

Choosing Parentage Laws in Multistate Conduct Cases

by
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I. Introduction

The (r)evolution in U.S. state parentage laws in the last half century presents significant, and to date generally unrecognized, challenges when parentage issues arise in multistate conduct settings, whether involving childcare (i.e., care, custody, and con-

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trol²) or nonchildcare (i.e., child support, torts, or probate) issues. The challenges chiefly result from parentage law expansions which go beyond biological ties, marriages, and state-sponsored adoptions.

The (r)evolution in state childcare parentage laws has been uneven.³ Only some states now broadly embrace de facto parenthood and intended assisted reproduction parentage, norms that do not chiefly dependent upon biology, marriage, or adoption. These states frequently follow the proposals of the Uniform Law Commission (ULC)⁴ in the 2017 Uniform Parentage Act (UPA) or the 2002 Principles of the Law of Family Dissolution of the American Law Institute (ALI Principles). Other states veer less dramatically from childcare parentage founded on biology, marriage, and formal adoption, often following the proposals in the earlier 1973 UPA and/or 2000 UPA.⁵

While the (r)evolution in childcare parentage has crept into nonchildcare parentage cases, the creep is slow. The creep should remain slow because legal parenthood has always been contextual, in that it is dependent upon the individual state policy in each parenthood context. One who is not a parent for one purpose (i.e., childcare) may be a parent for another purpose (i.e., child support). Careful analysis is required. These analyses require time. Unfortunately, sometimes there is no connection made between the two contexts where there should be due to

² *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (finding a “fundamental right of parents to make decisions concerning the care, custody, and control of their children”).

³ The definitions of the parents with such rights have been chiefly left to state lawmakers by the U.S. Supreme Court and Congress. *See, e.g.*, Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN’S L. REV. 965 (2016). More guidance by the U.S. Supreme Court has been urged by Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1483 (2018) (while “a definitive definition . . . is both impractical and unrealistic,” the Court should offer “more guidance on how states may define constitutional parenthood”), and Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 261 (2020) (making “an affirmative case for constitutional protection for nonbiological parents”).

⁴ The ULC is also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL).

⁵ The 1973 UPA and the 2000 UPA, as slightly amended in 2002, were said to be drafted by the NCCUSL. References herein to the 2000 UPA are to the 2002 version.

similar public policies. And sometimes there is a connection made where there should not be because the public policies differ.

While unraveling the mysteries of one state's parentage law in one context, lawyers, judges, and litigants involved in multistate conduct cases sometimes must also utilize another state's substantive law. Here, the substance/procedure dichotomy is challenging because parentage law issues can be either procedural or substantive in nature. Where a true conflict of substantive laws exists, a choice of law determination must be made.

This article explores choosing parentage laws in multistate conduct cases in varying contexts, including cases involving parentage for childcare purpose and for such nonchildcare purposes as tort, probate, and child support.⁶ Choice of law may be compelled by Full Faith and Credit.⁷ Where there is no compulsion,

⁶ My earlier reviews of parentage law choices focused primarily on childcare parentage. They appear in Jeffrey Parness, *Choice of Childcare Parentage Laws*, 70 *MERCER L. REV.* 325 (2019), and Jeffrey Parness, *Choosing Among Imprecise American State Parentage Laws*, 76 *LA. L. REV.* 482 (2015) [hereinafter *Imprecise Laws*] (the articles predate state adoptions of the 2017 UPA which contains significant changes, including recognitions of de facto parenthood and new guidelines on assisted reproduction (both surrogacy and nonsurrogacy) pacts).

⁷ Federal constitutional compulsion occurs when the forum state "has no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). *See, e.g.,* *Finsturn v. Crutcher*, 496 F.3d 1139, 1156 (10th Cir. 2007) (determining that an out-of-state final adoption order involving a same-sex couple is entitled to Full Faith and Credit). State Full Faith and Credit laws can compel respect for sister state laws even when the federal constitutional mandate may not operate. *See, e.g.,* *OHIO REV. CODE ANN.* § 3111.02(B) (West 2022) (effective 1992) ("A court that is determining a parent and child relationship . . . should give full faith and credit to a parentage determination made under the laws of . . . another state, regardless of whether the parentage determination was made pursuant to a voluntary acknowledgment of paternity, an administrative procedure, or a court proceeding."). A Nebraska statute, *NEB. REV. STAT. ANN.* § 43-1406 (West 2022) (effective 2015), is similar and was applied to a voluntary acknowledgement of paternity (VAP) executed in Ohio. *Jesse B. v. Tyler H.*, 883 N.W.2d 1, 16 (Neb. 2016) (such recognition was "not contrary to Nebraska's public policy"). A New Hampshire statute dictates that its courts shall give full faith and credit to a paternity determination "made by another state, whether established by court or administrative order, through a voluntary acknowledgment . . . or by operation of another state's law." *N.H. REV. STAT. ANN.* § 168-A:2 (II) (2022) (effective 2006). *See*

the forum choice of law rules typically apply. These rules, of course, can vary in a single state between contexts, as with parenthood in childcare and in probate settings. These rules can also vary between states in a single context, as with parentage in tort settings. This article seeks to provide guidance to those who face challenging choice of parentage law issues in multistate conduct cases.

Before examining choice of parentage law norms, the article in Part II. first demonstrates the ever-expanding approaches to legal parentage by reviewing many of the forms of childcare parentage set forth by the ULC and ALI. Unlike parentage via biological ties, marriage, or formal adoption, these forms are imprecise in that they depend upon assessments of parental-like acts and/or of private agreements on intended parenthood. In the childcare setting, the ULC has propounded three different UPAs. It has also proposed the widely enacted Uniform Interstate Family Support Act (UIFSA) and Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). These proposals have been far more influential than the ALI's 2002 Principles.⁸

Following this survey, in Parts III and IV, the article explores choice of law rules and precedents on parentage disputes with multistate conduct. It reviews disputes involving both childcare and nonchildcare parenthood, thus including cases involving child custody, probate, torts, and child support.

II. Imprecise State Childcare Parent Laws

A. Introduction

State childcare parentage laws increasingly require judicial inquiry into multistate conduct where assessments of the conduct are done on a case-by-case basis and where there is no (fairly) precise point in time that dictates the outcome. Inquiries no

generally *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 272 (1935) (“A state court, in conformity to state policy, may, by comity, give a remedy which the full faith and credit clause does not compel.”).

⁸ On why the ALI's 2002 Principles generally have not been followed, see, e.g., Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 *HOFSTRA L. REV.* 1103 (2010). On the merits of the 2017 UPA, see, e.g., Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 *YALE L.J.F.* 589 (2018).

longer are generally limited to precise times, like the date of marriage, the date of birth, the probable date of conception, the birth certificate date, the date of a court order on parentage, the voluntary parentage acknowledgment date, the date of an intended parent contract, and/or the date of a formal adoption decree. Imprecise parentage laws often arise in childcare parent contexts which are then sometimes employed in other contexts, like torts, probate, and child support.

The following sections review the imprecise childcare parentage laws that have emerged in the last fifty years. Later the article demonstrates how these laws have sometimes been applied in nonchildcare parentage settings.

B. *Residency/Hold Out Parent*

One form of imprecise childcare parentage is residency/hold out parentage. All UPAs recognize childcare parentage in some people who have resided with living children whom they held out as their own. To date, no UPA (and no state law) has recognized residency/hold out childcare parents where there is common residency with, and support of, expecting legal parents (i.e., those pregnant or those awaiting formal adoption approval).

The 1973 UPA is quite different than the later UPAs on residency/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.⁹

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.¹⁰

The 2017 Uniform Parentage Act altered the presumption again.

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.¹¹

⁹ UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973).

¹⁰ UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2000).

¹¹ UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017).

The 2000 ALI Principles of the Law of Family Dissolution (ALI Principles) also recognize forms of residency/hold out parentage. One form, like the 2000 UPA and the 2017 UPA, encompasses “a parent by estoppel,” described as one who “lived with the child since the child’s birth” while holding out and accepting full and permanent parental responsibilities 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.¹²

Many current state laws reflect the policies of these proposed laws. Yet not all states have expressly extended their laws beyond publicly identified opposite sex couples.¹³ Nevertheless, residency/hold out parentage is generally available to a female partner of one giving birth due to equality demands.¹⁴ Residency/hold out parentage is generally unavailable to a partner of a man who is a parent at birth where the person giving birth re-

¹² PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(iii) (AM. LAW INST. 2000) (further requiring a finding of serving the child’s best interests).

¹³ See, e.g., VT. STAT. ANN. tit. 15C, § 401(a)(4) (West 2022) (effective 2018) (“person,” not man); WASH. REV. CODE ANN. § 26.26A.115(1)(b) (West 2022) (effective 2019) (“individual,” not man). On the need to treat equally all people involved in hold out/residency settings, see Jeffrey A. Parness, *Marriage Equality: Parentage (In)Equality*, 32 WIS. J.L., GENDER & SOC’Y 179, 189 (2017).

¹⁴ See, e.g., *Elisa B. v. Superior Ct.*, 117 P.3d, 660, 670 (Cal. 2005) (finding that a former unwed lesbian partner was a child support parent under California statutory law on presumed natural hold out fathers); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 972 (Vt. 2006) (upon dissolution of the civil union of a lesbian couple, both women are custodial parents since the statute making a 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, VT. STAT. ANN. tit 15, §§ 308(4), 1204(f) (West 2022) (effective 2018). 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.*, 985 N.Y.S. 2d 845 (N.Y. Sup. Ct. 2014). 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) (even where statutes only explicitly recognize hold out/residency parentage for men, women are sometimes deemed parents under the statutes).

mains a legal parent and where state laws disallow three custodial parents.¹⁵

There are varying state laws reflecting the distinct UPA approaches to residency/hold out parentage.¹⁶ 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.”¹⁷ 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 cases¹⁸ have recognized as presumed parents those who knew there were no biological ties, but who acted in the community as if there were.¹⁹ Elsewhere, some U.S. state

¹⁵ In California, though, there can be three legal parents, including the birth mother, her spouse, and a hold out/residency parent. *See* CAL. FAM. CODE § 7612(c) (West 2022) (effective 2020) (stating that three parents may be recognized where recognition of only two parents “would be detrimental to the child”). Compare *C.G. v. J.R.* 130 So. 3d 776, 782 (Fla. Dist. Ct. App. 2014) (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).

¹⁶ Also, there are doctrines that effectively recognize residency/hold out parentage, though with different terms and some different norms. *See, e.g., J.S.B. v. S.R.V.*, 630 S.W.3d 693, 701 (Ky. 2021) (employing a birth mother’s “parental waiver” doctrine to allow parentage in a person who could not formally adopt children, but who held children out as one’s own while residing with them for some time).

¹⁷ CAL. FAM. CODE § 7611(d) (West 2022) (effective 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 (Cal. Ct. App. 2015) (ruling that a preponderance of evidence norm should be used to establish the presumption). As to what constitutes receipt into the home, see, e.g., *In re N.V.*, No. A141323, 2014 LEXIS 8870 (Cal. Ct. App. Dec. 12, 2014) (reviewing cases).

¹⁸ *See, e.g., In re Jesusa V.*, 85 P.3d 2, 15 (Cal. 2004) (both Paul (also the husband) and Heriberto (also the biological father) were each judicially declared 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 LEXIS 10543 (Cal. Ct. App. Nov. 21, 2006) (finding that a birth mother’s uncle is a presumed parent); *In re Jerry P.*, 116 Cal. Rptr. 2d 123, 140 (Cal. Ct. App. 2002) (holding that a presumed hold out/residency parent need not have, or even claim to have, biological ties).

¹⁹ How long an alleged hold out/residency parent must so act is determined on a case-by-case basis. *See, e.g., In re J.B.*, No. B291208, 2019 WL

laws recognize residency/hold out parentage only for those who raise children from birth,²⁰ following the 2017 UPA.

There are other interstate variations in residency/hold out parentage. Some state laws do not require receipt into the home.²¹ 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.²²

State laws also vary on the circumstances allowing, and the standing available to present, a challenge to residency/hold out parentage. Consider challenges by nonresident sperm providers who did not know, and could not reasonably have known, that hold out/residency acts were undertaken by a nonparent together with an existing legal parent (often the person giving birth). In Vermont, such a provider may challenge a residency/hold out parentage within two years of “discovering the potential genetic parentage” in cases where there was no earlier reasonably assumed knowledge of the potential due to “material misrepresen-

1451304 (Cal. Ct. App. Apr. 2, 2019) (two day hold out is insufficient for presumed parent status).

²⁰ See, e.g., TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2022) (effective 2015) (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”); WASH. REV. CODE ANN. § 26.26A.115(1)(b) (West 2022) (effective 2019) (similar). Compare MONT. CODE ANN. §40-6-105(1)(d) (West 2022) (effective 2019) (saying that a person is presumed to be the natural father if “while the child was under the age of majority,” the person “receives the child into the person’s home and openly represents the child to be the person’s natural child”).

²¹ See, e.g., DEL. CODE ANN. tit. 13, § 8-201(c) (West 2022) (effective 2013) (“parental role” and “bonded and dependent relationship . . . that is parental in nature”); N.J. STAT. ANN. § 9:17-43(a)(4) (West 2022) (effective 2018) (either receives into his home or “provides support for the child”).

²² See, e.g., D.C. CODE ANN. § 16-831.01(1) (West 2022) (effective 2009) (single parent’s “agreement” to same household residency for one wishing to be deemed a de facto parent); VT. STAT. ANN. tit. 15C, § 401(a)(4) (West 2022) (effective 2018) (presumed hold out/residency parent if in the child’s first two years, where “another parent” of the child jointly held the child out as the presumed parent’s child). Compare N.J. STAT. ANN. §§ 9:17-43(a)(4)-(5), 9:17-40 (West 2022) (effective 1983) (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”).

tation or concealment.”²³ Elsewhere, there are different time limits,²⁴ as well as the unavailability of “concealment” as a condition of extending the normal time limits for challenging residency/hold out parents.²⁵

No state to date follows the 2000 ALI Principles on parentage by estoppel, where a co-parenting pact with a potential residency/hold out parent must be undertaken by, if there are, two existing legal parents.²⁶ Yet, the 2000 ALI Principles are most appropriate, since one existing legal parent, as in a formal adoption, generally should have no agency/common authority to surrender the parental childcare rights of a second existing legal parent.²⁷ In 2021 the Maryland high court found two parent consent necessary.²⁸

²³ VT. STAT. ANN. tit. 15C, §§ 401(a)(4), 402(b)(2) (West 2022) (effective 2018).

²⁴ Compare, e.g., UNIF. PARENTAGE ACT §§ 204(a)(2) (residence/hold out in the child’s first two years), 204(b), 608(b) (UNIF. LAW COMM’N 2017) (presumption rebuttal usually must be presented before the child turns two), with UNIF. PARENTAGE ACT §§ 4(a)(4) (residence/hold out where the child is “under the age of majority”), 6(b) (UNIF. LAW COMM’N 1973) (“at any time”).

²⁵ Compare, e.g., UNIF. PARENTAGE ACT §§ 204(a)(2), 204(b), 608(b) (UNIF. LAW COMM’N 2017) (two year limit on challenging hold out/residency 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), 204(b), 607(b) (UNIF. LAW COMM’N 2000) (two year limit on actions to disprove earlier determined presumed hold out/residency 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), 6(b) (UNIF. LAW COMM’N 1973) (presumed hold out/residency parentage can be challenged “at any time”).

²⁶ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(iii) (AM. LAW INST. 2000).

²⁷ See, e.g., Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 IDAHO L. REV. 421, 461-78 (2020).

²⁸ E.N. v. T.R., 255 A.3d 1, 30 (Md. 2021) (“where there are two legal (biological or adoptive) parents, a prospective *de facto* parent must demonstrate that both legal parents consented to and fostered such a relationship or that a non-consenting parent is unfit or exceptional circumstances exist”), followed in *Martin v. MacMahan*, 264 A.3d 1224, 1234-35 (Me. 2021).

C. *De Facto Parent*

Another form of imprecise childcare parentage is *de facto* parentage. The 2017 UPA, but neither of its UPA predecessors, expressly recognizes “*de facto*” parenthood as a form of parentage for those without biological, marital or formal adoption ties.²⁹ Such parenthood is dependent upon meeting far more explicit terms than the terms underlying residency/hold out parentage.³⁰ For *de facto* parentage, an existing legal parent must have “fostered or supported” a “bonded and dependent relationship” between the child and the nonparent which is “parental in nature;”³¹ the nonparent must have held out the child as the nonparent’s own child and undertaken “full and permanent” parental responsibilities;³² and, the nonparent must have “resided with the child as a regular member of the child’s household for a significant period of time.”³³

Of particular note on *de facto* parentage is the limit on who can commence a proceeding to establish such parentage. Commencement may be undertaken only by an “individual” who is “alive” and who “claims to be a *de facto* parent of the child.”³⁴

²⁹ 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 § 203(1) (AM. LAW INST. 2000). *See also* RESTATEMENT OF THE LAW: CHILDREN AND THE LAW, Preliminary Draft No. 8, at Appendix B, at 170 (§ 1.72 on *de facto* parentage (once labeled § 1.82) is one of the “black letter” sections approved by membership).

³⁰ 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) (UNIF. LAW COMM’N 2017). Thus, there is not recognized a possible “bonded and dependent relationship” with a fetus, a fertilized egg, or some child of sex yet unconceived.

³¹ *Id.* § 609(d)(5)-(6).

³² *Id.* § 609(d)(3)-(4).

³³ *Id.* § 609(d)(1).

³⁴ *Id.* § 609(a).

The 2000 ALI Principles,³⁵ and an ALI Draft of a Restatement of the Law: Children and the Law,³⁶ also recognize forms of "de facto" parentage for those without biological, marital, 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."³⁷

Under the 2000 ALI Principles, a "parent by estoppel" is "not a legal parent," but is an individual 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)."³⁸

The 2000 ALI Principles recognize as a "de facto parent" 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."³⁹ A de facto parent, unlike a legal parent or a parent

³⁵ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.03(1)(c), 3.02(1)(c) (AM. LAW INST. 2000) (requirements include 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").

³⁶ RESTATEMENT OF THE LAW: CHILDREN AND THE LAW, Preliminary Draft No. 8, § 1.72(a) (AM. LAW INST. Oct. 2021) (requirements include residence with the child, as well as establishing that "a parent consented to and fostered the formation of the parent-child relationship").

³⁷ Under the 2000 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 decisionmaking responsibility for a child. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.04(1) (AM. LAW INST. 2000). A "legal parent" is "an individual who is defined as a parent under other state law." *Id.* § 2.03(1)(a).

³⁸ *Id.* § 2.03(1)(b).

³⁹ *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. *See, e.g., In re B.G.*, 523 P.2d 244, 254 n.21 (Cal. 1974) (not resolving whether a de facto parent may have the same rights of notice, hearing or counsel as have natural parents in Juvenile Court Law

by estoppel, has no presumptive right to “an allocation of decisionmaking responsibility for the child.⁴⁰ Further, 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.”⁴¹

The ALI Restatement Draft describes a de facto parent as a third party who establishes that the person “lived with the child for a significant period of time;” was “in a parental role” long enough that the person established “a bond and dependent relationship . . . parental in nature;” the person had no “expectation of financial compensation;” and “a parent” consented to the third party’s parental-like role.⁴² So, the ALI Draft, but not the 2000 ALI Principles, invite a childcare parentage designation adversely impacting the childcare interests of an existing and non-consenting parent.⁴³

Before and since 2017, there exist state statutes and 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

proceedings under due process or equal protection principles); *In re Kieshia E.*, 859 P.2d 1290, 1296 (Cal. 1993) (discussing standing of a de facto parent in a juvenile delinquency proceeding); *In re Dependency of J.H.*, 815 P.2d 1380, 1384 (Wash. 1991) (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). 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 cmt. c (AM. LAW INST. 2000).

⁴⁰ *Id.* § 209(2).

⁴¹ *Id.* § 209(4).

⁴² RESTATEMENT OF THE LAW: CHILDREN AND THE LAW, Preliminary Draft No. 8, § 1.72(a) (AM. LAW INST. Oct. 2021) (proof by clear and convincing evidence is required).

⁴³ The ALI Restatement Draft, like the 2017 UPA, on de facto parentage invites substantive due process violations of the childcare interests of existing and nonconsenting legal parents. See Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183, 203-05 (2020); *E.N. v. T.R.*, 255 A.3d 1, 30 (Md. 2021) (de facto parenthood requires consent by two existing legal parents, if there are two, or a finding of unfitness in a nonconsenting parent or a finding of “exceptional circumstances”); *Martin v. MacMahan*, 264 A.3d 1224, 1234-35 (Me. 2021).

comparable Maine and Delaware statutes⁴⁴ and a less comparable Wisconsin Supreme Court precedent,⁴⁵ that were utilized by the drafters of the 2017 UPA.⁴⁶ Since 2017, a few states have statutorily recognized 2017 UPA de facto parenthood.⁴⁷

On occasion, statutes within a single U.S. state recognize both residency/hold out and de facto parents who are neither biologically-tied nor maritally-tied to, and who are not 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,”⁴⁸ as well as provides for de facto parents who, inter alia, resided with the child “for a significant period of time,” established with the child “a bonded and

⁴⁴ DEL. CODE ANN. tit. 13, § 8-201(c) (West 2022) (effective 2013); ME. REV. STAT. ANN. tit. 19-a, § 1891 (2022) (effective July 1, 2016).

⁴⁵ *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (holding that a parental-like relationship can prompt visitation rights when they are in the 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 (S.C. 2008) (following *H.S.H.-K.*, 533 N.W. at 435-36, which set out norms for nonparent child visitation orders). *See also* *Conover v. Conover*, 141 A.3d 31, 73-75 (Md. 2016) (using *H.S.H.-K.* in recognizing the 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 (5th Cir. 2009) (relying on, inter alia, *Favre v. Medders*, 128 So. 2d 877, 879 (Miss. 1961)).

By contrast, in some U.S. 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.*, Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Power and More Rational Distinctions*, 50 CREIGHTON L. REV. 479, 479 (2017). For a forceful argument on the need for continuing the common law “equitable parenthood doctrine” even where there are statutes, see 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).

⁴⁶ UNIF. PARENTAGE ACT § 609 cmt. (UNIF. LAW COMM’N 2017).

⁴⁷ *See, e.g.*, VT. STAT. ANN. tit. 15C, §§ 201(6) and 501 (West 2022) (effective 2018); WASH. REV. CODE ANN. § 26.26A.440 (West 2022) (effective 2019).

⁴⁸ ME. REV. STAT. ANN. tit. 19-A, § 1881(3) (2022).

dependent relationship,” and “accepted full and permanent responsibilities as a parent . . . without expectation of financial compensation.”⁴⁹ Similarly, there are both residency/hold out and de facto parents in Delaware,⁵⁰ Vermont,⁵¹ and Washington.⁵²

D. *Intended Assisted Reproduction Parent*

i. *Nonsurrogacy Parent*

A third form of imprecise childcare parentage involves nonsurrogacy assisted reproduction. The 1973 UPA does not deal with the “many complex and serious problems raised by the practice of artificial insemination.”⁵³ It does, however, address “one fact situation that occurs frequently,” a “consent” by a husband to the artificial insemination of his wife with “semen donated by a man not her husband.”⁵⁴ 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.⁵⁵ The husband is a non-presumptive spousal parent. The semen donor who is not the husband is to “be treated in law as if he were not the natural father.”⁵⁶

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 assisted reproduction parentage settings, the 2017 UPA “is substantially similar” to the 2000 UPA, with the “primary changes. . . in-

⁴⁹ *Id.* § 1891(3).

⁵⁰ DEL. CODE ANN. tit. 13, §§ 8-204(a)(5) (presumed residency/hold out parent), 8-201(c) (West 2022) (de facto parent).

⁵¹ VT. STAT. ANN. tit. 15C, §§ 401(a)(4) (presumed residency/hold out parent after the first two years), 501(a) (West 2022) (de facto parent).

⁵² WASH. REV. CODE ANN. §§ 26.26A.115(1)(b) (presumed residency/hold out parent “for the first four years”), 26.26A.440 (West 2022) (de facto parent).

⁵³ UNIF. PARENTAGE ACT § 5 cmt. (UNIF. LAW COMM’N 1973).

⁵⁴ *Id.* § 5(a).

⁵⁵ *Id.* (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”).

⁵⁶ *Id.* § 5(b).

tended to update the article so that it applies equally to same-sex couples.”⁵⁷ The 2017 UPA recognizes that a sperm donor is not always a parent of a child conceived by assisted reproduction.⁵⁸ For there to be two legal parents, a consent to parentage must be signed by the person giving birth and “an individual who intends to be a parent,” though the “record” need not be certified by a physician.⁵⁹ Seemingly, “consent in a record” can be undertaken “before, on, or after birth of the child.”⁶⁰ The lack of this form of consent does not foreclose childcare parentage for an intended parent where there is clear-and-convincing evidence of an “express agreement” between the individual and the person giving birth “entered before conception.”⁶¹ As well, the lack of such consent or agreement 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.⁶² The nonparental status of one married to a person giving birth to a child born by assisted reproduction, even if a gamete donor, may be established by a showing of a lack of consent, of any agreement, and of holding out of the child as one’s own.⁶³

⁵⁷ UNIF. PARENTAGE ACT § 701 cmt. preceding (UNIF. LAW COMM’N 2017).

⁵⁸ *Id.* §§ 702-704.

⁵⁹ *Id.* § 704(a).

⁶⁰ *Id.* § 704(b).

⁶¹ *Id.* § 704(b)(1). It is clear why an “express agreement” undertaken postconception 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. Perhaps instead of a postconception agreement, the 2017 UPA contemplated a prebirth VAP, as it recognizes an “intended parent” can sign a VAP. Yet, an “intended parent” under the 2017 UPA in many states has no prebirth VAP access because the states follow the 1973 UPA or 2000 UPA which only authorize postbirth (paternity) VAPs. UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. LAW COMM’N 1973) (“paternity” acknowledgment “of the child” in a “writing filed with” the state, which is not disputed by “the mother”); UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM’N 2000) (“man claiming to be the genetic father of the child” signs together with the “mother of a child”).

⁶² UNIF. PARENTAGE ACT § 704(b)(2) (UNIF. LAW COMM’N 2017). *See, e.g.,* Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014).

⁶³ UNIF. PARENTAGE ACT § 705 (UNIF. LAW COMM’N 2017).

The nonsurrogacy parentage norms in the UPAs are now reflected in some U.S. state statutes⁶⁴ and in precedents untethered to statutes,⁶⁵ with significant interstate variations.⁶⁶ The 2017 UPA provisions have been enacted in a few states.⁶⁷

Childcare parentage for those giving birth and for intended parents in nonsurrogacy 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

⁶⁴ American state statutes include: DEL. CODE ANN. tit. 13, § 8-704(a) (West 2022) (“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.”); N.H. REV. STAT. ANN. § 5-C:30(I)(b) (2022) (unwed mother has sperm donor “identified on birth record” where “an affidavit of paternity” has been executed); N.M. STAT. ANN. § 40-11A-703 (West 2022) (“A person who provides eggs, sperm, or embryos for or consents to assisted reproduction as provided in Section 704 [“record signed . . . before the placement”] . . . with the intent to be the parent of a child is a parent of the resulting child”); WYO. STAT. ANN. § 14-2-904(a) (West 2022) (like Delaware); TEX. FAM. CODE § 160.7031 (West 2022) (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).

⁶⁵ Precedents include: *Jason P.*, 171 Cal. Rptr. 3d at 797 (though the statute (both pre-2011 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); *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488 (N.Y. 2016) (agreement between lesbian partners can prompt parentage in the non-birth mother); *Ramey v. Sutton*, 362 P.3d 217 (Okla. 2015) (unwritten pre-conception agreement prompts in loco parentis childcare status for the former lesbian partner of birth mother, though she contributed no genetic material); *Shineovich v. Shineovich*, 214 P.3d 29 (Or. Ct. App. 2009) (holding that to avoid constitutional infirmity, an assisted reproduction statute as written solely for married opposite sex couple applied to same sex domestic partners).

⁶⁶ The laws are reviewed, and critiqued, in 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) .

⁶⁷ The 2017 UPA suggested assisted reproduction statutes involving no surrogates, appearing in UNIF. PARENTAGE ACT §§ 701-708 (UNIF. LAW COMM’N 2017), are followed in VT. STAT. ANN. tit. 15C, § 701 (West 2022) (effective July 1, 2018) and WASH. REV. CODE ANN. § 26.26A.600 (West 2022) (effective 2019).

may be used, but they are not required.⁶⁸ Suggested state-formulated consent forms should be more generally available as informed consent would be better assured and there would be greater certainty in resolving factual disputes regarding party intentions.⁶⁹ Such forms would be comparable to the required forms for VAPs.⁷⁰ State-sanctioned forms on nonsurrogacy assisted reproduction, compatible with a state's laws on assisted reproduction, would be especially helpful to do-it-yourselfers who otherwise, for example, might employ internet forms which will not later be recognized as enforceable agreements.⁷¹

ii. *Surrogacy Parent*

A fourth form of imprecise childcare parentage includes some surrogacy assisted reproduction parentage. As to surro-

⁶⁸ CAL. FAM. CODE § 7613.5(d) (West 2022) (effective Jan. 1, 2020) (forms on 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).

⁶⁹ I urged that such forms be created in Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage*, 92 NOTRE DAME L. REV. ONLINE SUPP. 87 (Mar. 30, 2017) [hereinafter *Formal Declarations*]. In the absence of legally sanctioned forms that are widely employed, disputes can arise over whether, for example, a certain writing meets the statutory standard for a private agreement on intended parentage. See, e.g., *Jason P.*, 171 Cal. Rptr. 3d at 798 (deciding that an informed consent form related to an in vitro fertilization, which listed the sperm provider as an intended parent, was not a preconception “writing” granting the provider “legal status as a parent”).

⁷⁰ See, e.g., Jeffrey A. Parness & Zach Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U BALT. L. REV. 53, 63-87 (2010) (reviewing similarities and differences in state-generated VAP forms). At times, written parentage acknowledgments operate though state-generated VAP forms. See, e.g., D.C. CODE ANN. § 16-909(a)(4) (West 2022) (effective Apr. 9, 2016) (presumption that a man is the father of a child if he “has acknowledged paternity in writing”); KAN. STAT. ANN. § 23-2208(a)(4) (West 2022) (effective 1994) (a man is presumed 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); N.M. STAT. ANN. § 40-11A-204(A)(4)(c) (West 2022) (effective Jan. 1, 2010) (a man is presumed 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).

⁷¹ See, e.g., *Gatsby v. Gatsby*, 495 P.3d 996, 999, 1003 (Idaho 2021) (form found online suffered from “severe inadequacies”).

gacy, the 1973 UPA is silent.⁷² The 2017 UPA, like the 2000 UPA, distinguishes between genetic and gestational surrogacy.⁷³ The UPA surrogacy provisions are limited to instances of assisted reproduction births.⁷⁴ Unlike its 2000 predecessor, the 2017 UPA does not require all surrogacy agreements to be validated by a court order prior to any medical procedures.⁷⁵ So there is more imprecision in the 2017 UPA than in the 2000 UPA.

The 2017 UPA imposes differing requirements for the two surrogacy forms, with “additional safeguards or requirements on genetic surrogacy agreements,”⁷⁶ since only they involve a woman giving birth while “using her own gamete.”⁷⁷ The 2017 UPA recognizes there can be “one or more intended parents”⁷⁸ in surrogacy settings.⁷⁹

⁷² UNIF. PARENTAGE ACT § 5 cmt. (UNIF. LAW COMM’N 1973) (while 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”).

⁷³ UNIF. PARENTAGE ACT § 801 cmt. preceding (UNIF. LAW COMM’N 2017).

⁷⁴ UNIF. PARENTAGE ACT § 801(a)(i) (UNIF. LAW COMM’N 2000) (“agrees to pregnancy by means of assisted reproduction”); UNIF. PARENTAGE ACT § 801(3) (UNIF. LAW COMM’N 2017) (surrogacy agreement on pregnancy “through assisted reproduction”). This is not to say there are no instances of surrogacy undertaken through consensual sex. *See, e.g.,* K.B. v. M.S.B., 2021 BCSC 1283 (Can. B.C. Sup. Ct.) (parentage action by person who gave birth against sperm provider and spouse). On occasion a female couple undertakes intended parentage when one partner has sex. *See, e.g.,* Cook v. Sullivan, 330 So. 3d 152 (La. 2021) (lesbian partner has intercourse “with a friend”; this former same-sex partner is deemed a nonparent and not entitled to custody because there was no proof of substantial harm to child without such custody).

⁷⁵ UNIF. PARENTAGE ACT § 808 cmt. preceding (UNIF. LAW COMM’N 2017).

⁷⁶ *Id.* § 801 cmt. preceding. The common safeguards or requirements for all surrogacy pacts are found in *id.* §§ 802-807. *See also id.* §§ 808-812 (special requirements for gestational surrogacy agreements), 813-818 (special requirements for genetic surrogacy agreements).

⁷⁷ *Id.* § 801(1). Gestational surrogacy covers births to a woman who uses “gametes that are not her own.” *Id.* § 801(2). The special rules for gestational surrogacy pacts are found in *id.* §§ 808-812, while the special rules for genetic surrogacy pacts are found in *id.* §§ 813-818.

⁷⁸ *Id.* § 801(3).

⁷⁹ The 2017 UPA does not address accidental surrogacy, such as where there is a “tragic mix-up at a fertility clinic through which a woman became a ‘gestational mother’ to another couple’s embryo, when the embryo was mistak-

The common requirements for the two forms of surrogacy pacts under the 2017 UPA include signatures in a record, “attested by a notarial officer or witnesses,” independent legal counsel for all signatories, and, execution before implantation.⁸⁰ Special provisions for gestational surrogacy pacts include an opportunity for “party” termination “before an embryo transfer” and an opportunity, but not a requirement, for a prebirth court order declaring parentage vesting at birth.⁸¹ 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” and understood its terms;⁸² that a genetic surrogate may withdraw consent “in a record” at any time before 72 hours after the birth;⁸³ 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.”⁸⁴ So there is more precision in genetic surrogacy parentage than in gestational surrogacy parentage under the 2017 UPA.

UPA surrogacy parentage norms are now reflected both in state statutes⁸⁵ and judicial precedents untethered to statutes.⁸⁶

only implanted into the wrong woman’s uterus.” *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 21 (N.Y. App. Div. 2000) (custody awarded to the embryo creators, with no visitation for the gestational mother).

⁸⁰ UNIF. PARENTAGE ACT § 803(6)-(7), (9) (UNIF. LAW COMM’N 2017). Thus, by definition, a person who may become pregnant through sex cannot agree to be a surrogate, as cannot a person who is pregnant and only agrees to surrogacy postpregnancy. *Id.* § 801(1)-(2) (each surrogacy form applies only to a person “who agrees to become pregnant through assisted reproduction”).

⁸¹ *Id.* §§ 808(a), 811(a)(1).

⁸² *Id.* § 813(a)-(b).

⁸³ *Id.* § 814(a)(2). Genetic and gestational surrogates should be recognized, however, as having federal constitutional parental opportunity interests under *Lehr v. Robertson*, 463 U.S. 248, 261-62. *See, e.g., Matter of Schnitzer*, 493 P.3d 1071 (Or. Ct. App. 2021).

⁸⁴ UNIF. PARENTAGE ACT § 818(b) (UNIF. LAW COMM’N 2017).

⁸⁵ *See, e.g., WASH. REV. CODE ANN.* § 26.26.A.715 (West 2022) (effective Jan. 1, 2019) (gestational and genetic surrogacy agreements). In New Hampshire, which veers from the 2017 UPA, one statutory scheme covers genetic and gestational surrogacy. There, before insemination pursuant to a surrogacy contract will be deemed “lawful,” N.H. REV. STAT. ANN. § 168-B:16(I) (2022), a court “shall” be petitioned for “judicial preauthorization,” *id.* § 168-B:21(I). Requirements include that the “intended mother” is “psychologically unable to

State surrogacy laws vary significantly, as between laws that do⁸⁷ and do not⁸⁸ recognize genetic surrogacy. Certain provisions of the 2017 UPA have been enacted in a few states, though there are different degrees of UPA incorporation.⁸⁹ Elsewhere, there operate major sections of the 2000 UPA on surrogacy.⁹⁰ As yet there are generally no state required forms on surrogacy pacts, although there are, as noted, suggested forms for nonsurrogacy

bear a child without risk to her health or to the child's health;" the "intended father" "provided a gamete;" and either the intended mother or surrogate provided the ovum. Authorization is permitted only where the "surrogacy contract is in the best interest of the intended child." *Id.* § 168-B:23(III)(d).

⁸⁶ Precedents recognizing judicial discretion to enforce surrogacy arrangements include: *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011) (biological father's male domestic partner can also be intended parent of a child born to a gestational surrogate). *In re Baby*, 447 S.W.3d 807 (Tenn. 2014) ("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*, No. W2014-01281-COA-R3-JV, 2015 WL 1956247 (Tenn. Ct. App. Apr. 24, 2015) (a gestational surrogate for a married couple is placed on the birth certificate, as required by the statute where the intended father's/husband's sperm is used with an egg from an unknown donor and the intended mother/wife was recognized by all parties as the legal mother; reiterates the plea from *In re Baby*, 447 S.W.3d 807, that the legislature should enact a comprehensive statutory scheme); *In re Paternity of F.T.R.*, 833 N.W.2d 634, ¶ 73 (Wis. 2013) (enforcing a surrogacy pact between two couples as long as the 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"). Beyond enforcing a surrogacy pact in the absence of a statute, an intended parent (also the sperm donor) who employed a gestational surrogate was allowed in one case to adopt formally his genetic offspring. *Matter of John*, 103 N.Y.S.3d 541 (N.Y. App. Div. 2019).

⁸⁷ See, e.g., WASH. REV. CODE ANN. § 26.26.A.715 (West 2022) (gestational and genetic surrogacy pacts).

⁸⁸ See, e.g., MICH. COMP. LAWS ANN. § 722.853(f) (West 2022) (effective Mar. 28, 2014) ("surrogate carrier means the female in whom the embryo is implanted").

⁸⁹ See, e.g., 15 R.I. GEN. LAWS ANN. § 15-8.1-801 (West 2022) (effective Jan. 1, 2021) (gestational carrier agreement); VT. STAT. ANN. tit. 15C, § 801 (West 2022) (effective July 1, 2018) (gestational carrier agreement); WASH. REV. CODE ANN. § 26.26.A.715 (2022) (effective Jan. 1, 2019) (gestational or genetic surrogacy agreement).

⁹⁰ See, e.g., UTAH CODE ANN. § 78B-15-801 (West 2022) (effective Feb. 7, 2008) (similar to 2000 UPA).

assisted reproduction births in California.⁹¹ Increased mandates on required forms and/or increased availability of suggested forms would diminish significantly disputes over surrogacy parentage.⁹²

E. *Voluntary Acknowledgment Parent*

All three UPAs recognize childcare parentage arising from voluntary parentage (once called paternity) acknowledgments (VAPs). This parentage establishment form has not been imprecise since the mid-1990s as state laws generally just follow federal mandates.⁹³ But this form is deceptively imprecise in its disestablishment norms. As with other forms of childcare parentage, there can be multistate conduct relevant in VAP disputes.

The 1973 UPA recognized a “presumption of paternity” for a man who acknowledges his paternity in a writing filed with the state which is not thereafter disputed by the birth mother “within a reasonable time.”⁹⁴ This presumption could only be rebutted by “clear and convincing evidence” which accompanied a court decree “establishing paternity of the child by another man.”⁹⁵

The 2000 UPA recognized an “acknowledgment of paternity” could be undertaken by the “mother of a child and a man claiming to be the genetic father.”⁹⁶ Acknowledgments usually

⁹¹ See CAL. FAM. CODE § 7613.5 (West 2022).

⁹² *Formal Declarations*, *supra* note 69, at 104. See also *Guardianship of Keanu*, 174 N.E.3d 1228 (Mass. App. Ct. 2021) (recognizing the need for legislation given “the risks of an informal surrogacy”).

⁹³ 42 U.S.C.A. § 666(a)(11) (West 2022), as reflected, for example, in N.Y. FAM. CT. ACT § 516-a(d) (McKinney 2022). But there are some unique state parentage acknowledgment avenues. See, e.g., KAN. STAT. ANN. § 23-2208(a)(4) (West 2022) (eff. 1994) (“man notoriously or in writing recognizes paternity . . . including but not limited to a voluntary acknowledgment made in accordance with K.S.A. 23-2223 or K.S.A. 65-2409a”); *What Constitutes “Notorious Recognition” or “Notorious Acknowledgment” in Context of Parentage-Related Claims*, 69 A.L.R.7th Art. 7 (2021). On the means of proving an out-of-state VAP, see, e.g., 28 U.S.C.A. § 1739 (West 2022) (full faith and credit to nonjudicial records).

⁹⁴ UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. LAW COMM’N 1973).

⁹⁵ *Id.* § 4(b).

⁹⁶ UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM’N 2000). The requirements for execution included “a record”; a possible “penalty of perjury”; no other father; consistency with any genetic testing results; and an equivalence of an acknowledgment with a “judicial adjudication.” *Id.* § 302.

could be overcome via a rescission by a “signatory” within sixty days of signing. After sixty days, but within two years of signing, acknowledgments could be overcome by proof of “fraud, duress, or material mistake of fact.”⁹⁷ The 2000 UPA on VAPs was grounded on the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.⁹⁸

The 2017 UPA recognized an acknowledgment of parentage could be undertaken by “a woman who gave birth to a child and an alleged genetic father of the child,” an intended parent via nonsurrogacy assisted reproduction, or a “presumed parent.”⁹⁹ As with the 2000 UPA, VAPs could be overcome by rescission¹⁰⁰ or by challenge brought by a signatory after the period for rescission ended, but “not later than two years” after the VAP became effective.¹⁰¹ A challenge by a signatory¹⁰² is differently guided than a challenge by a nonsignatory.¹⁰³

VAP challenge laws vary widely between states, including on how fraud, duress, and/or mistake are measured, how long one has to challenge, and who has standing to challenge.¹⁰⁴

F. Spousal Parent

Spousal parentage arises presumptively under the UPAs when a child is born to one then married or once married to a birth mother, or to one who marries (or attempts to marry) a birth mother after birth.¹⁰⁵ The form of parentage is established at varying times under state laws, such as when the birth mother

⁹⁷ *Id.* § 308(a).

⁹⁸ *Id.* Art. 3 introductory cmt.

⁹⁹ UNIF. PARENTAGE ACT § 301 (UNIF. LAW COMM’N 2017).

¹⁰⁰ *Id.* § 308.

¹⁰¹ *Id.* § 309(a).

¹⁰² *Id.* § 310.

¹⁰³ *Id.* §§ 309(b), 610 (also must be brought within two years).

¹⁰⁴ See, e.g., Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgment of Paternity*, 92 CHI-KENT L. REV. 177, 185-203 (2017).

¹⁰⁵ See, e.g., UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. LAW COMM’N 1973) (“born during the marriage, or within 300 days after the marriage is terminated”); *id.* § 4(a)(3) (marriage or attempted marriage postbirth); UNIF. PARENTAGE ACT § 204(a)(1)-(2) (UNIF. LAW COMM’N 2000) (“child is born during the marriage” or “within 300 days after the marriage is terminated”); *id.* § 204(a)(4) (marriage or attempted marriage postbirth); UNIF. PARENTAGE ACT § 204(a)(1)(A)-(B) (UNIF. LAW COMM’N 2017) (“child is born during the

was married at the time of conception,¹⁰⁶ sometime during the pregnancy,¹⁰⁷ or at the time of birth.¹⁰⁸ Further, state laws, as with the UPAs, recognize that postbirth marriages can prompt spousal parentage.¹⁰⁹ Recently, spousal parentage laws have recognized parentage in women married to birth mothers at the relevant time, though there are clearly no biological ties.¹¹⁰ While the time requirements relevant to establishing spousal parentage do vary a bit interstate, choice of law issues do not arise often.¹¹¹ The time from conception to any postbirth marriage usually does

marriage” or “not later than 300 days after the marriage is terminated”); *id.* § 204(a)(1)(C) (marriage or attempted marriage postbirth).

¹⁰⁶ See, e.g., MICH. COMP. LAWS ANN. § 722.1433I (West 2022) (effective Mar. 17, 2015) (marriage at time of conception).

¹⁰⁷ See, e.g., ARIZ. REV. STAT. ANN. § 25-814(A)(1) (2022) (effective 2003) (marriage “at any time in the ten months immediately preceding the birth”).

¹⁰⁸ See, e.g., MICH. COMP. LAWS ANN. § 722.1433(e) (West 2022) (marriage at the time of birth).

¹⁰⁹ See UNIF. PARENTAGE ACT § 4(a)(3) (UNIF. LAW COMM’N 1973) (actual or attempted marriage “after the child’s birth” and the spouse acknowledged paternity, is named on the birth certificate or is obligated to pay child support under a written agreement or court order); UNIF. PARENTAGE ACT § 204(a)(4) (UNIF. LAW COMM’N 2000) (similar to 1973 UPA); UNIF. PARENTAGE ACT § 204(a)(1)(c) (UNIF. LAW COMM’N 2017) (actual or attempted marriage “after the birth of the child” and the spouse “asserted parentage” in a state record or is named on the birth certificate). Similar state laws include COLO. REV. STAT. ANN. § 19-4-105(1)(c) (West 2022) (effective Aug. 10, 2022) (similar to 1973 and 2000 UPAs); KAN. STAT. ANN. § 23-2208(a)(3) (West 2022) (similar to 1973 and 2000 UPAs); MONT. CODE ANN. § 40-6-105(1)(c) (West 2022) (effective Oct. 1, 2019) (similar to 1973 and 2000 UPAs); R.I. GEN. LAWS ANN. § 15-8.1-401(a)(3) (West 2022) (effective Jan. 1, 2021) (similar to 2017 UPA); WASH. REV. CODE ANN. § 26.26A.115(1)(a)(iii) (West 2022) (similar to 2017 UPA).

¹¹⁰ See UNIF. PARENTAGE ACT §§ 204(a) (“individual is presumed to be a parent”) and 701 (UNIF. LAW COMM’N 2017) (“assisted reproduction” norms on parentage do not apply to “child conceived by sexual intercourse”). Similar state laws include R.I. GEN. LAWS ANN. § 15-8.1-401(a)(1) (West 2022) (presumed parentage where the individuals who gave birth to the child are married to each other and the child is “born during the marriage”); WASH. REV. CODE ANN. § 26.26A.115(1)(a) (West 2022) (similar; “the individual and the woman who gave birth to the child are married”).

¹¹¹ *But see* McGovern v. Clark, 298 So. 3d 1244 (Fla. Dist. Ct. App. 2020) (the effect of a marriage in New Hampshire of a same-sex female couple on the parentage of children born in Florida and still residing in Florida would be assessed under Florida law, FLA. STAT. ANN. § 742.091 (West 2022), governing parentage in children born prior to the marriage).

not span much time and couples with newborns often remain together in one place during this entire period.

Not unlike VAP parentage, spousal parentage laws across the United States have more significant variations on disestablishment. VAP disestablishments are driven by federal child support subsidy requirements, including laws on rescissions and challenges.¹¹² As noted, the VAP challenge norms on fraud, duress, and mistake are imprecise and contain significant interstate variations. With spousal parentage, there are usually disestablishments by rebuttals.¹¹³ The rebuttal norms vary, *inter alia*, in their substantive override requirements (i.e., on the significance of no biological ties in the spousal parent),¹¹⁴ their standing requirements (i.e., who can seek to rebut),¹¹⁵ and their timing require-

¹¹² 42 U.S.C.A. § 666(a)(5)(D)(iii) (West 2022).

¹¹³ See UNIF. PARENTAGE ACT § 4(b) (UNIF. LAW COMM'N 1973) (rebuttal “in an appropriate action only by clear and convincing evidence”); UNIF. PARENTAGE ACT §§ 204(b) (rebuttal under Article 6), 607-608 (UNIF. LAW COMM'N 2000). *But see* UNIF. PARENTAGE ACT §§ 204(b) (“overcome” a spousal parent presumption by an Article 6 adjudication or a “valid denial of parentage” under an Article 3 VAP), 303 (presumed spousal parent signs “a denial of parentage in a record”), 608 (UNIF. LAW COMM'N 2017) (“proceeding to determine whether a presumed parent is a parent”).

¹¹⁴ Compare, e.g., UNIF. PARENTAGE ACT § 4(a) (UNIF. LAW COMM'N 1973) (spousal parentage in a “man presumed to be the natural father of a child”), with UNIF. PARENTAGE ACT § 204(a) (UNIF. LAW COMM'N 2000) (spousal parentage in a man “presumed to be the father”), and UNIF. PARENTAGE ACT § 204(a) (UNIF. LAW COMM'N 2017) (spousal parentage in an “individual who is “presumed to be a parent”). Similar state laws include ALA. CODE § 26-17-204(a)(1) (2022) (similar to 2000 UPA); COLO. REV. STAT. ANN. § 19-4-105(1) (West 2022) (effective Aug. 10, 2022) (similar to 1973 UPA); 15 R.I. GEN. LAWS ANN. § 15-8.1-401(a)(1) (West 2022) (similar to 2017 UPA); WASH. REV. CODE ANN. § 26.26A.115(1)(a)(i) (West 2022) (similar to 2017 UPA); WISC. STAT. ANN. § 891.41(1)(a) (West 2022) (similar to 1973 UPA); LA. CIVIL CODE ANN. art. 185 (2022) (similar to 2000 UPA; husband “is presumed to be the father”).

¹¹⁵ Compare, e.g., UNIF. PARENTAGE ACT § 6(a)(2) (UNIF. LAW COMM'N 1973) (a “child, his natural mother, or a man presumed to be his father” due to actual or attempted marriage can seek a declaration of “the non-existence of the father and child relationship”), with UNIF. PARENTAGE ACT § 607(a) (UNIF. LAW COMM'N 2000) (where a child has a presumed spousal parent, a related adjudication of parentage may be brought by “a presumed father, the mother or another individual”), and UNIF. PARENTAGE ACT § 602 (UNIF. LAW COMM'N 2017) (standing to adjudicate parentage of presumed spousal parent recognized, *inter alia*, in the child, the birth mother, the spousal parent, an individual who

ments (i.e., how long do those with standing have to seek to rebut).¹¹⁶

III. Choosing Childcare Parentage Laws

A. Introduction

In July 2017, the ULC recommended for enactment in all states a new UPA.¹¹⁷ This act followed the 1973 and 2000 UPAs which were widely adopted by state lawmakers and which continue to be employed in many states. Each UPA speaks to establishing childcare parentage¹¹⁸ and to choosing between differing

seeks a parentage order, a child-support agency, an authorized adoption agency or a licensed child-placement agency). State laws that vary include MO. ANN. STAT. § 210.826(1) (West 2022) (child, natural mother, presumed father, an alleged father, any person “having physical or legal custody for more than sixty days,” or “the family support division”); NEV. REV. STAT. ANN. § 126.071(1) (West 2022) (effective 1987) (action involving “existence or nonexistence of the father and child relationship” may be brought by a child, the natural mother, a man presumed or alleged to be the father, or “an interested third party”).

¹¹⁶ Compare, e.g., UNIF. PARENTAGE ACT § 6(a)(2) (UNIF. LAW COMM’N 1973) (action to declare “non-existence of the father and child relationship involving spousal parentage” must be brought “within a reasonable time after obtaining knowledge of relevant facts”), with UNIF. PARENTAGE ACT § 607 (UNIF. LAW COMM’N 2000) (adjudication of parentage of a child having a “presumed father must be commenced not later than two years after the birth of the child;” no time limit, however, where no cohabitation or sexual intercourse “during the probable time of conception” and where spousal parent “never openly held out the child as his own”), and UNIF. PARENTAGE ACT § 608(b)(1) (UNIF. LAW COMM’N 2017) (similar to 2000 UPA § 607). Differing state laws include COLO. REV. STAT. ANN. § 19-4-107(1)(b) (West 2022) (effective Aug. 8, 2018) (no later than five years after the child’s birth); 750 ILL. COMP. STAT. ANN. 46/205(b) (West 2022) (eff. Jan. 1, 2017) (action possible until the child is eighteen).

¹¹⁷ A review of the 2017 UPA, its predecessors, and its goals is provided by its Reporter in Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J.F. 589, 597-99 (2018).

¹¹⁸ Childcare parentage establishment vests federal, constitutionally protected interests in the “care, custody and control” of children. *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Such parentage establishment may also operate outside of childcare. Compare UNIF. PARENTAGE ACT § 1 (UNIF. LAW COMM’N 1973) (as used in the Act, “parent and child relationship means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations”), with UNIF. PARENTAGE ACT § 203 (UNIF. LAW COMM’N 2000) (a “parent-child

childcare parent laws in cases involving multistate conduct. The choice of law norms in the UPAs have become increasingly problematic when applied to cases involving newer forms of childcare parentage, since they are imprecise by nature and reliant on assessing parental-like conduct occurring at varying times. The next section reviews the UPA choice of law norms, while the following section demonstrates some bad choices in choosing between the differing state childcare parent laws of two or more interested states.

B. UPA Choice of Law Norms on Childcare Parentage

The 1973 UPA says a parentage action “may be brought in the county in which the child or the alleged father resides or is found or, if the father is deceased, in which proceedings for probate of his estate have been or could be commenced.”¹¹⁹ Once parentage is the subject of “a judgment or order,” the issuing court has continuing jurisdiction to modify or revoke.¹²⁰ The 1973 UPA does not speak directly to choice of law in multistate conduct cases. Yet it does hint that respect for out-of-state recognitions of paternal child support declarations, acknowledgments, and adjudications may be needed and that UPA parentage determinations might be applicable for purposes beyond childcare, as with child support and heirship in probate proceedings.¹²¹

The 2000 UPA does address choice of law. It says that a court shall apply its own law “to adjudicate the parent-child relationship.”¹²² This norm is said not to depend on either “the place of birth of the child” or “the past or present residence of the child.”¹²³ As “for a proceeding to adjudicate parentage,” the pos-

relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of this State”), and UNIF. PARENTAGE ACT § 203 (UNIF. LAW COMM’N 2017) (similar to 2000 UPA § 203).

¹¹⁹ UNIF. PARENTAGE ACT § 8(c) (UNIF. LAW COMM’N 1973).

¹²⁰ *Id.* § 18.

¹²¹ *Id.* § 17(a) (“If the existence of the father and child relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated . . . the obligation of the father may be enforced in the same *or other* proceedings”) (emphasis added).

¹²² UNIF. PARENTAGE ACT § 103(b) (UNIF. LAW COMM’N 2000).

¹²³ *Id.* § 103(b)(1)-(2). These provisions on forum law application regardless of place of birth or residence operate in several American jurisdictions. *See*,

sible venues include a county in which “the child resides or is found; the respondent resides or is found if the child does not reside in this State; or a proceeding of probate or administration of the presumed or alleged father’s estate has been commenced.”¹²⁴ Thus, in a case seeking to establish parentage, the 2000 UPA eliminates as a possible venue a county in which the respondent resides or is found if the child resides in the same state, but in a different county. It also eliminates a county where the alleged parent’s estate “could be commenced.”

The preference for application of forum law is expressly excepted in the 2000 UPA. The Act says a “court . . . shall give full faith and credit” to a VAP which was properly executed in another state and has not been rescinded or successfully challenged.¹²⁵ The Act further says that a valid VAP, filed with the state birth records office, “is equivalent to an adjudication of paternity.”¹²⁶

The 2017 UPA says that in a proceeding to adjudicate parentage, the applicable law does not depend on “the place of birth of the child” or “the past or present residence of the child,”¹²⁷ with the court to apply its own law “to adjudicate parentage.”¹²⁸ Venue “in a proceeding to adjudicate parentage” is appropriate in a county in which “the child resides or is found;” in a county where “the respondent resides or is found if the child resides out of state;” or in a county where there is commenced “a proceeding for administration of the estate of a person who is or may be a

e.g., DEL. CODE ANN. tit. 13, § 8-103(b) (West 2022); 750 ILL. COMP. STAT. ANN. 46/104(b) (West 2022); ME. REV. STAT. ANN. tit. 19-A, § 1833(2) (2022) (effective Jan. 1, 2016); N.M. STAT. ANN. § 40-11A-103(B) (West 2022); N.D. CENT. CODE ANN. § 14-20-03(2) (West 2022); OKLA. STAT. ANN. tit. 10, § 7700-103(B) (West 2022) (effective Nov. 1, 2006); WASH. REV. CODE ANN. § 26.26A.040 (West 2022) (effective Jan. 1, 2019).

¹²⁴ UNIF. PARENTAGE ACT § 605 (UNIF. LAW COMM’N 2000).

¹²⁵ *Id.* §§ 311, 307, 308.

¹²⁶ *Id.* § 305(a).

¹²⁷ UNIF. PARENTAGE ACT § 105 (UNIF. LAW COMM’N 2017).

¹²⁸ *Id.* § 105. The 2017 UPA provision on choice of forum law “to adjudicate parentage” already has been substantially enacted in a few American states. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-453 (West 2022); WASH. REV. CODE ANN. § 26.26A.040 (West 2022). *See also* 15 R.I. GEN. LAWS ANN. § 15-8.1-103(b) (West 2022) (“court shall apply the law of Rhode Island to adjudicate parentage”).

parent.”¹²⁹ The 2017 choice of law and venue norms thus substantially follow the 2000 UPA norms, including its exception for voluntary parentage acknowledgments.¹³⁰

In declaring forum state law applicable “to adjudicate the parent-child relationship” in 2000 and to “adjudicate parentage” in 2017, the UPAs were said to follow the Uniform Interstate Family Support Act (UIFSA).¹³¹ In each instance, a UPA Comment asserts that this directive “simplifies choice of law principles,” though recognizing that should the chosen state provide “an inappropriate forum, dismissal for forum non-conveniens may be appropriate.”¹³²

The 1996 and 2008 versions of the UIFSA generally speak to how a “responding tribunal” should proceed when asked by an “initiating tribunal” to determine the duty of, and amount payable for, child support. Here, the respondent is not subject to per-

¹²⁹ UNIF. PARENTAGE ACT § 605 (UNIF. LAW COMM’N 2017).

¹³⁰ As with the 2000 UPA on voluntary paternity acknowledgment, the 2017 UPA excepts forum law application where a voluntary parentage acknowledgment was properly executed and filed in another state. UNIF. PARENTAGE ACT §§ 305, 311 (UNIF. LAW COMM’N 2000); UNIF. PARENTAGE ACT §§ 305, 311 (UNIF. LAW COMM’N 2017). While the 2000 UPA speaks of “paternity” and not “parentage” acknowledgments, its provisions, where adopted, have been read to permit parentage acknowledgments by some women, as where these women contributed gametes employed in pregnancies leading to birth. See Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 *YALE J.L. & FEMINISM* 99 (2018); Jennifer P. Schrauth, Note, *She’s Got to Be Somebody’s Baby: Using Federal Voluntary Acknowledgments to Protect the Legal Relationship of Married Same-Sex Mothers and Their Children Conceived Through Artificial Insemination*, 107 *IOWA L. REV.* 903 (2022). See also UNIF. PARENTAGE ACT § 106 (UNIF. LAW COMM’N 2000) (UPA provisions “relating to determination of paternity apply to determination of maternity”).

¹³¹ UNIF. PARENTAGE ACT § 103(b) cmt. (UNIF. LAW COMM’N 2000) (points to the 1996 UIFSA § 303); UNIF. PARENTAGE ACT § 105 cmt. (UNIF. LAW COMM’N 2017) (points to the 2000 UPA as well as to the 1996 UIFSA § 303 and to the 2008 UIFSA § 303). The 2000 Comment does not expressly speak to its newly adopted choice of law doctrine which is not found in the 1973 UPA.

¹³² UNIF. PARENTAGE ACT § 103(b) cmt. (UNIF. LAW COMM’N 2000); UNIF. PARENTAGE ACT § 105 cmt. (UNIF. LAW COMM’N 2017).

sonal jurisdiction in the initiating tribunal.¹³³ The responding tribunal, in hearing child support issues, is recognized as sometimes having to “determine parentage”¹³⁴ first. In a child support proceeding in a responding tribunal, the 1996 UIFSA declares that the responding tribunal shall “apply the procedural and substantive law, *including the rules on choice of law*, generally applicable to similar proceedings originating” in its state; it also declares that a determination of “the duty of support and amount payable” should be in accordance with its own state’s “law and support guidelines.”¹³⁵

For a child support proceeding in a responding tribunal, the 2008 UIFSA declares that the responding court shall apply “the procedural and substantive law generally applicable to similar proceedings originating” in the state.¹³⁶ The provision on applying “the rules on choice of law” was stricken in the 2001 UIFSA.¹³⁷ As in the 1996 UIFSA, the 2008 UIFSA declares that determination of the duty of support and amount payable should be in accordance with its own state’s “law and support guidelines.”¹³⁸ American state lawmakers that follow the 2008 UIFSA

¹³³ UNIF. INTERSTATE FAMILY SUPPORT ACT § 301(c) (UNIF. LAW COMM’N 1996); UNIF. INTERSTATE FAMILY SUPPORT ACT § 301(b) (UNIF. LAW COMM’N 2008).

¹³⁴ UNIF. INTERSTATE FAMILY SUPPORT ACT § 305(b)(1) (UNIF. LAW COMM’N 1996).

¹³⁵ *Id.* § 303 (emphasis added). These provisions continue to operate in several American jurisdictions. *See, e.g.*, 5 GUAM CODE ANN. § 35303 (2022); P.R. LAWS ANN. tit. 8, § 543b (2022); WIS. STAT. ANN. § 769.303 (West 2022). *See also* UNIF. INTERSTATE FAMILY SUPPORT ACT § 701(b) (UNIF. LAW COMM’N 1996) (“In a proceeding to determine parentage, a responding tribunal of this state shall apply” the laws of this State, including “*the rules . . . on choice of law*”).

¹³⁶ UNIF. INTERSTATE FAMILY SUPPORT ACT § 303(1) (UNIF. LAW COMM’N 2008).

¹³⁷ UNIF. INTERSTATE FAMILY SUPPORT ACT § 303(1) (UNIF. LAW COMM’N 2001). The 2001 UIFSA sole provision on choice of law seemingly did not mandate that a responding tribunal utilize the parentage determination laws of another state. *Id.* § 604. *See also id.* § 701(b) (eliminating the reference to a responding court’s use of its rules on choice of law).

¹³⁸ UNIF. INTERSTATE FAMILY SUPPORT ACT § 303(2) (UNIF. LAW COMM’N 2008). These provisions on child support decisions and guidelines, without referencing a choice of law rule, operate in several American jurisdictions. *See, e.g.*, COLO. REV. STAT. ANN. § 14-5-303 (West 2022); IOWA CODE

by eliminating reference to “the rules on choice of law” generally view the change as “nonsubstantive.”¹³⁹

Clearly, both the 2000 and 2017 UPAs contemplate, as with the UIFSA, that in making “parent-child relationship” adjudications, or “parentage” adjudications (if there is a difference¹⁴⁰), a state court, guided by federal full faith and credit dictates,¹⁴¹ should not undertake a choice of law analyses in a multistate conduct case, but should respect another state’s earlier formal recognition of a person’s parentage. Such respect can arise from a civil case judgment¹⁴² or from a voluntary parentage acknowledgement.¹⁴³

Similar deference, or a concern for interstate comity, might, however, also be deemed necessary without an earlier judgment or VAP. Consider, for example, a marital-related birth in another state, although there may be no formal judgment, adjudication, acknowledgement, declaration, or certificate on parentage in the other state. In this setting, the other state’s parentage laws might be guided by fairly precise principles, in that legal parentage arises at a discrete point in time, like marriage at the time of conception, during a pregnancy, or at birth. The point is sometimes verifiable by state birth certificate records. The precise point in time of the parentage in a spouse whose mate gives birth

ANN. § 252K.303 (West 2022); NEV. REV. STAT. ANN. § 130.303 (West 2022); VA. CODE ANN. § 20-88.46 (West 2022).

¹³⁹ See, e.g., IOWA CODE ANN. § 252K.303 (West 2022) (statutory note); NEV. REV. STAT. § 130.303 (2022) (statutory note); VA. CODE ANN. § 20-88.46 (West 2022) (statutory note).

¹⁴⁰ In 2017 UPA, the Comment does not address what, if any, differences there are between adjudications of “the parent-child relationship” and adjudications of “parentage.” UNIF. PARENTAGE ACT § 105 cmt. (UNIF. LAW COMM’N 2017).

¹⁴¹ See U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); 28 U.S.C.A. § 1738 (West 2022) (authenticated judicial proceedings “shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken”).

¹⁴² See, e.g., *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268 (1935) (Wisconsin court judgment for taxes owed to the state can be recognized and enforced in Illinois).

¹⁴³ See, e.g., *In re Adoption of Jaelyn B.*, 883 N.W.2d 22, 37 (Neb. 2016) (holding that a court must extend full faith and credit to an Ohio VAP).

usually will not prompt significant factual disputes. Should a choice of a spousal parent law be made where precise principles differ between two interested states, as when spousal parenthood arises from marriage at the time of conception in one state and arises at the time of birth in another state,¹⁴⁴ or when spousal parent rebuttal norms differ between two interested states?¹⁴⁵ Whether via full faith and credit or comity, a seemingly hard and fast rule on always choosing forum law in childcare parent cases should be subject to exception.¹⁴⁶

C. Bad Parentage Law Choices

As noted, the 2017 UPA also introduces a new form of legal parenthood, *de facto* parentage, that is far less precise in its contours than spousal parentage. The 2017 UPA also continues the

¹⁴⁴ Compare, e.g., ARIZ. REV. STAT. ANN. § 25-814(A)(1) (2022) (effective 2003) (marriage any time in the ten months immediately preceding the birth), with CAL. FAM. CODE § 7611(a) (West 2022) (effective Jan. 1, 2020) (“child born during the marriage”), and MICH. COMP. LAWS ANN. § 722.1433(e) (West 2022) (effective Mar. 17, 2015) (marriage at the time of conception or birth).

¹⁴⁵ Compare, e.g., *Strausser v. Stahr*, 726 A.2d 1052 (Pa. 1999) (upholding an irrebuttable presumption of paternity based on marriage as long as the marriage is intact, there was an intact family at all times, and the married couple favors maintaining the spousal parentage), with *Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999) (although a statute precluded the putative biological father of a child born into an intact marriage from paternity, he had an Iowa due process right to seek to overcome the spousal parentage in the husband).

¹⁴⁶ One general hard and fast rule in childcare parentage settings, subject to some exceptions, is the Restatement’s directive that “a court applies its own local law in determining whether to grant an adoption.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 289 (AM. L. INST. 1971); *Stubbs v. Weathersby*, 892 P.2d 991, 998 (Or. 1995) (holding that section 289 is inapplicable in “unusual circumstances,” citing *Matter of Appeal in Pima Cty. Juv. Act No. B-7087*, 577 P.2d 714 (Ariz. 1978) (Arkansas law applies “when parties intended the adoption would take place pursuant to the law of Arkansas”). This rule is special in that it applies only in adoption cases.

Tentative Draft No. 3 of this Restatement, Third (Mar. 2022) declares that a court may dismiss an action based on foreign law “that is deeply offensive to forum public policy, regardless of the forum’s contacts with the case,” and that a court may decline to decide an issue under foreign law if it “would offend a deep-rooted forum public policy.” RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.04 (AM. L. INST. Tentative Draft Mar. 2022).

somewhat imprecise norm of residency/hold out parentage.¹⁴⁷ As with residency/hold out parentage, *de facto* parentage goes unrecognized in the state via a formal (i.e., state-recognized) act, like a court judgment, as soon as, or shortly after, its standards have been met. Further, interested persons often are unaware of imprecise parentage laws until childcare disputes arise. In residency/hold out and *de facto* parent cases, courts are asked to look (sometimes far) back in time to determine parentage. When acts that might prompt residency/hold out, *de facto*, or comparable parentage occur wholly in one state, a second state, given the mandate to apply its own laws, perhaps under provisions modeled on the 2017 UPA, may not apply the first state's law and may not defer to a forum in the first state through a *forum non conveniens* dismissal. Failure to apply the law of the place where all relevant parental-like conduct occurred runs contrary to some nonparentage choice of law rules, whether founded on the precise location of a particular act (i.e., as where the contract was signed¹⁴⁸) or on the weighing of the policy interests of all interested states (i.e., as in some multistate torts cases¹⁴⁹). An exemplary bad case involved Nicholas Gansner whose parental-like acts in Wisconsin may well have satisfied Wisconsin equitable

¹⁴⁷ The 1973 UPA recognized a significant form of imprecise parentage when it deemed presumptive natural fatherhood in a man who, "while the child is under the age of majority . . . receives the child into his home and openly holds out the child as his natural child." UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. LAW COMM'N 1973). The imprecision was dramatically reduced in the 2000 and 2017 UPAs which require a holding out parent [who could be a woman under the 2017 UPA] to reside in the same household with the child for the first two years of the child's life. UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. LAW COMM'N 2000); UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017). While the 2000 UPA and the 2017 UPA each continued with a parentage presumption for a hold out/residency parent, such a parent under each act was not presumed to be a "natural" parent.

¹⁴⁸ See, e.g., RESTATEMENT OF CONFLICT OF LAWS §§ 332, 312 (AM. LAW INST. 1934) ("law of the place of contracting determines the validity and effect of a promise;" on an initial contract, the "place of contracting" is where the delivery of the contract is made when the contract becomes effective on delivery).

¹⁴⁹ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (AM. LAW INST. 1971) ("rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, in respect to that issue, has the most significant relationship to the occurrence and the parties") (applied in *Townsend v. Sears, Roebuck and Co.*, 879 N.E.2d 893 (Ill. 2007)).

adoption precedents, but who was denied equitable adoption parent status in an Illinois court under Illinois law, where there were no equitable adoption precedents. The failure of the Illinois courts to consider application of Wisconsin law while dissolving Nicholas' marriage to the child's adoptive mother, who moved to Illinois with the child after a marital separation,¹⁵⁰ was disrespectful of Wisconsin governmental interests.

Beyond residency/hold out and de facto parentage, prospective assisted reproduction parents (with or without surrogacy) can also undertake all parental-like conduct necessary to legal parentage in one state, but then face a second state's court's failure to recognize the legal import of that conduct. Like de facto and residency/hold out parentage, nonsurrogacy assisted reproduction norms vary interstate,¹⁵¹ as do surrogacy assisted reproduction norms.¹⁵²

Where these new forms of childcare parentage are disputed in multistate conduct cases, state courts and legislators should eschew a choice of law norm that automatically directs forum law to be solely applicable.¹⁵³ In a case where very significant, if not all, relevant parental-like conduct occurred outside the forum, though there was no court judgment or state-recorded acknowledgment on parentage elsewhere, a court should utilize its general "rules on choice of law," as was done under the 1996

¹⁵⁰ *In re Marriage of Mancine & Gansner*, 9 N.E.3d 550 (Ill. App. Ct. 2014). The case is reviewed in detail in *Imprecise Laws*, *supra* note 6, at 504-07.

¹⁵¹ See, e.g., Forman, *supra* note 66, at 47-57 (overview of assisted reproduction cases involving single women and lesbian couples).

¹⁵² The prospect that a same-sex male couple's home state's ban on surrogacy would override the couple's parentage of a child born to a surrogate in another state can lead to significant legal maneuvering by those sophisticated in parentage laws. See Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399; Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235 (2014). The variations in American state surrogacy norms are reviewed in Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401, 464-492 (2021). The variations in American state nonsurrogacy assisted reproduction norms are reviewed in Thomas B. James, *Assisted Reproduction: Reforming State Statutes After Obergefell v. Hodges and Pavan v. Smith*, 19 U. MD. L.J. OF RACE, RELIGION, GENDER & CLASS 261 (2019).

¹⁵³ See, e.g., UNIF. PARENTAGE ACT § 103(b) (UNIF. LAW COMM'N 2000); UNIF. PARENTAGE ACT § 105 (UNIF. LAW COMM'N 2017).

UIFSA,¹⁵⁴ or a special choice of law rule for that particular parentage dispute, as with a special law governing disputes over parentage in a gestational surrogacy setting where the law of the situs of the contract, or a contractual choice of law clause, would be deemed presumptively applicable.¹⁵⁵

Challenging choice of law issues can arise during disputes over parentage disestablishment as well as during disputes over initial parentage establishment. Parentage disestablishment can undo, for example, marital (or spousal) parentage. Where such parentage initially arises from a statutory presumption, the presumption is usually rebuttable. The standards for such rebuttals vary interstate. Cases are easily imagined where parentage arising from birth during a marriage in one state may be challenged in a second state (as in a marriage dissolution proceeding where child custody and/or child support are at issue). Seemingly, some rebuttal norms (as with norms involving the lack of genetic ties) may best be taken from the laws of the first state where the birth occurred (or where conception occurred), while other rebuttal norms (as with the time for challenging presumptive parentage) might best be taken from the laws of the second state.

Similarly, VAP establishment norms may be taken from one state while VAP challenge norms are taken from a second state, perhaps where the VAP is sought to be undone in a third state. It is quite imaginable that a VAP is executed in one state, that this VAP was prompted by fraud or mistake of fact occurring in a second state, and that a VAP challenge is brought in a third state where the VAP from the first state initially has the effect of a judgment. Thus, a couple is intimate in State A, with disagreements as to birth control promises; they have a child together via a VAP in State B; and then they dispute the VAP in State C where the birth mother has moved with the child following her

¹⁵⁴ UNIF. INTERSTATE FAMILY SUPPORT ACT § 701(b) (UNIF. LAW COMM'N 1996). *See, e.g., In re K.M.H.*, 169 P.3d 1025, 1032 (Kan. 2007) (in a nonsurrogacy assisted reproduction case, forum law as to sperm donor's alleged parental interests only applied because all relevant conduct, except for the insemination (done in Missouri), occurred in the forum). *But see, e.g., Warren Cty. Dep't of Soc. Servs. v. Garrelts*, 862 S.E.2d 65 (N.C. Ct. App. 2021) (Virginia law applied in a paternity action designed to secure child support where the artificial insemination and birth occurred in Virginia, with a sperm donor/alleged father then living in North Carolina).

¹⁵⁵ *Jesse B. v. Tylee H.*, 883 N.W.2d 1, 17 (Neb. 2016).

break up with the VAP cosignor. A less perplexing VAP challenge case in Nebraska found that an Ohio VAP was entitled to respect in a Nebraska adoption proceeding, even though Nebraska law allowed a challenge in an adoption case to a Nebraska VAP due to an alleged VAP parent's lack of genetic ties, because Ohio law did not permit such a challenge.¹⁵⁶ By comparison, a Hawaii statute seemingly requires that full faith and credit be given to a VAP from another state, but makes it subject to its own challenge provisions that operate after sixty days,¹⁵⁷ which, as noted, vary interstate.

IV. Choosing Nonchildcare Parent Laws

A. Introduction

Childcare parentage norms guiding those possessing parental “care, custody and control” of children can differ in a single state from parentage in nonchildcare contexts, as in child support, probate, or tort.¹⁵⁸ For example, there is no childcare parentage in many states where there is child support parentage. This dichotomy is not troublesome as the policies underlying the two forms of parentage differ. As one court noted:

there are no judicial decisions recognizing a constitutional right of a man to terminate his duties of support under state law for a child that he has fathered, no matter how removed he may be emotionally from the child. Child support has long been a tax fathers have had to pay in Western civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring even if unwanted and unacknowledged remains constitutionally sufficient to support paternity tests and child support requirements. We do not have a system of government like ancient Sparta where male children are taken over early in their lives by the state for military service. The biological parents remain responsible for their welfare. One of the ways the state enforces this duty is through pater-

¹⁵⁶ *Id.* at 17.

¹⁵⁷ HAW. REV. STAT. ANN. § 584-3.5(f)-(g) (West 2022) (effective 2001).

¹⁵⁸ This was expressly recognized in both the 2000 UPA and the 2017 UPA. UNIF. PARENTAGE ACT § 203 (UNIF. LAW COMM'N 2000); UNIF. PARENTAGE ACT § 203 (UNIF. LAW COMM'N 2017) (noting that exceptions to applying UPA parentage definitions may be “specifically” provided by other state laws).

nity laws. This responsibility is not growing weaker in our body politic . . . but stronger.¹⁵⁹

Elsewhere, there are intrastate problems when childcare parent norms differ from nonchildcare parent norms. For example, common law equitable adoption parentage norms have been applied in a probate, but not in a childcare, proceeding.¹⁶⁰ So one may be a parent upon death, meaning that estate properties can flow to a child, though during life the same person could not seek a parental childcare order regardless of the child's best interests (though the person could, perhaps, seek a child visitation order as a nonparent).

As with childcare parentage disputes, multistate conduct in nonchildcare parentage disputes can prompt choice of law issues. Where imprecise forms of parentage operate in nonchildcare parentage cases, conflicting laws of interested states present particular challenges for judges, lawyers and litigants. The following sections illustrate the difficulties that can arise in parentage disputes in probate, tort, and child support cases.

Difficulties arise because parentage laws are contextual, meaning that there is no one-size-fits-all approach. Yet some parentage determinations seemingly appear to define parentage for all settings. As to the consequences of childcare parentage establishments, the UPAs are similar. The 1973 UPA says the "parent and child relationship means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties

¹⁵⁹ N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004). See *In re* Stephen Tyler R., 584 S.E.2d 581, 595 (W. Va. 2003) (child support continues though parental rights have been terminated); see also *Ex Parte* M.D.C., 39 So. 3d 1117, 1132-33 (Ala. 2009) (similar). Compare *In re* H.S., 805 N.W.2d 737, 745 (Iowa 2011) ("when parental rights are terminated in Iowa, a parent's support obligation ends"). Criticism of this policy is voiced in Leslie Joan Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611, 614 (2009). See also *A.S. v. Gift of Life Adoptions, Inc.*, 944 So. 2d 380, 395 n.21 (Fla. Dist. Ct. App. 2006) (differences in assessing parentage in support and adoption cases "maximize an unwed biological father's "responsibilities"), disapproved on other grounds, 963 So. 2d 189 (Fla. 2007).

¹⁶⁰ *DeHart v. DeHart*, 986 N.E.2d 85, 100-04 (Ill. 2013) (equitable adoption in probate); *In re* Scarlett Z.-D., 28 N.E.3d 776, 792 (Ill. 2015) (equitable adoption doctrine is inapplicable to child custody and visitation cases).

and obligations.”¹⁶¹ Further, the 1973 UPA declares that the “judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes.”¹⁶² The 2000 UPA declares that absent parental rights termination, “a parent-child relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of this State.”¹⁶³ The 2017 UPA similarly declares that the Act “applies to an adjudication or determination of parentage in this State”¹⁶⁴ and that unless “parental rights are terminated, a parent-child relationship established under this [act] applies for all purposes, except as otherwise provided by law of this state other than this [act].”¹⁶⁵ The “all purposes” language is misleading because child parentage, at least at times, differs from nonchildcare parentage, as with the well-recognized differences between parentage in custody and support in contexts.¹⁶⁶

B. Parentage in Probate

Without a will, a decedent may be an alleged parent or an alleged child. In probate proceedings, some state statutes direct the application of their UPAs.¹⁶⁷ Elsewhere, there are special

¹⁶¹ UNIF. PARENTAGE ACT § 1 (UNIF. LAW COMM’N 1973).

¹⁶² *Id.* § 15(a).

¹⁶³ UNIF. PARENTAGE ACT § 203 (UNIF. LAW COMM’N 2000).

¹⁶⁴ *Id.* § 103(a).

¹⁶⁵ UNIF. PARENTAGE ACT § 203 (UNIF. LAW COMM’N 2017).

¹⁶⁶ See, e.g., *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. 2004); *In re Stephen Tyler R.*, 584 S.E.2d 581 (W. Va. 2003).

¹⁶⁷ See, e.g., UTAH CODE ANN. § 75-2-114(1) (West 2022) (in probate cases where there is no will, the “parent and child relationship may be established as provided in . . . Utah Parentage Act”). But there are exceptions to UPA usage, as when a natural parent, in cases where there is no will, is precluded from inheriting “from or through the child” if the natural parent has not “openly treated the child as the natural parent’s” and has refused to support the child). Strangely, there is no express exception for one who is not a natural parent but has parental rights and who has not openly treated the child as one’s own or has refused to support the child. Such parents include some intended assisted reproduction parents and gestational surrogate parents in Utah. UTAH CODE ANN. §§ 78B-15-704 (assisted reproduction parent by consent), 78B-15-801 (West 2022) (intended parent in surrogacy setting). See also HAW. REV. STAT. ANN. § 560:2-114(a) (West 2022) (“for purpose of intestate succession . . . The parent and child relationship may be established under chapter 584), with chap-

probate provisions.¹⁶⁸ In multistate conduct cases, courts thus could use the express UPA directive to employ in-state laws without any choice of law analysis. Of course, in-state laws eventually may not be applied due to forum nonconveniens dismissals¹⁶⁹ as well as Full Faith and Credit mandates.

Employing in-state laws on UPA childcare parentage in probate proceedings presents difficulties when the relevant care, custody, and control by a deceased alleged parent occurred in another state, or when the care, custody, and control of a deceased alleged child occurred in another state.

Consider also so-called Mandy Jo's Law in Kentucky. That law says that a "parent who has willfully abandoned the care and maintenance of his or her child shall not have a right to intestate succession."¹⁷⁰ In considering parentage disestablishment in probate due to abandonment, whose probate law should define abandonment if all relevant abandonment acts occurred outside of Kentucky, with an alleged deceased child's death in Kentucky? Mandy Jo's Law also prevents an abandoning parent from maintaining a wrongful death action upon a child's death.¹⁷¹ Might the Kentucky law apply to a wrongful death action on a child's behalf outside of Kentucky, with an alleged Kentucky parent, but with tortious acts occurring outside of Kentucky? This leads to a consideration of parentage in tort law.

C. *Parentage in Tort*

Determinations of nonchildcare parentage are also first undertaken in tort cases through applications of common law rulings or statutes. Here, the claimant can be an alleged child of a

ter 584 constituting the Uniform Parentage Act, construed in *Estate of Rogers*, 81 P.3d 1190 (Haw. 2003) (statute is "permissive," not "mandatory"); N.J. STAT. ANN. § 3B:1-2 (West 2022) (Parentage Act applies in intestate succession case).

¹⁶⁸ See, e.g., *Carlson v. Marcel*, No. B227661, 2011 WL 3841218 (Cal. Ct. App. Aug. 31, 2011) (employing CAL. PROB. CODE § 6454, not CAL. FAM. CODE § 7611).

¹⁶⁹ UNIF. PARENTAGE ACT § 103(b) cmt. (UNIF. LAW COMM'N 2000); UNIF. PARENTAGE ACT § 105 cmt. (UNIF. LAW COMM'N 2017).

¹⁷⁰ KY. REV. STAT. ANN. § 391.033(1) (West 2022) (effective July 14, 2000) (with exceptions for a parent who had resumed care or was deprived of custody).

¹⁷¹ *Id.* § 411.137(1) (effective July 14, 2000) (with exceptions for a parent who had resumed care or was deprived of custody).

decedent; an alleged child of an injured parent; an alleged parent of a decedent; or, an alleged parent of an injured person. The ambit of parentage determination may not follow the UPA choice of law directive, such as where there is no express declaration of UPA applicability, as in some probate codes.

In multistate conduct cases, nonforum tort laws on liability and/or damages are often followed, either because the culpable act and/or resulting injuries occurred outside the forum and/or because the forum state is much less interested, if interested at all, in having its own laws apply than is an interested nonforum state. Should forum law determine whether a complaining party is a parent of an injured child, or is a child of an injured parent, who has standing to recover under the tort law of another state? The answer usually should be no when childcare or child support parentage has already been subject to a judgment (as in a marriage dissolution case) or its equivalent (as with a VAP), in the other state, however differently it would have been treated in the forum. The question seems closer when there is no official parentage recognition in another state (as in a judgment or birth certificate). In cases where there could not have been earlier parentage recognition in the nonforum though most relevant acts occurred there, perhaps differing choice of law approaches are needed. Consider, for example, preconception negligent acts occurring in the nonforum with injuries later incurred at birth in the forum.¹⁷² Is parentage to be guided by the laws of the forum? If so, for liability as well as damage issues?

Full Faith and Credit Clause precedents support, at times, nonrecognition of nonforum laws that run contrary to significant forum policies. Yet in the absence of strong contrary public policy (which, if found, might prompt dismissal without prejudice), a parent-child relationships in tort should be guided by the law of the forum where the factual circumstances underlying such a possible relationship occurred, though there as yet is no legal recognition of the relationship that is reflected in an earlier judgment, parentage acknowledgment or the like, at least where the forum otherwise employs the most significant relationship test in choice

¹⁷² See, e.g., Mark Strasser, *Making Preconception Tort Theory Crisper*, 105 MARQ. L. REV. 297 (2021) (reviewing state differences in tort recoveries for preconception and postconception negligence).

of law matters.¹⁷³ Incidentally, within a single forum there may be surprising differences in parentage determinations between tort cases where alleged children and alleged parents seek recovery.¹⁷⁴ And within a single forum, the state policies may differ on whether expecting legal parents can recover for losses of parentage opportunities depending upon whose tortious acts caused harm.¹⁷⁵

D. *Parentage in Child Support*

Child support proceedings can also prompt initial determinations of legal parentage. Here, a petitioner can be a birth mother seeking child support,¹⁷⁶ a child seeking child support,¹⁷⁷ or a state agency seeking child support reimbursement.¹⁷⁸ Thorny issues can arise when, for example, a mother's failed suit is followed by a child's or a state's suit wherein the child or state urge there is no *res judicata/collateral estoppel* effect.¹⁷⁹

¹⁷³ See generally RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 501 (AM. L. INST. Tentative Draft Mar. 2022). Compare *Clark Sand Co., Inc. v. Kelly*, 60 So. 3d 149, 156 (Miss. 2011) (while Mississippi does not recognize common law marriage, “full faith and credit” must be given to “a valid common-law marriage from another state” in a Mississippi wrongful death suit though there was no finding of a marriage in the other state).

¹⁷⁴ See, e.g., *Martin v. Summers*, 576 S.W.3d 249 (Mo. Ct. App. 2019) (equitably adopted child, but not equitable adoption parent, can recover).

¹⁷⁵ See, e.g., *Herndon v. Kaminski*, No. 2-21-0297, 2022 WL 552534 ¶¶ 38-39 (Ill. App. Ct. Feb. 24, 2022) (“person” who is injured and dies under Wrongful Death Act includes an unborn fetus, who is not included among those subject to injury and death under the Dramshop Act).

¹⁷⁶ See, e.g., UNIF. PARENTAGE ACT § 602(2) (UNIF. LAW COMM’N 2017) (“woman who gave birth” usually can file a proceeding to adjudicate parentage).

¹⁷⁷ See, e.g., *id.* § 602(1) (a “child” generally can file a proceeding to adjudicate parentage).

¹⁷⁸ See, e.g., *id.* § 602(5) (“a child-support agency” generally can file a proceeding to adjudicate parentage).

¹⁷⁹ See, e.g., *Hall v. Lalli*, 977 P.2d 776 (Ariz. 1999) (an earlier suit by the state and the mother against the father for child support did not bar the child's later suit for child support); *Johnson v. Hunter*, 447 N.W.2d 871, 876 (Minn. 1989) (child's 1985 support action was not barred by a dismissal with prejudice of the mother's 1969 paternity action); *State ex rel. Mart v. Mart*, 380 N.W.2d 604, 607 (Minn. Ct. App. 1986) (a county child support reimbursement case against father is not barred by an earlier case determination that no support (per agreement) was owed by the father to the mother); *State v. Tucker*, 474

If in-state laws are always chosen, a newly-arrived alleged parent may have the relevant parental-like acts, relevant in, for example, residency/hold out or de facto parenthood, assessed under forum laws even though the acts occurred outside the forum. This happened in a North Dakota case where the child, then living in Kentucky, had never lived in North Dakota; the alleged parent (also a step-grandfather) had just moved to North Dakota; and, the child was earlier raised by the alleged parent in New Jersey and Florida.¹⁸⁰ A more sensible choice of parentage law occurred in a North Carolina child support case against a North Carolina man who was the sperm donor of a child born of artificial insemination where all acts surrounding pregnancy and birth occurred in Virginia and where Virginia law was used by the North Carolina court.¹⁸¹

Parental child support duties only sometimes arise for those whose earlier acts were parental-like in nature. Thus in Colorado, not everyone acting as a parent may be obligated to pay support.¹⁸² Child support duties sometimes also arise for those who are not childcare parents, like grandparents¹⁸³ or stepparents.¹⁸⁴ As well, in some states there can be child support obligations for one-time childcare parents, including those whose child care, custody, and control interests were terminated due to unfit-

S.E.2d 127, 130-131 (N.C. 1996) (the state is not barred from seeking recovery of public assistance from a father that was paid on behalf of a child notwithstanding an earlier action by a county); *Commonwealth v. Johnson*, 376 S.E.2d 787, 793 (Va. Ct. App. 1989) (neither the child nor the state as subrogee of child was barred from seeking child support from the father whose paternity was not established in two earlier child support suits brought by the mother); *State v. Pentasuglia*, 457 S.E.2d 644, 648 (W. Va. 1995) (the dismissal of mother's earlier paternity action with prejudice did not preclude the child from later pursuing child support).

¹⁸⁰ *Johnson v. Johnson*, 617 N.W.2d 97 (N.D. 2000).

¹⁸¹ *Warren Cty. Dep't of Soc. Servs. V. Garrelts*, 862 S.E.2d 65 (N.C. Ct. App 2021) (using *lex loci test*).

¹⁸² *See, e.g., In re Marriage of Bergeson-Flanders & Flanders*, 509 P.3d 1083 (Col. App. 2022) (holding that the maternal grandmother was not a psychological parent because she differed from former stepfather in *In re A.C.H.*, 440 P.3d 1266 (Col. App. 2019)).

¹⁸³ *See, e.g., Jeffrey A. Parness & Matthew Timko, De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769, 826-30 (2018).

¹⁸⁴ *See, e.g., id.* at 818-26.

ness.¹⁸⁵ In support cases states can assert significant interests in securing financial support (whether the secured support goes directly to the child or to a governmental agency for reimbursement of earlier support that was provided) where the child lives in the state even though the obligor, whether always a nonparent or a one-time parent, now lives and has lived out-of-state.¹⁸⁶ It may be appropriate in multistate conduct cases involving support to utilize different state laws regarding who is obligated to pay support and on how much support should be ordered, especially where the conduct relevant to the “who” occurred in a different state than the conduct relevant to the “how much.” This approach seems more sensible than the forum law choices made in the aforescribed North Dakota case.

V. Conclusion

The (r)evolution in U.S. state childcare parentage laws in the last half century present today significant choice of law issues where disputes involve multistate conduct. The challenges for judges, lawyers, and litigants go beyond cases involving the “care, custody, and control” of children. Challenges also arise in nonchildcare cases, as in probate, tort, and child support. Too often, guided by the more recent Uniform Parentage Acts, state courts utilize their own state’s laws on parenthood without undertaking an analysis of the legitimate governmental interests of both the forum and of other states, at times seemingly contrary to the full faith and credit mandate. Difficult choice of law issues arise most often in parentage cases involving residency/hold out, de facto and assisted reproduction parenthood.

¹⁸⁵ See, e.g., *id.* at 830-34.

¹⁸⁶ Here, thorny personal jurisdiction issues can arise when the alleged obligor has no or insufficient contacts, ties, or relations with the forum other than the child’s residence. See, e.g., *Morrill v. Tong*, 453 N.E.2d 1221, 1228 (Mass. 1983) (reviewing personal jurisdiction limits); *M.A.P. v. E.B.A.*, 272 A.3d 921 (N.J. Super. Ct. App. Div. 2022) (finding no jurisdiction where sex with a New Jersey woman in New York occurred with an Argentine national who resided in New York or the District of Columbia). See generally Monica J. Allen, *Child-State Jurisdiction: A Due Process Invitation to Reconsider Some Basic Family Law Assumptions*, 26 FAM. L.Q. 293 (1992).