

Faithful Parents: Choice of Childcare Parentage Laws*

Jeffrey A. Parness□

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A. INTRODUCTION

In July 2017, the National Conference of Commissioners on Uniform State Law (NCCUSL) approved and recommended for enactment in all U.S. states a new Uniform Parentage Act (2017 UPA).¹

* The title derives from Rebecca Aviel’s wonderful piece, “Faithful Unions,” 69 *Hastings L.J.* 721 (2018) [hereinafter Aviel] wherein she reviews the reasons why the Full Faith and Credit Clause has not been employed in choice of marriage law cases, and how such cases are resolved. Herein I review the fast-rising choice of law issues involving childcare parentage, wherein again the Full Faith and Credit Clause has not been significantly employed.

□Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D., The University of Chicago. Copyright 2018. All rights reserved.

¹ A review of the 2017 UPA, its predecessors, and its goals is provided by its Reporter in Courtney G. Joslin, “Nurturing Parenthood Through the UPA (2017),” 127 *Yale L.J.F.* 589, 597-599 (2018) [hereinafter Joslin].

This act follows the 1973 and 2000 UPAs of NCCUSL which have been widely adopted.² While all three UPAs recognize certain forms of childcare parentage arising from neither biological ties nor formal adoptions, the 2017 UPA is quite expansive in its provisions on de facto parenthood, voluntary acknowledgment parentage, and parents of children born of assisted reproduction. Such expanded forms of childcare parentage, involving rights and duties related to custody, visitation and support, are chiefly dependent on childcare agreements and/or parental-like acts rather than marriage or blood ties.

This article focuses on the choice of law problems arising with the expanded forms of childcare parentage.³ The article reviews first the UPA sections on choice of law and on the expanded forms of childcare parentage. It then demonstrates the challenging choice of law issues prompted when childcare parentage issues arise in settings where alleged childcare parents, and/or their alleged children, move interstate before childcare parent disputes are resolved. The article posits that in declaring forum laws usually apply when adjudicating childcare parentage, as suggested by recent UPAs, courts should expressly recognize that forum laws sometimes include their own state laws on choice of law. Such a possible recognition should be noted in an amended 2017 UPA. This amendment would not only follow the approaches in choosing between conflicting state laws in other settings, including contract and tort, but also honor reasonable expectations, lessen forum shopping, and avoid Full Faith and Credit violations arising when state courts apply their own laws where the in-state conduct of the parties is very attenuated, at best.

B. CHOICE OF LAW UNDER THE UPA

² NCCUSL tracks state governmental uses of its varying UPAs, with the results summarized on its website.

³ Choice of Law problems are particularly challenging as there is no state that is a “place of celebration,” that is, a state which “exercised regulatory authority over a domiciled couple.” Aviel, at 769 (Professor Aviel does not discuss the challenging choice of law issues that would arise where there was an attempt to have one U.S. state recognize a common law marriage arising from purely private marital agreements or marital-like acts in a second state).

The 1973 Uniform Parentage Act says a parentage action “may be brought in the county in which the child or the alleged father resides or is found or, if the father is deceased, in which proceedings for probate of his estate have been or could be commenced.”⁴ It does not speak generally to choice of law.

The 2000 Uniform Parentage Act does address generally choice of law in childcare parentage disputes. It says a court shall apply its own law “to adjudicate the parent-child relationship.”⁵ This norm is said not to depend on either “the place of birth of the child” or “the past or present residence of the child.”⁶ As “for a proceeding to adjudicate parentage,” the possible venues include a county in which “the child resides or is found; the respondent resides or is found if the child does not reside in this State; or a proceeding of probate or administration of the presumed or alleged father’s estate has been commenced.”⁷ Thus, in a case seeking to establish male parentage, the 2000 UPA eliminates as a possible venue a county in which the respondent resides or is found if the child resides in the same state, but in a different county. It also eliminates a county where the alleged father’s estate “could be commenced.” Further, the 2000 UPA specifically addresses choice of law where childcare parentage allegedly flows from a voluntary parentage acknowledgment undertaken elsewhere.⁸

⁴ 1973 Uniform Parentage Act § 8(c) [hereinafter 1973 UPA].

⁵ 2000 Uniform Parentage Act, as amended in 2002, § 103(b) [hereinafter 2000 UPA].

⁶ 2000 UPA, at §§ 103(b)(1) and (2). These provisions on forum law application regardless of place of birth or residence operate in several American jurisdictions. See, e.g., 750 Ill. Comp. Stat. Ann. 46/104; 19-A Maine Rev. Stat. Ann. 1833(2); North Dakota Century Code 14-20-03(2); New Mexico Stat. Ann. 40-11A-103(B); 13 Delaware Code Ann. 8-103(b); 10 Okl. St. Ann. 7700-103(B); and Wash. Rev. Code 26.26.021(2).

⁷ Id. at § 605.

⁸ Id. at § 311 (“full faith and credit” to a VAP “effective in another state” if “signed” and “otherwise in compliance” with the other state’s law).

The 2017 Uniform Parentage Act says that in a proceeding to adjudicate parentage, the applicable law does not depend on “the place of birth of the child” or “the past or present residence of the child,”⁹ with the court to apply its own law “to adjudicate parentage.”¹⁰ Venue “in a proceeding to adjudicate parentage” is appropriate in a county in which “the child resides or is found;” in a county where “the respondent resides or is found if the child resides out of state;” or in a county where there is commenced “a proceeding for administration of the estate of a person who is or may be a parent.”¹¹ Thus, the 2017 UPA choice of law and venue norms substantially follow the 2000 UPA. Like the 2000 UPA, the 2017 UPA has a special choice of law provision for voluntary parentage acknowledgments.¹²

In declaring forum state law applicable “to adjudicate the parent-child relationship” in 2000 and to “adjudicate parentage” in 2017, the UPAs were said to follow the Uniform Interstate Foreign Support Act (UIFSA).¹³ In each instance, the UPA Comment asserts that this directive “simplifies choice of law principles,” though recognizing that should the chosen state provide “an inappropriate forum, dismissal for forum non-conveniens may be appropriate.”¹⁴

The 1996 and 2008 versions of the UIFSA generally speak to how a “responding tribunal” should proceed when asked by an “initiating tribunal” to determine the duty of, and amount payable for, child

⁹ 2017 Uniform Parentage Act § 105 [hereinafter 2017 UPA].

¹⁰ 2017 UPA, at § 105. The 2017 UPA provision on choice of forum law “to adjudicate parentage” already has been presented in several American state legislatures. See, e.g., 2017 Vermont House Bill 562 (introduced 1-3-18), at §103(b); 2017 Washington Senate Bill 6037 (prefiled 12-20-17), at §106; and 2017 Rhode Island House Bill 7226 (introduced 1-18-18), at §15-8.1-1.105.

¹¹ 2017 UPA, at § 605.

¹² 2017 UPA, at § 311.

¹³ The 2000 comment points to the 1996 UIFSA, at § 303, while the 2017 comments point to the 2000 UPA as well as the 1996 UIFSA, at § 303 and the 2008 UIFSA, at § 303. The 2000 Comment does not expressly speak to its newly adopted choice of law doctrine not found in the 1973 UPA.

¹⁴ *Id.*

support. Here, the respondent is not subject to personal jurisdiction in the initiating tribunal.¹⁵ The responding tribunal, in hearing child support issues, is recognized as sometimes having first to “determine parentage.”¹⁶ In a child support proceeding in a responding tribunal, the 1996 UIFSA declares that the responding tribunal shall “apply the procedural and substantive law, *including the rules on choice of law*, generally applicable to similar proceedings originating” in its state. It also declares that a determination of “the duty of support and amount payable” should be in accordance with its own state’s “law and support guidelines.”¹⁷

For a child support proceeding in a responding tribunal, the 2008 UIFSA declares the responding court shall apply “the procedural and substantive law generally applicable to similar proceedings originating” in the state.¹⁸ The provision on applying “the rules on choice of law” was stricken in the 2001 UIFSA.¹⁹ As in the 1996 UIFSA, the 2008 UIFSA declares that the determination of the duty of support and amount payable should be in accordance with its own state’s “law and support guidelines.”²⁰ U.S. states following the 2008 UIFSA, when making no reference to “the rules on choice of law,” generally view these reference failures as “nonsubstantive.”²¹

¹⁵ 1996 UIFSA, at § 301(c) and 2008 UIFSA, at § 301(b).

¹⁶ 1996 UIFSA, at § 305(b)(1).

¹⁷ 1996 UIFSA, at § 303(12) (emphasis added). These provisions continue to operate in several American jurisdictions. See, e.g., Wisc. Stat. Ann. 769.303; 8 Puerto Rico Laws Ann. 543b; and 5 Guam Code Ann. 35303. See also 1996 UIFSA, at § 701(b) (“In a proceeding to determine parentage, a responding tribunal of this state shall apply” the laws of this State, including “*the rules ... on choice of law*”).

¹⁸ 2008 UIFSA, at § 303(1).

¹⁹ 2001 UIFSA, at § 303(1). The 2001 UIFSA sole provision on choice of law seemingly did not mandate that a responding tribunal utilize the parentage determination laws of another state. *Id.* at § 604. See also 2001 UIFSA, at § 701(c) (eliminating the reference to a responding court’s use of its rules on choice of law).

²⁰ 2008 UIFSA, at § 303(2). These provisions on child support decisions and guidelines, without referencing a choice of law rule, operate in several American jurisdictions. See, e.g., Virginia Code 20-88.46; Colorado Rev. Stat. 14-5-303; Nevada Rev. Stat. 130.303; and Iowa Code 252K.303.

Seemingly, both the 2000 and 2017 UPAs contemplate that “parent-child relationship” adjudications, or “parentage” adjudications (if there is a difference²²) require one U.S. state court, presumably using its own choice of law rules or the Full Faith and Credit dictate, to respect another U.S. state court’s earlier formal recognition of a person’s parentage. Such a formal recognition can clearly arise from an actual civil or administrative case judgment or from a voluntary parentage acknowledgement.²³

Yet, another U.S. state may also have childcare parent laws dependent upon marital-related birth or a residency/holding out of a child as one’s own.²⁴ Here, there is no formal parentage recognition in the other state even though the parentage requisites have been met. Further, the 2017 UPA introduces a new form of legal parenthood, *de facto* parentage, that is far less precise.²⁵ As with

²¹ See, e.g., Virginia Code 20-88.46 (statutory note); Nevada Rev. Stat. 130.303 (statutory note); and Iowa Code 252K.303 (statutory note).

²² In 2017 UPA, the Comment does not address what, if any, difference exist between adjudications of “the parent-child relationship” and adjudications of “parentage.” 2017 UPA, at § 105 Comment.

²³ 2017 UPA, at § 311 (“The court shall give full faith and credit to an acknowledgment of parentage or denial of parentage effective in another state if the acknowledgement or denial was in a signed record or otherwise complies with law of the other state”). Undoubtedly, this need to recognize properly-executed VAPs from other states was prompted by the federal statutory mandate (for states participating in the federal TANF program covering welfare subsidies) that “full faith and credit” be given to “other state” VAPs. 42 U.S.C. 666(a)(5)(C)(iv). Once recognized, a VAP from another state potentially can be overcome, usually through a recession by a signatory within 60 days or by a challenge thereafter. While any post 60 day challenge is required by federal statute to be founded on “fraud, duress or material mistake of fact,” 42 U.S.C. 666(a)(5)(D)(ii), state laws vary on what those requisites mean, as well as vary on other procedures for VAP challenges, including who can challenge and when challenges are untimely (either due to failure to meet a prescribed time period or due to equitable estoppel principles). On variations in state VAP laws, see Section D (ii), *infra*.

²⁴ In these latter two settings, the recognition would not be embodied in a formal act, but in the satisfaction of a norm guiding “parent-child” or “parentage” establishments. No precedents have been found that deem such satisfaction in one state prompts a legal status recognition without a court order (or other formal act) in that state.

²⁵ The 1973 UPA recognized a significant form of imprecise parentage when it deemed presumptive natural fatherhood in a man who, “while the child is under the age of majority ... receives the child into

marital or resident/hold out parentage this new form usually goes unrecognized in the state via a formal act, like a court-judgment, as soon as, or shortly after, its standards have been met. And the applicability of this new parenthood form to particular cases is usually not self-evident, as often will be a marital or resident/hold out parent.

While both the 2000 and 2017 UPAs suggest that forum law shall apply to “adjudicate” issues of “parent-child relationship”/“parentage,” U.S. state parentage laws do vary a bit in their language on applicable choice of law norms. Some special laws speak only to the need to give “full faith and credit” to a paternity acknowledgment undertaken in another American state “according to its procedures.”²⁶ Where allowed, maternity acknowledgments are similarly deemed creditable.²⁷ Other special U.S. state laws additionally require explicitly that “full faith and credit” be given to a “denial of paternity” in a VAP if undertaken in another state in compliance with the law of the other state.²⁸

Other U.S. state laws on choice of law in parent-child/parentage settings are broader, sometimes even in the same state. Thus some state laws speak to the need to give “full faith and credit”

his home and openly holds out the child as his natural child.” 1973 UPA, at § 4(a)(4). The imprecision was dramatically reduced in the 2000 and 2017 UPAs which require a holding out parent [who could be a woman under the 2017 UPA] to reside in the same household with the child for the first two years of the child’s life. 2000 UPA, at § 204(a)(5) and 2017 UPA, at § 204(a)(2).

²⁶ See, e.g., Conn. Gen. Stat. 46b-172(a)(4) and 23 Pa. C.S.A. 5103(d). See also Louisiana Rev. Stat. 9:393 (“in accordance with the laws and procedures of that state”) and 31 Hawaii Rev. Stat. 584-3.5(g) (“full faith and credit to affidavits” for VAPs, which constitute “legal findings”).

²⁷ Wash. Rev. Stat. 26.26.301 and 15C Vt. Rev. Stat. 301.

²⁸ See, e.g., 10 Okla. Stat. 7700-311; Wyoming Stat. 14-2-611; Alabama Stat. 26-17-311; New Mexico Stat. 40-11A-311; Texas Code 160.311; 13 Delaware Code 8-311; and N.D. Code 14-20.21. Noncompliance can involve, e.g., signing a VAP form outside the state whose VAP form was used. See, e.g., *Teague v. Teague*, 999 So.2d 86, 92 (La. App.2d Cir. 2008) (Indiana form signed in Louisiana).

not only to a sister state VAP, but also to a sister state paternity “determination” made “through an administrative or judicial process.”²⁹

At least one state law perhaps goes beyond “full faith and credit” to a paternity determination via an administrative or judicial process in a sister state by expressly recognizing the need to defer comparably to a paternity determination “made by any other state or jurisdiction.”³⁰ Importantly though, there still needs to be a “determination.” This seemingly contemplates a more formal U.S. state recognition of a certain parent rather than a U.S. state law recognizing generally that childcare parentage can arise from certain conduct (i.e., parental-like acts) though the actual occurrence of such conduct in a particular family setting is not formally recognized as having occurred (as through a court or administrative adjudication, or through the completion and filing of a state authorized form like a voluntary parentage acknowledgement) around the time of occurrence.

C. BEYOND BIOLOGY AND FORMAL ADOPTION: EXPANDED FORMS OF PARENTAGE UNDER THE UPA

The UPA has always had some form of childcare parentage that is not necessarily prompted by actual proof of biological ties or formal adoptions. Thus, childcare parentage under all three UPAs can arise under less precise standards. Such standards now involve marital births; voluntary parentage acknowledgments; residency/hold out parenting; de facto parenting; and parenthood via assisted human reproduction agreements.

i. Spousal Parentage

The 1973 UPA recognizes “a man is presumed a natural father of a child if . . . he and the child’s mother are or have been married to each other and the child is born during the marriage, or within 300

²⁹ See, e.g., California Family Code 5604 and New York Family Court Act 516-a(d). See also New Hampshire Stat. 168-A:2 (II) (paternity “established by court or administrative order”). California has a separate statute addressing only the “full force and effect” of a VAP. California Family Code 7573.

³⁰ Kansas Stat. 23-2208(d) (including a determination “established by judicial or administrative process or by voluntary acknowledgement”).

days after the marriage is terminated.”³¹ Seemingly for children born to their spouses via “artificial insemination” utilizing the semen not donated by the husbands, there are additional requirements, including husband “consent” and “supervision of a licensed physician.”³²

The 2000 UPA, as amended in 2002, similarly recognizes a marital parentage presumption, as well as nonpresumptive parentage via consent to “assisted reproduction” and nonpresumptive parentage via a “validated” gestational mother “agreement.”³³ The marital parent presumption expressly applies to a man married to the mother when “the child is born,” or who was married to the mother when the child is born “within 300 days after the marriage is terminated.”³⁴ As to a child born to a married mother via assisted reproduction, a husband is a parent if he “provides sperm for, or consents to, assisted reproduction” per the UPA requisites.³⁵ Within 2 years of birth, the husband may dispute paternity if he did not consent.³⁶ 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

³¹ 1973 UPA, at §4(a)(1). 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. 2017 UPA, at §4(a)(2) and (3).

³² 1973 UPA, at §5 (other forms of artificial insemination, raising “complex and serious legal problems,” are not dealt with, as was noted in the earlier Section 5 Comment). Failure to follow Section 5 mandates may nevertheless prompt a marital parentage presumption under Section 4 for a child born of artificial insemination. See, e.g., 1973 UPA, at §4(a)(1) (husband is presumed natural father of a child born to his wife “during the marriage”).

³³ 2000 UPA, at §201 (b)(1),(5), and (6).

³⁴ 2000 UPA, at §204(a)(1) and (2). As with the 1973 UPA, there is also a marital parentage 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, 2000 UPA, at §204(a)(3), as well as for a man who married or tried to marry the mother “after the birth of the child” and who “voluntarily asserted his paternity of the child,” 2000 UPA, at §204(a)(4).

³⁵ 2000 UPA, at §703 (with the consent requisites in Section 704).

³⁶ 2000 UPA, at §705(a).

since the probable time of assisted reproduction” and he “never openly held out the child as his own.”³⁷ As to a child born to a gestational carrier where there is a validated agreement, a husband and his wife are parents unless the agreement is terminated.³⁸

The 2017 UPA also contains a marital parentage presumption. But it expressly applies to both male and female spouses married to the birth mother at the time of birth; married to the birth mother within 300 days of the marriage’s termination; or married to the birth mother after the child’s birth as long as they “asserted parentage.”³⁹ Nonpresumptive parentage attaches to consenting spouses of birth mothers, as under the 2000 UPA, who give birth via “assisted reproduction.”⁴⁰ Nonpresumptive parentage also attaches to married spouses (and others) where there are either gestational or genetic surrogacy agreements.⁴¹

ii. Voluntary Parentage Acknowledgment

The 1973 UPA recognized “a man is presumed to be the natural father of a child,” thus prompting parental childcare interests, if “he acknowledges his paternity in a writing” filed with the state which is not disputed by the birth mother “within a reasonable time after being informed.”⁴² Rebuttal of such a presumption occurs only with “clear and convincing evidence of no biological ties” and “a court decree

³⁷ 2000 UPA, at §705(b).

³⁸ 2000 UPA, at §806.

³⁹ 2017 UPA, at §204(a)(1).

⁴⁰ 2017 UPA, at §703 (with the consent requisites in Section 704).

⁴¹ 2017 UPA, at §§802-807 (comparable requirements for each form of agreement, with additional special rules for gestational surrogacy pacts, at Sections 808-812, and for genetic surrogacy pacts, at Sections 813-818).

⁴² 1973 UPA, at § 4(a)(5).

establishing paternity of the child by another man.”⁴³

The 2000 UPA, as amended in 2002, recognized no parentage presumption for a male VAP signor.

⁴⁴ It did recognize 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.”⁴⁵ The 2000 UPA declared a VAP could be rescinded within 60 days of its effective date by a “signatory.”⁴⁶ Thereafter, a signatory could commence a court case to “challenge” the VAP, but only on “the basis of fraud, duress, or material mistake of fact” within two years of the VAP filing.⁴⁷

The 2017 UPA again recognizes VAPs establish nonmarital parent-child relationships without a presumption.⁴⁸ Parentage establishments can now be undertaken by VAP signatories who claim to be “an alleged genetic father” of the child born of sex;⁴⁹ a presumed parent (man or woman) due to an alleged or actual marriage or 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;”⁵⁰ or, an intended parent (man

⁴³ 1973 UPA, at § 4(b).

⁴⁴ 2000 UPA, at § 204(a).

⁴⁵ 2000 UPA, at § 301. The accompanying Comment indicates that “a sworn assertion of genetic parentage of the child” is needed though not “explicitly” required by federal welfare subsidy statutes that often prompt state VAP laws, a federal statutory “omission” that is corrected in the 2000 UPA. The Comment also recognizes a male sperm donor may undertake a VAP in an assisted reproduction setting where his “partner” is the birth mother.

⁴⁶ 2000 UPA, at § 307.

⁴⁷ 2000 UPA, at § 308(a).

⁴⁸ 2017 UPA, § 201 (5). Some marital parentage presumptions, including marriages occurring after birth, can be prompted by parentage assertions in records filed with the state. 2017 UPA, at § 204(a)(c)(i).

⁴⁹ 2017 UPA, at § 301.

⁵⁰ 2017 UPA, at §§ 301 and 204(a).

or woman) in a nonsurrogacy, assisted reproduction setting.⁵¹ VAPs may be undertaken “before or after the birth of the child”.⁵² As with the 2000 UPA, VAP rescissions may be undertaken by signatories within 60 days after their effective date,⁵³ while challenges may proceed thereafter, “but no later than two years after the effective date” and “only on the basis of fraud, duress or material mistake of fact.”⁵⁴ While nonsignatory VAP challenges may be pursued within “two years after the effective date of the acknowledgement”, challenges, except those presented by a child, will be sustained only when a judge finds the child’s “best interest” will be served.⁵⁵ Nonsignatory challenges are limited. Those with standing include the child; the woman who gave birth who, as yet, has not been deemed a nonparent; 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.⁵⁶

The explicit recognition in the 2017 UPA that VAPs may be undertaken by those with no biological ties to the children they acknowledge is revolutionary, clearly allowing circumvention of formal adoption laws and the safeguards they provide for children, including background checks and best interest findings. A Comment in the 2000 UPA lamented that the federal statutes guiding state VAP laws do not “require that a man acknowledging paternity must assert genetic paternity” and indicated the 2000 UPA was “designed to prevent circumvention of adoption laws by requiring a sworn statement of genetic

⁵¹ 2017 UPA, at §§ 301 and 703.

⁵² 2017 UPA, at § 304(c).

⁵³ 2017 UPA, at § 308(a)(I).

⁵⁴ 2017 UPA, at § 309 (a).

⁵⁵ 2017 UPA, at §§ 309(b) and 610(b)(1) and (2).

⁵⁶ 2017 UPA, at §§ 610(b) and 602.

parentage of the child.”⁵⁷

iii. Residency/Hold Out Parentage

The 1973 Uniform Parentage Act has this parentage presumption:

- (a) A man is presumed to be the natural father of the child if...
- (4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child⁵⁸

The 2000 Uniform Parentage Act altered the holding out parentage presumption. It says:

- (a) A man is presumed to be the father of a child if:...
- (5) for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own.⁵⁹

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

- (a) A individual is presumed to be a parent of a child if:...
- (2) the individual resided in the same household with the child for the first two years of the life of the child, including periods of temporary absence, and openly held out the child as the individual’s child.⁶⁰

iv. De Facto Parentage

Besides continuing with presumed parentage for a residing and holding out parent for two years, who now can be either a man or a woman, the 2017 Uniform Parentage Act adds a new “de facto parentage provision.” This expanded form of childcare parentage is far less precise than the two year hold out parentage presumption. It says:

- (a) A proceeding to establish the parentage of a child under this section may be commenced only by an individual who: (1) is alive when the proceeding is commenced; and (2) claims to be a de facto parent of the child.

⁵⁷ 2000 UPA, Comment to Article 3.

⁵⁸ 1973 UPA, at § 4(a)(4).

⁵⁹ 2000 UPA, at § 204(a)(5).

⁶⁰ 2017 UPA, at § 204(a)(2).

- (b) An individual who claims to be a de facto parent of a child must commence the proceeding (1) before the child is 18 years of age and (2) while the child is alive ...
- (d) In a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, if there is only one other individual who is a parent or has a claim to parentage of the child, the court shall adjudicate the individual who claims to be a de facto parent to be a parent of the child if the individual demonstrates by clear and convincing evidence that:
 - (1) the individual resided with the child as a regular member of the child’s household for a significant period;
 - (2) the individual engaged in consistent caretaking of the child;
 - (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial benefit;
 - (4) the individual held out the child as the individual’s child;
 - (5) the individual established a bonded and dependent relationship with the child which is parental in nature;
 - (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and
 - (7) continuing the relationship between the individual and the child is in the best interest of the child.
- (e) In a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, if there is more than one other individual who is a parent or has a claim to parentage of the child and the court determines that the requirements of paragraphs (1) through (7) of subsection (d) are met, the court shall adjudicate parentage under Section 613, subject to other applicable limitations in this [part].⁶¹

v. Parentage Following Assisted Reproduction Births

a. No Surrogate

The 2017 UPA has distinct articles on nonsurrogacy and surrogacy assisted human reproduction undertakings. In nonsurrogacy settings, the 2017 UPA “is substantially similar” to the 2000 UPA, updated in 2002, with the “primary changes... intended to update the article so that it applies equally to same-sex couples.”⁶² The 2017 thus recognizes that a donor, in the absence of consent or common residence in the first two years while holding out a child as one’s own, “is not a parent of a child conceived by assisted reproduction.”⁶³ The nonparental status of one married to a childcaring birth mother of a child

⁶¹ 2017 UPA, at § 609(a), (b), (d) and (e).

⁶² 2017 UPA, at Comment preceding § 701.

⁶³ Id. at §§ 702-703.

born by assisted reproduction, even if a gamete donor, may be established by a showing of a lack of consent and of no holding out of the child as one's own.⁶⁴

b. Surrogate

As to surrogacy settings, the 2017 UPA-like the 2000 UPA, as amended in 2002-distinguishes between genetic (“traditional”) and gestational surrogacy.⁶⁵ Unlike its 2000 predecessor, the 2017 UPA imposes differing requirements for the two surrogacy forms, with “additional safeguards or requirements on genetic surrogacy agreements,”⁶⁶ as only they involve a woman giving birth while “using her own gamete.”⁶⁷

D. INTERSTATE VARIATIONS IN THE EXPANDED FORMS OF CHILDCARE PARENTAGE LAWS

Of course, there is no need to choose between the childcare parentage laws of two or more interested states in cases involving childcare parentage establishment and/or parentage disestablishment if all the states have comparable laws. Yet, notwithstanding the efforts of the NCCUSL via their UPAs, its goals of sensible and uniform laws across U.S. state borders, U.S. state laws on establishing and disestablishing childcare parentage now vary widely. Thus, when relevant conduct occurs in two or more states, a U.S. state court adjudicating parentage/parent-child relationship potentially may choose to, if not be compelled to, employ nonforum laws. The following sections demonstrate the significant variations in U.S. state parentage laws dependent upon neither actual (or

⁶⁴ Id. at § 705.

⁶⁵ 2017 UPA, at Comment preceding § 801.

⁶⁶ Id. at Comment preceding § 801. The common safeguards or requirements for all surrogacy pacts are found in id. at §§ 802-807.

⁶⁷ Id. at § 801 (1). Gestational surrogacy covers births to a woman who uses “gametes that are not her own.” Id. at 801 (2). The special rules for gestational surrogacy pacts are found in id. at §§ 808-812, while the special rules for genetic surrogacy pacts are found in id. at §§ 813-818.

even presumed, at times) biological ties nor formal adoptions. They demonstrate the great potential for “true conflicts” to arise in disputes involving the expanded forms childcare parentage, as well as the failures of several state courts to address choice of parentage law issues when resolving these disputes.

i. Spousal Parentage

Spousal parentage laws, sometimes involving presumptions of biological ties, are recognized in each UPA. Marriages may be actual or attempted.⁶⁸ Where places of birth, pregnancy, and conception differ, there may need to be a choice of law if spousal parentage can arise under any of these norms.⁶⁹ The marriage “at conception” norm, of course, can prompt different results than the marriage “at birth” norm.⁷⁰ Where conflicting spousal parentage laws are based on the place of birth or of pregnancy residence, if not the place of conception, the chances for conflicting governmental interests in declaring parentage at birth, are infrequent as multistate prebirth and at birth activities most typically occur within a year or so (involving, e.g., existing marriage, conception, attempted marriage, or marital residence) where all such acts occur in a single state. More likely to arise are conflicting interests in the standards on overcoming (as by rebutting or disestablishing) at birth spousal parentage.

Conflicts can arise as state laws do vary significantly. In California today, a man “is presumed to be the natural father of the child” if “(a) he and the child’s natural 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

⁶⁸ See 1973 UPA, at §4(a); 2000 UPA, at §204; and 2017 UPA, at §204.

⁶⁹ See, e.g., California Family Code 7611 (husband is presumed natural father of child born to his wife “during the marriage, or within 300 days after the marriage is terminated”); Michigan Comp. Laws §722.1433 (marriage to birth mother at the time of the child’s conception or birth); Arizona Stat. 25-815(a)(1) (marriage to birth mother at “any time in the ten months immediately preceding the birth”). Also see *State v. EKB*, 35 P.3d 1224 (Wyoming 2001) (birth mother was married to two different men during her pregnancy, who each qualified as presumed marital fathers under state law, Wyoming Stat. 14-2-102).

⁷⁰ See, e.g., *Debra H. v. Janice R.*, 930 N.E.2d 184, 195 (N.Y. 2010) (civil union at time of birth was key, even though there was no civil union at the time of conception) [hereinafter *Debra H.*].

or after a judgment of separation is entered by a court; (b) before the child's birth, he and the child's natural mother attempted to marry each other although the attempted marriage is invalid and either the child is born during the attempted marriage or within 300 days after its termination; (c) after the child's birth, he and the child's natural mother married and either he consented to being named as the child's father on the child's birth certificate or he became obligated to support the child under a written voluntary promise or by court order."⁷¹

As well, though it is said that in California "the child of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage,"⁷² this presumption can now be rebutted in California with "evidence based on blood tests," at which time "the question of paternity of the husband shall be resolved accordingly."⁷³ One case where such a question was "resolved accordingly" was *Jesusa V.*, wherein the California Supreme Court designated as the legal father the husband Paul (a presumed natural father) rather than Heriberto (the actual natural father).⁷⁴ In doing so, it implicitly recognized that at times (with differing facts), an unwed biological father would prevail over a husband's presumed marital fatherhood. An unwed biological father in California faces differing disestablishment norms in California where the husband, with no marital parentage presumption due to no cohabitation, nevertheless was a presumed parent as he held out his wife's child

⁷¹ Cal. Family Code 7611 (a, b, and c).

⁷² Cal. Family Code 7540. See also *In re M.R.*, 212 Cal. Rptr. 3d 807 (Cal. App. 4th 2017) (reading section 7540 as requiring marriage both at the time of conception and birth).

⁷³ Cal. Family Code 7541(a). See also *K.S. v. R.S.*, 669 N.E.2d 399 (Ind. 1996) (putative father can seek to establish paternity though child was born into a marriage and remains living with that marital family).

⁷⁴ *In re Jesusa V.*, 32 Cal. 4th 588 (2004).

as his own.⁷⁵

Outside of California, a marital parentage presumption can be subject to different establishment and/or rebuttal standards. In Michigan, establishment occurs if married to the child's mother at the time of the child's conception or birth.⁷⁶ In Utah, the standards for rebutting a marital parentage presumption dictate that only the mother or her husband, the presumed father when "the child is born during the marriage," can challenge the marital paternity presumption so long as the couple is "committed to remaining married" and to raising "the child as issue of the marriage."⁷⁷ Somewhat comparably, in Oregon only a wife or husband can challenge the husband's presumed marital parentage "as long as the husband and wife are married and cohabitating, unless the husband and wife consent to the challenge" by a third party.⁷⁸

Under the 1999 Pennsylvania decision in *Strauser v. Stahr*, there is an irrebuttable presumption of paternity based upon marriage as long as the marriage is intact, there was an intact family at all times, and the married couple favors maintaining the presumption.⁷⁹ The case involved the legal

⁷⁵ See, e.g., *In re Emma*, 193 Cal. Rptr. 3d 154 (Cal. App. 4th 2015) (no biological father involved; husband was a presumed parent under Cal. Family Code 7611, and not a presumed marital parent under Cal. Family Code 7540).

⁷⁶ Michigan Comp. Laws 722.1433. See also Ariz. Stat. 25-814 (a)(1) (husband is a presumed father if married to birth mother, "At any time in the ten months immediately preceding the birth").

⁷⁷ Utah Code 78B-15-607(1), as read in *R.P. v. K.S.W.*, 2014 UT App 38, ¶¶14 and 44 (reviewing the effects of 2005 legislation and finding it preempted any common law theories unwed fathers might utilize, while noting "no constitutional challenge" had been presented). See also *Kielkowski v. Kielkowski*, 2015 UT App 59 (marital presumption not rebutted though default divorce contained husband's statement in automated divorce filing that there were "no children at issue in this marriage").

⁷⁸ Oregon Rev. Stat. 109.070(1)(b) and (2).

⁷⁹ 726 A.2d 1052 (Pa. 1999) [hereinafter *Strauser*]. Compare *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012) (mother can sue biological father for support where child was born into her marriage; she is not estopped by her own or her husband's actions at birth and thereafter because the best interests of the child would not be served by estoppel) [hereinafter *K.E.M.*]. And see *B.S. v. R.S.*, 782 A.2d 1031 (Pa.

paternity of Amanda Stahr, the third child born to April and Steven Stahr during their marriage. The Stahrs always resided together and never separated. April Stahr, at one time, acknowledged that Timothy Strauser, not her husband, was Amanda's biological father. She allowed Timothy frequent visits with Amanda, as voluntary blood tests showed a high probability that Timothy was the biological father. After April began to interfere with his visitation with Amanda, Timothy sued in paternity for childcare opportunities. April's husband, Steven, intervened, requesting that the paternity suit be dismissed because of the presumption that he was Amanda's father.

In a 4-3 decision, the Pennsylvania high court dismissed the unwed biological father's paternity suit. The court found the marital presumption ("one of the strongest presumptions known to the law") could only be rebutted by proof of the husband's sterility or lack of access to his wife during the period of conception, at least where "the marriage into which Amanda was born continues" (and, perhaps, where there has never been any legal separation of the spouses).⁸⁰ This standard was said to insure that "marriages which function as family units" would not be "destroyed by disputes over parentage of children born or conceived during the marriage."⁸¹ The court did not investigate Timothy's assertion that there was truly "no marriage to protect" since the union between April and Steven lacked "love and intimacy" and had prompted April's adultery, which caused Steven to exhibit an "attitude of indifference" toward Amanda.⁸² The court also did not look into whether "it would be in the child's best

Super. 2001) (biological father may sue for custody where mother and husband had separated from time of conception to well after birth, during which time biological father parented the child).

⁸⁰ Strauser, 726 A.2d at 1055. A husband who is not biologically-tied cannot always himself challenge a marital paternity presumption. K.E.M., 38 A. 3d at 798 (common law doctrine of paternity by estoppel can bar husband's denial of paternity where the bar will serve the child's best interests). And see R.K.J. v. S.P.K., 77 A.3d 33 (Pa. Super. 2013) (paternity by estoppel used to support a child support order against a nonbiological father who acted like a father for 6 years).

⁸¹ Id. at 1054.

⁸² Id. at 1055.

interests” for Timothy to be granted some childcare rights.⁸³ Two dissenters opined that the marital presumption “should be open to rebuttal by reliable blood test evidence.”⁸⁴ Another dissenter welcomed blood tests as well as a “case-by-case” analysis on “what is best for Amanda.”⁸⁵

In Illinois, there are different marital parentage presumption and rebuttal standards. The Illinois Parentage Act creates a few parentage presumptions founded on marriage (and marital-like relationships). One is that a person (i.e., man or woman) man is presumed to be the parent of a child “born to the mother during...marriage...or substantially similar legal relationship.”⁸⁶ The marital and marital-like parentage presumption in Illinois is not conclusive, as it may be challenged “in a proceeding to adjudicate the parentage of a child.”⁸⁷ A challenge seeking to disestablish a marital parentage presumption may be brought by a presumed parent, acknowledged parent, adjudicated parent, or alleged parent,⁸⁸ as well as by the child.⁸⁹ A challenge may be foreclosed, however, due to the earlier

⁸³ Id. at 1053. Similar norms operate in Alabama. See, e.g., *B.C. v. J.S.U.*, 158 So. 2d 464 (Ala. Civ. App. 2014) (putative biological father cannot challenge marital parentage presumption where presumed parent “wishes to persist” in parentage under law). Compare *Pena v. Diaz*, 125 So. 3d 356 (Fla. App. 5th 2013) (J. Griffin, specially concurring) (noting “intact” marriage rule operates in Florida, but finding, contrary to other Florida judges, it is inapplicable when divorce action was pending when child was born into marriage, even if divorce case is later voluntarily dismissed) and *C.G. v. J.R.*, 130 So. 2d 776 (Fla. App. 2d 2014)(denying biological father standing to upset husband’s paternity; no support in Florida law for “two legally recognized fathers” for childcare purposes where the married couple only separated a few years after the child’s birth).

⁸⁴ *Strauser*, 726 A.2d at 1057 (J. Newman, dissenting).

⁸⁵ Id. at 1056-7 (J. Nigro, dissenting).

⁸⁶ 750 ILCS 46/204(a)(1) (“except as provided by a valid gestational surrogacy contract or other law”).

⁸⁷ 750 ILCS 46/610 (a)(also covering challenges to, e.g., acknowledged and adjudicated parents).

⁸⁸ 750 ILCS 46/610(a).

⁸⁹ 750 ILCS 46/610(a). Where the challenger was earlier involved in a lawsuit in which a presumed parent was deemed an adjudicated parent, a challenge may be foreclosed. See, e.g., *In re Griesmeyer*, 302 Ill. App. 3d 905 (Ill. App. 1st 1998) (dismissing parentage petition due to earlier dissolution

conduct of the challenger, inequity, or the child’s best interests.⁹⁰

Disestablishments by unwed biological fathers of the marital parentage in other men are easier in Mississippi. There, the Mississippi Supreme Court recognized a strong parental presumption for those biologically connected.⁹¹ A child was born in 2004 into the 2004 marriage of Amy and Scott, who were divorced in 2009.⁹² T.J., the child’s biological father who first learned of his genetic ties in 2011, sued for custody in 2011.⁹³ While T.J. for quite some time “did little to nothing to inquire or otherwise try to involve himself in the life of a child that could have been his,” he nevertheless was found entitled to the “natural-parent presumption” which could only be overcome by “clear and convincing evidence of abandonment, desertion, immoral conduct detrimental to the child, and/or unfitness.”⁹⁴ By contrast, in Louisiana, barring maternal “bad faith”, a biological father cannot seek to undo a marital paternity presumption one year after the child is born.⁹⁵

proceeding, where both mother and child were parties and where there was an “uncontested judgment” declaring child was “born as a result of the marriage”). Compare *Simcox v. Simcox*, 131 Ill.2d 491 (1989) (as child was not a party to earlier dissolution proceeding, no preclusive effects as to child). Outside of Illinois there is, e.g., *Myers v. Myers*, 13 N.E.2d 478, 483 (Ind. App. 2014) (ex-wife barred by laches from challenging ex-husband’s paternity since earlier dissolution case deemed ex-husband the legal father though it recognized there were no biological ties).

⁹⁰ 750 ILCS 46/610 (a)(1)-(3). Also see *Buchanan v. Legan*, 92 N.E.2d 600 (Ill. App. 3d 2017) (child’s action to establish fatherhood in biological dad foreclosed due to failed earlier attempt where there was a presumed marital father).

⁹¹ *In re Waites*, 152 So. 3d 306 (Miss. 2014)[hereinafter *Waites*].

⁹² *Waites*, 152 So.3d at 307-308.

⁹³ *Id.* at 308.

⁹⁴ *Id.* at 308 (quoting chancery court) and 314.

⁹⁵ *L.J.D. v. M.V.S.*, 212 So. 3d 581 (La. App. 1st 2017) (interpreting Louisiana Civil Code 189). Even if filed within a year, *res judicata* can bar a challenge. *State v. Jim*, 162 So.3d 1270 (La. App. 3d 2015) (man cannot challenge his paternity when he earlier was adjudged the father in a paternity suit seeking child support).

Disestablishment norms for spousal parentage presumptions not only vary interstate, but also can vary intrastate. Thus in Louisiana, an unwed biological father has only one year from birth to seek disestablishment while the birth mother has two years from birth.⁹⁶

And spousal parentage norms can vary for purposes beyond child custody/visitation. Whatever the circumstances allowing establishment or rebuttal of spousal parentage, once rebutted, at least by the marital parent, the disestablished parent usually will no longer have child support duties.⁹⁷ Yet may such a disestablished parent recover any earlier support, or perhaps other monies tied to the one-time parenthood? In 2012, the Tennessee Supreme Court allowed a man who rebutted, as of April 2009, his marital parentage earlier recognized in a February 2001 dissolution decree, to recover on an intentional misrepresentation of facts claim against his ex-wife—the child support, medical expenses and insurance premiums he had paid on the child’s behalf following the dissolution.⁹⁸ Elsewhere, there is a differing assessment of damages, or culpability, as in West Virginia.⁹⁹

It should be noted that even when spousal parentage is established and then rebutted or subject to rebuttal, the spousal parent (current or former) may still have avenues to childcare. Thus in a 1996 New Hampshire case,¹⁰⁰ a husband who lost his presumptive parenthood became a stepfather, as he remained married to the birth mother. In that state, a stepparent can be granted child custody if it serves the child’s best interest, as long as the stepparent acts “in loco parentis” by admitting the child

⁹⁶ Leger v. Leger, 2017 WL 6029740 (La. App. 3d 2017).

⁹⁷ Price v. Price, 2013 Tenn. App. LEXIS 263 (unless the husband is a legal father by other means, like a voluntary parentage acknowledgment).

⁹⁸ Hodge v. Craig, 382 S.W. 3d 325 (Tenn. 2012).

⁹⁹ See, e.g., Kessel v. Leavitt, 511 S.E. 2d 720 (W. Va. 1998) (no claim against mother, however).

¹⁰⁰ Bodwell v. Brooks, 141 N.H. 508 (1996) (employing *In re Diana P.*, 120 N.H. 791, 794-5 (1980)).

into the family and treating the child as a family member. The Missouri high court in 2018 allowed a disestablished spousal parent to pursue a nonparent childcare order after the biological father joined a pending divorce case.¹⁰¹ And in some states, a marital parent-whose status is more easily rebutted-can sign a voluntary parentage acknowledgment, though not biologically tied-prompting childcare parentage which is more difficult to disestablish.¹⁰²

There are many interstate differences in spousal parentage. Some were prompted by the differences in the UPAs. When marital families wholly or partially move across U.S. state borders, and childcare parentage issues then arise, choice of law issues can emerge.¹⁰³

¹⁰¹ *Bowers v. Bowers*, 543 S.W. 3d 608 (Mo. 2018).

¹⁰² See, e.g., 15C Vt. Rev. Stat. 301 and 401 (“presumed parent,” which includes spouse of birth mother, can sign an acknowledgment of parentage).

¹⁰³ Incidentally, beyond childcare, spousal parentage presumptions can vary interstate in other settings. Two Florida cases illustrate. The issue in the cases was whether a deceased man’s biological son was his survivor under the state Wrongful Death Act where the son’s mother was married to another man at the time of the son’s birth and where the husband’s presumptive parentage had never been, and would likely never be, rebutted. The cases differ in result. In *Daniels v. Greenfield*, 15 So.3d 908 (Fla. App. 4th 2009), approved and remanded for hearing, 51 So. 3d 421 (Fla. 2010), the court found the son was a survivor, especially as the decedent was listed as the father on the birth certificate and was the only father known to the child. In 2001, another appeals court, in *Achumba v. Neustein*, 793 So.2d 1013 (Fla. App. 5th 2001), cause dismissed, 805 So.2d 804 (Fla. 2001) and disapproved in *Greenfield v. Daniels*, 51 So.3d 421 (Fla. 2010), the court found no survivorship, at least where the husband’s name was on the child’s birth certificate. Of course, here there is typically less potential harm to an intact family. And here, one family will benefit financially by the legal recognition of a second father, with likely financial detriment to another family.

The financial detriment to other family members of a decedent who is labeled a presumptive parent has led to some lawsuits wherein those family members seek to disestablish a marital presumption favoring the child of the decedent. The Minnesota Supreme Court in 2006, in a probate case involving a decedent’s heirs, the decedent’s daughter sought to disestablish the decedent’s son (i.e., then her brother) via a marital paternity presumption by proving the decedent had no biological ties to his presumed son, born in the late 1940s. The daughter lost, but only because the Parentage Act required an action “declaring the nonexistence of the father and child relationship presumed” be brought no later than three years after the child’s birth. In *re Estate of Jotham*, 722 N.W.d 447 (Minn. 2006) (employing Minn. Stat. 257.55, a daughter also may not have had standing to seek disestablishment within 3 years as the Parentage Act granted standing to “a child, the child’s biological mother, or a man presumed to be the child’s father,” meaning the daughter might only be able to knock out her brother’s recovery from the estate if her mom sued). Had the decedent died earlier, the sister’s

ii. Voluntary Parentage Acknowledgment

State voluntary parentage acknowledgement (VAP) statutes can also, but need do not, involve parentage presumptions. With and without presumptions,¹⁰⁴ VAP statutes on parentage establishment typically recognize that signed and state-filed parentage declarations can establish childcare parentage, sometimes said to have the force and effect of court judgments,¹⁰⁵ for signors, sometimes without alleged biological ties, who do not undertake formal adoptions. VAP laws vary as to whether there is required an express requirement of possible biological ties. As well, VAP laws are subject to differing disestablishment standards, though all norms, due to federal welfare subsidy mandates, must conform to certain requisites within the federal Social Security Act.¹⁰⁶ VAP statutes usually are employed by birth mothers and unwed men, with or without biological ties to children born of sex, who seek to establish

attempt to disestablish the parentage of her father as to her then brother might have been successful. Elsewhere, the sister would be barred by a lack of standing to challenge the presumption. See, e.g., *Estate of Lamey v. Lamey*, 689 N.E.2d 1265 (Ind. App. 1997) (uncle cannot challenge paternity of his brother's daughter for purposes of determining heirship in his brother's estate).

Marital paternity presumptions can also be rebutted in child support reimbursement settings where husbands, once presumed fathers, seek reimbursement from biological fathers. In 2012, the New Jersey Supreme Court recognized such a former husband's claim against the biological father, his former brother-in-law, where the child was 19. *D.W. v. R.W.*, 212 N.J. 232 (2012). A statute recognized such a claim and there was no showing of good cause for not requiring genetic testing. Seemingly, good cause might well bar a court order on genetic testing in a reimbursement setting where the child was 9, and not 19, years old and where the relevant marriage remained intact.

¹⁰⁴ Compare, e.g., Montana Code 40-6-1-5(5)(C) ("irrebuttable presumption") to California Family Code 7573 (establishment of paternity) and McKinney's New York Family Court Act 516-a(a) (establishment). State voluntary acknowledgment statutes are reviewed in Parness and Townsend, at 63-87, and Jayna Morse Cacioppo, Note, "Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a legal Father?", 38 *Indiana Law Review* 479 (2005)[hereinafter Cacioppo].

¹⁰⁵ State statutes on the effects of VAPs vary in their language though federal law (tied to state participation in TANF, a federal welfare subsidy program) requires that VAPs from other states be given "full faith and credit." 42 U.S.C. 666(a)(5)(c)(iv).

¹⁰⁶ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.). Disestablishment (i.e., rescissions and challenges) norms are reviewed in Truth and Consequences. Part I, at 44-53 and Appendix B at 82-90 (2003) (including table citing all statutes).

legal paternity.¹⁰⁷ Increasingly though, VAP establishments can be undertaken by birth mothers and other women.

VAP statutes on parentage disestablishment via VAP challenges often are used by one or both of the signatories (like the birth mother and/or putative father). Further, they are sometimes employed by others, like the state or a nonsigning man with actual biological ties to the child.¹⁰⁸ VAPs are typically distinguished from birth certificate recognitions of childcare parents encompassing those married to birth mothers who never undertake VAPs.¹⁰⁹

Thus, in Alaska and Nevada the forms do not speak to biological ties, with the signing man indicating only that he is the “father.”¹¹⁰ In Wyoming and Washington, there is no explicit requirement the signing man affirm a belief in biological ties, though the signer elsewhere is referred to as the “natural father.”¹¹¹

As well, only in some places can an acknowledgments be returned prior to birth.¹¹² And, only in

¹⁰⁷ But see *In re Sebastian*, 879 N.Y.S. 2d 677 (N.Y. Surr., N.Y. 2009) (suggesting woman whose ova was used by her partner to bear a child born of assisted reproduction might employ the voluntary acknowledgment process).

¹⁰⁸ See, e.g., Parness and Townsend, at 82-86.

¹⁰⁹ See, e.g., *Castillo v. Lazo*, 386 P. 3d 839 (Ariz. App. 2d 2016) (birth certificate naming husband is not “equivalent” to a VAP).

¹¹⁰ Alaska Bureau of Vital Stat., Form No. 06-5376 VS Form 16, Affidavit of Paternity (rev. Jan. 2009) and Nevada Declaration of Paternity, Nevada Vital Records, Form No. NSPO, Declaration of Paternity (rev. July 2008) [these and other cited forms, were collected for Jeffrey Parness and Zach Townsend, “For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth,” 40 *Univ. of Baltimore L. Rev.* 53 (2010) [hereinafter Parness and Townsend], are available from the author].

¹¹¹ Vital Records Servs., State of Wyoming, Affidavit Acknowledging Paternity and Washington Paternity Affidavit, Ctr. For Health Stat., Wash. Dep’t. of Health, Form No. DOH/CHS 021 (rev. Sept. 2007). Generally, see Cacioppo, at 489-491.

¹¹² See, e.g., Texas Acknowledgment of Paternity, Vital Stat. Unit, Texas Dep’t of State Health Servs., Form No. VS-159-1M (rev. Sept. 2005).

some places must information as to any completed genetic testing be submitted; may forms be used by residents for out-of-state births; witnesses or notaries are needed; and must forms require parental or guardian consent when the signing mothers are young.¹¹³

Further, notwithstanding any designated “conclusive” status, voluntary acknowledgments usually may be rescinded within sixty days.¹¹⁴ After sixty days, however, VAPs usually may only be challenged in court on the basis of fraud, duress or material mistake of fact, standards prompted by the federal Social Security Act.¹¹⁵ The following cases demonstrate significant interstate variations on such VAP challenges,¹¹⁶ notwithstanding the federal standards.

A Connecticut Superior Court, in *Thompson v. Fulse*, ruled in 2004 on a February, 2004 motion by a male voluntary parentage acknowledger to reopen a December, 1989 Connecticut court judgment.¹¹⁷ That judgment was based on a voluntary acknowledgment signed in Florida by the male, Willie Fulse, in October, 1989, about seven months after the birth of Rishawn Fulse to Andrea Thompson in Connecticut. As to fraud, the court held that a challenger must prove:

(1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon it to some detriment.¹¹⁸

¹¹³ The varying state forms are reviewed in Parness and Townsend, at 63-87.

¹¹⁴ 42 U.S.C. 666(a)(5)(D)(ii).

¹¹⁵ 42 U.S.C. 666(a)(5)(D)(iii). At least one state statute combines its norms on disestablishing presumed marital paternity and its norms on challenging VAPs. Alabama Code 26-17-608(a)(1).

¹¹⁶ On the variations and suggested reforms, see Jeffrey A. Parness and David A. Saxe, “Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity,” 99 *Chicago-Kent Law Review* 177 (2017) [hereinafter Parness and Saxe].

¹¹⁷ 2004 Conn. Super. LEXIS 1936 [hereinafter Thomson].

¹¹⁸ Thomson, at *2. Comparable is A.M.C., at *2.

Willie was unable to show fraud because Andrea did not “intentionally” keep her sexual liaisons with Trevor, her former boyfriend, from Willie. While pregnant Andrea did tell Willie he was the father. Around March, 1990 Willie learned from Andrea that he “was not Rishawn’s father.” Willie did not then challenge the VAP because he thought “the matter had been taken care of” by Andrea. Willie only realized the acknowledgment continued in effect in April, 2003 when he was served with papers to appear in a Connecticut child support proceeding, seemingly prompted by Andrea’s receipt of state assistance in Connecticut. The state wanted reimbursement of the state aid from Willie. Before then, Willie “had some minimal contact” with Rishawn, but had never been asked by Andrea for child support.

While Willie failed to prove fraud, the trial court said he might still disestablish his VAP parentage due to a material mistake of fact. In this “unique” setting, the court found Willie’s arguments “slightly more persuasive, particularly from Rishawn’s point of view” as the child might be helped “from a medical history standpoint” if Trevor was named the legal father.¹¹⁹ The trial court retained jurisdiction and ordered genetic testing of Andrea, Willie, and Rishawn. Here, a mistake as to biological ties seemingly sufficed for a successful VAP challenge.

An Oklahoma appellate court ruled in 2004 on a VAP challenge by Billy J. Chisum, who sought disestablishment of a VAP signed on the date of the child’s birth in June, 1999.¹²⁰ The acknowledgment was used in a 2000 administrative child support order. The challenge came in April, 2001 after Billy had private testing done that was prompted by the mother’s statement that Billy was not the father. The appellate court found there was a “material mistake of fact” even though Billy could have insisted on biological testing before his acknowledgment. It found no “neglect” by Billy due to his failure to seek

¹¹⁹ Thomson, at *5.

¹²⁰ Dep’t. of Human Services v. Chisum, 85 P.3d 860 (Okl. Civ. App. 2004) [hereinafter Chisum].

testing earlier. It reasoned that any testing at birth would “likely” have injected “an element of hostility into . . . already volatile emotional relationships,” would have been “expensive,” and may have prompted unfortunate perceptions about “an attack on the mother’s veracity and an attempt to shirk responsibility for the child.”¹²¹ The court rejected arguments about the applicability of a best interests of the child test, or of an equitable estoppel analysis.¹²² Again, mistake as to biological ties sufficed for a successful VAP challenge, with an accompanying rationale that is sensible. Yet here, unlike in *Fulse*, there was little talk of helping the child.

In *Rousseve v. Jones* in 1997, the Louisiana Supreme Court held that an acknowledgment of an illegitimate child only creates a presumption of biological parentage that can be overridden whenever biological ties are lacking, “absent some overriding concern of public policy.”¹²³ The *Rousseve* court recognized, however, that when a VAP forms the basis of a court judgment for child support, Louisiana law expressly allowed an attack on the judgment only if it was procured “by fraud or ill practice” and only if it was brought within a year of discovery of the fraud or ill practice.¹²⁴ By contrast, the court noted that an action to disavow the paternity of a child by a man who was at some time the husband of the mother “generally must be filed within 180 days after the husband learned of the birth of the child.”¹²⁵ Yet, where such a husband “erroneously believed, because of misrepresentation, fraud, or deception by the mother, that he was the father of the child, then the time for filing suit for disavowal of paternity shall be suspended during the period of such erroneous belief or for ten years, whichever ends

¹²¹ *Chisum*, at 862.

¹²² *Id.* at 863 n.2.

¹²³ 704 So.2d 229 (La. 1997) [hereinafter *Rousseve*].

¹²⁴ *Id.* at 233.

¹²⁵ *Id.* at 234 n.4.

first.”¹²⁶

Because unwed Matthew Rousseve had not yet proven his allegations “that he had just become aware of fraud or misrepresentation by the child’s mother” when he sought a paternity disavowal involving a court judgment founded on his VAP, the high court remanded the case for an additional hearing. Clearly, then, because Matthew had never been married to the mother, he had more time to “sit on” his newfound discovery of nonpaternity (1 year) than a married man would have had (180 days), but far less time to escape a paternity court judgment based on a VAP than an acknowledged father would have had to undo a VAP that was unaccompanied by a court order. In Louisiana, mistakes on biological ties are sufficient for VAP challenges, but not for paternity judgment disestablishments where “fraud or ill practice” must be shown. As well, mistakes are insufficient for marital presumption disestablishments where, after 180 days, “misrepresentation fraud or deception by the mother” must be shown.

In Indiana, some precedents maintain that a male VAP signatory can challenge his parentage only “in extreme and rare instances” where the evidence of a lack of biological ties “has become available independently of court action.”¹²⁷ This has been read to mean that the evidence of no ties “was not actively sought by the putative father, but was discovered almost inadvertently in a manner that was unrelated to child support proceedings.”¹²⁸ Inadvertent discovery can occur when the putative father receives “ordinary medical care,” but not when he is told by the child that he may not be the

¹²⁶ *Id.* at 231.

¹²⁷ *In re Paternity of E.M.L.G.*, 863 N.E.2d 867, 870 (Ind. App. 2007).

¹²⁸ *Tirey v. Tirey*, 806 N.E.2d 360, 362 n.2 (Ind. App. 2004).

biological father.¹²⁹ Yet other precedents make disestablishment of a “paternity affidavit” easier.¹³⁰

Finally, in Michigan at least, a post 60 day challenge to a VAP requires not only fraud, duress or mistake, but also a child’s best interest analysis. Such a proceeding is treated like a request to set aside a paternity determination.¹³¹

The foregoing cases illustrate only some of the many differences between state laws on how fraud, duress, or material mistake of fact may be used to undo VAPs.¹³² The cases raise difficult policy questions. Is there a certain time within which one can challenge a VAP regardless of the reason, or should there be no absolute time limit? Is there usually a “material mistake” whenever an acknowledging man is wrong about biological ties, though there is no fraud?¹³³ Must any “material mistake of fact” be “mutual?”¹³⁴ Can a concern for justice, or a child’s best interests, bar a signing

¹²⁹ *In re Paternity of B.M.*, 93 N.E.3d 1132, 1137 (Ind. App. 2018) (relying on *In re Paternity of M.M.B.*, 877 N.E.2d 1239, 1245 (Ind. App. 2007)).

¹³⁰ See, e.g., *Paternity of I.I.P. v. Rodgers*, 92 N.E. 3d 1158 (Ind. App. 2018) (with a strong dissent urging that judicial action on disestablishment violates the statutory norms on VAPs, which follow the federal Social Security Act).

¹³¹ *Helton v. Beamon*, 497 Mich. 1001 (Mich. 2015)(adopting concurring opinion’s rationale in the Court of Appeals, 304 Mich. App. 97, 115 (2014) (J. Kelly, concurring)) [hereinafter *Helton*].

¹³² State statutes on rescinding or challenging voluntary paternity acknowledgments are collected and summarized in *Truth and Consequences*. Part I, Appendix B at 82-90. See also Caroline Rogus, “Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws,” 21 *Mich. J. of Gender & Law* 67 (2014) (suggesting reforms easing burdens on those seeking rescissions of voluntary parentage acknowledgments); Leslie Joan Harris, “Reforming Paternity Law to Eliminate Gender, Status and Class Inequality,” 2013 *Michigan State Law Review* 1295 (suggesting rescission reforms for voluntary parentage acknowledgments); and Parness and Saxe, at 185-205 (varying state VAP challenge laws).

¹³³ See, e.g., *Rogers v. Wcisel*, 877 N.W. 2d 169 (Mich. App. 2015) (signing man can have some doubt as to biological ties but still be mistaken and thus eligible to rescind).

¹³⁴ See, e.g., *Gordon v. Hedrick*, 364 P. 3d 951 (Idaho 2015)(court says yes). See also *State v. Smith*, 392 P. 3d 68 (Kan. 2017) (no VAP challenge allowed when both signors knew signing man was not the biological father).

woman's or a signing man's challenge even though fraud, duress or mistake is proven?¹³⁵ How should a state welfare agency's interests in welfare payment reimbursements from nonsigning biological fathers be considered when determining VAP challenges? The absence of more explicit federal guidelines allows the noted interstate differences. Further, this absence is sometimes coupled with state general assembly inaction, leaving those within a single state to wonder what VAP challenge processes operate.¹³⁶

Beyond the variations in the state procedures available to nonbiological acknowledging fathers seeking to challenge their VAPs, there are also interstate differences on when and how others (including, but not limited to, signing mothers) can contest such earlier acknowledgments. By federal statute, "any signatory" has a right to rescind a voluntary acknowledgment within sixty days.¹³⁷ Thereafter, states participating in the federal TANF program "must have in effect laws" allowing a post-sixty day "contest" of a signed voluntary acknowledgment where the "challenger" must show "fraud, duress, or material mistake of fact" and where the legal responsibilities of any signatory usually continue "during the challenge."¹³⁸ Does this federal law require fraud and the like only of signatories who contest after sixty days, or must anyone who challenges meet these requirements? Who is a "challenger"? Can others besides acknowledging fathers even challenge? Federal statutes speak of both a "signatory" and a "challenger." At least in Indiana, "there is no provision . . . that would permit

¹³⁵ See, e.g., *Helton*, 497 Mich. at 1001 and *Flores v Sanchez*, 137 So. 3d 1104(Fla. App. 3d 2014) (best interests test must be met before testing ordered on behalf of a mother that might result in a rescission of a voluntary paternity acknowledgement by a nonbiological father who raised the child for 4 years.)

¹³⁶ See, e.g., the problems posed for the Vermont Supreme Court Justices in *McGee v. Gonyo*, 140 A. 3d 162 (Vt. 2016) (several justices call for legislative reforms).

¹³⁷ 42 U.S.C. 666(a)(5)(D)(ii).

¹³⁸ 42 U.S.C. 666(a)(5)(D)(iii).

Mother to attempt to rescind the paternity affidavit.”¹³⁹ Of course, intact families would often be disrupted by allowing nonsignatories to challenge, even where there are no marriages. Nevertheless, an Alabama statute provides that for a child with an acknowledged father, a nonsignatory can seek an adjudication of paternity “if the court determines that it is in the best interests of the child.”¹⁴⁰

If a child challenges a VAP (for example, in order to establish legal parentage in the real biological father), it may be difficult to ask the child to prove “fraud, duress or material mistake of fact” since any such acts occurred, if at all, by or to another. When a mother has custody of an acknowledged child, might she be able to challenge a VAP on the child’s behalf when she herself could not challenge due to her own fraud? While her own challenge may be estopped because of her own conduct (e.g., deceiving a man as to his biological ties while allowing him to develop a loving parental relationship with her child), the child may not be assessed responsibility for such maternal conduct.

Further, if an alleged unwed biological father is allowed to challenge another man’s VAP (for example, to establish his own childcare parentage), would only fraud personal to him (if fraud is even required) be sufficient? Or could an alleged unwed biological father rely on the fraud committed against the acknowledging father by the mother, or on the fraud perpetrated on the government by each of the two signatories? In one, quite sensible, ruling, a biological father was found able to contest a VAP signed by another man in order to avoid the formal adoption process, though the contesting father may not always prevail.¹⁴¹ In addition, what about allowing challenges to VAPs by state welfare agencies looking to recover child support expenditures from “deadbeat” dads, or looking to protect children from abuse

¹³⁹ A.G.P. M.O v. R.K.P., 2014 Ind. App. Unpub. LEXIS 698 (Ind. App.) (mother was also denied rescission authority as she “cannot take advantage of the fraud she herself perpetuated on the court”).

¹⁴⁰ Alabama Code 26-17-609(b).

¹⁴¹ Alvarado v. Thomson, 375 P.3d 77 (Ariz. App. 1st 2016).

or neglect by an acknowledging man via a VAP challenge rather than via an abuse or neglect petition?¹⁴²

Answers to these and other questions on VAP challenges after 60 days will come from state laws as long as federal lawmakers are silent. As already noted, there is some diversity of approach in the state requirements for VAP challenges, as with the norms on fraud, duress, and mistake. Further illustrations of interstate variations on VAPs follow, demonstrating additional chances for “true conflicts” to arise in court proceedings involving VAPs where relevant human conduct occurred in two or more U.S. states.

On challenges by nonsignatories to voluntary paternity acknowledgments, there are some written state laws. In Arizona, “the mother, father or child,” as well as the state, seemingly may challenge a VAP (which earlier was used to prompt a court order) after the sixty day period only on the basis of fraud, duress or material mistake of fact.¹⁴³ In Virginia, fraud and the like are required of “the person challenging” the “voluntary statement acknowledging paternity.”¹⁴⁴ In Wisconsin, “a determination of paternity” arising from a statement acknowledging paternity “may be voided at any time upon a motion or petition stating facts that show fraud, duress or mistake of fact.”¹⁴⁵ In Delaware, after sixty days “a signatory of an acknowledgment” may commence a proceeding to challenge on the basis of fraud, duress or material mistake of fact.¹⁴⁶ In Michigan, revocation of a parentage acknowledgment may be sought by the mother, the signing man, the child, or a prosecuting attorney.¹⁴⁷

¹⁴² In Illinois, the state may not pursue a rescission against an alleged abuser in a neglect proceeding, but a child, via a guardian, may pursue. *In re N.C.*, 12 N.E. 3d 23 (Ill. 2014).

¹⁴³ Ariz. Stat. 25-812E.

¹⁴⁴ Va. Code 20-49.1.

¹⁴⁵ Wisc. Stat. 767.805(5).

¹⁴⁶ Del. Code tit. 13, 8-308(a)(1).

¹⁴⁷ Mich. Comp. Laws 722.1011(1).

In Utah, after sixty days, challenges may only be brought by “a signatory” or “a support-enforcement agency.”¹⁴⁸ Finally, in Vermont a VAP challenge can be pursued by “a person who is neither the child nor a signatory.”¹⁴⁹

These differences in explicit state statutes on nonsignatory challengers may not prompt as much interstate variations as first appear. In many places, though unrecognized in explicit VAP statutes, nonsignatories may challenge VAPs by civil actions, e.g., seeking declarations of the existence or nonexistence of father-child relationships under law¹⁵⁰

There are other differences in current state VAP laws. For example, there are varied time limits on VAP challenges. Even with fraud, duress or mistake, challenges must be commenced under written law within a year in Massachusetts,¹⁵¹ within two years in Delaware,¹⁵² and within four years in Texas.¹⁵³ In Utah, a statutory challenge may be made “at any time” on the ground of fraud or duress, but only within four years for material mistake of fact.¹⁵⁴ Where there are no written time limits, (often quite

¹⁴⁸ Utah Code 78B-15-307(1).

¹⁴⁹ 15C Vermont Stat. 308(b)

¹⁵⁰ See, e.g., *In re Paternity of Unknown Minor*, 951 N.E. 2d 1220 (Ill. App. 1st 2011) (alleged biological father can challenge another man’s VAP via a paternity suit seeking a childcare order).

¹⁵¹ Mass. Gen. Laws 209C(11)(a). See also *State v. Smith*, 392 P.3d 68 (Kan. 2017) (one year (after birth) limit on signatory challenges applied though there were found technical violations (e.g., no proper notarizations) of the statute).

¹⁵² Del. Code, tit. 13, 7-308(a)(2). See also 15C Vermont Stat. 308(a)(1) and *Paul v. Williamson*, 322 P. 3d 1070 (Okl. Civ. App. 2014)(employing Oklahoma two year limit against alleged biological father per 10 Okl. Stat. 7700-609(B)). Compare Louisiana Stat. 9:406 (two year prescriptive period previously imposed for revocation of authentic acts of acknowledgement was repealed in 2016).

¹⁵³ Texas Family Code 160.308(1).

¹⁵⁴ Utah Code 78B-15-307.

broad) trial court discretion reigns.¹⁵⁵ Further, there are differences in whether the effects of a successfully challenged VAP include the elimination of past child support arrearages.¹⁵⁶

Notwithstanding some federal law demands on national uniformity on VAP establishments and disestablishments, as seen U.S. state laws - both statutes and judicial precedents –vary greatly.¹⁵⁷ Variations may significantly diminish should U.S. state legislators enact the 2017 UPA provisions on VAPs. Current laws often reflect the earlier model VAP provisions in the 1973 or 2000 UPA. Should states choose to follow the 2017 UPA, interstate variations might lessen. But with the 2017 UPA, there would also be a major shift in VAP policies as far more “unnatural” parentage acknowledgments are invited, that is, parentage not dependent upon alleged biological ties.

iii. Residency/Hold Out Parentage

The current UPA limitation of the “holding out” parentage presumption to one residing with a child “for the first two years of the child’s life,” first established in 2000, lessened considerably the prospects of conflicting governmental interests. The state of residence on the child’s second birthday should typically be key, with such residency usually limited to a single state. While the “same household” may be maintained for a child in several different states before the child reaches two, only one state will usually qualify as the child’s residence at the time of the child’s second birthday, the key

¹⁵⁵ See, e.g., *Matter of Neal*, 184 A.3d 90 (N.H. 2018) (sustainable exercise of trial court discretion where a 2009 VAP was challenged by male signatory in 2015 after a 2012 paternity test revealed that he was not the biological father; challenge brought in November, 2015, after child contact was cut off in March, 2014).

¹⁵⁶ See, e.g., *Adler v. Dormio*, 872 N.W. 2d 721 (Mich. App. 2015) (reviewing Michigan laws on when responsibility for arranges may be eliminated).

¹⁵⁷ On the need for state law reforms, as well as a review of current voluntary paternity acknowledgment processes, see Caroline Rogus, “Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws,” 21 *Michigan J. of Gender & Law* 67 (2014); Leslie Joan Harris, “Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality,” 2013 *Michigan State Law Review* 1295 (2013); and Parness and Saxe, at 185-205 (varying state laws on VAP challenges).

to prompting the UPA presumption. Yet the residency/hold out parentage norms in the 1973 UPA, which do not require residency/hold out in the first two years, present more serious choice of law problems where implemented.

As with spousal parentage, there are varying U.S. state laws on parentage arising from the nonmarital acts of residency/hold out. Thus in California, a man is “presumed to be the natural father of a child” if he “received the child into his home and openly holds out the child as his natural child.”¹⁵⁸ There is no explicit requirement that a residency/hold out man have any beliefs about his actual biological ties. Thus, California cases have recognized as presumed fathers men who knew there were no biological ties, but who acted in the community as if there were. For example, in *Jesusa V*, both Paul (the husband) and Heriberto (the biological father) were each judicially declared to be “presumed” California fathers because each had received Jesusa into his home and held her out as his natural child.¹⁵⁹

Elsewhere, the requisites for nonmarital childcare parentage arising from residency/hold out differ. For example, some laws do not require receipt into the home.¹⁶⁰ Some laws require hold out for a definite time period, which often must start at birth.¹⁶¹ Some laws explicitly require existing parents

¹⁵⁸ Cal. Family Code 7611(d). The presumption has been sustained when challenged on the ground of interfering with federal constitutional childcare interests. See, e.g., *R.M. v. T.A.*, 233 Cal. App. 4th 760 (Cal. App. 4th 2015)(preponderance of evidence norm used to establish presumption). As to what constitutes receipt into the home, see, e.g., *In re N.V.*, 2014 Cal. App. Unpub. LEXIS 8870 (Cal. App. 1st Div. 4) (reviewing cases).

¹⁵⁹ *Jesusa V.*, 85 P.3d 2, 14 (Cal. 2004). See also *Barnes v. Cypert*, 2006 Cal. App. Unpub. LEXIS 10543 (Cal. App. 5th) (birth mother’s uncle is a presumed parent).

¹⁶⁰ See, e.g., N.J. Stat. 9:17-43(a)(4) (either receives into his home or “provides support for the child”) and Delaware Code tit. 13, 8-201(c) (“parental role” and “bonded and dependent relationship . . . that is parental in nature”).

¹⁶¹ See, e.g., Texas Code 160.204(a)(5) (man is a presumed father if “during the first two years of the child’s life, he continuously resided in the household in which the child resided and he represented to others that the child was his own”) and Wash. Code 26.26.116(2) (similar). Compare Montana Code 40-

to agree to such matters as residency and hold out by nonparents who can later morph into new childcare parents¹⁶² on equal footing with existing parents.¹⁶³

Disestablishment norms for even similar nonmarital parentage founded on residency/hold out also vary interstate.¹⁶⁴ Incidentally, where a single state has two distinct forms of nonmarital parentage, as with voluntary acknowledgment and residency/hold out, their disestablishment norms can also vary.¹⁶⁵

So, interstate variations in residency/hold out parentage laws can prompt choice of law issues in childcare parentage cases.

iv. De Facto Parentage

6-105(d)(1) (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”).

¹⁶² Even when the statutes only explicitly recognize hold out by men, women are often deemed eligible to be presumed parents under these statutes. See, e.g., Nancy D. Polikoff, “From Third Parties to Parents: The Case of Lesbian Couples and Their Children,” 77 *Law and Contemporary Problems* 195, 212-219 (2014).

¹⁶³ See, e.g., D.C. Code 16-831.01(1) (single parent’s “agreement” to same household residency for one wishing to be deemed a de facto parent). Compare N.J. Stat. 9:17-43(a)(4) and (5) and 9:17-40 (a man can be “presumed to be the biological father of a child on equal footing with the unwed birth mother, if he “openly holds out the child as his natural child” and either “receives the child into his home” or “provides support for the child”).

¹⁶⁴ See, e.g., Paula Roberts, “Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children,” 37 *Family Law Quarterly*, 35, 47-51 (2003) [hereinafter Truth and Consequences. Part I].

¹⁶⁵ See, e.g., Hawaii Code 584-4 (presumed natural fatherhood for man who receives child into his home while openly holding out the child as his natural child or who executes a voluntary paternity acknowledgment). Here, disestablishment norms will inevitably vary given the federal mandates on VAP challenges and the very different prerequisites to parentage establishment via residency/hold out).

By contrast to spousal, acknowledged and residency/hold out parentage, “de facto” parentage under the 2017 UPA and comparable state laws should more frequently prompt the interests of several fora. Recall that “de facto” parentage under the 2017 UPA can involve some residency; child support; childcaretaking; and/or support by a legal parent of the parental-like acts of a then nonparent.¹⁶⁶ These acts need not begin at birth, and may extend well beyond a two year period, unlike the presumptive residential parentage recognized in the 2000 UPA. Relevant acts preceding a dispute over “de facto” parentage under the 2017 UPA can thus occur in several states, which may or may not include the forum state where parentage is to be adjudicated.¹⁶⁷

Choice of the appropriate de facto parentage law-to resolve either a custody/visitation request by an alleged de facto parent, or a child support request against an alleged de facto parent-will be necessary, of course, in settings where de facto parenthood laws materially differ in two or more interested U.S. states. While generally seeking to promote nationwide uniformity through individual state lawmaking (via statute or precedent, though statute seems preferred¹⁶⁸), the NCCUSL recognizes reasonable policymaking can yield differing results. Thus for de facto parenthood, the 2017 UPA provides alternative models on the issue of whether a child may have more than two custody/visitation parents.¹⁶⁹ The first two states to enact generally the 2017 UPA, including its de facto parent provisions,

¹⁶⁶ 2017 UPA, at §609.

¹⁶⁷ See *infra* Section (E)(i)(a) (reviewing North Dakota and Ohio cases wherein courts were asked to assess de facto parentage conduct occurring outside their state borders).

¹⁶⁸ See, e.g., 2017 UPA, at §1001 (courts “need to promote uniformity” when “applying and construing” the UPA provisions adopted in their states). On separation of powers issues in the realm of state childcare parentage lawmaking by legislatures and courts, 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 (2017).

¹⁶⁹ 2017 UPA, at §613(c) (Alternative A-court may not adjudicate a child to have more than two parents; Alternative B- court may recognize more than two parents if failure to so recognize “would be detrimental to the child”).

have differed on this issue. In Vermont proceedings “to adjudicate competing claims of parentage or challenges to a child’s parentage by two or more persons,” adjudications must serve “the best interests of the child.”¹⁷⁰ In Washington, a child may be adjudicated to have more than two parents only if a failure to so recognize “would be detrimental to the child.”¹⁷¹

There are other material differences in U.S. state de facto parent laws. The 2017 UPA,¹⁷² followed in Vermont¹⁷³ and Washington,¹⁷⁴ requires an alleged de facto parent to prove “consistent caretaking;” holding out the child as the individual’s child; and residing with the child “as a regular member of the child’s household for a significant period of time.” In Delaware, whose statute served as a model for the 2017 UPA,¹⁷⁵ the de facto parentage law has none of those requirements.¹⁷⁶ Maine, whose statute also served as a model for the 2017 UPA¹⁷⁷ on de facto parentage, does not require a holding out, though it does demand, unlike the 2017 UPA, Vermont, Washington and Delaware

¹⁷⁰ 15C Vermont Stat. 206. De facto parentage guidelines appear in 15C Vermont Stat. 501(a), with “clear and convincing evidence” required if there may be more than two parents, 15C Vermont Stat. 501(b). At least one U.S. state court has ruled three parent standards violate federal constitutional precedents on avoiding interference with the superior childcare rights of two existing legal parents. *Bancroft v. Jameson*, 19 A.3d 730 (Del. Fam. Sussex 2010) (13 Del. Code 8-201 on de facto parentage impermissibly allows interference with childcare interests of two fit parents). But see *A.L. v. D.L.*, 2012 WL 6765564 (Del. Fam. Kent 2012) (disagreeing). And see *JwS. Jr. v. Em. S.*, 2013 WL 6174814 (Del. Fam. Sussex) (three parents: biological mother, adjudicated biological father, and de facto parent).

¹⁷¹ Washington Rev. Code 26.26.513(3).

¹⁷² 2017 UPA, at §609(d)(1), (2) and (4).

¹⁷³ 15C Vermont Stat. 501(a)(1)(A), (B) and (D).

¹⁷⁴ Washington Rev. Code 26.26.509(4)(a), (b), and (d).

¹⁷⁵ 2017 UPA, at §609 Comment, para. 1.

¹⁷⁶ 13 Delaware Code 8-201(c) and 1101(10) (on “parental responsibilities”).

¹⁷⁷ 2017 UPA, at §609 Comment, para. 1.

provisions, “clear and convincing evidence that the person has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child’s life.”¹⁷⁸

So, interstate variations on de facto childcare parentage can prompt choice of law issues.

v. Parentage Following Assisted Reproduction Births

Fortunately, the 2017 UPA updates the 2002 (and 1973) UPA by providing suggested state law norms on legal parentage arising from assisted human reproduction, whether or not the woman giving birth intends to raise the child and whether or not there are biological ties between intended parents(s) and children. If the 2107 UPA has a reception in American state legislatures the 1973 and 2000 UPAs, American state laws on assisted human reproduction will be more sensible and respectful of intended family structures, however nontraditional to some.

For children born of assisted reproduction, the longstanding dual parentage policies within U.S. state laws have been loosened, for good reasons. While this can leave children with only one legal parent at birth, it opens the door to second childcare parents per the laws on VAP, residency/hold out, or de facto parenthood.

Some state laws now recognize that unwed women can secure single parenthood through giving birth via assisted reproduction where the sperm donors are not recognized as legal parents.¹⁷⁹ Further,

¹⁷⁸ 19-A Maine Rev. Stat. 1891(3). Note that these requirements on de facto parentage, however different state to state, are sometimes also used in nonparent childcare settings. See, e.g., *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435-6 (Wis. 1995) (“parental-like relationships;” same household residence; and “bonded, dependent relationship parental in nature”).

¹⁷⁹ See, e.g., Ohio Code 3111.89 (“non-spousal artificial insemination for the purpose of impregnating a woman so that she can bear a child she intends to raise as her child” through using “the semen of a man who is not her husband”) and *Szafranski v. Dunston*, 2015 IL App (1st) 122975-B (finding ex-girlfriend is not enjoined, due to earlier contract, from using cryopreserved pre-embryos she created with her ex-boyfriend, while observing ex-boyfriend could later sue for a declaration that he was not “the natural father” of any later-born child) [hereinafter *Szafranski*]. “Due process safeguards,” however, [together with state contract law principles] may prompt some sperm donors under the statute to be fathers under law. *C.O. v. W.S.*, 639 N.E.2d 523, 525 (Ohio Comm. Pl., Cuyahoga Cty., 1994), as when future

some state laws now recognize that unwed men can secure single parenthood through the services of gestational (if not genetic) carriers (a.k.a. surrogates) who are not recognized as legal parents.¹⁸⁰ In some states, assisted reproduction via gestational surrogacy arrangements can even prompt single legal parentage for those with no biological ties to their children.¹⁸¹

These assisted reproduction laws,¹⁸² leaving children with only one legal parental at birth, make

parental childcare interests were not subject to earlier waivers and, in fact, were expressly recognized by both the donors and birth mothers.

¹⁸⁰ See, e.g., Arkansas Code 9-10-201 (unwed sperm donors can utilize surrogates) and *In re Roberto D.B.*, 923 A.2d 115 (Md. 2007) (similar). Compare *In re Paternity and Maternity of Infant T.*, 991 N.E.2d 596 (Ind. App. 2013) (unwed sperm donor can disestablish paternity of surrogate's husband who consented to disestablishment, but could not disestablish maternity of surrogate who gave birth even though she too had agreed to disestablishment; court reasoned there would otherwise be no second parent). Surrogacy laws vary widely among American states, with some states barring such arrangements while others allow them; some states still having no statute or major case precedent. See, e.g., "Assisted Reproductive Technologies," 17 *Georgetown Journal of Gender and the Law* 83, 99-107 (2016) (reviewing varying American state surrogacy laws) [hereinafter *Assisted Reproductive Technologies*]; Mark Strasser, "The Updating of Baby M: A Confused Jurisprudence Becomes More Confusing," 78 *University of Pittsburgh Law Review* 181 (2016) (similar); and Joseph F. Morrissey, "Surrogacy: The Process, the Law, and the Contracts," 51 *Willamette Law Review* 459 (2015) (similar). Even where parentage via surrogacy pacts is not recognized, intended parents can sometimes prevail on their parentage claims. See, e.g., *Matter of Adoption of J.*, 72 N.Y.S. 3d 811 (N.Y. Fam. 2018) (sperm donor could prevail on parentage claim under "equitable estoppel" theory even where there was "a patently illegal surrogacy contract").

¹⁸¹ Compare *Matter of Parentage of a Child by T.J.S. and A.L.S.*, 16 A.3d 386 (N.J. Super. 2011) (husband is the father of a child born to gestational carrier who used the husband's sperm and anonymously donated ovum, but his infertile wife could not be listed as a parent on the child's birth certificate even with the husband's consent), *affd.*, 54 A.3d 263 (N.J. 2012), with 750 ILCS 40/3 (a) (husband's consent to his wife's pregnancy via assisted reproduction with anonymously donated sperm can lead to the husband being a presumed natural father).

¹⁸² State assisted reproduction laws are often guided by the models developed by such entities as the NCCUSL and the American Bar Association (ABA). Charts briefly describing, and citing to, American state laws on varying forms of assisted human reproduction (e.g., donor insemination; marital presumptions; nonmarital nonbiological parentage; intended parentage; and gestational surrogacy) are found in Douglas Nejaime, "The Nature of Parenthood", 126 *The Yale Law Journal* 2260, 2363-2381 (2017). Techniques for assisted human reproduction are reviewed in Charles Thomas, "Novel Assisted Reproductive Technologies and Procreative Liberty: Examining In Vitro Gametogenesis Relative to Currently Practiced Assisted Reproduction Procedures and Reproductive Cloning", 26 *Southern California Interdisciplinary Law Journal* 623, 625-629 (2017).

sense as they provide parentage opportunities for women and men who may otherwise be unable to parent; they reasonably assume single intended parents will become good parents;¹⁸³ they aim to insure informed decision-making by those involved in child creation; and, they clarify the legal status of those involved in assisted reproduction, as by relieving certain semen and egg donors of later financial obligations and by insuring intended parents of opportunities for childrearing.¹⁸⁴

Unfortunately, some limited assisted reproduction laws prompting at birth only a single legal parent, the birth mother, make no sense. In 2017, for example, the Idaho Supreme Court rejected an unwed woman's claim to parentage of a child born of assisted reproduction to her former partner because the statute only addressed parentage of a birth mother's consenting spouse.¹⁸⁵ What happened to equality principles involving the wed and unwed and the dual parentage at birth policy, if not the privacy interest in having children? Are unwed lesbian couples more likely to be worse parents than wed lesbian (or wed opposite sex) couples, or more likely not to understand the childcare agreements they undertake? I think not.

And unfortunately, most U.S. state lawmakers have yet to resolve the standards on single

¹⁸³ At times permissive assisted reproduction laws require that intended parents cannot otherwise have children outside of formal adoption. See, e.g., Florida Stat. 742.15(2) (gestational surrogacy contract only allowed where the commissioning mother "cannot physically gestate a pregnancy to term" or otherwise safely deliver a child).

¹⁸⁴ Especially in surrogacy settings, there are legitimate concerns with how the written laws regulate the contractual undertakings. See, e.g., Lori B. Andrews, "Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood," 81 Virginia Law Review 2343 (1995).

¹⁸⁵ *Doe v. Doe*, 395 P. 3d 1287, 1290-1 (Idaho 2017) (deferring to legislature while rejecting the woman's constitutional claim as she had a "legally recognized, protected relationship" with the child) [hereinafter *Doe*]. In *Strickland v. Day* in 2018, the Mississippi Supreme Court recognized, without a statute directly on point, that a "then-married" lesbian couple shared parental childcare interests where there was an agreement to employ assisted reproduction, with an anonymous sperm donor, to conceive and raise a child together. 239 So. 3d 486 (Miss. 2018). But see *Garnys v. Westergaard*, 71 N.Y.S. 3d 554 (N.Y. Sup. App. 2d 2018) (hinting that only preconception pacts between two women to raise a child together will be honored).

parenthood arising from assisted reproduction involving frozen embryos where only one of the two donors wishes to prompt a pregnancy and birth, while the other objects to employing any artificial reproductive techniques.¹⁸⁶

Of course, assisted reproduction via surrogates raises issues that do not arise in nonsurrogacy settings. These issues can be quite controversial, and also prompt differing state law norms, as with the enforceability of selective reduction clauses in surrogacy contracts.¹⁸⁷

So, interstate variations on childcare parentage following assisted reproduction births can prompt choice of law issues.

E. CHOICE OF LAW IN CHILDCARE PARENTAGE CASES

The expanded forms of childcare parentage, now significantly recognized in the 2017 UPA and in American state laws beyond the 2017 UPA, can prompt the interests of several states, including the states where there were some elements of marital residency, nonmarital residency, child support, childcaretaking, and/or assisted reproduction contracting relevant to a single child. Too often nonforum interests are ignored when an expanded form of childcare parentage is adjudicated. The 2017 UPA should be amended, and choice of childcare parentage precedents should be (re)formulated, to recognize, and balance better, the multistate interests often arising in parentage cases where parentage is not wholly dependent upon biology or formal adoption. Before suggesting how choice of law issues involving expanded childcare parentage should be resolved, a few troubling cases will be reviewed to illustrate the urgent need for reform. The first case, a North Dakota high court ruling involving 2017 UPA-like childcare parentage for both custody and support purposes, will be examined in great depth.

¹⁸⁶ See, e.g., Ayssa Yoshida, Note, “The Modern Legal Status of Frozen Embryos,” 68 *Hastings Law Review* 711 (2017) (urging a contract analysis where embryos are not “judicial persons”).

¹⁸⁷ See, e.g., Julia Dalzell, Note, “The Enforcement of Selective Reduction Clauses in Surrogacy Contracts,” 27 *Widener Commonwealth L. Rev.* 83 (2018)(urging there should be some enforcement).

Additional illustrations involving other expanded forms of childcare parentage follow, including examples involving VAP and assisted reproduction laws.

i. A Few Troubling Cases

a. UPA-Like De Facto Parentage

The case of *Johnson v. Johnson*¹⁸⁸ illustrates how a state parentage law, not unlike the 2017 UPA on de facto parentage, can prompt multistate interests, resulting in troubling consequences when there is an exclusive use of forum childcare parentage laws when a court adjudicates a “parent-child relationship” or “parentage.”

The Johnsons, Antonyio and Madonna, were married in September 1986. No child was born during this marriage. In August 1988, the Johnsons, then living in New Jersey, took custody of Jessica in Pennsylvania, then three months old and the natural granddaughter of Madonna.¹⁸⁹ While Jessica was scheduled to remain with the Johnsons for only a month, ten years later Jessica was still living with the Johnsons.¹⁹⁰ Jessica believed until she was nine that Madonna and Antonyio were her biological parents.¹⁹¹ During this first decade, Jessica was raised as the Johnsons’ child, residing with them as they regularly changed residences due to Antonyio’s Air Force deployments. The Johnsons did initiate two separate formal adoption proceedings, one in New Jersey and one in Kentucky (where Jessica’s natural

¹⁸⁸ *Johnson v. Johnson*, 617 N.W.2d 97 (N.D. 2000) [hereinafter *Johnson I*]. Earlier (pre 2017 UPA) thoughts on choice of law guidelines in imprecise parentage cases appear in Jeffrey A. Parness, “Choosing Among Imprecise American State Parentage Laws,” 76 *Louisiana L. Rev.* 481 (2015).

¹⁸⁹ *Id.* at 100 (Jessica’s biological mother is Michelle Clayton, who was married to Madonna’s son David Clayton. In August 1988, David was incarcerated in Vermont. Michelle called the Johnson’s requesting help and the Johnson’s housed Michelle for about a week at which point Michelle went back to Kentucky, and left Jessica with the Johnsons. Madonna obtained a temporary custody order for 30 days, but Michelle never returned to retake custody of Jessica. Jessica has no biological ties to Antonyio).

¹⁹⁰ *Id.*

¹⁹¹ Brief for Appellant at ¶ 4, *Johnson I*, (No. 990353) (Antonyio did not believe Jessica should have been told “until later in her life” but “Antonyio testified that he did not see even the – eventual – disclosure of her biological parentage being a factor that ‘was going to change [his] relationship with [Jessica]”).

parents lived). But neither proceeding was completed due to Antonyio's redeployment.¹⁹² From August 1988 to May, 1997, the Johnsons resided primarily in New Jersey and Florida, with Antonyio occasionally deployed overseas.

In 1997 Antonyio was deployed to Korea while Madonna and Jessica resided in Florida. Antonyio requested Madonna file for divorce in Florida while he was away, but she never did.¹⁹³ In May 1998, Antonyio was sent to Grand Forks, North Dakota. By then, Madonna and Jessica were living in Kentucky.¹⁹⁴

Antonyio filed for divorce in North Dakota in July 1998. There, Madonna sought child support for Jessica whom she urged had been equitably adopted by herself and Antonyio.¹⁹⁵ From 1997 until 1998, Antonyio voluntarily sent Madonna \$500.00 for support, which a North Dakota court ordered to continue from July 1998 until the beginning of the divorce trial in April 1999, at which point Antonyio stopped making support payments.¹⁹⁶

The North Dakota Supreme Court concluded in 2000 that "North Dakota law clearly recognizes the doctrine of equitable adoption" founded on "contract to adopt" principles.¹⁹⁷ It cited North Dakota cases on "contract to adopt" in inheritance settings.¹⁹⁸ Yet, it recognized that the contract principles in

¹⁹² Johnson I, 617 N.W.2d at 100 (due to the Johnsons' military work transfers).

¹⁹³ Brief for Appellant (at this time Antonyio asked Madonna to move to Kentucky, and subsequently for her to file for divorce there while he was stationed overseas; however Madonna never initiated divorce proceedings).

¹⁹⁴ Johnson I, 617 N.W.2d at 101.

¹⁹⁵ Id.

¹⁹⁶ Johnson v. Johnson, 652 N.W.2d 315, 318 (N.D. 2002) [hereinafter Johnson II].

¹⁹⁷ Johnson I, 617 N.W.2d at 101.

¹⁹⁸ Id. at 102–03 (Klein v. Klein, 286 N.W. 898 (N.D. 1939); Borner v. Larson, 293 N.W. 836 (N.D. 1940); Mulhauser v. Becker, 20 N.W.2d 353 (N.D. 1945); Fish v. Berzel, 101 N.W.2d 548 (N.D. 1960) [hereinafter Fish]; and Geiger v. Estate of Connelly, 271 N.W.2d 570 (N.D. 1978). It also cited Ceglowki v. Zachor, 102

the two settings should differ, with a more significant commitment to continuing parent-like care needed in the child support setting than in the inheritance setting.¹⁹⁹

Without North Dakota cases on point, the North Dakota high court looked to three American state court cases elsewhere that imposed a child support duty on an equitable adoption parent. In one case, the obligor was a stepfather who supported the child during his marriage to the woman who primarily cared for the child; claimed the child as dependent for tax purposes; and promised to adopt.²⁰⁰ In another case, the obligor was a stepfather who agreed with his wife to adopt her child from a previous marriage; treated the child as his own; began the adoption process; and, acted to terminate the parental rights of the child's natural father.²⁰¹ In a third case, a soon-to-be-ex husband was the obligor because he brought the child to Maryland from Iran while making adoption promises to his wife and to the Republic of Iran; he lived with the child for only four months.²⁰² While employing these cases, the Johnson court did recognize that there were differing approaches elsewhere.²⁰³

The North Dakota high court determined in 2000 that state public policy supported application of an adoption contract doctrine "to impose a child support obligation under certain circumstances." It

F. Supp. 513 (D.N.D. 1951) (enforcing a 40 year old contract to adopt made by a North Dakota childless couple who brought a child over from Germany as a result, where child sued after husband died in 1949 and his widow died intestate in 1950).

¹⁹⁹ Johnson I, 617 N.W.2d at 109 ("Application of the doctrine of equitable adoption in the domestic context, unlike its application in inheritance cases, contemplates an ongoing relationship between living parties, and, therefore, something more than the agreement to adopt is required . . . The inquiry includes whether there exist indicia of a true parent-child relationship between the child and the alleged equitable parent. Some of the facts and circumstances considered by courts include representations . . . that she was their natural child . . . that she had been adopted; holding the child out to the community . . . incomplete efforts to adopt . . . and the natural parents' consent to the adoption").

²⁰⁰ Johnson I, at 104 (finding "instructive" *Wener v. Wener*, 312 N.Y.S. 2d 815, 817-18 (N.Y. App. Div. 1970)).

²⁰¹ Johnson I, at 104 (finding "instructive" *Frye v. Frye*, 738 P.2d 505, 505 (Nev. 1987)).

²⁰² Johnson I, at 104 (finding "instructive" *Geramifer v. Geramifer*, 688 A.2d 475 (Md. 1997)).

²⁰³ Johnson I, at 104 n.2.

found that no North Dakota statutes forbade it.²⁰⁴ All high court members failed to address in great detail, however, the distinctions between Antonyio’s legal parenthood in child support and inheritance settings.²⁰⁵ The Court remanded for resolution of the factual issues relevant to the application of the North Dakota equitable adoption doctrine to Antonyio’s possible child support.²⁰⁶

A dissenting justice began: “This is a case of a grandmother and her grandchild who have never lived in North Dakota.”²⁰⁷ He went on: “it is clear that if an ‘equitable adoption’ took place, it took place in New Jersey or Kentucky and would therefore be governed by the law of one of those states.”²⁰⁸ In both New Jersey and Kentucky the dissent found there to be no equitable adoption doctrine.²⁰⁹ New

²⁰⁴ Id. at 109. Such an application of the equitable adoption doctrine, however, was “limited” as the court expressed “preference for adherence to statutory procedures” on formal adoptions. Id. at 106 n.3.

²⁰⁵ Id. at 101. Antonyio never sought childcare or visitation opportunities; the request from Madonna was solely for monetary support for herself – which was denied – and child support for Jessica. As Antonyio had not sought sole or shared custody of Jessica, or visitation, pursuant to a North Dakota court order, the North Dakota courts did not need to consider how “contract to adopt” principles would apply in childcare settings.

²⁰⁶ Id. at 109–10. In 2002, the North Dakota Supreme Court sustained some parts of the lower courts’ child support orders. Johnson II, 652 N.W.2d at 319 (child support order sustained through it was inappropriately labeled as a “spousal support order”).

²⁰⁷ Id. at 112. It is unclear why there was no mention of the possible application of Florida law.

²⁰⁸ Id. at 112.

²⁰⁹ Id. at 112. In New Jersey, regardless of the lack of any expressly recognized “equitable adoption” doctrine, there is a “psychological parent” doctrine allowing a nonparent to morph into a parent in certain settings not necessarily tied to a particular time, which arguably would encompass both Antonyio and Madonna. See, e.g., V.C. v. M.J.B., 748 A.2d 539, 551-2 (N.J. 2000) (legal parent “must consent to and foster the parental-like relationship,” which include also the child’s residence with the nonparent during which time “parental functions” are performed “for the child to a significant degree”). In Kentucky, beyond any possible, expressly-recognized “equitable adoption” doctrine, there is, compared to New Jersey, the rather limited “de facto custodian” doctrine. Kentucky Rev. Stat. 403.270(1)(a) (custody standing only for one who, “by clear and convincing evidence,” was “primary caregiver” and “financial supporter”.)

The dissent in Johnson did later opine, however, that a “determination of equitable adoption should be made in Kentucky by declaratory judgement or other proceeding.” Id. at 124.

Jersey or Kentucky law was deemed appropriate by the dissent under North Dakota choice of law rules for contract cases.²¹⁰ The majority did not respond. The dissenting justice did not explain why neither Pennsylvania, nor (particularly) Florida, policies on equitable adoption would never apply.²¹¹

Unfortunately, no opinion in Johnson considered utilizing an interest analysis to determine which state's child support law, via an equitable adoption theory or otherwise, might operate. When child support was sought, Antonyio was in North Dakota while Jessica and Madonna were in Kentucky. Antonyio's parental-like acts, including conduct amounting to a contract to adopt, occurred chiefly in New Jersey and Florida, if not Pennsylvania. Further, no opinion considered whether to decline jurisdiction altogether, or at least to decline jurisdiction over the parentage or child support issues.

Upon remand, the lower court found that Antonyio and Madonna had equitably adopted Jessica and then set child support under North Dakota law.²¹² The case returned again to the Supreme Court on the issue of the amount of support owed by Antonyio.²¹³

²¹⁰ *Id.* at 123.

²¹¹ While Pennsylvania's governmental interests seem weak, if wholly absent, Jessica was delivered to the Johnsons in Pennsylvania, where any agreements as to future childcare/child support may have been entered and where any waivers of the parental rights of the biological parents may have been undertaken.

As to a possible equitable adoption (or comparable legal parentage) doctrine arising in Pennsylvania from contract-like acts, compare, e.g., *Kilby v. Folson*, 238 F.2d 699 (3rd Cir. 1956) (agreement to adopt and creation of parent-like relationship, though no formal adoption) and *Miller v. Ribicoff*, 209 F. Supp. 460 (E.D. Pa. 1962) (no such agreement or relationship).

As to a possible equitable adoption (or comparable legal parentage) doctrine arising in Florida from parental-like acts by nonparents involving childcare or child support, see, e.g., *Music v. Rachford*, 654 So.2d 1234, 1235 (Fla. App. 1st 1995) (no inherent authority regarding de facto parentage as "visitation rights are . . . statutory").

²¹² Appellant Brief, *Johnson II* at paragraph 6 (the trial court applied the child support calculation standard of North Dakota, but held the payments to begin at October 1, 2001, after the court ruled that the equitable adoption occurred; the court also ruled that Antonyio was eligible for interim support of \$500 for August and September, 2001).

²¹³ The Supreme Court recognized in 2002 that Antonyio had been paying Madonna \$500 a month in "interim spousal support" from May 1997 (and thus before he moved to North Dakota) until April 1999, which was "intended to be child support." *Johnson II*, 652 N.W. 2d. at 318-19. While Antonyio was

The use of a North Dakota equitable adoption doctrine allowed a nonparent to become a parent responsible for child support though he never did or would care for the child in North Dakota. The support obligation conceivably could be applied retroactively to cover any time when there was an equitable adoption via a contract to adopt. For Antonyio, child support could depend on his acts in Pennsylvania, New Jersey, and/or Florida; the North Dakota courts never determined at which precise moment the contract to adopt, including the requisite parental-like acts, occurred.

The North Dakota high court held that since the trial court had correctly found Antonyio equitably adopted Jessica, the original \$500.00 order should apply retroactively for the time between the start of the first trial in April 1999 and the end of the second trial in October 2001. It also ruled the \$669.00 support order should operate after the end of the second trial, in October 2001.²¹⁴ The decision clearly rested on an equitable adoption finding that Antonyio was Jessica's legal parent before he moved to North Dakota and before his divorce case was filed.²¹⁵ Although Antonyio never sought a childcare order, he was still liable for child support to Madonna, who had custody of Jessica, albeit in Kentucky.

ordered to pay child support to Madonna in the amount of \$500.00 through August 1998, the last payment was made on March 3, 1999, before the commencement of the first trial in April 1999; from April 1999 until July 2001, Antonyio was not ordered to pay, and did not pay, anything to Madonna for child support. *Id.*

²¹⁴ *Id.* at 320 (the July 2001 ruling on Antonyio's equitable adoption of Jessica applied the interim child support order to more than two years of back child support from the commencement of the first trial in April 1999).

²¹⁵ Antonyio moved to North Dakota in May 1998 and filed for divorce there in July 1998. His only connection with Jessica during that time was the \$500 in child support he (voluntarily) paid to Madonna in those few months. At least some of the equitable adoption precedents in inheritance cases cited in *Johnson I* were grounded on parental-like acts in North Dakota that went well beyond a few months of voluntary child support. See, e.g., *Fish*, 101 N.W.2d at 550–51 (decendent acted as a father from 1917 to 1956, when he died) and *Ceglowski*, 102 F. Supp. At 514–15 (decendent acted as mother for at least 27 years).

The equitable adoption doctrine in North Dakota allowed a previous nonparent like Antonyio to become a parent responsible for child support. The support obligation could be applied retroactively to cover any time when there was a form of childcare parentage. In Johnson, Antonyio’s parentage was recognized as arising (at least) at the time he filed for divorce, though an earlier time seemingly would have been quite reasonable, given the equitable adoption principles guiding inheritance cases.²¹⁶

Another troubling choice of law case involving UPA-like de facto parentage is S.D. v. K.H., a 2018 Ohio appellate court ruling.²¹⁷ There, a 2007 Ohio divorce decree found a husband and wife to be the biological and legal parents of a child, and then established “full and legal custody” in the mother, with visitation for the father.²¹⁸ Thereafter, a California court in 2014 found in a stipulated order that another woman was also a childcare parent for the child.²¹⁹ In early 2016, the father sought to set aside in California the 2014 parentage order favoring “Mother 2,” occurring after the natural mother sought a California court order allowing her to relocate with the child to Ohio.²²⁰ This request was denied by the California court in July, 2016.²²¹ This was followed by Mother 2’s petition in September, 2016 asking the Ohio divorce court to enforce the California parentage order- a request opposed by the natural

²¹⁶ A different choice of parentage law issue would have been presented in a divorce proceeding brought by Madonna in Kentucky, in which Antonyio appeared and defended. Might not Kentucky law be reasonably applied to the issue of Antonyio’s parentage, as only child support was sought and Jessica was then living in Kentucky with Madonna, who was in need there of child aid? See, e.g., *State ex rel. S.O.*, 122 P.3d 686 (Utah App. 2005) (Utah law applied in parental rights termination hearing involving father whose alleged abusive acts occurred in Arizona, where an Arizona court declined jurisdiction over a child custody dispute).

²¹⁷ 98 N.E. 3d 375 (Ohio App. 8th 2018) [hereinafter S.D.].

²¹⁸ *Id.* at 376.

²¹⁹ *Id.* at 376.

²²⁰ *Id.* at 376.

²²¹ *Id.* at 376.

parents.²²² The Ohio court denied in late 2016 Mother 2's petition to enforce, though it recognized that she could pursue a child "companionship time" order as an intervenor in the 2007 divorce case, though not she could pursue a child "parenting time" order because the California court's parentage order was issued without subject matter jurisdiction.²²³ These ruling were affirmed, with "the companionship matter" left for trial.²²⁴

The Ohio courts clearly chose not to defer to the employment of California law that recognized Mother 2 could be a third legal parent,²²⁵ or to the California court ruling that Mother 2 was such a parent. They did so because "Ohio does not recognize more than two legal parents,"²²⁶ thus rejecting Mother 2's argument that Ohio courts apply California's three parent law to her parentage request because all of Mother 2's parental-like actions occurred in California, as did the concession of her parentage by the natural mother who had "full and legal custody."²²⁷ This failure to defer meant Mother 2's nonparental companionship claim arising from her conduct in California would be adjudicated in Ohio under Ohio law. The Ohio courts failed to consider California's governmental interests in the childcare of a child who had been living in California, where two women shared "joint physical custody" for at least two years²²⁸ and where the child was moved to Ohio by the natural mother before there was a ruling on the motion in the California case on the natural mother's relocation.²²⁹ The Ohio courts also,

²²² Id. at 377.

²²³ Id. at 379.

²²⁴ Id. at 379.

²²⁵ California Family Code 7612(c) (to avoid detriment to the child).

²²⁶ S.D., at 379.

²²⁷ Id. at 376-378.

²²⁸ Id. at 376.

²²⁹ Id. at 376.

quite reasonably, failed to consider whether a California court provided “a more convenient forum” to resolve the nonparent companionship claim.²³⁰

b. Voluntary Parentage Acknowledgment

Another expanded form of childcare parentage, not necessarily dependent upon actual biological ties, actual or attempted marriage, or formal adoption, involves a voluntary acknowledgment of parentage (usually, but not always, in a paternity setting). Here, multistate interests rarely arise in initial parentage establishments via signed VAPs. As noted, under federal statute every other U.S. state (participating in federal welfare assistance subsidy programs) must recognize a VAP properly undertaken and recognized in a U.S. state. Infrequently, will, for example, a state-recognized VAP form from one state be properly employed in a second state.²³¹

However, multistate interests can easily arise where an earlier recognized VAP from one state is later challenged in a second state. Challengers typically come more than 60 days after signing, must demonstrate “fraud, duress, or material mistake of fact,” and (unlike VAP recessions within 60 days) may include nonsignatories.²³² When a VAP signed in state A is challenged in state B, whose challenge norms govern? The federal requirement of fraud, duress or mistake in VAP challenge cases has not been uniformly interpreted. Further, the need to recognize VAP parentage establishments has not yet been

²³⁰ Id. at 377 (per the UCCJEA, adopted in Ohio, a state court can “decline jurisdiction if another state would offer a more convenient forum”). In the Ohio case the companionship claim of a California person involved a child and two legal parents who then all lived in Ohio. Id. at 376.

²³¹ But see, e.g., *Teague v. Teague*, 999 So. 2d 86, 92 (La. App. 2d 2008) (Indiana VAP form was signed and notarized in Louisiana; no need to give full faith and credit to the VAP as its signatures did not follow either Louisiana or Indiana law). On occasion a VAP form from one state is permitted by that state to be executed outside the state. See, e.g., Div. of Vital Records, Illinois Dept. of Public Health, FORM No. DPA 3416BC4, Voluntary Acknowledgment of Paternity (rev. Aug. 2000), reviewed in Parness and Townsend, at 74 (also noting a Colorado statute, Col. Rev. Stat. 25-2-112(l) allows a Colorado VAP to be used for a child born on a “moving conveyance” within the U.S. if the child is first removed from the conveyance in Colorado).

²³² See, e.g., 2017 UPA, at §309(b)

read to demand full deference to the VAP disestablishment norms operating where the challenged VAPs first took effect. Choice of law issues arise in VAP challenge cases as the norms on timing of challenges, the standing of nonsignatories to challenge, and the estoppel barriers to challenges vary widely interstate.

The 2017 UPA provides little guidance on choice of VAP challenge norms. It says only that U.S. state courts shall give full faith and credit to a VAP “effective in another state” if the VAP “was signed in a record and otherwise complies with the law of the other state.”²³³

As well, current American state statutes on VAP challenges at least sometimes provide little guidance. Thus, in New Hampshire the courts are required to “give full faith and credit to a determination of paternity made...through voluntary acknowledgment of paternity.”²³⁴ In New Jersey, comparable full faith and credit is to be given to an out-of-state paternity determination via a VAP on behalf of a “natural father.”²³⁵ In Connecticut an out-of-state VAP as to paternity is given “full faith and credit” if “signed” in accordance with the out-of-state’s procedures,²³⁶ while in Oklahoma there is credit if “signed and otherwise in compliance” with the out-of-state laws.²³⁷

In California, there is some greater indication that California challenge norms shall apply to an out-of-state VAP. There, a “previous determination of paternity,” including via a VAP, is to be given “the

²³³ 2017 UPA, at §311.

²³⁴ N.H. Rev. Stat. 168-A:2 (II)

²³⁵ N.J. Stat. 9:17-41(b)

²³⁶ Conn. Gen. Stat. 46 b-172(a)(4)

²³⁷ Okla. Stat. 7700-311. Comparable is Wyoming Stat. 14-2-611; Alabama Code 26-17-311; New Mexico Stat. 40-11A-311; and Texas Family Code 160.311. See also Louisiana Rev. Stat., Civil Code 393 (deference to VAP from another state “executed” in accordance with “the laws and procedures” of that state).

same effect” as a California made paternity determination and thus “may be enforced and satisfied in a like manner” as a paternity determination made in California.²³⁸

So, in a multistate interest setting involving a state court challenge to a VAP executed in another U.S. state, the VAP must be accorded “the same status as a judgment.”²³⁹ Civil procedure judgment modification standards are generally applied in some states.²⁴⁰ In other states there are special civil procedure VAP modification standards.²⁴¹ Wherever their origins, questions can arise where certain VAP challenge norms are deemed substantive and thus must originate in the laws of the state where the VAP was initially executed should those laws differ from the forum state laws on VAP challenges. Is a time bar to a VAP challenge substantive? Is a standing barrier on who can challenge a VAP substantive? To what extent can the “fraud, duress, or material mistake of fact” requisite be deemed substantive (as where the natural father-due “a reasonable opportunity to initiate a paternity action,”²⁴² is unfairly blocked from seeking a parentage determination in the forum state).

c. Parentage Following Assisted Reproduction Births

A further expanded form of childcare parentage, not necessarily dependent upon actual biological ties, actual or attempted marriage, or formal adoption, involves parentage arising from assisted reproduction births. Such births may or may not involve a surrogate; either way, significant choice of law issues can arise.

²³⁸ California Family Code 5604.

²³⁹ Federal statutory directives, in 42 U.S.C. 666 (a)(5)(c)(iv), are generally recognized, as in the 2017 UPA, at §311 Comment, to prompt such status.

²⁴⁰ See, e.g., Parness and Saxe, at 200-203.

²⁴¹ See, e.g., Parness and Saxe, at 196-199 (reviewing varying special timing limits on VAP challenges).

²⁴² 42 U.S.C. 666(a)(5)(L)

Consider the choice of law concerns that prompted two men in Washington state to employ Oregon surrogacy laws.²⁴³ The men considered utilizing varying out-of-state laws, choosing Oregon because their desired goals were quite achievable and because California’s surrogacy laws had undesirable attributes.²⁴⁴

When the birth mother of a child born of assisted reproduction will become a childcare parent, significant choice of law issues can also arise, as when semen (and perhaps egg) donation, implantation, pregnancy and birth were each significantly related to different U.S. states. Of course, challenging choice of law issues can be avoided by contractual choice of law provisions. But such provisions are unlikely in settings where “do it yourself” assisted reproduction pregnancies are undertaken, and thus where lawyers, doctors and other professionals are not involved.

ii. Principles Guiding Choices of Law on Childcare Parentage

The 2017 UPA should be amended to contain the language, “including the rules on choice of law.” The absence of this language in the 1996 and 2008 UIFSA was far less troublesome then because before 2008, expanded forms of childcare parentage were far more limited. Thus, residency/hold parents were required to reside with children for the first two years of the children’s lives since the 2000 UPA. While the 1973 UPA had no such residency requirement, between 1973 and 1996 there were likely far fewer instances than there are today where residency/hold out parentage might arise; back then, a

²⁴³ The men’s avenue to parentage is described in Peter Nicolas, “Straddling the Columbia: A Constitutional Law Professor’s Musings on Circumventing Washington State’s Criminal Prohibition on Compensated Surrogacy,” 89 Washington L. Rev. 1235 (2014) [hereinafter Nicolas].

²⁴⁴ Nicolas, at 1245.

greater number of children were born into marriages²⁴⁵ and fewer children were essentially raised by grandparents like the Johnsons.²⁴⁶

With the return to the 2017 UPA of the choice of law language, there should also be explicit recognition in the official comments that more than a single state's parentage laws might be applied in a single case. Differing state interests can apply, for example, to custody/visitation and to child support issues. In *Johnson*, Antonio's satisfaction of any de facto parent child custody norm seemingly occurred in New Jersey or Florida, if not in Pennsylvania, while his child support duties would involve funds in North Dakota for a child in Kentucky, seemingly making North Dakota or Kentucky the most interested U.S. state on this aspect of childcare.

An explicit recognition in the 2017 UPA, and in state choice of law precedents, that a forum's choice of law principles might sometimes guide determinations of parental childcare, and that differing state interests might arise in the settings²⁴⁷ involving differing aspects of childcare, like child custody and

²⁴⁵ See, e.g., Lawrence W. Waggoner, "Marriage Is on the Decline and Cohabitation Is on the Rise; At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?," 50 *Family Law Quarterly* 215, 216-224 (2016) (reviewing data) and J. Herbie DiFonzo, "How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms," 8 *Rutgers J.L. & Pub. Policy* 521, 523 (2011) (increasing childcare by single parents and relatives).

²⁴⁶ Data on grandparent childcare is available in varying sources, including some listed in Jeffrey A. Parness and Alex Yorke, "Nonparental Childcare and Child Contact Orders for Grandparents," 120 *West Virginia L. Rev.* 95, 110, n. 149 (2017) and in Ken Bryson and Lynne M. Casper, "Coresident Grandparents and Grandchildren" (1999), at <https://www.census.gov/prod/99pubs/p23-198.pdf> (from 1970 to 1997 the numbers of children living in grandparent-maintained households rose from 2.2 million to 3.9 million).

²⁴⁷ Such an explicit recognition would help state courts choose to apply their own explicit, though general, choice of law rules, which may direct the application of nonforum childcare (including parentage) and child support policies. Consider Louisiana Civil Code Article 3515 ("Except as otherwise provided . . . an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue."), whose applicability to both a paternity and then child support issues was assumed, though not implemented in *Edwards v. Dominick*, 815 So.2d 236, 238 (La. App. 5th 2002) (no implementation as alleged father had not "established" the elements of the nonforum laws, so presumptions arose that they were "the same as the existing law of Louisiana"). Compare *Crouch v. Smick*, 24 N.E.3d 300, 305 (Ill. App. 5th 2014) ("If

child support, would follow other general choice of law principles where the substantive legal norms are also imprecise, in that earlier human actions occurring at no particular time and in no single place. Consider, for example, choice of law in contract settings where bargaining, signing, breach and harm may all have occurred in different states. Here, the ALI Restatements of Conflict of Laws have recognized that sometimes a court should employ another state's contract law. For example, one provision says that the "rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to the issue, has the most significant relationship to the transaction and the parties."²⁴⁸ Alternatively, an earlier provision says a court should utilize the local law of the state where the contract was last signed.²⁴⁹

Consider, as well, choice of law in tort settings where negligence, causation and injury all occurred in different states. Here, too, the ALI Restatements have recognized that sometimes a court should utilize another state's tort law principles. For example, one ALI Restatement of Conflict of Laws provision says "the rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to the issue, has the most significant relationship to the occurrence and the parties".²⁵⁰ Alternatively, an earlier provision encompasses a more precise norm, as with the use of the local law of the "place of the wrong" to determine "whether a person has sustained a legal injury,"²⁵¹ where the "place of the wrong is in the state where the last event necessary to make

an Illinois court is determined to be the home state for jurisdiction, it is necessarily the state with the most significant relationship for choice-of-law purposes and Illinois law applies.").

²⁴⁸ Restatement (Second) of Conflict of Laws § 188(1) (1971).

²⁴⁹ Restatement (First) of Conflict of Laws § 332 (1934) and Restatement (First) of Contracts § 74 (1932) (law of place of contracting, with focus on where last act occurs that prompts a contract formation).

²⁵⁰ Restatement (Second) of Conflict of Laws § 145 (1971).

²⁵¹ Restatement (First) of Conflict of Laws § 378 (1934).

an actor liable for an alleged tort takes place,”²⁵² rather than the use of the state law from the state where an injury to the person was first manifested.²⁵³

In some parental childcare settings prompting different state interests, there has already been recognized a comparable need to employ choice of law norms, with foreign laws occasionally being applied. As to choice of foreign law on child custody, the New York high court recognized, as a matter of comity, the parental custody interests in a female partner of a birth mother under Vermont law due to an earlier valid civil union in Vermont which continued at the time the child was born.²⁵⁴

The failure of both the 2017 UPA and U.S. state courts to recognize explicitly that a forum’s choice of law principles might sometimes guide childcare parentage adjudications invites violations of federal constitutional Full Faith and Credit obligations where the “relationship of the forum state to the parties and the transaction was . . . attenuated.”²⁵⁵ An “attenuated” relationship between the forum and a substantive legal issue before a court disallows use of forum law. An attenuated relationship was found, for example, by the U.S. Supreme Court where a Massachusetts corporate insurer issued a life insurance policy for a New York resident in New York. Upon the insured’s death, the surviving spouse moved from New York to Georgia where she sued on the policy. The Court found Georgia law could not

²⁵² Restatement (First) of Conflict of Laws § 377 (1934).

²⁵³ Restatement (Second) of Conflict of Laws § 145, Comment (f)(1971) (in cases of false advertising and misappropriation of trade values, unlike in cases of other torts, “principal location of the defendant’s conduct” will be given more weight than location of place of injury).

²⁵⁴ Debra H., 930 N.E.2d at 197.

²⁵⁵ Allstate Ins. Co. v. Hague, 449 U.S. 302, 309 (1981).

be applied on issues of material misrepresentation arising during the application for the policy.²⁵⁶ Do not the Johnsons seem similar to the insured and his spouse?²⁵⁷

Two artificial insemination cases involving the parental interests of sperm donors illustrate how Full Faith and Credit precedents can guide choice of law determinations involving childcare parentage. In one, all relevant activity occurred in Kansas except that the nonmarital insemination was performed in Missouri. The Kansas Supreme Court employed Kansas law in determining male parentage, distinguishing an Illinois case wherein Florida law was employed as all relevant activity leading to conception and birth via a marital insemination occurred in Florida, though the mother and child later moved to Illinois wherein a divorce was later sought.²⁵⁸

Surely, there will be challenges when choosing between differing U.S. state laws for particular issues in childcare parentage disputes. But such challenges arise, and have been met elsewhere. Recall that the ALI Restatements on Conflict of Laws guide decisions on an “issue” in contract or in tort. Different issues within a contract or tort claim can prompt the employment of different U.S. state laws.

As well, there are comparable challenges when differentiating between issues in a federalism context where varying choices between federal and U.S. state laws must be made. Consider *Pulliam v.*

²⁵⁶ *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936).

²⁵⁷ On the failure to recognize that forum parentage law cannot be applied when the forum’s relationship to the parties is attenuated, see, e.g., *Joslin*, at 604, n. 89 (“while states are constitutionally required to recognize and enforce out-of-state judgments, including parentage judgments, it is generally constitutionally permissible for courts to apply their own state’s law to an action properly pending before them.”). Reinsertion of the choice of foreign law option in the 2017 UPA, at §105, for certain parentage issues [as arose in the Johnson case] would help insure that exceptions to the general permissibility approach are considered. It would be helpful as well if there was explicit recognition that differing laws might apply to differing aspects of legal parentage, like childcare interests and child support obligations [as could arise in cases like Johnson].

²⁵⁸ *In re K.M.H.*, 169 P.3d 1025, 1032 (Kan. 2007) (distinguishing *In re Marriage of Adams*, 551 N.E.2d 635 (Ill. 1990)).

City of Calumet,²⁵⁹ where a federal district court made choices of law regarding the timing of filing federal civil claims under 42 U.S.C. 1983. The court recognized that state laws would govern the issues of a limitations period and any equitable tolling, while federal laws would govern claim accrual and discovery issues as well as equitable estoppel. In a childcare parentage dispute involving an earlier voluntary parentage acknowledgement, comparably both federal (e.g., on fraud, duress, and recession issues) and state (e.g., on timing of challenge and standing of challengers) laws sometimes must be employed.

F. CONCLUSION

The 2017 UPA on “parentage” adjudications follows the 2000 UPA on “parent-child relationship” adjudications in not expressly recognizing that a court applying its own parenthood laws may sometimes need to utilize its rules on choice of law. Express recognition is necessary in the 2017 UPA, as well as in state court precedents on adjudicating childcare parentage not founded on biological ties or formal adoption where relevant conduct occurs in several states. Childcare parentage issues may involve initial determinations of legal parenthood or disestablishments of earlier legal parenthood determinations. Such issues may need to be resolved under differing U.S. state laws dependent on whether, for example, child custody or child support is disputed.

The need to utilize choice of law rules, and sometimes to choose nonforum laws, in childcare parentage disputes arises due to comity, if not the federal constitutional Full Faith and Credit requirement. The increasing recognition of expanded forms of parentage, which more frequently involve conduct in two or more states, demand nonforum childcare parentage laws sometimes be employed in disputes involving childcare parentage establishment and/or disestablishment.

²⁵⁹ 2018 WL 844421, (N.D. Ill. 2018).