

NONADOPTIVE SECOND PARENT CHOICES AFTER BIRTH

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ABSTRACT

Increasingly state laws, often driven by one of the three Uniform Parentage Acts, recognize a second childcare parent can be solely determined by a single legal parent. Some chosen second parents need not undertake formal adoption processes, including devices seeking to assure the making of informed parental choices and the promotion of the health and safety of children. When a hopeful second childcare parent is not chosen, any earlier parental-like relationship between the child and the unchosen is often ended, regardless of its negative consequences on the child and of any second parent childcare promises earlier made by the single legal parent.

Laws on second parent choices made after birth should be part of any discussion of a more coherent legal framework governing single parent choices of second childcare parents. New nonadoptive second parent choices made after birth by single parents now occur in varying ways. They include spousal, residency/hold out, voluntary acknowledgment, and de facto parentage. Greater coherency is needed between these forms, as well as between the laws on after birth, at birth, and prebirth second parent choices.

This Article explores a more coherent legal framework for nonadoptive second childcare parent choices by single parents made after birth. It speaks to children born of sex and of assisted reproduction. Its major premise, to date generally unappreciated in second parent choice laws and commentaries, is that single parent prebirth and at birth second parent choices should be treated differently under law than second parent choices made after birth.

This Article begins by reviewing formal adoptions and the major forms of nonadoptive after birth second parent choices made by single parents. While formal adoptions are available across the country, some types of informal adoptions may be unavailable. This Article ends with suggested reforms. It posits changes that would incorporate some formal adoption attributes into some nonadoptive second parent choice laws. Further, it urges new limits on single parent choices after birth. Finally, the Article demonstrates how amendments to

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the 2017 Uniform Parentage Act could prompt state laws that better guide single parent choices of second parents after birth.

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I. INTRODUCTION

Increasingly, state laws—often driven by one of the three Uniform Parentage Acts (UPAs)—¹ recognize a second childcare parent can effectively be designated by a single legal parent outside of a formal adoption.² Such chosen second parents

1. The UPAs were approved in 1973, 2000 (with 2002 revisions) and 2017. *See* UNIF. PARENTAGE ACT (UNIF. L. COMM'N 1973); UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2000); UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2002); UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017).

2. *See* UNIF. PARENTAGE ACT § 609, Prefatory Note (UNIF. L. COMM'N 2017). Designations may be more formal, as via written consents to adoptions upon lawyer advice, or less formal, as a parent allowing or perhaps just observing a nonparent's assumption of parental-like responsibilities. *See id.* §§ 204, 301–10. In the adoption setting, the nonparent, when designated by the parent, must affirmatively act, as with a consent to assume childcare. In some less formal settings outside of adoption processes, as with residency or hold out parenthood, affirmative parental-like actions by the then nonparent, but no actual consent to legal parentage, must have preceded the legal recognition of a second childcare parent. *See id.* § 204. Such a recognition can occur at a time when there is no consent to the recognition (as when a parent objects to a nonparent seeking in court residency or hold out status, or as when a nonparent objects to a parent seeking another's legal status as a residency or hold out parent in order to secure future child support). *See id.* § 609.

need not undertake formal adoption processes, including devices seeking to assure the making of informed single parental choices, the fitness of the proposed second parent to childcare, and the promotion of the health and safety of the child.³ When a hopeful second childcare parent is not chosen by a single parent, any earlier parental-like (or other) relationship between the child and the unchosen is often ended, regardless of its negative consequences on the child and of any second childcare parent promises earlier made by the single parent.

Besides a prebirth or at-birth choice of a second legal parent, a single custodial parent can choose a second childcare parent sometime after birth.⁴ Here, the recognition of the parentage choice sometimes only then takes effect; there is no retroactivity. And here, the choice is often chiefly assessed on post-birth acts.⁵ Formal adoption processes generally need not be followed.⁶ Laws on second parent

3. New nonadoptive second parent choices by one existing legal parent can also be undertaken where there is a disestablishment of parentage for a second expecting (i.e., parental opportunity interest) or existing legal parent, even one genetically tied to the child. *See* Jeffrey A. Parness, *Evaporating Natural Parent Childcare Liberties Under New Parentage Laws*, 77 ARK. L. REV. 643, 661–63 (2025). This raises issues not significantly addressed herein, including whether such laws are unconstitutional where there is no consent by both legal parents to the new parent, and whether new nonadoptive parent choices should be able to lead to three or more childcare parents for a single child. *See id.* Some suggestions on laws addressing parentage and parentage opportunity disestablishments in nonadoptive parent choice settings where there are two recognized or expecting childcare parents under law are chiefly set forth in Section IV of the Article. *See id.* at 693.

4. *See* UNIF. PARENTAGE ACT §§ 304, 609 (UNIF. L. COMM’N 2017).

5. Second parent non-adoption choice laws can operate before, or at the time of, or long after birth. *See id.* § 304. For example, voluntary parentage acknowledgments can be signed prebirth (taking effect at birth), at birth (taking effect immediately), or after birth (taking effect immediately). *See id.* (stating a parentage acknowledgement “may be signed before or after birth” with no limit on timing); *see also* VT. STAT. ANN. tit. 15C, § 304(b) (2025). Signing, though, does not mean parentage inevitably continues, as acknowledgments are subject to revocation by one signor within 60 days of signing and to challenge by signatories as well as certain nonsignatories (states vary) more than 60 days after signing. *See* UNIF. PARENTAGE ACT § 308(a)(1) (UNIF. L. COMM’N 2017). By contrast, residency or hold out and de facto parentage must always be based on post-birth acts by the single parent and new parent occurring long after birth, even if tentatively chosen prebirth or at birth. *See id.* §§ 204(a)(2), 609(b). In some states there can be three or more childcare parents. *See, e.g.,* CAL. FAM. CODE § 7612(c) (West 2024) (more than two parents may be recognized to avoid detriment to the child), following UNIF. PARENTAGE ACT § 613(c) (Alternative B) (UNIF. L. COMM’N 2017).

6. *See id.* § 609 (providing for de facto parentage as an alternative to adoption without requiring its formalities).

choices made after birth should be part of any “discussion” of a “more coherent legal framework” governing single parent choices of second childcare parents.⁷

New nonadoptive second parent childcare choices made after birth by single parents now are assessed under varying laws.⁸ The laws have differing names and requisites.⁹ They include spousal, residency/hold out, voluntary acknowledgment, and de facto parentage laws. Not every state has all such laws.¹⁰ The relevant lawmakers may be the state legislatures via statutes or the state courts via common law precedents.

Greater coherency is needed between the varied after birth second parent choice laws, as well as between these laws and the at-birth¹¹ and prebirth¹² second

7. Jessica Feinberg, *Parent Zero*, 55 UC DAVIS L. REV. 2271, 2325 (2022) (calling for further consideration of gestating parent choices of second legal parents that take effect at birth); see also Melanie B. Jacobs, *Parental Parity: Intentional Parenthood’s Promise*, 64 BUFF. L. REV. 465, 466 n.1, 496 (2016) (focusing on parentage at birth, suggesting that any parent other than the birth-giver must sign an intentional acknowledgement of parenthood along with the birth-giver). For my own observations on these and other views of at birth non adoption parentage laws founded on the choices by gestating parents, see Jeffrey A. Parness, *New Mothers Know Best? Second-Parent Choices at Birth*, 48 S. ILL. U. L.J. 1, 14–19 (2023) [hereinafter Parness, *New Mothers*].

8. See, e.g., CAL. FAM. CODE § 7612 (West 2024); ME. STAT. tit. 19-A, § 1881 (2024); UNIF. PARENTAGE ACT §§ 301, 609 (UNIF. L. COMM’N 2017).

9. See, e.g., CAL. FAM. CODE § 7612 (West 2024); ME. STAT. tit. 19-A, § 1881 (2024); UNIF. PARENTAGE ACT §§ 301, 609 (UNIF. L. COMM’N 2017).

10. Some state laws follow the framework of a UPA on presumed spousal parentage, but not on presumed residency/hold out parentage. See, e.g., KAN. STAT. ANN. § 23-2208(a) (2024); MO. REV. STAT. § 210.822(1) (2024).

11. At-birth parentage choices include second parent recognition arising very shortly after birth. See Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183, 221–22 (2020) [hereinafter Parness, *Unconstitutional Parenthood*]. Some formal adoptions (as with stepparents) exemplify, as do second parents (per presumptions at times) arising from marriages to gestating parents very soon after birth. On post-birth marriage laws prompting spousal parentage shortly after birth, see *id.* (discussing laws under which a marriage shortly after birth creates spousal parentage).

12. A prebirth choice by a later birth-giver to marry a partner can later prompt the partner to be a legal parent of a later born child at the time of birth. See *id.* The varying UPAs encompassing the Acts of 1973, 2000 as amended in 2002, and 2017, as well as some current state laws on spousal parentage are reviewed in Parness, *Unconstitutional Parenthood*, *supra* note 11 at 220–23. By contrast, a prebirth choice to reside with a partner can prompt—but only long after birth—the partner to be a legal parent of a later born child if the partner later holds out the child as one’s own or satisfies de facto parent norms. See *id.* at 190–205. Additionally, a post-birth choice to reside with one’s child and with a partner (or family member) can later

parent choice laws. Some second parent choice laws, like voluntary parentage acknowledgment (VPA) and spousal parentage, can operate prebirth, around the time of birth, or long after birth.¹³

This Article explores a “more coherent legal framework” for nonadoptive second parent choices made by single parents after birth.¹⁴ It speaks to children born of sex and to children born of assisted reproduction.

One major premise of this Article—to date unappreciated in the current laws and in their commentaries—is that certain protections afforded to parents, children, and their family members by formal adoption laws should also be utilized in some non-adoption laws on second parent choices. Thus, this Article urges that certain stepparent adoption guidelines, particularly those seeking to ensure informed consent and continuing healthy child-nonparent family relations, also be considered for some non-adoption second parent choice laws, like those on de facto and residency/hold out parenthood. Further, worthy of consideration by legal reformers are the informed consent requisites in artificial reproduction birth laws and voluntary parentage acknowledgment laws operating prebirth and at-birth.

Another major premise, to date also unappreciated, is that single parent prebirth and at-birth second parent choices should be treated differently in law than second parent choices made after birth. Distinctions are necessary for several reasons. One is that only with after-birth choices are there opportunities for a single parent and the state to review the actual parent-like relationship between the child and the chosen second parent. Inquiries can also then be made into the familial relationships between the child and nonparents, particularly the family members of the single parent and of the chosen second parent.¹⁵ Additionally, inquiries can be made regarding any familial or familial-type relationships arising from earlier perceptions of expecting or existing legal parentage (like the perceptions of the family members of abandoning genetic fathers).¹⁶ Finally, there can be reviews of

prompt that partner (or family member) to be a legal parent of the child, but only if the partner (or family member) later holds out the child as one’s own or satisfies de facto parent norms. *See id.* (discussing residential/hold out and de facto parenthood laws).

13. *See id.* at 206.

14. Feinberg, *supra* note 7, at 2235.

15. *See* UNIF. PARENTAGE ACT § 609(d)(6)–(7) (UNIF. L. COMM’N 2017) (recognizing that courts may consider the development of a bonded, parental relationship between the child and an individual supported by another parent, reflecting the broader familial context in which that relationship formed).

16. *See id.* § 609(d) (providing that adjudication of de facto parentage may consider whether a legal parent fostered the parent-child bond, which may incorporate perceptions of parentage held by family and community at earlier stages).

the childcare undertaken by potential second parents (and their family members) where those potential parents wish to be, but are not, chosen.¹⁷

Another reason for laws to distinguish between prebirth, at-birth, and after-birth second parent choices by single parents is that with choices made after birth, there are greater opportunities for genetic testing demonstrating the semen and egg providers who prompted births. The import of genetic ties can, and sometimes should, diminish, if not disappear, long after birth, as when a genetic parent fails for some time to pursue childcare for, or to support, a child. Some current state laws already recognize the importance of genetic ties when second parent issues are determined long after birth.¹⁸

A further distinction involves the greater opportunity after birth to assess the childcare decision-making by the single parent. Problematic conduct by a single parent after birth is relevant when assessing that person's second parent choice.

Finally, the chief motivation behind an after-birth second parent choice, as well as the willingness to be a second parent, may not be a desire for the chosen person to undertake childcare. Rather, the desire to legally name someone and to be recognized by name may be financially motivated. For example, a new second parent may seek legal standing to sue for damages in an anticipated tort suit on behalf of a child.¹⁹ Similarly, a child may gain standing to recover as a relative from the estate of an intestate decedent.²⁰ Similar motivations are less frequent when second parents are chosen before or at birth.

17. See *id.* (authorizing courts to review childcare activities by individuals seeking de facto parent status, including potential second parents and those close to them, when they are not legally recognized as parents).

18. See, e.g., ALA. CODE § 26-17-204 cmt. (2024).

19. See FED. R. CIV. P. 17(c) (allowing a guardian to represent a minor in a lawsuit).

20. See *Zambito v. Martino* (*In re Estate of Martino*), 314 Cal. Rptr. 3d 630, 641 (Ct. App. 2023) (“[Plaintiff-child] did not lack standing to pursue heirship . . . merely because he was not [d]ecedent’s biological son.”). The 1973 UPA employs “parent and child relationship” to encompass a “legal relationship . . . to which the law confers or imposes rights, privileges, duties and obligations.” UNIF. PARENTAGE ACT § 1 (UNIF. L. COMM’N 1973). Furthermore, the 1973 UPA declares a court judgment or order on the relationship “determin[es] the existence . . . of the parent and child relationship . . . for all purposes.” *Id.* § 15(a). Likewise, the 2000 and 2017 UPAs each declare that except as specifically “provided by other law,” the establishment of a parent-child relationship “applies for all purposes.” UNIF. PARENTAGE ACT § 203 (UNIF. L. COMM’N 2000); UNIF. PARENTAGE ACT § 203 (UNIF. L. COMM’N 2017). The across-the-board application of a UPA parentage ruling to all settings is problematic as legal parentage determinations serve differing purposes in different settings. Exemplary are rulings that one can be a child-support parent without also being a childcare parent. See, e.g., *N.E. v. Hedges*, 391 F.3d 832, 836 (6th Cir. 2004) (“[N]o matter how [far a parent] may be [removed]

The Article begins by reviewing the constitutional liberty interests of natural parents and others in childcare.²¹ These interests limit single custodial parent choices of second childcare parents. It then surveys after-birth formal adoptions and the major forms of legally recognized nonadoptive second parentage based on choices by single parents.²² While adoptions are available across the country,²³ not all other after-birth parentage forms arising from single-parent choices are available everywhere.²⁴

The Article ends with suggested reforms.²⁵ It posits changes incorporating some formal adoption attributes into some nonadoptive second-parent choice laws. Further, it urges new limits on single-parent choices of second parents after birth, as with some choices that end parental-like relationships between children and the

emotionally. . . . Child support has long been a tax fathers have had to pay.”); *In re Stephen Tyler R.*, 584 S.E.2d 581, 598 (W. Va. 2003) (noting that child support can be required to continue after termination of parental rights). On the need to account for the varied purposes underlying legal parentage, see Katharine K. Baker, *Where Do Families Come From? The Law of Family Definition*, 49 *BYU L. REV.* 1249, 1277–1306 (2024) (analyzing definitions of and state purposes for families by examining the Supreme Court’s definitions and legal implications); *see also* UNIF. PARENTAGE ACT § 17(a) (UNIF. L. COMM’N 1973) (providing a judgment or order confirming the father-child relationship enables the court to enforce a child support obligations in any legal proceedings).

21. *See infra* Part II.

22. *See infra* Part III.

23. *See* U.S. DEP’T. OF HEALTH & HUM. SERVS. ET AL., THE AFCARS REPORT 1 (2023), <https://acf.gov/sites/default/files/documents/cb/afcars-report-30.pdf> [<https://perma.cc/HRD4-2ZXL>] (noting the number of children waiting to be adopted in the United States in 2022 was 108,877). State formal adoption laws differ. Unlike the three versions of the UPA, the 1994 Model Adoption Act has not been significantly employed by state lawmakers. *See, e.g.*, John J. Sampson, *Uniform Family Laws and Model Acts*, 42 *FAM. L.Q.* 673, 683–84 (2008) (explaining that originally the 1994 Model Adoption Act was a uniform act, but was “downgraded” to a model act as it was only enacted by a single state).

24. Interstate variations often prompt challenging choice of parentage law issues, as when an existing parent’s consent and a new nonadoptive parent’s acts occur in one state, but where a parentage dispute is adjudicated in another state. *See, e.g.*, Ill. Dep’t. of Healthcare & Fam. Servs. *ex rel.* Hull v. Robinson, No. 4-22-1025, 2023 WL 5815829, at *6 (Ill. App. Ct. Sep. 8, 2023) (holding that Illinois courts could enforce an Iowa voluntary paternity acknowledgment against a man despite DNA evidence and a notarized denial of paternity, because Illinois law offered no remedy). *But see* Jeffrey A. Parness, *Reforming Illinois Paternity/Maternity/Parentage Acknowledgment Laws*, 48 *S. ILL. U. L.J.* 417, 420–24 (2024) [hereinafter Parness, *Reforming Illinois*] (criticizing Ill. Dep’t. of Healthcare & Fam. Servs. *ex rel.* Hull v. Robinson). On choice of parentage laws, *see generally* Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws*, 70 *MERCER L. REV.* 325 (2019) (discussing choice of law issues that arising around childcare parentage laws).

25. *See infra* Part IV.

unchosen, but willing, would-be parents, as well as their family members. Finally, the Article demonstrates how amendments to the 2017 UPA can prompt state laws that better guide single-parent choices of second parents occurring after birth.

II. CONSTITUTIONAL CHILDCARE LIBERTIES FOR NATURAL PARENTS

In the United States, natural parents have constitutionally protected childcare interests.²⁶ These interests can be lost under second-parent choice laws before birth, at birth, or after birth without fault or waiver. Losses prompt natural parents to be replaced by parents without natural ties and without formal adoption processes.²⁷ Nonadoptive second-parent choice laws embodying after-birth conduct leading to nonadoptive childcare parentage include forms of residency/hold out parentage and de facto parentage.²⁸ These laws should not allow easy foreclosures of preexisting constitutionally protected childcare liberties.

The U.S. Supreme Court has recognized two distinct federal constitutional due process parental liberty mandates involving natural-parent childcare.²⁹ One is the right to the “care, custody, and management” of a person’s “natural” child.³⁰

26. These protections have been grounded in the U.S. Constitution under the Fourteenth Amendment. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that the “liberty” protected by the Due Process Clause includes the right of parents to establish a home, raise children, and control their education).

27. *See* Parness, *New Mothers*, *supra* note 7, at 1–3 (noting that natural parents may be replaced by individuals without biological connection or adoption through parentage frameworks that prioritize gestating parents’ at-birth choices).

28. The requisites for a particular form of such parentage can vary interstate. *Contrast* CAL. FAM. CODE § 7611(d) (West 2024) (stating that a presumed natural parent includes a person who “receives the child into their home and openly holds out the child as their natural child”), *and* NEV. REV. STAT. § 126.051(1)(d) (2023) (“A man is presumed to be the father of a child if: . . . 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.”), *with* ME. STAT. tit. 19-A, § 1881(3) (2024) (stating that a person is a “presumed” parent if the “person resided in the same household with the child and openly held out the child as that person’s own from the time the child was born or adopted and for a period of at least 2 years thereafter and assumed personal, financial or custodial responsibilities for the child”).

29. The Court has not expressly found a child to have a protected liberty interest in a developed parent-child or parent-like relationship. *But see In re Adoption/Guardianship No. 6Z970003*, 731 A.2d 467, 477 (Md. Ct. Spec. App. 1999), *rev’d on other grounds*, 746 A.2d 379 (Md. 2000) (holding that a child had a due process liberty interest in maintaining his filial relationship with a man who had acted as his father for the first five years of his life).

30. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (affirming the parental right to the “care, custody and control” of a child). State statutes sometimes define the particular attributes of this right. *See, e.g.*, FLA. STAT. § 1014.04(1) (2024).

This childcare right is clearly held at birth by those who give birth as a result of sex.³¹ The Court has not, however, expressly ruled that this same right is held by those who give birth via artificial insemination or those who give birth wholly using the gametes of others.

The Court also has not ruled on whether birth-givers may waive their childcare interests before birth. The 2017 Uniform Parentage Act (UPA) rejects irreversible prebirth waivers where there is a genetic surrogacy pact naming another or others as parents; the Act does authorize, however, a post-birth waiver by a genetic surrogate within 72 hours of birth.³² The Act also recognizes there can be irreversible prebirth parent childcare waivers by birth-givers through gestational surrogacy pacts.³³

As for “natural” fathers, the Supreme Court has sustained, but not mandated, state laws on parent childcare liberties for the men who are married to the birth-givers, where the state laws recognize—whether via a rebuttable or an irrebuttable presumption—“natural” parenthood.³⁴ State spousal parent laws are widespread,

31. *See* *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (recognizing the constitutional significance of the biological connection established through childbirth). Outside the U.S. Supreme Court, mothers who raped are sometimes accorded childcare parent status. *See, e.g.*, Daniel Victor, *Mary Kay Letourneau, Teacher Who Raped Student and Then Married Him, Dies at 58*, N.Y. TIMES (July 7, 2020), www.nytimes.com/2020/07/07/obituaries/mary-kay-letourneau-dead.html (illustrating that mothers who have committed criminal sexual acts against their children’s fathers may nonetheless be recognized as caregivers and retain parental roles).

32. Under the UPA, for example, a gestational surrogate (i.e., egg donor utilized) can waive rights prebirth while a genetic surrogate (i.e., no egg donor) can only waive post-birth. *See* UNIF. PARENTAGE ACT § 809(b) (UNIF. L. COMM’N 2017) (stating that neither a gestational surrogate nor her spouse “is a parent” at birth); *id.* § 814(a)(2) (stating that a genetic surrogate “may withdraw consent the agreement any time before 72 hours after the birth”). These UPA provisions now operate in some locales. *See, e.g.*, WASH. REV. CODE § 26.26A.715 (2024) (codifying the state’s gestational or genetic surrogacy pact).

33. UNIF. PARENTAGE ACT § 808(a) (UNIF. L. COMM’N 2017) (“A party to a gestational surrogacy agreement may terminate the agreement, at any time before an embryo transfer”); *id.* § 809(a)–(b) (recognizing intended parents as legal parents at birth and excluding gestational surrogate and spouse from parentage).

34. *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) (addressing a California statute that established a conclusive presumption that a child born to a married woman living with her husband was a child of the marriage, rebuttable only by a spouse). Current California law appears at CAL. FAM. CODE § 7611(a) (West 2024) (stating a “person” is the presumed “natural parent” if married to a mother who gives birth during the marriage or within 300 days after the marriage is terminated); *id.* § 7612(a) (stating the Section 7611 presumption is rebuttable in an appropriate action); *see also In re Jesusa V.*, 85 P.3d 2, 13 (Cal. 2004) (holding biological ties do not always rebut the presumption of parenthood).

but do vary.³⁵ Not all male spousal parents will be actual natural parents. Further, some state statutes and judicial precedents recognize noncontractual female spousal parentage for children born of sex to their mates, though they are not actual “natural” parents.³⁶

The U.S. Supreme Court has sustained, but not mandated, childcare liberty interests in natural male parents under state laws on voluntary paternity acknowledgements (VPAs) for children born of sex to unmarried birth-givers.³⁷ VPA parenthood can be lost, however, through rescission or challenge norms that are governed, in part, by the federal Social Security Act.³⁸ Not all VPA fathers are actual “natural” parents in the genetic sense.³⁹ Further, some state laws allow parentage acknowledgments for women who are not actual “natural” parents via genes,⁴⁰ with no supporting U.S. Supreme Court precedent as of yet.

The other federal constitutional due process liberty mandate on natural parent childcare expressly recognized by the U.S. Supreme Court encompasses the

35. See Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 252 (2019) [hereinafter Feinberg, *Restructuring Rebuttal*]; June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 663 (2016).

36. See, e.g., UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM’N 2017) (presuming parentage for an “individual” married to the birth-giver, at the time of birth); CONN. GEN. STAT. § 46b-488(a)(1) (2024) (presuming parentage for a “person” married to the birth-giver at the time of the child’s birth); WASH. REV. CODE § 26.26A.115(1)(a)(i) (2024) (presuming parentage for an “individual” married to or in a registered domestic partnership with the birth-giver at the time of the child’s birth). Spousal parentage is also recognized through judicial precedents on equality for some women wed to birth-givers who have no genetic ties to their children. See Jeffrey A. Parness, *Marriage Equality, Parentage (In)Equality*, 32 WIS. J. L. GENDER & SOC’Y 179, 187–88 (2017) [hereinafter Parness, *Marriage Equality*].

37. See *Lehr v. Robertson*, 463 U.S. 248, 262–63 (1983) (analyzing a New York statute under which voluntary paternity acknowledgments could trigger notice and hearing rights in an adoption proceeding).

38. See Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI.-KENT L. REV. 177, 183–84 (2017).

39. See UNIF. PARENTAGE ACT § 304 (UNIF. L. COMM’N 2017) (allowing voluntary acknowledgment of parentage regardless of genetic ties); see also Jeffrey A. Parness, *No Genetic Ties, No More Fathers: Voluntary Acknowledgment Recissions and Other Paternity Disestablishments Under Illinois Law*, 39 J. MARSHALL L. REV. 1295, 1317–18 (2006) (explaining that under Illinois law, a man may be presumed the natural father via voluntary acknowledgment, even absent genetic ties).

40. See, e.g., CONN. GEN. STAT. § 46b-476 (2025) (stating a presumed parent or an intended parent may sign an acknowledgment of parentage). Such an acknowledgment is recognized in the 2017 UPA, but not in the 1973 UPA, nor the 2000 UPA. See UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM’N 2017).

unique opportunity interest of a “natural father,” and only a natural father, in establishing parental childcare⁴¹ for a child born of consensual sex to a woman to whom he is not married.⁴² This opportunity interest has been expanded by some lower courts to “natural” mothers and fathers if they provided gametes for assisted reproduction births.⁴³ According to U.S. Supreme Court precedent, this opportunity interest may be successfully asserted through state laws that recognize parental status, particularly in formal adoption contexts, through mechanisms such as paternity actions, VPAs, putative father registries, and the provision of care or support for expected or born children.⁴⁴

After its ruling in *Dobbs v. Jackson Women’s Health Organization*, which negated the federal constitutional right to abortion,⁴⁵ further extensions of federal constitutional parental childcare liberty mandates by the U.S. Supreme Court seem unlikely. Long before *Dobbs*, the Court generally left it to state lawmakers to define which parents hold childcare liberties, either automatically or upon the assertion of a parental opportunity interest.⁴⁶

State lawmakers and federal legislators have recognized natural parent childcare interests beyond those mandated by the federal constitution. Some recognitions come via state judicial precedents applying U.S. Supreme Court constitutional analyses, such as those involving equality demands in spousal parent

41. *Lehr*, 463 U.S. at 262 (“The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development.”).

42. *See id.* at 261–65 (recognizing as constitutional a New York statute regulating when natural fathers of children born of consensual sex to unwed mothers must be given notice of ongoing formal adoption proceeding); *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (holding when a child is born into a marriage, the state may constitutionally deny the natural father an opportunity to assert parental rights in favor of the mother’s husband).

43. *See, e.g., In re Parentage of S.D.S.*, 539 P.3d 722, 744 (Or. 2023) (recognizing that intended parents and known gamete donors may contract for contact with the resulting child).

44. *See Lehr*, 463 U.S. at 251 (putative father registries and VPAs); *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (paternity actions and care or support for the child).

45. 597 U.S. 215, 302 (2022).

46. *See* Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN’S L. REV. 965, 968 (2016) (noting the Court’s deference to state lawmakers in defining parental rights has led to significant variations across states, creating problems for children and caregivers).

presumption laws for men and women.⁴⁷ Some recognitions arise from case precedents recognizing “independent” state constitutional liberties beyond U.S. Supreme Court constitutional law precedents.⁴⁸

State judges and legislators have recognized additional, nonconstitutional childcare interests, including for some who are deemed natural parents with no actual natural ties.⁴⁹ Nonconstitutional childcare liberties for second parents arising from single-parent choices made after birth arise under laws on spousal, residency/hold out, voluntary acknowledgment, and de facto parentage.⁵⁰ Further, Congress has extended natural parent childcare interests in limited settings, as with

47. *See, e.g.,* *Elisa B. v. Superior Ct.*, 117 P.3d 660, 670 (Cal. 2005) (finding former unwed lesbian partner is a parent under California’s presumed parent law for natural fathers who hold out children as their own); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 969–70 (Vt. 2006) (finding upon dissolution of a lesbian couple’s civil union, both women are recognized as natural parents, based on statutes granting the same rights to civil unions and marriages as those afforded to husbands and wives).

48. *Contrast* *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999) (challenging paternity, the genetic father of a child born to married woman has a “liberty interest in challenging paternity” under the Iowa Constitution, even though the husband, as a presumed spousal parent, opposed the paternity suit), *with* *Michael H. v. Gerald D.*, 491 U.S. 110, 129–30 (1989) (holding putative biological father had no federal constitutional right to establish paternity of a child born into an existing, intact marital family where the husband and wife wished to raise the child as their own); *see also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 552 (1986) (addressing the role of state constitutional interpretation while cautioning against weakening federal constitutional protections). State constitutional privacy provisions that may support state constitutional childcare liberties include ALASKA CONST. art. I, § 22 (“The right of the people to privacy is recognized and shall not be infringed.”); CAL. CONST. art. I, § 1 (“All people are by nature free and independent and have inalienable rights. Among these [is] . . . privacy.”); D.C. CONST. art. I, § 4 (recognizing an inviolable right to decide whether to procreate or bear a child as part of privacy protections); MONT. CONST. art. II, § 10 (“The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”).

49. *See, e.g.,* *Conover v. Conover*, 146 A.3d 433, 453 (Md. 2016) (recognizing parental rights to individuals who are not biologically or legally connected to a child, but who have assumed a parental role through caregiving and emotional bonding).

50. *See, e.g., id.* (recognizing de facto parent status); OR. REV. STAT. § 109.070(1)(a) (2025) (presuming parentage for married individuals to the birth mother); UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM’N 2017) (providing a basis for legal parentage through holding out as a parent); MASS. GEN. LAWS ch. 209C, § 11 (2024) (permitting voluntary acknowledgment of parentage by the mother and father).

natural parents of American Indian children.⁵¹ Where nonconstitutional childcare interests are recognized, they prompt constitutional protections.⁵²

III. SECOND PARENT CHOICES BY SINGLE PARENTS AFTER BIRTH

A. Formal Adoptions

New childcare parentage that depends upon acts, and is effective after birth, can arise from a formal adoption.⁵³ Here, the childcare liberties of existing legal parents are generally respected.⁵⁴ Adoption laws typically require that those with parental childcare liberties can knowingly waive their rights or can have their rights forfeited, typically due to unintentional abandonment, neglect, child support failure, or the like.⁵⁵

51. Indian Child Welfare Act, 25 U.S.C. §§ 1912–1915; *see also* *Haaland v. Brackeen*, 599 U.S. 255, 280 (2023) (holding the Indian Child Welfare Act does not exceed Congress’s power).

52. *See, e.g., Lehr v. Robertson*, 463 U.S. 248, 262–63 (1983) (describing a New York statutory scheme in which a genetic father of a child born to a married woman and placed for adoption is entitled to notice and hearing only if he has taken steps to establish a recognized parental role).

53. There can also be state-recognized adoptions long after birth for other purposes, including heirship in probate. *See, e.g., DeHart v. DeHart*, 986 N.E.2d 85, 100–01 (Ill. 2013) (applying the equitable adoption doctrine in an intestate succession dispute to recognize parentage after birth); *Bean v. Ford (In re Estate of Ford)*, 82 P.3d 747, 754 (Cal. 2004) (explaining that California’s equitable adoption doctrine recognizes post-birth adoptions for purposes including inheritance where there is evidence of the decedent’s intent to adopt and a close familial relationship); *Wheeling Dollar Sav. & Tr. Co. v. Singer*, 250 S.E.2d 369, 373–74 (W. Va. 1978) (recognizing that equitable adoption may be established long after birth to confer inheritance rights and other legal benefits traditionally associated with formal adoption).

54. Herein, custodial rights/interests encompass all forms of parental childcare, including sole custody, shared custody, and visitation. Existing parents have been deemed by law to be entitled to pursue parental childcare, while potential parents may only pursue parental childcare after meeting certain conditions, as by developing parental-like relationships. *See, e.g., Carvin v. Britain (In re Parentage of L.B.)*, 122 P.3d 161, 176–78 (Wash. 2005) (en banc) (distinguishing between legal parents, who possess constitutional rights to custody, and nonparents, who may pursue childcare rights only after proving a parent-like relationship and meeting other equitable conditions).

55. Forfeitures easily occur when there is a short window for a childcare parent to contest an adoption. *See, e.g., In re Adoption of K.W.*, 243 N.E.3d 760, 765 (Ohio Ct. App. 2024) (holding that under OHIO REV. CODE ANN. § 3107.07(K) (West 2025), a parent who fails to object to adoption within 14 days forfeits parental rights, even where the parent timely sought counsel but did not otherwise file an objection).

Choices to undertake stepparent adoptions are at times guided by special requirements.⁵⁶ Thus, a single parent's childcare liberties need not be ended when a stepparent adopts.⁵⁷ There are other special norms on stepparent adoptions, like waivers of "preplacement evaluation" and of "postplacement evaluation."⁵⁸ Yet stepparent adoptions, like other adoptions, generally must account for the parental liberties of all recognized or potential childcare parents,⁵⁹ not just those pursuing adoption. In Hawaii, written consent to a proposed adoption is sometimes required of "[a] concerned natural non-birthing parent who is not the legal, adjudicated, or presumed non-birthing parent but who has demonstrated a reasonable degree of interest, concern, or responsibility as to the welfare of a child."⁶⁰ In Pennsylvania, standing to intervene in an adoption case is recognized for some, with no genetic ties, who have secured *in loco parentis* status.⁶¹

56. See Alexis Pollitto et al., *Adoption and Foster Care*, 25 GEO. J. GENDER & L. 303, 304–10 (2024) (surveying procedural and eligibility standards in contemporary adoption law, including agency and independent frameworks and statutory restrictions on who may adopt).

57. See, e.g., 23 PA. CONS. STAT. § 2903 (2024) (explaining that a biological parent who consents to a stepparent adoption does not lose parental rights); *J.S.B. v. S.R.V.*, 630 S.W.3d 693, 698 (Ky. 2021) (citing KY. REV. STAT. ANN. § 199.520(2) (West 2025)). (explaining that under Kentucky law, a stepparent adoption preserves the parental rights of the biological parent who is married to the adoptive stepparent).

58. See, e.g., MONT. CODE ANN. § 42-4-309 (2025); UNIF. ADOPTION ACT art. 4 cmt. (UNIF. L. COMM'N 1994) ("A stepparent who seeks to adopt a minor stepchild under this article has to deal with fewer as well as somewhat different legal requirements than does an individual who seeks to adopt an unrelated minor."); ARIZ. REV. STAT. ANN. § 8-105(N)(1) (2024) (exempting stepparents and certain relatives from preadoption certification requirements, including grandparents, adult siblings, and great-grandparents).

59. See, e.g., MONT. CODE ANN. § 42-4-310 (2025) (requiring termination of the noncustodial parent's rights before or at the time of a stepparent adoption petition); MO. REV. STAT. § 453.040(1) (2024) (explaining that a parent's consent to adoption is required unless their parental rights have been previously terminated). See generally Amendments to Florida Supreme Court Approved Family Law Forms-Stepparent Adoption Forms, 821 So. 2d 263 (Fla. 2002) (discussing the processes for stepparent adoptions through a review of the required Florida forms).

60. HAW. REV. STAT. § 578-2(a)(5) (2024). While the potential natural childcare parent has to give written consent, no consent is needed from a person with no genetic ties who has demonstrated similar interest, but who has not been, but could have been, adjudicated a residency/hold out, de facto, or similar parent. *Id.* § 578-2(c)(1)(E) (providing that no consent is required from a natural non-birthing parent who has not been adjudicated, presumed, or demonstrated sufficient interest as a concerned parent).

61. *In re K.N.L.*, 284 A.3d 121, 150–51 (Pa. 2022) (allowing adoption intervention based on demonstrated parental role absent biological relationship); see also *In re U.A.C.*, 520 P.3d 295, 300 (Mont. 2022) (noting foster parents lack constitutional liberty interest absent exceptional circumstances creating a permanent parental role).

There are other special adoption laws. In Colorado, there is a streamlined process for adopting children born through assisted reproduction.⁶² Non-gestating existing or potential childcare parents are sometimes subject to more stringent parental rights terminations or fewer norms than the norms applied to those who gave birth.⁶³ Special norms apply in Utah when a potential adult adopter has committed a “disqualifying offense.”⁶⁴ There, in order to be eligible to adopt, such an offender must show by “clear and convincing evidence,” *inter alia*, that there was “successful treatment or rehabilitation directly related to the disqualifying offense,” no imprisonment for such an offense in the last 10 years, and no conviction, guilty plea, or no contest plea “to an offense greater than an infraction or traffic violation that would likely impact the health, safety or well-being of the child.”⁶⁵

Some adoption norms are dictated by U.S. Supreme Court precedents. For example, in *Santosky v. Kramer*, the Court held in 1982 that a state needs to demonstrate permanent neglect (or other bad acts) by “clear and convincing evidence” before involuntarily terminating the childcare rights of a “natural” parent in a formal adoption.⁶⁶ It observed that the “fundamental liberty interest of

62. COLO. REV. STAT. § 19-5-203.5 (2024).

63. Under Utah law a birth mother’s relinquishment of parental rights may only be taken before a judge, a person appointed by the judge, or an authorized child-placing agency representative, who must certify that the relinquishment was signed “freely and voluntarily.” UTAH CODE ANN. § 78B-6-124(1)–(2), (4) (West 2024). By contrast, a biological father’s relinquishment need only be signed before a notary public, without any certification of voluntariness. *Id.* § 78B-6-124(3). A constitutional challenge to this distinction under the Equal Protection Clause was dismissed for lack of standing. *See In re Adoption of B.B.*, 469 P.3d 1083, 1086, 1092 (Utah 2020). Even when the grounds for a parental rights termination have been successfully proven, some state laws allow a court to decline to terminate, as where a termination “would seriously affect the child’s welfare.” *See, e.g., In re C.D.G.E.*, 889 N.W.2d 863, 866 (N.D. 2017).

64. UTAH CODE ANN. § 78B-6-117(5), (6)(a) (West 2024) (listing “disqualifying offenses” such as child abuse, child abuse homicide, child kidnapping, sexual abuse of a minor, rape of a child, and child abandonment, and prohibiting adoption unless strict rehabilitative and time-based conditions are met).

65. *Id.* § 78B-6-117(6)(b)(i)–(iii); *see also* N.C. GEN. STAT. § 48-3-603(a)(9) (2024) (stating consent to adoption is not required from a person convicted of certain sex offenses that resulted in the conception of the child); WASH. REV. CODE § 26.26A.465(7) (2024) (providing that where an allegation of sexual assault leading to birth is proven, the perpetrator generally lacks notification and objection rights in adoption proceedings).

66. 455 U.S. 745, 769–70 (1982) (“[The] determination of the precise burden equal to or greater than [this] standard is a matter of state law properly left to state legislatures and state courts.”). At times, bad acts seemingly are unnecessary. *See, e.g., K.O. v. N.D.*, No. A-0260-

natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”⁶⁷ Seemingly, comparable evidence is required when involuntary terminations of the childcare liberties of existing adoptive or other nonnatural parents⁶⁸ are needed to facilitate new adoptions, again assuming there is no three childcare parent option.⁶⁹

The U.S. Supreme Court held in *Lehr*, that the *Santosky* standard need not apply when a natural parent’s childcare opportunity interest is extinguished. Involuntary failures, and voluntary but inadvertent acts, can prompt liberty opportunity losses.⁷⁰ Not all genetic parents are treated comparably in formal adoption proceedings.

21, 2022 WL 17086523, at *6 (N.J. Super. App. Div. Nov. 21, 2022) (explaining that “exceptional circumstances” may justify intervention based on a substantial likelihood of serious harm, even without proof of traditional bad acts, such as when a third party assumes the role of psychological parent due to the legal parent’s inability or unwillingness).

There are other federal constitutional protections afforded parents in parental rights termination cases. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (holding a state may not condition an indigent parent’s appeal from a parental rights termination order on prepayment of record preparation fees).

67. *Santosky*, 455 U.S. at 753.

68. Nonnatural parents (i.e., no genetic ties) include afterbirth parents via spousal parent or residency/hold out parent laws. Confusion can arise when state statutes speak of natural parents but then include people without genetic ties to the children within those parents. This occurs, for example, where a statute presumes the husband of a woman who gives birth is the “natural” parent, where no proof of genetic ties is required, but where the statute is applied to the female spouse of a birth-giver where there is no proof of gametes donations leading to birth. *See, e.g.*, *Gartner v. Iowa Dep’t. of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013) (holding that Iowa’s parentage presumption statute, which lists a husband as the legal parent without requiring proof of genetic ties, must be applied equally to female spouses in same-sex marriages). Similarly, residency/hold out parents are sometimes statutorily presumed “natural” fathers, but where the statute is applied to a female partner of the birth-giver with no proof of genetic ties. *See, e.g.*, *Elisa B. v. Superior Ct.*, 117 P.3d 660, 667 (Cal. 2005) (applying California law to hold that a woman who received children into her home and held them out as her own could be presumed their “natural” parent despite no genetic ties).

69. *See, e.g.*, UNIF. PARENTAGE ACT § 613(c) (Alternative B) (UNIF. L. COMM’N 2017) (permitting a court to adjudicate more than two parents where recognizing fewer would be detrimental to the child); CAL. FAM. CODE § 7612(c) (West 2024) (allowing court to recognize more than two legal parents if limiting to two would be detrimental to the child).

70. Non-willful losses are difficult to avoid where formal adoption laws expressly recognize a gestating parent’s “right of privacy,” including “no legal obligation to disclose the identity” of the other natural parent. *See* IDAHO CODE § 16-1501A(4) (2025). The statute also declares the other natural parent “has the primary responsibility to protect” that parent’s childcare opportunity interest. *Id.* § 16-1501A(3)(d).

Some adoption norms are dictated by Congressional policy. For example, the federal Indian Child Welfare Act governs adoptions of Indian children.⁷¹ Thus, a Washington statute generally governing adoption declares a petition for adoption by the prospective adoptive parent shall contain “[a] statement that the child is or is not an Indian covered by the Indian Child Welfare Act”⁷²

Parental childcare losses can occur in non-adoption settings without parental rights terminations. A Louisiana statute declares that if “substantial harm to the child” would arise with “an award of joint custody or of sole custody” to either parent, “the court shall award custody to another person with whom the child has been living in a wholesome and stable environment.”⁷³ Further, a finding in Indiana that a child under 18 is in need of services due to the potential for danger to the child’s health or for substantial danger to the health of another can prompt “coercive intervention of the court.”⁷⁴

B. Spousal Parents

With advances in reproductive technologies and the rise of same sex marriages, there are increased opportunities for children born into a marriage to have no genetic, no other biological, and no formal adoptive ties in one of their legal parents. All UPAs recognize spousal parentage wherein the spouse of one who gives birth is a (presumed oftentimes) second parent under law.⁷⁵ Spousal parentage can arise even when the marriage occurred after birth.⁷⁶ Spousal parentage also can arise when there is an attempted, but ultimately failed, marriage to the birth-giver before or after birth.⁷⁷ Spousal parentage may not arise, however, in a gestational surrogacy setting for the male spouse of the natural father.⁷⁸

71. See Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963; *see also* *Haaland v. Brackeen*, 599 U.S. 255, 296 (2023) (affirming the constitutionality of the Indian Child Welfare Act).

72. WASH. REV. CODE § 26.33.150(2)(c) (2024).

73. LA CIV. CODE ANN. art. 133 (2024).

74. IND. CODE § 31-34-1-6 (2024).

75. The UPAs do not recognize spousal parentage in the spouse of a person who singly undertakes a formal adoption. *See* UNIF. PARENTAGE ACT § 4(a) (UNIF. L. COMM’N 1973); UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM’N 2000); UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM’N 2017).

76. *See* UNIF. PARENTAGE ACT § 204(a)(1)(C) (UNIF. L. COMM’N 2017).

77. *See id.* § 204(a).

78. *See, e.g.,* *Foret v. Serrano*, 395 So. 3d 876, 884 (La. Ct. App. 2024) (declining to recognize the male spouse of the biological father as a legal parent where he was not included in the gestational surrogacy agreement, not listed on the child’s birth certificate, and did not complete an adoption).

The 1973 UPA deems “a man [to be the] natural father of a child if . . . he and the child’s mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated.”⁷⁹ For a child born into marriage via “artificial insemination” of the wife utilizing semen that was not donated by a husband, assuming the means of conception were known to a court, there are different requirements for male spousal parentage, including the husband’s “consent” and the “supervision of a licensed physician.”⁸⁰

The 2000 UPA, as revised in 2002, similarly recognizes presumptive male spousal parentage for children born of sex⁸¹ and non-presumptive male spousal parentage via consent to “assisted reproduction” involving his wife.⁸² As with the 1973 UPA, there is also a marital parent presumption for a man who attempted to marry the birth mother before the child’s birth and the child is born “during the invalid marriage or within 300 days after its termination.”⁸³ As well, there is spousal parentage for a man who married or tried to marry the mother “after the birth of the child,” as long as he “voluntarily asserted his paternity of the child.”⁸⁴ Further, the 2000 UPA recognizes non-presumptive spousal parentage via a “validated” gestational mother “agreement.”⁸⁵

79. UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. L. COMM’N 1973). The 1973 UPA also recognizes male parentage presumptions in certain men who married or attempted to marry the natural mothers before or after the births. *Id.* § 4(a)(2)–(3).

80. *Id.* § 5 cmt. (noting that other forms of artificial insemination raise “complex and serious legal problems” and are not addressed). Failure to follow Section 5 mandates may nevertheless prompt a marital parentage presumption under Section 4 for a child born of artificial insemination. *See id.* § 4(a)(1) (providing that a husband is presumed the natural father of a child born to his wife during the marriage).

81. UNIF. PARENTAGE ACT § 204(a)(1)–(2) (UNIF. L. COMM’N 2000) (presuming paternity of a child born during marriage or within 300 days after the marriage ends).

82. *Id.* §§ 703–704. Within 2 years of birth, a husband may dispute paternity if he did not provide sperm or consent. *Id.* § 705(a). However, if the husband did not provide sperm and did not consent, he may pursue “at any time” an adjudication of nonpaternity where he and the mother “have not cohabited since the probable time of assisted reproduction” and he “never openly held out the child as his own.” *Id.* § 705(b).

83. *Id.* § 204(a)(3).

84. *Id.* § 204(a)(4).

85. *Id.* § 201(b)(6). When a child is born to a gestational carrier where there is a validated agreement, “[t]he intended parents must be married,” unless the agreement is terminated. *Id.* §§ 801, 806.

The 2017 UPA recognizes spousal parent presumptions that are applicable to both male and female spouses⁸⁶ who were married to the birth mothers at the time of birth; who were married to the birth mothers at the likely time of conception, defined as former spouses whose marriage ended no later than 300 days after birth; or who married or tried to marry the birth mothers after the child's birth as long as the individual "asserted parentage."⁸⁷ Such presumptive parentage does not, and should generally not, arise for those marrying expecting or existing legal fathers. Here, the typical bar on three legal parents is implicated since there is already another expecting or existing legal parent: the birth mother. Presumptive spousal parentage may not arise where a birth occurs through assisted reproduction.⁸⁸

In the 2017 UPA, as in earlier UPAs, marital-like acts can also prompt spousal parentage.⁸⁹ Thus, attempts to marry which do not result in actual

86. See UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM'N 2017) ("An *individual* is presumed to be a parent of a child if: . . ." (emphasis added)). To date, only a few states recognize marital parentage in the female spouse of a birth mother for a child born of sex. See, e.g., WASH. REV. CODE § 26.26A.115(1)(a) (2024); VT. STAT. ANN. tit. 15C, § 401(a)(1) (2024).

87. UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. L. COMM'N 2017). The Act defines an individual's assertion of parentage only as including an assertion in a record filed with a state birth record agency or an assertion agreeable to parentage that resulted in birth certificate recognition. *Id.* § 204(a)(1)(C). The Act surely contemplates such spousal parentage required cooperative efforts by birth mothers as unitary assertions by would-be parents are foreclosed. See, e.g., *id.* § 301 (requiring signature of the "woman who gave birth" for voluntary parentage acknowledgment). There is precedent recognizing spousal parentage where a same-sex female partner, though not married at relevant times, can claim spousal parentage if she proves there were legal bars to marriage at the times, but otherwise there would have been a marriage. See *In re L.E.S.*, 233 N.E.3d 1259, 1269 (Ohio Ct. App. 2024).

88. UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM'N 2017). Non-presumptive parentage under the 2017 UPA attaches to consenting individuals who agree with birth mothers on joint future parentage where the mothers give birth via "assisted reproduction." See *id.* § 801(3); see also *id.* §§ 802–807. For comparable requirements for each form of agreement, with additional special rules for gestational surrogacy pacts, see Sections 808–812, and for genetic surrogacy pacts, see Sections 813–818. *Id.* §§ 808–818. Further, non-presumptive parentage may attach to married spouses, unmarried couples, or one or more intended parents where there is valid consent to assisted reproduction, including gestational or genetic surrogacy agreements. See *id.* §§ 703–704 (providing that an individual who consents under § 704 to assisted reproduction with the intent to be a parent is a parent of the resulting child and detailing requirements for valid consent, including exceptions where consent may be found absent a signed record); cf. *In re L.E.S.*, 233 N.E.3d at 1269 (recognizing a same-sex marriage for purposes of establishing parentage, where the parties would have married but for an unconstitutional ban, to safeguard the parent-child bond).

89. See UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM'N 2017).

marriages can trigger childcare parentage in the would-be spouses.⁹⁰ Under the 2017 UPA, there is presumed parentage in a person who married the birth mother after the birth of the child, even if the marriage “is or could be declared invalid.”⁹¹

“[S]pousal parentage can arise . . . where there is no explicit consent to parentage. . . .”⁹² It can arise where there is adversity to parentage “as when a wife’s extramarital affair prompts for her a pregnancy, birth, and childcare parentage.”⁹³

Where spousal parentage is presumed, as in the 1973, 2000, and 2017 UPAs, it is subject to rebuttal.⁹⁴ Under the 1973 UPA, presumed spousal paternity may be rebutted in “an appropriate action,”⁹⁵ including an action resulting in a “court decree establishing paternity of the child by another man.”⁹⁶ Under the 2000 UPA, a presumption of spousal paternity may be rebutted⁹⁷ more easily within two years of birth than two years after birth and beyond.⁹⁸ Under the 2017 UPA, “an individual” rather than “a man” can be a presumed parent due to marriage to the

90. *Id.* § 204(a)(1).

91. *Id.* § 204(a)(1)(C) (assuming the person is “in a record filed” with the state agency maintaining birth records or is named on the child’s birth certificate); *cf.* UNIF. PARENTAGE ACT § 4(a)(3) (UNIF. L. COMM’N 1973); UNIF. PARENTAGE ACT § 204(a)(4) (UNIF. L. COMM’N 2000); 750 ILL. COMP. STAT. 46/204(a)(4) (2024); CAL. FAM. CODE § 7611(c) (West 2024).

92. Parness, *Unconstitutional Parenthood*, *supra* note 11, at 221.

93. *Id.* The spousal parent presumption may not operate, however, when the marital status remains, but there is no longer an intact family or a marriage to preserve. *See, e.g.*, *Glover v. Junior*, 306 A.3d 899, 917 (Pa. Super. Ct. 2023), *aff’d in part, rev’d in part*, 333 A.3d 323 (Pa. 2025).

94. UNIF. PARENTAGE ACT § 4 (UNIF. L. COMM’N 1973); UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM’N 2000); UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM’N 2017).

95. UNIF. PARENTAGE ACT § 4(b) (UNIF. L. COMM’N 1973).

96. *Id.* *But see id.* § 6(a)(2) (stating that when marital presumption is rebutted, “paternity of the child by another man *may* be determined in the same action.” (emphasis added)). Rebuttal of the “father and child relationship” arising from marital acts must be brought “within a reasonable time after obtaining knowledge of relevant facts, but in no event later than [five] years after the child’s birth.” *Id.* By comparison, under the 1973 UPA, an action by “[a]ny interested party” to rebut the parent presumption for men who take children into their home or who sign a paternity acknowledgment may be brought “at any time.” *Id.* § 6(b).

97. UNIF. PARENTAGE ACT § 204(b) (UNIF. L. COMM’N 2000).

98. *Contrast id.* § 607(a) (within two years), *with id.* § 607(b) (after two years).

birth-giver,⁹⁹ again with the presumption more easily rebutted if an action is brought within two years of birth.¹⁰⁰

Current state laws generally reflect the policies of the UPAs, but states do not comparably implement these policies. For example, spousal parentage can arise from a marriage in existence at the time of birth, in existence at the time of conception, or in existence during a pregnancy though not at conception or birth.¹⁰¹

Spousal parentage, as a form of childcare parentage for those without genetic, other biological, or adoptive ties, may be grounded on the inferred consent to share custody inherent in actual or purported marriages between expecting or existing legal parents and their actual or would-be spouses.¹⁰² Consent arises when the marriage ceremony occurs or is attempted.¹⁰³ Consent to parentage encompasses future children, whether or not now conceived, as well as some current living children, as when there are post-birth marriages.¹⁰⁴

The circumstances permitting spousal parentage disestablishments vary interstate. Variations arise when state public policies differ on the import of genetic or other biological ties to parentage. These ties are less, or not, important when marriage, as in the *Obergefell* ruling (where opportunities for same-sex marriages were deemed constitutionally demanded), is viewed as “the basis for an expanding

99. Contrast UNIF. PARENTAGE ACT § 4(a) (UNIF. L. COMM’N 1973) (“man”), with UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM’N 2017) (“individual”).

100. UNIF. PARENTAGE ACT § 608(b) (UNIF. L. COMM’N 2017). Rebuttal can be pursued where there are genetic ties. *Id.* §§ 506, 608(c)(3)–(d) (allowing rebuttal by the mother, the presumed parent or an individual).

101. See, e.g., *id.* § 204(a)(1)(A) (“An individual is presumed to be a parent of a child if . . . the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage . . .”). Compare GA. CODE ANN. § 19-7-20 (2024) (“All children born in wedlock or within the usual period of gestation thereafter are legitimate.”), with ARIZ. REV. STAT. ANN. § 25-814(a)(1) (2024) (“A man is presumed to be the father of the child if . . . [h]e and the mother of the child were married at any time in the ten months immediately preceding the birth.”), and MICH. COMP. LAWS § 722.1433(e) (2024) (demonstrating that marriage at time of conception or birth will give rise to presumed fatherhood); see also *State v. EKB*, 35 P.3d 1224, 1229 (Wyo. 2001) (noting two spousal presumptions: the first husband as presumed father because the child was born within 300 days of divorce, and the second husband as presumed father because he was married to the birth mother at the time of birth); *Ex parte Kimbrell*, 180 So. 3d 30, 38 (Ala. Civ. App. 2015) (demonstrating that two men can be presumed spousal parents, as child was born to a woman and her supposed second husband, though there was no divorce from her first husband and both men were presumed spousal parents).

102. See *E.N. v. T.R.*, 255 A.3d 1, 34 (Md. 2021).

103. See UNIF. PARENTAGE ACT § 204(a)(1) (UNIF. L. COMM’N 2017).

104. See *id.* § 204(a)(1)(C).

list of governmental rights, benefits and responsibilities,”¹⁰⁵ including child custody and support.¹⁰⁶ Thus in Vermont, genetic ties are more important as a presumed parent is a person who is married to the birth mother at the time of the birth of a child born of consensual sex, but where an unwed genetic father may challenge the presumption within two years of discovering “the potential genetic parentage,” though the court may not disestablish the presumed spousal parentage.¹⁰⁷ Genetic ties are less important where a child is born of consensual sex into a marriage where the non-gestating spouse is not a genetic parent, but a presumed parent, and where the childcare parentage presumption may not be easily overcome by the birth mother or by a person (like a genetic father) who is outside the marriage.¹⁰⁸

105. *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015).

106. *See, e.g.,* *McLaughlin v. Jones*, 401 P.3d 492, 495–96 (Ariz. 2017) (demonstrating that marital paternity presumption applies to female spouse of birth mother, as Arizona’s spousal parentage presumption statute (ARIZ. REV. STAT. ANN. § 25-814(A)(1) (2024)) does not specifically reference any likelihood of biological ties in the spouse, but rather addresses the spouse’s rights and responsibilities); *Henderson v. Box*, 947 F.3d 482, 487 (7th Cir. 2020) (holding that same-sex female spouses are both legal parents of child born in wedlock); *see also* *LC v. MG*, 430 P.3d 400, 424–25 (Haw. 2018) (demonstrating that a female spouse is not allowed to rebut marital parentage due to spouse’s failure to consent to assisted reproduction involving her wife since the child’s best interests require “a child have two parents to provide financial benefits.”).

107. VT. STAT. ANN. tit. 15C, §§ 401(a)(1), (b), 402(b)(2) (2024) (demonstrating that a presumption of parentage is rebuttable and may be overcome and competing claims to parentage are resolved only by a court order).

108. *See, e.g.,* *Waites v. Ritchie (In re Waites)*, 152 So. 3d 306, 311 (Miss. 2014) (demonstrating that spousal parentage sometimes can be challenged solely due to lack of genetic ties); *Castro v. Lemus*, 456 P.3d 750, 754, 760 (Utah 2019) (finding that denial of challenge opportunity would raise constitutional issue, especially where the unwed biological father came forward and provided childcare; constitutional issue was not addressed as the relevant statute allowed a challenge to spousal parentage by “a man whose paternity of the child is to be adjudicated,” under UTAH CODE ANN. § 78B-15-602(3) (West 2024)). *But see* *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (finding that federal constitution does not bar a state marital parentage presumption law where the presumption cannot be rebutted by an unwed genetic parent); *Strauser v. Stahr*, 726 A.2d 1052, 1056 (Pa. 1999) (finding that marital presumption not rebuttable by genetic father where marriage is intact), *abrogated by*, *Sitler v. Jones*, 334 A.3d 861 (Pa. 2025); *In re A.M.*, 223 A.3d 691, 697 (Pa. Super. Ct. 2019) (finding that a female spouse who used male pronouns of birth mother entitled to marital paternity presumption); *B.S. v. T.M.*, 782 A.2d 1031, 1037 (Pa. Super. Ct. 2001) (finding no irrebuttable marital parent presumption here as marriage was not intact at relevant times), *overruled by*, *B.C. v. C.P.*, 310 A.3d 721, 735–36 (Pa. 2024) (holding parental presumption applies even in cases involving strained marriages); *see also* *Vargo v. Schwartz*, 940 A.2d 459, 461–62, 472 (Pa. Super. Ct. 2007) (finding that while an unwed biological father may not himself be able to petition for an

Without concerns about genetic ties, difficulties in overcoming a spousal parent presumption are illustrated by short limitation periods.¹⁰⁹ As well, overriding difficulties arise from limits on who may seek to overcome a spousal parent presumption.¹¹⁰

Spousal parentage might arise from a common law marriage.¹¹¹ Here, there may be no actual or attempted marriage ceremony. Rather, the marriage is judicially recognized upon proof of a marital-like relationship which did not arise on a particular date, as does a formal marriage.¹¹² While the UPAs and written state laws today do not expressly address childcare parentage for common law spouses of birth mothers, seemingly such a spouse can attempt to pursue parenthood by proving a common law marriage existed at the time of conception, pregnancy, or birth (depending on the state law) so that the child can be deemed to be born into a marriage.¹¹³

C. Residency/Hold Out Parents

Childcare parentage, effective only after birth and facilitated by custodial parents, also encompasses residency/hold out parents.¹¹⁴ There are two basic types

adjudication of custodial parentage, he may still be able to be pursued, as by state welfare officials seeking welfare payment reimbursements, for an adjudication of child support parentage, especially when a cuckolded husband is disestablished as a presumed parent.).

109. *See, e.g.*, UNIF. PARENTAGE ACT § 608(b) (UNIF. L. COMM'N 2017) (demonstrating that a spousal parent presumption cannot be overcome after the child attains two years of age, with some exceptions); CONN. GEN. STAT. § 46b-489(b) (2024) (demonstrating that Connecticut follows the UPA approach); WASH. REV. CODE § 26.26A.435(2) (2024) (demonstrating that a spousal parent presumption “cannot be overcome after the child attains four years of age,” with some exceptions).

110. *See, e.g., Michael H.*, 491 U.S. at 129 (demonstrating that a parentage presumption will generally stand unless challenged by one of the spouses, as a state may bar an unwed genetic father from challenging a husband’s spousal parentage for a child born of sex).

111. *See, e.g., Hogsett v. Neale*, 478 P.3d 713, 719 (Colo. 2021).

112. *Gill v. Nostrand*, 206 A.3d 869, 875 (D.C. 2019).

113. *See, e.g., Valentine v. Wetzell*, No. 790 MDA 2018, 2019 WL 1130441, at *5 (Pa. Super. Ct. Mar. 12, 2019) (holding that although state law barred common law marriages entered into after January 2005, the court applied the earlier common law marriage norms to conduct before 2005 since the bar was not made retroactive); *Hogsett*, 478 P.3d at 724 (applying *Obergefell* retroactively to give same-sex couple right to prove common law marriage for purposes of a dissolution proceeding); *Gill*, 206 A.3d at 873, 875 (holding common law marriage doctrine applied in case involving alimony and marital property).

114. Such second parent choices can only sometimes be made long after birth. Some residency/hold out parents must be chosen right after birth. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017) (“An individual is presumed to be a parent of a child if . . . the

in contemporary American state laws. One statutory type, usually arising from the 1973 UPA, involves a “man” (or a person per judicial interpretation)¹¹⁵ who receives a child into his (or the person’s) home and “openly holds out the child as his [or the person’s] natural child.”¹¹⁶ The other statutory type, usually arising from either the 2000 UPA, as amended in 2002,¹¹⁷ embodying a “man” (or any person per judicial interpretation)¹¹⁸ or from the 2017 UPA¹¹⁹ embodying an “individual” who resides in the same household with the child and “openly [holds] out the child” as one’s own for the first two years of the child’s life.¹²⁰

The 2002 ALI Principles of the Law of Family Dissolution also recognize a form of residency/hold out parentage.¹²¹ Somewhat similar to the 2000 and 2017 UPAs, the ALI Principles envision “a parent by estoppel,” rather than “a legal parent,”¹²² who “lived with the child since the child’s birth,” while holding out and accepting full and permanent responsibilities as parent as part of a prior co-parenting agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities.¹²³ A significant difference in the ALI Principles from the later UPAs is that a “prior co-parenting” pact is needed, better assuring actual (not inferred) choices by single parents on second parents.¹²⁴

individual resided in the same household with the child for the first two years of the life of the child . . . and openly held out the child as the individual’s child.”). *But see* UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM’N 1973) (requiring only that the second parent hold out the child as their natural child while they are under the age of majority).

115. *See, e.g.,* *Elisa B. v. Superior Ct.*, 117 P.3d 660, 666–67, 670 (Cal. 2005) (holding former lesbian partner of a gestating parent is a hold out parent required to pay child support though there were no biological ties); *McLaughlin v. Jones*, 401 P.3d 492, 498 (Ariz. 2017); *Henderson v. Box*, 947 F.3d 482, 487 (7th Cir. 2020).

116. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM’N 1973).

117. UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM’N 2000).

118. *See, e.g., In re Guardianship of Madelyn B.*, 98 A.3d 494, 501 (N.H. 2014).

119. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM’N 2017).

120. *See id.* Note that unlike the 1973 UPA, the 2017 UPA does not say the hold out is for one’s “natural” child. *See id.* *But see* VT. STAT. ANN. tit. 15C, § 401(a)(4) (2024) (presuming a “person” to be a parent of a child if they resided with the child while holding out the child with “another parent of the child”).

121. *See* PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (A.L.I. 2002).

122. *Id.* (stating that a legal parent “is an individual who is defined as a parent” under state law other than a definition involving a “parent by estoppel” or a “de facto parent.”).

123. *Id.* § 2.03(1)(b)(iii) (requiring a further finding that parentage recognition serves the child’s best interests).

124. *See id.*

Many current state laws reflect the policies of these proposed laws. Yet only a few states to date have expressly extended the policies beyond publicly identified opposite sex couples.¹²⁵ Nevertheless, residency/hold out parentage is significantly available to an identified female partner of a gestating parent due to equality demands.¹²⁶ Residency/hold out parentage is generally not available to a partner of an identified male who is a custodial parent at birth where the person giving birth remains a legal parent and where state laws disallow three custodial parents.¹²⁷

As noted, state laws often reflect the UPA approaches to residency/hold out parentage.¹²⁸ In California, following the 1973 UPA, a man is “presumed to be the natural [father] of a child” if he “receive[d] the child into [his] home and openly holds out the child as his natural child.”¹²⁹ There is no explicit requirement that a

125. See, e.g., VT. STAT. ANN. tit. 15C, § 401(a)(4) (2024) (person, not man); WASH. REV. CODE § 26.26A.115(1)(b) (2024) (individual, not man); see also Parness, *Marriage Equality*, *supra* note 36, at 189 (discussing the need to treat equally all people involved in residency/hold out settings).

126. See, e.g., *Elisa B. v. Superior Ct.*, 117 P.3d 660, 670 (Cal. 2005) (finding a former unwed lesbian partner to be a child support parent under California statutory law on presumed natural hold out fathers). Similar equality mandates operate when there is common law, rather than statutory, hold out parentage. See, e.g., *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845, 861 (Sup. Ct. 2014). See generally Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW & CONTEMP. PROBS. 195 (2014) (recognizing that women are sometimes deemed parents under the statutes which only explicitly recognize residency/hold out parentage for men).

127. In California, though, there can be three legal parents, including the birth mother, her spouse, and a residency/hold out parent. See CAL. FAM. CODE § 7612(c) (West 2024) (discussing instances where recognition of only two parents would be detrimental to the child). *But cf.* *C.G. v. J.R.*, 130 So. 3d 776, 782 (Fla. Dist. Ct. App. 2014) (illustrating how 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). See generally Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. REV. 307 (2022) (discussing instances where there are three or more parents.).

128. 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, 703–04 (Ky. 2021) (employing a birth mother’s “parental waiver” doctrine to allow parentage in a person who could not formally adopt children, but who held children out as one’s own while residing with them for some time).

129. CAL. FAM. CODE § 7611(a), (d) (West 2024). The presumption has been sustained when challenged on the ground of interfering with federal constitutional childcare interests. See, e.g., *R.M. v. T.A.*, 182 Cal. Rptr. 3d 836, 847–49 (Ct. App. 2015) (using the preponderance of evidence norm to establish presumption). Other similar state laws which generally follow the 1973 UPA on residency/hold out parentage include: MONT. CODE ANN. § 40-6-105(1)(d) (2023) (“[P]erson . . . openly represents the child to be the person’s natural child.”); COLO. REV. STAT.

man who holds out a child as “his natural child” needs to have any beliefs about his actual biological ties.¹³⁰ California cases have recognized as presumed parents those who knew there were no genetic ties, but who acted in the community as if there were.¹³¹ Elsewhere, state laws recognize residency/hold out parentage only for those who raise children from birth,¹³² following the later UPAs.

There are other variations on residency/hold out parentage. Some laws, for example, do not require receipt into the home.¹³³

State residency/hold out parent laws generally do not follow the policies in the 2000 ALI Principles on parentage by estoppel. Under these principles, a co-

§ 19-4-105(1)(d) (2024) (resembling Montana); ALA. CODE § 26-17-204(a)(5) (2024) (resembling California except man “establishes a significant parental relationship with the child by providing emotional and financial support for the child”); MINN. STAT. § 257.55(a)(3) (2024) (resembling California); N.J. STAT. ANN. § 9:17-43(a)(4)–(5) (West 2024) (resembling California but specifying a man provides support to a child who is openly held out as his natural child); HAW. REV. STAT. § 584-4(a)(4) (2024) (resembling California); NEV. REV. STAT. § 126.051(1)(d) (2023) (resembling California).

130. See CAL. FAM. CODE § 7611 (West 2024).

131. See, e.g., *In re Jesusa V.*, 85 P.3d 2, 15 (Cal. 2004) (holding both Paul (the husband) and Heriberto (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); *Alameda Cnty. Soc. Servs. Agency v. S.R. (In re L.W.)*, No. JD-036423-01, 2024 WL 4579300, at *5–7 (Cal. Ct. App. Oct. 25, 2024) (reviewing California precedents on residency/hold out parentage); *Barnes v. Cypert*, No. F049259, 2006 WL 3361790, at *6 (Cal. Ct. App. Nov. 21, 2006) (finding the birth mother’s uncle is a presumed parent); *L.A. Cnty. Dep’t of Child. & Fam. Servs. v. J.R. (In re Jerry P.)*, 116 Cal. Rptr. 2d 123, 140 (Ct. App. 2002) (holding presumed residency/hold out parent need not have, or even claim to have, biological ties).

132. See, e.g., TEXAS FAM. CODE ANN. § 160.204(a)(5) (West 2023) (“[D]uring the first two years of the child’s life, [a man is a presumed to be the father if] he continuously resided in the household in which the child resided and he represented to others that the child was his own.”); WASH. REV. CODE § 26.26.115(1)(b)(2) (2024) (“An individual is presumed to be a parent of a child if . . . [t]he individual resided in the same household with the child for the first four years of the life of the child, including any period of temporary absence, and openly held out the child as the individual’s child.”); MONT. CODE ANN. § 40-6-105(d) (2023) (A person is presumed the natural father if “while the child was under the age of majority,” the person “receives the child into the person’s home and openly represents the child to be the person’s natural child”).

133. See, e.g., DEL. CODE ANN. tit. 13, § 8-201(c) (2024) (establishing parent status through a “parental role” and “bonded and dependent relationship . . . that is parental in nature”); VT. STAT. ANN. tit. 15C, § 401(a)(4) (2024) (presuming residency/hold out parent if in child’s first two years, another parent of child jointly held the child out as presumed parent’s child). *Contrast* N.J. STAT. ANN. § 9:17-43 (West 2024) (providing different ways a man is presumed to be the biological father of a child), *with id.* § 9:17-40 (“The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.”).

parenting pact with a potential residency/hold out parent seemingly must be undertaken by, if there are, two existing legal parents.¹³⁴ Yet, the two-parent approach in the 2000 ALI Principles has been followed outside the residency/hold out parent context, as in some de facto parenthood cases.¹³⁵

D. Voluntary Acknowledgment Parents

While federal welfare law “child support” mandates prompted states to initiate voluntary paternity acknowledgment (VPA) procedures in IV-D child-support settings.¹³⁶ These and similar procedures (e.g., voluntary parentage acknowledgment procedures) are also now used by the states beyond IV-D child support settings,¹³⁷ as well as in nonsupport parentage settings, like custody,¹³⁸ visitation¹³⁹ and tort.¹⁴⁰ Further, parent acknowledgment procedures are increasingly employed in settings beyond gamete providers, that is, in cases where

134. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(iii) (A.L.I. 2002).

135. See, e.g., *E.N. v. T.R.*, 255 A.3d 1, 6 (Md. 2021) (holding de facto parenthood requires consent by two existing legal parents, if there are two, or a finding of unfitness in a nonconsenting parent or a finding of exceptional circumstances); *Martin v. MacMahan*, 264 A.3d 1224, 1234–35 (Me. 2021); Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 IDAHO L. REV. 421, 461–78 (2020) [hereinafter Parness, *Constitutional Limits*]; Parness, *Unconstitutional Parenthood*, *supra* note 11, at 203–05.

136. See Parness, *Reforming Illinois*, *supra* note 24, at 417–19 (reviewing the federal laws on IV-D funding of state welfare programs). Voluntary parentage acknowledgment schemes predated the 1995 federal laws in some states. See, e.g., UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM’N 1973) (providing a man is presumed a natural father of a child when he acknowledges his paternity in a writing filed with government); NEB. REV. STAT. § 43-1409 (2024) (original version at 1994 Neb. Laws. 1224).

137. See, e.g., CAL. FAM. CODE § 7570(a)(1) (West 2024) (“Establishing parentage is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors’ benefits, military benefits, and inheritance rights.”).

138. See, e.g., UNIF. PARENTAGE ACT § 305(a) (UNIF. L. COMM’N 2017) (“[A]n acknowledgment of parentage . . . is equivalent to an adjudication of parentage of the child and confers on the acknowledged parent all rights and duties of a parent.”); *id.* § 203 (“[A] parent-child relationship established under this [act] applies for all purposes.” (second alternation in original)).

139. See, e.g., CAL. FAM. CODE § 7573 (West 2024) (allowing a voluntary declaration of parentage).

140. See, e.g., *Hussey v. Woods*, No. W2014–01235–COA–R3–CV, 2015 WL 5601777, at *1 (Tenn. Ct. App. Sep. 23, 2015) (examining a case in which a birth mother, on behalf of the child, attempted to employ a VPA executed in Mississippi in a wrongful death lawsuit first pursued by the deceased male signor’s mother), *rev’d*, 538 S.W.3d 476 (Tenn. 2017).

acknowledged parentage is not founded on actual or alleged genetic ties.¹⁴¹ State parentage acknowledgment laws today are guided by not only the federal IV-D directives, but also by the UPAs that were promulgated by a national, nongovernmental commission in 1973, 2000 (as amended in 2002) and 2017.¹⁴²

Each UPA recognizes childcare parentage in those who have undertaken a voluntary paternity or parentage acknowledgment.¹⁴³ These acknowledgments reflect actual consents to parentage by those then either expecting or existing legal parents and by those then nonparents.¹⁴⁴ Nonparent signors may have no actual genetic ties to the acknowledged children.¹⁴⁵ Increasingly, acknowledgment signors need not even believe there are such ties.¹⁴⁶

The 1973 UPA recognizes “[a] man is presumed to be the natural father of a child,” thus prompting childcare parentage, if “he acknowledges his paternity . . . in a writing” filed with the state which is not disputed by the birth mother “within

141. See, e.g., *Scott v. Benson*, 529 P.3d 319, 325, 329 (Utah 2023) (holding gestating mother could not undo VPA though a male signor who had no genetic ties).

142. See UNIF. PARENTAGE ACT (UNIF. L. COMM’N 1973); UNIF. PARENTAGE ACT (UNIF. L. COMM’N 2000); UNIF. PARENTAGE ACT (UNIF. L. COMM’N 2017). The National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission, has operated since 1892. *About Us*, UNIF. L. COMM’N, <https://www.uniformlaws.org/aboutulc/overview> [<https://perma.cc/3PEN-D8N8>]. A provision in the draft leading to the 1973 UPA recognized that if no second legal parent was pursued or recognized within a year of the birth of a nonmarital child born of consensual sex, “an action to determine the existence of the relationship shall be brought promptly on behalf of the child by the [appropriate state agency].” Harry D. Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 11–12 (1974) (alteration in original) (highlighting a reporter-draftsman to the drafting committee deeming the striking of this provision before UPA passage regrettable).

143. See UNIF. PARENTAGE ACT § 4(a)(3)(iii)–(4) (UNIF. L. COMM’N 1973); UNIF. PARENTAGE ACT § 302 (UNIF. L. COMM’N 2000); UNIF. PARENTAGE ACT § 204 (UNIF. L. COMM’N 2017).

144. See UNIF. PARENTAGE ACT § 4 (UNIF. L. COMM’N 1973); UNIF. PARENTAGE ACT §§ 204, 302 (UNIF. L. COMM’N 2000); UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM’N 2017).

145. See UNIF. PARENTAGE ACT § 4 (UNIF. L. COMM’N 1973); UNIF. PARENTAGE ACT §§ 204, 302 (UNIF. L. COMM’N 2000); UNIF. PARENTAGE ACT § 204 (UNIF. L. COMM’N 2017).

146. See UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM’N 2017) (setting no requirement for the mother of the child and acknowledgment signer to believe the father is the actual genetic father). In contrast to VPAs, where presumed spousal parents can deny parentage due to lack of genetic ties so that genetic parents may undertake VPAs, at times presumed spousal parents can deny parentage without any accompanying new VPA undertaking. *But see Mackley v. Openshaw*, 456 P.3d 742, 744 (Utah 2019) (holding husband could not rescind his earlier denial of paternity in order to secure an order of legal fatherhood because any mistake in making the denial involved legal, not factual matters).

a reasonable time after being informed”¹⁴⁷ Beliefs about “natural” bonds seem quite important, even if mistaken.

The 2000 UPA, as amended in 2002, recognizes no childcare parentage presumption attending a paternity acknowledgment signature.¹⁴⁸ It does recognize that the birth mother 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.”¹⁴⁹ Here too, genetic bonds seem quite important, even when beliefs are mistaken.¹⁵⁰

The 2017 UPA also recognizes a parentage acknowledgment can prompt childcare parentage without a presumption.¹⁵¹ But it is revolutionary in that it recognizes parentage acknowledgments can be undertaken by an expanded field of signatories, including not only those who claim to be “an alleged genetic father” of a child born of sex,¹⁵² but also those who do not allege genetic ties, including a presumed parent (man or woman) due to an alleged or actual marriage;¹⁵³ a presumed parent due to a holding out of the child as one’s own while residing in the same household with the child “for the first two years of the life of the child;”¹⁵⁴

147. UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. L. COMM’N 1973). Rebuttal of such a presumption occurs only with “clear and convincing evidence” of no biological ties, together with “a court decree establishing paternity of the child by another man.” *Id.* § 4(b).

148. *See* UNIF. PARENTAGE ACT § 204 (UNIF. L. COMM’N 2002 Amendments).

149. *Id.* § 301. The accompanying Comment indicates that “a sworn assertion of genetic parentage of the child” is needed though not “explicitly” required by federal welfare subsidy statutes that often prompt state VPA laws, a federal statutory “omission” that is corrected in the 2000 UPA. *Id.* § 301 cmt. The Comment to a later section in the 2002 amendment also recognizes a male sperm donor may undertake a VPA in an assisted reproduction setting where his “partner” is the birth mother. *Id.* § 703 cmt. The 2000 UPA declares a VPA can be rescinded within 60 days of its effective date by a signatory. UNIF. PARENTAGE ACT § 307. (UNIF. L. COMM’N 2000). Thereafter, a signatory can commence a court case to challenge the VPA, but only on “the basis of fraud, duress, or material mistake of fact” within two years of the VPA filing. *Id.* § 308(a)(1).

150. *See* UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM’N 2002 Amendments). The U.S. Department of Health and Human Services, in 2003, did opine that the federal Social Security Act did not allow IV-D states to require genetic testing before accepting a VPA. *See* Sherri Z. Heller, *Paternity Disestablishment*, OFF. OF CHILD SUPPORT SERVS. (Apr. 28, 2003), <https://acf.gov/css/policy-guidance/paternity-disestablishment> [<https://perma.cc/CL64-D8NA>].

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

152. *Id.* § 301.

153. *Id.* §§ 204(a)(1)(A)–(C), 301.

154. *Id.* § 204(a)(2).

and, an intended parent (man or woman) in a non-surrogacy, assisted reproduction setting.¹⁵⁵ The 2017 UPA thus recognizes parentage acknowledgments beyond VPAs.¹⁵⁶ Acknowledgments under the 2017 UPA may be undertaken “before or after the birth of the child.”¹⁵⁷ Beliefs on genetic ties need not always exist in undertaking parentage acknowledgments, and the lack of genetic ties cannot always undo such parentage.¹⁵⁸

In recognizing parentage acknowledgments by those with no genetic ties to acknowledged children, the 2017 UPA allows circumvention of formal adoption laws and the safeguards they provide for children, including adult background checks and child best-interest findings. Gone is the concern in the Comment to the 2000 UPA lamenting that the federal statutes guiding state paternity acknowledgment laws did not expressly “require that a man acknowledging paternity must assert genetic paternity.”¹⁵⁹ A related Comment indicated that the 2000 UPA was “designed to prevent circumvention of adoption laws by requiring a sworn assertion of genetic parentage of the child.”¹⁶⁰ By 2017, the UPA policies on acknowledgments had changed dramatically.

Current U.S. state laws reflect the varying UPA approaches. Only a few states to date, as with the 2017 UPA, have extended parentage acknowledgments to a married same-sex female couple where a child is born of consensual sex.¹⁶¹

155. *Id.* §§ 301, 703.

156. *See id.* §§ 204(a), 301, 703.

157. *Id.* § 304(b).

158. As with the 2000 UPA, signatories may rescind within 60 days. *Id.* § 308(a)(1). Challenges may proceed thereafter, “but not later than two years after the effective date” and “only on the basis of fraud, duress, or material mistake of fact.” *Id.* § 309(a). While nonsignatory challenges may be pursued within “two years after the effective date of the acknowledgement,” such challenges usually will only be sustained when a judge finds the child’s “best interest” are served. *Id.* § 610(b)(1)–(2). Nonsignatory challengers are limited. Those with standing include the child; a parent under the 2017 UPA; “an individual whose parentage is to be adjudicated;” an adoption agency; and a child support, or other authorized, governmental agency. *Id.* § 602. Thus, the parents or siblings of an alleged sperm provider of a child born of consensual sex seemingly cannot challenge.

159. UNIF. PARENTAGE ACT, art. 3 cmt. (UNIF. L. COMM’N 2002 Amendments).

160. *Id.*

161. *See, e.g.,* VT. STAT. ANN. tit. 15C, §§ 301(a)(4), 401(a)(1) (2024) (stating a person married to birth mother at time child is born can undertake voluntary parentage acknowledgment); WASH. REV. CODE § 26.26A.200 (2024) (stating birth mother and presumed parent may sign acknowledgment; presumed parent includes the spouse of birth mother under § 26.26A.115(1)(a)(i)). On the need for allowing parentage acknowledgments for same-sex female couples, see Jessica Feinberg, *A Logical Step Forward: Extending Voluntary*

Parentage acknowledgment opportunities are not, and clearly could not be, extended to a same-sex married male couple where one of the men naturally conceived a child born of sex. There, the birth mother is an existing legal parent,¹⁶² and state laws generally fail to recognize acknowledgments for would-be third parents.¹⁶³

Current laws, as well, generally do not explicitly recognize acknowledgment opportunities for alleged residency/ hold out parents.¹⁶⁴ Nor do they encompass intended parents in assisted reproduction settings.¹⁶⁵

Acknowledgment statutes most often are employed by those involved in births outside of marriage who establish legal paternity.¹⁶⁶ VPAs are typically distinguished from birth certificate recognitions of parents who were or are married to birth mothers and who are presumed parents who never undertake VPAs.¹⁶⁷ VPA parentage is distinct from presumptive spousal parentage because the latter is more easily rebutted.¹⁶⁸ Acknowledged parents who reside and hold out children

Acknowledgments of Parentage to Female Same-Sex Couples, 30 YALE J.L. & FEMINISM 99, 135 (2018) (covering same-sex female couples who conceive children using donated sperm). On the problems with two women VPAs for children born of consensual sex, see Jeffrey A. Parness, *Unnatural Voluntary Parentage Acknowledgments Under the 2017 Uniform Parentage Act*, 50 U. TOL. L. REV. 25, 36 (2018).

162. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978) (distinguishing sperm providers); *Nguyen v. INS*, 533 U.S. 53, 64–65 (2001) (holding by giving birth, one always has developed a real, meaningful relationship with the child).

163. In California there can be three parents under the law. CAL. FAM. CODE § 7612(c) (West 2024). But a presumed parent does not include a VPA parent. *Id.* §§ 7611, 7612(c) (stating a voluntary parentage acknowledgment does not prompt presumed parentage).

164. But see ME. STAT. tit. 19-A, §§ 1861(3), 1881(c) (2024).

165. But see *id.* §§ 1861(4), 1923.

166. But see *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 690 (Sur. Ct. 2009) (suggesting woman whose ova was used by her partner to bear a child born of assisted reproduction might employ the voluntary acknowledgment process); *Orosco v. Rodriguez*, 376 So. 3d 92, 96 (Fla. Dist. Ct. App. 2023) (finding a genetic father of child born to one who is married to another cannot, by statute, undertake a VPA).

167. See, e.g., *Castillo v. Lazo*, 386 P.3d 839, 842 (Ariz. Ct. App. 2016) (finding birth certificate naming husband is not equivalent to a VPA).

168. Contrast UNIF. PARENTAGE ACT, § 308 (UNIF. L. COMM'N 2000) (stating VPA challenge after 60 days only on basis of fraud, duress or material mistake of fact), with *id.* § 607 (stating presumed parent can seek to disprove parent-child relationship within two years of birth).

as their own thus differ from residency/hold out parents who never undertake acknowledgments.¹⁶⁹

State parentage or paternity acknowledgment laws vary significantly.¹⁷⁰ In New York, the “Acknowledgment of Parentage” form, as of April, 2021, requires the “birth parent” to sign with the “other parent,” who is said to be the “genetic or intended parent” of the named child.¹⁷¹ In California, there is a form for “Acknowledgment of Paternity/Parentage,”¹⁷² which can be employed by an unmarried birth-giver and “another person who is a genetic parent”¹⁷³ or by a birth-giver and an intended parent of a child “conceived through assisted reproduction,”¹⁷⁴ but which seemingly needs post-birth signatures.¹⁷⁵ In Maine, an “Acknowledgment of Parentage” can be employed by a “parent” who

169. See, e.g., VT. STAT. ANN. tit. 15C, §§ 301(a)(4), 401(a)(4) (2024). (providing a presumed hold out or residency parent may, but need not, sign a parentage acknowledgement).

170. State voluntary acknowledgment statutes on parentage establishments are reviewed in Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 63–87 (2010); Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 494–99 (2005). As well, state VPA laws vary in their disestablishment standards. Due to federal welfare subsidy mandates, VPA laws must conform to the federal Social Security Act. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.). For a discussion of disestablishment (i.e., rescissions and challenges) norms, see Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 44–53 (2003); Paula Roberts, *Truth and Consequences: Part III. Who Pays When Paternity Is Disestablished?*, 37 FAM. L.Q. 69, 82–90 (2003) (including table citing all statutes).

171. *Acknowledgment of Parentage*, LDSS-5171 (Rev. 04/21), https://www.health.ny.gov/vital_records/child_parent_security_act/docs/ldss-5171.pdf [<https://perma.cc/VJ87-YYUV>] (defining an intended parent as “an individual who intends to be legally bound as the parent of a child resulting from assisted reproduction”). Such an intent to be a parent (and not just a sperm donor) seemingly must exist at the time of conception, so that a post-birth VPA executed by a sperm donor (here, there was, at conception, an agreement not to be a father) is void. See *C.A. v. R.R.*, No. A167444, 2023 WL 8735242, at *10 (Cal. Ct. App. Dec. 19, 2023) (finding that a prebirth agreement between sperm donor and woman who later bore a child only involved his being “a member of her supportive community”).

172. *Acknowledgement of Paternity/Parentage*, CAL. DEP’T. OF PUB. HEALTH (Rev. 04/20), <https://www.eldoradocounty.ca.gov/files/assets/county/v/1/documents/services/vs22.pdf> [<https://perma.cc/PZX3-2D4U>].

173. CAL. FAM. CODE § 7573(a)(1) (West 2024).

174. *Id.* § 7573(a)(2) (referencing *id.* § 7613).

175. *Id.* § 7573(b) (requiring a “record signed by the woman who gave birth”).

resided with the mother/parent in the same household with the child and openly held out the child as the person's own child from the time the child was born or adopted and for a period of at least two years thereafter and assumed personal, financial, or custodial responsibilities for the child.¹⁷⁶

And in Massachusetts, a "Voluntary Acknowledgment of Parentage" can be employed by a presumed parent, such as the birth parent's spouse, but not in cases of surrogacy without a court order.¹⁷⁷

Only in some states can acknowledgments be filed prior to birth.¹⁷⁸ And only in some states must information on any completed genetic testing be submitted; may forms be used by residents for out-of-state births; are witnesses or notaries needed; and must there be parental or guardian consent if the signing birth-giver is young.¹⁷⁹

There are also significant differences in current acknowledgment challenge laws. Federal statutes allow paternity acknowledgments in child support settings in participating IV-D states only to be challenged by signatories on the grounds of fraud, duress, or material mistake of fact.¹⁸⁰ These grounds are not further defined by Congress and are differently implemented in the states.¹⁸¹ Standing to pursue nonsignatory challenges are not addressed by Congress.¹⁸²

State laws vary on acknowledgment challenges beyond signatories,¹⁸³ with recognized challengers including at times, alleged genetic fathers; governmental offices, officers, or both; the children; and certain family members of

176. *Acknowledgment of Parentage (AOP)*, ME. DEP'T. OF HEALTH & HUM. SERVS., <https://www.maine.gov/dhhs/mecdc/public-health-systems/data-research/vital-records/forms/Acknowledgment%20of%20Parentage%20VS27-A.pdf> [<https://perma.cc/PY5L-PLHT>].

177. *Voluntary Acknowledgment of Parentage*, COMMONWEALTH OF MASS., https://glad-org-wpom.nyc3.cdn.digitaloceanspaces.com/wp-content/uploads/2019/07/12202024_MA-Voluntary-Acknowledgment-of-Parentage_Guide.pdf [<https://perma.cc/M6MM-XTVS>].

178. *See, e.g.*, TEX. FAM. CODE ANN. § 160.304(b) (West 2023) (allowing a paternity acknowledgment to be signed before the birth of the child); VT. STAT. ANN. tit. 15C, § 304(b) (2024).

179. Parness & Townsend, *supra* note 170, at 63–87 (discussing the various state forms).

180. 42 U.S.C. § 666(a)(5)(D)(iii).

181. *See, e.g.*, Parness & Saxe, *supra* note 38, at 183–203.

182. *See* 42 U.S.C. § 666(a)(5)(D)(iii).

183. *See* Parness & Saxe, *supra* note 38, at 186–194.

acknowledgment signatories.¹⁸⁴ The standards for successful challenges can vary between nonsignatory challengers.¹⁸⁵

There are also varied time limits on post-60-day parent acknowledgment challenges.¹⁸⁶ Challenges must be commenced under written laws within a year in Massachusetts,¹⁸⁷ within two years in Delaware,¹⁸⁸ and within four years in Texas.¹⁸⁹ In Utah, a statutory challenge may be made at any time on the ground of fraud or duress, but only within four years for a material mistake of fact.¹⁹⁰ In Michigan an alleged genetic father can seek to revoke an acknowledgment of parentage “within [three] years after the child’s birth” or within one year after the acknowledgment was signed.¹⁹¹ Where there are no written time limits, (often quite broad) trial court discretion reigns.¹⁹²

184. *See id.*

185. *See, e.g.,* D.E. v. State (State *ex rel.* J.E.), 524 P.3d 1009, 1017–18 (Utah Ct. App. 2023) (citing UTAH CODE ANN. §§ 78B-15-307(1), 78B-15-623(2) (West 2024) (holding a child can challenge VPA based simply on genetic testing, with no need to show fraud, mistake or duress as required of other challengers).

186. *See infra* notes 187–92.

187. MASS. GEN. LAWS ch. 209C, § 11(a) (2024); *see also* J.M. v. C.G., 212 N.E.3d 776, 779 (Mass. 2023) (holding one year limit for genetic father to challenge another man’s VPA notwithstanding genetic father’s allegation of fraud, though he could pursue common law parentage if he proved substantial parent-child relationship existed); State *ex rel.* Sec’y of Dep’t for Child. & Fams. v. Smith, 392 P.3d 68, 74 (Kan. 2017) (holding one year (after birth) limit on signatory challenges applied though there were found technical violations (e.g., no proper notarizations) of the statute).

188. DEL. CODE ANN. tit. 13, § 8-308(a)(2) (2024); *see also* VT. STAT. ANN. tit. 15C, § 308(a)(2) (2024); Paul v. Williamson, 322 P.3d 1070, 1074 (Okla. Civ. App. 2014) (employing Oklahoma two-year limit against alleged biological father per OKLA. STAT. tit. 10, § 7700-609(B) (2024). *But see* LA. STAT. ANN. § 9:406 cmt. (2024) (“The 2016 revision repeals the two-year prescriptive period previously imposed for revocation of authentic acts of acknowledgement.”).

189. *See In re* R.A.H., 130 S.W.3d 68, 69 (Tex. 2004) (citing TEX. FAM. CODE ANN. § 160.609(b) (West 2025)).

190. UTAH CODE ANN. § 78B-15-307 (West 2024).

191. MICH. COMP. LAWS § 722.1437(1) (2024); *see also* Taylor v. Brown, No. 366736, 2024 WL 207022, at *6 (Mich. Ct. App. Jan. 18, 2024) (dismissing revocation petition for no showing of mistake of fact or newly discovered evidence).

192. *See, e.g., In re* Neal, 184 A.3d 90, 92 (N.H. 2018) (finding a sustainable exercise of trial court discretion where a 2009 VPA was challenged by male signatory in 2015 after a 2012 paternity test revealed that he was not the biological father, and a challenge was brought in November 2015, after child contact was cut off in March 2014); Kelley v. Kelley, 376 So. 3d 320, 321, 324 (La. Ct. App. 2023) (finding that a non-biological father’s acknowledgements of children in 2012 and 2014 to be absolute nullities in 2022 as there were no genetic ties).

Failure to meet the time limits in acknowledgment challenge laws may not foreclose a parentage action by a genetic father of a child born of consensual sex. In Massachusetts, a father has a “common law [claim] pursuant to the court’s equity jurisdiction” to “establish paternity” by demonstrating “a substantial parent-child relationship by clear and convincing evidence.”¹⁹³

There are further interstate differences in whether a successfully challenged acknowledgment eliminates past child support arrearages.¹⁹⁴

Intrastate variations also exist. There is precedent that different timing requirements for acknowledgment challenges operate in different settings, like probate and childcare.¹⁹⁵

E. *De Facto Parents*

The 2017 UPA expressly recognizes, unlike its predecessors, “de facto” parenthood, determined by one parent, as a form of childcare parentage for those without genetic, other biological, or formal adoption ties.¹⁹⁶ Such parenthood is dependent upon a nonparent meeting far more explicit terms than those required for residency/hold out parentage.¹⁹⁷ Under the 2017 UPA on 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;”¹⁹⁸ the nonparent must have held out the child as the nonparent’s own child

193. J.M. v. C.G., 212 N.E.3d 776, 783 (Mass. 2023).

194. See, e.g., Adler v. Dormio, 872 N.W.2d 721, 724–25 (Mich. Ct. App. 2015) (reviewing Michigan laws on when responsibility for arrearages may be eliminated).

195. See, e.g., Gibbs v. Beck (*In re Matter of Beck*), 541 P.3d 208, 214–16 (Okla. App. Civ. 2023) (holding acknowledgment challenge allowed in probate proceeding regarding whether a child was an heir, though a Uniform Parentage Act challenge in childcare setting would be differently assessed).

196. UNIF. PARENTAGE ACT § 609(d) (UNIF. L. COMM’N 2017). It further recognizes such parenthood may be determined by one of two (or three) childcare parents. *Id.* § 609(d)(5). The term “de facto” parent did not originate in the 2017 UPA. The Comment to the Act indicates its de facto parentage standard was modeled on Maine and Delaware statutes. *Id.* at Prefatory Note. The term was also employed in the 2002 ALI Principles. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (A.L.I. 2002); see also RESTATEMENT OF THE L. – CHILD. & THE L. § 1.62(a) (A.L.I., Tentative Draft No. 6, 2024) (providing de facto parentage is one of the black letter sections approved by membership).

197. 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 “a bonded and dependent relationship with the child.” UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. L. COMM’N 2017). Thus, there is not recognized a possible “bonded and dependent relationship” with a fetus, a fertilized egg, or some child of sex yet unconceived.

198. *Id.* § 609(d)(5)–(6).

and undertaken full and permanent parental responsibilities;¹⁹⁹ and the nonparent must have “resided with the child as a regular member of the child’s household for a significant period” of time.²⁰⁰

A curious requisite for de facto parentage is the express limit on who can commence a parentage proceeding. Commencement may only be undertaken by an individual who is alive and who “claims to be a de facto parent of the child.”²⁰¹ Thus, an existing legal parent, like a birth mother, seemingly cannot choose to pursue de facto parenthood, as for child support, even where the requirements are met. This hampers some child support efforts against those who undertook full and permanent parental responsibilities.²⁰² Perhaps judicial precedents can recognize common law de facto parentage, with expanded norms, though they would face separation of powers concerns.²⁰³

The 2002 ALI Principles,²⁰⁴ as well as the 2024 ALI Draft of a Restatement of the Law: Children and the Law,²⁰⁵ also recognize forms of de facto parentage for those without genetic, other biological, or formal adoption ties. Each form requires both common residence and consent by an existing legal parent.²⁰⁶

199. *Id.* § 609(d)(3)–(4).

200. *Id.* § 609(d)(1).

201. *Id.* § 609(a); see also Jeffrey A. Parness, *Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act*, 31 J. AM. ACAD. MATRIM. LAWS. 157, 160–62 (2018) [hereinafter Parness, *Comparable Pursuits*] (criticizing de facto parentage requirement).

202. UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. L. COMM’N 2017).

203. See Jeffrey A. Parness, *State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479, 495–504 (2017) [hereinafter Parness, *More Rational Distinctions*] (discussing judicial reluctance to expand childcare parentage beyond statutory norms).

204. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.03(1)(c), 3.02(1)(c) (A.L.I. 2002) (requiring 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).

205. RESTATEMENT OF THE L. – CHILD. & THE L. § 1.62(a) (A.L.I., Tentative Draft No. 6, 2024) (requiring residence with the child, as well as establishing that “a parent consented to and fostered the formation of the parent-child relationship”).

206. But only the 2002 Principles further recognize a “parent by estoppel.” PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.04(1)(a)–(c) (A.L.I. 2002). Under the 2002 ALI Principles, a legal parent, a parent by estoppel and a de facto parent each has standing to pursue/participate in an action involving judicial allocation of custodial and decision-making responsibility for a child. *Id.* A legal parent is “an individual who is defined as a parent under other state law.” *Id.* § 2.03(1)(a).

The 2002 ALI Principles recognize a de facto parent as 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.”²⁰⁷ Unlike a parent by estoppel, a de facto parent does not need to agree to co-parenting with an existing noncustodial legal parent.²⁰⁸ 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.²⁰⁹ Further, a de facto parent has no presumptive right of “access to the child’s school and health-care records to which legal parents have access by other law.”²¹⁰ The de facto parenthood standards of the 2002 ALI Principles have been well-criticized for their recognition of a “thinned out conception of parenthood.”²¹¹

The 2024 ALI Restatement Draft describes a de facto parent as a third party who establishes that they “lived with the child for a significant period of time;” were “in a parental role” long enough that they established “a bond and dependent relationship . . . parental in nature;” had no “expectation of financial

207. *Id.* § 2.03(1)(c). Alternatively, a de facto parent is one who is other than a legal parent or a parent by estoppel and who lived with and cared for the child for at least two years “as a result of a complete failure or inability of any legal parent to perform caretaking functions.” *Id.* Precedents predating the 2002 ALI Principles recognize the concept of de facto parentage in different settings. *See, e.g.*, S.D. Cnty. Dep’t of Soc. Servs. v. Williams (*In re Kieshia E.*), 859 P.2d 1290, 1295–96 (Cal. 1993) (resolving standing of a de facto parent in a juvenile delinquency proceeding); Schwebke v. Lutheran Soc. Servs. of Wash. (*In re Dependency of J.H.*), 815 P.2d 1380, 1383–84 (Wash. 1991) (en banc) (noting in a delinquency case, permissive intervention, not intervention as of right, is available to some foster parents claiming de facto (or psychological) parent status); Vlasta Z., v. San Bernardino Cnty. Welfare Dep’t (*In re B.G.*) 523 P.2d 244, 254 n.21 (Cal. 1974) (deciding not to resolve 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 2002 ALI Principles observes the “law that most closely approximates the criteria for a ‘de facto’ parent relationship is that of Wisconsin” where “visitation (but not custody) may be awarded to an individual who has formed a ‘parent-like relationship’ with a child.” PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. c (A.L.I. 2002).

208. *Id.* § 2.03(1)(b)(iii).

209. *Id.* § 2.09(2).

210. *Id.* § 2.09(4).

211. Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute’s Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1109–11 (2010) (recognizing disproportionate adverse effects on custodial mothers since de facto parenthood can arise from “chores and time-in-residence” with opposition by the mothers and potential “bad risks” of harm to children).

compensation;” and “a parent” consented to third party’s parental-like role.²¹² Thus, the 2024 Draft, like the 2017 UPA, and the 2002 ALI Principles on de facto parentage, but not like the 2002 ALI Principles on parentage by estoppel, invite a childcare parentage designation adversely impacting the childcare interests of an existing and nonconsenting, noncustodial legal parent.²¹³

Before and since 2017, American state statutes and common law precedents recognize nonmarital, nonbiological, and nonadoptive childcare parentage on terms similar to the suggested UPA and ALI de facto parent norms. For example, before 2017 there were quite comparable Maine and Delaware statutes²¹⁴ as well as a Wisconsin Supreme Court precedent²¹⁵ which were, in fact, utilized by the drafters of the 2017 UPA.²¹⁶ Since 2017, a few states have statutorily recognized de facto parenthood as defined by the 2017 UPA.²¹⁷

212. RESTATEMENT OF THE L. – CHILD. & THE L. § 1.62 (A.L.I., Tentative Draft No. 6, 2024) (requiring proof by clear and convincing evidence).

213. *Id.*; see also UNIF. PARENTAGE ACT § 609(d)(2) (UNIF. L. COMM’N 2017). *But see* PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.04 (A.L.I. 2002). The 2024 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.

214. See ME. STAT. tit. 19-A, § 1891 (2024); DEL. CODE ANN. tit. 13, § 8-201(c) (2024).

215. *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 421 (Wis. 1995) (holding that parental-like relationship can prompt visitation rights when in child’s best interests). There are common law precedents elsewhere. In 2008 the South Carolina Supreme Court, adopting a Wisconsin high court analysis, determined that a nonparent was eligible for psychological parent status if a four-prong test was met. *Marquez v. Caudill*, 656 S.E.2d 737, 241–42 (S.C. 2008) (following *Holtzman*); see also *Conover v. Conover*, 146 A.3d 433, 446–47 (Md. 2016) (citing *Holtzman* in recognizing de facto parent doctrine). And in 2009, a federal appeals court noted that the Mississippi Supreme Court had long recognized that a person standing “in loco parentis,” meaning “one who has assumed the status and obligations of a parent without a formal adoption,” has the same “rights, duties and liabilities” as a natural parent. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 182–83 (5th Cir. 2009) (quoting *Farve v. Medders*, 128 So. 2d 877, 879 (Miss. 1961)).

By contrast, in some U.S. states where there are no de facto parent statutes, courts choose not to develop precedents because any new de facto parentage norms are the responsibility of state legislators. See, e.g., Parness, *More Rational Distinctions*, *supra* note 203, at 495–504. For a forceful argument on the need for continuing the common law equitable parenthood doctrine even where there are statutes, see Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents’ Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 87–97 (2017).

216. UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM’N 2017).

217. See, e.g., WASH. REV. CODE § 26.26A.440 (2024); VT. STAT. ANN. tit. 15C, § 501 (2024).

On occasion, statutes within a single state recognize both residency/hold out and de facto parents who are neither biologically-tied to, nor formal adopters of, children.²¹⁸ Thus, the Maine Parentage Act provides for presumed parents who have resided since birth with a child for at least two years and “assumed personal, financial, or custodial responsibilities,”²¹⁹ as well as for de facto parents who, *inter alia*, have resided with the child “for a significant period of time,” established “[a] bonded and dependent relationship” with the child, and “accepted full and permanent responsibilities as a parent . . . without expectation of financial compensation.”²²⁰ Similarly, there are both recognized residency/hold out parents and de facto parents in Delaware,²²¹ Washington,²²² and Vermont.²²³

IV. NEW LAWS ON NONADOPTIVE SECOND PARENT CHOICES BY SINGLE PARENTS AFTER BIRTH?

Second childcare parentage can now be established without formal adoption through single parent choices made long after birth. Establishments can come at the behest of a would-be second parent (as when desiring legally recognized childcare parent status) or at the behest of a single custodial parent (as when desiring a court-recognized child support responsibility).²²⁴ Parentage establishments may, but need not, require parental-like acts by those chosen. Nor do they inevitably require proven genetic ties between the child and the chosen second parent.

218. See e.g., ME. STAT. tit. 19-A, §§ 1881(3), 1891(3) (2024).

219. *Id.* § 1881(3).

220. *Id.* § 1891(3).

221. DEL. CODE ANN. tit. 13, §§ 8-201(c), 8-204(a)(5) (2024).

222. WASH. REV. CODE §§ 26.26A.115(b), 26.26A.440 (2024).

223. VT. STAT. ANN. tit. 15C, §§ 401(a)(4), 501(a) (2024).

224. At times, others, like the state or a family member of a would-be second parent can pursue second parent status. The state can be interested in child support (perhaps reimbursement) and a family member can be interested in a formal familial relationship (like grandmother) in order to secure nonparent visitation. See, e.g., UNIF. PARENTAGE ACT § 602(5) (UNIF. L. COMM’N 2017) (providing a child support agency has standing to seek a parentage adjudication); *People v. Matthew A. (In re A.A.)*, 43 N.E.3d 947, 948 (Ill. 2015) (holding grandparents can intervene in order to seek visitation with the biological child of their dead son in a suit brought by the child’s guardian ad litem to challenge a voluntary paternity acknowledgment signed by another man).

New laws are needed on nonadoptive second childcare parenthood founded on conduct long after birth.²²⁵ Reforms should take account, as did the 2002 ALI Principles in its “parent by estoppel norm,” of the childcare parentage rights of any existing noncustodial legal parent.²²⁶ Notwithstanding the 2017 UPA’s failure, some state legislatures and courts have taken account.²²⁷

In considering new laws, state lawmakers should determine what, if any, coherency is needed between nonadoptive and adoptive parentage chosen by single custodial parents arising solely from acts long after birth. As well, they should determine what, if any, coherency is needed between the varying after-birth nonadoptive parentage forms. Finally, they should determine whether certain forms of nonadoptive second parentage should be eliminated (as with residency/hold out if there is available *de facto*) or should be limited (as with residency/hold out needing to start at birth as under the later UPAs). Some suggested reforms follow. Any reforms should be guided by some key issues, a few of which follow.

There are issues involving policy differences on single parent choices depending upon when second parent choices are made. Only with choices made sometime after birth have there been opportunities for prospective nonadoptive parents to undertake significant actual childcare of existing children.²²⁸ Lawmakers must consider how prebirth or at-birth potential childcare conduct might be differently assessed as compared to actual childcare conduct beginning only some extended time after birth.

With formal adoptions, at times the age of the child prompts differing norms on the requisite conditions, as when younger children are more easily adopted.²²⁹

225. While unaddressed in this Article, new laws may also be needed on after birth pursuits and choices of new third childcare parents. Some states, at times prompted by the 2017 UPA, allow for three childcare parents. *See, e.g.*, CAL. FAM. CODE § 7612(c) (West 2024); WASH. REV. CODE §§ 26.26A.115(b), 26.26A.460(3) (2024).

226. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)(iii) (A.L.I. 2002).

227. *See, e.g.*, *E.N. v. T.R.*, 255 A.3d 1, 6 (Md. 2021); *Martin v. MacMahan*, 264 A.3d 1224, 1231–36 (Me. 2021); *see also* D.C. CODE § 16-831.01(1) (2025) (stating *de facto* parentage requires agreement of two existing parents if there are two).

228. *See, e.g.*, UNIF. PARENTAGE ACT § 609(d) (UNIF. L. COMM’N 2017).

229. *See, e.g.*, OKLA. STAT. tit. 10, § 7505-4.2(C)(1)–(2) (2024) (explaining that for a minor placed for adoption within 90 days or within 14 months of birth, consent of the father or putative father to an adoption if there was failure to exercise parental rights, including failure to contribute to support; but only for a child placed within 14 months of birth does the statute say “failure to contribute to the support of the mother during her term of pregnancy shall not in and of itself be grounds for finding the minor eligible for adoption without such father’s consent”).

With younger children, greater deference is afforded to single-parent choices on possible formal adoptions because, e.g., there is no significant evidence available on the chosen parent's actual childcare, because the single-parent's choice is presumed to be made in the child's interest, and because state policy generally prefers two parents for every child (at least when born of consensual sex).²³⁰ For any nonadoptive parents chosen long after birth, as noted, the earlier actual childcare acts can be assessed. Issues arise, then, on whether state nonadoptive second parent laws should follow, in some way, the state's second parent adoption laws, which may be general in nature on proposed adopters or specific to certain types of proposed adopters, like stepparents, foster parents, or grandparents (or others genetically tied).²³¹

Constitutionally, in approaching nonadoptive second-parent choices by single parents, lawmakers must consider the parental opportunity interests of non-birth-giving genetic parents of children born of consensual sex since they often prompt protected childcare interests. The U.S. Supreme Court has recognized parental opportunity seizure in formal adoption cases and via birth certificate recognitions or other post-birth acts like providing child support while acting in parental-like ways.²³² When seized by genetic parents prebirth, at birth, or after birth, the post-birth choices by the birth-giving parents of nongenetic second parents are limited, particularly where there is no three-parent option. With long after-birth single-parent choices of second childcare parents, determinations of parental opportunity seizures must be assessed differently than when alleged seizures occur prebirth or at-birth. With post-birth seizures, time requirements are

230. See, e.g., CAL. FAM. CODE § 7570(a)(2) (West 2024) (recognizing a compelling state interest for parentage establishment opportunities via a simple administrative system, such as VPAs, for children born of consensual sex). For parentage of children born of assisted reproduction, see *id.* § 7613.

231. Special laws favoring certain prospective formal adopters include 750 ILL. COMP. STAT. 50/1(B) (2024) (defining related child); *id.* 50/3 (stating with an adoption of adults, there is a need for a two-year residency with the prospective adopters except where the adopters are related to the adult); ARIZ. REV. STAT. ANN. § 8-105(N) (2024) (stating preadoption certification norms do not apply to a prospective adoptive parent who is married to the birth or legal parent of the child to be adopted or who is "an uncle, aunt, adult sibling, grandparent or great-grandparent of the child to be adopted"); CAL. FAM. CODE § 9000.5(b) (West 2024) (exempting stepparent adoptions from certain process requirements); *id.* § 8600; *id.* § 8601 (providing adult adoption of unwed minor requires 10-year age difference except if it is in best interest of the parties, in the public interest, and the prospective adoptive parent is a stepparent, sister, brother, aunt, uncle, or first cousin).

232. *Lehr v. Robertson*, 463 U.S. 248, 250–51 n.4 (1983) (recognizing that via a New York statute, notice of a prospective adoption must be given to a man recorded as the father on the birth certificate or a man openly living with the child and the child's mother while holding himself out as the child's father).

sensible and permeate laws, as with the laws on whether genetic parents have acted promptly after birth in seizing their protected childcare opportunities.²³³

Policies on second-parent choices should also differ in after-birth second-parent choices since those with genetic ties (or other biological ties) to children may have developed intimate family or family-like relationships with the children that are deemed worthy of continuation, even if not constitutionally protected.²³⁴ For example, consider family members of unwed genetic fathers of children born of consensual sex who themselves failed to seize their parental opportunity interests. In formal adoption settings such relationships are sometimes protected, as when a natural parent dies or becomes mentally incompetent and a stepparent seeks formal adoption.²³⁵ Comparably, certain family members of birth-givers sometimes have their own intimate family relationships with the children that are deemed worthy of preservation, as with third-party (i.e., nonparent) visitation laws where the gestating parent has died and her minor child is subject to a stepparent adoption.²³⁶ In assessing second-parent choices after birth, beneficial, preexisting nonparental family relationships should be considered.²³⁷

Further, policy differences between prebirth, at-birth, and after-birth second-parent choices are appropriate because only post-birth are there greater chances that genetic testing could or did occur.²³⁸ Where testing could have occurred, but was not undertaken, issues arise regarding the import of failures to test in later determinations of second parenthood. Only in after-birth settings might an alleged

233. See, e.g., 750 ILL. COMP. STAT. 50/3 (2024).

234. See UNIF. ADOPTION ACT §§ 4-102(a)(3), 4-113(c) (UNIF. L. COMM'N 1994).

235. See, e.g., *id.* §§ 4-102(a)(3), (c), 3-504(c) (such an adoption petition may be joined with a petition to terminate the parental rights of the other parent, which may only be granted if in the best interest of the child).

236. See, e.g., *id.* § 4-113(c) (favoring current or former family members, including grandparents and siblings).

237. Some have urged federal constitutional protections have been/should be afforded certain family relationships between nonparents and children, as in claims under 42 U.S.C. § 1983. See, e.g., *Chambers v. Sanders*, 63 F.4th 1092, 1101 (6th Cir. 2023) (finding substantive Due Process right to family integrity on behalf of child for harm caused child because of a parent's wrongful incarceration requires governmental acts "with a culpable state of mind directed at the family relationship").

238. See Marcel Ramirez, *Paternity Test: Everything You Need to Know About DNA Tests*, ALL. DNA LAB'Y (Nov. 6, 2023), <https://www.alliancedna.com/paternity-test-everything-you-need-to-know-about-dna-tests/> [<https://perma.cc/MGU9-Z665>]; Andras Kovacs, *Understanding Paternity Test Results: A Comprehensive Guide to Interpretation*, THE DNA TESTS, <https://thednatests.com/understanding-paternity-test-results/> [<https://perma.cc/33CN-BL5M>].

genetic parent be faulted for not obtaining a positive test where genetic ties are relevant to second-parent status.²³⁹

As well, the motivations underlying proposed single-parent choices of second parents made after birth, compared to prebirth or at-birth choices, should be assessed differently. Post-birth choices more likely involve motivations beyond desired childcare, as when tort or probate recoveries are available to people chosen as second parents.

With these issues in mind, consider now possible law reforms that would validate or reject single-parent choices of second parents made long after birth.

A. Spousal Parents

Amendments to spousal-parent laws covering (actual or attempted) marriages long after birth should be considered.²⁴⁰ A California law prompted spousal parentage, but only if the marriage occurred within two years of birth.²⁴¹ In *Los Angeles County Department of Children and Family Services v. Mario A. (In Re Kiana A.)*, Mario, the genetic father of Kiana, married Kiana's mother, but secured no spousal parentage because the wedding occurred too long after birth.²⁴²

239. Consider, e.g., voluntary acknowledgements in paternity (in birth through sex settings) and in maternity (in assisted reproduction settings involving fertilized egg implants) where genetic ties are needed for second parent status.

240. Post-birth marriage at or very shortly after birth should be distinguished and continue to prompt spousal parentage. See Parness, *Unconstitutional Parenthood*, *supra* note 11, at 221. Here, there is more likely at least some good faith belief as to, if not knowledge of, genetic ties. Sometimes longer after birth, a residency/hold out parentage law can operate without spousal parentage. See, e.g., UNIF. PARENTAGE ACT § 204 (UNIF. L. COMM'N 2017). State laws on residency/hold out parents do differ. Marriages long after birth more likely prompt nonnatural stepparent status, which frequently has its own legal guidelines on achieving parenthood through formal adoption laws. See, e.g., N.M. STAT. ANN. § 32A-5-32(B)–(C) (2024) (stating a stepparent who has lived with adoptee for more than a year after marriage to custodial parent need not have a pre-placement study or post-placement report; may obtain a waiver of the 90 day waiting period between the filing and issuance of a decree; and a noncustodial parent's obligatory counseling can be waived).

241. See 1990 CAL. STAT. 543 (previously codified at CAL. EVID. CODE § 621).

242. 113 Cal. Rptr. 2d 669 (Ct. App. 2001). Mario married Kiana's birth mother on May 9, 1990, "two years after Kiana A.'s birth." *Id.* at 674. At about the time of Kiana's birth in the spring of 1988, Mario was arrested and spent 12 years continuously incarcerated, with a parole release likely occurring in October 2001. *Id.* At the time of Kiana's birth, and until January 1994, California's spousal parent law provided "the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage," with rebuttal only by "blood tests" within two years of the child's date of birth. 1990 CAL. STAT.

Should genetic ties distinguish him from Kevin who had no such ties, but who, like Mario, resided with and held out Kiana as his own under residency/hold out parentage norms? Is it important that Mario, but not Kevin, will certainly be obligated to provide child support for Kiana? Is it important if Mario missed the filing deadline for paternity suits? These are questions left to state lawmakers by the U.S. Supreme Court. As well left to the states is the question, once both Mario and Kevin deemed a residency/hold out parent, of how a court is to choose between them. Should Mario's genetic ties give him a positive (if not dispositive) edge, or a negative inference in his dispute with Kevin over second parenthood?

If spousal-parent laws continue to operate long after birth without genetic ties, lawmakers must contemplate whether they need to be reconciled with certain laws on formal adoptions, including the laws on who gets adoption notices and the laws on time limits for genetic fathers to seek childcare parentage (because, e.g., barriers arise under *Lehr* due to failures to seize parental opportunity interests in a timely way). Given that Mario, not Kevin, possessed the federal constitutional opportunity interest in establishing childcare parentage with his genetic child born of consensual sex to an unmarried woman,²⁴³ the court ruling favoring Kevin over Mario is sensibly read as the court choosing solely between two residency/hold out parents, with Mario's paternity opportunity interest having been earlier lost so that genetic ties were not relevant.²⁴⁴

New spouses often can secure parentage through mechanisms other than marital presumptions.²⁴⁵ These avenues frequently afford better protection of the children's interests,²⁴⁶ as well as the interests of any existing or potential legal

543 (previously codified at CAL. EVID. CODE § 621). Rebuttal was available to the husband or the wife as long as "the natural father ha[d] filed an affidavit acknowledging paternity." *Michael H. v. Gerald D.*, 491 U.S. 110, 115 (1989). Since *In re Kiana A.*, California statutes have been amended and now allow broader rebuttal opportunities. *See* CAL. FAM. CODE § 7541 (West 2024).

243. Justices Scalia, Rehnquist, O'Connor, and Kennedy, formed a plurality recognizing no state obligation to recognize a similar opportunity for a natural father where birth is to a mother married to another. *See Michael H.*, 491 U.S. at 129–30.

244. A finding of Mario's paternity opportunity loss can be founded on his incarceration at the time of Kiana's birth, with child contact coming only through letters and phone calls. *In re Kiana A.*, 113 Cal. Rptr. 2d at 674.

245. *See, e.g.*, UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM'N 2017).

246. With many formal adoptions, there are at least some governmental inquiries into the prospective adopter's suitability for childrearing. *See, e.g.*, N.M. STAT. ANN. § 32A-5-13(B) (2024) (providing that a pre-placement study "approving the petitioner as an appropriate adoptive parent" is usually needed for "issuance of a placement order"). With de facto parentage, there must be an established parental-like relationship. *See, e.g.*, UNIF. PARENTAGE

parents beyond the birth-giver. These mechanisms arise through laws, prompted by the UPAs, that came long after spousal parentage was generally recognized.²⁴⁷ Yet spousal-parent laws have often remained intact, notwithstanding that their norms seem to be at odds with some new norms on non-spousal parentage. New norms include residency/hold out and de facto parent laws.²⁴⁸ Unlike marriages before conception, marriages after conception but before birth, and marriages very shortly after birth (actual and attempted), marriages long after birth are less likely to involve new spouses with genetic ties and more likely to clash with other second parent claims, especially when parentage law policies are significantly dependent on genetic ties.²⁴⁹ Perhaps spousal-parent laws operating long after birth should be eliminated in states with clashing second-parent laws.

If spousal-parentage laws operating after birth remain, what should “very shortly” after birth mean? Under the 1973 UPA, a spousal-parentage presumption arises, for a man, *inter alia*, from a marriage or attempted marriage to the “natural mother” after the child’s birth as long as “he is obligated to support the child under a written voluntary promise or by court order.”²⁵⁰ There are no time limits under this version.²⁵¹ More importantly, there is no consideration in advance of a recognition of presumptive parenthood that the presumed spousal parent actually provided child care or that a presumption will benefit the child.²⁵² As noted, newer laws on nonadoptive childcare parentage, like residency/hold out or de facto parenthood laws, are focused, in part, on past childcare.²⁵³ Further, public policy favoring the import of a child’s interests, beyond financial, could reasonably prompt alterations of spousal parentage based on marriages long after birth.

ACT § 609(d)(1) (UNIF. L. COMM’N 2017); WASH. REV. CODE § 26.26A.440 (2024); VT. STAT. ANN. tit. 15C, § 501 (2024)

247. See Feinberg, *Restructuring Rebuttal*, *supra* note 35, at 248–54 (covering the history and development of the marital presumption).

248. See Parness, *Comparable Pursuits*, *supra* note 201, at 173 (describing the use of hold out and de facto parentage in the 2017 UPA).

249. *Supra* notes 53–61 and accompanying text.

250. UNIF. PARENTAGE ACT § 4(a)(3)(iii) (UNIF. L. COMM’N 1973) (recognizing presumptive spousal parentage if there is a voluntary parentage acknowledgment or appearance on a birth certificate). These provisions substantially appear, in MONT. CODE ANN. § 40-6-105(1)(C) (2023); COLO. REV. STAT. § 19-4-105(1)(c) (2024); ALA. CODE § 26-17-204(a)(4) (2024); MINN. STAT. § 257.55(c) (2024); HAW. REV. STAT. § 584-4(a)(3) (2024).

251. See UNIF. PARENTAGE ACT § 4(a)(3)(iii) (UNIF. L. COMM’N 1973).

252. *Id.* § 4.

253. See Parness, *Comparable Pursuits*, *supra* note 201, at 173 (describing hold out parentage as cohabitation with the child from birth for at least two years, treating the child as one’s own; and describing de facto parentage as a bonded parental relationship with the child.).

State lawmakers must reconsider their long-established spousal-parent laws in light of the new avenues to second parenthood established by acts undertaken long after birth where genetic ties or marriage are not required. Where non-spousal second-parent choice laws are available, but the norms cannot be met—as with the need for a developed parental-like relationship—the recognition of spousal parentage arising from a marriage long after birth does an end run around those other parentage laws. The 2000 UPA generally follows the 1973 UPA on afterbirth presumptive spousal parentage.²⁵⁴ By contrast, the 2017 UPA on spousal parenthood is not only gender neutral, but also has no presumption favoring a spouse who simply promised support.²⁵⁵ As noted earlier, under the 2017 UPA, but not the 1973 or 2000 UPA, an afterbirth spouse can pursue *de facto* parentage (though, seemingly and surprisingly, may not be able to be pursued as for child support),²⁵⁶ as well as residency/hold out parentage.²⁵⁷

B. Residency/Hold Out Parents

Where there are no existing or expecting noncustodial second parents at the time of birth (i.e., no available genetic parental opportunity interests), often in settings involving nonmarital births arising from sex, a single parent²⁵⁸ at birth can easily open the door to possible future second parenthood by inviting acts leading to residency/hold out parentage under law. Alternatively, a single parent can support, at birth, a formal adoption plea on behalf of another.²⁵⁹ Only in the latter setting is there any significant state oversight.²⁶⁰ Some states, including Illinois, do

254. UNIF. PARENTAGE ACT § 204(a)(4)(C) (UNIF. L. COMM'N 2000) (stating man promised in a record to support the child as his own).

255. UNIF. PARENTAGE ACT § 204(a)(1)(C) (UNIF. L. COMM'N 2017) (recognizing only after-birth spouses (or attempted spouses) who asserted parentage in a state agency birth record or who is named, upon consent, on the birth certificate).

256. *Id.* § 609(a)(1) (“a proceeding to establish [de facto parentage of a child] may be commenced only by an individual who: (1) is alive . . . and (2) claims to be a de facto parent.”).

257. *Id.* § 602(4) (providing a proceeding to adjudicate parentage may be maintained by “an individual whose parentage of the child is to be adjudicated,” including a presumed post-birth spouse under § 204(a)(1)(C)).

258. Such a single parent need not be the birth-giver, and can be a man, as through an assisted reproduction surrogacy pact. *See, e.g., id.* § 703 (providing that an individual who consents to assisted reproduction or is a party to a gestational surrogacy agreement is a parent).

259. *See* UNIF. ADOPTION ACT § 2-401(a) (UNIF. L. COMM'N 1994).

260. *See, e.g.,* UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM'N 2017).

not recognize residency/hold out parentage, thus requiring the formal adoption avenue to childcare parentage for partners of certain single parents.²⁶¹

Of course, sensitivity is needed in residency/hold out parent settings where there are existing or expecting parental interests, as with some unwed genetic fathers of children born of consensual sex (who, for example, signed VPAs), some spouses of those giving birth, and some genetic fathers or mothers of children born of assisted reproduction (who, for example, are intended parents by agreements with those giving birth).²⁶²

As conduct prompting residency/hold out parentage for a second parent only prompts parenthood long after birth, lawmakers should consider when, if at all, its legal norms should vary from the norms applicable to other post-birth adoptive, nonadoptive, nonmarital, and nongenetic parentage.²⁶³ Residency/hold out parentage only arises long after birth where potential parents have resided with children who they held out as their own. But no evidence seemingly is needed on

261. See, e.g., 750 ILL. COMP. STAT. 46/204(a) (2024) (providing presumed parentage limited to spousal parents); James R.D. v. Maria Z. (*In re* Parentage of Scarlett Z.-D.), 28 N.E.3d 776, 790 (Ill. 2015) (holding the legislature has superior institutional competence so that a common law equitable adoption doctrine, in the absence of spousal parentage, was rejected). Similar is KAN. STAT. ANN. § 23-2208(a) (2024) (providing presumed parent statute has no residency/hold out provisions); MO. REV. STAT. § 210.822(1) (2024). But see UTAH CODE ANN. § 78B-6-117(3) (West 2024) (“[A] child may not be adopted by an individual who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state unless the individual is a relative of the child or a recognized placement under the Indian Child Welfare Act.”). The separation of powers issues arising when courts are asked to expand the forms of nonadoptive parentage beyond those recognized in statutes are reviewed in Parness, *More Rational Distinctions*, *supra* note 203, at 479.

262. A genetic non-gestating parent of a child born of consensual sex has only a limited parental opportunity interest in establishing parental childcare rights. *Lehr v. Robertson* 463 U.S. 248, 260–61 (1983) (requiring the development of a parent-child relationship, demonstrating “a full commitment to the responsibilities of parenthood”). Further limits can be set by state laws. One such state law limit is a statute establishing an irrebuttable presumption of parentage in the spouse of a gestating parent. *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989). Another limit on the parental opportunity interest could be a state law designed to protect an “extant” family (as a marital family was protected in *Michael H.*, 491 U.S. at 127).

263. Note that standards do vary for at-birth and long-after-birth formal adoptions. See, e.g., OKLA. STAT. tit. 10, § 7505-4.2(c) (2024) (indicating the adoption of a minor child who was put up for adoption within 90 days of birth does not require consent of the unwed genetic father who failed to contribute child support (including prebirth failures), while the adoption of a minor child put up for adoption within 14 months of birth more often requires consent of father, even where there was prebirth support failures).

the promotion of the child's best interests.²⁶⁴ And there is good reason to distinguish between inviting residency/hold out and consenting to formal adoption.

Lawmakers should also consider whether the norms on residency/hold out parentage should follow, in at least some ways, the norms on formal adoptions occurring long after birth. Formal adoption laws limiting those who can adopt a child long after the child's birth are worthy of legislative consideration. These laws typically exclude, for example, child abusers.²⁶⁵ Child abusers should not qualify as childcare parents simply because they cohabited with single parents and held out children as their own.

Further sensible reforms worthy of consideration for residency/hold out parent laws are adaptations of formal adoption norms recognizing less onerous paths for those genetically tied to the children and for those who also married single custodial parents where spousal-parentage laws would not operate (e.g., special stepparent childcare laws). Thus, as noted, someone like Mario might be given some preference over someone like Kevin in a case involving a child like Kiana A. due to Mario's genetic ties.²⁶⁶

Finally, lawmakers should consider the limits to residency/hold out parentage suggested in the latter UPAs, especially where de facto parentage norms operate with residency/hold out parent laws. Under the 2017 UPA, a required parental-like relationship must be held "for the first two years of the life of the child."²⁶⁷ Residency/hold out norms applicable to acts which only begin long after birth seem unnecessary and are arguably preempted by the more explicit requirements of de facto parent laws.²⁶⁸ Some residency/hold out norms do not assure a child's best interests are served in the same manner as do the de facto parentage norms.

264. See, e.g., UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973); UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N 2000); UNIFORM PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017). A child's best interests will be considered where there are grounds for the termination of parental rights. See, e.g., N.J. Div. of Child Prot. & Permanency v. D.C.A. (*In re Guardianship of I.A.C.C.*), 304 A.3d 660, 674–75 (N.J. 2023) (applying N.J. STAT. ANN. § 30:4C-15.1(a) (West 2024)).

265. See *supra* notes 64–65.

266. See *supra* notes 242–45 and accompanying text.

267. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017).

268. See *id.* § 609. Not all states with residency/hold out parent laws also have de facto parent laws. See, e.g., CAL. FAM. CODE § 7611 (West 2024). De facto parentage was first recognized in the 2017 UPA; further the act did not alter the requisites for residency/hold out parentage, though it made an "individual," not just a man, eligible to become a residency/hold out parent. UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM'N 2017); see also *id.* § 204(a)(3); UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N 2000).

By contrast, especially where there is no de facto (or comparable, as with equitable adoption)²⁶⁹ nonadoptive parent law for children born of consensual sex, the 1973 UPA approach to residency/hold out parentage makes some sense, as it secures stability in established familial relations, though it does not require that parental-like acts begin right after birth.²⁷⁰ In a judgment or order for custody/visitation, judicial oversight is always available to serve a child's best interests.²⁷¹ Nevertheless, perhaps a child's age limit in a residency/hold out parent law is wise, reflecting that formal adoption processes are always available for older children, with the opportunity in formal adoptions to learn of the child's desires and of any developed nonparental family relationships. In some formal adoption laws today, once a child reaches a certain age, the child's preferences must be heard and generally followed.²⁷²

C. Voluntary Acknowledgment Parents

Voluntary acknowledgment parentage, including male parentage through VPAs, generally can be established at birth and after birth, as well as prebirth in some states.²⁷³ Though the UPA guidelines and the Federal Social Security Act requisites on voluntary parent acknowledgments primarily address in-hospital acknowledgments serving the federal policy of states seeking reimbursements of federal child support payments, state acknowledgment processes now serve public policies prompting second-parent recognitions arising long after birth, which are sometimes based on acts occurring long after birth.²⁷⁴ The 2017 UPA authorizes parentage acknowledgments (including but not limited to VPAs) at least two years after birth for alleged residency/hold out parents.²⁷⁵

Again, as with residency/hold out parentage sought long after birth, lawmakers must be sensitive to the interests of those serving as parents and nonparent family members to children beyond those who are or may ever be

269. See, e.g., *James R.D. v. Maria Z. (In re Parentage of Scarlett Z.-D.)*, 28 N.E.3d 776, 790 (Ill. 2015); see also *Mullins v. Picklesimer*, 317 S.W.3d 569, 579 (Ky. 2010) (stating that de facto custodian recognition “would essentially give the child another parent,” justified as a “partial waiver” of a single parent’s custodial rights).

270. See UNIF. PARENTAGE ACT § 4 (UNIF. L. COMM’N 1973).

271. *Id.* § 15(c).

272. See, e.g., N.C. GEN. STAT. § 48-3-603(b)(2) (2024) (stating in an adoption proceeding the “court may issue an order dispensing with the consent of . . . [a] minor 12 or more years of age upon a finding that it is not in the best interest of the minor to require the consent.”).

273. See UNIF. PARENTAGE ACT §§ 301–302 (UNIF. L. COMM’N 2017) (after and at birth); 750 ILL. COMP. STAT. 46/304 (2024) (prebirth).

274. See *supra* note 107 and accompanying text.

275. UNIF. PARENTAGE ACT §§ 204(a)(2), 301 (UNIF. L. COMM’N 2017).

designated acknowledged legal parents. Consider a few examples. A birth-giver, with a longtime partner who acted in parental-like ways toward their child, now wishes to exclude the partner from their child's future life, signs an acknowledgment with someone else, perhaps the genetic father, and thereby limits possible legal parenthood for the previous partner regardless of the partner's desires, of the nature of the earlier partner-child relationship, of child's best interests, and of the child's own desires. Further, consider a birth-giver who signs a VPA with the genetic father in order to exclude from their child's future life her current spouse, whose post-birth marriage prompted a parentage presumption that could be overcome solely by genetic testing, even where the genetic father failed, continues to fail, and will very likely fail in the future to care for and financially support the child and even where the spouse had been a good expecting parent (i.e., during pregnancy) and a good childcare parent thereafter. Assessments of prospective adopters' fitness to childcare accompany all formal adoptions, but similar assessments by the state generally are lacking when parental childcare status is sought via parentage acknowledgments.

D. *De Facto Parents*

De facto parent laws, as with residency/hold out parent laws, necessarily involve parental-like actions long after birth by those who are chosen by existing childcare parents.²⁷⁶ Here again, sensitivity is needed for the parental childcare liberties of those not making the choices, including existing and expecting parents who are genetically tied and who continue to have constitutionally protected parentage opportunity interests, as with some genetic fathers of children born of extramarital sex and as with some one-time partners of custodial parents who earlier agreed to and participated in artificial inseminations contemplating dual parenthood upon birth.

Beyond the respect warranted for such liberties, state lawmakers should consider new limits on de facto parent laws. For example, general exemptions of child abusers are warranted, though some abusers perhaps should be allowed to pursue parentage through special procedures; here, the exemptions in de facto parent laws should be harmonized with exemptions in formal adoption laws.

Outside of childcare, de facto parent recognition can benefit children and their parents in other settings. The 2017 UPA generally recognizes de facto parentage applies "for all purposes."²⁷⁷ Such parentage might prompt applications

276. *See id.* § 609 (de facto parents must take certain actions which must involve the childcare parent, i.e. the child cannot live with the de facto parent without the childcare parent allowing it).

277. *See id.* §§ 203, 609.

of laws on probate, tort, and domestic violence involving intrafamily relationships.²⁷⁸ Unfortunately, the 2017 UPA limits de facto parent pursuits to those seeking their own parental status.²⁷⁹

E. Other Possible Reforms

Finally, reforms of laws on nonadoptive second-parent choices by single custodial parents should be considered in other settings, including where noncustodial childcare parents remain, as with former spouses or voluntary parentage acknowledgers. Like formal adoption choices, new nonadoptive parent choices can be made where there are already two childcare parents under law.²⁸⁰ Recall, for example, the aforementioned residency/hold out and de facto parentage laws allowing—on their faces—one parent choices of new parents although there are already two recognized legal parents and there is no three-parent option. Unlike formal adoptions, there is no need for termination of one parent’s childcare status for a new second childcare parent to be named under certain nonadoptive second-parent norms.²⁸¹

Lawmakers reviewing nonadoptive second-parent laws should also consider whether a prenuptial (i.e., premarital) pact provision on future second parentage between a single custodial parent and a prospective spouse should necessarily prompt an inquiry post-marriage into parenthood for the now spouse that is effective long after birth and depends on the pact and post-marriage parental-like acts by the spouse, though the single custodial parent now objects. There could be certain conditions imposed on enforceable pacts, like a written contract, a marriage for a certain duration where there was common residence, and stepparent child support during the entire marriage. Such pacts would be useful in states where state laws do not recognize residency/hold out, de facto, or comparable nonadoptive

278. See, e.g., TEX. EST. CODE ANN. § 22.004(a)(2) (West 2023) (child includes one who was equitably adopted); CAL. PROB. CODE § 6453(a) (West 2024) (stating natural parent includes a person presumed a parent under Uniform Parentage Act, as with residency/hold out).

279. For a criticism of this limit, see, Parness, *Comparable Pursuits*, *supra* note 201, at 160–62 (offering a criticism of the UPA’s limitation).

280. See UNIF. PARENTAGE ACT § 613(c) (UNIF. L. COMM’N 2017).

281. Recall the UPA provisions calling for “weightier considerations of policy and logic” to control choices between two or more presumed parents. UNIF. PARENTAGE ACT § 4(b) (UNIF. L. COMM’N 1973). Also recall the UPA provisions calling for “best interest of the child” to control, with enumerated factors to be considered. UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM’N 2017); see also Parness, *Constitutional Limits*, *supra* note 135, at 461–78 (criticizing legislative and judicial failures to consider the parental liberties in some second-parent choice laws).

parentage for chosen second parents,²⁸² especially in states that recognize other intended parent pacts in and outside assisted reproduction births.²⁸³ Even in states where there are nonadoptive second-parent laws, prenuptial agreement laws can be beneficial; they should have different requisites on new parentage than operate in residency/hold out, de facto, or similar nonadoptive parent law settings, as only with prenuptial pacts might there be required writings and contractually recognized child support duties.²⁸⁴

Relatedly, lawmakers should also now consider whether a judicial determination of a new nonadoptive parent long after birth by a single custodial parent can be foreclosed by agreement (perhaps in a prenuptial or in a postmarital pact). For example, when a gestating parent with a child divorces and then remarries, an earlier agreement with the now-former spouse might be able to rule out a second legal parentage, as through use by the former spouse of a residency/hold out or de facto parent law.²⁸⁵ Here, superior parental rights are supported through recognition of a single parent's clear intentions.

Lawmakers should also consider whether a custodial parent who has separated from a partner (male or female) who provided childcare can enforce a promise made to rule out possible new legal parenthood (as per residency/hold out or de facto parenthood) which might otherwise arise for the partner, except perhaps for new parentage founded on a formal adoption. Where such foreclosures are possible, a written agreement should be legally mandated, mitigating the need for later significant fact-finding involving contentious parties.²⁸⁶

282. See, e.g., *Potts v. Potts*, No. M2020-00170-COA-R3-CV, 2021 WL 2226622, at *10–12 (Tenn. Ct. App. June 2, 2021) (concluding fertilized egg implant birth to one who agreed in a court order to a permanent parenting plan for her former spouse gave the former spouse standing to seek custody; there was only a post-birth marriage).

283. Intended parentage pacts between a natural parent and a stepparent occurring during marriage dissolution proceedings are enforceable in Illinois, which to date has no residency/hold out, de facto, or similar nonadoptive parent doctrine. See *James R.D. v. Maria Z. (In re Parentage of Scarlett Z.-D.)*, 28 N.E.3d 776, 790 (Ill. 2015) (acknowledging the state courts' deference to legislators); *In re Marriage of Schlam*, 648 N.E.2d 345, 351 (Ill. App. Ct. 1995) (holding that an earlier agreement embedded in a judgment estopped the gestating parent from thereafter challenging joint custody with a former stepparent with no genetic ties).

284. See Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GA. ST. U. L. REV. 343, 355–56 (2015) (acknowledging that some states recognized the ability of prenuptial agreements to affect parental obligations).

285. See *id.* at 355–67.

286. Other procedures may also be wise, including perhaps notice to anyone acting in a parental-like way whose road to legal parentage may only be available through formal adoption.

Further, lawmakers should also consider when a choice by a single custodial parent of a new nonadoptive parent effective long after birth can be made, even though another's existing legal parentage will (effectively) end without consent and without a formal parental rights termination proceeding. This occurs, for example, through a judicial determination on which of two people, each earlier recognized as a childcare parent under law, should be deemed a continuing childcare parent.²⁸⁷ A person so recognized can lose childcare opportunities though never deemed unfit and though some harm may come to the child, as when state laws fail to recognize a three-parent option, an option then not available in the earlier described parentage dispute between Mario and Kevin.²⁸⁸ Put differently, lawmakers should consider whether residency/hold out or de facto parenthood should only be available when there is a single parent under law with sole custody.²⁸⁹

Finally, in contemplating current and new laws on nonadoptive parent choices by single legal parents taking effect long after birth, lawmakers should consider whether second-parent choices by gestating parents deserve greater deference than similar choices by non-gestating parents. Some commentators have urged there be greater deference to decision-making by gestating parents, though at times for differing reasons, including the unique "labor" of the person who gave birth²⁹⁰ and the presumptive justifications that should attach to a natural mother's childcare decisions.²⁹¹

V. CONCLUSION

Besides a prebirth or at-birth choice by a single custodial parent of a second legal parent by marriage, acknowledgment, contract, or otherwise, a single parent

287. See, e.g., *In re Jesusa V.*, 85 P.3d 2, 15 (Cal. 2004) (dispute over continuing childcare parentage between the child's mother, the mother's spouse, and a residency/hold out parent).

288. See *supra* notes 242–245 and accompanying text. As of January 2020, California has a three-parent option. CAL. FAM. CODE § 7612(c) (West 2024); 2018 Cal. Legis. Serv. 876 (West); see also UNIF. PARENTAGE ACT § 613(c) (Alternative B) (UNIF. L. COMM'N 2017).

289. Where there are two recognized childcare parents under law, the sole custodial parent generally cannot choose another person as a childcare parent in a formal adoption case without an involuntary parental rights termination proceeding or consent, assuming there is no three parent option. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (holding that New York could terminate parental rights over the objection of the parent when there is a finding by at least "clear and convincing evidence" of permanent neglect).

290. E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 99 (2006).

291. See *id.*; Parness, *New Mothers*, *supra* note 7, at 1–3 (reviewing other commentaries favoring wide, if not absolute, second parent decision-making authority for birth-givers).

can choose a second childcare parent sometime long after birth. Here, the choice sometimes only takes effect at that moment (i.e., no retroactivity). And here, the choice usually is based on post-birth acts. Formal adoption processes usually need not be followed. Such after-birth parent choices are validated by laws on marital, residency/hold out, acknowledgment, and de facto parenthood. Laws on second parent choices made after birth should be part of any discussion of a more coherent legal framework governing single parent choices of second childcare parents made prebirth and at birth as well as laws on single parent choices made during formal adoptions.

In pursuing more coherency, lawmakers need to recognize that some forms of second parent choices, like voluntary parentage acknowledgment and spousal parentage, can be undertaken prebirth, around the time of birth, or long after birth. As well, they should note that nonadoptive second parent choices made after birth, as well as second parent prebirth and at-birth choices, can be made for purposes beyond childcare. Thus, any actual childcare parentage (i.e., parental care, custody and management) may not be contemplated, as with single parent choices made to impact probate or tort claims. Finally, lawmakers should note that even when second parent choices are only made for childcare purposes, those choices can later be employed in non-childcare settings, like child support, tort, and heirship.

In exploring a more coherent legal framework for nonadoptive second childcare parent choices made after birth by single parents, the Article speaks to children born of sex and to children born of assisted reproduction. Its major premise is that second parent choices by single parents, prebirth or at birth, should be assessed differently under law than second parent choices made long after birth. Unfortunately, varying treatment is not invited by the Uniform Parentage Acts, which are frequently followed in state laws. Amendments to the 2017 UPA could promote better state laws guiding second parent choices by single parents made after birth, including changes to the residency/hold out and acknowledged parent norms, first adopted in the 1973 UPA, and to the de facto parent norms of the 2017 UPA.

Distinctions between prebirth, at-birth and post-birth second parent choices are necessary for several reasons. One is that only in after-birth settings are there opportunities for a single parent and the state to review the actual parent-like relationship between the child and any possible second parent. Here, inquiries can also be made into the familial relationships between the child and certain nonparents, including the family members of the single parent, the family members of the possible second parent, and the family members of one considered, but not chosen, as a second parent.

Another important distinction is that with second parent choices made after birth, there are greater opportunities for genetic testing that demonstrates the semen or egg providers who prompted births. The import of genetic ties to childcare parenthood can, and sometimes should, diminish, if not disappear, long after birth, as due to a genetic parent's failure to pursue childcare for, or to support financially, one's child.

A further distinction involves the greater opportunity after birth to assess the childcare decision-making by the single parent. Where there is problematic childcare conduct by a single parent after birth, that single parent's choice might be subject to less deference.

Yet another distinction is that the chief motivation behind an after-birth second-parent choice, and the willingness to be a second parent, more likely will not be the desire for the second person to undertake childcare. Rather, the desire to name or be named a parent long after birth more likely will be financially motivated. A new second parent may gain standing to sue for damages in an anticipated tort suit. Further, the choice of a second parent after birth can result in a child standing to recover as a relative from an intestate decedent's estate. Non-childcare motivations should be considered in assessing reforms of nonadoptive second-parent choice laws.

Finally, there are distinctions between new parent choices by custodial parents when there are or are not two already recognized childcare parents. More frequently, custodial parent choices made when there is another childcare parent occur long after birth, though, as with residency/hold out and de facto parenthood. Here, there will more likely arise constitutional issues involving "care, custody and management" rights and parental opportunity rights in children of a childcare parent who will otherwise be displaced.

The Article urges certain legal reforms on second-parent choices by single parents made after birth. It posits changes that would incorporate some formal adoption attributes into second-parent choice laws. It proposes other reforms, such as changes that limit choices that end parental-like relationships between children and those not chosen, but willing and able, would-be parents.