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Irrationalities in Legal Parentage: Gender Identity and Beyond

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IRRATIONALITIES IN LEGAL PARENTAGE: GENDER IDENTITY AND BEYOND

Jeffrey A. Parness*

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I. INTRODUCTION

The laws on parenthood in the United States are in great flux. The continuing (r)evolution in childcare parenthood under the law (i.e., care, custody, and control of interests in children) has been chiefly spurred by the dramatic increases in assisted reproduction births and informal child adoptions; that is, adoptions recognized by courts only after the completion of post-birth childcare acts, which typically include same household residency and earlier parental-like relationships.[1] Informal adoptions authorized by state laws go by varying titles, including de facto, residency/hold out, and equitable parent.[2]

This (r)evolution in childcare parenthood laws has prompted limited changes, to date, in legal parenthood in other contexts, including child support, probate, and tort. Many needed changes in nonchildcare parentage laws remain. Yet nonchildcare parentage elsewhere should not always follow the (r)evolution in childcare parenthood; rather, nonchildcare parentage laws should only follow when the underlying policies are comparable.

There are constitutional limits on parenthood laws, whatever the context. The constraints are found in both federal and state constitutions. One constraint is that parenthood laws must be rational.[3] Rationality is necessary when denials of Due Process or Equal Protection are alleged.[4] To date, the rationality limits have not

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1. Brian Dakss, *Adoption 101*, CBS NEWS (Dec. 16, 2004, 7:17 AM), https://www.cbsnews.com/news/adoption-101/.
2. *See* Lauren Gill, Note, *Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1745 (2013) (describing how the law now recognizes "de facto parenthood" as a factor other than biological ties in order to determine parental rights); Adam Stephenson, *Arizona Juvenile Law Legal Research: Resources and Strategies*, 2 PHX. L. REV. 193, 266–67 (2009) (referring to the doctrine of "equitable adoption"). *See generally* UNIF. PARENTAGE ACT § 204 (UNIF. L. COMM'N 2017) (describing the various ways that an individual may be presumed to be a parent of a child).
3. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 486–87 (1970) (explaining that statutory distinctions under due process must be "rationally based and free from invidious discrimination"); United States v. Vaello-Madero, 956 F.3d 12, 18 (1st Cir. 2020) ("[P]recedent requires us to apply rational basis review to the equal protection claim before us."), *cert. granted*, 141 S. Ct. 1462 (2021).
4. *See, e.g.*, *Dandridge*, 397 U.S. at 486–87; *Vaello-Madero*, 956 F.3d at 18.

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been significantly applied to state policy choices in and outside of childcare parenthood.[5]

Rationality requirements should now constrain many new American parenthood laws, as well as the influential parenthood law reforms proposed by the Uniform Law Commissioners (ULC),[6] especially their Uniform Parentage Acts (UPAs). Further, some old state laws, once sensible, have become irrational over time as new childcare parenthood laws, with their new public policies, have emerged. There has been too little coordination of older parentage laws with the new public policies.[7] Genetic ties, heterosexual marriage, and consensual sex generally underlie old laws, while same-sex marriage, transgender rights, parental-like acts, and intentions about future parenthood, as well as genes, opposite-sex marriages, and sex underlie many new laws.[8] Coordination has been hindered by the cloudy divisions within many states of the lawmaking responsibilities of legislatures and courts.[9]

This Article is the first to outline the irrationalities in many new and old parentage laws. Irrationalities often arise when the laws employ gendered terms like mother and father, husband and wife, man and woman, and male and female. These terms require a parent to be gender identified by the state, even when such an identity

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5. *See generally* R. Randall Kelso, *The Structure of Rational Basis and Reasonableness Review*, 45 S. ILL. U. L. J. 415 (2021) (providing a comprehensive review and critique of U.S. Supreme Court rational basis, heightened rational basis, and strict scrutiny review); Brit Janeway Benjamin, *Equal Protection and Ectogenesis*, 23 VAND. J. ENT. & TECH. L. 779 (2021) (applying the various levels of Equal Protection review to a potential statute prohibiting the use of ectogenesis).

6. The ULC is also known as the National Conference of Commissioners on Uniform State Laws. *About Us*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/46FV-ZSKZ] (last visited May 8, 2022).

7. *But see* S.B. 464, 2021 Leg. (Wis. 2021) (proposing gender-neutral parentage terminology changes for over 100 laws, replacing terms like "mother" with "expectant parent," "biological father" with "natural parent," and "father" and "mother" with "parent").

8. *See* Jeffrey A. Parness, *Formalities for Informal Adoptions*, 43 CAP. U. L. REV. 373, 373–74 (2015).

9. For example, the Illinois Supreme Court has recognized an equitable adoption doctrine in probate proceedings solely through precedent but has failed to recognize a similar doctrine in child custody proceedings on separation of powers grounds. *See In re* Scarlett Z.-D., 28 N.E.3d 776, 791–95 (Ill. 2015). *See generally* Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479 (2017).

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clashes with the parent's own gender identification.[10] More importantly, these gendered terms frequently clash with public policies underlying parentage laws, new and old, that are not dependent upon any form of gender identity.[11] As a result, these terms create differential treatment of people, as between state-identified men and state-identified women, where the distinctions make no sense.

Parentage laws should generally be designated for a person, sperm donor, sperm provider, egg donor, egg provider, spouse, birth giver, and the like. Nongendered parentage laws, for many of us, will not end our speaking of mothers and fathers. But such laws will sensitize more of us some people's preferences without diminishing and, in fact, likely enhancing, the underlying public policies.[12] Some discomfort perhaps, but greater respect for all within our communities.[13]

Beyond gender identity, irrationalities also arise when there are distinctions without policy justifications. In the childcare parent context, there are troubling divides between a hold out/residency parent and a de facto parent.[14] Outside of childcare, there are troubling divides in survivorship, heirship, and personal injury claims.[15]

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10. *See* Annie Tritt, *States are Starting to Recognize a Third Gender. Here's What That Means for Nonbinary Youth.*, VOX, https://www.vox.com/identities/2018/3/28/17100252/trans-nonbinary-third-gender-youth-legal-recognition [https://perma.cc/ZT7X-8JJJ] (Apr. 2, 2018, 9:08 AM). Many states do not allow citizens to change the sex designation on their birth certificate. *But see In re* Childers-Gray, 487 P.3d 96, 129 (Utah 2021) (recognizing judicial power to adjudicate a petition for a different designation).
11. Gender identity laws discussed herein are distinct from gender, gender discrimination, and sexual orientation laws, though distinctions are sometimes difficult to draw. *See, e.g.*, ILL. COMP. STAT. ANN. 5/1-103(Q) (West 2022) (explaining that "unlawful discrimination" includes acts involving "perceived" sex and "sexual orientation"); Equality Act, H.R. 5, 117th Cong. § 305 (2021) (stating that a reference to "sex" shall be considered a reference to "sex, sexual orientation, gender identity").
12. *See* Parness, *supra* note 9, at 509–12.
13. Unfortunately, irrational gender identity laws exist outside the context of parenthood. *See, e.g.*, Arkansas Save Adolescents from Experimentation (SAFE) Act, H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (banning access to gender-affirming care for people under eighteen years of age); Meriwether v. Hartop, 992 F.3d 492, 498–500 (6th Cir. 2021) (holding that a professor who was reprimanded for refusing to use a student's preferred pronouns had sufficiently pleaded free-speech and free-exercise claims).
14. *See* Parness, *supra* note 8, at 390–95.
15. *See* Paul W. Norris, *Distribution of Personal Injury Proceeds to Heirs of a Decedent's Estate*, NAT'L L. REV. (May 23, 2016), https://www.natlawreview.com/article/distribution-personal-injury-proceeds-to-heirs-decedent-s-estate

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This Article demonstrates the disconnect between gender identity and the policies underlying parentage laws in several contexts, including parenthood for childcare and child support purposes (as with some spousal, assisted reproduction, and voluntary acknowledgment parents);[16] for probate purposes (as with deceased parents);[17] for tort purposes (as with grieving parents);[18] and for expecting parent purposes (as with some voluntary acknowledgment, assisted reproduction, and putative parents).[19]

The Article further demonstrates the lack of adequate justification for distinguishing between parents in a single context and in varying contexts, even where the laws are nongendered.[20] Irrationalities here are illustrated within the childcare, tort, and probate settings.[21]

A few notes of caution. First, legal parentage is contextual. Thus, a person may be defined as a legal parent for one purpose, like child support, but not for another purpose, like child custody. There is no per se irrationality in varying intrastate definitions. These variations can be challenging, though, as when the general policy serving the best interests of children means the same person is responsible for child support, but is not afforded child custody opportunities.[22]

A second note of caution. In assessing parentage laws for rationality, interstate variations will frequently arise in a single context. Many such variations are not irrational. Thus, one state may determine that the benefits of recognizing childcare parenthood via surrogacy outweigh the costs, while another state may weigh things

[https://perma.cc/5L9E-BEP4]. Naturally, troubling divides are more carefully scrutinized when suspect or quasi-suspect classes are differentiated. *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 895–96 (Iowa 2009) (applying heightened scrutiny for sexual orientation divides).

16. *See infra* Parts III–V.
17. *See infra* text accompanying notes 217–23.
18. *See infra* text accompanying notes 233–42.
19. *See infra* text accompanying notes 310–29.
20. *See infra* text accompanying note 59.
21. *See infra* notes 107–09 and accompanying text. Irrationalities between contexts are mitigated when statutory definitions on parentage are absent/inadequate where courts then employ the *in pari-materia* doctrine. *See, e.g.*, Potts v. Anastasia, No. M202000170COAR3CV, 2021 WL 2226622, at *9 (Tenn. Ct. App. June 2, 2021) (citing Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995)) (discussing standing to seek custody and visitation of minor children conceived by in vitro fertilization); LeFever v. Matthews, No. 353106, 2021 WL 1232747, at *1– 2 (Mich. Ct. App. Apr. 1, 2021).
22. *See, e.g.*, *In re* Baby A., 944 So. 2d 380, 395 n.21 (Fla. Dist. Ct. App. 2006).

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differently.[23] Interstate variations have, in fact, been invited by the U.S. Supreme Court and the U.S. Congress.[24] The U.S. Supreme Court and Congress have largely deferred to state lawmakers on defining parentage.[25] There are a few federal norms, however, found in both constitutional precedent[26] and legislation.[27]

II. SPOUSAL PARENT

The ULC has promulgated three versions of its Uniform Parentage Act, in 1973, 2000 (amended a bit in 2002), and 2017.[28] All UPAs

23. *Compare, e.g.*, MICH. COMP. LAWS ANN. § 722.855 (West 2022) (surrogacy restricted), *with* COLO. REV. STAT. ANN. § 15-11-121 (West 2022) (in intestate succession, there may be enforceable or unenforceable "gestational carrier" agreements where the person giving birth may or may not be the "genetic mother"), *and* 15 R.I. GEN. LAWS ANN. § 8.1-801 (West 2021) (gestational carrier agreement), *and* WASH. REV. CODE ANN. 26.26A.700 (West 2022) (both gestational and genetic surrogacy pacts recognized).
24. *See* Lehr v. Robertson, 463 U.S. 248, 256 (1983) ("In the vast majority of cases, state law determines the final outcome" when resolving "the legal problems arising from the parent-child relationship.").
25. *Id.*
26. Herein a childcare parent embodies an existing legal parent with "care, custody and control" interests in a child or children. Such a parent's interests are recognized as within a federal constitutional liberty interest. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65–66 (2000). The definition of a "parent" who has this right has been chiefly left to state lawmakers (both legislators and common lawmaking judges) by the U.S. Supreme Court. *See generally* Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965, 978–83 (2016) (criticizing the court's deferral to state lawmaking on federal constitutional childcare parentage). Elaborations on the scope of the constitutional right are elusive. A state statutory review of the "rights of a parent of a minor child," and the limits on these rights, is found in FLA. STAT. ANN. § 1014.04 (West 2021). The Supreme Court has also recognized some procedural due process protections from state interference with parental rights. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 769 (1982) (explaining due process requires clear and convincing evidence before a state can terminate parental rights). Federal statutes sometimes address the protections accompanying legal parentage, which can be substantive or procedural. Consider the dictates of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1912(f) (providing no termination of parental rights in an Indian Child without "evidence beyond a reasonable doubt" that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"). Certain ICWA provisions have been challenged. *See* Brackeen v. Haaland, 994 F.3d 249, 267–68 (5th Cir. 2021).
27. On federal statutes embodying parentage requirements, *see, e.g.*, 42 U.S.C. § 666(a)(3), (5)(B)(ii). "[P]rocedures concerning paternity establishment" required of all states participating in federal child welfare subsidy program, per 42 U.S.C. §§ 666 and 654(2).
28. *See generally* UNIF. PARENTAGE ACT (UNIF. L. COMM'N 1973); UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2000) (amended 2002); UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017).

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recognize childcare parentage in actual and would-be spouses of birth mothers.[29] The 1973 UPA deems "a man is presumed a natural father of a child if . . . he and the child's mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated."[30] So, a man's marriage to a pregnant or nonpregnant woman prompts parentage in the man for a child born or conceived during the marriage, whether or not the man is a biological parent. For children born into marriage via "artificial insemination" utilizing the semen not donated by a husband, there are additional requirements for male spousal parentage, including that the husband "consent" and that there be "supervision of a licensed physician."[31]

The 2000 UPA, as amended in 2002, similarly recognizes presumptive male spousal parentage for children born of sex.[32] And it recognizes nonpresumptive and nonspousal male parentage via consent to "assisted reproduction, whether or not there was sperm donation."[33] Further, the 2000 UPA recognizes nonpresumptive male

29. Jeffrey A. Parness, *Illinois Childcare Parentage Law (R)Evolution*, 51 LOY. U. CHI. L.J. 911, 920–21 (2020).

30. UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. L. COMM'N 1973). The 1973, 2000, and 2017 UPAs also recognize male parentage presumptions in certain men who married or attempted to marry the natural mothers before or after the births. *Id.* § 4(a)(3); UNIF. PARENTAGE ACT § 204(a)(4) (UNIF. L. COMM'N 2000) (amended 2002); UNIF. PARENTAGE ACT § 4(a)(1)(c), (a)(2)(3) (UNIF. L. COMM'N 2017). State laws include 750 ILL. COMP. STAT. ANN. 46/204(a)(3) (West 2021) and CAL. FAM. CODE § 7611(a) (West 2022). Where there is no marriage or clear evidence of an attempt to marry, perhaps a "putative spouse" approach might be taken, as is done in some probate cases. *See, e.g.*, Mark Strasser, *Fairness and the Putative Spouse*, 81 LA. L. REV. 1235 (2021).

31. UNIF. PARENTAGE ACT § 5 (UNIF. L. COMM'N 1973) (dealing with this form but not other forms of artificial insemination, that raise "complex and serious legal problems," as was noted in the earlier Section 5 Comment). Failure to follow Section 5 mandates may nevertheless prompt a marital parentage presumption under Section 4 for a child born of artificial insemination. *See, e.g.*, UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. L. COMM'N 1973) (presuming that the husband is the natural father of a child born to his wife "during the marriage").

32. UNIF. PARENTAGE ACT § 201(b)(1) (UNIF. L. COMM'N 2000) (amended 2002) ("father-child relationship"). UNIF. PARENTAGE ACT § 204(a)(1)–(4) (UNIF. L. COMM'N 2000) (amended 2002) (providing that the "man is presumed to be the father" in settings of actual or attempted marriage to the person giving birth).

33. UNIF. PARENTAGE ACT §§ 201(b)(5), 703 (UNIF. L. COMM'N 2000) (amended 2002) (man's consent to "assisted reproduction by a woman").

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parentage via a "validated" gestational mother "agreement,"[34] where the "intended parents" are "the man and the woman" who need not be married.[35] Thus actual biological ties are again not required for male spousal parentage of a child born of sex[36] and are not always required for legal parentage in spouses when a child is born of assisted reproduction to their mates.

The 2017 UPA also recognizes spousal parentage, but in more (but not complete) gender-neutral terms. It applies its spousal parent presumption to an "individual" who was married to, or attempted to marry, the "woman who gave birth."[37]

Nonpresumptive spousal parentage under the 2017 UPA, as under the 2000 UPA, attaches to spouses whose mates give birth via certain nonsurrogacy "assisted reproduction."[38] Here, consent—not the marriage itself—is key.[39] And here, these spouses need not be sperm or egg donors.[40] Further, spouses can become parents through either gestational or genetic surrogacy agreements.[41]

Current state spousal parentage laws can reflect any of the UPAs, leading to interstate variations. For example, spousal parentage can arise from a marriage in existence at the time of birth,[42] at the time of

34. UNIF. PARENTAGE ACT § 201(b)(6) (UNIF. L. COMM'N 2000) (amended 2002) ("father-child relationship"). *Id.* § 801(a) (contemplating agreement with "prospective gestational mother" by "donor" or by "intended parents").

35. *Id.* § 801(b).

36. *Id.* § 607(b). Lack of biological ties does not always allow male spousal parentage presumption rebuttals, as where the child is over two or when the spouse never engaged in relevant sex and never "openly held out the child as his own." *Id.* § 607(b)(2); *see also id.* § 608 (denying genetic testing order involving alleged biological father under certain circumstances).

37. UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. L. COMM'N 2017). To date, only a few states expressly recognize marital parentage in an identified female spouse of one giving birth. *See, e.g.*, WASH. REV. CODE § 26.26A.115(1)(a) (West. 2022); VT. STAT. ANN. tit. 15C. § 401(a)(1) (West 2022).

38. UNIF. PARENTAGE ACT § 703 (UNIF. L. COMM'N 2017) (with the consent requisites in UPA § 704).

39. *See id.* § 704.

40. *Id.* § 703 ("An individual who consents . . . to assisted reproduction by a woman with the intent to be a parent of the child conceived . . . .").

41. *Id.* § 801(3) (including surrogacy pact with "one or more intended parents" and the person who will give birth); *see also id.* §§ 802–807 (comparable requirements for each form of agreement); *id.* §§ 808–812 (additional special rules for gestational surrogacy pacts); *id.* §§ 813–818 (discussing genetic surrogacy pacts).

42. *Compare* GA. CODE ANN. § 19-7-20(a) (West. 2022) (child "born in wedlock or within the usual period of gestation thereafter"), *with* HAW. REV. STAT. ANN. § 584-4(a)(1) (West. 2022) ("child is born during the marriage"), *and* ALA. CODE § 26-17-204(a)(1) (2022) (spousal parentage if "child is born during the marriage"), *and* 750

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conception,[43] or sometime during pregnancy though not at conception or birth.[44] Thus, on occasion there can be two spousal parents beyond the person giving birth.[45]

Current state laws, like the UPAs, do not address spousal parentage arising from common law marriages. Yet some state judicial precedents consider common law marriages when assessing custodial interests in resolving family disputes.[46]

The circumstances allowing later disestablishments of spousal parentage presumptions also vary interstate. Differences occur because state policies differ on who can seek to rebut such a presumption.[47] Biological ties are less, or not, important where, as recognized by the U.S. Supreme Court,[48] marriage is deemed "the basis for an expanding list of governmental rights, benefits and

ILL. COMP. STAT. ANN. 46/204(a)(1) (West. 2022) ("person" married to one who gives birth "during marriage" or "substantially similar legal relationship").

43. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.1433(e) (West 2015) (discussing marriage at time of conception or birth).

44. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-814(A)(1) (2022) (marriage "at any time in the ten months preceding the birth"), *invalidated by* McLaughlin v. Jones, 401 P.3d 492 (Ariz. 2017).

45. *See* Wyoming v. EKB, 35 P.3d 1224, 1229 (Wyo. 2001) (ruling where two spousal parents as birth mother was married twice during pregnancy; first husband was presumed spousal parent as child was born within 300 days of his divorce, while second husband was presumed spousal parent as he was married to birth mother at the time of birth); *Ex parte* Kimbrell, 180 So. 3d 30, 34 (Ala. Civ. App. 2015) (involving a child born to woman and her supposed second husband, though there was no divorce from her first husband; both men were presumed spousal parents).

46. *See, e.g.*, Valentine v. Wetzel, No. 790 MDA 2018, 2019 WL 1130441, at *5 (Pa. Super. Ct. 2019) (deciding that while state law barred common law marriages entered into after January, 2005, the court would apply the earlier common law marriage norms to conduct before 2005 since the bar was not made retroactive); *In re* Marriage of Hogsett & Neale, 480 P.3d 696, 698 (Colo. App. 2018) (Obergefell v. Hodges, 576 U.S. 644 (2015) applied retroactively to give same-sex couple right to prove common law marriage for purposes of a dissolution proceeding); Gill v. Nostrand, 206 A.3d 869, 873 (D.C. 2019) (applying common law marriage doctrine in case involving alimony and marital property).

47. *Compare* OR. REV. STAT. ANN. § 109.070(1)(a), (2) (West 2022) (showing that spousal parentage presumption may be challenged "by either spouse," with no challenge by another person "as long as the spouses are married and are cohabiting, unless both spouses consent"), *with* 750 ILL. COMP. STAT. ANN. 46/610(a) (West 2022) (involving motion by a "parent, presumed parent, acknowledged parent, adjudicated parent, alleged parent or the child" seeking genetic testing to overcome spousal parentage can be denied in certain circumstances).

48. *Obergefell*, 576 U.S. at 670.

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responsibilities," including child custody and support.[49] Here, a parentage presumption is, at best, difficult to overcome by a person (usually an alleged sperm donor) outside the marriage.[50] By contrast, as in Vermont, biological ties can be more important.[51] There, a presumed parent is a person who is married to the person giving birth at the time of the birth of a child born of consensual sex.[52] But there, an alleged unwed sperm donor may challenge the presumption within two years of discovering "the potential genetic parentage."[53] In some states, like Iowa and Texas,[54] there are significant state constitutional protections of the parental opportunity interests of sperm donors even where those giving birth arising from sex are married to others.

The foregoing review of spousal parentage laws reveals several irrationalities, only some of which have been eliminated by the courts. States following the 1973 and 2000 UPAs only regard spousal parentage laws applicable to men (self-identified or identified by the state?).[55] Yet with marriage equality, the laws should apply to all

49. *See, e.g.*, *McLaughlin*, 401 P.3d 492, 496 (Ariz. 2017) (holding that marital paternity presumption applies to female spouse of birth mother; Arizona spousal parentage presumption statute, ARIZ. REV. STAT. ANN. § 25-814(A)(1) (1995) *invalidated by McLaughlin*, 401 P.3d 492 (Ariz. 2017), does not specifically reference any likelihood of biological ties in the spouse, but rather addresses the spouse's rights and responsibilities).

50. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 131–32 (1989) (finding that federal constitution, per a split, court does not bar a marital parentage presumption law where the presumption cannot be rebutted by an unwed genetic parent); Strauser v. Stahr, 726 A.2d 1052, 1053–54 (Pa. 1999) (concluding that marital presumption not rebuttable by genetic father where marriage is intact); B.S. v. T.M., 782 A.2d 1031, 1035 (Pa. Super. Ct. 2001) (precluding irrebuttable marital parent presumption here as marriage was not intact at relevant times). While an unwed biological father may not himself be able to petition for an adjudication of child custody parentage, he may still be able to be pursued, as by state welfare officials seeking welfare payment reimbursements, for an adjudication of child support parentage, especially when a cuckolded husband is disestablished as a presumed parent. *See, e.g.*, Vargo v. Schwartz, 940 A.2d 459, 462 (Pa. Super. Ct. 2007).

51. *See* VT. STAT. ANN. Tit. 15C, § 401 (West 2022) (listing circumstances in which someone is a presumed parent to a child based on biological ties); *id.* § 303 (listing specific circumstances in which a presumed parent may deny parentage).

52. *Id.* § 401(a)(1).

53. *Id.* § 402(b)(2) (allowing the court to choose not to disestablish the spousal parentage presumption).

54. *See* Callender v. Skiles, 591 N.W.2d 182, 187, 190 (Iowa 1999) (recognizing an unwed biological father has "a liberty interest in challenging paternity" of the husband of a birth mother under Iowa Due Process Clause); *In re* Interest of J.W.T., 872 S.W.2d 189, 198 (Tex. 1994) (recognizing similar interest per Texas Constitution), *superseded by statute*, TEX. FAM. CODE ANN. § 160.101(a)(3) (West 1996).

55. *Compare* UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM'N 2000) (amended 2002) (describing only a presumption of paternity for men), *and* UNIF. PARENTAGE ACT §

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persons who are the spouses of those who give birth. Low hanging fruit here; this distinction has already fallen in several cases, as it has in the 2017 UPA.[56]

A more challenging rationality analysis arises when there are births without sex. The more progressive 2017 UPA distinguishes between presumed spousal parents of children born to some mates and nonpresumed spousal parents of children born to other mates.[57] A spouse can prompt a pregnancy and spousal parentage in a mate by extramarital sex or by assisted reproduction (with or without a surrogate). The mate is only a presumed parent where there was extramarital sex.[58] Presumptions can be difficult for a spousal parent to rebut. Yet only with a child born of sex was there an actual sexual liaison with one outside the marriage, which may be deemed a more significant betrayal than a spouse's assisted reproduction pregnancy and birth utilizing an anonymous sperm donor.

Finally, is there any significance to employing terms like husband, wife, mother, and father in spousal parent laws, as per the older UPAs, where children are born of sex? How people are gender-identified, by themselves or by others, has nothing to do with actual or presumed biological ties (via sperm).

III. RESIDENCY/HOLD OUT AND/OR DE FACTO PARENT

Residency/hold out parentage and de facto parentage are two childcare parenthood forms that are dependent upon parental-like acts, allowing parentage in those without marital, biological, or formal adoption ties. These forms have been prompted by the ULC and the American Law Institute (ALI).[59] Newer laws reflecting these forms increasingly contain nongendered terms like individual and person. Nevertheless, irrationalities are found even in some of these newer laws where distinctions are drawn without adequate justifications.

4(a) (UNIF. L. COMM'N 1973), *with* UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM'N 2017) (describing a presumption of parentage for individuals).

56. UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM'N 2017) (describing a presumption of parentage for individuals rather than men).

57. *Id.* §§ 201, 204 (describing ways in which a parent-child relationship is established and when parentage is presumed but providing processes for non-presumed parents to establish the same).

58. *See id.* §§ 201–204 (defining when a person is a presumed parent of a child born of sex and excluding assisted reproduction from those enumerated).

59. *See, e.g.*, PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.03(1)(c) (AM. L. INST. 2002) [hereinafter 2000 ALI PRINCIPLES] (recognizing de facto parentage).

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A. Residency/Hold Out Parent

All UPAs recognize childcare parentage in some who have resided with living children whom they held out as their own.[60] 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.[61]

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.[62]

The 2017 Uniform Parentage Act altered a 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.[63]

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 and 2017 UPAs, encompasses "a parent by estoppel" who "lived with the child since the child's birth," while

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60. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973); UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N 2000) (amended 2002); UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017).
61. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973).
62. UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N 2000) (amended 2002).
63. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017).

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holding out and accepting full and permanent responsibilities as a parent as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities.[64]

Many current state laws reflect the policies of these proposed laws. Yet only a few to date have expressly extended the laws beyond publicly identified opposite-sex couples.[65] Nevertheless, residency/hold out parentage is generally available to an identified female partner of one giving birth due to equality demands.[66] Residency/hold out parentage is generally unavailable to a partner of one identified as a male who is a parent at birth where the person giving birth remains a legal parent and where state laws disallow three custodial parents.[67]

There are varying state laws reflecting the distinct UPA approaches to residency/hold out parentage.[68] In California, following the 1973

64. 2002 ALI PRINCIPLES, *supra* note 59, § 2.03(1)(b)(iii) (further requiring a finding of serving the child's best interests).

65. *See, e.g.*, VT. STAT. ANN. tit. 15C, § 401(a)(4) (West 2022) (using the term "person" instead of "man"); WASH. REV. CODE ANN. § 26.26A.115(1)(b) (West 2022) (using the term "individual" instead of "man"). On the need to treat equally all people involved in residency/hold out settings, *see* Jeffrey A. Parness, *Marriage Equality: Parentage (In)Equality*, 32 WIS. J. L., GEND. & SOC'Y 179, 189 (2017).

66. *See, e.g.*, Elisa B. v. Super. Ct., 117 P.3d 660, 670 (Cal. 2005) (finding former unwed lesbian partner a child support parent under California statutory law on presumed natural hold out fathers); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 966, 970 (Vt. 2006) (upon dissolution of civil union of lesbian couple, both women are custodial parents as statute making husband the presumed "natural parent" of a child born to his wife was applicable via a second statute saying that civil union and married couples shall have the "same" rights (citing VT. STAT. ANN. Tit. 15, § 308(4) (repealed 2018))); *id.* § 1204(f). 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, 861 (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 residency/hold out parentage for men, women are sometimes deemed parents under the statutes).

67. However, in California, there can be three legal parents, including the birth mother, her spouse, and a residency. *See* CAL. FAM. CODE § 7612(c) (West 2020) (three parents will be recognized when recognition of only two parents "would be detrimental to the child"). Florida law does not support enforcement of an agreement on sharing child custody when entered into by the married birth mother, her spouse, and the biological father of a child born of sex. *See* C.G. v. J.R., 130 So. 3d 776, 782 (Fla. Dist. Ct. App. 2014).

68. There are also 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, 695 (Ky. 2021) (employing a birth mother's "parental waiver" doctrine

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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."[69] 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.[70] Thus, California cases[71] have recognized as presumed parents those who knew there were no biological ties, but who acted in the community as if there were.[72] Some U.S. state laws recognize residency/hold out parentage only for those who raise children from birth,[73] following the 2017 UPA.[74]

There are other interstate variations in residency/hold out parentage. Some state laws do not require receipt into the home.[75] Some state laws more explicitly require existing legal parents to

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).

69. CAL. FAM. CODE § 7611(d) (West 2021). The presumption has been sustained when challenged on the ground of interfering with federal constitutional childcare interest. *See, e.g.*, R.M. v. T.A., 182 Cal. Rptr. 3d. 836, 839 (Cal. Ct. App. 2015) (preponderance of evidence norm is used to establish presumption); *see also* S.F. Hum. Servs. Agency v. A.V., 2014 Cal. App. Unpub. LEXIS 8870, at *14–15 (Cal. App. 1st Div. 4) (indicating what constitutes receipt into the home).

70. *See* CAL. FAM. CODE § 7611 (West 2021).

71. *See, e.g.*, *In re* Jesusa V., 85 P.3d 2, 15 (Cal. 4th 2004) (Both Paul (also the husband) and Heriberto (also the biological father) were each judicially declared to be "presumed" California fathers because each received Jesusa V. into his home and held her out as his natural child.); *see also* Barnes v. Cypert, No. S106843, 2006 WL 3351790 (Cal. App. Nov. 21, 2006) (birth mother's uncle is a presumed parent); *In re* Jerry P., 116 Cal. Rptr. 2d 123, 124 (Cal. App. 2d Div. 7 2002) (presumed residency/hold out parent need not have, or even claim to have, biological ties).

72. *See In re* Jesusa V., 85 P.3d at 15. How long an alleged residency/hold out parent must so act is determined on a case-by-case basis. *See, e.g.*, *In re* J.B., No. B291208, 2019 WL 1451304 (Cal. App. 2d Div. 1 2019) (finding a two day hold out insufficient for presumed parent status).

73. *Compare* TEX. FAM. CODE ANN. § 160.204(a)(5) (West 2021) (A man is presumed to be the father if "during the first two years of the child's life, he continuously resided in the household in which the child resided and he represented to others that the child was his own[.]"); *and* WASH. REV. CODE ANN. § 26.26A.115(1)(a)(iii)(b) (West 2022), *with* MONT. CODE ANN. § 40-6-105(1)(d) (West 2021) (A person is presumed to be the natural father if "while the child is 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[.]").

74. *Compare* WASH. REV. CODE ANN. § 26.26A.115 (West 2022) (evidencing how Washington amended the presumption of parentage statute to reflect the 2017 UPA), *with* WASH. REV. CODE ANN. § 26.26A.115 (West 2021).

75. *See, e.g.*, N.J. STAT. ANN. § 9:17-43(a)(4)–(5) (West 2021) (either receives the child into his home or "provides support for the child"); DEL. CODE ANN. tit. 13, § 8-201(c)(3) (West 2022) (alteration in original) ("[P]arental role . . . [and] bonded and dependent relationship . . . that is parental in nature.").

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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.[76]

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 residency/hold out was being 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 actual or reasonably assumed knowledge of the potential due to "material misrepresentation or concealment."[77] Elsewhere, there are different time limits,[78] as well as the unavailability of "concealment" as a condition of extending the normal time limits for challenging residency/hold out parents.[79]

76. *See, e.g.*, D.C. CODE ANN. § 16-831.01(1) (West 2021) (including 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) (presuming residency/hold out parent if in the child's first two years, where "another parent" of the child jointly held the child out as presumed parent's child). *Compare* N.J. STAT. ANN. § 9:17-43(a)(4)–(5) (West 2021) (allowing a man to be presumed to be the biological father of a child on equal footing with the unwed birth mother, if he "openly hold out the child as his natural child" and either "receives the child into his home" or "provides support for the child"), *with* N.J. STAT. ANN. § 9:17-40 (West 2021) (marital status of the parents does not impact the parent-child relationship).

77. *See* VT. STAT. ANN. tit. 15C, § 401(a)(4), (b)(2) (West 2022).

78. *Compare, e.g.*, UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017) (residence/hold out in child's first two years); § 204(b); § 608(b) (stating a presumption rebuttal usually must be presented before the child turns two), *with* UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973) (residence/hold out where child is "under the age of majority"); *id.* § 6(b) ("at any time").

79. *Compare, e.g.*, UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017); *id.* § 204(b); *id.* § 608(b) (excluding two year limit on challenging residency/hold out parentage of an individual from operating 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"), *and* UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N 2000) (amended 2002); *id.* § 204(b); *id.* § 607(b) (barring two year limit on actions to disprove earlier determined presumed residency/hold out parentage in a man from operating 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), *with* UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 2017); *id.* § 6(b) (providing that presumed residency/hold out parentage can be challenged "at any time").

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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.[80] Yet, the 2000 ALI Principles are most appropriate, since one existing legal parent, as in a formal adoption, generally should have no agency or common authority to surrender the parental childcare rights of a second existing legal parent.[81]

B. De Facto Parent

The 2017 UPA, but neither of its UPA predecessors, expressly recognizes "de facto" parenthood as a form of parentage for those without biological or formal adoption ties.[82] Such parenthood is dependent upon meeting far more explicit terms to gain shared custody between existing legal parents and nonparents than the terms underlying residency/hold out parentage.[83] 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;"[84] the nonparent must have held out the child as the nonparent's own child and undertaken "full and permanent" parental responsibilities;[85] and the nonparent must have "resided with the child as a regular member of the child's household for a significant period of time."[86]

Of particular note on de facto parentage is the limit on who can commence a proceeding to establish such parentage. Commencement

80. *See* 2000 ALI PRINCIPLES, *supra* note 59, § 2.03(1)(b)(iii).

81. *See, e.g.*, Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 ID. L. REV. 421, 467–78 (2020) [hereinafter Constitutional Limits].

82. The term "de facto" parent did not originate in the 2017 UPA. The Comment to the Act indicates it's de facto parentage standard was modeled on Maine and Delaware statutes. UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM'N 2017). The term was also employed in the 2000 ALI Principles. 2000 ALI PRINCIPLES, *supra* note 59, § 2.03(1); *see also* RESTATEMENT OF CHILDREN AND THE LAW app. B § 1.72 (AM. L. INST., TENTATIVE DRAFT, No. 3, 2021), [hereinafter ALI Restatement Draft] (§ 1.72 on de facto parentage is one of the "black letter" sections approved by membership).

83. 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, for example, "a bonded and dependent relationship with the child." UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. L. 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. *Id.*

84. *Id.* § 609(d)(5)–(6).

85. *Id.* § 609(d)(3)–(4).

86. *Id.* § 609(d)(1).

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may only be undertaken by an "individual" who is "alive" and who "claims to be a de facto parent of the child."[87]

The 2000 ALI Principles,[88] and an ALI Draft of a Restatement of the Law: Children and the Law,[89] also recognize forms of "de facto" parentage for those without biological or formal adoption ties. Each form requires both residence and consent by an existing legal "parent," but only the 2000 Principles further recognize a "parent by estoppel."[90]

Under the 2000 ALI Principles, a "parent by estoppel" is "not a legal parent."[91] 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)."[92]

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."[93] A

87. *Id.* § 609(a).

88. 2000 ALI PRINCIPLES, *supra* note 59, §§ 2.03(1)(c)(ii), 3.02(1)(c) (including requirements or 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).

89. ALI Restatement Draft, *supra* note 82, app. B §1.72(a) (requirements include residence with the child, as well as establishing that "a parent consented to and fostered the formation of the parent-child relationship").

90. 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 decision-making responsibility for a child. *Id.* § 2.04(1). "A *legal parent* is an individual who is defined as a parent under other state law." *Id.* § 2.03(1)(a).

91. *Id.* § 2.03(1)(b).

92. *Id.* § 2.03(1)(b)(iii)–(iv).

93. *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* Kieshia E., 859 P.2d 1290, 1296 (Cal. 1993) (standing of a de facto parent in a juvenile delinquency proceeding); *In re* Dependency of J.H., 815 P.2d 1380, 1384 (Wash. 1991) (allowing in a delinquency case, permissive intervention, not intervention as of right, to some foster parents claiming de facto (or psychological) parent status); *In re* B.G., 523 P.2d 244, 254 (Cal. 1974) (leaving un resolved whether a de facto parent may have the

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de facto parent, unlike a legal parent or a parent by estoppel, has no presumptive right to "an allocation of decisionmaking responsibility" for the child.[94] 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."[95]

The ALI Restatement Draft describes a de facto parent as a third party who establishes that they "lived with the child for a significant period of time;" were "in a parental role" long enough that they established "a bond and dependent relationship . . . parental in nature;" they had no "expectation of financial compensation;" and "a parent" consented to third party's parental-like role.[96] So, the Draft, but not the 2000 Principles, invites a childcare parentage designation adversely impacting the childcare interests of an existing and nonconsenting parent.[97]

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 comparable Maine and Delaware statutes[98] and a less comparable Wisconsin Supreme Court precedent,[99] that the drafters of the 2017 UPA utilized.[100]

same rights of notice, hearing or counsel as have natural parents in Juvenile Court Law proceedings under due process or equal protection principles). The Reporter's Notes to the 2000 ALI Principles observes the "law that most closely approximates the criteria for a 'de facto' parent relationship is that of Wisconsin" where visitation (but not custody) may be awarded "to an individual who has formed a 'parent-like relationship' with a child." 2000 ALI PRINCIPLES, *supra* note 59, § 2.03, cmt. c.

94. 2000 ALI PRINCIPLES, *supra* note 59, § 2.09(2).

95. *Id.* § 2.09(4).

96. ALI Restatement Draft, *supra* note 82, § 1.72(a) (proof by "clear and convincing evidence" is required).

97. 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, 41 (Md. 2021) (requiring, for de facto parenthood 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").

98. *See* ME. REV. STAT. ANN. tit. 19-A, § 1891 (West 2022); DEL. CODE ANN. tit. 13, § 8-201(c) (West 2022).

99. *See In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995) (parental-like relationship can prompt visitation rights when in child's best interests). There are common law precedents elsewhere. In 2008 the South Carolina Supreme Court, adopting a Wisconsin high court analysis, determined that a nonparent was eligible for psychological parent status if a four-prong test was met. Marquez v. Caudill, 656 S.E.2d 737, 743–44 (S.C. 2008) (following *H.S.H.-K.*, 533 N.W.2d at 435–36, which set out norms for nonparent child visitation orders); *see also* Conover v. Conover, 146

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Since 2017, a few states have statutorily recognized 2017 UPA de facto parenthood.[101]

On occasion, statutes within a single U.S. state recognize both residency/hold out and de facto parents who are neither biologically-tied to, nor formal adopters of, children. Thus the Maine Parentage Act, effective in July 2016, provides for presumed parents who resided since birth with a child for at least two years and "assumed personal, financial, or custodial responsibilities,"[102] 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 dependent relationship," and "accepted full and permanent responsibilities as a parent . . . without expectation of financial compensation."[103] Similarly, there are both residency/hold out and de facto parents in Delaware,[104] Washington,[105] and Vermont.[106]

C. Irrational Differences

State law and ULC differentiations between residency/hold out parentage and de facto parentage are puzzling. Most curious is the 2017 UPA provision recognizing that only a putative parent can seek

A.3d 433, 446–47 (Md. 2016) (using *H.S.H.-K.* in recognizing de facto parent doctrine). And in 2009, a federal appeals court noted that the Mississippi Supreme Court had long recognized that a person standing "in loco parentis," meaning "one who has assumed the status and obligations of a parent without a formal adoption[,]" has the same "rights, duties and liabilities" as a natural parent. First Colony Life Ins. Co. v. Sanford, 555 F.3d 177, 183 (5th Cir. 2009) (citing Farve 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.*, Parness, *supra* note 9, at 479. 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).

100. *See* UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM'N 2017).

101. *See, e.g.*, WASH. REV. CODE ANN. § 26.26A.440 (West 2022); VT. STAT. ANN. tit. 15C, § 501 (West 2022).

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

103. *Id.* § 1891(3).

104. DEL. CODE ANN. tit. 13, § 8-204(a)(5) (West 2022) (presumed residency/hold out parent); *id.* § 8-201(c).

105. WASH. REV. CODE ANN. § 26.26A.115(b) (West 2022) (presumed residency/holdout parent "for the first four years"); *id*. § 26.26A.440 (de facto parent).

106. *See* VT. STAT. ANN. tit. 15C, § 401(a)(1) (West 2022) (presumed residency/hold out parent after the first two years); *id.* § 501(a)(1) (de facto parent).

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to establish de facto parent status,[107] though another 2017 UPA provision recognizes that presumptive residency/hold out parenthood "applies for all purposes" (presumably including child support), where the person giving birth, the child, and the state can each seek to establish parentage.[108] The differences in standing norms prompt both Equal Protection (i.e., irrational distinction) and public policy concerns.[109]

IV. ASSISTED REPRODUCTION PARENT

A. Nonsurrogacy Parent

The 1973 UPA does not deal with the "many complex and serious problems raised by the practice of artificial insemination."[110] It does, however, address "one fact situation that occurs frequently,"[111] a "consent" by a husband to the artificial insemination of his wife with "semen donated by a man not her husband."[112] 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.[113] The husband is a nonpresumptive spousal parent. The semen donor who is not the husband is to "be treated in law as if he were not the natural father."[114]

In response to the increasing numbers of children born of assisted reproduction, the 2017 UPA contains distinct articles on nonsurrogacy and surrogacy births. In nonsurrogacy settings, the 2017 UPA "is substantially similar" to the 2000 UPA, with the "primary changes . . . intended to update the article so that it applies equally to same-sex couples."[115] The 2017 UPA recognizes that a sperm donor is not always a parent of a child conceived by assisted

107. *See* UNIF. PARENTAGE ACT § 609(a) (UNIF. L. COMM'N 2017).
108. *Id.* §§ 203, 602.
109. *See* Jeffrey A. Parness, *Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act*, 31 J. AM. ACAD. OF MATRIM. LAWS 157, 157–58 (2018).
110. UNIF. PARENTAGE ACT § 5 cmt. (UNIF. L. COMM'N 1973).
111. *Id.*
112. *Id.* § 5(a).
113. *Id.* (stating that all papers and records pertaining to the insemination are to be kept confidential, though subject to inspection pursuant to a court order "for good cause shown").
114. *Id.* § 5(b).
115. UNIF. PARENTAGE ACT §7 cmt. (UNIF. L. COMM'N 2017).

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reproduction.[116] 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.[117] Seemingly, "consent in a record" can be undertaken "before, on, or after birth of the child."[118] 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."[119] 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.[120] 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 showing a lack of consent, of any agreement, and of holding out the child as one's own.[121]

The nonsurrogacy parentage norms in the UPAs are now reflected in some U.S. state statutes[122] and in precedents untethered to

116. *Id.* §§ 702–704.
117. *Id.* § 704(a).
118. *Id.* § 704(b).
119. *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 as the states follow the 1973 UPA or 2000 UPA which only authorize post-birth (paternity) VAPs. UNIF. PARENTAGE ACT § 4(b) (UNIF. L. 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. L. COMM'N 2000) (amended 2002) ("man claiming to be the genetic father of the child" signs together with the "mother of a child").
120. *See* UNIF. PARENTAGE ACT § 704(b)(2) (UNIF. L. COMM'N 2017); *see, e.g.*, Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 798 (Cal. Ct. App. 2014).
121. *See* UNIF. PARENTAGE ACT § 705 (UNIF. L. COMM'N 2017).
122. *See* TEX. FAM. CODE ANN. § 160.7031 (West 2021) (stating fatherhood for unwed man, intending to be father, who provides sperm to licensed physician and consents to the use of that sperm for assisted reproduction by an unwed woman, where consent is in a record signed by man and woman and kept by the physician); N.H. REV. STAT. ANN. § 5-C:30 (2022) (stating unwed mother has sperm donor "identified on birth record" where "an affidavit of paternity" has been executed); DEL. CODE ANN. tit. 13, § 8-704 (West 2021) ("Consent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man."); WYO. STAT. ANN. § 14-2-904 (West 2021) ("Consent by a woman and a man who intends to be the parent of a child born to the woman by

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statutes,[123] with significant interstate variations.[124] The 2017 UPA provisions have been enacted in a few states.[125]

Childcare parentage for those giving birth and 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 may be used, but are not required.[126] Suggested state-formulated consent forms should be more generally available as informed consent would be better assured and there would be greater certainty in factual disputes regarding party intentions.[127] Such forms would be comparable to the generally required forms for a voluntary acknowledgment of paternity

assisted reproduction shall be in a record signed by the woman and the man. This requirement shall not apply to a donor."); N.M. STAT. ANN. § 40-11A-703 (West 2021) ("[P]erson who provides eggs, sperm or embryos for or consents to assisted reproduction . . . with the intent to be the parent of a child is a parent of the resulting child.").

123. *See* Shineovich v. Shineovich, 214 P.3d 29, 39 (Or. Ct. App. 2009) (holding to avoid constitutional infirmity, assisted reproduction statute as written solely for married opposite-sex couple applied to same-sex domestic partners); *Jason P.*, 171 Cal. Rptr. 3d at 798 (indicating explicitly a lack of paternity for this particular semen donor when his unwed partner delivered a child conceived via assisted reproduction, the statute on presumed parentage for one (either male or female) who receives a child into the home and openly holds out the child as one's own natural child can support – in certain circumstances – legal paternity for the semen donor); Ramey v. Sutton, 362 P.3d 217 (Okla. 2015) (holding unwritten preconception agreement prompts in loco parentis childcare status for former lesbian partner of birth mother, though she contributed no genetic material); *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 501 (N.Y. 2016) (holding agreement between lesbian partners can prompt parentage in non-birth mother).

124. *See generally* Deborah H. Forman, *Exploring the Boundaries of Families Created with Known Sperm Providers: Who's In and Who's Out?*, 19 UNIV. PA. J.L. & SOC. CHANGE 41 (2016) (explaining variations within the laws and their foundational principles).

125. *See generally* UNIF. PARENTAGE ACT §§ 701–708 (UNIF. L. COMM'N 2017); WASH REV. CODE ANN. § 26.26A.610 (West 2019); VT. STAT. ANN. tit. 15 § 701 (West 2018).

126. *See* CAL. FAM. CODE, § 7613.5 (West 2020) (indicating 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).

127. *See generally* Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage*, 92 NOTRE DAME L. REV. ONLINE 87 (2017). *See, e.g.*, *Jason P.*, 171 Cal. Rptr. 3d at 798 (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").

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(VAPs).[128] 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, employ internet forms that will not later be recognized as enforceable agreements.[129]

As with presumed spousal parentage laws for children born of sex, is there anything important added by employing terms like husband, wife, man, and woman in nonsurrogacy assisted reproduction parent laws? There are sperm and egg donors (not intended parents) and providers (intended parents), as well as consenting, agreeing, and residing individuals. How parents and nonparents are gender-identified, publicly or personally, should not impact legal analyses implementing public policies on childcare parentage, whatever they are.

B. Surrogacy Parent

As to surrogacy, the 1973 UPA is silent.[130] The 2017 UPA, like the 2000 UPA, distinguishes between genetic ("traditional") and gestational surrogacy.[131] Their surrogacy provisions are limited to instances of assisted reproduction births.[132] Unlike its 2000

128. *See, e.g.*, Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 63–87 (2010). At times, written parentage acknowledgments operating through state-generated VAP forms were not utilized. *See, e.g.*, D.C. CODE ANN. § 16-909(a)(4) (West 2021) (presuming that a man is the father of a child if he has "acknowledged paternity in writing"); *see also* N.M. STAT. ANN. § 40-11A-204(A)(4)(c) (West 2021) (providing that 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); KAN. STAT. ANN. § 23-2208(a)(4) (West 2021) (providing that 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 acknowledgment statutes).

129. *See, e.g.*, Gatsby v. Gatsby, 495 P.3d 996, 1005–06 (Idaho 2021) (inherent form found seriously deficient).

130. UNIF. PARENTAGE ACT § 5 cmt. (UNIF. L. COMM'N 1973) (addressing husband-wife pacts on assisted reproduction where the wife bears the child and intends to parent, but declining to "deal with many complex and serious legal problems raised by the practice of artificial insemination").

131. UNIF. PARENTAGE ACT § 8 cmt. (UNIF. L. COMM'N 2017).

132. UNIF. PARENTAGE ACT § 801(a)(1) (UNIF. L. COMM'N 2000) (amended 2002) (stating in the surrogacy agreement that the perspective gestational mother "agrees to pregnancy by means of assisted reproduction"); UNIF. PARENTAGE ACT § 801(3) (UNIF. L. COMM'N 2017) (stating in the surrogacy agreement that the 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 B.C.S.C 1283,

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predecessor, the 2017 UPA does not require all surrogacy agreements to be validated by a court order prior to any medical procedures.[133] The 2017 UPA imposes differing requirements for the two surrogacy forms, however, with "additional safeguards or requirements on genetic surrogacy agreements,"[134] as only they involve a woman giving birth while "using her own gamete."[135] The 2017 UPA recognizes there can be "one or more intended parents" in surrogacy settings.[136]

The common requirements for the two forms of surrogacy pacts include signatures in a record, "attested by a notarial officer or witnesses;" independent legal counsel for all signatories; and execution before implantation.[137] Special provisions for gestational surrogacy pacts include an opportunity for "party" termination "before an embryo transfer" and an opportunity for a prebirth court order declaring parentage vesting at birth.[138] 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;[139] that a genetic surrogate may withdraw consent "in a record" at any time before

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para. 2–3 (Can.) (involving a parentage action filed by surrogate against biological father and spouse).

133. UNIF. PARENTAGE ACT art. 8, pt. 2, cmt. (UNIF. L. COMM'N 2017).

134. *Id.* § 8 cmt. The common safeguards or requirements for all surrogacy pacts are found in Sections 802–807 of the 2017 UPA. *Id.* §§ 802–807; *see also id.* §§ 808–812 (special requirements for gestational surrogacy agreements); *id.* §§ 813–818 (special requirements for genetic surrogacy agreements).

135. *Id.* § 801(1). Gestational Surrogacy covers birth by a woman who uses "gametes that are not her own." *Id.* § 801(2). The special rules for gestational surrogacy pacts are found at §§ 808–812, while the special rules for genetic surrogacy pacts are found in §§ 803–818. *Id.* §§ 803–818.

136. *Id.* § 801(3). The 2017 UPA does not address accidental surrogacy, 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 mistakenly 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 embryo creators, with no visitation for gestational mother).

137. UNIF. PARENTAGE ACT § 803(6), (7), (9) (UNIF. L. 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 post pregnancy. *Id.* § 801(1)–(2) (applying each surrogacy form only to a person "who agrees to become pregnant through assisted reproduction").

138. *Id.* §§ 808(a), 811(a)(1).

139. *Id.* § 813(a)–(b).

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seventy-two hours after the birth;[140] 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."[141]

UPA surrogacy parentage norms are now reflected both in state statutes[142] and precedents untethered to statutes.[143] Certain provisions of the 2017 UPA have been enacted in a few states.[144] Elsewhere, there operate major sections of the 2000 UPA on surrogacy.[145] As yet there are no state-required forms, though there are suggested forms

140. *Id.* § 814(a)(2). However, genetic and gestational surrogates have both been recognized as having federal constitutional parental opportunity interests. Lehr v. Robertson, 463 U.S. 248, 261–62 (1983). *See generally In re* Schnitzer, 493 P.3d 1071 (Or. Ct. App. 2021) (holding mere genetic connections without more will not automatically confer a constitutionally protected parental interest).

141. UNIF. PARENTAGE ACT § 818(b) (UNIF. L. COMM'N 2017).

142. In New Hampshire, before insemination pursuant to a surrogacy contract will be deemed "lawful," a court "shall" be petitioned for "judicial preauthorization." N.H. REV. STAT. ANN. §§ 168-B:16(I), 21(I) (2010) (repealed 2014). Requirements include that the "intended mother [is] . . . psychologically unable to 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." *Id.* § 168-B:17(II)–(IV) (repealed 2014). Authorization is permitted only where the "surrogacy contract is in the best interest of the intended child." *Id.* § 168-B:23(III)(d) (repealed 2014).

143. There is legal precedent of judicial enforcement of surrogacy agreements. *See, e.g.*, *In re* F.T.R., 2013 833 N.W.2d 634, 653 (Wis. 2013) (enforcing surrogacy pact between two couples as long as child's best interests were served, while urging the legislature to "consider enacting legislation regarding surrogacy" to ensure "the courts and the parties understand the expectations and limitations under Wisconsin law"); *In re* Baby, 447 S.W.3d 807, 812, 833 (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 A., No. W2014-01281-COA-R3-JV, 2015 WL 1956247, at *1– 2 (Tenn. Ct. App. Apr. 24, 2015) (gestational surrogate for married couple is placed on birth certificate as said to be required by statute where intended father's/husband's sperm used with egg from unknown donor and intended mother/wife was recognized by all parties as legal mother; reiterates plea from *In re* Baby that the legislature should enact a comprehensive statutory scheme); Raftopol v. Ramey, 12 A.3d 783, 786–87 (Conn. 2011) (biological father's male domestic partner can also be intended parent of a child born to a gestational surrogate). Beyond enforcing a surrogacy pact in the absence of statute, an intended parent (also the sperm donor) who employed a gestational surrogate was allowed in one case to formally adopt his genetic offspring. *See In re* John 103 N.Y.S.3d 541, 543 (N.Y. App. Div. 2019).

144. *See, e.g.*, WASH. REV. CODE ANN. § 26.26A.715 (West 2022) (gestational or genetic surrogacy agreement); VT. STAT. ANN. 15C, § 801 (West 2021) (gestational carrier agreements); 15 R.I. GEN. LAWS ANN. § 15-8.1-801 (West 2021) (gestational carrier agreements).

145. *See, e.g.*, UTAH CODE ANN. § 78B-15-801 (West 2021) (similar to 2000 UPA).

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for nonsurrogacy assisted reproduction births in California.[146] Increased mandates on required forms and the increased availability of suggested forms would diminish significantly disputes over consents to parentage, nonparentage, and conditions of pregnancy.[147]

As with nonsurrogacy parenthood, the employment of terms in statutes and cases like husband, wife, man, and woman add nothing of public policy import to surrogacy parenthood laws. While intentions are always key, additional requirements, such as the need for spouses as intended parents, the need for two intended parents, or the need for gamete donation(s) might be added (and might survive constitutional attack). There is no reason to describe the surrogate or any intended parents as male or female.

V. VOLUNTARY ACKNOWLEDGMENT PARENT

All UPAs recognize childcare parentage in those who have undertaken a voluntary acknowledgment of paternity (VAP) of a child then alive.[148] The 2017 UPA also recognizes prebirth VAPs that take effect at birth.[149] Unlike spousal parentage, with VAPs there are actual consents to parentage.[150] Additional legal parentage protections generally arise for those signing VAPs whose spouses give birth (spousal parent).

The 1973 UPA recognizes "a man is presumed to be the natural father of a child" if "he acknowledges his paternity in a writing" filed with the state which is not disputed by the person giving birth "within a reasonable time after being informed."[151] Rebuttal of such a presumption occurs only with "clear and convincing evidence of no biological ties," along with "a court decree establishing paternity of the child by another man,"[152] with unclear limits on pursuing such a rebuttal.[153]

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146. *See* CAL. FAM. CODE § 7613.5 (West 2020).

147. *See* Parness, *supra* note 127, at 104; *see also* Guardianship of Keanu, 174 N.E.3d 1228, 1230 (Mass. App. Ct. 2021) (recognizing the need for legislation given "the risks of an informal surrogacy").

148. *See* UNIF. PARENTAGE ACT art. 3 cmt. (UNIF. L. COMM'N 2017).

149. *Id.* § 304(b)–(c).

150. *See id.* § 703.

151. UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM'N 1973).

152. *Id.* § 4(b).

153. *Compare id.* § 6(b) (regarding an action to determine the nonexistence of "the father and child relationship" under the hold out/residency provision can be brought by "any interested person"), *with id.* § 6(a) (stating an action to determine the nonexistence of presumed marital father must be brought "within a reasonable time after obtaining knowledge of relevant facts" but no "later than [five] years after the child's birth").

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The 2000 UPA recognizes no parentage presumption for a VAP signor.[154] It does recognize that the person giving birth and "a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's paternity."[155] That UPA declares a VAP can be rescinded within 60 days of its effective date by a "signatory."[156] Thereafter, a signatory can commence a court case to "challenge" the VAP, but only on "the basis of fraud, duress, or material mistake of fact" within two years of the VAP filing.[157]

The 2017 UPA also recognizes nonpresumptive parent-child relationships through VAPs.[158] Parentage establishments can be undertaken by an expanded field of VAP signatories, including those who claim to be "an alleged genetic father" of the child born of sex;[159] a presumed parent due to an alleged or actual marriage; a presumed parent due to a holding out of the child as one's own while residing in the same household with the child "for the first two years of the life of the child[;]"[160] and, an "intended parent" in a nonsurrogacy, assisted reproduction setting.[161] Under the 2017 UPA, a VAP is the equivalent of an adjudication of the parentage of the child.[162]

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154. *See* UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM'N 2000) (amended 2002).

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

156. *Id.* § 307.

157. *Id.* § 308(a)(1).

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

159. *Id.* § 301.

160. *Id.* §§ 301, 204(a).

161. *Id.* §§ 301, 703. Unlike earlier UPAs, VAPs may be signed "before" birth. *Id.* § 304(b).

162. UNIF. PARENTAGE ACT § 302(a)(3) (UNIF. L. COMM'N 2017). *But cf.* ARK. CODE ANN. § 20-18-702(a)(1)–(3) (West 2021) (Within the Department of Health there is a Putative Father Registry which can "entitle [signing] putative fathers to notice of legal proceedings pertaining to the child for whom the putative father has registered." But the "rights" do not attach until the putative father establishes "a significant custodial, personal, or financial relationship with the child[.]").

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As with the 2000 UPA, per the 2017 UPA signatories may rescind VAPs within 60 days of their effective date.[163] Challenges may proceed thereafter, "but no later than two years after the effective date" and "only on the basis of fraud, duress or material mistake of fact."[164] While nonsignatory VAP challenges may be pursued within "two years after the effective date of the acknowledgment," challenges usually will only be sustained when the child's "best interest" will be served.[165] Nonsignatory challengers are limited. Those with standing include the child; a parent under the 2017 UPA; "an individual whose parentage is to be adjudicated"; an adoption agency; and a child support, or other authorized, governmental agency.[166]

The 2017 UPA expressly recognizes that VAPs may be undertaken by those who know there are no biological ties to the children whom they acknowledge.[167] This is new, and revolutionary. The 2017 UPA allows circumvention of formal adoption laws and the safeguards they provide for children, including background checks and best interest findings. A comment to the 2000 UPA laments that the federal statutes guiding state VAP laws do not expressly "require that a man acknowledging paternity must assert genetic paternity"; it indicates the 2000 UPA was "designed to prevent circumvention of adoption laws by requiring a sworn statement of genetic parentage of the child."[168] Thus, in 2017, the ULC policy on VAPs changed dramatically. The change not only runs counter to formal adoption laws, but presents constitutional issues involving, at the least, as-applied challenges.[169]

Many current state laws reflect the policies of the UPAs on VAPs.[170] Only a few states have extended VAP authority to an

163. UNIF. PARENTAGE ACT § 308(a)(1) (UNIF. L. COMM'N 2017). The effective date of a VAP signed prebirth is the day the child is born. *Id.* § 304(c).

164. *Id.* § 309(a).

165. *Id.* § 610(b)(1)–(2).

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

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

168. UNIF. PARENTAGE ACT art. 3 cmt. (UNIF. L. COMM'N 2000) (amended 2002).

169. Challenges would be founded on the innocent losses of the constitutional parental opportunity interests of unwed sperm donors where children are born of consensual sex to a person who is unwed. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 248–49 (1983).

170. Alongside the aforedescribed UPA VAPs, some states also recognize parentage for those who acknowledge parentage in other ways. *See, e.g.*, MINN. STAT. ANN. §

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identified same-sex female couple where a child is born of consensual sex.[171] VAP opportunities are not, and in many states could not be, extended to an identified same-sex male couple where one of the men conceived a child born of sex, at least where the person giving birth continues to be a parent and where there cannot be three legal parents.[172]

State VAP statutes today only sometimes involve parentage presumptions. With or without presumptions,[173] VAP statutes typically recognize that signed and state-filed parentage declarations establish childcare parentage for signors who are not persons giving birth. Sometimes VAPs operate without alleged biological ties.[174]

257.55(c) (West 2021) (articulating that a man is presumed to be the biological father of a child if he married the birth mother after the child's birth and "is obligated to support the child under a written voluntary promise").

171. *See, e.g.*, VT. STAT. ANN. tit. 15C, §§ 301(a)(4), 401(a)(1) (West 2022) (stating that a person married to the birth mother when child is born can undertake voluntary parentage acknowledgment); WASH. REV. CODE ANN. § 26.26A.200 (West 2022) (permitting birth mother and "presumed parent," which includes spouse of birth mother under 26.26A.115(1)(a)(i), to sign acknowledgment). *Compare* Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 99, 103 (2018) (discussing the need for allowing VAPs for same-sex female couples who conceive children using donated sperm), *with* Jeffrey A. Parness, *Unnatural Voluntary Parentage Acknowledgments Under the 2017 Uniform Parentage Act*, 50 U. TOL. L. REV. 25, 25–26 (2018) (addressing the problems with two women signing VAPs for children born of consensual sex and concerns regarding lost paternity interests for unwed biological fathers involving children born of consensual sex).

172. In California there can be three parents under law. CAL. FAM. CODE § 7612(c) (West 2022). But one such parent cannot be a parent via voluntary parentage acknowledgment. *See id.* §§ 7611–7612(c) (voluntary parentage acknowledgment does not prompt presumed parentage).

173. *See* Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 63–82 (2010) (reviewing state voluntary acknowledgment statutes).

174. In Alaska and Nevada, the VAP forms do not speak to biological ties, the signing man indicates only that he is the "father." *See* ALASKA BUREAU VITAL STAT., FORM NO. 06-5376 VS FORM 16, AFFIDAVIT OF PATERNITY (rev. Jan. 2009); NEVADA DECLARATION OF PATERNITY, NEV. VITAL RECORDS, FORM NO. NSPO, DECLARATION OF PATERNITY (rev. July 2008). In Vermont, a woman residing with a birth mother for the first two years of a child's life is eligible to sign a VAP. *See* VT STAT. ANN. tit. 15C §§ 301(a)(4), 401(a)(4) (West 2022). In Wyoming and Washington, there is no explicit requirement that the signing man affirm a belief in biological ties, though the signor elsewhere is referred to as the "natural father." *See* VITAL RECORDS SERVS., WYO., AFFIDAVIT ACKNOWLEDGING PATERNITY; WASH. PATERNITY AFFIDAVIT, CTR. FOR HEALTH STAT., WASH. DEP'T OF HEALTH, FORM NO. DOH/CHS 021 (rev. Sept. 2007)

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VAPs operate without formal adoptions. State VAP laws also vary in their disestablishment standards, though all norms, due to federal welfare subsidy mandates, must conform to the federal Social Security Act.[175]

VAP statutes most often are employed by one giving birth and another person who seeks to establish legal parenthood.[176] VAPs are typically distinguished from birth certificate recognitions of childcare parents encompassing those married to persons giving birth, who frequently are presumed parents, but who never undertake VAPs.[177] VAP parents who also reside and hold out children as their own differ from residency/hold out parents who never undertake VAPs,[178] as a VAP is more difficult to challenge than is residency/hold out parentage.[179]

Only in some states must information as to any completed genetic testing be submitted; may forms be used by residents for out-of-state

(The foregoing VAP forms, and others later referenced, are on file with the author, who assembled them while writing *For Those Not John Edwards*.).

175. *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 301–333, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.). *See* Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 44–53, 82–90 (2003) (discussing disestablishment, i.e., rescissions and challenges, including table titled appendix B citing all statutes). Disestablishment norms can vary, for example, depending upon whether a birth mother and male signatory must acknowledge they are "biological parents." *Compare* State *ex rel*. v. Smith, 392 P.3d 68, 79 (Kan. 2017) (no such acknowledgment in Kansas so no fraud when male signatory has no biological ties, though VAP form establishes "paternity"), *with* McGee v. Gonyo, 140 A.3d 162, 162–63, 167 (Vt. 2016) (In Vermont, where "biological" parentage is acknowledged and where fraud as to belief in biological ties can undo a VAP.).

176. *But see In re* Sebastian, 879 N.Y.S.2d 677, 687–88, 692 (Surr. Ct. 2009) (suggesting that a woman whose ova was used by her partner to bear a child born of assisted reproduction might employ the voluntary acknowledgment process).

177. *See, e.g.*, Castillo v. Lazo, 386 P.3d 839, 842 (Ariz. Ct. App. 2016) (stating that birth certificate naming husband is "not equivalent to a voluntary acknowledgment of paternity").

178. *See, e.g.*, VT. STAT. ANN. tit. 15C §§ 301(a)(4), 401(a)(4) (West 2022) (a presumed hold out or residency parent may, but need not, sign a VAP).

179. For example, under both the 2000 and 2017 UPA a VAP usually cannot be challenged more than 60 days after signing unless no more than two years have passed and there is shown "fraud, duress, or material mistake of fact." UNIF. PARENTAGE ACT §§ 307–308 (UNIF. L. COMM'N 2000) (amended 2002); UNIF. PARENTAGE ACT §§ 308(a)(1), 309(a) (UNIF. L. COMM'N 2017). For residency/hold out parentage, a proceeding "to adjudicate the parentage of a child" having such a presumed parent must be commenced within two years after a child's birth, with no showing of fraud or the like. UNIF. PARENTAGE ACT 607(a) (UNIF. L. COMM'N 2000) (amended 2002); UNIF. PARENTAGE ACT § 608 (UNIF. L. COMM'N 2017).

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births; are witnesses or notaries needed; and must forms require parental or guardian consent when the signing persons who gave birth are young.[180] In Florida, besides a VAP, there is recognized a paternity acknowledgment "in a sworn statement" by a man "after learning that he is not the biological father of the child."[181]

Notwithstanding any statutorily-designated "conclusive" status, VAPs can be rescinded by signatories within sixty days.[182] After sixty days, VAPs can only be challenged in court on the basis of fraud, duress, or material mistake of fact.[183] For states participating in federal welfare subsidy programs, these standards are required by the federal Social Security Act.[184] Yet, state cases reflect significant interstate variations in the fraud, duress, and mistake guidelines for VAP challenges, with no Congressional or federal court movement, as yet, to unify state VAP challenge standards.[185]

Beyond fraud, duress, and mistake, there are other differences in U.S. state VAP challenge laws. For example, there are varied time limits on VAP challenges. Even with fraud, duress, or mistake, challenges must be commenced within a year in Massachusetts,[186] within two years in Delaware,[187] and within four years in Texas.[188] In

180. *See* Parness & Townsend, *supra* note 128, at 63–87 (reviewing the varying state forms).

181. FLA. STAT. ANN. § 742.18(3)(b), (f) (West 2021); *see also* FLA. STAT. ANN. § 742.10 (West 2021) (stating the law relevant to voluntary paternity acknowledgment).

182. 42 U.S.C. § 666(a)(5)(D)(ii) (2018).

183. *Id.* § 666(a)(5)(D)(iii).

184. *See id.* § 666(a)(5)(D)(ii)–(iii). At least one state statute combines its norms on disestablishing presumed marital paternity and its norms on challenging VAPs. *See* ALA. CODE 26-17-608(a)(1) (2021).

185. *See generally* Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI.-KENT L. REV. 177 (2017) [hereinafter *Reforming VAPs*] (discussing the significant variations in federal and state laws regarding voluntary paternity acknowledgment and proposing parental acknowledgment separate from the restrictions of the Social Security Act for the benefit of overall child welfare).

186. MASS. GEN. LAWS ANN. ch. 209C, § 11(a) (West 2022). Kansas also has a statutory one-year period. *See* State v. Smith, 392 P.3d 68 (Kan. 2017) (finding a one-year (after birth) limit on signatory challenges applied though the court found technical violations [e.g., no proper notarizations] of the statute).

187. DEL. CODE ANN., tit. 13, § 8-308(a)(2) (West 2022). Vermont also has a statutory two-year period. *See* VT. STAT. ANN. tit. 15C, § 308(a)(2) (West 2021). To see how other states have handled complications arising from the running of this statutory period, compare Paul v. Williamson, 322 P. 3d 1070 (Okla. Civ. App. 2014) (employing Oklahoma two-year limit against alleged biological father per OKLA. STAT. tit. 10, § 7700-609(B) (2021)), with LA. STAT. ANN. § 9:406 eds. note to 2016 amendment

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Utah, a statutory challenge may be made "at any time" on the ground of fraud or duress, but only within four years for a material mistake of fact.[189] Where there are no written time limits, (often quite broad) trial court discretion reigns.[190] Further, there are interstate differences in whether a successfully challenged VAP eliminates past child support arrearages.[191]

Importantly, particularly for nonsigning sperm donors with children born of consensual sex, there are some laws on the circumstances beyond fraud, duress, and mistake available to challenge VAPs. Consider challenges by nonsigning sperm donors who did not know that others were signing VAPs alongside those giving birth, and who did not know of, and did not reasonably foresee, their "potential parentage." In Vermont, such a sperm donor may challenge a VAP within two years after discovery of "potential parentage," as in cases where there was "concealment" of the pregnancy or of the birth though there was no fraud, duress, or mistake.[192] Elsewhere, "concealment" of a pregnancy or of a live birth by the person giving birth (and, at times, others) may not extend the time for a sperm donor to challenge a VAP because strict repose periods operate.[193]

Finally, again particularly important for nonsigning sperm donors (and their family members), state laws vary on which nonsignatories can challenge VAPs. In Vermont, a challenge is available to "a person not a signatory."[194] Elsewhere, standing to challenge a VAP is far more limited, as with laws recognizing only certain types of challengers, like children and governments.[195]

(2021) (repealing two-year prescriptive period previously imposed for revocation of authentic acts of acknowledgment).

188. TEX. FAM. CODE ANN. § 160.607(a) (West 2021).

189. UTAH CODE ANN. § 78B-15-307(3)–(4) (LexisNexis 2021).

190. *See, e.g.*, *In re* Neal, 184 A.3d 90 (N.H. 2018) (affirming exercise of trial court discretion where a 2009 VAP was challenged by male signatory in 2015 after a 2012 paternity test revealed that he was not the biological father and child contact was cut off in 2014).

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

192. VT. STAT. ANN. tit. 15C, § 308(b) (2021).

193. *See, e.g.*, *Reforming VAPs*, *supra* note 185, at 199–200 (noting that VAP challenges within the relevant time limits may be foreclosed by laches or estoppel).

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

195. *See, e.g.*, *Reforming VAPs*, *supra* note 185, at 188–94 (reviewing state law on the circumstances in which alleged biological father, the government, children, and certain others may challenge VAPs). While the 2017 UPA expressly recognizes a VAP may be challenged by a nonsignatory, UNIF. PARENTAGE ACT §§ 309(b), 610(b) (UNIF. L. COMM'N 2017) ("proceeding . . . brought by an individual other than the

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There are several constitutional problems with current VAP laws. As to the gendered terms in VAP laws, what is added by describing a signor as a mother or a woman, rather than as the person giving birth? What is added by describing a signor as a father or a man, or as a mother or a woman, rather than as an actual or possible gamete provider, which would recognize the interests of both sperm and egg providers where genetic ties are important?[196] By recognizing gamete provision rather than sperm or egg provision, irrational distinctions between donors who seek legal parenthood are eliminated.[197] VAPs should encompass those who undertake voluntary parentage acknowledgment, not voluntary paternity acknowledgment, a distinction recognized in the 2017 UPA.[198] Yet the 2017 UPA does unfairly differentiate between an "alleged genetic father" who can sign a VAP for a child born of sex to another and an alleged genetic mother who cannot sign a VAP for a child delivered by another if she has not undertaken a "record" of intent to parent a child born of assisted reproduction.[199]

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child"), the 2002 UPA only explicitly recognizes *signatory* challenges, UNIF. PARENTAGE ACT § 308(a) (UNIF. L. COMM'N 2000) (amended 2002). *See also* UNIF. PARENTAGE ACT §§ 4(a)(5), 6(b) (UNIF. L. COMM'N 1973) ("Any interested party may bring an action at any time for the purpose of determining the existence or non-existence of the father and child relationship presumed under [§ 4(a)(5)].").

196. Herein, "gamete providers" encompass those intending to parent their biological children born of assisted reproduction while "gamete donors" have no such intentions when they donate.

197. On the need for VAP availability for egg providers, see, for example, Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J. L. & FEMINISM 99, 103–04, 104 n.19 (2018) (arguing that female couples who have children with donated sperm and conceived through assisted reproduction should have legal parent status through completion of a VAP). A set of more progressive laws is VT. STAT. ANN. tit. 15C, §§ 301(a)(4), 401(a)(1) (West 2022) (meaning a person married to one bearing a child can undertake a VAP).

198. UNIF. PARENTAGE ACT art. 3 cmt., para. 2 (UNIF. L. COMM'N 2017).

199. *Id.* § 301 (recognizing the availability of VAPs for identified females but failing to recognize expressly VAPs for such unmarried females who have contributed eggs leading to children delivered by others). These egg providers also do not qualify as intended parents of children born to their partners who delivered the children where there is no effective consent. *Id.* § 704. For such consent, a "record" is needed, though there may be actual consent. *Id.* § 704(a). In nonsurrogacy assisted reproduction settings, the written "record" of consent must contain the signature of the person giving birth and the other intended parent, and can be executed "before, on, or after the birth of the child." *Id.* § 704(b). In the absence of such a "record," an individual can prove "consent to parentage" by proving "by clear-and-convincing evidence the existence of an express agreement entered into before conception" as to intended

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VI. DECEASED PARENT

On occasion, it is important to determine initially the legal parentage of one who dies before or after the birth of an alleged offspring or to disestablish an earlier parentage determination for one now dead. The parental status of one who is deceased is important in such matters as child support, inheritance, and personal injury. Those interested in having a decedent's parentage determined under law include the person giving birth (as for unpaid child support from an estate), the child (as for probate or tort recovery), the state (as for child support reimbursement), and the decedent's family members (as for familial visitation).40

The laws on the parental status of one now deceased can, but need not, vary by context. They can also distinguish between decedents who passed away before conception, between conception and birth, and after birth. The 2017 UPA demonstrates in its approach to the "parental status of deceased individual" in nonsurrogacy assisted reproduction settings.[200] As to intended parents who die preconception after consenting in a "record" to assisted reproduction with one who agrees to give birth, the decedent is a "parent" only if the decedent either consented to post-death parentage "in a record" or there is "clear-and-convincing" evidence of such an intent, as well as if the embryo is in utero not later than 36 months after death or the child is born not later than 45 months after death.[201] As to intended parents who die between "the transfer of a gamete or embryo and the birth of the child," the decedent is a parent if the "individual otherwise would be a parent under the UPA."[202] As to the parentage of spouses who die after their marital mates give birth via nonsurrogacy assisted reproduction, parental status seemingly can continue to be challenged if, before their death, the deceased spouses commenced a proceeding to adjudicate parentage not later than two

parentage. *Id.* §704(b)(1). Where an egg provider cannot prove a preconception express agreement, as when disputed by the person about to give or giving birth with whom the provider is no longer partnered, and cannot then undertake a VAP, as the former partner will not sign, the provider may seek an adjudication as a genetic parent but may have to compete with another individual claiming parenthood with the person who gave birth. *Id.* §§ 607, 613. By contrast to the "record" needed by an egg provider, an "alleged genetic father" can undertake a VAP before birth, establishing parentage effective at birth, without any other "record." *Id.* §§ 201(5), 301, 304(b).

200. *Id.* §§ 701, 708.

201. *Id.* § 708(b). The Connecticut Parentage Act, effective in 2022, differs in that there must be "a written document" on consent and the embryo is in utero not later than one year after the decedent's death. CONN. GEN. STAT. ANN. § 58(b) (West 2021).

202. UNIF. PARENTAGE ACT § 708(a) (UNIF. L. COMM'N 2017); *see also* CONN. GEN. STAT. ANN. § 58(b).

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years after birth and the deceased spouses are found to not have consented to the assisted reproduction.[203]

Notwithstanding these provisions, the 2017 UPA recognizes that laws outside the UPA might operate for some parentage proceedings tied to nonsurrogacy assisted reproduction. Thus, it declares that the Act "does not create, enlarge or diminish parental rights or duties under law of this state" outside the Act.[204]

A. Parents Who Die Before Birth

On prospective parents who die prepregnancy or during pregnancy, dead spouses of those later giving birth can be recognized as the parents of the marital children, as where spousal parentage arises for one married to the person giving birth at the time of conception or during the pregnancy. This opens the door post-birth to such interests as child support, child heirship in probate, child tort recovery, and family status for the decedent's family members in child visitation matters.[205] When one giving birth is unwed, here too there can be post-birth parenthood for the dead, as when a decedent's sperm or eggs were involved in the birth and where the decedent qualifies under assisted reproduction laws as an intended parent or qualifies as a prebirth VAP signor.

Parenthood for the dead usually does not, and should not, depend upon the decedent's gender identity. Unfortunately, too often gendered terms are employed when assessing parentage for the dead, making correct legal applications more difficult (as, e.g., equality claims must be presented to secure comparable treatment of self-identified men and self-identified women whose spouses give birth where spousal parentage laws are only written for opposite-sex couples).

203. UNIF. PARENTAGE ACT § 705(a) (UNIF. L. COMM'N 2017). The two-year period does not apply in certain settings (no gamete or consent, no cohabitation with the birth giver since the probable time of assisted reproduction, and no hold out of the child as the spouse's own). *Id.* § 705(b); *see also* CONN. GEN. STAT. ANN. § 57.

204. UNIF. PARENTAGE ACT § 103(b) (UNIF. L. COMM'N 2017). The 2022 Connecticut Parentage Act has a similar declaration, but it also says the Act does not impact "the equitable powers of the courts." CONN. GEN. STAT. ANN. § 3(b) (West 2021). The 2017 Uniform Parentage Act provision on the parental status of a deceased individual was written to conform to the UNIF. PROB. CODE § 2-120(f), (k). UNIF. PARENTAGE ACT § 708, cmt., para. 3.

205. Est. of Swift *ex rel.* Swift v. Bullington, 309 P.3d 102, 106 (N.M. Ct. App. 2013) (involving putative paternal grandfather who could pursue parentage action after son's death which preceded child's birth).

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There are very few child support cases on the parentage of persons who die before their children are born (via either consensual sex or assisted reproduction). A much-cited survey of American state laws says this of nonmarital children born after their sperm donors' deaths:

> Although statutes in most states now provide for the survivorship of many causes of action and, while the statutes vary widely in their provisions, some at least go so far as a sweeping provision that all causes of action survive the death of either the person in whom the cause is vested or the person liable, nevertheless the courts are in substantial agreement that, absent a statute expressly providing for the survival of a cause of action, or of an action, to establish paternity and support of an illegitimate child, neither the right of action nor an action already instituted survives the death of the putative father, so that no new filiation proceeding can be instituted against the decedent's estate, and an existing action which has not reached judgment abates and cannot be continued against decedent's personal representative. This reluctance to extend the support obligation beyond the death of the parent extends to the situation where the support order was entered during the father's lifetime, the courts usually holding that payment of accrued obligations may be enforced against the estate but that no further payments accrue after the father's death.[206]

If parental death ends child support for a living child, it should end child support for an unborn child. The survey does suggest, however, that continuing child support may be available from a decedent's estate when there is "a contract for support, secured, if possible, by an insurance policy or trust fund."[207]

The survey fails to recognize that persons other than "fathers" can be responsible for child support, both prebirth and post-birth.[208] There is now spousal parentage arising from marriages of couples who are not identified and who do not identify as husbands and wives. Further, the survey fails to recognize there can be nonspousal

206. W.E. Shipley, Annotation, *Death of a Putative Father as Precluding Action for Determination of Paternity or for Child Support*, 58 A.L.R. Fed. 3d 188, § 2(a) (1974).

207. *Id.* § 2(b).

208. *Id.* § 1(a) (limiting the scope of the annotation to the death of a putative father).

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parentage for persons other than those who can be assigned "paternity" status, as with some assisted reproduction births.[209]

The general unavailability of child support for a child born after a prospective parent's death does not foreclose the child from other monetary recoveries founded upon a prospective parent's death, including relief under tort, probate, or insurance laws. Thus, there might be, for example, post-birth parentage actions following the deaths of biological, spousal or intended parents before or during pregnancies. Here, marital and nonmarital children could be treated alike.[210]

There are, in fact, some money recovery cases, beyond child support, on the parentage of those who die before their children's births. Again, gendered terms prompt difficulties. For example, in tort there is the wrongful death claim which can usually be pursued when the death of an individual is caused by the wrongful act or omission of another.[211] Here, the decedent's personal representative maintains an action on behalf of the decedent against whomever caused the death if the decedent, had the decedent lived, could have maintained a comparable action.[212] Damages recovered for medical, hospital, funeral, and burial expenses inure to the exclusive benefit of the decedent's estate. The remainder of the damages, if any, often inure to the exclusive benefit of the surviving spouse, to the dependent children, or to the dependent's next of kin. This remainder is distributed in the same manner as the personal property of the decedent. For such a claim, a child of the decedent whenever conceived, but unborn prior to the decedent's demise, can be a dependent eligible to receive all or a portion of the remainder damages.[213]

209. *Id.*

210. *See, e.g.*, 20 PA. STAT. AND CONS. STAT. § 3538 (West 2022) ("Except as herein otherwise provided, a person born out of wedlock shall have the same rights in an estate and shall be subject to such time limitations and to such procedures as are applied to any other heir or claimant against an estate.").

211. *Wrongful-Death Action*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A lawsuit brought on behalf of a decedent's survivors for their damages resulting from a tortious injury that caused the decedent's death.").

212. *Id.*

213. *See, e.g.*, First Student, Inc. v. Est. of Meece, 849 N.E.2d 1156, 1160 (Ind. App. 2006) (applying IND. CODE ANN. § 34-23-1-1 (West 2021) which includes as possible claimants "dependent children"); Baez v. Rosenburg, 949 N.E.2d 250, 254 (Ill. App. 2011); Garza v. Maverick Market, Inc., 768 S.W.2d 273, 275 (Tex. 1989) (allowing illegitimate, posthumous child to sue for the wrongful death of his alleged father). The unborn may need to have viability. *See, e.g.*, Summerfield v. Superior Court, 698 P.2d

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As with child support laws, wrongful death laws unnecessarily reference gender identity. For example, the Mississippi Code references actions by "the widow, husband, child, father, mother, sister or brother of the deceased or unborn quick child[.]"[214] The Washington Code references "a parent or legal guardian who has regularly contributed to the support of his or her minor child[.]"[215] The Louisiana Civil Code references surviving fathers, mothers, brothers, sisters, grandfathers, and grandmothers.[216]

Beyond child support and tort, there are money recovery cases in probate. For example, in Nebraska, if a man dies without a will but with a surviving spouse, part of his estate passes to his "issue," defined as "all his . . . lineal descendants of all generations," but only includes a child who "survives the decedent by one hundred twenty hours," which includes a child conceived before the decedent's death but born thereafter.[217]

In Maryland, a statute says: "[a] child of the decedent who is conceived before the death of the decedent, but born afterward shall inherit as if the child had been born in the lifetime of the decedent." [218] This is a more sensible statute than in Nebraska.[219] Further, in Maryland when a surviving spouse is inseminated after a spouse's death with the decedent's "genetic materials," the intestate succession law says:

> No other after-born relation may be considered as entitled to distribution in the relation's own right unless:
> (1) The decedent had consented in a written record to use of the decedent's genetic material for posthumous conception . . .

712, 724 (Ariz. 1985) (viable, stillborn fetus is a "person" under the state wrongful death statute).

214. MISS. CODE ANN. § 11-7-13 (West 2022) (spouse and sibling would prompt same result).

215. WASH. REV. CODE ANN. § 4.24.010(1) (West 2022).

216. LA. CIV. CODE ANN. art. 2315.2 (West 2021).

217. Amen v. Astrue, 822 N.W.2d 419, 421–22 (Neb. 2012) (quoting NEB. REV. STAT. ANN. §§ 30-2303, -2304, -2308, -2209(23) (West 2021)) (noting these statutes, under Astrue v. Capato *ex rel.* B.N.C., 556 U.S. 541 (2012), mean the child can also not recover a surviving child's insurance benefits under federal Social Security laws).

218. MD. CODE ANN., EST. & TRUSTS § 3-107(a) (West 2021).

219. *Compare* NEB. REV. STAT. ANN. §§ 30-2304, -2308 (West 2021) (declining to recognize statutory recognition of heirs conceived posthumously with decedent's genetic material), *with* EST. & TRUSTS § 3-107(b) (allowing steps taken prior to decedent's death to permit recognition of posthumously conceived children with decedent's genetic material).

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> (2) The decedent consented in a written record to be the parent of a child posthumously conceived using the person's genetic material; and
> (3) The child posthumously conceived using the decedent's genetic material is born within 2 years after the death of the decedent.[220]

By a contrast, in Utah there is a problematic statute which says:

> If a spouse dies before placement of . . . sperm . . . the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.[221]

These days a deceased spouse can prompt birth through donated eggs as well as through donated sperm.[222]

For parentage in those who die before childbirth, the employment of gender-neutral terms often would not undermine, but would in fact promote the public policies benefitting children and their families. Gender-neutral laws would respect individual gender identifications having nothing to do with legal parenthood.

Rationality goals also suggest a need for the coordination of the child benefit laws in varying deceased parent settings like tort, insurance, and probate. Consistency would better promote the relevant public policies. Children are not less financially needy in support settings than in tort, insurance, or probate settings, when their parents die before their birth. Rationality goals also dictate that the varying monetary recovery laws benefitting a child who is born after the demise of a parent respect the earlier noted changes in childcare parent laws, including those recognizing parenthood founded on consent to parenthood in and outside of assisted reproduction. As stated in the 2017 UPA, "a parent-child relationship established" under a parentage act "applies for all purposes, except as otherwise provided . . . by law," with any deviations, of course, needing to meet rationality standards.[223]

220. EST. & TRUSTS § 3-107(b).

221. *See id.*; UTAH CODE ANN. § 78B-15-707 (West 2021).

222. *See generally* Kristine S. Knaplund, *Reimagining Postmortem Conception*, 37 GA. ST. UNIV. L. REV. 905 (2021) (reviewing American state laws on child inheritance in postmortem conception settings and finding "a bewildering array of standards").

223. UNIF. PARENTAGE ACT § 203 (UNIF. L. COMM'N 2017).

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B. Parents Who Die After Birth

When an alleged parent dies after the birth of a child, parenthood can still be initially established. Thus, in child support, tort, and probate settings, a child can recover monetarily upon establishing for the first-time parentage in one who died during the child's life. Here there are far more eligible alleged parents than when alleged parents die before their childrens' births; in post-birth parentage death settings parentage can arise due to post-birth acts, like holding out/residency or de facto parenthood.

As to child support, one state high court allowed a post-death parentage determination for a child born of sex, a ruling with much sense.[224] In June 2008, the Massachusetts Supreme Judicial Court found a trial court could enter a support order benefitting a nonmarital child after the biological father died.[225] The nonmarital child, Jaclyn, was born to L.M. in October 1992, with a VAP by J.M.M. in 1993 and a birth certificate recognition of J.M.M. as a parent at the time of Jaclyn's birth.[226] Though J.M.M. never married L.M., and married another woman after Jaclyn's birth, J.M.M always financially supported Jaclyn and included her on a life insurance policy and in a will.[227] After J.M.M. died in 2006, L.M. successfully obtained a future child support order on behalf of Jaclyn against the executor of J.M.M.'s estate.[228] The court noted that had there been a child support order entered before J.M.M.'s death, it would have been enforceable against his estate after his death.[229] The court observed that to deny post-death child support where parentage is not disputed would have the potential of adversely affecting the financial stability of children, as well as discourage parents from "attempting to resolve support issues amicably and without resort to court intervention which can fast assume one's resources."[230] While under the federal Social Security Act a VAP now has the "legal finding of paternity,"[231] such an effect is not always the same as the effect of a paternity court judgment founded on genetic testing.[232]

224. L.M. v. R.L.R., 888 N.E.2d 934, 935 (Mass. 2008).
225. *Id.*
226. *Id.*
227. *Id.* at 936.
228. *Id.* at 936–37.
229. *Id.* at 937.
230. *Id.* at 939.
231. 42 U.S.C. § 666(a)(5)(D)(ii) (2018).
232. *See, e.g.*, Martinez v. Cahue, 826 F.3d 983, 991, 994 (7th Cir. 2016) (indicating that a VAP differs from an actual court judgment after a hearing in international child relocation settings that are governed by a Hague Convention).

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As to torts, post-death parentage determinations are sometimes required in statutory wrongful death/survival actions. There, an alleged parent has died as a result of the wrongful act or omission of another; the parentage of a child has not yet been determined legally (as is often the case with a nonmarital child whose biological parent dies not long after the child's birth); and a surviving child of the decedent, upon proof of parentage, can recover for his or her own losses, as well as possibly receive additional money, including survival action damages recovered by the decedent's estate via intestate succession laws (benefitting a surviving child of a decedent who died without a will). In Alaska, when a man dies as a result of the "wrongful act or omission of another," the decedent's personal representative may sue the wrongdoer under a single statute "exclusively for the benefit of the decedent's spouse and children, or other dependents."[233] Damages can cover "loss of contributions for support," "loss of consortium," and "loss of prospective training or education," as well as "medical and funeral expenses."[234] Thus, damages go for injuries incurred by the decedent prior to death, like hospital bills where recovery goes to the decedent's estate, as well as for injuries incurred by the decedent's child after death, like the loss of prospective training and education. While the Alaska statute does not define "children," in a comparable Delaware wrongful death/survival setting, there is only a remedy for certain nonmarital children, including children whose parentage by a deceased parent has been "judicially determined" or where parentage was acknowledged or "openly and notoriously recognized" by the decedent before the decedent's death.[235] In Idaho, a deceased man's "illegitimate child" is only included in the wrongful death statute if "the father has recognized a responsibility for the child's support."[236] Thus, biological ties alone may not support wrongful death claims for all alleged biological children of deceased parents whose estates recover on survival claims. By contrast, in Washington stepchildren

233. *See* ALASKA STAT. ANN. § 09.55.580(a) (West 2021). Similar are OR. REV. STAT. ANN. § 30.020(1) (West 2021) and N.C. GEN. STAT. ANN. § 28A-18-2(a) (West 2021).
234. ALASKA STAT. ANN. § 09.55.580(a).
235. DEL. CODE ANN. tit. 10, § 3724(f) (West 2022). Somewhat comparable is Greenfield v. Daniels, 51 So. 3d 421, 426, 429 (Fla. 2010) (holding that a child born into an intact marriage may recover in a survival action for the death of a non-marital biological father who "acknowledged responsibility for support").
236. IDAHO CODE ANN. § 5-311(2)(b) (West 2021).

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are included as "beneficiaries" in the wrongful death statute.[237] And in Arizona, stepchildren may recover as beneficiaries in a wrongful death action if they can show the decedent stood "in loco parentis."[238]

There are sometimes separate wrongful death and survival statutes. In Louisiana, under one statute the "surviving spouse and child or children of the deceased, or either the spouse or the child or children," can pursue a survival action on behalf of an injured person who dies, where any recovery inures to the decedent's estate and is "heritable."[239] A second statute recognizes a wrongful death claim on behalf of certain persons for damages they personally sustained as a result of the death of another.[240] Claimants include the surviving child or children of the deceased.[241] Post-death parentage determinations are quite sensible here.[242]

A 2014 Mississippi Supreme Court decision demonstrates statutory language can prompt differences in applying varying death statutes covering injury claims.[243] In it, an "in loco parentis child" was deemed ineligible for recovery for the wrongful death of a parent, although such a child could recover under either the workers' compensation statute or the federal Longshoremen's and Harbor Workers' Compensation Act.[244] Such distinctions do not seem rational.

237. WASH. REV. CODE ANN. § 4.20.020 (West 2021), *construed in In re* Est. of Blessing, 273 P.3d 975, 979, ¶¶ 19–20 (Wash. 2012) to include the stepchildren of a woman who died after the stepchildren's biological father died.

238. ARK. CODE ANN. § 16-62-102(d)(2) (West 2021); *cf.* Zulpo v. Blann, 2013 Ark. App. 750, at *2 (2013) (implying stepchildren are covered by the language of § 16-62-102, but holding only that the stepchildren did not prove they stood in loco parentis).

239. LA. CIV. CODE ANN. art. 2315.1 (West 2021).

240. *Id.* art. 2315.2(A). *See also* Est. of Panec v. Panec *ex rel.* Panec, 864 N.W.2d 219, 225 (Neb. 2015) (noting that wrongful death and survival claims are "distinct" though they are "frequently joined in a single action" by a decedent's personal representative).

241. LA. CIV. CODE ANN. art. 2315.2(A) (West 2021).

242. There are comparable post-death parentage settings akin to, but distinct from, torts. For example, post-death parentage determinations are required in cases where there is a need to decide whether a non-marital child of a deceased worker is entitled to workers' compensation benefits. *See, e.g.*, Uninsured Emp.'s Fund v. Bradley, 244 S.W.3d 741, 742, 747 (Ky. Ct. App. 2007). *See also* Doe *ex rel.* Rodriguez v. County of Los Angeles, 2021 WL 1627486, at *3 (C.D. Cal. 2021) (involving a federal law claim for child's loss of alleged parent caused by defendants that was sustained where there was proof of the decedent's "ongoing involvement" and "participation in child-rearing activities").

243. Est. of Smith v. Smith *ex rel.* Rollins, 130 So. 3d 508, 512, 515 (Miss. 2014).

244. *Id.* at 511–12. The wrongful death statute only referenced the children's "blood" parents or adoptive parents, not "in loco parentis" parents. *Id.* at 512 (citing MISS.

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Where wrongful death legislation does not expressly address child recoveries for parental deaths, judicial precedents can recognize such claims. Thus, in Connecticut, an executor or administrator of an estate may recover "just damages" from one "legally at fault" for "injuries resulting in death."[245] This has been read to allow "filial consortium" claims for children arising from parental deaths.[246]

As to probate, state laws vary on whether when a person dies without a will, some or all of the estate can pass to a biological, or nonbiological, nonmarital child who was never formally adopted.[247] In California, a child can pursue estate distribution by providing clear and convincing evidence that the decedent "openly held out the child as his own," even if "grudgingly" and even if the decedent would not have wanted the child to inherit.[248] A child in California whose sperm-related parent dies intestate may not be able to recover from an estate if the parent had not "openly" held out the child as one's own.[249] In Tennessee, a nonmarital child may be able to recover in the event of an intestate biological father's death as the statute requires only clear and convincing proof of "paternity."[250] In an

CODE ANN. § 11-7-13 (West 2021)). The other two laws explicitly referenced in loco parentis children. *Id.* (referring to the Workers' Compensation statute, MISS. CODE ANN. § 71-3-3 (West 2021), and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(14) (2018)).

245. CONN. GEN. STAT. ANN. § 52-555(a) (West 2021).

246. *See* Campos v. Coleman, 123 A.3d 854, 857, 869, 869 n.19 (Conn. 2015). The statute has been extended to parental consortium claims for injured children. Lynch v. State, No. HHDCV166067438, 2021 WL 4520325, at *48–50 (Conn. Super. Ct. Aug. 27, 2021).

247. *See generally* Alexis C. Mejia, Comment, *A Piece of You and I: Posthumous Conception and Its Implications on Texas Estates Law*, 13 EST. PLAN. & CMTY. PROP. L.J. 509, 515–26 (2021) (reviewing laws on the effects of posthumous conception on heirship in probate proceedings involving intestate decedents). In Illinois, when a self-identified or publicly identified man dies with a will, nonmarital children born of sex can challenge the will even where the children were earlier adopted by the spouse of the person giving birth. *In re* Est. of Snodgrass, 784 N.E.2d 431, 432 (Ill. App. Ct. 2003).

248. Est. of Burden, 53 Cal. Rptr. 3d 390, 391, 394, 396 (Ct. App. 2007) (inheritance statute allows parenthood to be established via unrebutted presumption of parent and child relationship under Uniform Parentage Act).

249. Est. of Britel, 186 Cal. Rptr. 3d 321, 324 (Ct. App. 2015). In California, the wrongful death statute incorporates the probate statute's definition of a child when an alleged parent dies intestate. *See, e.g.*, Stennett v. Miller, 245 Cal. Rptr. 3d 872, 880 (Ct. App. 2019).

250. TENN. CODE ANN. § 31-2-105(a)(2)(B) (West 2021) (a similar paternity finding is not made when the nonmarital child dies intestate and the biological father or his "kindred" seek to inherit); *see also* Est. of Walton v. Young, 950 S.W.2d 956, 958–60

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Alabama case, a child could not recover from an intestate biological father's estate where the child already had a presumed father under law (here, a husband) who had not disclaimed his paternity.[251]

Probate laws on parentage sometimes differ, rather surprisingly, from childcare laws on parentage. In Georgia, though there may have been no presumed childcare parentage in a spouse because there were no biological ties, that spouse's parentage for estate distribution purposes could be established posthumously via that spouse's "virtual adoption" of the natural child of the spouse who gave birth.[252] Similarly, in Illinois there is equitable adoption in probate, but not in childcare.[253]

Relatedly, in a veteran's benefits case, a federal court found that the governing agency regulation required "a biological relationship" between the deceased veteran and the child in order for the child to recover from the deceased veteran's estate.[254] Here, evidently, the death of a veteran, who was a de facto or presumed parent on equal footing with the birth mother in childcare and child support settings under state law, would not prompt a recognition of a parental loss for the child for federal veteran benefit purposes.[255]

It is less common, but true, that parentage for the dead, who passed after the birth of their children, can be determined on behalf of those who are not the decedents' living children and who do not seek money. Consider, for example, an alleged dead parent's living parents who seek grandparent visitation orders. While an alleged grandparent may not be able to pursue a parentage action on behalf of the deceased parent, since any such claim usually abates upon a parent's death,[256] standing for a grandparent under a child visitation

(Tenn. 1997) (demonstrating the need for "clear and convincing" evidence of paternity).

251. Swafford v. Norton, 992 So. 2d 20, 29 (Ala. Civ. App. 2008).

252. Sanders v. Riley, 770 S.E. 2d 570, 571, 577 (Ga. 2015) (even where the child had developed, later in her life, a relationship with her biological father).

253. *Compare* DeHart v. DeHart, 986 N.E.2d 85, 103 (Ill. 2013) (probate), *with In re* Scarlett Z.-D., 28 N.E.3d 776, 792 (Ill. 2015) (childcare). On the contours of equitable adoption in probate, see, for example, *In re* Est. of North Ford, 200 A.3d 1207, 1215 (D.C. 2019) (holding the child must prove by clear and convincing evidence that decedent who died intestate "objectively and subjectively stood in the shoes" of a parent).

254. McDowell v. Shinseki, 23 Vet. App. 207, 212–13 (2009), *aff'd*, 396 Fed. Appx. 691 (Fed. Cir. 2010).

255. *See id.* at 209, 216.

256. *See, e.g.*, Bullock v. J.B., 725 N.W.2d 401, 404 (Neb. 2006) (concluding that paternal grandmother could not continue her son's earlier paternity action after his death, which she desired in order to be eligible for grandparent visitation orders).

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statute opens the door to an initial determination of legal parentage, which could then prompt grandparent visitation. The availability of such parentage determinations is wise, as the children are always protected since any nonparent visitation order depends upon a finding of the best interests of the child.

As with monetary recovery laws for children that are tied to parental deaths before the children's births, similar monetary recovery laws tied to parental deaths after the children's births, and nonmonetary laws as with nonparent visitations, should not be founded on gender identification requisites. If biological ties are key, they can be proven without proof of how people are gender-identified, in the community or by themselves.

More importantly, post-birth parental death laws should often reflect the earlier noted new childcare parent laws,[257] whether founded on parental-like acts or on consents to parenthood in and outside of assisted reproduction. Such reflections would promote consistencies in public policies on who are parents and how are children to be supported. What rationales support allowing a grieving child to recover wrongful death, but not worker's compensation, benefits? There are no rationales that support not allowing one to equitably adopt a child so as to have childcare interests and child support duties, with the blessing of the child's single parent, but allowing the same child to recover from the one's estate via an equitable adoption doctrine? Even if there are separation of powers concerns, should they not comparably apply in probate and in family relation cases?[258]

C. Parents Who Die Before or After Birth

A statute on post-death parentage determinations can apply whether the putative parent's death occurred before or after a child's birth. In Indiana, a statute says:

257. *See supra* notes 68–76 and accompanying text.

258. *But see In re* Scarlett Z.-D., 28 N.E.3d at 795 (recognizing judicial precedent on equitable adoption in probate and rejecting equitable adoption in childcare; but the court noted that while the justices "are not unsympathetic to the position" of the alleged equitable adoption parent seeking childcare, "[l]egal change . . . must be the product of policy debate that is sensitive not only to the evolving reality of 'non-traditional' families and their needs, but also parents' fundamental liberty interest embodied in the superior rights doctrine"). Of course, judicial recognitions of childcare interest need not necessarily follow precedents on children in probate because only in the former setting are superior parental caretaking rights implicated. *See supra* note 253 and accompanying text.

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> (b) For the purpose of inheritance (on the paternal side) to, through, and from a child born out of wedlock, the child shall be treated as if the child's father were married to the child's mother at the time of the child's birth, if:
> (1) The paternity of the child has been established by law in a cause of action that is filed:
> (A) During the father's lifetime; or
> (B) Within five (5) months after the father's death . . . .[259]

In an inheritance case against an estate brought on behalf of a child born about eight months after an alleged father's death, an Indiana appeals court dismissed.[260] It reasoned that a legitimate governmental interest supported the statute; the state's interest was the just and orderly disposition of property of decedents.[261] Yet the court noted that the same child may recover "attendant benefits" arising from parental death, including "social security survivor benefits, employee death benefits, and even proceeds of life insurance policies" since they "do not pass by way of inheritance."[262] Evidently, just and orderly dispositions of these other benefits are not as important. Rational?

D. Disestablishing the Parentage of the Dead

Parentage issues for the dead can involve post-death disestablishment of earlier legal parenthood as well as initial establishment of legal parenthood. Thus, sometimes in a probate setting, a family member will attempt to rebut a marital parentage presumption of a deceased spouse so that children born to the surviving spouse during marriage will be unable to recover from the decedent's estate as surviving children.[263] Comparably, in an insurance setting, a VAP by a decedent might be subject to a post-

259. IND. CODE ANN. § 29-1-2-7(b)(2) (West 2021). Where a child is "born after the father [has] died," today the child has eleven months after death to establish paternity in a cause of action. *Id.* § 29-1-2-7(b)(3).

260. S.V. v. Est. of Bellamy, 579 N.E.2d 144, 148 (Ind. Ct. App. 1991).

261. *Id.* at 147.

262. *Id.* at 148 & n.6.

263. *See, e.g.*, Jarke v. Mondry, 958 N.E.2d 730, 736 (Ill. App. Ct. 2011) (disallowing a sister from challenging the male parentage of her brother arising from a marital presumption; the court recommended the legislature give "serious consideration" to the purposes of the common law marital presumption, including protecting a child's inheritance rights, especially "where one sibling is trying to eliminate another sibling's inheritance").

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death rescission request.[264] And in a probate setting, one child might challenge the presumed nonmarital, non-VAP parentage presumption (e.g., residency/hold out) favoring another child.[265]

VII. GRIEVING PARENT

Not only may yet unrecognized parents die before or after the births of their children, or may the parenthood of a child be disestablished after the one-time parent's death, but children may die before a parent or parents are recognized under law, or before recognized parenthood can be disestablished. How can parenthood be established or disestablished in a deceased child, and for what purposes? Wrongful death and probate cases come to mind. Here, the policies generally should align with the policies underlying childcare parentage. All those who possess care, custody and control of children should be recognized as grieving parents when their children die. Grieving childcare parents should not be differentiated by whether they are biologically-tied or were married to those who gave birth.

In the tort case of *Caldwell v. Alliance Consulting Group, Inc.*, a New York appellate division reviewed a ruling by the Workers' Compensation Board.[266] The case involved the death of a son born to Elsie and Leon Caldwell, a married couple, in February, 1971.[267] The son died at the World Trade Center on September 11, 2001.[268] Leon had earlier left Elsie and their two sons behind in Philadelphia when he moved to New Jersey in September, 1972.[269] Thereafter, Leon had contact with his deceased son on only two occasions.[270] There was an overnight visit with Leon when his son was six.[271] And Leon saw his son, but did not speak, when they both attended the funeral of Elsie's mother in January, 1984.[272] Court records showed Leon likely

264. *But see* Minn. Life Ins. Co. v. Jones, 771 F.3d 387, 389–90 (7th Cir. 2014) (providing that under Illinois law, a decedent's sister cannot challenge the decedent's acknowledgment of a six-and-a-half-year-old in an insurance benefits dispute, which is "a probate case in effect").

265. *See, e.g.*, Est. of Murray v. Slaughter, 344 P.3d 419, 424 (Nev. 2015) (rejecting challenge as untimely, as standing was lost three years after child who was challenged "reached the age of majority").

266. Caldwell v. All. Consulting Grp., 775 N.Y.S.2d 92 (App. Div. 2004).

267. *Id.* at 94 (Lahtinen, J., dissenting).

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

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rejected Elsie's suggestions that he spend more time with his sons.[273] After Elsie obtained a court order for child support, Leon failed to make payments, with arrearages in excess of $20,000.[274] For a time, Elsie received public assistance to support her two sons.[275] Reimbursement from Leon, evidently, was not sought. Elsie raised her sons alone.[276] The son who died "was a college graduate with an ostensibly successful career."[277]

Because the deceased son was unmarried and had no dependents, Elsie filed a claim for a $50,000 death benefit under New York Workers' Compensation Law.[278] Upon his intervention in Elsie's case, Leon was awarded $25,000.[279] The relevant statute declared that the decedent's death benefit "shall be paid to the deceased's surviving parents."[280] Four of the five appellate court judges ruled that when a term as "parent" does not have "a controlling statutory definition and is clear and unambiguous," the term should be given its "usual and commonly understood meaning."[281] They looked to a legal dictionary, finding parent often means "the natural father or the natural mother."[282] Since Leon's parental rights were never terminated, the four judges found that Leon survived his deceased son.[283] They did recognize that in other statutory settings, as in probate[284] and wrongful death, abandoning parents were expressly disqualified by statutes as surviving parents, though their parentage was recognized earlier.[285] There was no such explicit provision in the New York Workers' Compensation Law.[286]

The one dissenting judge not only looked to different dictionary descriptions, but also undertook a different mode of statutory analysis, using the axiom that "the legislature is presumed to have

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273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 93 (majority opinion).
282. *Id.*
283. *Id.*
284. *See, e.g.*, *In re* Est. of Ball, 807 N.Y.S.2d 163, 164 (App. Div. 2005) (citing N.Y. EST. POWERS & TRUSTS LAW § 4-1.4(a) (Consol. 2022) in support of denying share of estate to abandoning parent); *In re* Est. of Arroyo, 710 N.Y.S.2d 492, 493 (App. Div. 2000) (citing EST., § 4-1.4(a) in support of denying share of wrongful death settlement to abandoning parent).
285. *Caldwell*, 775 N.Y.S.2d at 93.
286. *Id.*

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intended to do justice, unless its language compels the opposite conclusion."[287] The dissenter determined that justice required there be no award to "those who abandon their obligations to their children," a determination supported by the "public policy" expressly articulated in probate and other wrongful death settings, as well as in "common sense."[288] In a later case, this ruling was followed as the court found a "need for the Legislature, and not this Court, to remedy the perceived inconsistency and/or inequity."[289] Irrationality under Equal Protection was not addressed.

A different approach is taken for other New York statutory claims, as recognized in Caldwell. The Caldwell ruling was distinguished in a case involving the assets of a deceased child who died without a will.[290] There, an abandoning legal father received no share of the estate, as the New York Estate Powers and Trust Law provided:

> No distributive share . . . [s]hall be allowed to a parent who has failed or refused to provide for, or has abandoned . . . child . . . under the age of twenty-one years . . . unless the parental relationship and duties are subsequently resumed and continue until the death of the child.[291]

The different approach in other statutory contexts was employed against Leon Caldwell in a later case where Leon tried to share in his deceased son's $2.9 million award from the September 11th Victim Compensation Fund award.[292] In that case, a Brooklyn, New York Surrogate disqualified Leon from receiving any portion of the Fund due to Leon's abandonment.[293] Interestingly, one of the factors used was the fact that about half of the $25,000 awarded to Leon earlier by the Workers' Compensation Board was actually paid to Elsie as

287. *Id.* at 94–95 (Lahtinen, J., dissenting).

288. *Id.* at 95.

289. Crisman v. Marsh & McLennan Cos., 774 N.Y.S.2d 887, 889 (App. Div. 2004).

290. *In re* Est. of Pessoni, 810 N.Y.S.2d 296, 298–99, 302 (Surr. Ct. 2005).

291. *Id.* at 300–01 (quoting N.Y. EST. POWERS & TRUSTS LAW 4-1.4(a) (Consol. 2022)). *Cf.* Magwood v. Tate, 835 So. 2d 1241, 1242 (Fla. Dist. Ct. App. 2003) (holding that nonbiological father cannot receive proceeds from estate of a deceased child even though the nonbiological father took care of the child when young).

292. *Estate of Kenneth M. Caldwell (N.Y. Surr. Ct. Dec. 17, 2007)*, 21 QUINNIPIAC PROB. L.J. 221, 223 (2008); Gloria Campisi, *Absent Dad Cut From Estate of 9/11 Victim Son*, PHILA. INQUIRER (Dec. 19, 2007), https://www.inquirer.com/philly/hp/news_update/20071219_Absent_dad_cut_from_estate_of_9_11_victim_son.html [https://perma.cc/B74C-3L97].

293. *Estate of Kenneth M. Caldwell*, *supra* note 292, at 226.

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arrears in child support.[294] Justice was substantially, if not fully done, in the end.

In *Caldwell*, there were compelling reasons to differentiate between legal parentage in two settings, support obligation and recovery upon death.[295] But reason did not prevail. No longer should the term father be given a "usual and commonly understood meaning."[296] In fact the term father should not be used and be replaced by the term parent.

More importantly, parenthood should be differently defined by state lawmakers by context where public policies differ. But comparable definitions are needed where policies are similar. General Assemblies should act explicitly since judges may not employ "common sense" unless directed to do so by legislators. In *Caldwell* and similar settings, statutes should also recognize recoveries founded on new parentage forms, like de facto parenthood, that are legally established for the first time after children's deaths.

Fortunately, the *Caldwell* approach is not followed outside of New York. In 2003, the New Mexico Court of Appeals barred wrongful death benefits for a biological father who had abandoned his child over a decade before the child's death in 1986.[297] In *Perry v. Williams*, the court noted that while the relevant statute did not expressly say that abandonment precludes recovery (as did the Probate Code), common law and public policy barred relief. [298] The court also noted that the biological father had "failed to cooperate in the necessary testing for a bone marrow transplant though asked."[299] The father was told that his son had cancer, that he was "one of three possible donors," and that the other two donors did not match.[300] The

294. *Id.* at 224.

295. *See* Caldwell v. All. Consulting Grp., 775 N.Y.S.2d 92, 94–96 (App. Div. 2004) (Lahtinen, J., dissenting).

296. *Id.* at 93 (majority opinion) (quoting Orens v. Novello, 753 N.Y.S.2d 427, 430 (App. Div. 2002)).

297. Perry v. Williams, 70 P.3d 1283, 1284 (N.M. Ct. App. 2003). *Perry* was followed in Gonzales v. Bustos, No. 31,872, 2012 WL 2327644 (N.M. Ct. App. May 29, 2012), *cert. granted*, 295 P.3d 600 (N.M. 2012), *cert. denied*, 296 P.3d 491 (N.M. 2012).

298. *See Perry*, 70 P.3d at 1286–89 ("We do not lightly assume that the legislature intended to alter this common law principle when it enacted the Wrongful Death Act. To the contrary, we believe that the legislature intended to incorporate this common law principle into the Act when it was passed.").

299. *Id.* at 1285.

300. *Id.*

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Perry court followed the dissent's reasoned approach in *Caldwell*, employing "common sense."[301]

Comparably, in Louisiana in 1992, an appeals court held a nonbiological "legal" father, per a spousal parent presumption, could not bring an action upon the death of a child as he had not developed a "parental relationship" and "was a virtual stranger to the child."[302]

In New Jersey, some courts, in the absence of explicit statutory language, will also deny to abandoning legal parents any recoveries flowing from their children's deaths. Thus, in 2008, a court denied a neglectful mother's right to collect via intestacy (i.e., no will) proceeds from a personal injury recovery founded on her dead child's claims.[303] It sensibly concluded:

> How cruel, ironic, and inequitable it would be to hold that M.W. retained the right to inherit $1 million from the child she burned, abused, neglected, and abandoned. Equity, morality, and common sense dictate that physically or sexually abusive parents have no right of inheritance by intestacy. The contrary result would bespeak a thoughtless jurisprudence warranting public disrespect. The applicable principle of equity is that "equity will not suffer a wrong without a remedy." . . . In these extraordinary circumstances, the inherent equitable powers of the Family Part prevents the unjust enrichment of M.W. which would result from the mechanical application of the intestacy statute.[304]

There is a simple solution to problems caused by late-arriving deadbeat or neglectful legal parents looking for easy money, whether in tort or probate. The answer is legislation. In *Perry*, there was legislation on the effects of parental abandonment in probate, but not

301. *See id.* at 1287; *Caldwell*, 775 N.Y.S.2d at 95 (Lahtinen, J., dissenting) ("Under New York law, a parent who abandons a child . . . is disqualified from a share of wrongful death proceeds . . . . [T]his principle—which is little more than an articulation of common sense—has roots in the common law . . . .").

302. Gnagie v. Dep't of Health and Hum. Res., 603 So. 2d 206, 214 (La. Ct. App. 1992). *See also* Udomeh *ex rel.* S.U. v. Joseph, 103 So. 3d 343, 348 (La. 2012).

303. N.J. Div. of Youth and Fam. Servs. v. M.W., 942 A.2d 1, 18 (N.J. Super. Ct. App. Div. 2007) (also holding that parental rights could be retroactively terminated). The court recognized, *id.* at 20 n.6, that there were conflicting opinions in New Jersey, as with *In re* Rogiers, 933 A.2d 971 (N.J. Super. Ct. App. Div. 2007).

304. *N.J. Div. of Youth and Fam. Servs.*, 942 A.2d at 18.

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in wrongful death.[305] Elsewhere, legislation is more consistent, though somewhat forgiving of certain bad parents. Under a Kentucky statute,

> a parent may not recover proceeds of a child's estate . . . if he has willfully abandoned the child unless he resumed the care and maintenance of the child at least one year prior to his or her death, or was deprived of custody by court . . . and substantially complied with Orders requiring contribution to the support of the child.[306]

A Minnesota statute bars a parent from "inheriting from or through a child if . . . the child died before reaching eighteen . . . and there is clear and convincing evidence that immediately before the child's death the parental rights . . . could have been terminated . . . on the basis of nonsupport, abandonment, abuse, neglect" or other comparable actions.[307] In Louisiana, a nonmarital father can pursue a wrongful death claim where he seeks to avow paternity based on a biological relationship, earlier support, and an earlier parentage acknowledgment related to the deceased child.[308]

Regardless of the approach to a child abandonment and to the effects of a resumption of childcare, legislators should employ gender-neutral terms. Whether in tort or probate proceedings, a child may have parents who do not fit the father/mother mold. What should be key in recovery cases involving parental establishments and disestablishments is the parental or parental-like acts of those seeking recovery for harms due to their children's deaths.

Lawmakers must also recognize the relevance of the new forms of parenthood, as with de facto parentage and intended parentage in assisted reproduction settings, in money recovery cases benefitting

305. *Perry*, 70 P.3d at 1287.

306. Calhoun v. Sellers, No. 2008-CA-001311-DG, 2009 WL 3231506, at *3 (Ky. Ct. App. 2006) (citing KY. REV. STAT. ANN. § 391.033(1) (West 2022), which says a "parent who has willfully abandoned the care and maintenance of his or her child shall not have a right to intestate succession in any part of the estate . . ."). *See also* Simms v. Est. of Blake, 615 S.W.3d 14, 20–23 (Ky. 2021) (citing KY. REV. STAT. ANN. §§ 411.130 and 411.137, which recognize wrongful death recovery by "mother and father of the deceased," but deny the "right to maintain a wrongful death action" for a child of a "parent who has willfully abandoned the care and maintenance of his or her child"). Would eliminating "his or her," or replacing "mother and father" with "parent" undo the policy? Clearly not.

307. MINN. STAT. ANN. § 524.2-114(a) (West 2021). Various states have enacted similar provisions. *Cf.* N.M. STAT. ANN. § 45-2-114(A)(2) (West 2021); W. VA. CODE ANN. § 42-1-11(a)(2) (West 2021); COLO. REV. STAT. ANN. § 15-11-114(1)(b) (West 2022).

308. Udomeh v. Joseph, 103 So. 3d 343, 351 (La. 2012).

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parents where requisite parental or parental-like relationships were established, but not yet recognized by a state agency or a court before the children were harmed. An alleged de facto or intended parent, who demonstrates a fulfillment of the legal parent guidelines within a statutory childcare parent scheme, grieves a child's loss or harm though not yet on a birth certificate or on a family court parentage order. Yet such grievants are often not explicitly included in recovery statutes (including tort and probate) and are not expressly recognized in Uniform Parentage Acts as parents entitled to recoveries.[309]

VIII. EXPECTING PARENT

Expecting parents are those who have childcare rights or interests in those yet to be born. These rights or interests arise in varying ways, including by signing prebirth VAPs;[310] by consenting either prepregnancy or post-pregnancy to intended parenthood in those to be born of (surrogacy or nonsurrogacy) assisted reproduction;[311] or by registering with the state as putative parents who are entitled to notice and hearing in any later adoption or parental rights termination proceeding involving later-born children.[312] In the VAP setting, childcare rights arise at birth for those who properly executed prebirth acknowledgments.[313] In some putative parent registry and assisted reproduction settings, certain expecting parents are usually without childcare rights at the time of birth, having instead parental opportunity interests[314] which may lead to childcare rights after birth

309. Of course, parents who are unrecognized formally under the law grieve when their perceived children are harmed, though not killed, by others. If their children are harmed, tort claims should be available to these parents upon proof of parentage under law which is presented to and determined by courts.

310. As noted, VAPs may also be executed post-birth. *See, e.g.*, UNIF. PARENTAGE ACT § 304(b) (UNIF. L. COMM'N 2017).

311. As noted, there are also recognized consents to parenthood after a child is born of nonsurrogacy assisted reproduction. *See, e.g.*, *id.* § 704(b) (permitting consent in a record "before, on, or after birth").

312. Putative parent registries generally can also be employed after children are born. *See, e.g.*, *id.* § 402(a) (requiring a man desiring notification to register "not later than 30 days after the birth").

313. *Id.* §§ 304(b), 305(a).

314. The parental opportunity interests of sperm donors in children later to be born of consensual sex to those who are unmarried were recognized as constitutionally protected in Lehr v. Robertson, 463 U.S. 248, 262 (1983) ("natural father [has] an opportunity . . . to develop a relationship with his offspring"). Such interests as yet need not be afforded by states where there are births to those who are then married to others (or who marry others soon after birth). *See* Michael H. v. Gerald D., 491 U.S. 110, 129–30 (1989) (finding, per four justices, that "[i]t is a question of legislative

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if the expecting parents act in certain ways. Sometimes expecting parents have even more contingent childcare interests, as when genetic surrogacy contracts may be voided by those scheduled to give, or by those who gave birth,[315] or as when VAPs are rescinded by those giving birth.[316]

Expecting childcare parent laws are reviewed in detail in the following sections, with observations on irrational laws.[317] These sections are followed by a brief account of how expecting legal parentage do and should operate outside of care, custody and control contexts.[318]

A. Expecting Voluntary Acknowledgment Parent

As noted, for existing children both the 1973 UPA and the 2000 UPA recognize a "man" can undertake an acknowledgment of "paternity" of a "child."[319] Under the 2017 UPA, "an alleged genetic father," an "intended" assisted reproduction (nonsurrogacy) parent, or a "presumed parent" (spousal or residency/hold out), can sign a VAP together with the "woman who gave birth."[320] A VAP under the 2017 UPA can be signed "before . . . the birth of the child," with parentage taking effect "on the birth of the child" if the VAP is filed

policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived and born into their marriage to be rebutted"). State laws thus can disallow parental opportunity interests for those biologically tied to children who are born into the marriages of others where the marital couple opposes any attempt at rebutting spousal parentage, as such an approach was sanctioned by the U.S. Supreme Court when reviewing an earlier California law. *See id.* Some current state laws disallow such spousal parentage rebuttals. *See, e.g.*, Strauser v. Stahr, 726 A.2d 1052, 1055–56 (1999) (holding spousal parent presumption for husband not rebuttable by genetic father where marriage remains intact). *But see* Callender v. Skiles, 591 N.W.2d 182, 191–92 (Iowa 1999) (concluding unwed biological father had an Iowa Due Process liberty interest in parenting his biological child, so he could challenge spousal parentage over the husband's objection).

315. *See, e.g.*, UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM'N 2017) (withdrawal of consent "any time before 72 hours after the birth").

316. *See id.* § 308(a) (rescission of parentage acknowledgment within 60 days).

317. *See infra* Sections VIII(i)–(v).

318. *See infra* Part IX.

319. UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM'N 1973) (presumption of paternity); *but see* UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N 2000) (amended 2002) (no presumption of paternity).

320. UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N 2017).

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prebirth.[321] Yet VAP parentage is contingent, because VAPs can be rescinded within 60 days after birth by those who earlier signed.[322]

Few states currently authorize prebirth VAPs to aid expecting parents who wish to better secure their parental interests.[323] This is unfortunate as prebirth VAPs promote sensible public policy. The policy is best promoted, however, by a statute allowing an alleged gamete provider, that is, either an egg or sperm provider, to sign together with the person giving birth, who may or may not identify as a woman. Such a statute would benefit, for example, an egg donor who does not meet the statutory criteria on intended parentage via a record in assisted reproduction settings. But, as noted, the Connecticut Parentage Act, effective in 2022 and following the 2017 UPA, fails to recognize this policy.[324] Further, allowance of prebirth gender-neutral VAPs opens doors, perhaps otherwise closed, to legitimate governmental interests in securing monetary support promoting live and healthy births of future children and in remedying harms incurred by those who excitedly awaited parenthood only to have tortious acts intervene.

B. Expecting Nonsurrogacy Assisted Reproduction Parent

Children to be born through nonsurrogacy assisted reproduction often have two expecting parents, sometimes recognized preconception, sometimes recognized only during a pregnancy, and sometimes only recognized after birth. Conduct after live births of some can bar later parentage for others who were expecting legal parents. UPA-suggested childcare parentage laws illustrate, providing examples of irrationalities in legal parenthood.

In nonsurrogacy settings, the 1973 UPA only recognized an assisted reproduction birth undertaken by a married, opposite-sex couple who employed "a licensed physician" and "semen donated by a man" other than the husband.[325] The donor here is "treated in law

321. *Id.* § 304(b)–(c).

322. *Id.* § 308(a).

323. *But see* VT. STAT. ANN. tit. 15C, § 304(b) (West 2022); WASH. REV. CODE ANN. § 26.26A.215(2) (West 2022); 15 R.I. GEN. LAWS ANN. § 15-8.1-304(b) (West 2022). All substantially follow the 2017 UPA.

324. *See* Conn. Parentage Act, CONN. GEN. STAT. ANN. §26(a) (West 2022) (permitting prebirth acknowledgment, but requiring "presumed parents" to satisfy other statutory requirements). Elsewhere, other states similarly follow the 2017 UPA. *See* 15 R.I. GEN. LAWS ANN. § 15-8.1-302 (West 2022) (no VAP for "an intended parent" via assisted reproduction); *see also* VT. STAT. ANN. tit. 15C, § 310(b)(2) (West 2022) (a person who is "an intended parent" is not eligible).

325. *See* UNIF. PARENTAGE ACT § 5(a) (UNIF. L. COMM'N 1973).

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as if he were not the natural father."[326] The husband is only "treated in law as if he were the natural father" if insemination occurred "under the supervision of a licensed physician and with the consent" of the husband.[327] So a spouse of one giving birth via assisted reproduction can escape parentage if no consent was given, but cannot escape presumed parentage though no consent was given to a birth via extramarital sex.[328] Covert assisted reproduction choices by one spouse are not imputed to another spouse, but covert sexual liaisons and childbirth decisions are imputed.[329]

The 2000 UPA expands parentage opportunities for nonspouses who provide sperm,[330] as well as for nondonor men who consent to nonsurrogacy assisted reproduction "with the intent to be the parent."[331] Such donors and consenting nondonor men are expecting legal parents whose parentage arises when children are born.[332] The "husband" of a "wife" who gives birth via assisted reproduction has limited opportunities, however, to "challenge his paternity"[333] in settings where there is no resulting parentage at birth for a nonspousal sperm provider (e.g., consent withdrawal) or for a nondonor man who withdraws an earlier consent to assisted reproduction with "the intent to be the parent" and the donor/nondonor are not thereafter pursued for child support.[334]

The 2017 UPA further expands parentage opportunities in nonsurrogacy assisted reproduction settings, broadening the range of possible expecting nonsurrogacy assisted reproduction parents.[335] That act is "substantially similar" to the 2000 UPA, though it is

326. *Id.* § 5(b). Seemingly, sperm donation by a nonspouse in a do-it-yourself assisted reproduction setting might lead to the donor being deemed the "natural father," especially where child support is needed. *See id.* (failing statutory requirements in this circumstance because no licensed physician is present).

327. *Id.* § 5(a).

328. *See id.* § 4(a) (presumed spousal parentage). The presumption can be rebutted under certain circumstances. *See id.* § 4(b).

329. *Compare* 1973 UNIF. PARENTAGE ACT consent requirements in § 4(a) (presumptions connected to marriage) *with* those in § 5 (artificial insemination).

330. UNIF. PARENTAGE ACT § 703 (UNIF. L. COMM'N 2000) (amended 2002).

331. *See id.* §§ 703–704 (consent "must be in a record" that is signed).

332. *See id.* § 703 ("A man who provides sperm . . . is a parent of the resulting child.").

333. *See id.* § 705. One opportunity involves a lack of consent, "before or after birth of the child," shown in a proceeding brought "within two years after learning of the birth." *Id.* § 705(a). Another opportunity involves a challenge at any time where there was either no sperm donation or no consent; no cohabitation "since the probable time of assisted reproduction"; and no open hold out of the child as one's own. *Id.* § 705(b).

334. *Id.* § 703.

335. *See generally* UNIF. PARENTAGE ACT § 704 (UNIF. L. COMM'N 2017).

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updated so as to apply "equally to same-sex couples."[336] Thus, an "individual" who consents to assisted reproduction by a woman with the intent to be a parent of a child conceived by assisted reproduction is a parent of the child.[337] Where there is a nonsurrogacy assisted reproduction birth having no such person who consents with the intent to be a parent, again the spouse of the person giving birth has limited opportunities to challenge the spouse's parentage.[338] The 2017 UPA expansion of parentage opportunities is laudable. But is there anything added by describing consents by "same-sex couples" rather than by two people?

Unfortunately, the 2017 UPA is not followed in most states.[339] Current state laws on nonsurrogacy assisted reproduction create irrational distinctions between persons who wish to undertake parentage without sex. For example, in Alabama the statute explicitly recognizes only a husband's consent to assist reproduction by his wife.[340] In New Mexico, an intended parent who does not indicate consent "in a record" prior to the "placement of the eggs, sperm or embryos" cannot be a parent unless that person "during the first two years of the child's life, resided in the same household with the child and openly held out the child as the parent's own."[341] While husbands and non-husbands are treated comparably, practically speaking intended do-it-yourself parents are treated quite differently, and with no good reasons, from intended parents who employ medical and legal advisors.[342] In North Dakota, the assisted reproduction statute explicitly covers only "a woman" and "a man," where the "man" need not be a sperm provider.[343] It is irrational to exclude other intended parents, as they are generally not more likely to shirk their parental duties or forego their parental rights upon birth.

336. *Id*. at art. 7, introductory cmt.
337. *Id.* § 703.
338. *See id.* § 705(a) (spouse "at the time of the child's birth").
339. *But see, e.g.*, 15 R.I. GEN. LAWS ANN. § 15-8.1-704 (West 2021) (following 2017 UPA).
340. ALA. CODE § 26-17-703 (2021). Texas and Utah have a similar law in effect. TEX. FAM. CODE ANN. § 160.703 (West 2021); UTAH CODE ANN. § 78B-15-703 (West 2021).
341. N.M. STAT. ANN. § 40-11A-704(A)–(B) (West 2021).
342. *See id.* § 40-11A-704(C).
343. N.D. CENT. CODE ANN. § 14-20-61 (West 2021). Wyoming has a similar statue. WYO. STAT. ANN. § 14-2-904 (West 2021).

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C. *Expecting Surrogacy Assisted Reproduction Parent*

The 1973 UPA "does not deal with many complex and serious legal problems raised by the practice of artificial insemination" outside of the practice employed by a consenting "husband" and a "wife" who act "under the supervision of a licensed physician."[344]

The 2000 UPA recognizes a "prospective gestational mother" may agree with "intended parents" who are a "man" and a "woman" that "the intended parents become parents of the child."[345] Such an agreement must be validated by a court in a proceeding commenced by "the intended parents and the prospective gestational mother."[346] While there is yet no pregnancy, such an agreement may be terminated by the prospective gestational mother, her husband, or either of the intended parents.[347] Seemingly after pregnancy, a "court for good cause shown may terminate the gestational agreement."[348] Upon the birth of a child pursuant to a validated gestational agreement, a court will issue an order "confirming that the intended parents are the parents of the child."[349] A gestational agreement "that is not judicially validated is not enforceable."[350] Further, should a prospective gestational mother deliver a child not conceived through assisted reproduction, "genetic testing" is used to "determine the parentage of the child."[351]

While the 2000 UPA treated comparably gestational agreements where the "prospective gestational mother" utilized one or two donors,[352] the 2017 UPA distinguishes the requirements for gestational (i.e., two donors)[353] and genetic (i.e., one donor)[354] surrogacy agreements. Some requirements for enforceable pacts are

344. UNIF. PARENTAGE ACT § 5 cmt. (UNIF. L. COMM'N 1973).
345. UNIF. PARENTAGE ACT § 801(a) (UNIF. L. COMM'N 2000) (amended 2002) (signatories also include the "husband" of the prospective gestational mother and "a donor or the donors").
346. *Id.* § 802(a).
347. *Id.* § 806(a).
348. *Id.* § 806(b) (cause is left undefined, per Comment to § 806).
349. *Id.* §§ 807(a) (notice filed with court by the intended parents), 807(c) (notice filed with court by the gestational mother or the appropriate state agency).
350. *Id.* § 809.
351. *Id.* § 807(b).
352. *Id.* § 801(a) (written agreement including "a donor or the donors").
353. UNIF. PARENTAGE ACT § 801(2) (UNIF. L. COMM'N 2017) (woman using "gametes that are not her own").
354. *Id.* § 801(1) (woman using "her own gamete").

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comparable,[355] while others differ, with genetic surrogacy pacts having more stringent requirements.[356]

Importantly, the 2017 UPA was somewhat progressive regarding gendered terms. For example, it authorized agreements involving "one or more intended parents"[357] as compared to 2000 UPA agreements encompassing "intended parents" who are a "man" and a "woman."[358]

Significant, as well, is the effective characterization in the 2017 UPA of an intended parent in a genetic surrogacy setting as a contingent legal parent for 3 days following the surrogate giving birth, since the surrogate has 72 hours to withdraw consent to the surrogacy agreement.[359] Upon the genetic surrogate's withdrawal of consent within the 3 day period, the surrogate establishes a "parent-child relationship" as the surrogate is "the individual" who gave birth to the child.[360] But some intended parents may also establish a "parent-child relationship" even upon such withdrawals.[361] Thus, an intended parent who is a sperm provider can become a legal parent upon birth if the provider, with the genetic surrogate, signed a parentage acknowledgment before birth and the VAP remains unrescinded and unchallenged.[362]

Again, unfortunately some current state laws create questionable distinctions between persons who can undertake parentage via surrogacy assisted reproduction births.[363] For example, in Illinois the

355. *See, e.g.*, *id.* §§ 802(a)(1)–(5) (noting to execute an agreement, a woman must be 21 years old, have previously given birth, and have independent legal representation), 803 (describing the process for executing an agreement).

356. *Compare, e.g.*, *id.* § 814(a)(2) (genetic surrogate may withdraw consent any time before 72 hours after the birth), *with* § 808(a) (allowing termination of agreement "any time before an embryo transfer").

357. *Id.* § 801(3).

358. UNIF. PARENTAGE ACT § 801(a) (UNIF. L. COMM'N 2000) (amended 2002).

359. UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM'N 2017).

360. *Id.* §§ 201(1) (parent-child relationship for individual who gives birth), 815(c) (stating that upon withdrawal, "parentage of the child" is determined under Articles 1 through 6).

361. *See generally id.* § 815.

362. *Id.* §§ 201(5) (parent-child relationship for individual who acknowledges parentage), 301 (woman giving birth and "alleged genetic father" may sign acknowledgment), 304(b)–(c) (acknowledgment signed before birth becomes effective at birth), 308–309 (procedures for rescission and challenge of parentage acknowledgment), 815(c).

363. Surrogacy assisted reproduction laws seemingly prompt other constitutional problems, as when they fail to recognize the procreational interests of all those seeking to become parents. *See, e.g.*, N.D. CENT. CODE § 14-18-01(2) (West 2021) ("gestational carrier" agrees with "intended parents"); FLA. STAT. ANN. § 63.213(2)(c)

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intended parent(s) must have some gametes contribution and some "medical need" for a gestational surrogacy.[364] In Florida, a "gestational surrogacy contract" must include, as intending parents, a "commissioning couple" who are "legally married."[365] In Louisiana, "the legislature has restricted the range of enforceable gestational surrogacy agreements to those where the parties who engage the gestational surrogate are not only married to each other, but also create the child using their own gametes."[366]

D. Expecting Putative Parent

As with some VAPs and certain assisted reproduction pacts on intended childcare parentage for future children, putative parent registries recognize declarations of expecting (as well as current) legal parenthood.[367] Yet such registries usually involve unilateral declarations so that actual parenthood for the declarant is less certain because there is no simultaneous declaration by a person who gave birth, a pregnant person, or a nonpregnant prospective child bearer on the future parenthood of the declarant. Putative parent registries generally provide that those who register will receive notice and an opportunity to be heard in any later adoption or parental rights termination proceeding involving the later born child,[368] earlier described as the future child of a named prospective child bearer.[369]

(West 2021) (discussing preplanned adoption by "intended father" and "intended mother").

364. *See* 750 ILL. COMP. STAT. 47 / § 20(b)(1)–(2) (West 2021).

365. FLA. STAT. ANN. § 742.15(1) (West 2021) (providing that both the surrogate and each commissioning individual must be at least 18 years old).

366. LA. STAT. ANN. § 9:2718.1 (West 2021). *But see, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Lawrence v. Texas, 539 U.S. 558, 565 (2003).

367. *See, e.g.*, UNIF. PARENTAGE ACT § 402(a) (UNIF. L. COMM'N 2017) (providing that a man must register "not later than 30 days after the birth").

368. These adoption-related registries are distinct from adoption registries which facilitate information exchanges between those adopted and those who placed children for adoption. *See, e.g.*, OR. REV. STAT. ANN. § 109.460 (West 2021); 15 R.I. GEN. LAWS ANN. § 15-7.2-2 (West 2021). They are also distinct from child maltreatment registries, which can effectively bar listed "perpetrators" from certain employment opportunities. *See, e.g.*, Colleen Henry & Vicki Lens, *Marginalizing Mothers: Child Maltreatment Registries, Statutory Schemes, and Reduced Opportunities for Employment*, 24 CUNY L. REV. 1, 2 (2021).

369. *See* UNIF. PARENTAGE ACT § 407(a) (UNIF. L. COMM'N 1973) (woman who is the "subject of a registration").

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The 1973 UPA had no model law on putative parent registries.[370] For adoption proceedings, it required notice to "a presumed father,"[371] to one who is determined to be a "father" by a court,[372] or to "a father as to whom the child is a legitimate child."[373]

The 2000 UPA, by contrast, contains an article on "Registry of Paternity."[374] Registration is designed to protect the parental opportunity interests of "a man who desires to be notified of a proceeding for adoption of, or termination of parental rights regarding, a child he may have fathered."[375] Registration must occur "before the birth of the child or within 30 days after the birth."[376] Failure to so register leads to automatic termination of the parental rights of a nonexempt man where the child has not attained one year of age at the time of termination.[377] Where the child is one year of age or older, in adoption or termination proceedings notices are required to "every alleged father . . . whether or not he has registered."[378] Such notices are designed to protect "those fathers who may have had some informal or de facto relationship with the child or mother for some time," preventing "unilateral action to adversely affect" the alleged father's rights.[379] Evidently, prebirth child support and post-birth childcare and child support before a child is one year old are per se insufficient to establish residency/hold out or de facto parent-child relationships.

370. *See*, *e.g.*, UNIF. PARENTAGE ACT § 4 (UNIF. L. COMM'N 2000) (amended 2002), cmt. (citing Lehr v. Robertson, 463 U.S. 248, 248 (1983)).

371. Under the 1973 UPA, a presumed father was one who was married to, or who tried to marry, a certain child bearer, as well as an alleged hold out/resident parent or a voluntary paternity acknowledger. *See* UNIF. PARENTAGE ACT § 4(a) (UNIF. L. COMM'N 1973).

372. *See id.* § 24(2).

373. *See id.* § 24(3).

374. *See* UNIF. PARENTAGE ACT § 4 (UNIF. L. COMM'N 2000) (amended 2002).

375. *See id.* § 402(a).

376. *See id.*

377. *See id.* § 404, cmt. (a procedure said to facilitate greatly "infant adoption"). Exempted are men who have already established "a parent-child relationship" under law or who commenced paternity cases before a parental rights termination proceedings commenced. *See* UNIF. PARENTAGE ACT § 402(b) (UNIF. L. COMM'N 2017) (a procedure said to facilitate greatly "infant adoption"). Exempted are men who have already established "a parent-child relationship" under law or who commenced paternity cases before a parental rights termination proceeding commenced. *See id.* § 402(b).

378. *See* UNIF. PARENTAGE ACT § 405 (UNIF. L. COMM'N 2002).

379. *See id.*, cmt. (discussing Lehr v. Robertson, 463 U.S. 248, 248 (1983)).

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The 2017 UPA generally follows the 2000 UPA on Registry of Paternity, limiting its effect to cases in which the child is less than one year old at the time of a court hearing on adoption or parental rights termination.[380] While there were said to be no "substantive changes,"[381] the 2017 Act was described as replacing "gendered terms with gender-neutral ones where appropriate."[382]

Yet the 2017 UPA is not gender-neutral where it might be. For example, it speaks of a "man" and "his genetic child" rather than a person and a child conceived with the person's sperm.[383] More importantly, it does not recognize prebirth expecting parent registrations by those whose sperm or egg donations prompted assisted reproduction conception where those donors were the spouses of those to be bearing children.[384] Thus, if the spousal child bearer placed the child for adoption by another person, or sought sole state custody of the child through the termination of any other parental interests, the state and its courts may not know of the relevant marriage. Expanded registrations would aid, for example, spousal donors whose presumptive spousal parent status was otherwise unknown to the state and its courts.

Even more importantly, the 2017 UPA does not recognize expecting parent registrations by nonspousal gamete donors and nondonors who are the intended parents of children to be born of nonsurrogacy assisted reproduction[385] where their consents are not in a "record," but where nonrecord consents can nevertheless prompt parentage, as through proof of an express agreement by clear-and-convincing evidence.[386] The state and its courts are far less likely to know of nonrecord childcare pacts than of marriages.

380. *See* UNIF. PARENTAGE ACT § 4, cmt. (UNIF. L. COMM'N 2017).
381. *Id.* art. 4, cmt. para. 3.
382. *Id*.
383. *Id.* § 402.
384. *Id.* § 412, cmt. (establishing that the search of the state registry as part of an adoption/parental rights termination proceeding "does not apply to a child born through assisted reproduction"). This comment to § 412 was "added to clarify that individuals who have children through assisted reproduction" are not required to conduct a search of the paternity registry, which was not designed or intended to address such situations. Presumably, a sperm donor's clarification of an earlier non-record agreement to rear a child born of assisted reproduction is not a substantial change. See, for example, Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 248–54 (2019) for a brief history of the marital parent presumption.
385. UNIF. PARENTAGE ACT § 412 (UNIF. L. COMM'N 2017).
386. *Id.* § 704(b)(1).

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Paternity registries in some form are employed by more than half of the states.[387] The 2000 UPA noted that as of May 2000, "at least 28 states had enacted legislation creating paternity registries."[388] The 2017 UPA recognizes that a "substantial number of legislatures" enacted registries in response to a 1983 U.S. Supreme Court decision and its aftermath.[389] Even where the 2017 UPA is otherwise substantially enacted, its "Registry of Paternity" provisions may not be included.[390]

Not unlike the 2000 and 2017 UPAs on "Registry of Paternity," state registry laws generally address paternity declarations by putative fathers.[391] Some laws may go further, as in Alabama where the "putative father registry" contains the names of "any person adjudicated by a court . . . to be the father of a child born out of wedlock"[392] and any person who filed a VAP with the registry.[393] In Arizona, the paternity registry is open to one "who is a father or claims to be the father" of a child who may be placed for an adoption where receipt of notice is desired.[394] In some areas there is a compact for sharing putative father registry information.[395]

Most importantly, however, state registry laws fail to provide opportunities to receive notices of adoptions for many expecting and existing legal parents. The aforenoted excluded parents from the 2017 UPA model are excluded from current state laws.[396] Registry laws sometimes foreclose an expecting legal parent who had no real opportunity to become an existing legal parent, though possessing constitutional interests in achieving childcare parentage.[397] Thus in Arkansas, a registering putative father only has "rights attach" after

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387. CHILD WELFARE INFO. GATEWAY, THE RIGHTS OF UNMARRIED FATHERS 3 (2018), https://www.childwelfare.gov/pubPDFs/putative.pdf [https://perma.cc/X3AS-T3EZ].

388. UNIF. PARENTAGE ACT art. 4 cmt. para. 1 (UNIF. L. COMM'N 2000) (amended 2002).

389. UNIF. PARENTAGE ACT art. 4 cmt. para. 1 (UNIF. L. COMM'N 2017) (referencing Lehr v. Robertson, 463 U.S. 248, 262 (1983)).

390. *See, e.g.*, 15 R.I. GEN. LAWS § 15-8.1-401 to 403 (West 2021) (adopting the Uniform Parentage Act while omitting paternity registry provisions).

391. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 387.

392. *Compare* ALA. CODE § 26-10C-1(a)(1), (3) (2021) ("any person"), *with* ARK. CODE ANN. § 20-18-701(5) (West 2021) ("'putative father' means any man").

393. ALA. CODE § 26-10C-1(a)(1) (2021).

394. ARIZ. REV. STAT. ANN. § 8-106.01(A) (2021).

395. *See, e.g.*, UTAH CODE ANN. § 78B-6-121.5(1) (West 2021) (limiting registrations to men who had sexual relationships with women outside of marriage).

396. *See supra* notes 392–95.

397. Lehr v. Robertson, 463 U.S. 248, 262 (1983) (describing the constitutional interest of a biological parent when a child is born to one who is unwed as "an opportunity that no other male possesses to develop a relationship with his offspring").

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establishing "a significant custodial, personal or financial relationship with the child,"[398] with the rights then including notices about a possible adoption and notices about a parental rights termination proceeding.[399] Further, effective registration sometimes only insures notice of an adoption proceeding, and not notice of a nonadoption termination of parental rights proceeding.[400]

E. Expecting Grieving Parent

As with grieving legal parents in, e.g., tort and probate settings, some grieving expecting parents should be legally recognized in these (and other) settings where care, custody, and control parental interests may not have ripened because of prebirth (including preconception and postconception) losses of expected future children. Such losses are often recognized today in postconception tort cases for those whose later parentage would arise from consensual sex or assisted reproduction pacts. Yet recognitions may not fully extend to all those who grieve the losses of their perceived future children, as with biological fathers of potential children to be born of consensual sex with unwed mothers, where the fathers failed to seize parental opportunities during pregnancies.[401]

In the tort (and contract) setting there are some available preconception claims, such as where drugmakers cause infertility in those wishing to childbear.[402]

Comparably in tort (and contract) there are some postconception but prebirth claims, as where stillbirths are prompted by negligent drivers[403] or medical personnel.[404]

In probate, there too might be grieving expecting parents who should be recognized as heirs to any estate properties of their future children. Such recognitions are most likely where future children are

398. ARK. CODE ANN. § 20-18-702(a)(3) (West 2021).

399. *Id.* § 702(a)(2) (stating that effective registration prompts "notice of legal proceedings pertaining to the child").

400. *See, e.g.*, 750 ILL. COMP. STAT. 50 / § 12.1 (West 2021).

401. *Lehr*, 463 U.S. at 262–64 (discussing constitutionally-protected parental opportunity interests). Failure to provide pregnancy support can foreclose notice and participation rights of unwed biological fathers in adoption proceedings occurring shortly after birth. *See, e.g.*, *In re* Adoption of S.D.W., 758 S.E.2d 374, 377–78 (N.C. 2014) (interpreting the notice provision of a North Carolina statute).

402. *See, e.g.*, Moll v. Abbott Laboratories, 506 N.W.2d 816, 819 (Mich. 1993) (ruling on when claim involving pharmaceutical product liability for infertility accrued).

403. *See, e.g.*, Endresz v. Friedberg, 248 N.E.2d 901, 902 (N.Y. 1969) (deciding whether emotional distress and funeral expense damages are recoverable).

404. *See, e.g.*, Aka v. Jefferson Hosp. Ass'n, 42 S.W.3d 508, 512 (Ark. 2001) (discussing whether a wrongful death statute includes viable fetuses as persons able to recover).

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foreclosed by postconception but prebirth negligent or other acts prompting recoveries on behalf of the unborn.[405]

Here, challenging issues can arise regarding the identities of expecting grieving parents. Consider, for example, a tort case where postconception negligent acts prompt stillbirths and money damage opportunities for expecting parents. In genetic surrogacy cases, note that the 2017 UPA, and one state law, allow contract recissions by the surrogates within certain hours after birth.[406] Are there at some points three grieving parents, or four grieving parents, should the surrogate be married to one who is not one of the two intended parents? And in a case with an expecting putative biological parent with potential childcare interests (as arise from some consensual sex acts or assisted reproduction pacts),[407] what norms should govern parentage identifications?

IX. CONCLUSION

The continuing (r)evolution in childcare parenthood under law (i.e., constitutional and nonconstitutional parental interests in the care, custody, and control of children) has been chiefly spurred by the dramatic increases in assisted reproduction births and informal child adoptions; that is, adoptions recognized only after the completion of post-birth acts, as found by courts, which often include same household residency and parental-like relationships.[408] This (r)evolution in childcare parenthood laws has prompted limited changes, however, in legal parenthood in other contexts, including child support, probate, and tort. Changes in nonchildcare parentage laws are needed. These changes should not always follow the changes in childcare parentage. Parentage should be defined contextually under law.

There are constitutional limits on parenthood laws, whatever the context. The constraints are found in both federal and state

405. *See, e.g.*, Farley v. Sartin, 466 S.E.2d 522, 528 (W. Va. 1995) ("Although some jurisdictions do not permit a wrongful death action to be maintained for the death of an unborn child, the majority of jurisdictions now do permit a wrongful death action if the unborn child had reached the point of viability.").

406. *Compare* UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM'N 2017) (allowing for surrogacy contract recession within 72 hours of birth), *with* WASH. REV. CODE. ANN. § 26.26A.765(1)(b) (West 2021) (allowing for surrogacy contract recession within forty-eight hours of birth).

407. Lehr v. Robertson, 463 U.S. 248, 261–63 (1983) (discussing constitutionally-protected parental opportunity interests in children with whom they have biological ties).

408. *See supra* note 1 and accompanying text.

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constitutions. One common constraint is that parenthood laws must be rational.[409] Rationality is necessary under both substantive Due Process and Equal Protection.[410] To date, the rationality limits have not been significantly applied to state policy choices, especially outside of childcare parentage.

In fact, rationality requirements should now constrain many new American parentage laws, as well as the influential parentage law reforms proposed by the Uniform Law Commissioners in its Uniform Parentage Acts. Further, some old nonchildcare parentage laws, as in tort and probate, once sensible, have become irrational over time as new childcare parentage laws, with their new public policies, have emerged. There has been insufficient coordination of many older parentage laws with the new public policies. Genetic ties, heterosexual marriage, and consensual sex generally underlie old laws, while same-sex marriage, transgender rights, parental-like acts, and intentions about future parenthood, as well as genes, opposite-sex marriages, and sex underlie many new laws.

This Article is the first to outline the irrationalities in many new and old parentage laws. Irrationalities often arise when the laws employ gendered terms like mother and father, husband and wife, man and woman, and male and female. These terms require a parent to be gender identified by the state even when such an identity clashes with the parent's own gender identification. More importantly, these gendered terms frequently clash with the public policies underlying parentage laws, new and old, that are not dependent upon any form of gender identity. As a result, these terms create differential treatment of people, as between state identified men and state identified women, where the distinctions make no sense.

Parentage laws should generally be designated for a person, sperm donor, sperm provider, egg donor, egg provider, spouse, birthgiver, and the like. Nongendered parentage laws, for many of us, will not end our speaking of mothers and fathers. But such laws will sensitize more of us to the preferences of some people without any diminution of the underlying public policies. Some discomfort perhaps, but hopefully greater respect for all within our communities.

This Article demonstrates the disconnect between gender identity and the policies underlying parentage laws in several contexts, including parenthood for childcare and child support purposes (as with some spousal, assisted reproduction, and voluntary

409. *See supra* note 3 and accompanying text.
410. *See supra* note 4 and accompanying text.

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acknowledgment parents);[411] for probate purposes (as with deceased parents);[412] for tort purposes (as with grieving parents);[413] and for expecting parent purposes (as with some voluntary acknowledgment, assisted reproduction, and putative parents).[414]

Beyond gender identity, irrationalities in parentage laws arise when there are distinctions without policy justifications. In the childcare parentage, there are troubling divides between a hold out/residency and a de facto parent. Outside of childcare, there are troubling parentage divides in survivorship, heirship, and personal injury claims.

411. *See* discussion *supra* Parts II, IV–V.
412. *See* discussion *supra* Part VI.
413. *See* discussion *supra* Part VII.
414. *See* discussion *supra* Parts III–V.

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