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UNNATURAL VOLUNTARY PARENTAGE ACKNOWLEDGMENTS UNDER THE 2017 UNIFORM PARENTAGE ACT

*Jeffrey A. Parness**

INTRODUCTION

IN July 2017, the National Conference of Commissioners on Uniform State Law (“NCCUSL”) approved and recommended a new Uniform Parentage Act for enactment in all states (“2017 UPA”). This act follows NCCUSL’s 1973 and 2000 UPAs which have been widely adopted through both state statutes and common law rulings.¹ Unfortunately, the 2017 UPA needs to be amended.

This article focuses on one problematic section of the 2017 UPA, the provisions on voluntary parentage acknowledgments (“VAPs”). These provisions expand significantly the opportunities for formal parentage establishments by allowing VAPs to be employed by those seeking parentage with no natural ties, including spouses of birth mothers and intended parents in assisted reproduction settings.²

The article urges that VAPs continue to be available for parentage establishment only to persons other than birth mothers who are (actually or allegedly) naturally-related to the children they acknowledge. This would help to protect the constitutionally-recognized parentage interests of men whose natural children are born of consensual sex, as well as any constitutional interests of women whose eggs prompted assisted reproduction births. But the article further suggests that while VAPs are not available, there should be different opportunities under the 2017 UPA for parentage declarations by both men and women with no natural ties.³

The article reviews VAPs in the three Uniform Parentage Acts (“UPAs”), including their history and avenues to improvements. It concludes that there should

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

2. The provisions have been supported by distinguished commentators. *See, e.g.*, Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2343-45 (2017); Joslin, *supra* note 1, at 603-05.

3. Earlier (pre-2017 UPA) tentative thoughts on parentage declarations are found in Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage*, 92 NOTRE DAME L. REV. ONLINE 87 (2017).

be expanded opportunities for parentage declarations, which would operate differently from VAPs. Declarations would facilitate judicial determinations of either presumed *hold out* or *de facto* parenthood, each recognized in the 2017 UPA. Additionally, it concludes that these opportunities should be modeled on current California laws recognizing the import of intended parentage declarations by those without natural ties in assisted, nonsurrogacy, human reproduction settings, as well as on the 2017 UPA provisions on assisted reproduction intentions, both with and without surrogates. It further posits that parentage declarations can reflect anticipated, current, or earlier parental-like acts that are key to determining presumed *hold out* or *de facto* parent disputes under the 2017 UPA.

I. PARENTAGE ACKNOWLEDGMENTS UNDER THE UPAS

The 1973 Uniform Parentage Act (“1973 UPA”) addressed parentage acknowledgments for children, in part, as follows:

A man is presumed to be the natural father of a child if ... he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau]. If another man is presumed under this section to be the child’s father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted.⁴

Such acknowledgements were chiefly envisioned for unwed natural fathers of children born of sex, both where the birth mothers were unwed or wed to other men.⁵ VAPs became especially prominent after federal Social Security Act amendments 20 years later tied state usage to child welfare payment reimbursement.⁶

As to rebutting the “presumed” natural fatherhood of a man acknowledging paternity in writing, the 1973 UPA says rebuttal can occur “in an appropriate action only by clear and convincing evidence.”⁷ One such appropriate action involves the pursuit of a court decree seeking to establish the “paternity of the child by another man.”⁸ The Act also contemplates there may be an action by “any interested party ... for the purpose of determining the existence or non-existence of the father and

4. UNIFORM PARENTAGE ACT § 4(a)(5) (UNIF. LAW COMM’N 1973) [hereinafter 1973 UPA].

5. *See id.* § 4.

6. The Act was anticipated in the 1973 UPA as its Prefatory Note declares the “Act will fulfill an important social need” involving improved child support enforcement systems, then under consideration in connection with Social Security Act amendments, which “may be enacted soon.” *Id.* The amendments and their aftermath are reviewed in Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI.-KENT L. REV. 177, 179-84 (2017).

7. 1973 UPA § 4(b).

8. *Id.*

child relationship” arising from a written paternity acknowledgement.⁹ The Act does not describe all the attributes of such an action, including its required timing¹⁰ and who is an interested party. Further, it does not address whether, and if so how, an acknowledging man, or a birth mother who does not dispute a paternity acknowledgement “within a reasonable time,” can seek a rebuttal.¹¹

The 2000 Uniform Parentage Act (“2000 UPA”), as amended in 2002, altered the processes for voluntary paternity acknowledgments of children. It said, “The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man’s paternity.”¹² No longer must a birth mother dispute a VAP signed for her child by an alleged natural father. And no longer does a VAP prompt presumed parentage.¹³ If the mother was married to another man who was deemed a presumed father under the Act, any VAP signed by an alleged unwed natural father is void unless accompanied by a “denial of paternity” by the other man.¹⁴

As to rebutting a VAP under the 2000 UPA, any rebuttal must overcome the Act’s declaration that a properly-executed VAP “is equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all of the rights and duties of a parent.”¹⁵ The 2000 Act has two specific avenues to a VAP override. One is through rescission by a “signatory,” usually undertaken by commencing a proceeding to rescind within 60 days after the VAP’s effective date.¹⁶ The other is through a later signatory challenge (i.e., where a rescission

9. *Id.* §§ 6(b), 4(a)(5). Such an action was also recognized as available to an interested party seeking to rebut a paternity presumption arising when a man “receives the child into his home and openly holds out the child as his natural child.” *Id.* §§ 6(b), 4(a)(4).

10. By contrast, an action to determine the existence or nonexistence of presumed parentage arising from actual or attempted marriage to the birth mother has explicit time limits. *Id.* § 7.

11. *Id.* §§ 4(a)(5), 6(a)(2).

12. UNIFORM PARENTAGE ACT, § 301 (UNIF. LAW COMM’N 2000) (amended 2002) [hereinafter 2000 UPA]. While Social Security Act amendments addressing VAPs were foreseen under the 1973 UPA, amendments only took effect in 1996, as recognized in 2000 UPA, at art. 3 cmt. The NCCUSL recognized in 2000 the VAP amendments did “not explicitly require that a man acknowledging parentage necessarily is asserting his genetic parentage of the child.” *Id.* § 301 cmt. It viewed this as an “omission” that needed correction in order “to prevent circumvention of adoption laws.” *Id.* The NCCUSL recognized “genetic parentage” prompting a VAP could arise from sexual intercourse or from sperm contribution during assisted reproduction efforts. *Id.*

13. Statutory paternity presumptions then addressed only actual and attempted marriages between men and birth mothers, and men holding out children as their own for the children’s first two years. *Id.* § 240(a).

14. *Id.* § 302(b)(1). Comparably, a VAP is void if it states another man has already acknowledged the child or has been adjudicated the father, or if it falsely denies the existence of fatherhood in another (via a marital presumption, adjudication or acknowledgement). *Id.* § 302(b)(2)-(3).

15. *Id.* § 305(a). There are comparable rebuttal norms where a VAP includes a denial of paternity by a presumed father. *Id.* §§ 302(b)(1), 303, 304.

16. *Id.* § 307(1). A rescission may also be commenced before “the date of the first hearing” involving the signatory and a pursuit of an adjudication of an issue relating to the child, including a proceeding that establishes support. *Id.* § 307(2).

request is not timely) via a proceeding, within two years after the VAP is filed, where the challenger must prove “fraud, duress, or material mistake of fact.”¹⁷

Beyond the specific rebuttal avenues of rescission and challenge, available only to signatories, the 2000 UPA initially seems to foreclose other rebuttal avenues. It states, for example, that its provisions on standing to maintain an action “to adjudicate the parentage of a child” are subject to the UPA article on VAPs.¹⁸ And, it further expressly recognizes in two sections only a proceeding to adjudicate the parentage of a child having no acknowledged father,¹⁹ or a child having a presumed father (which, as noted, since 2000 no longer includes a VAP father).²⁰ Yet in a later section, the 2000 UPA does say that a nonsignatory to a VAP, “other than the child,” must commence a proceeding that “seeks an adjudication of paternity of the child” not later than two years after a VAP.²¹ The 2000 UPA does not explicitly address who has standing as a nonsignatory to commence such a proceeding.

A draft of what later became the 2017 Uniform Parentage Act altered the 2000 UPA section on VAPs. In October 2016, it said, “The woman who gave birth to a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man’s paternity.”²² Here again, an unwed natural father could only effectively acknowledge paternity where any presumed father (via marriage, actual or attempted) denies paternity.²³ And here, VAP override norms (for rescissions and challenges) followed those in the 2000 UPA.²⁴

The final version of the 2017 Uniform Parentage Act varied significantly from the 2000 UPA. It says, “A woman who gave birth to a child and an alleged genetic father of the child, intended parent under [Article] 7 [i.e., no sexual intercourse and no surrogate], or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child.”²⁵ For the first time, legal parentage per VAPs under a UPA did not require allegations as to natural ties, since neither Article 7 nor the presumed parentage norms require natural ties for certain parents.²⁶ The 2017 alterations were said to further “the goal of ensuring

17. *Id.* § 308.

18. *Id.* §§ 601-602. The accompanying Comment says that Article 3 (the VAP article) “details the procedures involved in a voluntary acknowledgment of parentage.” *Id.* § 602 cmt.

19. *Id.* § 606.

20. *Id.* § 607.

21. *Id.* § 609(b). Such a proceeding is governed by the estoppel principles of § 608, which outlines how courts should determine whether to order “genetic testing.” *Id.* §§ 608, 609(c).

22. REVISED UNIFORM PARENTAGE ACT § 301 (UNIF. LAW COMM’N, Redline Draft 2016).

23. *Id.* § 302.

24. *Id.* §§ 307, 308.

25. UNIFORM PARENTAGE ACT § 301 (UNIF. LAW COMM’N 2017) [hereinafter 2017 UPA].

26. Section 301 (and the corresponding comment) of the 2000 UPA spoke to VAPs by men of children born of sex only if they were “claiming to be” natural fathers in “order to prevent circumvention of adoption laws.” The change was described by the Reporter as including “new groups of people who can establish parentage” who “would already be considered or presumed to be parents under their relevant state’s law.” Joslin, *supra* note 1, at 604. Yet many VAP parents under the UPA would not already be parents, as with those not naturally tied and not married to birth mothers, who sign their VAPs very shortly after birth (when most VAPs today are signed) and thus

that the act applies equally to children born to same-sex couples,” who should also be able to benefit from parentage establishments done “quickly and with certainty.”²⁷ The “gender-neutral language” was thought to be “consistent with one of the goals” of the UPA “revision process,” to enhance equality for “same-sex couples.”²⁸

On the effect of an acknowledgment (including a parentage denial therein), the 2017 UPA follows the 2000 UPA for, assuming no later successful override, the acknowledgment “is equivalent to an adjudication of parentage of the child and confers on the acknowledged parent all rights and duties of a parent.”²⁹

As to VAP overrides, again there can be a signatory rescission within 60 days after the effective date of the VAP.³⁰ After this rescission period expires, but not later than two years after the effective date of the VAP, a “signatory” may “commence a proceeding to challenge ... only on the basis of fraud, duress, or material mistake of fact.”³¹ A challenge to a VAP by a nonsignatory individual, other than the child, must be pursued not later than two years after the VAP’s effective date.³² A challenging individual includes: “an individual whose parentage ... is to be adjudicated;” “a representative authorized ... to act for an individual who otherwise would be entitled to maintain a proceeding but is deceased, incapacitated, or a minor;” and the child.³³ VAP challenges by nonindividuals are not explicitly authorized.³⁴ Further, an individual challenge can only proceed “if the court finds permitting the proceeding is in the best interest of the child.”³⁵

II. VAPS WITHOUT NATURAL TIES?

The elimination of natural ties between acknowledging parents and the children acknowledged is problematic. However, expanded opportunities for parentage acknowledgments involving births to some same-sex couples are surely warranted. VAPs should be available to both the female spouses and the female partners of birth mothers where the eggs of those spouses or partners were used to conceive the acknowledged children. Here, there are natural ties between children

had insufficient time to establish presumed (via *hold out*) or *de facto* (via parental-like relationship) parentage.

27. 2017 UPA, § 301 cmt. *See, e.g.*, Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 467 (2012).

28. 2017 UPA, art. 3 cmt. The 2017 UPA provisions (or their equivalents) on VAP eligibility already have been presented in a few American state legislatures. *See, e.g.*, H. 562, 2018 Gen. Assemb., 2017-2018 Leg. Sess. (Vt. 2017) § 301(a); H.B. 7226, 2018 Gen. Assemb., Reg. Sess. (R.I. 2018) § 15-8.1-3.101; and adopted in one state. *See* S.B. 6037, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

29. 2017 UPA §305(a).

30. *Id.* § 308(a)(1).

31. *Id.* § 309(a).

32. *Id.* §§ 309(b), 610(b)(1).

33. *Id.* §§ 610(b), 602(1), (4), (7).

34. The 2017 UPA has no express provision on VAP challenges by nonindividuals. *Id.* §§ 309(b), 610(b). *But see id.* § 602(5)-(6) (allowing a state child-support or other authorized agency, as well as an authorized adoption agency, to maintain proceedings to adjudicate parentage).

35. *Id.* § 610(b)(2).

and the acknowledging nonbirth parents, as there are between acknowledging wed and unwed fathers and their children born of consensual sex. As well, VAPs should be available to the male spouses or partners of men who become parents via contracts with gestational surrogates utilizing the sperm of those spouses or partners. Here again, there are natural ties between such acknowledgers and their children, as there are between acknowledging wed and unwed fathers and their children born of sex.³⁶

Problems can arise, however, if parentage acknowledgers are unable to claim actual or possible natural ties. For example, under the 2017 UPA both men and women married to birth mothers of children born of sex can become presumed parents, who then are eligible to sign VAPs, including at the hospitals shortly after births.³⁷ Yet only men may be natural parents of children born of sex. When female spouses of birth mothers sign, there clearly are at least some unwed natural fathers who, under some state (but not federal) laws, are accorded opportunities to secure legal parenthood for their children born of sex.³⁸ VAPs by female spouses here, having the force and effect of court judgments, present significant obstacles to the pursuit of such opportunities. The laudable goal of providing equality for same-sex couples should not create insurmountable obstacles to the pursuit of parentage opportunities by unwed natural fathers of children born of sex, especially where the opportunities are constitutionally protected.

VAPs by female nonspousal partners of birth mothers of children born of sex are even more troublesome, as here there are no families within “intact” marriages, which the U.S. Supreme Court has said may be protected by government from unwed natural fathers. The family units here may have only been recently established and, at times, viewed for public policy purposes as less permanent than marital families.³⁹

Comparably, when male spouses of birth mothers sign,⁴⁰ again there are at least some unwed natural fathers whom, to date under state (but not federal) laws, are accorded opportunities to secure legal parenthood for their children born of extramarital sex. The laudable goals of establishing parentage “quickly and with certainty” should not be allowed to override constitutional and nonconstitutional state law protections of male natural parentage opportunities. Where there can be

36. Current American state laws (including cases and statutes) on gender-neutral donor-insemination laws are compiled in NeJaime, *supra* note 2, app. A at 2363-66. For current laws on gestational surrogacy, *see id.*, app. E at 2376-81.

37. 2017 UPA §§ 204, 301.

38. *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 192 (Iowa 1999) (unwed natural father has state constitutional liberty interest in being heard regarding his requested childcare of a child born into an intact marriage); *In re J.W.T.*, 872 S.W.2d 189, 198 (Tex. 1994) (similar hearing right arising from Texas constitutional “due course of law”). *See also* R. McG. v. J.W., 615 P.2d 666, 671 (Colo. 1980) (as birth mother can rebut her husband’s presumed paternity, state constitutional equality requires similar opportunity for natural father).

39. The female partners of birth mothers of children born of consensual sex have means beyond VAPs to establish parentage, including by *hold out* or *de facto* parenthood. 2017 UPA §§ 204(a)(2), 609.

40. Before the 2017 UPA, it was unclear, at best, whether a presumed spousal parent could also utilize a VAP; there was no incentive for use as the marital and VAP presumption of paternity could be similarly overridden with blood tests. *See, e.g.*, 1973 UPA § 4(b); 2000 UPA §§ 607-609.

VAPs by husbands, the VAP challenge standards should be adjusted to accommodate the pursued parental interests of the natural fathers,⁴¹ at least in states where presumed marital parentage can be rebutted.

The parental opportunity interests of unwed natural fathers of children born of sex arguably could be protected if any VAPs undertaken by intended parents with no natural ties were accompanied with parental rights waivers by the natural fathers (either written or demonstrated by proof). Yet, even here problems arise as there are, effectively, informal adoptions by those whose backgrounds and long-term intentions have not been investigated by government, leaving no safeguards protecting the best interests of children.⁴²

III. DECLARATIONS OF INTENDED PARENTAGE

While VAPs should remain for acknowledging parents claiming natural ties, the 2017 UPA should recognize new forms of intended parentage declarations by those without such ties. Such declarations would not be the equivalent of parentage adjudications or confer, as upon a VAP signor, “all rights and duties of a parent.”⁴³ But these forms would later facilitate judicial resolutions of claims involving the two major types of imprecise parentage now embodied in the 2017 UPA, *hold out* and *de facto* parentage.⁴⁴

Imprecise parenthood encompasses parentage establishments that are recognized at no specific point in time, unlike presumed parentage founded on a marriage to a birth mother, the signing of a voluntary parentage acknowledgement, or a formal adoption.⁴⁵ Imprecise parenthood arises under vague norms that are applied after the fact. Such norms include whether a child was held out earlier as

41. *But cf.* NeJaime, *supra* note 2, at 2340 (conceding that a fully gender-neutral marital presumption “may insufficiently protect the rights of women who give birth” if a male spouse of a male parent would be a presumed parent so that a “two-tiered system” is needed).

42. *See, e.g.*, Jeffrey A. Parness, *Dangers in De Facto Parenthood*, 37 U. ARK. LITTLE ROCK L. REV. 25, 36-43 (2014).

43. 2017 UPA § 305 (in absence of a successful rescission or challenge).

44. On occasion an ineffective VAP could also be a form of an intended parentage declaration. Under the 2017 UPA, while a VAP may be “signed before ... the birth of the child,” a filed pre-birth VAP does not take effect until “the birth of the child.” *Id.* § 304(b)-(c). In a pre-birth setting where impending parentage is important, as in a child support, probate or tort case involving duties to or familial relationships with the unborn, a filed pre-birth VAP, while not having the effect of a court judgment, may nevertheless be relevant evidence on parentage.

45. The specific point in time at which a marital parentage presumption arises does differ interstate. That point in time may be marriage at the time of conception, as in MD. CODE ANN., FAM. LAW § 5-1027(c)(1) (West, Westlaw through 2018 Reg. Sess. of Gen. Assemb.), marriage at the time of birth, as in KAN. STAT. ANN. § 23-2208(a)(1) (West, Westlaw through 2018 Reg. Sess. of Kan. Leg.) and VT. STAT. ANN. tit. 15, § 308(4) (West, Westlaw through Adjourned Sess. of 2017-18 Vt. Gen. Assemb.), or marriage sometime during a spouse’s pregnancy, as in ARIZ. REV. STAT. ANN. § 25-814(A)(1) (Westlaw through 1st Spec. Sess. of 53d Leg. 2018) (West). Whatever the approach taken, the application of a marital parentage presumption is easily undertaken with evidentiary showings unlikely to be disputable.

one's own or whether a bonded and dependent parent-child relationship developed earlier.⁴⁶

One type of imprecise parentage involves presumed parentage for those residing with children while holding out those children as their own. The 2017 UPA expanded upon such *hold out* parentage in the 1973⁴⁷ and 2000⁴⁸ UPAs by recognizing women as well as men. The 2017 UPA says:

An individual is presumed to be a parent of a child if: ... the individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child.⁴⁹

Another type of imprecise parentage under the 2017 UPA involves *de facto* parentage claims by one who not only resided with and held out a child at some time, but who also established a bonded and dependent relationship with the child. New to the 2017 UPA, the relevant provision says:

In a proceeding to adjudicate parentage of an individual who claims to be a *de facto* parent of the child, if there is only one other individual who is a parent or has a claim to parentage of the child, the court shall adjudicate the individual who claims to be a *de facto* parent to be a parent of the child if the individual demonstrates by clear and convincing evidence that: (1) the individual resided with the child as a regular member of the child's household for a significant period; (2) the individual engaged in consistent caretaking of the child; (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial benefit; (4) the individual held out the child as the individual's child; (5) the individual established a bonded and dependent relationship with the child which is parental in nature; (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and (7) continuing the relationship between the individual and the child is in the best interest of the child.⁵⁰

Seemingly, *de facto* parents will often act like *hold out* parents except that they will not reside with the children since birth.

For both an alleged *hold out* or *de facto* parent, a nonparent's intent to serve as a parent to a child indefinitely is key, as is at least some earlier support of that intention by a legal parent. Execution of intended parentage declaration forms by nonparents, especially when accompanied by declarations of legal parent support, could have significant probative value for judges determining, e.g., whether a nonparent held out a child as her or his own, or established a bonded and dependent relationship with a child that was parental in nature.

46. See, e.g., Jeffrey A. Parness, *Choosing Among Imprecise American State Parentage Laws*, 76 LA. L. REV. 481, 492-94 (2015).

47. 1973 UPA § 4(a)(4).

48. 2000 UPA § 204(a)(5).

49. 2017 UPA § 204(a)(2).

50. *Id.* § 609(d).

New UPA provisions on intended parent declarations in imprecise parentage settings could be modeled on the current California statutes allowing, but not requiring, the use of forms on intended parentage in later parentage disputes involving children “conceived through assisted reproduction” that do not involve “agreements for gestational carriers or surrogacy agreements.”⁵¹ In California, the optional forms reflect the statutory “writing requirement” on parentage⁵² in varied assisted reproduction settings.⁵³ Credibility is enhanced as the forms require notarization and are signed under the penalty of perjury.⁵⁴ The California forms are not filed with the government at the time of execution.⁵⁵ But they can later be presented when parentage disputes arise.⁵⁶ Thus, familial privacy interests are furthered through available low cost and accessible means of securing greater certainty about family relationships under law.

As with the California forms, UPA-facilitated intended parentage declarations in imprecise parentage settings should not, by themselves in the absence of court orders, establish parentage as a matter of law via a presumption (even if rebuttable) or otherwise. If nothing else, here any childcare interests or rights of the natural fathers of children born of consensual sex are respected.⁵⁷

51. CAL. FAM. CODE § 7613.5(a), (c) (West, Westlaw current with urgency leg. through Ch. 13 of 2018 Reg. Sess.).

52. *Id.* § 7613.5(a). The writing requirements for varied assisted reproduction settings appear in sections 7613(a), (b)(1), (b)(2)(A), and (b)(3). At times unwritten agreements on intended parentage are valid. *Id.* § 7613(b)(2)(B) (preconception oral agreement that a donor “would not be a parent”); *Id.* § 7613(c) (ova donor is treated as a natural parent if “satisfactory evidence” of parental intentions).

53. *Id.* § 7613.5(e) (settings include married spouses and unmarried intended parents).

54. *Id.*

55. *Id.*

56. Where the forms are used in California in varying (nonsurrogacy) assisted reproduction settings to satisfy the writing requirement necessary for intended legal parentage, the burden of proof seemingly is preponderance of the evidence. *Id.* § 7613(a), (b)(1), (b)(2)(A), (c). By contrast, where oral agreements can prompt intended legal parentage consequences in (nonsurrogacy) assisted reproduction settings, the burden of proof varies. *Compare id.* § 7613(b)(2) (nonspousal sperm donor, where there is no “licensed physician and surgeon or a licensed sperm bank” involved, is “not the natural parent of a child thereby conceived if ... [a] court finds by clear and convincing evidence ... that prior to the conception ... the woman and the donor had an oral agreement that the donor would not be a parent.”), *with id.* § 7613(c) (ova donor to a person by a nonspouse or a nonmarital partner is treated in law as “the natural parent of a child thereby conceived” if the court finds “satisfactory evidence that the donor and the person intended for the donor to be a parent”).

57. While these interests or rights generally have been neither well recognized nor respected, the somewhat comparable, but certainly stronger, interests of women giving birth have been. *See, e.g.*, Joslin, *supra* note 1, at 609 & n. 114 (both Professors Joslin and NeJaime posit that the marital parentage presumption should not operate similarly for men whose male spouses have children and for men whose female spouses have children, since in the former setting there is a need to “protect the rights of women who give birth”). While birth mothers of children born of sex, in the absence of waiver or unfitness, are parents under law while the natural fathers of nonmarital children may only have parental opportunity interests under law, some respect—if not comparable respect—should be afforded in both settings to these parental interests.

As UPA-facilitated intended parentage declarations for children born of sex should not operate by themselves to establish legal parentage, as do voluntary parentage acknowledgments, so intended parentage declarations for children born of assisted reproduction should not operate by themselves to establish legal parentage in the declared intended parents, as here the interests of gametes donors must be protected. *But see* NEV. REV. STAT. ANN. § 126.670 (West, Westlaw through

In *Lehr v. Robertson*, the U.S. Supreme Court recognized that some natural fathers possess federal constitutional childcare parentage opportunities where the children are born of sex to birth mothers with no spouses (men or women) as presumed parents.⁵⁸ Even where there are marital parentage presumptions, they can sometimes be overcome by natural fathers under state laws, which recognize paternity opportunity interests beyond the mandates of *Lehr*.⁵⁹

The revised 2017 UPA should treat voluntary parentage acknowledgements (only undertaken by putative natural parents); and intended parentage declarations—undertaken primarily by non-biologically-related men or women having previously acted, acting, or promising to act in parental-like ways for children born of sex—differently.⁶⁰ The differentiation would lessen any confusion over the state laws facilitating compliance with federal Social Security Act mandates regarding voluntary paternity (and maternity) establishments. These avenues are quite comparable interstate as the Social Security Act contains detailed requisites for states participating in federal welfare subsidy programs, and at least recognizes—albeit minimally—the need for acknowledgment processes for those naturally-tied to the children acknowledged.⁶¹

State lawmakers—whether legislators or judges—will likely continue, notwithstanding the 2017 UPA, to vary in their requirements on imprecise parentage, with variations on issues like whether *hold out* parentage must begin at

end of 79th Reg. Sess. (2017) of Nev. Leg.) (person who is a gametes provider or who consents to assisted reproduction with the intent to be a parent of her child is a parent); *id.* § 126.680(1) (consent can only be expressed in a “declaration for the voluntary acknowledgment of parentage;” no longer will intentions in a “signed record” suffice, as it did before July 1, 2017), and *id.* § 126.053(1) (after the period for rescission ends, “voluntary acknowledgment of parentage,” like a “voluntary acknowledgment of paternity,” has “the same effect as a judgment or order of court determining” a parent-child relationship under law).

58. *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983).

59. *E.g.*, *Callender v. Skiles*, 591 N.W.2d 182, 192 (Iowa 1999); *In re J.W.T.*, 872 S.W.2d 189, 198 (Tex. 1994).

60. As for children not born of sex, the 2017 UPA has special intended parentage provisions in both surrogacy and nonsurrogacy settings. 2017 UPA §§ 801-818 (differentiating two types of surrogacy, gestational and genetic, based on whether the surrogate’s eggs were employed); *id.* §§ 701-708 (assisted reproduction where birth mother is an intended parent).

61. The advances in assisted human reproduction techniques since the Act was adopted compel the need, on equality grounds, for women to acknowledge parentage due to their natural ties to children born to other women. Comparable parentage acknowledgment processes for nonbirth mothers naturally tied to children born as a result of sex and of assisted reproduction are warranted by the principles, if not the explicit holding, of *Lehr v. Robertson*, 463 U.S. 248 (1983), which recognized the federal constitutional paternity opportunity interests of biological fathers in children born of sex to unmarried women. Egg donations with intent to childcare any children later-born to other women via assisted reproduction should prompt comparable federal constitutional parental opportunity interests, seizable by employing voluntary parentage acknowledgments operating like voluntary paternity acknowledgments for men whose children are born of sex. Similarly, sperm donors who intend to childcare any children later-born of assisted reproduction should be able to employ VAPs. Parentage acknowledgment processes for those whose natural children are born to others should supplement, not replace, other parentage establishment processes, as in Article 7 and 8 of the 2017 UPA (e.g., contracts).

birth⁶² (as with the 2000 and 2017 UPAs, but not with the 1973 UPA) and on whether there can be three childcare parents for any single child at a particular point in time⁶³ (as recognized in one alternative version of the 2017 UPA).⁶⁴ Thus, available forms on intended parentage necessarily should vary between states. Yet, certain provisions can be consistent, like those on notarizations, perjury warnings, who develops the forms, and how such forms may be accessed. The 2017 UPA can be easily be amended to provide guidelines on these and other matters important to any effective intended parentage declarations in imprecise parentage settings.

In such amendment, the NCCUSL could address guidelines on intended parentage declarations for certain people—like stepparents, grandparents, or the significant others of established legal parents—and separately supplement with general provisions guiding those folks whose interests are not specifically addressed.⁶⁵ Alternatively, the NCCUSL could simply provide general guidelines

62. *E.g.*, KAN. STAT. ANN. § 23-2208(a)(4) (West, Westlaw through 2018 Reg. Sess. of Kan. Leg.) (man is presumed father if he “notoriously ... recognizes paternity of the child”); DEL. CODE ANN. tit. 13 tit. 13, § 8-204(a)(5) (West, Westlaw through 81 Laws 2018, chs. 200-34) (man is a presumed father if, “[f]or the first [two] years of the child’s life,” he resided with the child whom he held out as his own); TEX. FAM. CODE ANN. § 160.204(a)(5) (West, Westlaw through end of 2017 Reg. & 1st Called Sess. of 85th Leg. (similar); HAW. REV. STAT. § 584-4(a)(4) (West, Westlaw through Act 10 of the 2018 Reg. Sess.) (man is a presumed natural father if “[w]hile 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.”); MONT. CODE ANN. § 40-6-105(1)(d) (West, Westlaw through 2017 Sess.) (similar).

63. *Compare, e.g.*, CAL. FAM. CODE § 7612(c) (West, current with urgency leg. through Ch. 10 of 2018 Reg. Sess.) (more than two parents “if the court finds that recognizing only two parents would be detrimental to the child.”), *and* Smith v. Cole, 553 So. 2d 847, 854-55 (La. 1989) (three childcare parents recognized), *with* COLO. REV. STAT. ANN. § 19-4-105(2)(a) (West, current with immediately effective leg. through Ch. 151 of 2d Reg. Sess. of the 71st Gen. Assemb. (2018)) (if two or more men are presumed natural fathers, “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”).

64. 2017 UPA § 613(c) (Alternative B permits a finding of more than two parents if otherwise detriment to the child).

65. At times, general legal parentage provisions might be employed by those specifically covered elsewhere, as where a natural father of a child born of consensual sex to an unwed mother who fails to seize his paternity opportunity interest under *Lehr*, 463 U.S. at 262, but who later seeks an imprecise parentage finding because of his parental-like acts or residency. *See, e.g.*, N.J. STAT. ANN. § 9:17-43(a)(4) (West, Westlaw with laws through L.2018, c. 12, & J.R. No. 5) (a man is presumed to be the biological father of a child under the age of majority 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.”). Allowing a natural father in some circumstances to utilize such a statute though he failed to step up under *Lehr* makes sense, as where the biological father was faultless in his failure under *Lehr*, as when there was earlier maternal deception—often recognized as a *Lehr* failure in adoption cases challenged by natural fathers. *See, e.g.*, Jeffrey A. Parness, *Participation of Unwed Biological Fathers in Newborn Adoptions: Achieving Substantive and Procedural Fairness*, 5 J.L. & FAM. STUD. 223, 228-31 (2003).

Varying avenues to childcare sometimes operate as well in third party settings, as with grandparents or stepparents. *See, e.g.*, W.H. v. D.W., 78 A.3d 327, 341 (D.C. 2013) (maternal grandmother, upon mother’s death, could pursue a joint legal and physical custody order involving her grandchild with the grandchild’s stepbrother, though she did not meet criteria for *de facto* parentage or third-party child custody standing, due to judicial “common law or equitable jurisdiction” over child custody issues).

on at least some attributes of any intended parentage declarations, regardless of their makers.

Whatever the approach, the NCCUSL should recognize guidelines on intended parentage declarations between its two kinds of imprecise parentage—*hold out* and *de facto*. As to *hold out* parentage, the 2017 UPA should further recognize in its comment differences are needed in the guidelines on declarations undertaken where residency for the child's first two years is not needed, and thus where the 1973 UPA, and not the 2000 or 2017 UPA, *hold out* parentage attributes are in play.

Whatever approach the NCCUSL takes on suggested intended parentage declarations, it should first explore its guidelines on parentage establishments in both voluntary acknowledgement and assisted reproduction settings. In doing so, it will be confronted with process options.

Disputes involving a parentage *hold out* wherein residency must occur in the child's first two years, as under the 2000 and 2017 UPAs, can be guided by declarations involving anticipated residency with a child yet unborn, current residency with any child under two, and/or completed residency with a child over two. A single individual—preferably together with a natural or an adoptive parent—might undertake, at three varied times, three separate declarations, differentiated by anticipated, current and completed “hold outs.” Such *hold out* declarations would be especially important to those with no natural ties to the children soon-to-be, currently, or previously held out. Generally, those with natural ties need not go the declaration route. Men who conceived children via consensual sex with or sperm donation to mothers, and women whose eggs were used to prompt births to their partners or to surrogates, should be able to employ voluntary parentage acknowledgements. Thus, men who employ surrogates to use their sperm to prompt births on behalf of their male partners should be able to undertake, with their partners, voluntary parentage acknowledgments.

Parentage declarations involving anticipated, current, or completed habitations in the same household can guide disputes involving a parentage *hold out* where residency is needed, but not for the child's first two years. Here, such declarations are useful even for some with natural ties, as with natural fathers of children born of sex who failed to undertake a voluntary parentage acknowledgement and who earlier (may have) lost their constitutionally or otherwise protected paternity opportunity interest, but who later resided with the birth mothers and their children while holding themselves out as parents.

Similarly, parentage declarations involving anticipated, current or earlier parental-like acts can guide disputes involving *de facto* parentage. Such declarations might be undertaken by stepparents ineligible for adoption, as the children then have, and can only have, two parents. And they may be used by grandparents who have been significantly entrusted with the upbringing of their grandchildren, though parental rights have not then been terminated or perhaps have not then been seized (as with a paternity opportunity interest for a child born of sex).

Parentage declarations as to future parental-like childcare, coupled with evidence of past parental-like childcare, can play important roles in determining the best interests of children who have lost their legal parents, by death or

otherwise. Thus, the deaths of all legally-recognized parents can open doors to parentage recognitions for those whose were earlier ineligible for imprecise parenthood, as in states where there can be no more than two legal parents at any time.

As for the particular guidelines on parentage declarations, as noted above: possible notarizations, perjury warnings, form makers, and access points should be considered. Yet parentage declarations should differ from contracts, and from VAPs, having legal parentage effects. Consider, first, notarizations. For VAPs, notarizations were not required under the 1973 UPA⁶⁶ or the 2000 UPA.⁶⁷ But the 2017 UPA requires an acknowledgment contain signatures “attested by a notarial officer or witnessed.”⁶⁸

For assisted reproduction undertaken by a married opposite sex couple, the 1973 UPA required a “writing” that is certified by the licensed physician supervising the artificial insemination.⁶⁹ The 2000 UPA required that in settings where the woman giving birth intends to parent, consent should be “in a record” signed by the woman and the intended male parent.⁷⁰ In surrogacy settings, where the woman giving birth does not intend to parent, per the 2000 UPA, an agreement needed to be validated by a preconception court order.⁷¹ The 2017 UPA requires that in nonsurrogacy settings, consent—leading to legal parentage, including for two women—“must be in a record signed.”⁷² In the absence of such a record, which can be undertaken “before, on, or after birth,” legal parentage arises for an intended parent who proves “an express agreement entered into before conception.”⁷³ As for surrogacy settings, the 2017 UPA differentiates between gestational and genetic surrogacy pacts, but demands that agreements in both settings be undertaken preconception and must be “in a record signed by each party” where each signature is “attested by a notarial officer or witnessed.”⁷⁴

So, the UPAs have varied in their approach to notarizations for parentage intents in acknowledgement and assisted reproduction settings. Should all parentage declarations necessarily be notarized and thus written if they are to be employed as evidence in later imprecise parentage disputes? Clearly no, as oral and written agreements/communications should sometimes be considered. But state-suggested written forms for such declarations should recognize the weight of notarizations in any later judicial assessments of legal parentage.

Easy public access to state-suggested forms would promote the 2017 UPA’s goal of facilitating quicker and more certain parentage establishments.⁷⁵ Yet, perjury warnings in suggested forms, maintained privately, would be misplaced if

66. 1973 UPA § 4(a)(5) (acknowledgement via a “writing”).

67. 2000 UPA § 302 cmt. (acknowledgment must be “signed, or otherwise authenticated,” due to “penalty of perjury” warning, the “complication of requiring witnesses and a notary” is avoided).

68. 2017 UPA § 302(a)(1).

69. 1973 UPA § 5(a).

70. 2000 UPA § 704(a).

71. *Id.* § 803 & cmt.

72. 2017 UPA § 704(a).

73. *Id.* § 704(a), (b)(1) (agreement must be proved with “clear-and-convincing evidence”).

74. *Id.* § 803(4), (6), (9).

75. *Id.* § 301 cmt.

the forms simply reflected the current intentions, and even some past acts, of the signatories regarding parental-like childcare.⁷⁶ Where forms embody more formal declarations, such as notarized statements, that can be filed with state entities (be they courts or agencies), perjury warnings might then be appropriate.

CONCLUSION

The 2017 UPA should be amended so that it recognizes that varying forms of parentage declarations—other than voluntary parentage acknowledgments—are available to those without natural ties to children for whom they have acted, now act, and/or will act in parental-like ways in the future. Such declarations will facilitate judicial review of later imprecise parentage claims in both the *hold out* and *de facto* parent settings.

76. Declarations as to past acts a signatory believes were parent-like are different from declarations as to past acts involving a signatory's residence in the same household as the child for a particular period of time. The latter could carry perjury warnings indicating criminal penalties might arise from utilizing the declarations in later judicial proceedings, as signatories can be certain as to their past residences, but not as to how their interactions with children will be viewed by others.