement of the Law on Children and the Law* (2019 ALI Draft)⁵ has not been considered by Illinois lawmakers,⁶ though the earlier (and somewhat different) *ALI Principles of the Law of Family Dissolution* were available.⁷

Any (r)evolution in Illinois childcare parentage laws should not be fully fueled by the NCCUSL or ALI pronouncements. While a few other states have substantially embraced the 2017 UPA,⁸ it embodies certain public policy choices over which lawmakers can quite reasonably differ.⁹ As well, and more importantly, the 2017 UPA presents significant constitutional challenges.¹⁰

Parentage law (r)evolution in Illinois is chiefly the responsibility of the General Assembly. When asked to develop broad childcare parentage norms, the Illinois Supreme Court unanimously deferred, finding the complex issues merit broad “policy debate” in the General Assembly.¹¹

4. See generally UNIF. NONPARENT CUSTODY & VISITATION ACT (UNIF. LAW COMM’N 2018).

5. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW (AM. LAW INST., Tentative Draft No. 2, 2019).

6. As the drafting process for the 2017 UPA was underway when major Illinois parentage law amendments were recently enacted, and as the 2019 ALI Draft was preceded in 2002 by the somewhat comparable 2002 ALI *Principles of the Law of Family Dissolution*, certain parentage law reforms embodied in the 2017 UPA and in the 2019 ALI Draft, including de facto parentage, were presented, though not adopted in Illinois, as will be seen. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (AM. LAW INST. 2002).

7. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 2.03(1)(a)–(c) (suggesting three categories of childcare parentage, including legal parents, parents by estoppel, and de facto parents).

8. See WASH. REV. CODE § 26.26A.005–.903 (2020) (citing the Uniform Parentage Act, effective Jan. 1, 2019); VT. STAT. ANN. tit. 15C, § 101 (2020) (citing the Vermont Parentage Act, effective July 1, 2018).

9. For example, Illinois lawmakers have yet to adopt parentage via employment of genetic surrogates. See 750 ILL. COMP. STAT. 47/10 (2020).

10. I have written on a number of these questions. See generally Jeffrey A. Parness, *Choice of Law in De Facto Parent Cases: Tweaking the 2017 Uniform Parentage Act*, 88 MISS. L.J. SUPRA 1 (2020); Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws*, 70 MERCER L. REV. 325 (2019); Jeffrey A. Parness, *Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act*, 31 J. AM. ACAD. MATRIM. L. 157 (2018) [hereinafter Parness, *Comparable Pursuits*]; Jeffrey A. Parness, *Unnatural Voluntary Parentage Acknowledgements Under the 2017 Uniform Parentage Act*, 50 U. TOLEDO L. REV. 25 (2018) [hereinafter Parness, *Unnatural VAPs*].

11. *In re Scarlett Z.-D.*, 28 N.E.3d 776, 795 (Ill. 2015) (finding that this “complex area” is evolving). However, the court is open to developing common law norms in some assisted reproduction settings, as where there are preconception pacts on future childcare parentage. See, e.g., *In re M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) (noting common law claims of parentage and support of children can be pursued on “theories of oral contract or promissory estoppel” that extend beyond the reach of the Illinois Parentage Act). Outside of Illinois, some state courts give far less deference. See, e.g., Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479 (2017) [hereinafter Parness, *More Principled Allocations*].

Illinois legislators will be challenged when contemplating new childcare parentage laws. The laudable goals of promoting certainty, recognizing the import of blood ties, furthering children's best interests, respecting family members' wishes, protecting parental childcare rights, and enhancing public welfare often cannot be simultaneously pursued. Yet the General Assembly must act. Neither Congress nor the United States Supreme Court is likely to demand soon more national uniformity on childcare parentage.¹² Thus, as with many other family law matters (like marriage dissolution, heirs in probate, and standing to sue in tort), lawmaking on childcare parents will substantially remain for state lawmakers, who will need to set new guidelines with the rise of same-sex marriages, the increasing use of assisted reproduction technologies, and the continuing fluidity of family relationships.

This Article first briefly notes some recent significant changes in technology and human conduct impacting childcare parentage. Then it examines the federal constitutional boundaries on state childcare parent laws. Next it explores the diverse array of models, statutes and precedents on childcare parentage operating today in the United States. Then it looks at current Illinois childcare parent laws. Finally, the Article elaborates on some of the key questions facing Illinois legislators when considering new childcare parentage norms in light of scientific and social changes.

I. CHANGING REPRODUCTIVE TECHNOLOGIES AND FAMILY RELATIONSHIPS

A. *Changing Technologies*

In the past half century there have been at least two major technology advances prompting parentage law (r)evolution. One involves the increasing availability of reliable, less costly, and less intrusive DNA testing to determine male parentage, including testing to determine prebirth (future) male parentage.¹³

The other significant advance involves more reliable, less costly and generally available processes for assisted human reproduction, including births via artificial inseminations or implanted embryos.¹⁴

12. See, e.g., Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965, 969 (2016) [hereinafter Parness, *Constitutional Childcare Parents*] (noting that while the United States Supreme Court or Congress may constrain state parental childcare lawmaking, each is now unwilling to act, though the stated rationales for inaction are weak at best).

13. See, e.g., Andrew Pollack, *Before Birth, Dad's ID*, N.Y. TIMES (June 18, 2012), <https://www.nytimes.com/2012/06/20/health/paternity-blood-tests-that-work-early-in-a-pregnancy.html> [https://perma.cc/8HRS-PMUD].

14. Assisted reproductive technology is generally defined in 42 U.S.C. § 263a-7(1) (2019). For a review of available procedures and state laws, see *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313 (Jenna Casolo et al. eds., 2019).

Other technological advances have also prompted, and call for more, legal reforms. New processes now allow better freezing and storage of genetic materials so that later retrieval and use will more likely prompt healthy human births. Further, new processes now permit a prebirth determination of the sex of any later born child, as well as make available safer intended pregnancy terminations.¹⁵

B. Changing Families

As to changes in human conduct, in the past half century there has been a significant rise in births from consensual sex to unwed mothers who never marry the biological fathers and who raise their children alone.¹⁶ As well, there are rising numbers of stepparents, grandparents, and others (e.g., aunts, uncles, and siblings) chiefly rearing children.¹⁷ Changing

15. On the forms and advances in assisted reproduction technologies, see Caroline A. Harman, Comment, *Defining the Third Way—The Special-Respect Legal Status of Frozen Embryos*, 26 GEO. MASON L. REV. 515, 517–25 (2018).

16. See, e.g., Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 652 n.9 (2008); Elizabeth Wildsmith, Nicole R. Steward-Streng & Jennifer Manlove, *Childbearing Outside of Marriage: Estimates and Trends in the United States*, CHILD TRENDS, Nov. 2011, at 1, 1, available at https://www.childtrends.org/wp-content/uploads/2013/02/Child_Trends-2011_11_01_RB_NonmaritalCB.pdf [<https://perma.cc/ZLR9-27TK>] (“In 2009, 41 percent of all births (about 1.7 million) occurred outside of marriage, compared with 28 percent of all births in 1990 and just 11 percent of all births in 1970.”). While there have been increases for all racial groups, the numbers for black birth mothers are highest. GREGORY ACS ET AL., THE MOYNIHAN REPORT REVISITED 4 (2013), available at <https://www.urban.org/sites/default/files/publication/23696/412839-The-Moynihan-Report-Revisited.PDF> [<https://perma.cc/NYR5-DQGB>] (“In the early 1960s, about 20 percent of black children were born to unmarried mothers, compared with 2 to 3 percent of white children. By 2009, nearly three-quarters of black births and three-tenths of white births occurred outside marriage. Hispanics fell between whites and blacks and followed the same rising trend.”); see also JOYCE A. MARTIN ET AL., DEP’T HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL VITAL STATISTICS REPORTS, No. 1, at 38–40 (vol. 64, 2015), available at https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_01.pdf [<https://perma.cc/BBW5-TUAK>]; GREGORY ACS ET AL., *supra*, at 4 (“In 1960, 20 percent of black children lived with their mothers but not their fathers; by 2010, 53 percent of all black children lived in such families. The share of white children living with their mothers but not their fathers climbed from 6 percent in 1960 to 20 percent in 2010. Again, Hispanics followed the same trend and fell between whites and blacks. The bulk of the increase in the share of kids in ‘mother, no father’ families occurred by 1990; the growth has largely moderated over the past two decades.”); Tonya L. Brito, *Complex Kinship Networks in Fragile Families*, 85 FORDHAM L. REV. 2567, 2569–74 (2014).

17. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 63–64 (2000) (O’Connor, J., joined by three justices) (“[W]hile many children have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. . . . Understandably, in these single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday task of child rearing.”). See also Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 COLO. L. REV. 941, 953–62 (2019) (reviewing data and cases on children living with stepparents, cohabitating partners, and same-sex couples); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 132–36 (2006). The Pew Research Center provides excellent reviews and

human conduct has prompted more nontraditional families, including many headed by wed or unwed same-sex couples who plan for, have, and rear children together, as well as families embodying a single parent with a child or children.

II. FEDERAL LAW BOUNDARIES

State parentage laws are guided by federal constitutional boundaries chiefly set out in United States Supreme Court decisions. These rulings recognize significant discretion for state lawmakers, which has resulted in diverse state laws. While the decisions have only addressed parentage for children born of sex, the diversity extends to children born of assisted reproduction (with or without surrogacy).

In *Lehr v. Robertson*, in 1983,¹⁸ the Supreme Court ruled that a biological father of a child born of sex acquires “substantial” federal constitutional childrearing interests only after forming a “significant custodial, personal or financial relationship” with his child.¹⁹ Prior to formation, a biological father only has a less-protected parental opportunity interest, meaning, for example, he has no right to advance notice of an adoption petition by another man when this opportunity interest had not been timely seized.²⁰ By contrast, a birth mother necessarily has a significant relationship with any child she bears, so there always arise substantial childcare interests at birth.²¹

Of course, *Lehr* need not be (and should not be) limited to biological fathers for children born of sex. Both male and female genetic material donors who prompt assisted reproduction births should have, in the absence of waiver, protected parental opportunity interests.

And of course, the limited federal constitutional protections of parental opportunities for certain biological parents (e.g., rapists not included) does not mean there are not other more significant constitutional protections. Some state constitutional precedents, for example, have extended greater protections to unwed male parentage interests than are federally required.²²

analyses of the changing family structures in the United States, often reporting on the latest Census Bureau data. *Social & Demographic Trends*, PEW RES. CTR., www.pewsocialtrends.org [https://perma.cc/YZ2X-5U6B].

18. *Lehr v. Robertson*, 463 U.S. 248 (1983).

19. *Id.* at 271.

20. *Id.* at 266.

21. *See* *Nguyen v. I.N.S.*, 533 U.S. 53, 65 (2001) (noting the meaningful relationship between birth mother and child inheres “in the very event of the birth”); *see also* *Caban v. Mohammed*, 441 U.S. 380, 397 (1979).

22. *See, e.g.*, *Callender v. Skiles*, 591 N.W.2d 182, 192 (Iowa 1999); *In re Interest of J.W.T.*, 872 S.W.2d 189, 198 (Tex. 1994) (finding state constitutional law parentage opportunities for unwed biological fathers where the birth mothers are married to others).

In *Michael H. v. Gerald D.*, in 1989,²³ a plurality in the Supreme Court narrowed an unwed biological father's federal constitutional parental opportunity interest when a child is born into a "unitary family," that is, a "family unit accorded traditional respect in our society," typified "by the marital family" as well as by a "household of unmarried parents and their children."²⁴ There was a narrowing because there was held to be no automatic federal constitutional parentage opportunity interest for an unwed biological father where a child was born to a married woman then raising that child with her spouse. There, under state law at the time, the husband of the birth mother was the conclusively presumed childcare father as long as he was neither impotent nor sterile.²⁵ Had either the mother or her husband objected to the presumed spousal parentage within two years of the child's birth, however, an opportunity interest to childcare might then have arisen for the unwed biological father per *Lehr*, as the state law then allowed the birth mother or her husband to challenge the presumed paternity presumption.²⁶ There was no clear majority in *Michael H.* elaborating on the constitutional interests of unwed prospective biological fathers.²⁷

In *Troxel v. Granville*, in 2000,²⁸ the Supreme Court limited state lawmaking affording child custody interests to nonparents over the objections of existing legal parents whose "fundamental" parental rights had been recognized.²⁹ The precise limits remain unclear, however. In particular, it is uncertain whether detriment or harm to the child must be established before such nonparental interests can be recognized.³⁰

Beyond *Lehr*, *Michael H.*, and *Troxel*, there is the 1983 Supreme Court ruling in *Roe v. Wade*.³¹ There, and in later cases, both prospective spousal parents and unwed biological parents were denied a say in certain

23. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Scalia, J., plurality opinion).

24. *Id.* at 123 n.3.

25. *Id.* at 115 (citing CAL. EVID. CODE § 621(a) (1993) (repealed 1994)). Justice Stevens joined the Scalia-led plurality of four justices in deeming this statute prevented the unwed natural father from being a parent under California law should the unitary family remain intact; but he did find the unwed father had, under California Civil Code § 4601, since repealed, an opportunity as a nonparent for "reasonable" visitation rights. *Id.* at 133–34.

26. *Id.* at 113 (citing CAL. EVID. CODE § 621).

27. Five justices in *Michael H. v. Gerald D.* recognized such interests might be available for children born to women who were married to others. *See id.* at 136 (Brennan, J., dissenting) ("Five members of this court refuse to foreclose the possibility that a natural father might even have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth").

28. *Troxel v. Granville*, 530 U.S. 57, 63–64 (2000) (O'Connor, J., joined by three justices).

29. *Id.* at 66.

30. The open question and the diverse state law answers are reviewed in UNIF. NONPARENT CUSTODY & VISITATION ACT § 4 cmt. 3 (UNIF. LAW COMM'N 2018).

31. *Roe v. Wade*, 410 U.S. 113 (1973).

decisions on pregnancy termination by prospective birth mothers who were accorded broad decision-making authority under federal constitutional privacy interests.³² Decisionmaking on future parenthood can involve not only pregnancy termination, but also pregnancy establishment. *Roe* and its Supreme Court progeny have not addressed to what extent decisions to prompt pregnancy, especially via assisted reproduction (with or without a surrogate), are protected from governmental interference by federal constitutional privacy interests.³³

III. THE (R)EVOLUTION IN STATE CHILDCARE PARENTAGE LAWS

A. *New Uniform Parentage Act and ALI Principles*

Current Illinois parental and nonparental childcare laws reflect neither the models proffered in the 2017 UPA and 2018 UNCVA nor the 2019 ALI Draft *Restatement on Children and the Law*. What new NCCUSL

32. *Id.* at 163 (for the period of pregnancy prior to the end of the first trimester, a decision to abort made upon consultation between the attending physician and the pregnant woman can be “effectuated . . . free of interference by the State”).

33. See Ann MacLean Massie, *Regulating Choice: A Constitutional Response to Professor John A. Robertson’s Children of Choice*, 52 WASH. & LEE L. REV. 135 (1995) (urging that the optimal (not minimal) well-being of future children is the appropriate basis to shape social policy on assisted human reproduction); Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457 (2008) (reviewing scholarship and finding no general right to use assisted reproduction, though any legislation recognizing its use in some contexts should generally be read to extend use in other contexts); Tandice Ossareh, Note, *Would You Like Blue Eyes With That? A Fundamental Right to Genetic Modification of Embryos*, 117 COLUM. L. REV. 729 (2017) (exploring the parameters of a cognizable right to genetic modification of an embryo, whether to restore health or to enhance the traits of a future child). Elsewhere I have criticized the Court for not elaborating on such privacy interests. See Parness, *Constitutional Childcare Parents*, *supra* note 12, at 978–83 (showing that the Court looks to the exceptions to diversity of citizenship jurisdiction for many family (and probate) matters to justify deference to state lawmakers, though the rationales for those exceptions (e.g., lack of federal social service agencies when child custody is disputed) do not warrant the failure to set, by precedent, additional nationwide norms on who possess the fundamental parental right to the care, custody and control of children). Others have also thoughtfully criticized the Court and urged a greater federal constitutional recognition of who qualifies as a childcare parent. See, e.g., Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 340 (2017) (“[W]hile courts are generally cognizant of constitutional parental rights and their potential relevance to parentage determinations, they do not always grapple with those rights in ways that reflect a full grasp of their importance or a consensus on the best way to resolve the points of tension.”); Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1483 (2018) (“[T]he Supreme Court must offer more guidance on how states may define constitutional parenthood,” though “a definitive definition of the term is both impractical and unrealistic.”); Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 262 (2020) (noting the “functional vision of parenthood,” though arising from state family laws, “reflects and extends important constitutional commitments in ways that shed light on the parent-child relationships that merit recognition as a matter of due process”); Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 CASE W. RES. L. REV. 541, 541 (2019) (using “modern precedents to provide a clearer theory of constitutionalizing fathers”); see generally Mark Strasser, *Custody, Visitation, and Parental Rights Under Scrutiny*, 28 CORNELL J.L. & PUB. POL’Y 289 (2018).

and ALI guidelines, and what current state childcare parent laws, speak well to the new reproductive technologies and to changing familial relationships, thus meriting consideration by Illinois lawmakers?

B. Spousal Parentage

All UPAs recognize childcare parentage in actual and would-be spouses of birth mothers. The 1973 UPA deems “a man is presumed a natural father of a child if . . . he and the child’s mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated.”³⁴ So, a man’s marriage to a pregnant or nonpregnant woman prompts parentage in the man for a child born or conceived during the marriage, whether or not the man is a biological parent. For children born into marriage via “artificial insemination” utilizing the semen not donated by the husbands, there are additional requirements for male spousal parentage, including that the husband “consent” and that there be “supervision of a licensed physician.”³⁵

The 2000 UPA, as amended in 2002, similarly recognizes presumptive spousal parentage for children born of sex and nonpresumptive spousal parentage via consent to “assisted reproduction.” Further, it recognizes nonpresumptive spousal parentage via a “validated” gestational mother “agreement.”³⁶ No actual biological ties are required in many instances of spousal parentage.

The marital parent presumption in the 2000 UPA expressly applies to a man married to the mother when “the child is born.”³⁷ As to a child born to a married mother via assisted reproduction, a husband is a parent if he “provides sperm for, or consents to, assisted reproduction” per the UPA requisites.³⁸ Within two years of birth, the husband may dispute paternity

34. UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. LAW COMM’N 1973). The 1973, 2000, and 2017 UPAs also recognize male parentage presumptions in certain men who married or attempted to marry the natural mothers before or after the births. *See, e.g.*, UNIF. PARENTAGE ACT § 4(a)(3) (UNIF. LAW COMM’N 1973); UNIF. PARENTAGE ACT § 204(a)(4) (UNIF. LAW COMM’N 2000); UNIF. PARENTAGE ACT § 204(a)(1)(c), (a)(2) (UNIF. LAW COMM’N 2017). State laws include 750 ILL. COMP. STAT. 46/204(a)(3) (2020) and CAL. FAM. CODE § 7611(a) (2020).

35. UNIF. PARENTAGE ACT § 5 (UNIF. LAW COMM’N 1973) (noting that other forms of artificial insemination, raising “complex and serious legal problems,” are not dealt with). Failure to follow Section 5 mandates may nevertheless prompt a marital parentage presumption under Section 4 for a child born of artificial insemination. *See, e.g., id.* § 4(a)(1) (showing the husband is a presumed natural father of a child born to his wife “during the marriage”).

36. UNIF. PARENTAGE ACT § 201(b)(1), (5)–(6) (UNIF. LAW COMM’N 2000).

37. *Id.* § 204(a)(1)–(2). As with the 1973 UPA, there is also a marital parentage presumption for a man who attempted to marry the birth mother before the child’s birth and the child is born “during the invalid marriage,” or within 300 days after its termination, § 204(a)(3), as well as for a man who married or tried to marry the mother “after the birth of the child” and who “voluntarily asserted his paternity of the child,” § 204(a)(4).

38. *Id.* § 703 (providing the consent requisites in Section 704).

if he did not provide sperm or consent.³⁹ However, if the husband did not provide sperm and did not consent, he may pursue “at any time” an adjudication of nonpaternity where he and the mother “have not cohabited since the probable time of assisted reproduction” and he “never openly held out the child as his own.”⁴⁰ As to a child born to a gestational carrier where there is a validated agreement, a husband and his wife are parents unless the agreement is terminated.⁴¹

The 2017 UPA also recognizes spousal parentage. It expressly applies to both male and female spouses⁴² who are married to the birth mothers at the time of birth.⁴³ Such presumptive parentage does not, and should not, arise for those marrying expecting or existing legal fathers. This is because the bar on three legal parents usually would be implicated since there is also usually another expecting or existing legal parent, the prospective or actual birth mother whose constitutional custodial interests are fundamental and arise automatically upon birth.

Nonpresumptive spousal parentage under the 2017 UPA attaches to consenting spouses of birth mothers, as under the 2000 UPA, who give birth via “assisted reproduction.”⁴⁴ Further, nonpresumptive spousal parentage also attaches to married spouses where there are either gestational or genetic surrogacy agreements.⁴⁵

Current state laws generally reflect the policies of the UPAs on spousal parentage. Yet not all states comparably implement these policies. For example, under some laws spousal parentage can arise from a marriage in existence at the time of birth or at the time of conception, or from a marriage in existence sometime during pregnancy though not at conception or birth.⁴⁶

39. *Id.* § 705(a).

40. *Id.* § 705(b).

41. *Id.* § 806.

42. To date, only a few states expressly recognize marital parentage in the female spouse of a birth mother. *See, e.g.*, WASH. REV. CODE § 26.26.A.115(1)(a) (2020); VT. STAT. ANN. tit. 15C, § 401(a)(1) (2020).

43. UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. LAW COMM’N 2017).

44. *Id.* § 703 (coinciding with the consent requisites in Section 704).

45. *Id.* §§ 802–807 (outlining comparable requirements for each form of agreement, with additional special rules for gestational surrogacy pacts, at §§ 808–812, and for genetic surrogacy pacts, at §§ 813–818).

46. *See, e.g.*, GA. CODE ANN. § 19-7-20 (2019) (stating that a child “born in wedlock or within the usual period of gestation thereafter” is legitimate); ARIZ. REV. STAT. ANN. § 25-814(a)(1) (2020) (stating that there is presumptive paternity if a man is married “at any time in the ten months preceding the birth”); MICH. COMP. LAWS § 722.1433(e) (2019) (defining “presumed father” as the man “who is presumed to be the child’s father by virtue of his marriage to the child’s mother at the time the child’s conception or birth”); *see also* State v. EKB, 35 P.3d 1224, 1229–30 (Wyo. 2001) (holding that there were two spousal parents as birth mother was married twice during pregnancy; first husband was presumed spousal parent as child was born within 300 days of his

Current state laws, like the UPAs, do not address spousal parentage in common law marriages. Yet some state precedents do consider common law marriages when assessing custodial interests during family disputes.⁴⁷

Spousal parentage constitutes a form of parentage by consent for those without biological or formal adoption ties. Such parentage has been recognized in all three UPAs and is grounded in the inferred consents to share custody that inheres in actual or attempted marriages between expecting or existing legal parents and their actual or would-be spouse.⁴⁸ Consents arise when the marriage ceremony occurs (or is attempted).⁴⁹ Consents to parentage encompass future children, whether or not now conceived, as well as some current living children.⁵⁰

While such consents are undertaken comparably by actual or prospective birth mothers and their spouses, the circumstances allowing later spousal parentage disestablishments might vary, for example, where only one of the spouses knows of an existing pregnancy. Variations in spousal parentage disestablishments might also vary when state public policies differ on the importance of biological ties for an alleged legal parent who is not the birth mother. Biological ties are less, or not, important where, as recognized in *Obergefell v. Hodges*, marriage is deemed “the basis for an expanding list of governmental rights, benefits

divorce, while second husband was presumed spousal parent as he was married to birth mother at the time of birth); *Ex parte Kimbrell*, 180 So. 3d 30, 34–35, 39 (Ala. Ct. Civ. App. 2015) (holding that when a child born to woman and her supposed second husband, though there was no divorce from her first husband; both men were presumed spousal parents).

47. *See, e.g.*, *Valentine v. Wetzel*, No. 790 MDA 2018, 2019 WL 1130441, at *8 (Pa. Super. Ct. Mar. 12, 2019) (applying earlier common law marriage norms to conduct before 2005 since the bar was not made retroactive even though state law barred common law marriages entered into after January of 2005); *In re Marriage of Hogsett and Neale*, No. 2018 COA 176, at ¶¶ 1–2, 2018 WL 6564880, at *1 (Colo. Ct. App. Dec. 13, 2018) (applying *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), retroactively to give same-sex couple right to prove common law marriage for purposes of a dissolution proceeding), *cert. granted in part*, No. 19SC44, 2019 WL 4751467 (Sept. 30, 2019); *Gill v. Nostrand*, 206 A.3d 869, 873 (D.C. 2019) (applying common law marriage doctrine in a case involving alimony and marital property).

48. UNIF. PARENTAGE ACT § 4(a)(1)–(3) (UNIF. LAW COMM’N 1973); UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM’N 2000); UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. LAW COMM’N 2017).

49. UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. LAW COMM’N 1973) (stating that consent occurs); *id.* § 4(a)(2) (attempted); UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. LAW COMM’N 2000) (occurs); *id.* § 204(a)(3) (attempted); UNIF. PARENTAGE ACT § 204(a)(1)(A) (UNIF. LAW COMM’N 2017) (occurs or attempted).

50. UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. LAW COMM’N 1973) (referring to a future child); *id.* § 4(a)(3) (referring to a current child); UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. LAW COMM’N 2000) (referring to a future child); *id.* § 204(a)(4) (referring to a current child); UNIF. PARENTAGE ACT § 204(a)(1)(A) (UNIF. LAW COMM’N 2017) (referring to a future child); *id.* § 204(a)(1)(C) (referring to a current child).

and responsibilities,” including child custody and support.⁵¹ So, biological ties are not very important where a child is born of consensual sex into a marriage wherein the nonbirth spouse is not a genetic parent, but is a presumed parent whose childcare parentage presumption is, at best, difficult to overcome by a person (usually an alleged biological father) outside the marriage.⁵² By contrast, in Vermont, biological ties are more important as a presumed parent is a person who is married to the birth mother at the time of the birth of a child born of consensual sex, where an alleged unwed genetic father may challenge the presumption within two years of discovering “the potential genetic parentage.”⁵³ By further and greater contrast, in Iowa and Texas,⁵⁴ there are significant state constitutional protections of the parental opportunity interests of biological parents (logically, for children born of assisted reproduction as well as consensual sex).

C. Voluntary Acknowledgment Parentage

All UPAs recognize childcare parentage in those who have undertaken a voluntary parentage acknowledgment (VAP). Unlike spousal parentage, with VAPs there are clearly actual consents to parentage by those then either expecting or existing legal parents and by those then nonparents who may have no biological or marital ties.

The 1973 UPA recognizes “a man is presumed to be the natural father of a child” if “he acknowledges his paternity in a writing” filed with the state which is not disputed by the birth mother “within a reasonable time after being informed.”⁵⁵ Rebuttal of such a presumption occurs only with

51. See, e.g., *McLaughlin v. Jones*, 401 P.3d 492, 495–96, 500 (Ariz. 2017) (extending marital paternity presumption to female spouse of birth mother; Arizona spousal parentage presumption statute, ARIZ. REV. STAT. ANN. § 25-814(A)(1) (2019), does not specifically reference any likelihood of biological ties in the spouse, but rather addresses the spouse’s rights and responsibilities).

52. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (Scalia, J., plurality opinion) (opining that the federal constitution does not bar a marital parentage presumption law where the presumption cannot be rebutted by an unwed genetic parent); *Strauser v. Stahr*, 726 A.2d 1052, 1052–53 (Pa. 1999) (holding that the marital presumption not rebuttable by genetic father where marriage is intact); *B.S. v. T.M.*, 782 A.2d 1031, 1036–37 (Pa. Super. Ct. 2001) (finding no irrebuttable marital parent presumption here as the marriage was not intact at relevant times). While an unwed biological father may not himself be able to petition for an adjudication of child custody parentage, he may still be able to be pursued, as by state welfare officials seeking welfare payment reimbursements, for an adjudication of child support parentage, especially when a cuckolded husband is disestablished as a presumed parent. See, e.g., *Vargo v. Schwartz*, 940 A.2d 459, 469 (Pa. Super. Ct. 2007).

53. VT. STAT. ANN. tit.15C, § 401(a)(1) (2020); *id.* § 402(b)(2) (finding that the court may choose not to disestablish the spousal parentage presumption).

54. *Michael H.*, 491 U.S. at 125–26.

55. UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. LAW COMM’N 1973).

“clear and convincing evidence of no biological ties,” along with “a court decree establishing paternity of the child by another man.”⁵⁶

The 2000 UPA recognizes no parentage presumption for a male VAP signor.⁵⁷ It does recognize the birth mother and “a man claiming to be the father of the child conceived as the result of his sexual intercourse with the mother may sign an acknowledgment of paternity with intent to establish the man’s paternity.”⁵⁸ That UPA declares a VAP can be rescinded within sixty days of its effective date by a “signatory.”⁵⁹ Thereafter, a signatory can commence a court case to “challenge” the VAP, but only on “the basis of fraud, duress, or material mistake of fact” within two years of the VAP filing.⁶⁰

The 2017 UPA also recognizes that VAPs nonpresumptive parent-child relationships.⁶¹ Parentage establishments can be undertaken by an expanded field of VAP signatories, including those who claim to be “an alleged genetic father” of the child born of sex;⁶² a presumed parent (man or woman) due to an alleged or actual marriage; a presumed parent due to a holding out of the child as one’s own while residing in the same household with the child “for the first two years of the life of the child;”⁶³ and, an intended parent (man or woman) in a nonsurrogacy, assisted reproduction setting.⁶⁴ Unlike earlier UPAs, VAPs may be undertaken “at the birth of the child or the filing of the document with the [state agency maintaining birth records], whichever occurs later.”⁶⁵

As with the 2000 UPA, the 2017 UPA allows signatories to rescind within sixty days.⁶⁶ Challenges may proceed thereafter, “but no later than two years after the effective date” and “only on the basis of fraud, duress or material mistake of fact.”⁶⁷ While nonsignatory VAP challenges may be pursued within “two years after the effective date of the

56. *Id.* § 4(b).

57. UNIF. PARENTAGE ACT § 204(a) (UNIF. LAW COMM’N 2000).

58. *Id.* § 301. The accompanying Comment indicates that “a sworn assertion of genetic parentage of the child” is needed though not “explicitly” required by federal welfare subsidy statutes that often prompt state VAP laws, a federal statutory “omission” that is corrected in the 2000 UPA. The Comment also recognizes a male sperm donor may undertake a VAP in an assisted reproduction setting where his “partner” is the birth mother.

59. *Id.* § 307(1).

60. *Id.* § 308(a).

61. UNIF. PARENTAGE ACT § 201(5) (UNIF. LAW COMM’N 2017). Some marital parentage presumptions, including marriages occurring after birth, can be prompted by parentage assertions in records filed with the state. *Id.* § 204(a)(1)(C)(i).

62. *Id.* § 301.

63. *Id.*; *id.* § 204(a).

64. *Id.* §§ 301, 703.

65. *Id.* § 304(c).

66. *Id.* § 308(a)(1) (allowing rescission within two months of their effective dates).

67. *Id.* § 309(a).

acknowledgement”, challenges usually will only be sustained when the child’s “best interest” will be served.⁶⁸ Nonsignatory challengers are limited. Those with standing include the child; a parent under the 2017 UPA; “an individual whose parentage is to be adjudicated;” an adoption agency; and a child support, or other authorized, governmental agency.⁶⁹

The 2017 UPA expressly recognizes that VAPs may be undertaken by those who know there are no biological ties to the children whom they acknowledge.⁷⁰ This is new and revolutionary. The 2017 UPA allows circumvention of formal adoption laws and the safeguards they provide for children, including background checks and best interest findings. A comment in the 2000 UPA laments that the federal statutes guiding state VAP laws do not expressly “require that a man acknowledging paternity must assert genetic paternity;” it indicates the 2000 UPA was “designed to prevent circumvention of adoption laws by requiring a sworn statement of genetic parentage of the child.”⁷¹ Thus, in 2017, the NCCUSL policy on VAPs changed dramatically. The change not only runs counter to formal adoption laws, but presents constitutional issues involving, at the least, possible as applied challenges (likely under *Lehr*).

Many current state laws reflect the policies of the UPAs on VAPs. Only a few states to date have extended VAP authority to a same-sex female couple where a child is born of consensual sex.⁷² VAP opportunities are not, and could not be, extended to a same-sex male couple where one of the men conceived a child born of sex, as here the birth mother is a parent and no states, as yet, recognize VAPs for third parents.⁷³

68. *Id.* § 309(b); *id.* § 610(b)(1)–(2).

69. *Id.* §§ 610(b), 602. Thus, the parents or siblings of an alleged biological father of a child born of consensual sex seemingly cannot challenge a VAP.

70. *Id.* § 301 (recognizing intended parent for child born of assisted reproduction and spousal parent, who is a presumed parent under § 204(a)(1)(A), like a woman married to the birth mother).

71. UNIF. PARENTAGE ACT art III. cmt. (UNIF. LAW COMM’N 2000).

72. *See, e.g.*, VT. STAT. ANN. tit. 15C, § 301(a)(4) (2020); *id.* § 401(a)(1) (allowing a person married to birth mother at time child is born can undertake voluntary parentage acknowledgment); WASH. REV. CODE § 26.26A.200 (2020) (permitting a birth mother and “presumed parent” may sign acknowledgment; presumed parent includes the spouse of birth mother under 26.26A.115(1)(a)(i)). On the need for allowing VAPs for same-sex female couples, *see, e.g.*, Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 97, 101–03 (2018) (examining same-sex female couples who conceive children using donated sperm). On the problems with two women signing VAPs for children born of consensual sex, *see* Parness, *Unnatural VAPs*, *supra* note 10, at 25 (articulating concerns regarding lost paternity interests for unwed biological fathers involving children born of consensual sex).

73. In California, there can be three parents under law. CAL. FAM. CODE § 7612(c) (2020). But one such parent cannot be a parent via a VAP. *Id.*; CAL. FAM. CODE § 7611 (noting that voluntary parentage acknowledgment does not prompt presumed parentage).

State VAP statutes today only sometimes involve parentage presumptions. With or without presumptions,⁷⁴ VAP statutes typically recognize that signed and state-filed parentage declarations establish childcare parentage for signors who are not birth mothers. Sometimes VAPs operate without alleged biological ties.⁷⁵ They generally operate without formal adoptions. As well, state VAP laws vary in their disestablishment standards, though all norms, due to federal welfare subsidy mandates, must conform to the federal Social Security Act.⁷⁶

VAP statutes most often are employed by birth mothers and unwed men who seek to establish legal paternity.⁷⁷ VAPs are typically distinguished from birth certificate recognitions of childcare parents encompassing those married to birth mothers, who frequently are presumed parents, but who never undertake VAPs.⁷⁸ VAP parents who reside and hold out children as their own also differ from residency/hold out parents who never undertake VAPs,⁷⁹ as a VAP is more difficult to challenge than a residency/hold out parentage.

74. For a review of state voluntary acknowledgment statutes, see Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 63–69 (2010) [hereinafter Parness & Townsend, *For Those Not John Edwards*]; Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 482 (2005).

75. In Alaska and Nevada, the VAP forms do not speak to biological ties. The signing man indicates only that he is the “father.” ALASKA BUREAU VITAL STAT., FORM NO. 06-5376 VS FORM 16: AFFIDAVIT OF PATERNITY (rev. Jan. 2009); NEV. VITAL RECORDS, FORM NO. NSPO: DECLARATION OF PATERNITY (rev. July 2008). In Vermont, a woman residing with a birth mother for the first two years of a child’s life is eligible to sign a VAP. VT. STAT. ANN. tit. 15C, § 301(a)(4) (2017); *id.* § 401(a)(4). In Wyoming and Washington, there is no explicit requirement that the signing man affirm a belief in biological ties, though the signor elsewhere is referred to as the “natural father.” VITAL RECORDS SERVS., STATE WYO., AFFIDAVIT ACKNOWLEDGING PATERNITY (rev. 2017); CTR. FOR HEALTH STAT., WASH. DEP’T. OF HEALTH, FORM NO. DOH/CHS 021: PATERNITY AFFIDAVIT (rev. Sept. 2007). The foregoing VAP forms, and others later referenced, are on file with the author, who assembled them while writing *For Those Not John Edwards*. See generally Cacioppo, *supra* note 74, at 489–91.

76. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.). For a review of disestablishment (i.e., rescissions and challenges) norms, see PAULA ROBERTS, CTR. FOR LAW & SOC. POLICY, TRUTH AND CONSEQUENCES, pt. I, at 44–53 (2003); *id.* app. B, at 82–90 (including table citing all statutes).

77. *But see In re Sebastian*, 25 Misc. 3d 568, 583 (N.Y. Sur. Ct. 2009) (suggesting woman whose ova was used by her partner to bear a child born of assisted reproduction might employ the voluntary acknowledgment process).

78. See, e.g., *Castillo v. Lazo*, 386 P.3d 839, 842 (Ariz. Ct. App. 2016) (holding that a birth certificate naming husband is not “equivalent” to a VAP).

79. See, e.g., VT. STAT. ANN. tit. 15C, § 301(a)(4) (2020); *id.* § 401(a)(4) (stating that a presumed holdout/residency parent may, but need not, sign a VAP).

In only some states can VAPs be filed and effective prior to birth.⁸⁰ And only in some states must information as to any completed genetic testing be submitted; must forms be used by residents for out-of-state births; are witnesses or notaries needed; and must forms require parental or guardian consent when the signing mothers are young.⁸¹

Notwithstanding any statutorily-designated “conclusive” status, VAPs can be rescinded by signatories within sixty days. After sixty days, VAPs can only be challenged in court on the basis of fraud, duress or material mistake of fact.⁸² For states participating in federal welfare subsidy programs, these standards are required by the federal Social Security Act.⁸³ Yet, state cases reflect significant interstate variations in the fraud duress and mistake guidelines for VAP challenges, with no Congressional or federal court movement, as yet, to unify state VAP challenge standards.⁸⁴

Beyond fraud, duress, and mistake, there are other differences in state VAP challenge laws. For example, there are varied time limits on VAP challenges. Even with fraud, duress, or mistake, challenges must be commenced within a year in Massachusetts,⁸⁵ within two years in Delaware,⁸⁶ and within four years in Texas.⁸⁷ In Utah, a statutory challenge may be made “at any time” on the ground of fraud or duress, but only within four years for material mistake of fact.⁸⁸ Where there are no written time limits, (often quite broad) trial court discretion reigns.⁸⁹

80. See, e.g., VITAL STATISTICS UNIT, TEX. DEP’T STATE HEALTH SERVS., FORM NO. VS-159-1M: TEXAS ACKNOWLEDGEMENT OF PATERNITY (2005); VT. STAT. ANN. tit. 15C, § 304(b) (2020).

81. For a review of the varying state forms, see Parness & Townsend, *For Those Not John Edwards*, *supra* note 74, at 63–87.

82. Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI.-KENT L. REV. 177, 184 (2017) [hereinafter Parness & Saxe, *Reforming VAPs*].

83. 42 U.S.C. § 666(a)(5)(D)(ii)–(iii) (2019). At least one state statute combines its norms on disestablishing presumed marital paternity and its norms on challenging VAPs. ALA. CODE § 26-17-608(a)(1) (2020).

84. For more on such variations, see, e.g., Parness & Saxe, *Reforming VAPs*, *supra* note 82, at 194–96.

85. MASS. GEN. LAWS ch. 209C, § 11(a) (2020); see also *State v. Smith*, 392 P.3d 68, 76 (Kan. 2017) (holding that there is an one year (after birth) limit on signatory challenges applied though there were found technical violations (e.g., no proper notarizations) of the statute).

86. DEL. CODE ANN. tit. 13, § 8-308(a)(2) (2019); see also VT. STAT. ANN. tit. 15C, § 308(a)(2) (2020); *Paul v. Williamson*, 322 P. 3d 1070, 1073 (Okla. Civ. App. 2014) (citing OKLA. STAT. tit. 10, § 7700-609(B) (2020)) (employing Oklahoma two-year limit against alleged biological father). *But see* LA. STAT. ANN. § 9:406 (2019) (stating that the two-year prescriptive period previously imposed for revocation of authentic acts of acknowledgement was repealed in 2016).

87. TEX. FAM. CODE. ANN. § 160.308(a) (West 2019).

88. UTAH CODE. ANN. § 78B-15-307 (LexisNexis 2020).

89. See, e.g., *In re Neal*, 184 A.3d 90, 96 (N.H. 2018) (holding that there was sustainable

Further, there are interstate differences in whether a successfully challenged VAP eliminates past child support arrearages.⁹⁰

Importantly, particularly for nonsigning biological fathers of children born of consensual sex, there are some laws on the circumstances beyond fraud, duress, and mistake available to challenge VAPs. Consider challenges by nonsigning biological fathers who did not know that other men, or women in some states, were signing VAPs alongside birth mothers, and who did not know of, and did not reasonably foresee, their “potential parentage.” In Vermont, such a father may challenge a VAP within two years after discovery of his “potential parentage,” as in cases where there was “concealment” of the pregnancy and/or birth though there was no fraud, duress, or mistake.⁹¹ Elsewhere, “concealment” of a pregnancy and/or of a live birth by the birth mother (and, at times, others) may not extend the time for a biological father to challenge a VAP, assuming there is standing, because strict repose periods operate.⁹²

Finally, again particularly important for nonsigning biological fathers (and their family members), state laws vary on which nonsignatories can challenge VAPs. In Vermont, a challenge is available to “a person not a signatory.”⁹³ Elsewhere, standing to challenge a VAP is far more limited, as with laws recognizing only certain types of challengers, like children and governments.⁹⁴

D. Residency/Hold Out Parentage

All UPAs recognize childcare parentage in some of those who have resided with living children whom they held out as their own. Residency/hold out parentage is a form of parentage for those without biological or formal adoption ties. To date, no UPA (and no state law) has recognized residency/hold out childcare parents where there is

exercise of trial court discretion where a 2009 VAP was challenged by male signatory in 2015 after a 2012 paternity test revealed that he was not the biological father; challenge brought in November 2015, after child contact was cut off in March 2014).

90. See, e.g., *Adler v. Dormio*, 872 N.W.2d 721, 722 (Mich. Ct. App. 2015) (reviewing Michigan laws on when responsibility for arrearages may be eliminated).

91. VT. STAT. ANN. tit. 15C, § 308(b).

92. See, e.g., Parness & Saxe, *Reforming VAPs*, *supra* note 82, at 198–200 (noting also that VAP challenges within the relevant time limits may be foreclosed by laches or estoppel).

93. VT. STAT. ANN. tit. 15C, § 308(b).

94. See, e.g., Parness & Saxe, *Reforming VAPs*, *supra* note 82, at 188–94. While the 2017 UPA expressly recognizes a VAP may be challenged by a nonsignatory, the 2000 UPA only explicitly recognizes signatory challenges. Compare UNIF. PARENTAGE ACT §§ 309(b), 610(b) (UNIF. LAW COMM’N 2017) (proceeding “brought by an individual other than the child”), with UNIF. PARENTAGE ACT § 308(a) (UNIF. LAW COMM’N 2000). See also UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. LAW COMM’N 1973); *id.* § 6(b) (“[A]ny interested party may sue to disestablish an acknowledged father.”).

common residency with, and support of, expecting legal parents (i.e., pregnant women or those awaiting formal adoption approval).

The 1973 UPA is quite different than the latter UPAs on residences/hold out parentage.

The 1973 Uniform Parentage Act has this parentage presumption:

- (a) A man is presumed to be the natural father of the child if . . .
- (4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child.⁹⁵

The 2000 Uniform Parentage Act altered the presumption. It says:

- (a) A man is presumed to be the father of a child if: . . .
- (5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.⁹⁶

The 2017 Uniform Parentage Act altered again the presumption. It says:

- (a) An individual is presumed to be a parent of a child if: . . .
- (2) the individual resided in the same household with the child for the first two years of the life of the child, including periods of temporary absence, and openly held out the child as the individual's child.⁹⁷

While expanding VAPs in 2017 by including women, the last two UPAs limited childcare parentage opportunities for those living with, and supporting, nonmarital, nonbiological, and nonadoptive children without VAPs or assisted reproduction pacts. Since 2000, an alleged residency/hold out parent must begin to childrear upon the child's birth.

The 2000 *ALI Principles* also recognize forms of residency/hold out parentage. One form, like the 2000 and 2017 UPAs, encompasses "a parent by estoppel" who "lived with the child since the child's birth," while holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities.⁹⁸ Another form, as with the 1973 UPA, encompasses a "de facto parent" who lived and established a parental-like relationship with the child, again with a similar agreement and with comparable mandates on holding out and accepting responsibility.⁹⁹

Many current state laws reflect the policies of the UPAs on residency/hold out parentage. Yet only a few to date have expressly

95. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973).

96. UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2000).

97. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017).

98. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(iii) (AM. LAW INST. 2002) (requiring a finding of serving the child's best interests).

99. *Id.* § 2.03(1)(b)(iv) (requiring a finding of serving the child's best interests).

extended it to same-sex couples.¹⁰⁰ Nevertheless, residency/hold out parentage seems available to a female partner of a birth mother given equality demands.¹⁰¹ Residency/hold out parentage is generally unavailable to a male partner of a birth father where there is a birth mother who remains a legal parent, since state laws allowing three custodial parents are quite limited.¹⁰²

There are varying state laws reflecting the distinct UPA approaches to residency/hold out parentage. In California, following the 1973 UPA, a man is “presumed to be the natural father of a child” if he “received the child into his home and openly holds out the child as his natural child.”¹⁰³ There is no explicit requirement that a man who holds out a child as “his natural child” needs to have any beliefs about his actual biological ties. Thus, California cases¹⁰⁴ have recognized as presumed parents those who knew there were no biological ties, but who acted in the community as if

100. See, e.g., VT. STAT. ANN. tit. 15C, § 401(a)(4) (2020) (“person,” not man); WASH. REV. CODE. § 26.26A.115(1)(b) (2020) (“individual,” not man). On the need to treat equally men and women involved in same-sex residency/hold out parentage settings, see Jeffrey A. Parness, *Marriage Equality: Parentage (In)Equality*, 32 WIS. J.L. GENDER & SOC’Y 179, 189 (2017).

101. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (finding former unwed lesbian partner a child support parent under California statutory law on presumed natural hold out fathers); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 967 (Vt. 2006) (first citing VT. STAT. ANN. tit. 15, § 308(4) (2017) (repealed 2018); and then citing VT. STAT. ANN. tit. 15, § 1204(f) (2020)) (holding that upon dissolution of civil union of lesbian couple, both women are custodial parents as statute making husband the presumed “natural parent” of a child born to his wife was applicable via a second statute saying that civil union and married couples shall have the “same” rights). Similar equality mandates operate when there is common law, rather than statutory, hold out parentage. See, e.g., *Wendy G-M. v. Erin G-M.*, 45 N.Y.S.2d 845, 856 (N.Y. Sup. Ct. 2014) (“The Court of Appeals majority quoted, with approval, the Vermont Supreme Court opinion in *Miller-Jenkins v. Miller Jenkins*, which held that a partner in a civil union was the parent of a child born during the civil union.” (citation omitted)); see also Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW & CONTEMP. PROBS. 195, 212–19 (2014) (explaining that even where statutes only explicitly recognize residency/hold out parentage for men, women are sometimes deemed parents under the statutes).

102. In California, though, there can sometimes be three legal parents, including the birth mother, her spouse, and a residency/hold out parent. Compare CAL. FAM. CODE § 7612(c) (West 2020) (allowing three parents where recognition of only two parents “would be detrimental to the child”), with *C.G. v. J.R.*, 130 So. 3d 776, 782 (Fla. Dist. Ct. App. 2014) (holding that Florida law does not support enforcement of an agreement on sharing child custody which was entered into by the married birth mother, her spouse, and the biological father of a child born of sex).

103. CAL. FAM. CODE § 7611(d) (West 2020). The presumption has been sustained when challenged on the ground of interfering with federal constitutional childcare interests. See, e.g., *R.M. v. T.A.*, 182 Cal. Rptr. 3d 836, 839 (Cal. Ct. App. 2015) (using the preponderance of evidence norm to establish presumption). For what constitutes receipt into the home, see, e.g., *In re N.V.*, G049597, 2014 WL 2616503 (Cal. Ct. App. June 12, 2014) (reviewing cases).

104. See, e.g., *In re Jesusa V.*, 85 P.3d 2, 15 (Cal. 2004) (declaring both Paul (also the husband) and Heriberto (also the biological father) to be “presumed” California fathers because each had received Jesusa V. into his home and held her out as his natural child); see also *Barnes v. Cypert*, No. F049259, 2006 WL 3361790 (Cal. Ct. App. Nov. 21, 2006) (holding that the birth mother’s uncle is a presumed parent); *In re Jerry P.*, 116 Cal. Rptr. 2d 123, 141 (Cal. Ct. App. 2002) (holding that presumed residency/hold out parent need not have, or even claim to have, biological ties).

there were.¹⁰⁵ Elsewhere, some state laws recognize residency/hold out parentage only for those who raise children from birth,¹⁰⁶ following the 2017 UPA.

There are other interstate variations in residency/hold out parentage. Some state laws do not require receipt into the home.¹⁰⁷ Some state laws more explicitly require existing legal parents to agree to such matters as residency or hold outs by nonparents who can later morph into new childcare parents, on equal footing with existing legal parents.¹⁰⁸

State laws vary on the circumstances allowing, and the standing available to present, a challenge to residency/hold out parentage. Consider challenges by nonresident biological fathers who did not know, and could not reasonably have known, that residency/hold out was being undertaken by a nonparent together with an existing legal parent (often the birth mother). In Vermont, such a father may challenge a hold out/residency parentage within two years of “discovering the potential genetic parentage” in cases where there was no earlier actual or reasonably assumed knowledge of the potential due to “material misrepresentation or concealment.”¹⁰⁹ Elsewhere, there are different time limits,¹¹⁰ as well as the unavailability of “concealment” as a condition of

105. How long an alleged residency/hold out parent must so act is determined on a case-by-case basis. *See, e.g., In re J.B.*, B291208, 2019 WL 1451304, at *5 (Cal. Ct. App. Apr. 2, 2019) (concluding that two-day hold out is insufficient for presumed parent status).

106. *Compare* TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2019) (stating that a man is a presumed father if “during the first two years of the child’s life, he continuously resided in the household in which the child resided and he represented to others that the child was his own”), *and* WASH. REV. CODE § 26.26.115b (2020), *with* MONT. CODE ANN. § 40-6-105(d)(1) (2019) (stating that a person is presumed the natural father if “while the child was under the age of majority” and the person “receives the child into the person’s home and openly represents the child to be the person’s natural child”).

107. *See, e.g.,* N.J. STAT. ANN. § 9:17-43(a)(4) (West 2020) (stating that either the parent receives into his home or “provides support for the child”); DEL. CODE ANN. tit. 13, § 8-201(c) (2019) (requiring a “parental role” and “bonded and dependent relationship . . . that is parental in nature”).

108. *Compare* D.C. CODE § 16-831.01(1) (2020) (stating that a single parent’s “agreement” to same household residency for one wishing to be deemed a de facto parent), *and* VT. STAT. ANN. tit. 15C, § 401(a)(4) (2020) (finding that presumed residency/hold out parent if in child’s first two years, where “another parent” of child jointly held child out as presumed parent’s child), *with* N.J. STAT. ANN. § 9:17-43(a)(4)–(5), *and* N.J. STAT. ANN. § 9:17-40 (stating that a man can be “presumed to be the biological father of a child on equal footing with the unwed birth mother, if he “openly holds out the child as his natural child” and either “receives the child into his home” or “provides support for the child”).

109. VT. STAT. ANN. tit. 15C, § 401(a)(4); *id.* § 402(b)(2).

110. *Compare* UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM’N 2017) (looking at the residence/hold out in child’s first two years), *and id.* § 204(b), *and id.* § 608(b) (dictating that a presumption rebuttal usually must be presented before the child turns two), *with* UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM’N 1973) (considering the residence/hold out where child is “under the age of majority”), *and id.* § 6(b) (“at any time”).

extending the normal time limits for challenging hold out/residency parents.¹¹¹

No state to date follows the 2000 *ALI Principles* on parentage by estoppel, where co-parenting pacts with potential residency/hold out must be undertaken by, if there are, two existing legal parents.¹¹² Nevertheless, the 2000 *ALI Principles* seem right for many cases, as one existing legal parent, as in a formal adoption setting, generally has no agency/common authority to surrender the parental childcare rights of a second existing legal parent.

E. De Facto Parentage

The 2017 UPA, but neither of its predecessors, expressly recognizes “de facto” parenthood as a form of parentage for those without biological or formal adoption ties.¹¹³ Such parenthood is grounded in far more explicit agreements for shared custody between existing legal parents and nonparents than in any agreements leading to residency/hold out parentage.¹¹⁴ For de facto parentage, an existing legal parent must have “fostered or supported” a “bonded and dependent relationship” between the child and the nonparent who may become a de facto parent.¹¹⁵ The nonparent must have undertaken “full and permanent” parental responsibilities.¹¹⁶

The 2017 UPA de facto parentage provision is also far more precise in its details on parental-like acts than in its requisites for a two-year

111. Compare UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM’N 2017), and *id.* § 204(b), and *id.* § 608(b) (placing a two year limit on challenging residency/hold out parentage of an “individual” does not operate when the individual is “not a genetic parent, never resided with the child, and never held out the child as the presumed parent’s child”), with UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM’N 2000), and *id.* § 204(b), and *id.* § 607(b) (placing a two-year limit on actions to disprove earlier determined presumed residency/hold out parentage in a “man” does not operate when there was, in fact, no cohabitation or sexual intercourse during the probable time of conception and the presumed parent never openly held out the child as his own), and UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM’N 1973), and *id.* § 6(b) (presumed residency/hold out parentage can be challenged “at any time”).

112. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(iii) (AM. LAW INST. 2002).

113. The term “de facto” parent did not originate in the 2017 UPA. The Comment to the Act indicates its de facto parentage standard was modeled on Maine and Delaware statutes. UNIF. PARENTAGE ACT § 609 cmt. (UNIF. LAW COMM’N 2017). The term was also employed in the 2000 *ALI Principles*. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(iii) (AM. LAW INST. 2000).

114. Expecting legal parents are foreclosed under the 2017 UPA from being bound to any agreements on de facto parentage for children to be born of sex later, as the model law requires, e.g., “a bonded and dependent relationship with the child.” UNIF. PARENTAGE ACT § 609(d)(5). Thus, there is not recognized a possible “bonded and dependent relationship” with a fetus, a fertilized egg, or some child of sex yet unconceived.

115. *Id.* § 609(d)(6).

116. *Id.* § 609(d)(3).

residency/hold out parentage. While both de facto parentage and residency/hold out parentage encompass human acts occurring at no particular time or in no particular place, only de facto parentage requires all of the following conditions:

(a) A proceeding to establish the parentage of a child under this section may be commenced only by an individual who: (1) is alive when the proceeding is commenced; and (2) claims to be a de facto parent of the child.

(b) An individual who claims to be a de facto parent of a child must commence the proceeding (1) before the child is 18 years of age and (2) while the child is alive. . . .

. . .

(d) In a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, if there is only one other individual who is a parent or has a claim to parentage of the child, the court shall adjudicate the individual who claims to be a de facto parent to be a parent of the child if the individual demonstrates by clear and convincing evidence that:

(1) the individual resided with the child as a regular member of the child's household for a significant period;

(2) the individual engaged in consistent caretaking of the child;

(3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial benefit;

(4) the individual held out the child as the individual's child;

(5) the individual established a bonded and dependent relationship with the child which is parental in nature;

(6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and

(7) continuing the relationship between the individual and the child is in the best interest of the child.

(e) In a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, if there is more than one other individual who is a parent or has a claim to parentage of the child and the court determines that the requirements of paragraphs (1) through (7) of subsection (d) are met, the court shall adjudicate parentage under Section 613, subject to other applicable limitations in this [part].¹¹⁷

Of particular note is the 2017 UPA requirement that an existing legal parent (i.e., "another parent") "fostered or supported" the parental-like relationship between the child and the nonparent. There is no mention of any conduct-consensual or otherwise-involving any second existing legal parent (like a VAP parent or a presumed spousal parent), or any expecting legal parent (like a biological father of a child born of sex who maintains

117. *Id.* § 609(a)–(b), (d)–(e).

a paternity opportunity interest). An unmentioned parent may not even know of “another” parent’s fostering and support while it happens. Under the UPA, it is quite conceivable that the fostering and support nonparent is later deemed a de facto parent concurrent with the (effective) termination of, or reduction in, the unaware expecting or existing parent’s childcare interests.¹¹⁸ Significant constitutional issues arise where there are other, unaware parents.

On challenges to earlier determined de facto parentage, the 2017 UPA is relatively silent. It does provide, however, that a child is not bound by an earlier de facto parentage finding unless “the child was a party or was represented” in the earlier proceeding.¹¹⁹ Further, it recognizes that a party with standing “to adjudicate parentage”¹²⁰ may not challenge an earlier de facto parentage finding if that party was a party to the earlier proceeding or received notice of the earlier proceeding.¹²¹

Further noteworthy is the 2017 UPA’s restriction on who may attempt to establish de facto parenthood. Standing is limited to a putative parent who seeks such status.¹²² So, the consent to parent is one-way. The

118. *Id.* § 613 (stating where there is no state law recognition of the possibility of three or more custodial parents, a court must “adjudicate parentage in the best interest of the child,” with guiding factors enumerated). In the 2017 UPA, there is provided no express and significant mechanism for a second existing legal, or an expecting legal parent, to challenge a petition to establish de facto parentage. *Id.* Under the 2017 UPA, § 609(e), beyond the birth or adoptive parent, if there is another individual “who is a parent or has a claim to parentage of the child” for whom an alleged de facto parent seeks parental status, that individual’s interests must be adjudicated, *id.* § 609(e). Yet how would a court learn of this individual? And is it reasonable to assume that such an individual would likely know of the de facto parent petition and thus be able to intervene? Should there not be a duty to disclose, if not an affirmative responsibility for some governmental investigation? In Vermont, which substantially enacted the 2017 UPA, an alleged de facto parent’s petition to adjudicate his/her “claim to parentage” is to be determined by “clear and convincing evidence,” with no explicit statutory mention of the participatory rights of a nonresidential person with “a claim to parentage.” VT. STAT. ANN. tit. 15C, § 501(a)(1), (b) (2020); *but see id.* §§ 206(a)(6), 501(b) (stating that when courts consider claims of de facto parentage, the court must consider the “likelihood” of “harm to the child”). *Compare* DEL. CODE ANN. tit. 13, § 8-201(c) (2019) (imposing de facto parent norms, wherein there is not any presumed parentage if the norms are met), *with* DEL. CODE ANN. tit. 13, § 8-609(b) (2019) (allowing an adjudicated father to be challenged within two years after the adjudication). While findings of de facto parentage in favor of petitioners can effectively terminate (and can certainly reduce) parentage or parental opportunity interests for many, such findings, unlike findings in formal adoption proceedings, need not—at least expressly under the statutes—be preceded by reasonable attempts to notify those whose parental interests are possibly terminated should the petitions be granted.

119. UNIF. PARENTAGE ACT § 623(b)(4) (UNIF. LAW COMM’N 2017).

120. *Id.* § 602 (stating that standing is recognized for an individual, personally or through an authorized legal representative, “whose parentage of the child is to be adjudicated”).

121. *Id.* § 611(b) (coupling with notice governed by § 603, which includes “an individual whose parentage of the child is to be adjudicated,” which seemingly could include a non-birth mother who claims to be a biological parent and thus claims protected parentage opportunity interests). Of course, as in formal adoption proceedings, notice may never reach such a biological parent, as when notice is served by publication.

122. *Id.* § 609(a) (stating that a claimant must be “alive when the proceeding is commenced”).

nonparent meeting the de facto parent norms cannot be pursued for child support by the fostering and supportive legal parent, by any other legal parent, by the child, or by the state (for welfare payment reimbursement). This restriction stands in stark contrast to residency/hold out parentage under the 2017 UPA which generally recognizes standing in the woman who gave birth, a child, the state, and an adoption agency, as well as in the putative parent.¹²³ The differences in the standing norms present significant Equal Protection and public policy concerns.¹²⁴

Both the 2000 *ALI Principles*¹²⁵ and the 2019 ALI Draft¹²⁶ also recognize forms of “de facto” parentage for those without biological or formal adoption ties. Each of the forms requires both residence and consent by an existing legal “parent.” But only the 2000 Principles further recognize a “parent by estoppel.”¹²⁷

Under the 2000 *ALI Principles*, a “parent by estoppel” is “not a legal parent” who must have lived with the child, without an obligation to pay child support and without “a reasonable, good-faith belief” of biological ties, and who did so with either “a prior co-parenting agreement with the child’s legal parent (or, if there are two legal parents, both parents)” or “an agreement with the child’s parent (or, if there are two legal parents, both parents).”¹²⁸

The 2000 *ALI Principles* recognizes the “de facto parent” as the one who is “other than a legal parent or a parent by estoppel” and who lived with and cared for the child for at least two years under an “agreement of a legal parent to form a parent-child relationship.”¹²⁹ A de facto parent,

123. *Id.* § 204(a)(2) (stating that residency/hold out parentage presumed). Per the 2017 UPA § 602, limits on such pursuits are found in § 608 (stating that there is usually no pursuit of rebuttal of presumption after the child is two years of age). *Id.* §§ 602, 608.

124. See generally Parness, *Comparable Pursuits*, *supra* note 10.

125. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.03(1)(c), 3.02(1)(c) (AM. LAW INST. 2002) (listing requirements including residence with the child, as well as “the agreement of a legal parent to form a parent-child relationship” unless the legal parent completely fails, or is unable, to perform caretaking functions”).

126. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.82(a) (AM. LAW INST., Tentative Draft No. 2, 2019) (outlining requirements include residence with the child, as well as establishing that “a parent consented to and fostered the formation of the parent-child relationship”).

127. Under the 2002 *ALI Principles*, a legal parent, a parent by estoppel, and a de facto parent each has standing to pursue/participate in an action involving judicial allocation of custodial and decision-making responsibility for a child. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.04(1). A “legal parent” is “an individual who is defined as a parent under other state law.” *Id.* § 2.03(1)(a).

128. *Id.* § 2.03(1)(b).

129. *Id.* § 2.03(1)(c). Alternatively, a de facto parent is one who is other than a legal parent or a parent by estoppel and who lived with and cared for the child for at least two years “as a result of a complete failure or inability of any legal parent to perform caretaking functions.” *Id.* Precedents predating the 2000 *ALI Principles* recognize the concept of de facto parentage in different settings.

unlike a legal parent or a parent by estoppel, has no presumptive right to “an allocation of decision-making responsibility for the child,¹³⁰ and a de facto parent has no presumptive right of “access to the child’s school and health-care records to which legal parents have access by other law.”¹³¹

The 2019 ALI Draft describes a de facto parent as a third party who establishes that he or she “lived with the child for a significant period of time,” was “in a parental role” long enough that he/she established “a bond and dependent relationship . . . parental in nature,” he or she had no “expectation of financial compensation,” and “a parent” consented to third party’s parental-like role.¹³² So, the 2019 Draft, but not the 2000 *ALI Principles*, invites a childcare parentage designation adversely impacting the childcare interests of an existing and nonconsenting parent.

Before and since 2017, some states had or have statutes or common law precedents on nonmarital, nonbiological, and nonadoptive childcare parentage similar to the suggested UPA and ALI de facto parent norms. For example, before 2017 there were quite comparable Maine and Delaware statutes,¹³³ and a less comparable Wisconsin Supreme Court

See, e.g., In re Kieshia E., 859 P.2d 1290, 1296 (Cal. 1993) (en banc) (finding standing of a de facto parent in a juvenile delinquency proceeding); *In re J.H.*, 815 P.2d 1380, 1383 (Wash. 1991) (en banc) (holding that in a delinquency case, permissive intervention, not intervention as of right, is available to some foster parents claiming de facto (or psychological) parent status), *superseded by statute*, Act of May 7, 1993, ch. 241, 1993 Wash. Sess. Laws 864, *as recognized in In re E.H.*, 427 P.3d 587, 593 n.2 (Wash. 2018); *In re B.G.*, 523 P.2d 244, 254 n.21 (Cal. 1974) (failing to resolve whether a de facto parent may have the same rights of notice, hearing or counsel as have natural parents in Juvenile Court Law proceedings under due process or equal protection principles). The Reporter’s Notes to the 2000 *ALI Principles* observes the “law that most closely approximates the criteria for a ‘de facto’ parent relationship is that of Wisconsin” where visitation (but not custody) may be awarded “to an individual who has formed a ‘parent-like relationship’ with a child.” PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 reporter’s note (c) (AM. LAW INST. 2000).

130. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09(2) (AM. LAW INST. 2002).

131. *Id.* § 2.09(4).

132. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.82(a) (AM. LAW INST., Tentative Draft No. 2, 2019) (requiring proof by clear and convincing evidence).

133. ME. STAT. tit. 19-A, § 1891 (2019); DEL. CODE ANN. tit. 13, § 8-201(c) (2019).

precedent,¹³⁴ that were utilized by the drafters of the 2017 UPA.¹³⁵ Since 2017, a few states have statutorily recognized 2017 UPA de facto parenthood.¹³⁶

Current de facto parentage laws vary. In Delaware, a de facto parent can be judicially recognized for one who had “a parent-like relationship” with “the support and consent of the child’s parent,” who exercised “parental responsibility,” and who “acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.”¹³⁷ In Washington, a de facto parent resides with the child for a significant period, engages in consistent childcare, expects no financial compensation for acting in parental-like way, has a bonded and dependent relationship parental in nature, and has the support of another parent.¹³⁸

On occasion, statutes within a single state can recognize both residency/hold out and de facto parents who are neither biologically-tied

134. *In re H.S.H.-K.*, 533 N.W.2d 419, 434 (Wis. 1995) (evincing a parental-like relationship can prompt visitation rights when in child’s best interests). There are common law precedents elsewhere. In 2008 the South Carolina Supreme Court, adopting a Wisconsin high court analysis, determined that a nonparent was eligible for psychological parent status if a four-prong test was met. *Marquez v. Caudill*, 656 S.E.2d 737, 743–44 (S.C. 2008) (citing *H.S.H.-K.*, 533 N.W.2d at 435–36) (setting out norms for nonparent child visitation orders); *see also* *Conover v. Conover*, 146 A.3d 433, 446–47 (Md. 2016) (using *H.S.H.-K.* in recognizing de facto parent doctrine). And in 2009, a federal appeals court noted that the Mississippi Supreme Court had long recognized that a person standing “in loco parentis,” meaning “one who has assumed the status and obligations of a parent without a formal adoption,” has the same “rights, duties and liabilities” as a natural parent. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 183 (5th Cir. 2009) (first citing *Favre v. Medders*, 128 So. 2d 877, 879 (Miss. 1961); and then citing *Worley v. Jackson*, 595 So. 2d 853, 855 (Miss. 1992)). By contrast, in some states where there are no de facto parent statutes, courts choose not to develop precedents because any new de facto parentage norms are the responsibility of state legislators. *See, e.g.*, Parness, *More Principled Allocations*, *supra* note 11, at 480 (“[S]tate high courts generally need to defer to state legislators when state statutes clearly define parentage.”). For a forceful argument on the need for continuing the common law “equitable parenthood doctrine” even where there are statutes, *see generally* Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents’ Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55 (2017).

135. UNIF. PARENTAGE ACT § 609 cmt. (UNIF. LAW COMM’N 2017).

136. *See, e.g.*, WASH. REV. CODE § 26.26A.440 (2020); VT. STAT. ANN. tit. 15C, § 501 (2020).

137. DEL. CODE ANN. tit. 13, § 8-201(a)(4) (2019) (enumerating the requirements for the establishment of a mother-child relationship); *id.* § 8-201(b)(6) (stating the requirements for the establishment of a father-child relationship); *id.* § 8-201(c) (listing the three factors to attain “de facto parent status”). De facto parents are on equal footing with biological or adoptive parents. *See, e.g.*, *Smith v. Guest*, 16 A.3d 920, 931 (Del. 2011) (holding that the de facto parent’s parentage interest does not infringe on the legal parent’s due process rights). *But see In re Bancroft*, 19 A.3d 730, 750 (Del. Fam. Ct. 2010) (finding the statute overbroad and violative of fit mother’s and father’s due process rights when the mother’s boyfriend seeks to be a third parent); *K.A.F. v. D.L.M.*, 96 A.3d 975, 980 (N.J. Super. Ct. App. Div. 2014) (holding that a former female domestic partner of birth mother has standing to seek childcare order where birth mother ceded some of her parental authority, but where adoptive parent had not, upon showing “exceptional circumstances”).

138. WASH. REV. CODE § 26.26A.440(4) (2020) (directing preponderance of evidence standard).

to, nor formal adopters of, children. Thus the Maine Parentage Act, effective in July 2016, provides for presumed parents who resided since birth with a child for at least two years and “assumed personal, financial, or custodial responsibilities,”¹³⁹ as well as for de facto parents who, *inter alia*, resided with the child “for a significant period of time,” established with the child “a bonded and dependent relationship,” and “accepted full and permanent responsibilities as a parent . . . without expectation of financial compensation.”¹⁴⁰ Similarly, there are both residency/hold out and de facto parents in Delaware,¹⁴¹ Washington,¹⁴² and Vermont.¹⁴³

Comparably, there may be spousal and de facto parentage in a single state. Further, there are reasons for establishing both parentage forms in a single person. In Vermont, an adjudication of de facto parentage “does not disestablish the parentage of any other parent.”¹⁴⁴ Such an adjudicatory proceeding may include judicial consideration of “a claim to parentage of the child” by another,¹⁴⁵ though there is not explicit requirement that those with competing claims to parentage be noticed.¹⁴⁶ So, a birth mother’s husband who is not the biological father of the child born of sex might seek de facto parent status, to accompany his presumed marital parent status, in order to lessen—if not eliminate—any childcare parent initiative by the birth mother’s former residential, intimate partner who also childcared for a while, as a VAP is often more difficult to overcome than is a spousal parent presumption.¹⁴⁷

139. ME. STAT. tit. 19-A, § 1881(3) (2019).

140. *Id.* § 1891(3).

141. DEL. CODE ANN. tit. 13, § 8-204(a)(5) (2019) (listing requirements for a presumed residency/hold out parent); *id.* § 8-201(c) (enumerating requirements for a de facto parent).

142. WASH. REV. CODE § 26.26A.115(b) (2020) (requiring a presumed residency/hold out parent “for the first four years” of the child’s life); *id.* § 26.26A.440 (defining a de facto parent).

143. VT. STAT. ANN. tit 15C, § 401(a)(1) (2020) (presuming residency/hold out parent after the first two years); *id.* § 501(a) (describing the de facto parent).

144. *Id.* § 501(c).

145. *Id.* §§ 206, 501(b) (listing guidelines for “adjudicating competing claims of parentage”).

146. *Id.* § 502(a) (requiring that petitions are served on “all parents and legal guardians of the child”). *But see id.* § 502(b) (stating that an “adverse party,” presumably including an intervener, may file a response to a petition).

147. Post-sixty-day challenges to VAPs, but not to spousal parentage, at least by VAP signatories must be grounded on fraud, duress, or material mistake of fact as well as on the lack of biological ties. Parness & Saxe, *Reforming VAPs*, *supra* note 82, at 194–96. Spousal parentage sometimes can be challenged solely due to lack of biological ties. *See, e.g., In re Waites*, 152 So. 3d 306, 307 (Miss. 2014) (reversing the appellate court and excluding the spousal parent when it was found that the spousal parent was not the natural parent of the child). Biological ties are less important when state public policies more strictly view spousal parent rights and responsibilities, as attributes necessarily arising from marriages alone, as per *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), as in *McLaughlin v. Jones*, 401 P.3d 492, 495–96 (Ariz. 2017) (holding that spousal parentage not dependent upon presumptive biological ties), or when state public policies more significantly promote the best interests of children (especially as to two parent support), and as in

F. Nonsurrogacy Assisted Reproduction Parentage

The 1973 UPA does not deal with the “many complex and serious problems raised by the practice of artificial insemination.”¹⁴⁸ It does, however, address “one fact situation that occurs frequently,”¹⁴⁹ a “consent” by a husband to the artificial insemination of his wife with “semen donated by a man not her husband.” Here, the husband is to be “treated in law as if he were the natural father” where the consent was in writing and “signed by him and his wife,” with certification undertaken and then filed by the supervising “licensed physician” with state governmental officials.¹⁵⁰ The semen donor who is not the husband is to “be treated in law as if he were not the natural father.”¹⁵¹

In response to the increasing numbers of children born of assisted reproduction, the 2017 UPA contains distinct articles on nonsurrogacy and surrogacy births. In nonsurrogacy settings, the 2017 UPA “is substantially similar” to the 2000 UPA, with the “primary changes . . . intended to update the article so that it applies equally to same-sex couples.”¹⁵² The 2017 UPA thus recognizes that a donor, in the absence of common residence in the first two years while holding out a child as one’s own, “is not a parent of a child conceived by assisted reproduction.”¹⁵³ A consent to parentage must be signed by the birth mother and “an individual who intends to be a parent,” though the “record” need not be certified by a physician.¹⁵⁴ The lack of such a consent does not foreclose childcare parentage for an intended parent where there is found clear-and-convincing evidence of an “express agreement” between the individual and the birth mother “entered before conception.”¹⁵⁵ As well, the lack of such consent does not foreclose an individual’s parentage where the child was held out as the individual’s own in the child’s first two years.¹⁵⁶ The nonparental status of one married to a birth mother of a child born by assisted reproduction, even

LC v. MG & Child Support Enforcement Agency, 430 P.3d 400, 424–25 (Haw. 2018) (disallowing female spouse to rebut marital parentage due to spouse’s failure to consent to assisted reproduction involving her wife since the child’s best interests require “a child have two parents to provide financial benefits”), *cert. denied*, 140 S. Ct. 234 (2019).

148. UNIF. PARENTAGE ACT § 5 cmt. (UNIF. LAW COMM’N 1973).

149. *Id.*

150. *Id.* § 5(a) (stating that all papers and records pertaining to the insemination are to be kept confidential, though subject to inspection pursuant to a court order “for good cause shown”).

151. *Id.* § 5(b).

152. UNIF. PARENTAGE ACT § 701 preceding cmt. (UNIF. LAW COMM’N 2017).

153. *Id.* §§ 702–704.

154. *Id.* § 704(a).

155. *Id.* § 704(b)(1). It is clear why an “express agreement” undertaken post-conception does not prompt comparable childcare parentage. Here, there is much greater certainty that a child will be born so that an agreement is far less speculative.

156. *Id.* § 704(b)(2).

if a gamete donor, may be established by a showing of a lack of consent and by not holding out of the child as one's own.¹⁵⁷

The nonsurrogacy parentage norms in the UPAs are now reflected in some state statutes,¹⁵⁸ and in precedents untethered to statutes,¹⁵⁹ with significant interstate variations.¹⁶⁰ The 2017 UPA provisions have been enacted in a few states.¹⁶¹

Childcare parentage for birth mothers and intended parents in nonsurrogacy assisted reproduction settings often involve express consents. There could be, but there generally are no, state-required forms guiding such consents. In California, however, in nonsurrogacy settings there are statutorily-recommended consent forms that may be used but are not required.¹⁶² Regardless of the nonsurrogacy parentage norms, state-formulated consent forms should be contemplated as informed consent would be better assured and there would be greater certainty

157. *Id.* § 705.

158. *See, e.g.*, TEX. FAM. CODE ANN. § 160.7031 (West 2019) (stating that fatherhood for unwed man, intending to be father, who provides sperm to licensed physician and consents to the use of that sperm for assisted reproduction by an unwed woman, where consent is in a record signed by man and woman and kept by the physician); N.H. REV. STAT. ANN. § 5-C:30(I)(b) (2020) (stating that unwed mother has sperm donor “identified on birth record” where “an affidavit of paternity” has been executed); DEL. CODE ANN. tit. 13, § 8-704(a) (2020) (“Consent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man.”); WYO. STAT. ANN. § 14-2-904(a) (2020) (resembling Delaware’s statute); N.M. STAT. ANN. § 40-11A-703 (2020) (“A person who provides eggs, sperm, or embryos for or consents to assisted reproduction as provided in Section 7-704 of the New Mexico Uniform Parentage Act with the intent to be the parent of a child is a parent of the resulting child.”).

159. *See, e.g.*, Shineovich v. Shineovich, 214 P.3d 29 (Or. Ct. App. 2009) (noting that, to avoid constitutional infirmity, assisted reproduction statute as written solely for married opposite sex couple applied to same sex domestic partners); Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014) (opining that, though the statute (both pre- and post-2011) indicated explicitly a lack of paternity for this particular semen donor when his unwed partner delivered a child conceived via assisted reproduction, the statute on presumed parentage for one (either male or female) who receives a child into the home and openly holds out the child as one’s own natural child can support—in certain circumstances—legal paternity for the semen donor); Ramey v. Sutton, 362 P.3d 217 (Okla. 2015) (unwritten preconception agreement prompts in loco parentis childcare status for former lesbian partner of birth mother, though she contributed no genetic material); *In re Brooke S.B.*, 61 N.E.3d 488 (N.Y. 2016) (agreement between lesbian partners can prompt parentage in non-birth mother).

160. *See generally* Deborah H. Forman, *Exploring the Boundaries of Families Created with Known Sperm Donors: Who’s In and Who’s Out?*, 19 U. PA. J.L. & SOC. CHANGE 41 (2016).

161. *See* UNIF. PARENTAGE ACT §§ 701–708 (UNIF. LAW COMM’N 2017) (suggesting assisted reproduction statutes involving no surrogates which are followed in WASH. REV. CODE § 26.26A.610 (2020) and VT. STAT. ANN. tit. 15C, § 701 (2020)).

162. *See* CAL. FAM. CODE § 7613.5(d) (2020) (forming an assisted reproduction pacts by two married or by two unmarried people, where signatories may or may not have used their own genetic material to prompt a pregnancy).

regarding party intentions. Such forms would be comparable to the generally required forms for VAPs.¹⁶³

G. Surrogacy Assisted Reproduction Parentage

As to surrogacy, the 1973 UPA is silent.¹⁶⁴ The 2017 UPA, like the 2000 UPA, distinguishes between genetic (“traditional”) and gestational surrogacy.¹⁶⁵ Unlike its 2000 predecessor, the 2017 UPA does not require all agreements to be validated by a court order prior to any medical procedures.¹⁶⁶ The 2017 UPA imposes differing requirements for the two surrogacy forms, with “additional safeguards or requirements on genetic surrogacy agreements,”¹⁶⁷ as only they involve a woman giving birth while “using her own gamete.”¹⁶⁸ The 2017 UPA recognizes there can be “one or more intended parents”¹⁶⁹ in surrogacy settings. The common requirements include signatures in a record, “attested by a notarial officer or witnesses;” independent legal counsel for all signatories; and execution before implantation.¹⁷⁰ Special provisions for gestational surrogacy pacts include opportunity for “party” termination “before an embryo transfer” and opportunity for a prebirth court order declaring parentage vesting at birth.¹⁷¹ Special provisions for genetic surrogacy pacts include the general requirement that “to be enforceable,” an agreement must be judicially validated “before assisted reproduction” upon a finding that “all parties entered into the agreement voluntarily”

163. See Parness & Townsend, *For Those Not John Edwards*, *supra* note 74, at 63–87 (reviewing similarities and differences in state-generated VAP forms). At times, some written parentage acknowledgments operate though state-generated forms were not utilized. *See, e.g.*, D.C. CODE § 16-909(a)(4) (2020) (presuming that a man is the father of a child if he “has acknowledged paternity in writing”); N.M. STAT. ANN. § 40-11A-204(A)(4)(c) (2020) (presuming a man to be the father of a child that “he promised in a record to support . . . as his own” if he married the birth mother after the child’s birth); KAN. STAT. ANN. § 23-2208(a)(4) (2020) (presuming a man to be the father of a child if he “notoriously or in writing recognizes paternity of the child,” including but not limited to acts in accordance with the voluntary acknowledgement statutes).

164. UNIF. PARENTAGE ACT § 5 cmt. (UNIF. LAW COMM’N 1973) (addressing husband-wife pacts on assisted reproduction where the wife bears the child and intends to parent, the Act “does not deal with many complex and serious legal problems raised by the practice of artificial insemination”).

165. UNIF. PARENTAGE ACT art. VIII cmt. (UNIF. LAW COMM’N 2017).

166. *Id.* §§ 801–802.

167. *Id.* art. VIII cmt; *see, e.g., id.* §§ 803–807 (stating the common safeguards or requirements for all surrogacy pacts). *See also id.* §§ 808–812 (stating special requirements for gestational surrogacy agreements); *id.* §§ 813–818 (stating special requirements for genetic surrogacy agreements).

168. *Id.* § 801(1); *see id.* § 801(2) (stating gestational surrogacy covers births to a woman who uses “gametes that are not her own.”); *id.* §§ 808–812 (providing the special rules for gestational surrogacy pacts); *id.* §§ 813–818 (providing the special rules for genetic surrogacy pacts).

169. *Id.* § 801(3).

170. *Id.* § 803(6)–(7), (9).

171. *Id.* §§ 808(a), 811(a).

and understood its terms;¹⁷² that a genetic surrogate may withdraw consent “in a record” at any time before seventy-two hours after the birth;¹⁷³ and that a genetic surrogate cannot be ordered by a court to “be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures.”¹⁷⁴

Significant constitutional issues under these UPA provisions await rulings. For example, under *Lehr*, might both a gametes donor and a gestational surrogate be biological parents? Further, are the parental opportunity interests of gestational surrogates ever waivable prebirth, or preconception, or preimplantation? And, might the right to terminate a pregnancy, or especially to refuse or to secure certain nonlife threatening medical procedures, ever be subject to contractual limitations?

UPA surrogacy parentage norms are now reflected both in state statutes¹⁷⁵ and precedents untethered to statutes.¹⁷⁶ Certain provisions of the 2017 UPA have been enacted in a few states.¹⁷⁷ Elsewhere, major sections of the 2000 UPA on surrogacy operate.¹⁷⁸ There are no major state required forms as with VAPs. Few suggested forms have yet

172. *Id.* § 813.

173. *Id.* § 814(a)(2).

174. *Id.* § 818(b).

175. *See* N.H. REV. STAT. ANN. § 168-B:16(I) (2020) (stating before insemination pursuant to a surrogacy contract that must be deemed “lawful”); *see also id.* § 168-B:21(I) (stating a court “shall” be petitioned for “judicial preauthorization”); *id.* § 168-B:12(I) (requiring that “[a]ny of the parties to a gestational carrier agreement may petition the court for a parentage order declaring that the intended parent or parents are the sole parents of a child resulting from assisted reproduction and a gestational carrier arrangement, and that the gestational carrier and her spouse or partner, if any, are not the parent or parents of such a child” and mandating that the court “within 30 days, grant the petition upon a finding that the parties have substantially complied with the requirements of this chapter”).

176. *See In re F.T.R.*, 833 N.W.2d 634, 653 (Wis. 2013) (enforcing surrogacy pact between two couples as long as child’s best interests were served, while urging the legislature to “consider enacting legislation regarding surrogacy” to insure “the courts and the parties understand the expectations and limitations under Wisconsin law”); *see also In re Baby*, 447 S.W.3d 807, 833 (Tenn. 2014) (holding “traditional surrogacy contracts do not violate public policy as a general rule” where surrogate artificially inseminated with sperm of intended father, who was not married to intended mother); *In re Amadi A.*, No. W2014–01281–COA–R3–JV, 2015 WL 1956247 (Tenn. App. Apr. 24, 2015) (holding a gestational surrogate for married couple is placed on birth certificate, as said to be required by statute where intended father’s/husband’s sperm used with egg from unknown donor and intended mother/wife was recognized by all parties as legal mother and reiterating the plea from *In re Baby* that the legislature should enact a comprehensive statutory scheme); *Raftopol v. Ramey*, 12 A.3d 783, 786–87 (Conn. 2011) (holding biological father’s male domestic partner can also be intended parent of a child born to a gestational surrogate); *In re John*, 174 A.D.3d 89, 99–101 (N.Y. App. Div. 2019) (holding that enforcing a surrogacy pact in the absence of statute, an intended parent (also the sperm donor) who employed a gestational surrogate was allowed in one case to formally adopt his genetic offspring).

177. *See, e.g.*, WASH. REV. CODE § 26.26.A.715 (2020) (discussing gestational or genetic surrogacy agreement); VT. STAT. ANN. tit. 15C, § 801 (2020) (discussing gestational carrier agreements).

178. *See, e.g.*, UTAH CODE ANN. 78B-15-801 (2019) (similar to 2000 UPA).

appeared. But there are suggested forms for nonsuroggacy assisted reproduction births in California.¹⁷⁹ The increased use of required forms, and the increased availability of suggested forms, would diminish significantly individual case disputes over consents to parentage or nonparentage.

H. Nonparental Childcare

The 2018 UNCVA, as with the 2017 UPA, addresses the effects of the changing ways in which US families are formed and reformed. Unlike the UPA, the UNCVA generally speaks to childcare opportunities for nonparents over the objections of parents. The above-described *Troxel* precedent guided the NCCUSL norms on nonparental childcare, though the NCCUSL recognized there are some continuing uncertainties regarding the breadth of that precedent.¹⁸⁰

The 2018 UNCVA recognizes two forms of nonparents who may secure court-ordered childcare over parental objections. The forms encompasses nonparents who are “consistent” caretakers and nonparents who have “substantial” relationships with the children so that denial of custody or visitation would result in “harm” to the children.¹⁸¹ Consistent caretakers must demonstrate some of the circumstances that govern de facto parentage, including having “established a bond and dependent relationship,”¹⁸² or residency/hold out parentage, including living with the child.¹⁸³ Nonparents claiming “substantial” relationships must demonstrate “a familial relationship with the child by blood or law” or a relationship “without expectation of compensation,”¹⁸⁴ as well as that “a significant emotional bond exists between the nonparent and the child.”¹⁸⁵

The 2018 UNCVA defines a nonparent as “an individual other than the parent of the child,” who can be, but need not be, “a grandparent, sibling,

179. See CAL. FAM. CODE § 7613.5 (2020).

180. See, e.g., UNIF. NONPARENT CUSTODY & VISITATION ACT § 4 cmt. 3 (UNIF. LAW COMM’N 2018) (noting in Justice O’Connor’s plurality opinion in *Troxel v. Granville*, 530 U.S. 57, 73 (2000) (O’Connor, J., plurality opinion), the Court recognized the current precedent did not consider “whether the Due Process clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation”).

181. *Id.* § 4 (a)(1). These nonparents must also establish the best interests of children will be served by any childcare orders. *Id.* § 4(a)(2).

182. *Id.* § 4(b)(4).

183. *Id.* § 4(b)(1).

184. *Id.* § 4(c)(1)(A)–(B).

185. *Id.* § 4(c)(2).

or stepparent of the child.”¹⁸⁶ A child under the Act is “an unemancipated individual” under eighteen years of age.¹⁸⁷

IV. CURRENT ILLINOIS CHILDCARE PARENTAGE LAWS

A. Introduction

In Illinois there are several statutes on childcare parentage, including statutes in and outside of the Marriage and Dissolution of Marriage Act (IMDMA) and the Parentage Act. Some laws are relatively new. The Family Law Study Committee (FLCS), a 2008 directive of the Illinois General Assembly, proposed statutory reforms on childcare parentage for children born of sex and of assisted reproduction, with many of its proposed reforms enacted.¹⁸⁸ But with all the statutory amendments, current Illinois laws poorly address many of the questions raised by the changes in reproductive technologies and family relationships. The FLCS did its work before the 2017 Uniform Parentage Act and the 2018 Uniform Nonparent Custody and Visitation Act were adopted, as well as before the 2019 Draft ALI Restatement on Children and the Law.

The FLCS proposals appeared in two bills. In significant part, one sought to replace the Illinois Parentage Act of 1984 while the other sought to amend the IMDMA. Each bill extended somewhat parental childcare interests to those who were neither actual or alleged biological parents nor adoptive parents.¹⁸⁹

Common law rulings outside of statutory interpretation could, both before and after the work of the FLCS and General Assembly follow-up, extend childcare parentage to those outside statutes. Common law childcare parents who were similar to statutory childcare parents, in fact, have been recognized for certain assisted reproduction births. The former Illinois Parentage Act guided births to wives where licensed physician supervision was used and where written consents were needed where the husbands were not the semen donors. Precedents recognize other nonbirth spouses and other persons as parents in assisted reproduction settings.¹⁹⁰

186. *Id.* § 2(7).

187. *Id.* § 2(1).

188. See André Katz & Erin Bodendorfer, *The New and Improved Illinois Marriage and Dissolution of Marriage Act*, 103 ILL. B.J., Nov. 2015, at 30 (discussing the substantial revisions made to the Illinois Marriage and Dissolution Act); Margaret A. Bennett, *An Overview of the Illinois Parentage Act of 2015*, 103 ILL. B.J., Dec. 2015, at 28 (discussing the Illinois Parentage Act of 2015 and how it reflects changes in cultural now, as well as reproductive technology).

189. See Adam W. Lasker, *Is A Family-Law Overhaul On the Way?*, 100 ILL. B.J., Sept. 2012, at 458. See also Lisa K. Murphy, *House Bill 1452: The Future of Family Law in Illinois?*, 26 DUPAGE COUNTY B. ASS'N BRIEF, June 2014, at 28.

190. See *In re T.P.S.*, 2013 IL App (5th) 120438-U, ¶ 46 (discussing the former same sex partner has her guardianship continued for a child born of assisted reproduction where birth mother then

Thus parentage has been recognized in an unmarried couple employing assisted reproduction without physician supervision where one of the two delivers a child planned to be parented by the couple.¹⁹¹ As well, a joint parenting agreement, a part of a marriage dissolution case settlement, between a birth mother and a former stepfather has been enforced though the former husband would have had no standing to pursue court-ordered childcare without the agreement.¹⁹²

Yet common law precedents on childcare parentage have not spoken to all circumstances where technologies are employed in human conception, as with genetic surrogacy. And they have not addressed childcare parentage issues for children born of consensual sex in some circumstances where there are no statutory norms.¹⁹³ The Illinois Supreme Court has chosen, on separation of power grounds, to defer to the General Assembly in many circumstances.¹⁹⁴

B. Spousal Parentage

State-recognized partners of birth mothers when their children are born are “presumed” parents.¹⁹⁵ Such parentage continues for these persons until “rebutted or confirmed in a judicial or administrative proceeding.”¹⁹⁶ Similar parentage arises and continues for those whose partnerships were “terminated” no more than three hundred days before the births.¹⁹⁷ Further, such parentage arises and continues for those who “attempted” to establish similar partnerships.¹⁹⁸

objected, but had earlier entered into the guardianship with the expectation to raise the child “as a couple”).

191. See *In re M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) (recognizing parentage in an anonymous sperm donor).

192. Compare *In re Schlam*, 648 N.E.3d 345, 351 (Ill. App. Ct. 1995) (holding a joint parenting agreement was valid and noted the rights of the child were not bargained away), with *In re Engelkens*, 821 N.E.2d 799, 806 (Ill. App. Ct. 2004) (no visitation pact between father and former stepmother, only a “gratuitous undertaking”).

193. See, e.g., *In re A.B.*, 2015 IL App (5th) 140581-U, ¶ 19 (rejecting man’s request, via claims for common law contract involving promissory estoppel, fraud and equitable estoppel, for visitation with child fathered by another through sex where man supported and reared the child from birth and for eighteen months).

194. See *In re Scarlett Z.-D.*, 28 N.E.3d 776, 795 (Ill. 2015) (“Legal change in this complex area must be the product of a policy debate.”).

195. A partnership recognition arises through “a marriage, civil union, or substantially similar legal relationship,” like a domestic partnership. 750 ILL. COMP. STAT. 46/204(a)(1) (2020). Earlier presumed spousal parent statutes operated only for male partners, though equality principles could have operated to extend the presumption to female partners of birth mothers, at least where assisted reproduction was employed with donated sperm. *Henderson v. Adams*, 209 F. Supp. 3d 1059, 1076 (S.D. Ind. 2016), *aff’d in part and vacated in part*, *Henderson v. Box*, 947 F.3d 482 (7th Cir. 2020).

196. 750 ILL. COMP. STAT. 46/103(p) (2020). See, e.g., *Sparks v. Sparks*, 122 N.E.3d 715 (Ill. App. Ct. 2018) (discussing spousal parentage rebuttal).

197. 750 ILL. COMP. STAT. 46/204(a)(2) (2020).

198. *Id.* § 204(a)(3).

C. Voluntary Acknowledgment Parentage

Voluntary acknowledgment parentage arises when a birth mother and a “man seeking to establish his parentage” execute an acknowledgment on a form complying with statutory prerequisites, including that there be a witnessed “record;” “an authentication under penalty of perjury;” and an articulation of the limited availability of “a challenge by a signatory.”¹⁹⁹ Such an acknowledgment is the equivalent of a judicial adjudication of parentage of the child.²⁰⁰ Such an acknowledgment may be undertaken by a man where another is a presumed parent as long as the presumed parent, usually the spouse or otherwise the state-recognized partner of the birth mother,²⁰¹ signs a “denial of parentage.”²⁰²

D. Residency/Hold Out Parentage

As noted, the UPAs have presented two somewhat different norms for establishing childcare parentage involving both residence with the child and holding that child out as one’s own. The variations chiefly involve whether residency/hold out begins at birth and how long it lasts. Currently, Illinois statutes recognize no comparable form of childcare parentage, though this form was proposed for enactment in the General Assembly when the 2015 parentage law amendments were considered.²⁰³ The Illinois Supreme Court has chosen not to develop common law parentage tracking residency/hold out parentage in the UPAs in deference to General Assembly authority.²⁰⁴

E. De Facto Parentage

As noted, both the 2017 UPA and ALI pronouncements recognize forms of de facto parentage. These forms can arise not only with residence and hold out, but also with, inter alia, the establishment of a bonded and dependent, parental-like relationship with no expectation of financial benefit. Currently, Illinois statutes recognize no comparable avenue to childcare parentage. The Illinois Supreme Court has chosen here as well not to develop common law parentage tracking de facto

199. *Id.* § 302(a)(1), (2), (4)–(5).

200. *Id.* § 302(a)(5).

201. *Id.* § 204(a).

202. *Id.* § 303.

203. *See, e.g.*, Parentage Act of 2013 § 204(a)(5), (b)(5), H.B. 1243, 98th Sess., Gen. Assemb. (Ill. 2013) (describing situations where men and women will be presumed to be the parent of a child).

204. *See, e.g., In re Scarlett Z.-D.*, 28 N.E.3d 776, 795 (Ill. 2015) (concluding that custody and visitation issues are a “complex area” requiring “policy debate” in the legislature). On state court judicial deference to General Assembly authority regarding childcare parentage, see Parness, *More Principled Allocations*, *supra* note 11, at 480.

parentage in deference to General Assembly authority,²⁰⁵ which had a comparable parentage proposal before it when considering recent parentage law reforms.²⁰⁶

F. Nonsurrogacy Assisted Reproduction Parentage

Childcare parentage in Illinois arising from birth by nonsurrogacy assisted reproduction had been significantly governed by the Illinois Parentage Act.²⁰⁷ That act guided births to wives where there was required licensed physician supervision and there were written consents by husbands, acknowledged by their wives, in settings where the husbands were not the semen donors.²⁰⁸ Written consents and physician assistance were not mandated for parentage to arise where the semen donors were the husbands.²⁰⁹

Now, childcare parentage arising from nonsurrogacy assisted reproduction is significantly guided by the Illinois Parentage Act of 2015, effective in 2017.²¹⁰ It extends recognition of assisted reproduction parentage to the both wed and unwed,²¹¹ as it covers “any individual who is an intended parent” as defined by the Act.²¹² In particular, the Act generally recognizes that a donor of genetic material used to conceive a child by means of assisted reproduction presumptively “is not a parent” of the child,²¹³ but may become a parent by establishing intended parentage.²¹⁴ The Act allows prebirth as well as postbirth judicial

205. *See, e.g., Scarlett Z.-D.*, 28 N.E.3d at 795 (concluding that custody and visitation issues are a “complex area” requiring “policy debate” in the legislature). There is some hint that there could develop either residency/hold out or de facto parentage under common law principles in “egregious” cases. *See, e.g., In re A.B.*, 2015 IL App (5th) 140581-U, ¶¶ 16–18 (citing *Koelle v. Zwiren*, 672 N.E.2d 868 (Ill. App. Ct. 1996)) (detailing how “deceptive means” were employed by a birth mother to prompt childcare by a nonparent for over eight years).

206. *See, e.g., H.B. 1452*, 98th Sess., Gen. Assemb. (Ill. 2013) (providing an “equitable” parenthood provision).

207. The old version of the Illinois Parentage Act was enacted in 1984. *See* 750 ILL. COMP. STAT. 45/1–28 (1984); P.A. 083-1026 (eff. Jan. 5, 1984); P.A. 086-1475 (eff. Jan. 10, 1991). The Illinois Legislature revised the Parentage Act in 2017. P.A. 099-0085, § 977 (eff. Jan. 1, 2016); P.A. 099-0763, § 10 (eff. Jan. 1, 2017).

208. 750 ILL. COMP. STAT. 40/3(a) (2016) (repealed 2017).

209. *Id.* § 2.

210. 750 ILL. COMP. STAT. 46/701 (2020).

211. It also extends assisted reproduction parentage to certain gametes donors who were intended parents, but who died before insemination or embryo transfer. *Id.* § 705.

212. *Id.* § 703(a). Intended parent under the Act “means a person who enters into an assisted reproductive technology arrangement, including a gestational surrogacy arrangement, under which he or she will be the legal parent of the resulting child.” *Id.* § 103(m-5).

213. *Id.* § 702.

214. *Id.* § 703(a) (providing for an “agreement . . . entered into prior to any insemination or embryo transfer” involving both donor who is relinquishing rights and intended parent). *See also id.* § 703(b) (stating that an anonymous gamete donor, without a designated intended parent at time

confirmation of “the existence of a parent-child relationship” based on compliance with intended parentage norms.²¹⁵ Further, the Act generally allows withdrawals of consent to use donated genetic material and to future parenthood if asserted before significant steps toward conception are taken.²¹⁶

Importantly, where the requirements of the Act on “intended” parentage are not met or are inapplicable, and parentage disputes arise, “a court . . . shall determine parentage based on evidence of the parties’ intent at the time of donation.”²¹⁷ Explicit requirements of the Act regarding donor relinquishment of “all rights and responsibilities to any resulting child” are not met where there is no “written legal agreement” entered after consultation with “independent counsel.”²¹⁸ Explicit requirements of the Act regarding intended parentage are also not met where an agreement is not “entered into prior to any insemination or embryo transfer.”²¹⁹

The provisions of the Act on intended parentage for donors and nondonors alike in assisted reproduction births are inapplicable to children born as a result of “a valid gestational surrogacy arrangement meeting the requirements of the Gestational Surrogacy Act.”²²⁰ Seemingly, the Act invites judicial parentage determinations through common law rulings when children are born of assisted reproduction in contemplated surrogacy settings where there were no “valid” agreements under the Gestational Surrogacy Act.²²¹

G. Surrogacy Assisted Reproduction Parentage

Parentage via birth by assisted reproduction with the use of a surrogate is governed by the 2005 Gestational Surrogacy Act.²²² This Act guides reproductive contracts between a gestational surrogate²²³ and an intended

of donation, is not a parent if “parental rights” were “relinquished . . . in writing at the time of donation” and intended parent is “the parent of any resulting child”).

215. *Id.* § 703(c).

216. *See id.* § 704 (preventing intended parentage in another where “donor withdraws consent to his or her donation prior to the insemination or the combination of gametes.”). Burden of proof is “clear and convincing evidence.” *Id.* § 707; *see also id.* § 704 (preventing intended parentage for one who withdraws consent “prior to insemination or embryo transfer”). The burden of proof is “clear and convincing evidence.” *Id.* § 707.

217. *Id.* § 703(d).

218. *Id.* § 703(a).

219. *Id.*

220. *Id.* § 701.

221. *Id.* § 703(d).

222. 750 ILL. COMP. STAT. 47/1–75 (2020).

223. A gestational surrogate is defined under the Parentage Act of 2015 as “a woman who is not an intended parent and agrees to engage in a gestational arrangement pursuant to the terms of a

parent or two intended parents.²²⁴ Importantly, there is no recognition of possible genetic surrogacy as the Act defines a surrogate as one who “has made no genetic contribution.”²²⁵ Contracts under the Act must have involved at least one intended parent who contributes “one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term,”²²⁶ as well as a “medical need for the gestational surrogacy” by at least by one intended parent.²²⁷ A parent-child relationship could be established prebirth for a child to be born to a gestational surrogate where there is either an intended parent or intended parents.²²⁸

Clearly, certain surrogacy arrangements are outside the express terms of the Act. What if a surrogate is impregnated with a turkey baster? What if a single intended parent has no medical need?

H. Nonparent Childcare

By comparison to the 2018 UNCVA²²⁹ and many current state laws outside of Illinois,²³⁰ Illinois statutes provide fewer opportunities for nonparents to seek court-ordered childcare over the current objections of any existing legal parent.²³¹ “Visitation”²³² orders must only issue if a parent has voluntarily and indefinitely relinquished physical custody²³³ and “if there is an unreasonable denial of visitation by a parent and the denial has caused the child undue mental, physical or emotional harm.”²³⁴ Standing to seek such orders is limited to “appropriate” persons,²³⁵ identified as including only “grandparents, great-grandparents, step-

valid gestational surrogacy arrangement under the Gestational Surrogacy Act.” 750 ILL. COMP. STAT. 46/103(m) (2020).

224. 750 ILL. COMP. STAT. 47/15(b)(3) (2020). Seemingly the Act contemplates only an intended mother, an intended father, or both. *Id.* § 15(b)(1)–(2).

225. *Id.* § 10.

226. *Id.* § 20(b)(1).

227. *Id.* § 20(b)(2).

228. *Id.* § 35(a).

229. See UNIF. NONPARENT CUSTODY & VISITATION ACT § 4(a)(1) (UNIF. LAW COMM’N 2018) (stating nonparent childcare standing extends to “consistent” caretakers and those with “substantial” relationships with children).

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

231. 750 ILL. COMP. STAT. 5/602.9 (2020).

232. *Id.* § 602.9(b)(3). Seemingly, visitation orders include orders involving “visitation and electronic communication.” *Id.* § 602.9(a)(4).

233. *Id.* § 601.2(b)(3), *employed by In re K.N.L.*, 131 N.E.3d 130, 134 (Ill. App. Ct. 2019).

234. *Id.* § 602.9(b)(3); see also *id.* § 602.9(c)(1), (b)(4) (“[A nonparent must] prove that the parent’s actions and decisions regarding visitation will cause undue harm to the child’s mental, physical or emotional health”).

235. *Id.* § 602.9(b)(1).

parents and siblings.”²³⁶ Those with standing must establish that the “minor child is one year or older” and that one of the following conditions is also met: a nonobjecting parent is “deceased or has been missing for at least 90 days;” “a parent of the child is incompetent as a matter of law;” a parent has been in jail or prison for over ninety days; a parent, separated or divorced from another parent, does not object, but only where any visitation would not diminish “the parenting time” of the parent who is “not related to” the petitioning nonparent; or, the child was born to unwed parents who do not now live together.²³⁷ An independent avenue to nonparent childcare is available through the Illinois Probate Act’s provisions on guardianship appointments.²³⁸

As with the 2018 UNCVA, Illinois statutes do not address directly nonparent childcare in the form of child support obligations for nonparents arising from their earlier parental-like, or other, acts.²³⁹

V. CONTEMPLATING NEW ILLINOIS CHILDCARE PARENTAGE LAWS

Notwithstanding recent statutory enactments and a few common law precedents on childcare parentage, there is a pressing need, given changes in reproductive technologies and in human conduct, for Illinois lawmakers, especially General Assembly members, to consider further changes. They should focus on whether, and if so how far, to extend childcare interests and responsibilities arising at, or soon after, or long after birth, to those who are neither actual nor alleged biological parents or adoptive parents. Statutes and precedents already recognize some such interests and responsibilities, as with the precedents involving women whose partners bear children via assisted reproduction where the couple had earlier agreed to raise any children jointly. In considering further extensions of childcare rights and duties to those without biological or adoptive ties, Illinois lawmakers necessarily must confront several important issues. Some of those issues follow.

A. Three or More Childcare Parents

One issue raising several policy questions involves the circumstances under which three or more people might be deemed parents (of perhaps different forms) imbued with standing to seek “parenting time.” Two

236. *Id.* § 602.9(c)(1). For definitions of these persons, see *id.* § 602.9(a). See also Sharpe v. Westmoreland, 126 N.E.3d 690 (Ill. App. Ct. 2019) (holding that step-parent includes only those married, and not those in civil unions).

237. 750 ILL. COMP. STAT. 5/602.9(c)(1)(A)–(E) (2020).

238. See, e.g., Henry Kass, *The Illinois Probate Act: A Non-Parent’s Alternative to the IMDMA for Allocation of Parental Responsibilities*, 31 J. DUPAGE COUNTY B. ASS’N, Apr. 2019, at 8.

239. For current state laws on the child support obligations of nonparents, see, e.g., Jeffrey A. Parness & Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769, 780–86 (2018) [hereinafter Parness & Timko, *Child Support*].

General Assembly proposals at one time offered conflicting answers. Presumed parentage before the recent Parentage Act amendments meant a rebuttable presumption about male parentage, wherein only one man seemingly could be a father at any particular time. Under the Illinois Parentage Act of 1984, a husband's presumed parentage arising from marriage could be rebutted with proof of no genetic ties,²⁴⁰ with similar proof also available to challenge a paternity acknowledgment involving alleged genetic ties that had prompted a comparable presumed parentage in an unwed father.²⁴¹ A proposed Parentage Act provision called for a judicial choice of one or another presumed parent who will rear a child with the birth mother, with the choice guided by logic and public policy, especially the child's best interests.²⁴² Under this approach, there could initially be two presumed fathers—though only one could remain a parent along with the birth mother. But a proposed Marriage and Dissolution of Marriage Act provision allowed for three or more parents, as it had no provision on a mandated judicial choice between two competing equitable parents who existed simultaneously alongside a birth mother.²⁴³

In Louisiana, the high court has recognized, via its common lawmaking authority, that three different parents may child rear per court order.²⁴⁴ And in California, the possibility of three childcare parents is recognized by statute.²⁴⁵

If at all, under what circumstances might three (or more) people in Illinois simultaneously share parenting time? Should three (or more) parents be possible only in certain instances, as when parenting time allocations are based on preconception acts, like assisted reproduction pacts or preadoption pacts that were judicially recognized preconception or preadoption? Should three (or more) custodial parents be possible only where there are present or former stepparents (i.e., now or once married to one of two childcare parents)? Recognition of three parents under any

240. 750 ILL. COMP. STAT. 45/5(a)(1)–(2) (2020) (noting spousal parentage for man, “presumed to be the natural father of a child”); *id.* § 7(b)–(b-5) (showing that after rebuttal of spousal parentage arises under 45(a)(1) or (2) through “DNA tests,” the “paternity of the child by another man may be determined”).

241. *Id.* § 5(a)(3)–(4) (showing parentage for a man, “presumed to be the natural father of a child,” who “signed an acknowledgement of parentage”); *id.* § 6(d) (“a signed acknowledgment of paternity . . . may be challenged in court only on the basis of fraud, duress, or material mistake of fact”); *id.* § 7(a) (saying a man “alleging himself to be the father of the child” can pursue an action “to determine the existence of a father and child relationship” even where such “a relationship” is already presumed in another man under 45/5(a)).

242. Illinois Parentage Act of 2013 § 204(c), H.B. 1243, 98th Sess., Gen. Assemb. (Ill. 2013).

243. H.B. 1452 § 600, 98th Sess., Gen. Assemb. (Ill. 2013).

244. *See, e.g.*, *Smith v. Cole*, 553 So. 2d 847 (La. 1989); *T.D. v. M.M.M.*, 730 So. 2d 873 (La. 1999).

245. CAL. FAM. CODE § 7612(c) (2020) (providing that a court may find “more than two persons with a claim to parentage . . . if recognizing only two parents would be detrimental to the child”).

circumstances should always serve a child's best interests, perhaps as well serving to prevent harm or detriment to the child.

B. Expanded Visitation Interests for Nonparents

A second issue involves whether certain family members, or others, should be accorded greater standing to seek court orders at least for "parenting time," visitation, or continuing child contact (e.g., Skype or iPhone facetimes), if not an allocation of parental decisionmaking, even if they are not recognized as parents.²⁴⁶ If so, should any such orders be limited to those nonparents with intimate, or perhaps only state recognized marital or marital-like, relationships with existing legal parents? Further, should detriment to the child be required before a nonparent can be afforded such standing? And, should a showing of a parent's lack of physical custody be a prerequisite to nonparent standing, especially where detriment/harm to the child will arise without an order involving some form of continuing contact?

Beyond stepparents and the like, should grandparents who rear, or help to rear, their grandchildren under agreements with their grandchildren's parent or parents ever be able to attain nonparental childcare interests over the current objections of existing legal parents or an existing legal parent? If so, how should the standards for grandparents and stepparents (present, and perhaps former) be distinguished, if at all? For example, should grandparents, still part of a family that includes existing legal parents and their children, be accorded less standing to seek nonparental childcare orders than former stepparents, who are no longer within the traditionally-viewed families of the parents and their children, but who acted as parents for some time? Further, should standing to pursue nonparent childcare be extended beyond "grandparents, great-grandparents, step-parents and siblings," recognized as "appropriate" persons under the current nonparent childcare statute?²⁴⁷

Finally, should standing to pursue nonparent childcare ever be recognized pursuant to contract? In one case, the Illinois Appellate Court determined that it could not validate a preadoption contract by the maternal grandparents, who became parents, to allow "regular visitation, communication and contact" with the adopted child by the biological father and the paternal grandparents because such an arrangement was

246. The current Illinois Marriage and Dissolution of Marriage Act differentiates between childcare orders on decision-making and on parenting time when allocating parental responsibilities. 750 ILL. COMP. STAT. 5/602.5 (2020); *id.* § 602.7.

247. *Id.* § 602.9(c)(1). *See, e.g., In re R.W.*, 99 N.E.3d 222, 224–25, 232, 239 (Ill. App. Ct. 2018) (showing that parenting time was allocated to the birth mother, unwed biological father, maternal uncle, and an "unrelated individual" who was given decision-making authority).

foreclosed by the adoption statutes.²⁴⁸ In the case, there was no consideration of the particular child's best interests, and no analysis of how the ruling would later negatively impact adoption opportunities that would serve the best interests of other children. Further, even if contracts regarding future nonparent childcare are not recognized, should estoppel principles sometimes bar parental veto of future nonparent childcare where the parent earlier allowed (or requested) significant nonparent care leading to significant interpersonal relationships, especially where the lack of such future care will likely cause detriment to the child?

The standards under the 2018 UNCVA do not distinguish between (blood-related or nonblood-related) grandparents, stepparents, siblings, and others who may seek nonparental childcare orders over the objections of existing parents.²⁴⁹ But in several states, as now in Illinois,²⁵⁰ there are special nonparental childcare standing norms for grandparents, stepparents and others (like siblings), where other nonparents may also have standing, but with different norms.²⁵¹ To date, there are no significant constitutional precedents on differentiating between nonparents. But one can imagine that differences between those who are and who are not blood-related might be deemed important, as biology was important in *Lehr*, or that differences between those who are in and outside of stable family units might be deemed important, as marriage was important in *Michael H.*

C. Residency/Hold Out Parentage

A third issue involves whether there should be presumed childcare parentage arising from residency/hold out acts. If so, should the same household residence be required for all or most of the first two years after birth, as demanded in two UPAs and several state laws? It seems arbitrary that an aspiring presumed parent should be denied childcare simply because there were two households, even if only for a little while, as when the aspiring parent was deployed by the military, or was sent to jail or a mental health facility, or lived apart for job-related reasons? Some state

248. *In re K.M.*, 2017 IL App (3d) 150274, ¶¶ 17–19 (finding any such agreement would constitute an unenforceable “personal service contract,” seemingly distinguishing, e.g., marital dissolution settlements involving parental childcare because in such cases the pacts involve no one who is a “legal stranger” to the child).

249. See UNIF. NONPARENT CUSTODY & VISITATION ACT § 2(7) (UNIF. LAW COMM'N 2018) (defining nonparent as “an individual other than a parent of a child,” including “a grandparent, sibling, or stepparent of the child”).

250. 750 ILL. COMP. STAT. 5/602.9 (2020).

251. See, e.g., Jeffrey A. Parness, *Third Party Stepparent Childcare*, 67 MERCER L. REV. 383 (2016); Jeffrey A. Parness & Alex Yorko, *Nonparental Childcare and Child Contact Orders for Grandparents*, 120 W. VA. L. REV. 95 (2017).

statutes, following the first UPA,²⁵² have no such two-year residency requirement,²⁵³ though a minimum time of some similar household/hold out during some time in the child's life might be required, as it would respect the superior parental rights of existing legal parents.

D. Differing Custody and Support Norms

Parentage standards often vary by context. Thus, in Illinois the norms vary for childcare parentage and probate parentage, as only in probate is there recognized an equitable adoption standard.²⁵⁴

Childcare parentage in Illinois typically encompasses both custodial interests and support obligations. Whether there are two or more childcare parents at any one time, an issue worthy of debate involves whether child support orders should be comparably available against all legal parents who are responsible for support, including biological, spousal, intended and adoptive parents. It may be that unwed biological fathers of children born of consensual sex generally should not be responsible for support where their potential custodial interests (under *Lehr*) have been lost through no significant fault of their own, as by maternal deception, and where there are already two existing and supportive legal parents. Such fathers might be distinguished from unwed biological fathers who intentionally failed to care for their known children, prompting for them support responsibilities. And it may be that with assisted reproduction births, custody and support norms should vary between nonbirth mothers whose genetic materials were or were not used in prompting pregnancies.

Similarly, differentiated standards may be deemed appropriate for nonparents who have both potential custody interests and support duties. Should all nonparents eligible to pursue child parenting time/visitation/child contact orders be responsible for support even if parenting time/visitation/contact order is not pursued? Or, should such eligible nonparents never be, or only sometimes (as with those biologically tied) be, financially responsible?

E. Nonsurrogacy Assisted Reproduction Births

A fifth issue involves possible expansions of the Illinois Parentage Act of 2015 on assisted reproduction that add new requirements on “intended” parentage so that fewer common law precedents are needed to “determine parentage based on evidence of the parties’ intent at the

252. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM’N 1973).

253. *See, e.g.*, CAL. FAM. CODE § 7611(d) (2020).

254. *In re Scarlett Z.-D.*, 28 N.E.3d 776, 792 (Ill. 2015).

time of donation.”²⁵⁵ For example, should the Act directly address when, if at all, there can be no withdrawals of consent to the use the donated genetic materials, or to future parenthood by one whose genetic materials will not be used, prior to insemination, a combination of gametes, or embryo transfer.²⁵⁶ And should the Act directly address the effects of consent withdrawals after insemination, combination of gametes, or embryo transfer? Might certain consent withdrawals end child custody/visitation/contact/parenting time opportunities without ending child support obligations? Might intended parentage consent withdrawals undertaken post-insemination have different effects where there are no new intended parents who join with potential/actual birth mothers in urging withdrawals be allowed?²⁵⁷

F. Surrogacy Assisted Reproduction Births

A sixth issue involves whether additional surrogacy agreements should be authorized under the 2005 Gestational Surrogacy Act. As noted, the Act now fails to recognize genetic, as opposed to gestational, surrogacy; fails to recognize an intended parent or intended parents who contribute no gametes; and fails to recognize surrogacy agreements by those with no “medical need for the gestational surrogacy.”²⁵⁸

The 2017 UPA has such recognitions.²⁵⁹ It can be used by the Illinois General Assembly to craft new laws, as has been done significantly in Washington,²⁶⁰ and done less so in Vermont.²⁶¹ The 2017 UPA could also be employed by the Illinois Supreme Court, which has found that common law theories of oral contract or promissory estoppel are available for legitimating certain assisted reproduction arrangements.²⁶²

G. De Facto Parentage

A seventh issue is de facto parentage, which, unlike many same residency/hold out parentage proposals and laws, does not require a

255. 750 ILL. COMP. STAT. 46/703(d) (2020).

256. *Id.* § 704.

257. *See, e.g.*, *E.E. v. O.M.G.R.*, 20 A.3d 1171 (N.J. Super. 2011) (holding that an agreement by a birth mother to end parental obligations of the sperm donor for a child born through self-administered assisted reproduction would not be sanctioned by court where there was no new adoptive parent).

258. 750 ILL. COMP. STAT. 47/10 (2020); *id.* § 20(b)(1)–(2).

259. UNIF. PARENTAGE ACT §§ 801–818 (UNIF. LAW COMM’N 2017).

260. *See* WASH. REV. CODE § 26.26A.705 (2020) (noting eligibility to enter gestational or genetic surrogacy agreements).

261. *See* VT. STAT. ANN. tit. 15C, § 801 (2020) (noting eligibility to enter gestational carrier agreements).

262. *In re M.J.*, 787 N.E.2d 144, 152 (Ill. 2003).

common residence since birth, a minimum period of common residence, or a putative parent to have held the child out as their own natural child.

In considering de facto parentage, the Illinois General Assembly (if not the Supreme Court) should only recognize it if it is made available for child support purposes to those seeking monetary help for children as well as for those seeking continuing court-ordered caretaker opportunities.²⁶³ The 2017 UPA is wrong in limiting standing to pursue de facto parentage to those who seek such status.²⁶⁴ Child support claims should at times be available against a de facto parent who does not seek a caretaking order. By comparison, child support claims seemingly can be pursued against residency/hold out parents who do not seek a caretaking order (and who, unlike de facto parents, do not have “bonded and dependent” relationships).²⁶⁵

H. Voluntary Acknowledgment Parentage

Current Illinois statutes, unlike the 2017 UPA,²⁶⁶ fail to recognize expressly that VAPs are available to would-be parents beyond alleged genetic fathers.²⁶⁷ Express recognition seems especially apt for cosigning presumed spousal parents and males with genetic ties who forego childcare parentage involving children born of sex, as well as for intended parents in assisted reproduction settings where genetic material donors forego parentage. Such availability should sometimes cover both prebirth and postbirth VAPs.²⁶⁸ VAP parentage provides more certainty (and stability for children) then, for example, spousal parentage, as VAP parentage is more difficult to challenge with its fraud/duress/mistake requirements.

263. While the UPA § 609(a) limits standing to seek de facto parentage to a putative parent seeking such status, elsewhere de facto parentage can be sought by others, including existing legal parents, presumably for child support purposes, as in 13 DEL. CODE ANN. tit. 8, § 602 (2019).

264. See, e.g., Parness, *Comparable Pursuits*, *supra* note 10, at 167–68 (urging the need for comprehensive de facto parent statutes so that all are on notice of the consequences of parental-like relations developing for nonparents).

265. The residency/hold out parentage provisions in the 2017 UPA have no such limit on standing. See, e.g., UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM’N 2017); *id.* § 602 (addressing standing to maintain a proceeding to adjudicate parentage).

266. *Id.* § 301.

267. See 750 ILL. COMP. STAT. 46/302(a)(2) (2020) (requiring VAP to be signed by birth mother and “the man seeking to establish his parentage”); see 410 ILL. COMP. STAT. 535/12(5)(b) (2020) (noting that VAP involves “the child’s mother” and “biological father” if the mother was unwed).

268. Broader prebirth VAPs are recognized in the 2017 UPA. UNIF. PARENTAGE ACT § 304(c) (UNIF. LAW COMM’N 2017). Prebirth VAPs by genetic parents are recognized in Illinois. 750 ILL. COMP. STAT. 46/304(b) (2020).

I. Expanded Support Duties for Nonparents

An eighth issue involves whether, and to what extent, child support duties should be assignable to nonparents, that is, nonparent child support payable to caretaking parents or to others providing services benefiting children (e.g., schools), which are independent of any expenses related to nonparent-child custody, visitation, contact, child caretaking allocation, or parenting time.

As with nonparental child visitation, child contact (e.g., Skype, iPhone FaceTime, or parenting time laws), nonparental child support laws can be general (as with any person who has promised to provide support in an enforceable agreement) or particular (as with certain persons, like stepparents, grandparents, great-grandparents, aunts or uncles, or siblings). These laws can be founded on differing types of conduct by nonparents, including promissory acts and parental-like acts. Model NCCUSL laws, ALI Principles, and other state statutes and judicial precedents can be employed by Illinois lawmakers considering the expansion of nonparent child support duties.

More general in nature is the recognition in the 2000 *ALI Principles* of possible nonparent child support. They say:

The court may in exceptional cases impose a parental support obligation upon a person who may not be the child's parent under state law, but whose prior course of affirmative conduct equitably estops that person from denying a parental support obligation to the child. Such estoppel may arise only when there was an explicit or implicit agreement or undertaking by the person to assume a parental support obligation to the child; the child was born during the marriage or cohabitation of the person and the child's parent; or the child was conceived pursuant to an agreement between the person and the child's parent that they would share responsibility for raising the child and each would be a parent to the child. Only the child and the child's parents have standing to assert an estoppel under this section.²⁶⁹

A somewhat limited, but still general, child support statute in Connecticut declares that a court may order a “relative or relatives to contribute to . . . support” for a child who is a ward of the state.²⁷⁰

More particular in nature are state laws expressly recognizing stepparent or grandparent child support duties. State laws vary on the extent to which stepparents have child support duties to the children of

269. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.03(1) (AM. LAW INST. 2002). Elsewhere I have urged that prenuptial and mid-marriage agreements can include enforceable child support promises by those inside (like prospective or current stepparents) or outside the marriage. See Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GA. ST. U. L. REV. 343, 364–70 (2015) (urging enforceable child support promises inside and outside of marriage).

270. CONN. GEN. STAT. § 46b-215(a)(8)(B) (2019).

their current spouses, with any such support duties usually ending when the marriage ends (assuming the stepparent is not then, e.g., a residency/hold out or de facto parent).²⁷¹

Nonparent grandparents are sometimes subject to child support orders untethered to any earlier agreements. Current grandparents sometimes are responsible for providing support for grandchildren when the custodial parents lack the means to provide for the children or when the parents are minors. For example, Louisiana requires grandparents “to provide for their needy descendants . . . limited to the basic necessities of food, clothing, shelter, and health care.”²⁷² However, such orders are “used sparingly and as a last resort; and only when attempts at parental support have been exhausted.”²⁷³ Wisconsin requires grandparents to provide support for grandchildren when the grandchild’s parent is a “dependent person under the age of eighteen.”²⁷⁴

J. Common Law Parentage and Nonparent Childcare

A ninth issue involves the possible changed roles of the Illinois courts, as led and directed by the Illinois Supreme Court, in developing common law precedents supplementing statutes on childcare parentages and/or nonparent childcare. As noted, for children who are born of sex or who are adopted, to date the Illinois Supreme Court has deferred to legislators on many of the issues involving both childcare parentage and nonparent childcare as they are “complex” and merit a “policy debate” in the General Assembly. Yet for children born of assisted reproduction, the Court has recognized some room for common law precedents by establishing policies which are not dependent upon any constitutional mandates, as with due process or equality, and which are not directly dictated by statute.²⁷⁵

A central question is whether Illinois courts can afford to wait for new written laws. Elsewhere, state courts, while expressing deep concerns over separation of powers principles, have chosen not to wait as the changes in human conduct and reproductive technologies demanded immediate legal response which could not await General Assembly

271. See, e.g., Parness & Timko, *Child Support*, *supra* note 239, at 823–26; but see N.D. CENT. CODE § 14-09-09 (2019) (requiring that once a stepparent “receives” their spouse’s dependent children into their family, the stepparent is liable to support the children both during the marriage and after its termination if the children remain part of the stepparent’s family).

272. LA. CIV. CODE ANN. art. 237 (2019), *applied in* Landeche v. Airhart, 372 So. 2d 598, 599–600 (La. App. 1979).

273. Banquer v. Banquer, 554 So. 2d 790, 792–93 (La. Ct. App. 1989).

274. WIS. STAT. § 49.90(1)(a)(2) (2019).

275. See, e.g., *In re M.J.*, 787 N.E.2d 144, 152 (Ill. 2003) (recognizing common law “theories of oral contract or promissory estoppel”).

attention.²⁷⁶ For example, the New York high court observed in 2016 the following in overruling precedent denying any childcare standing to non-biological, non-adoptive partners of biological parents:

The “bright-line” rule of *Alison D.* promotes the laudable goals of certainty and predictability in the wake of domestic disruption. . . . But bright lines cast a harsh light on. . . . injustice and. . . . there is little doubt by whom that injustice has been most finely felt and most finely perceived. . . . We will no longer engage in the “deft legal maneuvering” necessary to read fairness into an overly-restrictive definition of “parent” that sets too high a bar for reaching a child’s best interest and does not take into account equitable principles.²⁷⁷

And, some members of the Maine high court said this in 2014:

Parenthood is meant to be defined by the Legislature, steeped as it is in matters of policy requiring the weighing of multiple viewpoints Although we have been discussing de facto parenthood for almost thirteen years, there is currently no Maine statutory reference to de facto parenthood. We take this opportunity to again emphasize that, given the evolving compositions of families and the need for a careful approach, the issue would be best addressed by the Legislature. In the absence of Legislative action in such an important and unsettled area, however, we must provide some guidance to trial courts faced with de facto parenthood petitions.²⁷⁸

So, should the Illinois Supreme Court continue to defer to (and await) General Assembly action? If not, in what parentage settings are new equitable principles needed? Genetic surrogacy? VAPs for women? De facto parentage? Nonparent visitation/child contact?

CONCLUSION

State childcare parentage laws have evolved significantly in the past half century, at times in revolutionary ways. State legislators and judges have responded to the major changes in both reproductive technologies and family relationships, often guided by NCCUSL and ALI pronouncements. Unfortunately, Illinois lawmakers have not kept pace, causing undue uncertainties, unfairness, and disregard of children’s best interests. Further evolution, if not a revolution, seems inevitable in Illinois, given likely new reproductive technologies and continuing changes in Illinois family formations and reformations.

276. For a review of separation of powers issues in parentage cases, see Parness, *More Principled Allocations*, *supra* note 11, at 479.

277. See *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 500 (N.Y. 2016) (overruling *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991), which held there could be no childcare parentage without a biological or adoptive relation to a child due to the Domestic Relations Law).

278. *Pitts v. Moore*, 90 A.3d 1169, 1176–77 (Me. 2014) (plurality opinion).

State childcare parentage laws, prompted by the 2000 and 2017 UPAs, increasingly recognize forms of nonbiological and nonadoptive childcare parentage. In particular, there is parentage for a one-time nonbiological and nonadoptive parent-like figure in an intimate relationship with a biological or adoptive parent. Illinois state legislators should pay heed and consider anew who may be recognized as a new childcare parent over the objections of an existing legal parent or existing legal parents. They should seek to ensure that all interested persons have participation opportunities, facilitated perhaps by duties to disclose and/or investigate, in childcare parentage proceedings. As well, the General Assembly should consider when someone may be designated as a parent for support (if not custody) purposes. Finally, Illinois lawmakers should explore, while employing the 2018 UNCVA, possible new standing norms for nonparents seeking child caretaking/child contact orders over the objections of existing legal parents.

In exploring new childcare laws, Illinois legislators should put the best interests of children first, while always respecting the childcare rights of existing and expecting legal parents.