

Who Is a Parent? Intrastate and Interstate Differences

by

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I. Introduction

When the parental status of one or more people involved in a civil action is contested in a court in the United States, the need for a legal parentage determination arises. Fifty years ago such contests were rare. Today they are common.

In these contests, legal parentage can differ from personally and/or publicly perceived parentage. Legal parentage can also differ by context, as between child custody and child support settings.

Legal parentage most often varies by context in a single American state where the purposes behind varying parentage laws differ, as where biology is key in one setting and parental-like acts are key in another setting. A need for a parentage determination can arise, *inter alia*, in contests over child custody/visitation/parental responsibility allocation (herein “childcare”); child support; heirship in probate; domestic violence; and standing to pursue tort remedies.

Parental status laws are challenging today because increasingly they no longer operate chiefly at birth or during a formal adoption. Rather, more frequently parental status under law

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arises due to actions occurring preconception; postconception but prebirth; or long after birth but with no formal adoption.²

Parentage contests are even more challenging when relevant conduct occurs in several states. Family relationships can first be established in one state, be continued in a second state, and only become legally disputed in a third state. For example, an unwed couple can conceive a child via sex in one state, the child can be born in a second state, and the birth mother and child can thereafter move to a third state where a parent status contest first arises. Or, a romantic female couple can first reside in one state, prompt per agreement a pregnancy for one spouse/partner or a surrogate in a second state, and then split up, whereupon one of the women and the child move to a third state where parentage is first contested.

The following sections reflect on some of the challenges facing judges, lawyers, families, the public at large, and the state(s) interested in legal parentage contests. These challenges include issues reviewed in Section II on finding the source(s) of parentage law, which sometimes necessitate analyzing shared governmental powers; issues reviewed in Section III involving differing intrastate parentage laws by context; issues reviewed in Section IV involving interstate parentage law variations in a single context; and, issues reviewed in Section V on choosing between conflicting state laws in multistate conduct cases.

II. Finding Parentage Laws

While the interests of a parent in the “care, custody and control” of a child is said by the U.S. Supreme Court to encompass a fundamental constitutional right,³ the role of the federal constitution in defining parental status in childcare settings is surpris-

² Further complicating parental status laws are other laws that speak to parental-like acts or interests for those who remain nonparents. Thus in Illinois, a court can order an “allocation of parental responsibilities” for a child on behalf of a nonparent, like a grandparent or a stepparent. 750 ILL. COMP. STAT. §§ 5/601.2(b)(4), (5) (2021).

³ Such rights were generally recognized in *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“perhaps the oldest of the liberty interests recognized”) (plurality opinion).

ingly limited.⁴ Further, the role of state constitutions in determining such status varies greatly among the states. So, much is left to state statutes and state common law precedents. This makes locating parental status laws quite challenging.

As to the federal constitution, the U.S. Supreme Court and Congress have significantly deferred to American state lawmakers on the issue of who possesses parental childcare rights under federal substantive due process. This deference will likely continue.⁵ Thus, the U.S. Supreme Court has found that constitutional parental childcare rights involving the “care, custody, and control” of children need not always be recognized in state laws for unwed biological fathers of children born of consensual sex to either a married or to an unmarried woman.⁶ By contrast, the Supreme Court has nationalized the norms on the holders of other federal constitutional privacy rights like contraception, abortion, sexual conduct, and marriage.⁷

Some state high courts have deferred, significantly if not wholly, to their general assemblies on the parents who possess federal, constitutionally-protected, childcare rights; others have not, employing both state constitutional precedents and state

⁴ See, e.g., Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1491-1502 (2018).

⁵ See, e.g., Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965 (2016), analyzing the cases following *United States v. Yazell*, 382 U.S. 341, 352 (1966) (“solicitude for state interests, particularly in the field of family and family-property arrangements”). A call for more U.S. Supreme Court guidance on how states can define federal constitutional due process parenthood appears in Higdon, *supra* note 4, at 1541 (“it is time for the Court to return to the subject of constitutional parenthood and provide a more contemporary definition — one that, at a minimum, both recognizes and protects the rights of intentional parents”).

⁶ On births to those married to others, see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (states can create, if they wish, irrebuttable presumptions of spousal parentage). On births to those unwed, see *Lehr v. Robertson*, 463 U.S. 248 (1983) (states can deny, if they wish, opportunities for biological fathers to participate in adoption proceedings involving children born to unwed mothers which were initiated by the mothers where the fathers failed to establish a parent-child relationship with the child).

⁷ Parness, *Federal Childcare Parents*, *supra* note 5, at 976.

common law precedents.⁸ At times, common law precedents establishing new parentage forms are superseded by legislation.⁹

Notwithstanding state law dominance, the U.S. Supreme Court has invalidated some state laws regarding parental rights to childcare on federal procedural due process and/or federal equal protection grounds. The Supreme Court gives no state deference on these matters.

State laws are vulnerable both in childcare parent establishment and disestablishment settings. Federal procedural due process, for example, was key in a parentage disestablishment case involving the termination of earlier-recognized parental childcare rights. The Court ruled that clear and convincing evidence was necessary for a termination.¹⁰ Federal substantive due process was also key in a disestablishment case involving an unwed father of a child whose birth mother had died.¹¹

Federal equal protection, similarly, was central to a case on childcare parentage establishment involving the interests of a genetic father in rearing his child placed for adoption by the birth

⁸ 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, 489-504 (2017) (reviewing differing state approaches to parentage lawmaking by constitutional interpretation, statutes, and common law precedents).

⁹ Consider the de facto parentage form, initially introduced in Maine via precedent. See, e.g., *Pitts v. Moore*, 90 A.3d 1169 (Me. 2014). The form was later established by legislation whose norms are similar to those in the 2017 Uniform Parentage Act (“2017 UPA”). See 19 ME. STAT. 1891 (effective July 1, 2016); UNIF. PARENTAGE ACT Comment to § 609 (2017) (the 2017 UPA draft utilized the Maine statute, as well as the Wisconsin precedent of *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995)). Some de facto parent precedents have not been later codified, as with *Conover v. Conover*, 146 A.3d 433, 446-447 (Md. 2016) (utilizing *H.S.H.-K.*). The 2017 UPA has also been significantly adopted in Rhode Island and Washington in the absence of earlier precedents. See R. I. GEN. LAWS §§ 15-8.1-101 to 15-8.1-10.104 (2021); WASH. STAT. §§ 26.26A.005 to 26.26A.903 (2021).

¹⁰ *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that a state must prove parental unfitness by clear and convincing evidence).

¹¹ *Stanley v. Illinois*, 405 U.S. 645, 659-660 (1972) (Burger, C.J., dissenting) (noting that while the father had urged equal protection analysis, the majority utilized due process reasoning, finding the father had “sired and raised” the child, 405 U.S. at 651).

mother.¹² The Court recognized there could be a “difference between maternal and paternal relations at every phase of a child’s development.”¹³

A few American state courts have employed their own state constitutions to define childcare parentage beyond the limited guidelines of the U.S. Supreme Court. In Iowa, the high court recognized, under its state constitution’s liberty protections, broader parentage opportunities for unwed parents whose sexual acts prompted pregnancies and births to women married to others.¹⁴ Elsewhere, there are available explicit state constitutional privacy rights unlike any - explicit or implied - found in the federal constitution.¹⁵

Without state constitutional law precedents, state legislatures have significantly defined parentage for childcare, as well as nonchildcare, purposes. Yet there are some common law (non-constitutional) precedents, which sometimes lead to, or are preempted by, new legislation.¹⁶

Nevertheless, deferring state high courts occasionally review lower precedents and legislation on childcare parentage under

¹² The birth mother supported the adoption petition by her husband, the child’s stepfather. *Caban v. Mohammed*, 441 U.S. 380, 383 (1979).

¹³ *Caban*, 441 U.S. at 389. The court observed there may be a rational difference when the children are newborn. *Id.* at 389. Rational differences also permeate prebirth parental opportunity interests. *See, e.g., Lehr*, 463 U.S. at 261 (explaining how only an unwed biological father of a child born of consensual sex must demonstrate “a full commitment to the responsibilities of parenthood” to acquire “substantial protection under the due process clause”).

¹⁴ *Callender v. Skiles*, 591 N.W.2d 182, 187 (Iowa 1999) (stating that under the Iowa constitution there is “a strong history of providing protection” to parentage based on biological ties).

¹⁵ *See, e.g., FLA. CONST. Art. I, § 23* (“Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.”). This provision is broader, more fundamental, and more highly guarded than its federal counterparts. *Winfield v. Div. of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985) (noting the provision’s drafters rejected using the words “unreasonable” or “unwarranted” before the phrase “governmental intrusion”).

¹⁶ *See, e.g., In re Parentage of L.B.*, 122 P.3d 161, 166-167 (Wash. 2005) (“first impression” common law case); *Matter of J.D.W.*, 471 P.3d 228, 231 (Wash. Ct. App. 2020) (“first impression” case under 2018 Washington Uniform Parentage Act). On the differing state court approaches to common lawmaking on issues of childcare parentage, *see, e.g., Parness, State Lawmaking, supra* note 8, at 495-504.

both procedural due process and equal protection.¹⁷ Less constitutional review is undertaken in parentage cases outside of child-care, such as in torts and probate, since fundamental rights are not usually implicated. There is no constitutional right to inherit from a biological parent's estate or to be compensated when a biological parent is wrongly injured.¹⁸

Finally, even when the parentage lawmaker is identified, locating the parentage law can still be challenging. For example, different terms/phrases are employed by legislators in different states to cover the same parentage form. Thus, there are voluntary parentage acknowledgments (VAPs) and recognitions of parentage (ROPs)¹⁹ in childcare settings: There are de facto parents, psychological parents, equitable parents, and in loco parentis parents in childcare settings.²⁰ When the lawmakers are identified, new challenges await as there are significant intrastate differences in parental status laws.

III. Intrastate Parentage Law Variations Between Contexts

Legal parentage is key in many civil actions beyond child-care, including child support, tort, and probate disputes. Pur-

¹⁷ See, e.g., *Doherty v. Leon*, 472 P.3d 531, ¶ 11 (Ariz. Ct. App. 2020) (ruling that the wife of a birth mother is a presumptive parent of a child as would be a husband).

¹⁸ While there is no constitutional right for a child to recover in probate or in tort arising from the death of a biological parent who had successfully earlier placed the child for adoption, state laws can recognize such recoveries. See, e.g., TEX. EST. CODE §§ 201.054(b), 22.004(a)(2) (2021); *Rismiller v. Gemini Ins. Co.*, 330 So.3d 145 (La. 2021) (holding that wrongful death and survival actions were allowed for a minor, but not an adult, child when the biological father and half siblings died in an accident). See also TEX. FAM. CODE § 162.507(c) (2021) (stating that an adopted child, but not an adopted adult, can inherit from the estate of a deceased natural parent).

¹⁹ See, e.g., 750 ILL. COMP. STAT. § 46/301 (VAPs) (2022); MINN. STAT. § 257.75 (ROPs) (2021).

²⁰ See, e.g., DEL. CODE tit. 13, § 8-201(a)(4) (2021) (de facto parent); *Laker v. Putman*, 894 N.W.2d 62 (Mich. Ct. App. 2016) (equitable parent); and *Windham v. Griffin*, 887 N.W.2d 710 (Neb. 2016) (in loco parentis parent, though such a parent does not possess all the rights held by a natural or adoptive parent); *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005) (psychological parent).

poses behind parentage designations often vary by context. There should be no single size for all. Yet proper differentiations are difficult because unlike childcare parentage, there are generally no comparable comprehensive proposals on parental status in many nonchildcare parent contexts, leaving state lawmakers with difficult drafting tasks. Civil litigation parties, lawyers, and judges, as well as legislators, families, and the public at large, need to understand the challenges posed by contextual parentage in intrastate settings.

In civil actions, legal parent status should always be first approached contextually. The need is exemplified in a state where laws make a biological father a child support parent, but not a childcare parent.²¹ Unfortunately, at times lawmakers fail to consider their policy goals in context, leading them to some unreasonable differentiations between parentage norms arising in quite comparable contexts. This has happened, for example, in personal injury and probate settings. In New York, a parent who abandons a child can recover under the worker's compensation statute upon a child's death, but cannot recover under the wrongful death or probate statute.²² Perhaps for simplicity, if not due to comparable underlying policies, at times lawmakers in a single state incorporate a parentage norm from one context into another context.²³

²¹ A biological father exercising or having no childcare rights is nonetheless a parent for child support purposes. *See, e.g.*, *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. 2004); *Dept. of Health & Fam. Servs. v. Arevalo*, 68 N.E.3d 652 (Ill. App. Ct. 2016) (reviewing support cases); *In re H.S.*, 805 N.W.2d 737, 745 (Iowa 2011) (ruling that child support duties only end upon termination of parental rights). In Illinois there is parentage via equitable adoption for probate, but not for parental responsibility allocation. *See DeHart v. DeHart*, 986 N.E.2d 85, 103-05 (Ill. 2013) (holding that an equitably adopted child can inherit from the estate of a deceased biological father); *In re Scarlett Z.-D.*, 28 N.E.3d 776, 792 (Ill. 2015) (deciding that the equitable adoption doctrine is inapplicable in the childcare context).

²² *See, e.g.*, *Caldwell v. Alliance Consulting Group, Inc.*, 775 N.Y.S. 2d 92 (N.Y. App. Div. 2004) (recognizing an abandoning parent as nevertheless eligible to share in death benefits involving his child under the Workers' Compensation Law though he would be ineligible to be a surviving parent in a probate or wrongful death case). Similar distinctions are drawn in *Smith v. Smith*, 130 So. 3d 508, ¶¶ 10-12 (Miss. 2014).

²³ *See, e.g.*, UNIF. PROBATE CODE § 1-201(5) (amended 2019) ("child means an individual of any age whose parentage is established under [cite to

In a single context, one finds significant interstate differences. These variations prompt additional challenges for those applying parental status laws.

IV. Interstate Parentage Law Variations in a Single Context

Interstate movements make legal parentage determinations more challenging because state laws often vary interstate within a single context, as with laws on surrogacy agreements,²⁴ de facto parents,²⁵ and hold out/residency parents.²⁶ Further, childcare parentage disestablishment norms, that is, the norms on waiving parental custody/visitation rights, differ widely interstate. For example, state laws differ in voluntary acknowledgment settings on when earlier parentage acknowledgments can be challenged²⁷ and in spousal²⁸ parent settings on when the presumptive parentage in the spouses of those giving birth can be rebutted. Thus, choice of law issues often must be resolved before parentage norms are applied in cases involving relevant multistate conduct.

Since 1973, the National Conference of Commissioners on Uniform State Laws, now titled the Uniform Law Commission, has proposed parentage acts that seek to unify state laws on childcare parentage. The 2017 proposed version of the Uniform Parentage Act (UPA) contains some very different approaches to childcare parentage than were suggested in the 1973 UPA and the 2000 UPA. The 2017 UPA, for example, expressly recognizes, for the first time, a voluntary parentage acknowledgment option for a female partner of a birth mother.²⁹ As well, the 2017

Uniform Parentage Act (2017)]”); ALASKA STAT. § 13.12.114 (illegitimate child can establish fatherhood of a decedent in a probate case under the Uniform Parentage Act).

²⁴ Compare, for example, the laws in two states otherwise generally following the 2017 Uniform Parentage Act. VT. STAT. tit. 15C, § 801 (2021) (gestational carrier agreements); WASH. REV. CODE § 26.26.A.715 (gestational or genetic surrogacy agreements).

²⁵ See, e.g., Jeffrey A. Parness, *Illinois Childcare Parentage Law (R)Evolution*, 51 LOYOLA U. CHI. L.J. 911, 937-38 (2020).

²⁶ See, e.g., *id.* at 929-32.

²⁷ See, e.g., *id.*, at 925-28.

²⁸ See, e.g., *id.*, at 921-23.

²⁹ 2017 UPA § 301 (an intended nonsurrogacy assisted reproduction parent or a spouse can sign a VAP together with the person who gave birth).

UPA first recognizes a “de facto” parent doctrine, which is quite different from the “hold out” parent doctrine under the 2000 and 2017 UPAs.³⁰ De facto parenthood does not require residency with the child from the time of birth or for a minimum number of years as does “hold out” parenthood. The 2017 UPA also has new approaches to assisted reproduction contracts involving no surrogate, a genetic surrogate, or a gestational surrogate.³¹ A few states have already substantially adopted the 2017 UPA.³² Other state UPAs continue with different parentage provisions from earlier UPAs, as with the 1973 UPA provisions on “hold out” parentage.³³

Interstate variations in childcare parentage exist even when comparable terms are used because there are varied definitions of the same terms in UPAs. Thus, the 1973 UPA recognizes a presumption of paternity in a man who “receives the child into his home and openly holds out the child as his natural child” while “the child is under the age of majority.”³⁴ In the 2000 UPA, that provision was replaced by a recognition of a “presumption of paternity” in a man who “for the first two years of the child’s life . . . resided in the same household with the child and openly held out the child as his own.”³⁵ This presumption, however, can “apply to determinations of maternity.”³⁶ The 2017 UPA recognizes “an individual is presumed to be a parent of a child if . . . the individual resided in the same household with the child for the first two years of the life of the child. . . . and openly

³⁰ Parness, *Parentage Law (R)Evolution*, *supra* note 25, at 932-37 (reviewing the American Law Institute’s approaches to de facto parentage).

³¹ 2017 UPA §§ 701-708 (no surrogate), 808-812 (gestational surrogate), 813-818 (genetic surrogate).

³² R.I. GEN. LAWS §§ 15-8.1-101-15-8.1-10.104 (2021) presumed hold out/residency parent; VT. STAT. tit 15C, §§ 101-809; WASH. REV. CODE §§ 26.26A.005-26.26A.903 (2021).

³³ See, e.g., CAL. FAM. CODE § 7611(d) (2021) (presumed natural hold out/residency parent, based on 1973 UPA § 4(a)(4)).

³⁴ 1973 UPA § 4(a)(4). This presumption substantially operates in some states. See, e.g., CAL. FAM. CODE § 7611(d) (2021); HAWAII REV. STAT. § 584-4 (2021); NEVADA REV. STAT. § 126.05(1)(d) (2021).

³⁵ 2000 UPA § 204(a)(5). This presumption substantially operates in some states. See, e.g., OKLA. STAT. § 7700-204(a)(5) (2021); TEX. FAM. CODE § 160.204(a)(5) (2021).

³⁶ 2000 UPA § 106.

held out the child as the individual's child.”³⁷ So, the holdout/residency parentage norms differ interstate due to the different UPA approaches, as well as to some unique individual state adaptations.³⁸

There are interstate parentage law variations in contexts beyond childcare, as with child support, tort, probate, and criminal laws. As to child support, states differ on what, if any, duties are assigned stepparents.³⁹ As to heirship of children in intestate probate proceedings, one state defines parentage according to the state Parentage Act while another has a common law precedent on equitable adoption.⁴⁰ Here, as in intrastate settings, challenges await lawyers, judges, parties, the state, families, and the public.

In probate, interstate variations arise where different versions of the same model act have been enacted. The NCCUSL and its successor have proposed varying Uniform Probate Code (“UPC”) provisions. Since 2019, a parent generally is defined as “an individual who has established a parent-child relationship under” the 2017 UPA.⁴¹ Prior to 2019, a parent was “any person entitled to take, or who would be entitled to take if the child died without a will, as a parent . . . by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.”⁴² Both

³⁷ 2017 UPA § 204(a)(2). This presumption operates in some states. *See, e.g.,* R.I. GEN. LAWS § 15-8.1-401(a)(4) (2019), VT. STAT. tit. 15C, § 401(a)(4) (2018).

³⁸ *Compare* ALA. CODE § 26-17-204(a)(5) (2021) (also need to establish “significant parental relationship”), *with* N.J. STAT. §§ 9:17-43(a)(4), (5) (2021) (hold out parentage if there is either receipt of a child under the age of majority into the “home” or provision of “support” for such a child).

³⁹ *See, e.g.,* Jeffrey A. Parness & Matthew Timko, *De Facto Parent & Nonparent Child Support Orders*, 67 AMER. U. L. REV. 769, 823-26 (2018).

⁴⁰ *Compare* UTAH CODE § 75-2-114 (2021) (parent-child relationship can be established in intestate succession cases under the Uniform Parentage Act) *with* *DeHart v. DeHart*, 986 N.E.2d 85, 100-04 (Ill. 2013) (common law equitable adoption doctrine operates in intestate succession cases).

⁴¹ 2019 UPC § 1-201(32). The 2019 UPC also has special provisions, again referencing the 2017 UPA, on parentage in assisted birth settings. *See, e.g.,* 2019 UPC §§ 2-120 (no surrogate), 2-121 (gestational or genetic surrogate).

⁴² 1969 UPC § 1-201(32).

the earlier and current UPC recognize states can add to parentage through “the doctrine of equitable adoption.”⁴³

V. Choosing Parentage Laws

The NCCUSL and its successor, in both the 2017 UPA and the 2000 UPA, tried to limit the uncertainties in interstate settings by proposing a simple choice of law norm applicable to childcare parentage contexts.⁴⁴ That norm declares a court must always choose its own state’s laws in adjudicating disputes about parenthood in childcare and child support cases regardless of a child’s place of birth or residence.⁴⁵ The NCCUSL approach to choosing parentage laws, however, recognizes choice of law norms can be special, that is, applicable only in limited contexts.⁴⁶ So while parentage adjudications under the 2017 UPA generally are governed by forum law,⁴⁷ a special provision requires a state court to give full faith and credit to parentage establishments through voluntary acknowledgment processes that were undertaken in another state.⁴⁸

Unfortunately, a court that chooses its own parentage laws, whether in childcare, probate, or elsewhere, may run afoul of U.S. Supreme Court precedents on Full Faith and Credit obligations and/or a state’s own policies on interstate comity. Problems

⁴³ 1969 UPC § 2-122; 2019 UPC § 2-122.

⁴⁴ This norm appears in the 2000 Uniform Parentage Act (UPA), at § 103(b) and in the 2017 UPA, at § 105. The norm often is followed, as in Illinois. 750 ILL. COMP. STAT. § 46/104(b) (declaring within the Illinois Parentage Act of 2015, that adjudications of “the parent-child relationship” do “not depend on . . . the place of birth of the child . . . or . . . the past or present residence of the child” and thus that the Act will apply to a “determination of parentage in this State”).

⁴⁵ A more detailed criticism of this norm appears in Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws*, 70 MERCER L. REV. 325 (2019).

⁴⁶ Thus the 2000 UPA says a court shall apply its own law “to adjudicate the parent-child relationship,” but then says “full faith and credit” must be given to a voluntary parentage acknowledgment “effective” in another state. 2000 UPA §§ 103(b), 311. The deferral arises from a federal welfare subsidy law that requires full faith and credit be given to a voluntary parentage acknowledgment “signed in any other State according to its procedures.” 28 U.S.C. § 666(a)(5)(c)(iv). The 2017 UPA is similar. 2017 UPA §§ 105, 311.

⁴⁷ 2017 UPA § 105.

⁴⁸ 2017 UPA § 311.

can arise in parentage settings where a case in one state implicates significant parental and/or parental-like conduct in another state. Consider cases involving challenges to voluntary parentage acknowledgments (VAPs) undertaken in other states.⁴⁹ A court applying its own VAP laws may rule against the legitimate expectations of some signing people as to later VAP overrides (via “challenges”) when the people move between states, as well as of the lawmakers who regulate family relationships within the signing state. Consider also the situation of an unvalidated genetic surrogacy contract undertaken and fully satisfied in one state which is later challenged in another state where such a contract is prohibited.⁵⁰ Finally, consider the aforescribed parentage

⁴⁹ Consider, for example, the typical state statutory requirement that VAP challenges after 60 days be founded on fraud, duress, or material mistake of fact. This mandate is implemented quite differently between states on, among other issues, what constitutes fraud, who can initiate a challenge, and how long one with standing has to challenge. *See, e.g.,* Jeffrey A. Parness & David Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHICAGO-KENT L. REV. 177, 183-203 (2017). These mandates are driven by federally-subsidized welfare benefits laws. 42 U.S.C. § 666(a)(5)(D)(iii), as recognized in 2000 UPA § 308 and 2017 UPA §§ 309, 610 (which proposes a two year limitations period and a “signatory” challenger, as well as a challenger who, according to 2017 UPA § 602, includes “an individual whose parentage is to be adjudicated,” a “child-support agency,” or an “adoption agency”).

Under federal statute, a court shall give full faith and credit to a VAP effective in another state if the VAP complies with the law of the other state. 42 U.S.C. § 666(a)(5)(C)(iv), as recognized in 2000 UPA § 311 and 2017 UPA § 311. Such credit was given to an unchallenged VAP in *Adoption of Jaelyn B.*, 883 N.W.2d 22 (Neb. 2016). Yet it is unclear whether one state needs to credit another state’s VAP challenge statute since a VAP may no longer be effective in the other state if the other state’s fraud, time limits, or standing requisites are followed. Stated differently, it is unclear whether the federal statute demands a second state respect the laws in a VAP signing state on both initial and continuing effectiveness.

⁵⁰ Under the 2017 UPA, a genetic surrogacy contract can be validated by a court before artificial insemination or during pregnancy. 2017 UPA §§ 813 (preconception validation where contract requirements of UPA are met and parties agreed voluntarily, with understandings of the contract terms); 816(b) (postconception validation needs for the parties to then agree). In each instance there is a court order establishing (expecting) parentage. When there is no validation, there is no earlier court order to which the new residential state can look to in order to give credit. While the 2017 UPA addresses the parentage processes arising from unvalidated genetic surrogacy contracts, at §§ 816(c)

norms on residency/hold out and de facto parentage, which each look to conduct occurring long before the initiation of an action to adjudicate a parent-child relationship.

The problems arising from always employing one's own parentage laws are well illustrated by the case of *Johnson v. Johnson*.⁵¹ There, Antonyio and Madonna, living in New Jersey in 1988, took custody in Pennsylvania of Jessica, then three months old and the natural grandchild of Madonna.⁵² Jessica's birth mother – who was married to Madonna's son who was then in jail – placed Jessica with the Johnsons; Jessica was scheduled to remain with the Johnsons for a month.⁵³ However, ten years later she was still with the Johnsons.⁵⁴ During the decade the Johnsons had resided both in New Jersey and Florida.⁵⁵ In 1998, Antonyio moved to North Dakota where he filed for divorce. Madonna was then living with Jessica in Kentucky.⁵⁶ In response to the divorce suit, Madonna sought child support from Antonyio.⁵⁷ Applying its own common law principles on equitable adoption, the North Dakota high court found Antonyio was

and (d) (differentiating a genetic surrogate's withdrawal of consent before and after 72 hours from birth), these process norms may not be recognized in a state, like Michigan, per MICH. COMP. LAWS § 722.855 (barring genetic surrogacy contracts) or Indiana, per IND. CODE § 31-20-1-1 (restrictions on surrogate agreements). On the differences in American state surrogacy laws, see Courtney G. Joslin, *Surrogacy and the Politics of Pregnancy*, 14 HARV. L. & POL'Y REV. 365 (2020). On choice of law issues when there are no earlier court orders, see, e.g., Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM L. Q. 633 (2005). On how contractual choice of law clauses in surrogacy contracts may be viewed, see, e.g., *Hodas v. Morin*, 814 N.E.2d 320 (Mass. 2004) (enforcing the clause, but noting there was a "close question" on "fundamental policy" of one interested state).

While the judges in states following the 2000 UPA or 2017 UPA are told to utilize their own state's childcare parentage laws, those same judges often approach conflicting state contract laws outside of genetic surrogacy pacts by employing an interest analysis. See, e.g., RESTATEMENT OF THE LAW THIRD: CONFLICT OF LAWS, Preliminary Draft No. 6 at 811 (Sept. 29, 2020).

⁵¹ 617 N.W.2d 97 (N.D. 2000).

⁵² *Id.* at 100.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 101.

⁵⁶ *Id.*

⁵⁷ *Id.*

liable as a parent for support, with liability calculated under North Dakota laws.⁵⁸

The problems in the *Johnson* ruling jump out. No significant acts prompting Antonio's equitable adoption occurred in North Dakota. The needs of Jessica arose in Kentucky, while Antonio's assets were in North Dakota. The interests of Jessica's biological parents were never considered, and likely could not have been, given personal jurisdiction constraints. And, there was no consideration of the governmental interests of New Jersey and Florida in Antonio's earlier childcare (if not the interests of Pennsylvania in Antonio's earlier agreement to care for Jessica).

In a case like *Johnson*, forum laws should only be used after inquiry into forum choice of law rules. These rules might prompt (if not require per Full Faith and Credit) the employment of out-of-state parentage laws. It seems far more reasonable to assess Antonio's support parentage under North Dakota law in a North Dakota probate context prompted by Antonio's death in North Dakota than to assess Antonio's parentage under North Dakota law in a child support context (and certainly in a child custody/visitation context). Choice of law analysis, rather than simply using forum law, would be deferential to both individual expectations and legitimate governmental interests.

Another troubling choice of law case, involving UPA-like de facto parentage for child custody purposes, is *S.D. v. K.H.*,⁵⁹ a 2018 Ohio court ruling. Here, there was a 2007 Ohio divorce decree which found a husband and wife to be the biological and legal parents of a child.⁶⁰ The decree established "full and legal custody" in the mother, with visitation for the father.⁶¹ Shortly after the divorce, the wife began a relationship with a woman; she and the child moved with the woman to California in 2008; the women ended their relationship in 2010, but continued to "share parenting responsibilities."⁶² In July 2013, the birth mother ended child contact with the woman.⁶³ Thereafter, a Cal-

⁵⁸ *Id.* at 109-10.

⁵⁹ 98 N.E.3d 375 (Ohio Ct. App. 2018).

⁶⁰ *S.D.*, 98 N.E.3d at 376.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

ifornia court in 2014 found, in a stipulated order, that the other woman (“Mother 2”) was also a childcare parent for the child. But in early 2016, the father sought to set aside in California the 2014 parentage order favoring “Mother 2.”⁶⁴ This occurred after the natural mother sought a California court order allowing her to relocate with the child to Ohio. The natural mother and child moved to Ohio without any court ruling on relocation.⁶⁵ The California court denied the relocation request in July 2016, finding Ohio courts retained “continuing and exclusive jurisdiction” over all custody matters.⁶⁶ This was followed by Mother 2’s petition in September 2016 asking the Ohio divorce court to enforce the California parentage order — a request opposed by both natural parents.⁶⁷ The Ohio court denied, in late 2016, Mother 2’s petition to enforce, though it recognized that she could pursue a child “companionship time” order under Ohio law as an intervenor in the 2007 divorce case.⁶⁸ The Ohio court ruled Mother 2 could not pursue a child “parenting time” order because the California court’s parentage order was issued without subject matter jurisdiction.⁶⁹ These rulings were affirmed, with “the companionship matter” left for trial.⁷⁰

The Ohio court clearly chose not to defer to the California law recognizing Mother 2 could be a third legal parent.⁷¹ The Ohio court did so because “Ohio does not recognize more than two legal parents,”⁷² rejecting Mother 2’s argument that Ohio courts should apply California’s three-parent law to her parentage request because all of Mother 2’s parental-like actions occurred in California, as did the concession of her parentage by the birth mother, who had “full and legal custody.”⁷³ This failure to defer meant that Mother 2’s nonparental companionship claim would be adjudicated in Ohio under Ohio law. The Ohio court

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 377.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 378.

⁷⁰ *Id.*

⁷¹ CAL. FAM. CODE § 7612(c) (to avoid detriment to the child), cited at *S.D.*, 98 N.E.3d at 379.

⁷² *S.D.*, 98 N.E.3d at 379.

⁷³ *Id.* at 376-78.

failed to consider California's governmental interests in the childcare of a child who had been living in California, where two women shared "joint physical custody" for at least two years and where the child was moved to Ohio before a ruling on a requested relocation.⁷⁴ The Ohio court also did not consider whether a California court provided "a more convenient forum" to resolve the nonparent companionship claim of a woman in California.⁷⁵

The choice of law approach in parentage cases involving relevant conduct in two or more states surely is simple to apply – a court always uses its own laws. Yet this approach is troubling (if not unconstitutional) when all of the conduct relevant to the parentage law issue occurred outside the forum. As in cases involving nonparentage issues, a court should sometimes choose to apply nonforum law on parental status issues. Such choices would respect the wishes of outside lawmakers and meet the expectations of the parties.

VI. Conclusion

Parental status laws in the United States have become increasingly challenging. Difficulties arise when adults and/or children move interstate. Difficulties also arise when there are no interstate moves because intrastate parentage norms and terminology often vary by context, as in child custody and child support settings. This can be confusing to litigating parties, if not lawyers and judges. There is, and should be, no one-size-fits-all approach to legal parenthood.

Difficulties will continue as state laws more frequently recognize parental status in the absence of blood ties, marriage and formal adoption, often at times other than at birth. Expecting legal parentage is now often recognized preconception, as with artificial insemination and surrogacy contracts, or postconception but prebirth, as with voluntary parentage acknowledgments and assisted reproduction contracts. Existing legal parentage is now

⁷⁴ *Id.* at 376.

⁷⁵ *Id.* at 377 n.1 (noting that, according to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) adopted in Ohio, a state court can "decline jurisdiction if another state would offer a more convenient forum"). In the Ohio case, the companionship claim of a California person involved a child and two legal parents who then all lived in Ohio. *Id.* at 376.

often recognized long after birth for acts occurring after birth, as with “hold out” and de facto parenthood.

Lawyers and judges facing difficulties in identifying parents also often confront further challenges due to the varying parentage lawmaking sources. Power is differently shared by judges and legislators in a single state between contexts (like childcare and probate). And power is differently shared between states in a single context (like childcare and probate).

Judges, lawyers, parties in civil cases, as well as legislators, families, parents, would-be parents, and the public at large, must understand the challenges presented by the fast-changing landscape of parent status laws. When asked to identify a parent, lawyers and judges should respond by asking for what purpose.

