Choosing Parentage Laws in Multistate Conduct Cases

Jeffrey A. Parness

Follow this and additional works at: https://huskiecommons.lib.niu.edu/clglaw

Part of the Law Commons
Choosing Parentage Laws in Multistate Conduct Cases

Jeffrey A. Parness

I. Introduction

II. Imprecise State Childcare Parent Laws
   A. Introduction
   B. Residency/Hold Out Parent
   C. De Facto Parent
   D. Intended Assisted Reproduction Parent
      i. Nonsurrogacy Parent
      ii. Surrogacy Parent
   E. Voluntary Acknowledgment Parent
   F. Spousal Parent

III. Choosing Childcare Parentage Laws
   A. Introduction
   B. UPA Choice of Law Norms on Childcare Parentage
   C. Bad Parentage Law Choices

IV. Choosing Nonchildcare Parent Laws
   A. Introduction
   B. Parentage in Probate
   C. Parentage in Torts
   D. Parentage in Child Support

V. Conclusion

I. Introduction

The (r)evolution in U.S. state parentage laws in the last half century presents significant, and to date generally unrecognized, challenges when parentage issues arise in multistate conduct settings, whether involving childcare (i.e., care, custody and control\(^2\)) or nonchildcare (i.e., child support, torts, or probate) issues. The challenges chiefly result from parentage law expansions which go beyond biological ties, marriages, and state-sponsored adoptions.

---

1 Emeritus Professor, Northern Illinois University College of Law. B.A., Colby College; J.D., The University of Chicago. Thanks to Alexandria Short for her editorial assistance. All errors are mine alone.

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

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

---

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

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

5 The 1973 UPA and the 2000 UPA, as slightly amended in 2002, was said to be drafted by the NCCUSL. References herein to the 2000 UPA are to the 2002 version.
While unraveling the mysteries of one state's parentage law in one context, lawyers, judges, and litigants involved in multistate conduct cases sometimes must also utilize another state's substantive law. Here, the substance/procedure dichotomy is challenging because parentage law issues can be either procedural or substantive in nature. Where a true conflict of substantive laws exists, a choice of law determination must be made.

This paper explores choosing parentage laws in multistate conduct cases in varying contexts, including cases involving parentage for childcare purpose and for such nonchildcare purposes as tort, probate and child support. Choice of law may be compelled by Full Faith and Credit. Where there is no compulsion, the forum choice of law rules typically apply. These rules, of course, can vary in a single state between contexts, as with parenthood in childcare and in probate settings. These rules can also vary between states in a single context, as with parentage in tort settings. The paper seeks to provide guidance to those who face challenging choice of parentage law issues in multistate conduct cases.

---


7 Federal constitutional compulsion occurs when the forum state “has no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.” Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981). See, e.g., Finsturn v. Crutchler, 496 F. 3d 1139, 1156 (10th Cir. 2007) (out-of-state final adoption order involving same-sex couple is entitled to Full Faith and Credit). State Full Faith and Credit laws can compel respect for sister state laws even when the federal constitutional mandate may not operate. See, e.g., Ohio Rev. Code 3111.02(8) (“A court that is determining a parent and child relationship...should give full faith and credit to a parentage determination made under the laws of...another state, regardless of whether the parentage determination was made pursuant to a voluntary acknowledgment of parenthood, an administrative procedure, or a court proceeding.”). A Nebraska statute, 43-1406, is similar and was applied to a VAP executed in Ohio. Jesse B. v. Tyler H., 883 N.W.2d 1, 16 (Neb. 2016) (such recognition was “not contrary to Nebraska’s public policy”). A New Hampshire statute dictates its courts shall give full faith and credit to a paternity determination “made by another state, whether established by court or administrative order, through a voluntary acknowledgment...or by operation of another state’s law.” New Hampshire Stat. Ann. 168-A:2 (II). Generally see Milwaukee County v. M.E. White Co., 296 U.S. 268, 272 (1935) (“A state court, in conformity to state policy, may, by comity, give a remedy which the full faith and credit clause does not compel.”).
Before examining choice of parentage law norms, the paper first demonstrates the ever-expanding approaches to legal parentage by reviewing many of the forms of childcare parentage set forth by the ULC and ALI. Unlike parentage via biological ties, marriage or formal adoption, these forms are imprecise in that they depend upon assessments of parental-like acts and/or of private agreements on intended parenthood. In the childcare setting, the ULC has propounded three different UPAs. It has also proposed the widely enacted Uniform Interstate Family Support Act (UIFSA) and Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). These proposals have been far more influential than the ALI’s 2002 Principles.

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

II. Imprecise State Childcare Parent Laws

A. Introduction

State childcare parentage laws increasingly require judicial inquiry into multistate conduct where assessments of the conduct are done on a case-by-case basis and where there is no (fairly) precise point in time which dictates the outcome. Inquiries no longer are generally limited to precise times, like the date of marriage, the date of birth, the probable date of conception, the birth certificate date, the date of a court order on parentage, the voluntary parentage acknowledgment date, the date of an intended parent contract, and/or the date of a formal adoption decree. Imprecise parentage laws often arise in childcare parent contexts which are then sometimes employed in other contexts, like torts, probate, and child support.
The following sections review the imprecise childcare parentage laws that have emerged in the last 50 years. Later the paper demonstrates how these laws have sometimes been applied in nonchildcare parentage settings.

B. Residency/Hold Out Parent

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

The 1973 UPA is quite different than the later UPAs on residency/hold out parentage. The 1973 Uniform Parentage Act has this parentage presumption:

(a) A man is presumed to be the natural father of the child if...
(4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child.8

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.9

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

(a) An individual is presumed to be a parent of a child if: …

---

9 2000 UPA, at §204(a)(5).
(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.10

The 2000 ALI Principles of the Law of Family Dissolution (ALI Principles) also recognize forms of residency/hold out parentage. One form, like the 2000 UPA and the 2017 UPA, encompasses “a parent by estoppel,” described as one who “lived with the child since the child’s birth” while holding out and accepting full and permanent parental responsibilities as part of a prior co-parenting agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a child together, each with full parental rights and responsibilities.11

Many current state laws reflect the policies of these proposed laws. Yet not all states have expressly extended their laws beyond publicly identified opposite sex couples.12 Nevertheless, residency/hold out parentage is generally available to a female partner of one giving birth due to equality demands.13 Residency/hold out parentage is generally unavailable to

10 2017 UPA, at §204(a)(2).

11 2000 ALI Principles, at §2.03(1)(b)(iii) (further requiring a finding of serving the child’s best interests) [hereinafter 2000 ALI Principles].


13 See, e.g., Elisa B. v. Superior Court, 117 P.3d, 660, 670 (Cal. 2005) (finding former unwed lesbian partner a child support parent under California statutory law on presumed natural hold out fathers) and Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 972 (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, 15 Vt. Stat. 308(4) and 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 (N.Y. Sup. Monroe Cty., 2014). See also Nancy D. Polikoff, “From Third Parties to Parents: The Case of Lesbian Couples and Their Children,” 77 Law and Contemporary Problems 195, 212-219 (2014) (even where statutes only explicitly recognize hold out/residency parentage for men, women are sometimes deemed parents under the statutes).
a partner of a man who is a parent at birth where the person giving birth remains a legal parent and where state laws disallow three custodial parents.\footnote{In California, though, there can be three legal parents, including the birth mother, her spouse, and a hold out/residency parent. See California Family Code 7612(c) (three parents where recognition of only two parents "would be detrimental to the child"). Compare C.G. v. J.R. 130 So.3d 776, 782 (Fla. App. 2d 2014) (Florida law does not support enforcement of an agreement on sharing child custody which was entered into by the married birth mother, her spouse, and the biological father of a child born of sex).}

There are varying state laws reflecting the distinct UPA approaches to residency/hold out parentage.\footnote{As well, there are doctrines that effectively recognize residency/hold out parentage, though with different terms and some different norms. See, e.g., J.S.B. v. S.R.V., 630 S.W.3d 693, 701 (Kty. 2021) (employing a birth mother’s "parental waiver" doctrine to allow parentage in a person who could not formally adopt children, but who held children out as one’s own while residing with them for some time).} In California, following the 1973 UPA, a man is “presumed to be the natural father of a child” if he “received the child into his home and openly holds out the child as his natural child.”\footnote{Cal. Family Code 7611(d). The presumption has been sustained when challenged on the ground of interfering with federal constitutional childcare interests. See, e.g., R.M. v. T.A., 233 Cal. App. 4th 760 (Cal. App. 4th 2015) (preponderance of evidence norm used to establish presumption). As to what constitutes receipt into the home, see, e.g., In re N.V., 2014 Cal. App. Unpub. LEXIS 8870 (Cal. App. 1st Div. 4) (reviewing cases).} There is no explicit requirement that a man who holds out a child as “his natural child” needs to have any beliefs about his actual biological ties. Thus, California cases\footnote{See, e.g., In re Jesusa V., 85 P.3d 2, 15 (Cal. 2004) (both Paul (also the husband) and Heriberto (also the biological father) were each judicially declared to be “presumed” California fathers because each had received Jesusa V. into his home and held her out as his natural child) [hereinafter Jesusa V.]. See also Barnes v. Cypert, 2006 Cal. App. Unpub. LEXIS 10543 (Cal. App. 5th) (birth mother’s uncle is a presumed parent) and In re Jerry P., 95 Cal. App. 4th 793, 816 (Cal. App. 2d 2002) (presumed hold out/residency parent need not have, or even claim to have, biological ties).} have recognized as presumed parents those who knew there were no biological ties, but who acted in the community as if there were.\footnote{How long an alleged hold out/residency parent must so act is determined on a case-by-case basis. See, e.g., In re J.B., 2019 WL 1451304 (Cal. App. 2d 2019) (two day hold out is insufficient for presumed parent status).} Elsewhere, some U.S. state laws recognize residency/hold out parentage only for those who raise children from birth,\footnote{See, e.g., Texas Code 160.204(a)(5) (man is a presumed father if “during the first two years of the child’s life, he continuously resided in the household in which the child resided and he represented to others that the child was} following the 2017 UPA.
There are other interstate variations in residency/hold out parentage. Some state laws do not require receipt into the home. Some state laws more explicitly require existing legal parents to agree to such matters as residency or hold outs by nonparents who can later morph into new childcare parents on equal footing with existing legal parents.

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

---

20 See, e.g., N.J. Stat. 9:17-43(a)(4) (either receives into his home or “provides support for the child”) and Delaware Code tit. 13, 8-201(c) (“parental role” and “bonded and dependent relationship . . . that is parental in nature”).

21 See, e.g., D.C. Code 16-831.01(1) (single parent’s “agreement” to same household residency for one wishing to be deemed a de facto parent) and 15C Vermont Stat. 401 (a)(4) (presumed hold out/residency parent if in child’s first 2 years, where “another parent” of child jointly held child out as presumed parent’s child). Compare N.J. Stat. 9:17-43(a)(4) and (5) and 9:17-40 (a man can be “presumed to be the biological father of a child on equal footing with the unwed birth mother, if he “openly holds out the child as his natural child” and either “receives the child into his home” or “provides support for the child”).

22 15C Vermont Stat. 401(a)(4) and 402(b)(2).

23 Compare, e.g., 2017 UPA, at §§204(a)(2) (residence/hold out in child’s first two years) 204(b), and 608(b) (presumption rebuttal usually must be presented before the child turns two) to 1970 UPA, at §4(a)(4) (residence/hold out where child is “under the age of majority”) and 6(b) (“at any time”).
condition of extending the normal time limits for challenging residency/hold out parents.\textsuperscript{24}

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.\textsuperscript{25} Yet, the 2000 ALI Principles are most appropriate, since one existing legal parent, as in a formal adoption, generally should have no agency/common authority to surrender the parental childcare rights of a second existing legal parent.\textsuperscript{26} In 2021 the Maryland high court found two parent consent necessary.\textsuperscript{27}

C. De Facto Parent

Another form of imprecise childcare parentage is de facto parentage. The 2017 UPA, but neither of its UPA predecessors, expressly recognizes "de facto" parenthood as a form of parentage for those without biological, marital or formal adoption ties.\textsuperscript{28} Such parenthood is

\begin{itemize}
\item \textsuperscript{24} Compare, e.g., 2017 UPA, at §§204(a)(2), 204(b) and 608(b) (two year limit on challenging hold out/residency parenthood of an "individual" does not operate when the individual is "not a genetic parent, never resided with the child, and never held out the child as the presumed parent’s child"); 2000 UPA at §§204(a)(5), 204(b), and 607(b) (two year limit on actions to disprove earlier determined presumed hold out/residency parenthood in a "man" does not operate when there was, in fact, no cohabitation or sexual intercourse during the probable time of conception and the presumed parent never openly held out the child as his own); and 1970 UPA, at §§4(a)(4) and 6(b) (presumed hold out/residency parenthood can be challenged "at any time").
\item \textsuperscript{25} 2000 ALI Principles, at §2.03(1)(b)(iii).
\item \textsuperscript{26} See, e.g., Jeffrey A. Parness, "The Constitutional Limits on Custodial and Support Parentage By Consent," 56 Idaho L. Rev. 421, 461-478 (2020) [hereinafter Constitutional Limits].
\item \textsuperscript{27} E.N. v. T.R., 255 A.3d 1, 30 (Md. 2021) (”where there are two legal (biological or adoptive) parents, a prospective de facto parent must demonstrate that both legal parents consented to and fostered such a relationship or that a non-consenting parent is unfit or exceptional circumstances exist“) [hereinafter E.N.], followed in Martin v. MacMahan, 264 A.3d 1224, 1234-1235 (Maine 2021) [hereinafter Martin].
\item \textsuperscript{28} The term "de facto" parent did not originate in the 2017 UPA. The Comment to the Act indicates its de facto parenthood standard was modeled on Maine and Delaware statutes. 2017 UPA, at Comment to §609. The term was also employed in the 2000 ALI Principles. 2000 ALI Principles, at § 203(1). See also Preliminary Draft No. 8, October, 2021, ALI Restatement of the Law: Children and the Law, at Appendix B, at 170 (§1.72 on de facto parenthood (once labeled § 1.82) is one of the "black letter" sections approved by membership) [hereinafter ALI Restatement Draft].
\end{itemize}
dependent upon meeting far more explicit terms than the terms underlying residency/hold out parentage. 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;" the nonparent must have held out the child as the nonparent's own child and undertaken "full and permanent" parental responsibilities; and, the nonparent must have "resided with the child as a regular member of the child's household for a significant period of time."

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

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

---

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

30 2017 UPA, at §609(d)(5) and (6).

31 2017 UPA, at §609(d)(4) and (3).

32 2017 UPA, at §609(d)(1).

33 2017 UPA, at §609(a).

34 2000 ALI Principles, at §§2.03(1)(c) and 3.02(1)(c) (requirements include residence with the child, as well as "the agreement of a legal parent to form a parent-child relationship" unless the legal parent completely fails, or is unable, to perform caretaking functions).

35 ALI Restatement Draft, at §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").
formal adoption ties. Each of the forms requires both residence and consent by an existing legal "parent." But only the 2000 Principles further recognize a “parent by estoppel.”

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

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.” A 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.” Further, a de facto parent has no presumptive right

---

36 Under the 2000 ALI Principles, a legal parent, a parent by estoppel and a de facto parent each has standing to pursue/participate in an action involving judicial allocation of custodial and decisionmaking responsibility for a child. 2000 ALI Principles, at § 2.04(1). A “legal parent” is “an individual who is defined as a parent under other state law.” 2000 ALI Principles, at §2.03(1)(a).

37 2000 ALI Principles, at §2.03(1)(b).

38 2000 ALI Principles, at §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) (in a delinquency case, permissive intervention, not intervention as of right, is available to some foster parents claiming de facto (or psychological) parent status); and In re B.G., 523 P.2d 244, 254 n. 21 (Cal. 1974) (not resolving whether a de facto parent may have the same rights of notice, hearing or counsel as have natural parents in Juvenile Court Law 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.” §2.03, at Comment c.

of “access to the child’s school and health-care records to which legal parents have access by other law.”

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

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 and a less comparable Wisconsin Supreme Court precedent, that were

----------------------------------------


41 ALI Restatement Draft, at § 1.72(a) (proof by clear and convincing evidence is required).

42 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 Marquette L. Rev. 183, 203-205 (2020); E.N., 255 A.3d at 30 (de facto parenthood requires consent by two existing legal parents, if there are two, or a finding of unfitness in a nonconsenting parent or a finding of "exceptional circumstances"); and Martin, 264 A.3d at 1234-1235.


44 In re Custody of H.S.H.-K., 533 N.W. 2d 419 (Wis. 1995) (parental-like relationship can prompt visitation rights when in child’s best interests) [hereinafter H.S.H.-K.]. There are common law precedents elsewhere. In 2008 the South Carolina Supreme Court, adopting a Wisconsin high court analysis, determined that a nonparent was eligible for psychological parent status if a four-prong test was met. Marquez v. Caudill, 656 S.E.2d 737 (S.C. 2008) (following H.S.H.-K., 533 N.W. at 435-436, which set out norms for nonparent child visitation orders). See also Conover v. Conover, 146 A.3d 433, 446-447 (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
utilized by the drafters of the 2017 UPA.\textsuperscript{45} Since 2017, a few states have statutorily recognized 2017 UPA de facto parenthood.\textsuperscript{46}

On occasion, statutes within a single U.S. state recognize both residency/hold out and de facto parents who are neither biologically-tied nor maritally-tied to, and who are not formal adopters of, children. Thus the Maine Parentage Act, effective in July, 2016, provides for presumed parents who resided since birth with a child for at least 2 years and “assumed personal, financial, or custodial responsibilities,”\textsuperscript{47} 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.”\textsuperscript{48} Similarly, there are both residency/hold out and de facto parents in Delaware,\textsuperscript{49} Washington,\textsuperscript{50} and Vermont.\textsuperscript{51}

---

formal adoption,” has the same “rights, duties and liabilities” as a natural parent. First Colony Life Ins. Co. v. Sanford, 555 F.3d 177 (5th Cir. 2009) (relying on, inter alia, Favre v. Medders, 128 So.2d 877, 879 (Miss. 1961)). By contrast, in some U.S. states where there are no de facto parent statutes, courts choose not to develop precedents because any new de facto parentage norms are the responsibility of state legislators. See, e.g., More Principled Allocations, 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 Dogmas in Light of Same-Sex Parents’ Increased Access to Obtaining Formal Legal Parent Status,” 83 Brooklyn L. Rev. 55 (2017).

\textsuperscript{45} 2017 UPA, at Comment to §609.


\textsuperscript{47} 19-A Maine Rev. Stat. c. 61, 1881 (3) (eff. 7-1-16).

\textsuperscript{48} 19-A Maine Rev. Stat. c. 61, 1891 (3) (eff. 7-1-16).

\textsuperscript{49} Del. Code tit. 13, 8-204 (a) (5) (presumed residency/hold out parent) and Del. Code tit. 13, 8-201 (c) (de facto parent).

\textsuperscript{50} Washington Rev. Stat. 26.26A.115(b) (presumed residency/hold out parent “for the first four years”) and 26.26A.440 (de facto parent).

\textsuperscript{51} 15C Vermont Stat. 401(a)(1) (presumed residency/hold out parent after the first two years) and 501(a) (de facto parent).
D. Intended Assisted Reproduction Parent

i. Nonsurrogacy Parent

A third form of imprecise childcare parentage involves nonsurrogacy assisted reproduction. The 1973 UPA does not deal with the "many complex and serious problems raised by the practice of artificial insemination."52 It does, however, address "one fact situation that occurs frequently,"53 a "consent" by a husband to the artificial insemination of his wife with "semen donated by a man not her husband." Here, the husband is to be "treated in law as if he were the natural father" where the consent was in writing and "signed by him and his wife," with certification undertaken and then filed by the supervising "licensed physician" with state governmental officials.54 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."55

In response to the increasing numbers of children born of assisted reproduction, the 2017 UPA contains distinct articles on nonsurrogacy and surrogacy births. In nonsurrogacy assisted reproduction parentage settings, the 2017 UPA “is substantially similar” to the 2000 UPA, with the “primary changes… intended to update the article so that it applies equally to same-sex couples.” 56 The 2017 UPA recognizes that a sperm donor is not always a parent of a child conceived by assisted reproduction. 57 For there to be two legal parents, a consent to parentage

52 1973 UPA, at §5 at Comment.
53 1973 UPA, at §5 at Comment.
54 1973 UPA, at §5(a) (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").
55 1973 UPA, at §5(b).
56 2017 UPA, at Comment preceding §701.
57 2017 UPA, at §§702-704.
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. 58 Seemingly, "consent in a record" can be undertaken "before, on, or after birth of the child." 59 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." 60 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. 61 The nonparental status of one married to a person giving birth to a child born by assisted reproduction, even if a gamete donor, may be established by a showing of a lack of consent, of any agreement, and of holding out of the child as one’s own. 62

The nonsurrogacy parentage norms in the UPAs are now reflected in some U.S. state

58 2017 UPA, at §704(a).

59 2017 UPA, at §704(b).

60 2017 UPA, at §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 postbirth (paternity) VAPs. 1973 UPA, at §4(b) ("paternity" acknowledgment "of the child" in a "writing filed with" the state, which is not disputed by "the mother") and 2000 UPA, at §301 ("man claiming to be the genetic father of the child" signs together with the "mother of a child").


62 2017 UPA, at §705.
statutes and in precedents untethered to statutes, with significant interstate variations. The 2017 UPA provisions have been enacted in a few states.

Childcare parentage for those giving birth and for intended parents in nonsurrogacy settings often involve express consents. There could be, but there generally are no, state-required forms guiding such consents. In California, however, in nonsurrogacy settings there are statutorily-recommended consent forms that may be used; but they are not required. Suggested state-formulated consent forms should be more generally available as informed consent would be better assured and there would be greater certainty in resolving factual disputes regarding party

---

63 American state statutes include Texas Family Code 160.7031 (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. 5-C:30(I)(b)(unwed mother has sperm donor “identified on birth record” where “an affidavit of paternity” has been executed); 13 Delaware Code 8-704(a)(“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.”); Wyoming Stat. 14-2-904(a)(like Delaware); and New Mexico Stat. 40-11A-703(“A person who provides eggs, sperm, or embryos for or consents to assisted reproduction as provided in Section 704 [“record signed . . . before the placement”] . . . with the intent to be the parent of a child is a parent of the resulting child”).

64 Precedents include Shineovich v. Shineovich, 214 P.3d 29 (Or. App. 2009) (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 797 (though the statute (both pre2011 and post 2011) indicated explicitly a lack of paternity for this particular semen donor when his unwed partner delivered a child conceived via assisted reproduction, the statute on presumed parentage for one (either male or female) who receives a child into the home and openly holds out the child as one’s own natural child can support – in certain circumstances – legal paternity for the semen donor); Ramey v. Sutton, 362 P.3d 217 (Okl. 2015) (unwritten preconception agreement prompts in loco parentis childcare status for former lesbian partner of birth mother, though she contributed no genetic material); and In re Brooke S.B. v. Elizabeth A.C.C., 61 N.E. 3d 488 (N.Y. 2016) (agreement between lesbian partners can prompt parentage in non-birth mother) [hereinafter Brooke S.B.].

65 The laws are reviewed, and critiqued, in Deborah H. Forman, “Exploring the Boundaries of Families Created with Known Sperm Donors: Who’s in and Who’s Out?,” 19 Univ. of Pennsylvania J. of Law and Social Change 41 (2016) [hereinafter Exploring the Boundaries].


67 California Family Code 7613.5(d) (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).
intentions.\textsuperscript{68} Such forms would be comparable to the required forms for VAPs.\textsuperscript{69} State-sanctioned forms on nonsurrogacy assisted reproduction, compatible with a state's laws on assisted reproduction, would be especially helpful to do-it-yourselfers who otherwise, for example, might employ internet forms which will not later be recognized as enforceable agreements.\textsuperscript{70}

\textbf{ii. Surrogacy Parent}

A fourth form of imprecise childcare parentage includes some surrogacy assisted reproduction parentage. As to surrogacy, the 1973 UPA is silent.\textsuperscript{71} The 2017 UPA, like the 2000 UPA, distinguishes between genetic and gestational surrogacy.\textsuperscript{72} The UPA surrogacy provisions are limited to instances of assisted reproduction births.\textsuperscript{73} Unlike its 2000 predecessor, the 2017

\begin{flushright}
\textsuperscript{68} I urged that such forms be created in "Formal Declarations of Intended Childcare Parentage," 92 Notre Dame L. Rev. Online Supplement 87 (March 30, 2017) [hereinafter Formal Declarations]. In the absence of legally sanctioned forms that are widely employed, disputes can arise over whether, e.g., a certain writing meets the statutory standard for a private agreement on intended parentage. See, e.g., Jason P., 171 Cal. Rptr. 3d at 798 (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").

\textsuperscript{69} See, e.g., Jeffrey A. Parness and Zach Townsend, “For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth,” 40 Univ. of Baltimore L. Rev. 53, 63-87 (2010) (reviewing similarities and differences in state-generated VAP forms). At times, written parentage acknowledgments operate though state-generated VAP forms were not utilized. See, e.g., District of Columbia Code 16-909(a)(4) (presumption that a man is the father of a child if he “has acknowledged paternity in writing”); New Mexico Stat. 40-11A-204(A)(4)(c) (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); and Kansas Stat. 23-2208(a)(4) (a man is presumed to be the father of a child if he “notoriously or in writing recognizes paternity of the child,” including but not limited to acts in accordance with the voluntary acknowledgement statutes).

\textsuperscript{70} See, e.g., Gatsby v. Gatsby, 495 P.3d 996, 999 and 1003 (Idaho 2021) (form found online suffered from “severe inadequacies”).

\textsuperscript{71} 1973 UPA, at §5 at Comment (while addressing husband-wife pacts on assisted reproduction where the wife bears the child and intends to parent, the Act "does not deal with many complex and serious legal problems raised by the practice of artificial insemination").

\textsuperscript{72} 2017 UPA, at Comment preceding §801.

\textsuperscript{73} 2000 UPA, at § 801(a)(i) (“agrees to pregnancy by means of assisted reproduction”) and 2017 UPA, at § 801(3) (surrogacy agreement on pregnancy “through assisted reproduction”). This is not to say there are no instances of
UPA does not require all surrogacy agreements to be validated by a court order prior to any medical procedures.\textsuperscript{74} So there is more imprecision in the 2017 UPA than in the 2000 UPA.

The 2017 UPA imposes differing requirements for the two surrogacy forms, with “additional safeguards or requirements on genetic surrogacy agreements,”\textsuperscript{75} as only they involve a woman giving birth while “using her own gamete.”\textsuperscript{76} The 2017 UPA recognizes there can be "one or more intended parents"\textsuperscript{77} in surrogacy settings.\textsuperscript{78}

The common requirements for the two forms of surrogacy pacts under the 2017 UPA include signatures in a record, "attested by a notarial officer or witnesses;" independent legal counsel for all signatories; and, execution before implantation.\textsuperscript{79} Special provisions for gestational surrogacy pacts include an opportunity for "party" termination "before an embryo

\begin{footnotesize}
\begin{enumerate}
\item 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. Sup. App. Div. 1st Dep't. 2000) (custody awarded to embryo creators, with no visitation for gestational mother).
\item 2017 UPA, at §801(3).
\item 2017 UPA, at §801(6), (7) and (9). Thus, by definition, a person who may become pregnant through sex cannot agree to be a surrogate, as cannot a person who is pregnant and only agrees to surrogacy postpregnancy. 2017 UPA, at §801(1) and (2) (each surrogacy form applies only to a person "who agrees to become pregnant through assisted reproduction").
\end{enumerate}
\end{footnotesize}
transfer" and an opportunity, but not a requirement, for a prebirth court order declaring parentage vesting at birth.\textsuperscript{80} 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;\textsuperscript{81} that a genetic surrogate may withdraw consent "in a record" at any time before 72 hours after the birth;\textsuperscript{82} 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."\textsuperscript{83} So there is more precision in genetic surrogacy parentage than in gestational surrogacy parentage under the 2017 UPA.

UPA surrogacy parentage norms are now reflected both in state statutes\textsuperscript{84} and judicial precedents untethered to statutes.\textsuperscript{85} State surrogacy laws vary significantly, as between laws that

\textsuperscript{80} 2017 UPA, at §§808(a) and 811(a).

\textsuperscript{81} 2017 UPA, at §§813(a) and (b).

\textsuperscript{82} 2017 UPA, at §814(a)(2). Genetic and gestational surrogates should be recognized, however, as having federal constitutional parental opportunity interests under Lehr, 463 U.S. at 261-62. See, e.g., Matter of Schnitzer, 493 P.3d 1071 (Or. App. 2021).

\textsuperscript{83} 2017 UPA, at §818(b).

\textsuperscript{84} See, e.g., Washington Rev. Stat. 26.26.A.715 (gestational and genetic surrogacy agreements). In New Hampshire, which veers from the 2017 UPA, one statutory scheme covers genetic and gestational surrogacy. There, before insemination pursuant to a surrogacy contract that will be deemed "lawful," N.H. Rev. Stat. 168-B:16(I), a court "shall" be petitioned for "judicial preauthorization," N.H. Rev. Stat. 168-B:21(I). 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. Authorization is permitted only where the "surrogacy contract is in the best interest of the intended child." N.H. Rev. Stat. 168-B:23(III)(d).

\textsuperscript{85} Precedents recognizing judicial discretion to enforce surrogacy arrangements include In re Paternity of F.T.R., 833 N.W. 2d 634, at ¶173 (Wis. 2013) [enforcing surrogacy pact between two couples as long as child's best interests were served, while urging the legislature to "consider enacting legislation regarding surrogacy" to insure "the courts and the parties understand the expectations and limitations under Wisconsin law"] [hereinafter F.T.R.]; In re Baby, 447 S.W.3d 807 (Tenn. 2014) ("traditional surrogacy contracts do not violate public policy as a general rule" where surrogate artificially inseminated with sperm of intended father, who was not married to intended mother); In re Amadi, 2015 WL 1956247 (Tenn. App. 2015) (gestational surrogate for married couple is placed on
do not recognize genetic surrogacy. Certain provisions of the 2017 UPA have been enacted in a few states, though there are different degrees of UPA incorporation. Elsewhere, there operate major sections of the 2000 UPA on surrogacy. As yet there are generally no state required forms on surrogacy pacts, though there are, as noted, suggested forms for nonsurrogacy assisted reproduction births in California. Increased mandates on required forms and/or increased availability of suggested forms would diminish significantly disputes over surrogacy parentage.

E. Voluntary Acknowledgment Parent

All three UPAs recognize childcare parentage arising from voluntary parentage (once called paternity) acknowledgments (VAPs). This parentage establishment form has not been imprecise since the mid-1990s as state laws generally just follow federal mandates. But this

---


87 See, e.g., Michigan Comp. Laws 722.853 (“surrogate carrier means the female in whom the embryo is implanted”).


90 See California Family Code 7613.5.


form is deceptively imprecise in its disestablishment norms. As with other forms of childcare parentage, there can be multistate conduct relevant in VAP disputes.

The 1973 UPA recognized a “presumption of paternity” for a man who acknowledges his paternity in a writing filed with the state which is not thereafter disputed by the birth mother “within a reasonable time.”93 This presumption could only be rebutted by “clear and convincing evidence” which accompanied a court decree “establishing paternity of the child by another man.”94

The 2000 UPA recognized an “acknowledgment of paternity” could be undertaken by the “mother of a child and a man claiming to be the genetic father.”95 Acknowledgments usually could be overcome via a rescission by a “signatory” within 60 days of signing. After sixty days, but within two years of signing, acknowledgments could be overcome by proof of fraud, duress, or material mistake of fact.”96 The 2000 UPA on VAPs was grounded on the Federal Personal Responsibility and Reform Act of 1996.97

The 2017 UPA recognized an acknowledgment of parentage could be undertaken by “a woman who gave birth to a child and an alleged genetic father of the child,” an intended parent

\footnotesize{\textsuperscript{93} 1973 UPA, at § 4(a)(5).} \\
\footnotesize{\textsuperscript{94} 1973 UPA, at § 4(b).} \\
\footnotesize{\textsuperscript{95} 2000 UPA, at § 301. The requirements for execution included “a record;” a possible “penalty of perjury;” no other father; consistency with any genetic testing results; and an equivalence of an acknowledgment with a “judicial adjudication.” 2000 UPA, at § 302.} \\
\footnotesize{\textsuperscript{96} 2000 UPA, at § 308.} \\
\footnotesize{\textsuperscript{97} 2000 UPA at Introductory Comment to Article 3.}
via nonsurrogacy assisted reproduction, or a “presumed parent.””\textsuperscript{98} As with the 2000 UPA, VAPs could be overcome by rescission\textsuperscript{99} or by challenge brought by a signatory after the period for rescission ended, but “not later than two years” after the VAP became effective.\textsuperscript{100} A challenge by a signatory\textsuperscript{101} is differently guided than a challenge by a nonsignatory.\textsuperscript{102}

VAP challenge laws vary widely between states, including on how fraud, duress and/or mistake are measured, on how long one has to challenge, and on who has standing to challenge.\textsuperscript{103}

\section*{F. Spousal Parent}

Spousal parentage arises presumptively under the UPAs when a child is born to one then married or once married to a birth mother, or to one who marries (or attempts to marry) a birth mother after birth.\textsuperscript{104} Such parentage is established at varying times under state laws, as when the birth mother was married at the time of conception,\textsuperscript{105} sometime during the pregnancy,\textsuperscript{106} or

\begin{footnotesize}
\textsuperscript{98} 2017 UPA, at § 301.
\textsuperscript{99} 2017 UPA, at § 308.
\textsuperscript{100} 2017 UPA, at § 309(a).
\textsuperscript{101} 2017 UPA, at § 310.
\textsuperscript{102} 2017 UPA, at §§ 309(b) and 610 (also must be brought within two years).
\textsuperscript{104} See, e.g., 1973 UPA, at § 4(a)(1) ("born during the marriage, or within 300 days after the marriage is terminated"); 1973 UPA, at 4(a)(3) (marriage or attempted marriage postbirth); 2000 UPA, at § 204(a)(1) and (2) ("child is born during the marriage" or “within 300 days after the marriage is terminated”); 2000 UPA, at § 204(a)(4) (marriage or attempted marriage postbirth); 2017 UPA, at § 204(a)(1)(A) and (B) (“child is born during the marriage” or “not later than 300 days after the marriage is terminated”); and 2017 UPA, at § 204(a)(1)(C) (marriage or attempted marriage postbirth).
\textsuperscript{105} See, e.g., Michigan Comp. Laws 722.1433(e) (marriage at time of conception).
\end{footnotesize}
at the time of birth. Further, state laws, as with the UPAs, recognize that postbirth marriages can prompt spousal parentage. Recently, spousal parentage laws have recognized parentage in women married to birth mothers at the relevant time, though there are clearly no biological ties. While the time requirements relevant to the establishing spousal parentage do vary a bit interstate, choice of law issues do not arise often. The time from conception to any postbirth marriage usually does not span much time and couples with newborns often remain together in one place during this entire period.

Not unlike VAP parentage, spousal parentage laws across the U.S. have more significant variations on disestablishment. VAP disestablishments are driven by federal child support subsidy requirements, including laws on rescissions and challenges. As noted, the VAP challenge norms on fraud, duress and mistake are imprecise and contain significant interstate variations.

---

107 See, e.g., Michigan Comp. Laws 722.1433(e) (marriage at time of birth).

108 See 1973 UPA, at § 4(a)(3) (actual or attempted marriage “after the child’s birth” and the spouse acknowledged paternity, is named on birth certificate or is obligated to pay child support under a written agreement or court order); 2000 UPA, at 204(a)(4) (similar to 1973 UPA); and 2017 UPA, at 204(a)(1)(c) (actual or attempted marriage “after the birth of the child” and the spouse “asserted parentage” in a state record or is named on the birth certificate). Similar state laws include Kansas Stat. Ann. 23-2208(a)(3) (similar to 1973 and 2000 UPAs); Montana Code Ann. 40-6-105(1)(c) (similar to 1973 and 2000 UPAs); Colorado Rev. Stat. 19-4-105(1)(c) (similar to 1973 and 2000 UPAs); Washington Rev. Code 26.26A.115(1)(ii) (similar to 2017 UPA); and Rhode Island Gen. Laws 15-8.1-401(a)(3) (similar to 2017 UPA).

109 See 2017 UPA, at 204(a) (“individual is presumed to be a parent”) and § 701 (“assisted reproduction” norms on parentage do not apply to “child conceived by sexual intercourse”). Similar state laws include Rhode Island Gen. Laws 15-8.1-401(a)(1) (presumed parentage where individual and individual who gave birth to the child are married to each other and the child is “born during the marriage”) and Washington Rev. Code 26.26A.115(1)(a) (similar; “the individual and the woman who gave birth to the child are married”).

110 But see McGovern v. Clark, 298 So. 3d 1244 (Fla. App. 5th 2020) (effect of marriage in New Hampshire of same-sex female couple on parentage of children born in Florida and still residing in Florida would be assessed under Florida law, Florida Stat. 742.091, governing parentage in children born prior to the marriage).

With spousal parentage, there are usually disestablishments by rebuttals. The rebuttal norms vary, inter alia, in their substantive override requirements (i.e., on the significance of no biological ties in the spousal parent), in their standing requirements (i.e., who can seek to rebut), and in their timing requirements (i.e., how long do those with standing have to seek to rebut).115

III. Choosing Childcare Parentage Laws

A. Introduction

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

113 Compare, e.g., 1973 UPA, at § 4(a) (spousal parentage in a “man presumed to be the natural father of a child”) to 2000 UPA, at § 204(a) (spousal parentage in a man “presumed to be the father”) and to 2017 UPA, at § 204(a) (spousal parentage in an “individual who is ‘presumed to be a parent’”). Similar state laws include Colorado Rev. Stat. 19-4-105(1) (similar to 1973 UPA); Wisconsin Stat. Ann. 891.41(1)(a) (similar to 1973 UPA); Lousiana Civil Code 185 (similar to 2000 UPA; husband “is presumed to be the father”); Alabama Code 26-17-204(a)(1) (similar to 2000 UPA); Washington Code Ann. 26.26A.115(1)(a)(i) (similar to 2017 UPA); and Rhode Island Gen. Laws Ann. 15-8.1-401(a)(1) (similar to 2017 UPA).

114 Compare, e.g., 1973 UPA, at § 6(a)(2) (a “child, his natural mother, or a man presumed to be his father” due to actual or attempted marriage can seek a declaration of “the non-existence of the father and child relationship”) to 2000 UPA, at § 607(a) (where a child has a presumed spousal parent, a related adjudication of parentage may be brought by “a presumed father, the mother or another individual”) and to 2017 UPA, at § 602 (standing to adjudicate parentage of presumed spousal parent recognized, inter alia, in the child, the birth mother, the spousal parent, an individual who seeks a parentage order, a child-support agency, an authorized adoption agency or a licensed child-placement agency). State laws that vary include Nevada Rev. Stat. 126.071 (action involving “existence or nonexistence of the father and child relationship” may be brought by a child, the natural mother, a man presumed or alleged to be the father, or an interested third party) and Missouri Stat. 210.826(1) (child, natural mother, presumed father, an alleged father, any person “having physical or legal custody for more than sixty days,” or “the family support division”).

115 Compare, e.g., 1973 UPA, at § 6(a)(2) (action to declare “non-existence of the father and child relationship involving spousal parentage” must be brought “within a reasonable time after obtaining knowledge of relevant facts”) to 2000 UPA, at § 607 (adjudication of parentage of a child having a “presumed father must be commenced not later than two years after the birth of the child;” no time limit, however, where no cohabitation or sexual intercourse “during the probable time of conception” and where spousal parent “never openly held out the child as his own”) and to 2017 UPA, at § 608(b)(1) (similar to 2000 UPA, at §607). Differing state laws include Colorado Rev. Stat. Ann. 19-4-107(b) (no later than five years after the child’s birth) and 750 Illinois Comp. Stat. Ann. 46/205(b) (action possible until child is eighteen).
In July 2017, the ULC recommended for enactment in all states a new UPA.116 This act followed the 1973 and 2000 UPAs which were widely adopted by state lawmakers and which continue to be employed in many states. Each UPA speaks to establishing childcare parentage117 and to choosing between differing childcare parent laws in cases involving multistate conduct. The choice of law norms in the UPAs have become increasingly problematic when applied to cases involving newer forms of childcare parentage, as they are imprecise by nature and reliant on assessing parental-like conduct occurring at varying times. The next section reviews the UPA choice of law norms, while the following section demonstrates some bad choices in choosing between the differing state childcare parent laws of two or more interested states.

B. UPA Choice of Law Norms on Childcare Parentage

The 1973 UPA says a parentage action “may be brought in the county in which the child or the alleged father resides or is found or, if the father is deceased, in which proceedings for probate of his estate have been or could be commenced.”118 Once parentage is the subject of "a judgment or order," the issuing court has continuing jurisdiction to modify or revoke.119 The 1973 UPA does not speak directly to choice of law in multistate conduct cases. Yet it does hint that respect for out-of-state recognitions of paternal child support declarations,


117 Childcare parentage establishment vests federal, constitutionally-protected interests in the "care, custody and control" of children. Troxel, 530 U.S. at 66. Such parentage establishment may also operate outside of childcare. See 1973 UPA, at § 1 (as used in the Act, "parent and child relationship means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations") [hereinafter 1973 UPA]. Compare the 2000 UPA, as amended in 2002, at § 203 (a "parent-child relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of this State") and the 2017 UPA, at § 203 (similar to 2000 UPA, at § 203).

118 1973 UPA, at § 8(c).

acknowledgments, and adjudications may be needed and that UPA parentage determinations might be applicable for purposes beyond childcare, as with child support and heirship in probate proceedings.\textsuperscript{120}

The 2000 UPA does address choice of law. It says that a court shall apply its own law “to adjudicate the parent-child relationship.”\textsuperscript{121} This norm is said not to depend on either “the place of birth of the child” or “the past or present residence of the child.”\textsuperscript{122} As “for a proceeding to adjudicate parentage,” the possible venues include a county in which “the child resides or is found; the respondent resides or is found if the child does not reside in this State; or a proceeding of probate or administration of the presumed or alleged father’s estate has been commenced.”\textsuperscript{123} Thus, in a case seeking to establish parentage, the 2000 UPA eliminates as a possible venue a county in which the respondent resides or is found if the child resides in the same state, but in a different county. It also eliminates a county where the alleged parent’s estate “could be commenced.”

The preference for application of forum law is expressly excepted in the 2000 UPA. The Act says a "court . . . shall give full faith and credit" to a VAP which was properly executed in another state and has not been rescinded or successfully challenged.\textsuperscript{124} The Act further says that

\textsuperscript{120} 1973 UPA, at § 17(a) ("If the existence of the father and child relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated . . . the obligation of the father may be enforced in the same or other proceedings") [emphasis added].

\textsuperscript{121} 2000 UPA, at § 103(b).


\textsuperscript{123} 2000 UPA, at § 605.

\textsuperscript{124} 2000 UPA, at §§ 311, 307, and 308.
a valid VAP, filed with the state birth records office, “is equivalent to an adjudication of paternity.”

The 2017 UPA says that in a proceeding to adjudicate parentage, the applicable law does not depend on “the place of birth of the child” or “the past or present residence of the child,” with the court to apply its own law “to adjudicate parentage.” Venue “in a proceeding to adjudicate parentage” is appropriate in a county in which “the child resides or is found;” in a county where “the respondent resides or is found if the child resides out of state;” or in a county where there is commenced “a proceeding for administration of the estate of a person who is or may be a parent.” The 2017 choice of law and venue norms thus substantially follow the 2000 UPA norms, including its exception for voluntary parentage acknowledgments.

In declaring forum state law applicable “to adjudicate the parent-child relationship” in 2000 and to “adjudicate parentage” in 2017, the UPAs were said to follow the Uniform Interstate

---

125 2000 UPA, at § 305(a).

126 2017 UPA, at § 105.


128 2017 UPA, at § 605.

129 As with the 2000 UPA on voluntary paternity acknowledgment, the 2017 UPA excepts forum law application where a voluntary parentage acknowledgment was properly executed and filed in another state. 2000 UPA, at §§ 305 and 311 and 2017 UPA, at §§ 305 and 311. While the 2000 UPA speaks of “paternity” and not “parentage” acknowledgments, its provisions, where adopted, have been read to permit parentage acknowledgments by some women, as where these women contributed gametes employed in pregnancies leading to birth. See Note, Jennifer P. Schrauth, “She’s Got to Be Somebody’s Baby: Using Federal Voluntary Acknowledgments to Protect the Legal Relationship of Married Same-Sex Mothers and Their Children Conceived Through Artificial Insemination,” 107 Iowa L. Rev. 903 (2022) and Jessica Feinberg, “A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples,” 30 Yale J. of Law and Feminism 97 (2018). See also 2000 UPA, at § 106 (UPA provisions “relating to determination of paternity apply to determination of maternity”).
Family Support Act (UIFSA). In each instance, a UPA Comment asserts that this directive “simplifies choice of law principles,” though recognizing that should the chosen state provide “an inappropriate forum, dismissal for forum non-conveniens may be appropriate.”

The 1996 and 2008 versions of the UIFSA generally speak to how a “responding tribunal” should proceed when asked by an “initiating tribunal” to determine the duty of, and amount payable for, child support. Here, the respondent is not subject to personal jurisdiction in the initiating tribunal. The responding tribunal, in hearing child support issues, is recognized as sometimes having to “determine parentage” first. In a child support proceeding in a responding tribunal, the 1996 UIFSA declares that the responding tribunal shall “apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating” in its state [emphasis added]; it also declares that a determination of “the duty of support and amount payable” should be in accordance with its own state’s “law and support guidelines.”

For a child support proceeding in a responding tribunal, the 2008 UIFSA declares that the responding court shall apply “the procedural and substantive law generally applicable to similar

130 A 2000 UPA Comment, at § 103(b), points to the 1996 UIFSA, at § 303, while a 2017 UPA Comment, at § 105, points to the 2000 UPA as well as to the 1996 UIFSA, at § 303 and to the 2008 UIFSA, at § 303. The 2000 Comment does not expressly speak to its newly adopted choice of law doctrine which is not found in the 1973 UPA.

131 Comments to 2000 UPA, at § 103(b) and to 2017 UPA, at § 105.

132 1996 UIFSA, at § 301(c) and 2008 UIFSA, at § 301(b).

133 1996 UIFSA, at § 305(b)(1).

134 1996 UIFSA, at § 303(12) (emphasis added). These provisions continue to operate in several American jurisdictions. See, e.g., Wisc. Stat. Ann. 769.303; 8 Puerto Rico Laws Ann. 543b; and 5 Guam Code Ann. 35303. See also 1996 UIFSA, at § 701(b) (“In a proceeding to determine parentage, a responding tribunal of this state shall apply” the laws of this State, including “the rules ... on choice of law”)

28
proceedings originating” in the state.\textsuperscript{135} The provision on applying “the rules on choice of law” was stricken in the 2001 UIFSA.\textsuperscript{136} As in the 1996 UIFSA, the 2008 UIFSA declares that determination of the duty of support and amount payable should be in accordance with its own state’s “law and support guidelines.”\textsuperscript{137} American state lawmakers that follow the 2008 UIFSA by eliminating reference to “the rules on choice of law” generally view the change as “nonsubstantive.”\textsuperscript{138}

Clearly, both the 2000 and 2017 UPAs contemplate, as with the UIFSA, that in making “parent-child relationship” adjudications, or “parentage” adjudications (if there is a difference\textsuperscript{139}), a state court, guided by federal Full Faith and Credit dictates,\textsuperscript{140} should not undertake a choice of law analyses in a multistate conduct case, but should respect another

\textsuperscript{135} 2008 UIFSA, at § 303(1).

\textsuperscript{136} 2001 UIFSA, at § 303(1). The 2001 UIFSA sole provision on choice of law seemingly did not mandate that a responding tribunal utilize the parentage determination laws of another state. Id. at § 604. See also 2001 UIFSA, at § 701(c) (eliminating the reference to a responding court’s use of its rules on choice of law).


\textsuperscript{138} See, e.g., Virginia Code Ann. 20-88.46 (statutory note); Nevada Rev. Stat. 130.303 (statutory note); and Iowa Code Ann. 252K.303 (statutory note).

\textsuperscript{139} In 2017 UPA, the Comment does not address what, if any, difference there are between adjudications of “the parent-child relationship” and adjudications of “parentage.” 2017 UPA, at § 105 Comment.

\textsuperscript{140} See U.S. Const. Art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.") and 28 U.S.C. 1738 (authenticated judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken").
state’s earlier formal recognition of a person’s parentage. Such respect can arise from a civil case judgment\textsuperscript{141} or from a voluntary parentage acknowledgement\textsuperscript{142}.

Similar deference, or a concern for interstate comity, might, however, also be deemed necessary without an earlier judgment or VAP. Consider, for example, a marital-related birth in another state, though there may be no formal judgment, adjudication, acknowledgement, declaration, or certificate on parentage in the other state. In this setting, the other state’s parentage laws might be guided by fairly precise principles, in that legal parentage arises at a discrete point in time, like marriage at the time of conception, during a pregnancy, or at birth. The point is sometimes verifiable by state birth certificate records. The precise point in time of the parentage in a spouse whose mate gives birth usually will not prompt significant factual disputes. Should a choice of a spousal parent law be made where precise principles differ between two interested states, as when spousal parenthood arises from marriage at the time of conception in one state and arises at the time of birth in another state\textsuperscript{143}, or when spousal parent rebuttal norms differ between two interested states?\textsuperscript{144} Whether via Full Faith and Credit or

\textsuperscript{141} See, e.g., Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935) (Wisconsin court judgment for taxes owed to State can be recognized and enforced in Illinois).

\textsuperscript{142} See, e.g., In re Adoption of Jaelyn B., 883 N.W.2d 22, 37 (Neb. 2016) (court must extend full faith and credit to an Ohio VAP).

\textsuperscript{143} Compare, e.g., California Family Code 7611(a) ("child born during the marriage"); Michigan Comp. Laws 722.1433 (marriage at the time of conception or birth); and Arizona Stat. 25-814(a)(1) (marriage any time in the ten months immediately preceding the birth).

\textsuperscript{144} Compare, e.g., Strausser v. Stahr, 726 A.2d 1052 (Pa. 1999) (irrebuttable presumption of paternity based on marriage as long as the marriage is intact, there was an intact family at all times, and the married couple favors maintaining the spousal parentage) to Callender v. Skiles, 591 N.W.2d 182 (Iowa 1999) (statute precluding putative biological father of a child born into an intact marriage had an Iowa Due Process right to seek to overcome spousal parentage in husband).
comity, a seemingly hard and fast rule on always choosing forum law in childcare parent cases should be subject to exception.\footnote{One general hard and fast rule in childcare parentage settings, subject to some exceptions, is the Restatement’s directive that “a court applies its own local law in determining whether to grant an adoption.” Restatement of the Law Second, Conflict of Laws § 289 and Stubbs v. Weathersby, 892 P.2d 991, 998 (Or. 1995) (Section 289 inapplicable in “unusual circumstances,” citing Matter of Appeal in Pima Cty. Juv. Act No. B-7087, 577 P.2d 714 (Ariz. 1978) (Arkansas law applies “when parties intended the adoption would take place pursuant to the law of Arkansas”). This rule is special in that it applies only in adoption cases. Tentative Draft No. 3 of this Restatement, Third (March 2022) declares a court may dismiss an action based on foreign law “that is deeply offensive to forum public policy, regardless of the forum’s contacts with the case,” and that a court may decline to decide an issue under foreign law if it “would offend a deep-rooted forum public policy.” Section 5.04 [hereinafter Tentative Draft].}

C. Bad Parentage Law Choices

As noted, the 2017 UPA also introduces a new form of legal parenthood, de facto parentage, that is far less precise in its contours than spousal parentage. The 2017 UPA also continues the somewhat imprecise norm of residency/hold out parentage.\footnote{The 1973 UPA recognized a significant form of imprecise parentage when it deemed presumptive natural fatherhood in a man who, “while the child is under the age of majority ... receives the child into his home and openly holds out the child as his natural child.” 1973 UPA, at § 4(a)(4). The imprecision was dramatically reduced in the 2000 and 2017 UPAs which require a holding out parent [who could be a woman under the 2017 UPA] to reside in the same household with the child for the first two years of the child’s life. 2000 UPA, at § 204(a)(5) and 2017 UPA, at § 204(a)(2). While the 2000 UPA and the 2017 UPA each continued with a parentage "presumption for a hold out/residency parent, such a parent under each act was not presumed to be a "natural" parent.} As with residency/hold out parentage, de facto parentage goes unrecognized in the state via a formal (i.e., state-recognized) act, like a court judgment, as soon as, or shortly after, its standards have been met. Further, interested persons often are unaware of imprecise parentage laws until childcare disputes arise. In residency/hold out and de facto parent cases, courts are asked to look (sometimes far) back in time to determine parentage. When acts that might prompt residency/hold out, de facto, or comparable parentage occur wholly in one state, a second state, given the mandate to apply its own laws, perhaps under provisions modeled on the 2017 UPA, may not apply the first state’s law and may not defer to a forum in the first state through a forum...
non conveniens dismissal. Failure to apply the law of the place where all relevant parental-like conduct occurred runs contrary to some nonparentage choice of law rules, whether founded on the precise location of a particular act (i.e., as where the contract was signed\textsuperscript{147}) or on the weighing of the policy interests of all interested states (i.e., as in some multistate torts cases\textsuperscript{148}). An exemplary bad case involved Nicholas Gansner whose parental-like acts in Wisconsin may well have satisfied Wisconsin equitable adoption precedents, but who was denied equitable adoption parent status in an Illinois court under Illinois law, where there were no equitable adoption precedents. The failure of the Illinois courts to consider application of Wisconsin law while dissolving Nicholas’ marriage to the child’s adoptive mother, who moved to Illinois with the child after a marital separation.\textsuperscript{149}

Beyond residency/hold out and de facto parentage, prospective assisted reproduction parents (with or without surrogacy) can also undertake all parental-like conduct necessary to legal parentage in one state, but then face a second state’s court failure to recognize the legal import of that conduct. Like de facto and residency/hold out parentage, nonsurrogacy assisted reproduction norms vary interstate,\textsuperscript{150} as do surrogacy assisted reproduction norms.\textsuperscript{151}

\textsuperscript{147} See, e.g., ALI Restatement of Conflict of Laws 332 and 312 (1934) ("law of the place of contracting determines the validity and effect of a promise;" on an initial contract, the "place of contracting" is where the delivery of the contract is made when the contract becomes effective on delivery).

\textsuperscript{148} See, e.g., ALI Second Restatement of Conflict of Laws 145 (1971) ("rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, in respect to that issues, has the most significant relationship to the occurrence and the parties"), applied in Townsend v. Sears, Roebuck and Co., 879 N.E.2d 893 (III. 2007).

\textsuperscript{149} In re Marriage of Mancine and Gansner, 9 N.E. 3d 550 (Ill. App. 1st 2014). The case is reviewed in detail in Imprecise Laws, at 504-507.

\textsuperscript{150} See, e.g., Exploring the Boundaries, at 47-57 (overview of assisted reproduction cases involving single women and lesbian couples).

\textsuperscript{151} The prospect that a same-sex male couple's home state's ban on surrogacy would override the couple's parentage of a child born to a surrogate in another state can lead to significant legal maneuvering by those sophisticated in parentage laws. See Peter Nicolas, "Straddling the Columbia: A Constitutional Law Professor's
Where these new forms of childcare parentage are disputed in multistate conduct cases, state courts and legislators should eschew a choice of law norm that automatically directs forum law to be solely applicable.\textsuperscript{152} In a case where very significant, if not all, relevant parental-like conduct occurred outside the forum, though there was no court judgment or state-recorded acknowledgment on parentage elsewhere, a court should utilize its general “rules on choice of law,” as was done under the 1996 UIFSA,\textsuperscript{153} or a special choice of law rule for that particular parentage dispute, as with a special law governing disputes over parentage in a gestational surrogacy setting where the law of the situs of the contract, or a contractual choice of law clause, would be deemed presumptively applicable.\textsuperscript{154}

Challenging choice of law issues can arise during disputes over parentage disestablishment as well as during disputes over initial parentage establishment. Parentage disestablishment can undo, for example, martial (or spousal) parentage. Where such parentage initially arises from a statutory presumption, the presumption is usually rebuttable. The standards for such rebuttals vary interstate. Cases are easily imagined where parentage arising from birth during a marriage in one state may be challenged in a second state (as in a marriage dissolution

\textsuperscript{152} See, e.g., 2000 UPA, at § 103(b) and 2017 UPA, at § 105.

\textsuperscript{153} 1996 UIFSA, at § 701(b). See, e.g., In re K.M.H., 169 P.3d 1025, 1029 (Kan. 2007) (in a nonsurrogacy assisted reproduction case, forum law as to sperm donor’s alleged parental interests only applied because all relevant conduct, except for the insemination (done in Missouri), occurred in the forum). By contrast, see, e.g., Warren County Dept. of Soc. Serv. v. Garrelts, 278 N.C. App. 140 (2021) (Virginia law applied in paternity action designed to secure child support where artificial insemination and birth occurred in Virginia, with sperm donor/alleged father then living in North Carolina).

\textsuperscript{154} Jesse B. v. Tylee H., 883 N.W.2d 1, 17 (Neb. 2016) [hereinafter Jesse B.].
proceeding where child custody and/or child support are at issue). Seemingly, some rebuttal norms (as with norms involving the lack of genetic ties) may best be taken from the laws of the first state where the birth occurred (or where conception occurred), while other rebuttal norms (as with the time for challenging presumptive parentage) might best be taken from the laws of the second state.

Similarly, VAP establishment norms may be taken from one state while VAP challenge norms are taken from a second state, perhaps where the VAP is sought to be undone in a third state. It is quite imaginable that a VAP is executed in one state, that this VAP was prompted by fraud or mistake of fact occurring in a second state, and that a VAP challenge is brought in a third state where the VAP from the first state initially has the effect of a judgment. Thus, a couple is intimate in State A, with disagreements as to birth control promises; have a child together via a VAP in State B; and then dispute the VAP in State C where the birth mother has moved with the child following her break up with the VAP cosignor. A less perplexing VAP challenge case in Nebraska found that an Ohio VAP was entitled to respect in a Nebraska adoption proceeding, even though Nebraska law allowed a challenge in an adoption case to a Nebraska VAP due to an alleged VAP parent’s lack of genetic ties, because Ohio law did not permit such a challenge.155 By comparison, a Hawaii statute seemingly requires that full faith and credit be given to a VAP from another state, but make it subject to its own challenge provisions that operate after 60 days,156 which, as noted, vary interstate.

IV. Choosing Nonchildcare Parent Laws

A. Introduction

155 Jesse B., 883 N.W.2d at 17.

156 Hawaii Rev. Stat. 584-3.5(g) and (f).
Childcare parentage norms guiding those possessing parental "care, custody and control" of children can differ in a single state from parentage in nonchildcare contexts, as in child support, probate or tort.\(^\text{157}\) For example, there is no childcare parentage in many states where there is child support parentage. This dichotomy is not troublesome as the policies underlying the two forms of parentage differ. As one court noted:

there are no judicial decisions recognizing a constitutional right of a man to terminate his duties of support under state law for a child that he has fathered, no matter how removed he may be emotionally from the child. Child support has long been a tax fathers have had to pay in Western civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring even if unwanted and unacknowledged remains constitutionally sufficient to support paternity tests and child support requirements. We do not have a system of government like ancient Sparta where male children are taken over early in their lives by the state for military service. The biological parents remain responsible for their welfare. One of the ways the state enforces this duty is through paternity laws. This responsibility is not growing weaker in our body politic . . . but stronger.\(^\text{158}\)

Elsewhere, there are intrastate problems when childcare parent norms differ from nonchildcare parent norms. For example, common law equitable adoption parentage norms have been applied in a probate, but not in a childcare, proceeding.\(^\text{159}\) Further, common law equitable

\(^{157}\) This was expressly recognized in both the 2000 UPA, at § 203, and the 2017 UPA, at § 203 (noting exceptions to applying UPA parentage definitions may be "specifically" provided by other state laws).

\(^{158}\) N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004). See also In re Stephen Tyler R., 584 S.E.2d 581, 595 (W. Va. 2003) (child support continues though parental rights have been terminated) and Ex Parte M.D.C., 39 So.3d 1117, 1132-3 (Ala. 2009) (similar). Compare In re H.S., 805 N.W.2d 737, 745 (Iowa 2011) ("when parental rights are terminated in Iowa, a parent’s support obligation ends"). Criticism of this policy is voiced in Leslie Joan Harris, "The Basis for Legal Parentage and the Clash Between Custody and Child Support," 42 Indiana L. Rev. 611, 614 (2009). See also A.S. v. Gift of Life Adoptions, Inc., 944 So.2d 380, 395 n. 21 (Fla. App. 2006), (differences in assessing parentage in support and adoption cases “maximize an unwed biological father’s “responsibilities”), disapproved on other grounds, 963 So.2d 189 (Fla. 2007).

\(^{159}\) DeHart v. DeHart, 986 N.E.2d 85, 100-104 (I11. 2013) (equitable adoption in probate) and In re Scarlett Z.-D., 28 N.E.3d 776, 792 (I11. 2015) (equitable adoption doctrine is inapplicable to child custody and visitation cases) [hereinafter Scarlett Z.-D.].
adoption norms have operated in a childcare, but not in a probate proceeding. So one may be a parent upon death meaning that estate properties can flow to a child, though during life the same person could not seek a parental childcare order regardless of the child's best interests (though the person could, perhaps, seek a child visitation order as a nonparent).

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

Difficulties arise because parentage laws are contextual, meaning that there is no one-size-fits-all approach. Yet some parentage determinations seemingly appear to define parentage for all settings. As to the consequences of childcare parentage establishments, the UPAs are similar. The 1973 UPA says the "parent and child relationship means the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations." Further, the 1973 UPA declares that the "judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes." The 2000 UPA declares that absent parental rights termination, "a parent-child relationship established under this [Act] applies for all purposes, except as otherwise specifically provided by other law of this State." The 2017 UPA

---


161 1973 UPA, at § 1.

162 1973 UPA, at § 15(a).

163 2000 UPA, at § 203.
similarly declares that the Act "applies to an adjudication or determination of parentage in this State" and that unless "parental rights are terminated, a parent-child relationship established under this [act] applies for all purposes, except as otherwise provided by law of this state other than this [act]." The "all purposes" language is misleading as child parentage, at least at times, differs from nonchildcare parentage, as with the well-recognized differences between parentage in custody and support in contexts.

B. Parentage in Probate

Without a will, a decedent may be an alleged parent or an alleged child. In probate proceedings, some state statutes direct the application of their UPAs. Elsewhere, there are special probate provisions. In multistate conduct cases, courts thus could use the express UPA directive to employ in-state laws without any choice of law analysis. Of course, in-state laws

164 2000 UPA, at § 103(a).
165 2017 UPA at § 203.
167 See, e.g., Utah Code 75-2-114(1) (in probate cases where there is no will, the "parent and child relationship may be established as provided in . . . Utah Parentage Act"). But there are exceptions to UPA usage, as when a natural parent, in cases where there is no will, is precluded from inheriting "from or through the child" if the natural parent has not "openly treated the child as the natural parent's" and has refused to support the child). Strangely, there is no express exception for one who is not a natural parent but has parental rights and who has not openly treated the child as one's own or has refused to support the child. Such parents include some intended assisted reproduction parents and gestational surrogate parents in Utah. Utah Code 78B-15-704 (assisted reproduction parent by consent) and 78B-15-801 (intended parent in surrogacy setting). See also Hawaii Stat. 560:2-114(a) ("for purpose of intestate succession . . . The parent and child relationship may be established under chapter 584), with chapter 584 constituting the Uniform Parentage Act, construed in Estate of Rogers, 81 P.3d 1190 (Haw. 2003) (statute is "permissive," not "mandatory") and New Jersey Stat. 3B: 1-2 (Parentage Act applies in intestate succession case).
eventually may not be applied due to forum nonconveniens dismissals\(^{169}\) as well as Full Faith and Credit mandates.

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

Consider also so-called Mandy Jo’s Law in Kentucky. That law prevents “a parent who has willfully abandoned the care and maintenance of his or her child from inheriting any part of the child’s estate through intestate succession.”\(^{170}\) In considering parentage disestablishment in probate due to abandonment, whose probate law should define abandonment if all relevant abandonment acts occurred outside of Kentucky, with an alleged deceased child’s death in Kentucky? Mandy Jo’s Law also prevents an abandoning parent from maintaining a wrongful death action upon a child’s death.\(^{171}\) Might the Kentucky law apply to a wrongful death action on a child’s behalf outside of Kentucky, with an alleged Kentucky parent, but with tortious acts occurring outside of Kentucky? Speaking of torts.

**C. Parentage in Tort**

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

\(^{169}\) Comments to 2000 UPA, at § 103(b) and to 2017 UPA, at § 105.

\(^{170}\) Kentucky Rev. Stat. 391.033(1) (with exceptions for a parent who had resumed care or was deprived of custody).

\(^{171}\) Kentucky Rev. Stat. 411.137(1) (with exceptions for a parent who had resumed care or was deprived of custody).
parent of an injured person. The ambit of parentage determination may not follow the UPA choice of law directive, as where there is no express declaration, as in some probate codes, of UPA applicability.

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

Full Faith and Credit Clause precedents support, at times, nonrecognition of nonforum laws that run contrary to significant forum policies. Yet in the absence of strong contrary public policy (which, if found, might prompt dismissal without prejudice), parent-child relationships in tort should be guided by the law of the forum where the factual circumstances underlying any legal recognition that is not reflected in earlier judgments, acknowledgments or the unlike, solely

\textsuperscript{172} See, e.g., Mark Strasser, “Making Preconception Tort Theory Crisper,” 105 Marquette L. Rev. 297 (reviewing state differences in tort recoveries for preconception and postconception negligence).
(or chiefly) occurred if the forum state otherwise employs the most significant relationship test in choice of law matters.\(^\text{173}\) Incidentally, within a single forum there may be surprising differences in parentage determinations between tort cases where alleged children and alleged parents seek recovery.\(^\text{174}\) And within a single forum, the state policies may differ on whether expecting legal parents can recover for losses of parentage opportunities depending upon whose tortious acts caused harm.\(^\text{175}\)

### D. Parentage in Child Support

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

\(^{173}\) Generally see Tentative Draft at Section 501. Compare Clark Sand Co., Inc. v. Kelly, 60 So. 3d 149, 156 (Miss. 2011) (while Mississippi does not recognize common law marriage, “full faith and credit” must be given to “a valid common-law marriage from another state” in a Mississippi wrongful death suit though there was no finding of a marriage in the other state).


\(^{175}\) See, e.g., Heendon v. Kaminski, 2022 IL App (2d) 210297, ¶¶ 38-39 (“person” who is injured and dies under Wrongful Death Act includes an unborn fetus, who is not included among those subject to injury and death under the Dramshop Act).

\(^{176}\) See, e.g., 2017 UPA, at § 602(2) (“woman who gave birth” usually can file a proceeding to adjudicate parentage).

\(^{177}\) See, e.g., 2017 UPA, at § 602(1) (a “child” generally can file a proceeding to adjudicate parentage).

\(^{178}\) See, e.g., 2017 UPA, at § 602(5) (“a child-support agency” generally can file a proceeding to adjudicate parentage).

\(^{179}\) See, e.g., State v. Tucker, 474 S.E.2d 127, 130-131 (N.C. 1996) (the state is not barred from seeking recovery of public assistance from a father that was paid on behalf of a child notwithstanding an earlier action by a county); State ex rel. Mart v. Mart, 380 N.W.2d 604, 607 (Minn. App. 1986) (county child support reimbursement case against father is not barred by earlier case determination that no support (per agreement) was owed by father to
If in-state laws are always chosen, a newly-arrived alleged parent may have the relevant parental-like acts, relevant in, e.g., residency/hold out or de facto parenthood, assessed under forum laws even though the acts occurred outside the forum. This happened in a North Dakota case where the child, then living in Kentucky, had never lived in North Dakota; the alleged parent (also a step-grandfather) had just moved to North Dakota; and, the child was earlier raised by the alleged parent in New Jersey and Florida.180 A more sensible choice of parentage law occurred in a North Carolina child support case against a North Carolina man who was the sperm donor of a child born of artificial insemination where all acts surrounding pregnancy and birth occurred in Virginia and where Virginia law was used by the North Carolina Court.181

Parental child support duties only sometimes arise for those whose earlier acts were parental-like in nature. Thus in Colorado, not everyone acting as a parent may be obligated to pay support.182 Child support duties sometimes also arise for those not childcare parents, like grandparents183 or stepparents.184 As well, in some states there can be child support obligations

184 See, e.g., Parness and Timko, at 818-826.
for one-time childcare parents, including those whose child care, custody, and control interests were terminated due to unfitness. In support cases states can assert significant interests in securing financial support (whether the secured support goes directly to the child or to a governmental agency for reimbursement of earlier support that was provided) where the child lives in the state even though the obligor, whether always a nonparent or a one-time parent, now lives and has lived out-of-state. It may be appropriate in multistate conduct cases involving support to utilize different state laws on who in obligated to pay support and on how much support should be ordered, especially where the conduct relevant to the “who” occurred in a different state than the conduct relevant to the “how much.” This approach seems more sensible than the forum law choices made in the aforesaid North Dakota case.

V. Conclusion

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

See, e.g., Parness and Timko, at 830-834.

mandate. Difficult choice of law issues arise most often in parentage cases involving residency/hold out, de facto and assisted reproduction parenthood.