

THE CONSTITUTIONAL LIMITS ON CUSTODIAL AND SUPPORT PARENTAGE BY CONSENT

JEFFREY A. PARNES^{*}

ABSTRACT

Prompted by the National Conference of Commissioners on Uniform State Laws through its Uniform Parentage Acts, and by the American Law Institute through its Family Dissolution Principles and its Restatement Draft on Children and the Law, recently U.S. state legislators and judges have spurred a revolution in parentage laws. In particular, lawmakers have expanded parental custody opportunities and parental support obligations for those without biological (actual or presumed) or formal adoptive ties by recognizing ever-increasing forms of legal parentage by consent. Lawmakers have revolutionized parentage in some startling ways, as by deeming women to be parents under written paternity laws (including laws on marital paternity presumptions and on voluntary paternity acknowledgements). Unfortunately, U.S. state lawmakers have not always acted in ways compatible with constitutional (federal and state) constraints. This article is the first to review comprehensively the constitutional issues arising from the new U.S. state laws on parentage by consent, including residency/hold out parentage; spousal parentage; de facto parentage; voluntary acknowledgment parentage; and assisted reproduction parentage. These issues most often arise when forms of “presumed consent” are employed, meaning there is neither earlier actual nor apparent consent to justify impositions of shared (if not eliminated) child custody upon expecting or existing legal parents or to justify impositions of child support upon those then nonparents who object. Presumed consent, unlike “common authority” in Fourth Amendment search cases, should not generally operate in parentage by consent settings. If it does operate, public awareness should be enhanced by education initiatives so that important Due Process interests are not lost without at least some prior notice of the revolutionary parentage laws sweeping across the United States.

^{*} Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D., The University of Chicago. Thanks to Jessica Theodoratis, Deven Tlanda, and Leah Nolan for their help. Any errors are mine alone.

TABLE OF CONTENTS

I. Introduction.....	422
II. CUSTODIAL PARENTAGE BY CONSENT UNDER THE UPAS AND U.S. STATE LAWS	427
A. Spousal Parentage.....	430
B. Voluntary Parentage Acknowledgment	433
C. Residency/Hold Out Parentage	438
D. De Facto Parentage.....	441
E. Parentage Arising from Assisted Reproduction Births	448
i. Without Surrogate.....	448
ii. With Surrogate	450
III. SUPPORT PARENTAGE BY CONSENT UNDER THE UPAs AND U.S. STATE LAWS	452
IV. LOST DUE PROCESS INTERESTS GENERALLY.....	454
A. Jury Trial Rights	456
B. Hearing Opportunities Beyond Jury Trial Rights	458
C. Privacy Interests in Property Searches by Government.....	461
D. Privacy Interests in Paternity Opportunity	465
E. As Applied and Facial Due Process Challenges to Governmental Actions	478
V. THE CONSTITUTIONAL INTERESTS OF EXPECTING LEGAL PARENTS, EXISTING LEGAL PARENTS, AND PUTATIVE PARENTS IN PARENTAGE BY CONSENT SETTINGS.....	479
A. Expecting Legal Parents	482
i. Illustrative Case	482
ii. As Applied Concerns.....	486
B. Existing Legal Parents	491
i. Illustrative Case	491
ii. As Applied Concerns.....	495
C. Putative Parents by Consent	496
i. Illustrative Case	497
ii. As Applied Concerns.....	500
VI. CONCLUSION	502

I. INTRODUCTION

In July 2017, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved and recommended for enactment in all U.S. states a revised Uniform Parentage Act (UPA).¹ This act follows the 1973 and 2000, as

1. The Act is available on the NCCUSL website. See UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017), <https://www.uniformlaws.org/viewdocument/final-act-with-comments-61?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f&tab=librarydocuments>. A review of the 2017 UPA, its predecessors, and its goals is provided by its Reporter in Courtney G. Joslin, *Nurturing Parenthood Through the UPA* (2017), 127 YALE L.J.F. 589, 597–99 (2018) [hereinafter Joslin].

amended in 2002, UPAs which have been widely followed.² All three UPAs recognize several childcare parentage forms that are dependent upon neither biological ties nor formal adoptions. Childcare parentage under the UPAs can prompt nonfinancial interests, as with child custody or visitation [herein custodial parent], and/or financial obligations, as with child support [herein support parent].

The American Law Institute (ALI) supports similar forms of childcare parentage. In its 2000 Principles of the Law of Family Dissolution: Analysis and Recommendations (2000 ALI Principles), the ALI recognizes estoppel parentage and de facto parentage.³ The ALI is now undertaking a new Restatement of the Law on Children and the Law, where, through its March 2019 Draft, it recognizes "de facto" parentage (2019 ALI Parental Authority Draft).⁴

Childcare parentage laws independent of biology and formal adoption are chiefly dependent upon varying forms of consent.⁵ Consents involve those who are then nonparents [herein putative parents] and those who are then either expecting or existing legal parents. Expecting legal parents include those who will very likely be vested with "care, custody, and control" interests in later-born children whose births are then reasonably anticipated (whether or not there are pregnancies at the time), or in living children to be placed with them for formal adoption.⁶ Existing

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

3. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, AM. LAW INST. § 2.03(1)(a)-(c) (2000) (in the chapter on allocating custodial and decision making responsibility for children, there are recognized parents by estoppel and de facto parents, who must have lived with the child; there were also recognized legal parents) and § 3.02(1)(a), (c) (in the chapter on child support, there are also recognized legal parents). See also *id.* at § 3.02(1)(b) (a parent for child support purposes also includes a person "required by state law to support a child despite termination of the person's parental rights").

4. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.82 (AM. LAW INST., Tentative Draft No. 2, 2019) (in the chapter on Parental Authority and Responsibilities, within Topic 8 on Decisions About A Child's Associations). Under the ALI's "Handbook for ALI Reporters," as recognized in the Parental Authority Draft, the four steps in preparing a Restatement are: ascertain "the majority rule," ascertain "trends in the law," determine what specific rule "leads to more coherence in the law," and "ascertain the relative desirability of competing rules." On the continuing debate over whether ALI Restatements should only state "what the law is," and how that position has been rejected, see Richard L. Revesz, *The Debate Over the Role of Restatements*, 41 A.L.I. REP. 3, at 1, 4–5 (2019).

5. I have earlier recognized that there can be "functional parenthood" as well as "contractual parentage" outside of biology and formal adoption. Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965, 986–989 (2016) [hereinafter *Federal Constitutional Childcare Parents*]. Herein I only review the constitutional issues arising from expanding recognitions of parentage by consent, though I recognize that there are similar issues with functional parenthood and that the divide between the two parentage forms is not easily drawn. It is reasonable to view yet another form of parentage outside of biology and formal adoption. Presumed parentage laws sometimes recognize parenthood in one who neither consents to nor functions as a parent, as with certain types of residency/hold out or spousal parents. See, e.g., UNIF. PARENTAGE ACT § 4(a)(5) (UNIF. LAW COMM'N 1973) (a man is presumed to be the natural father of a child whom he receives into his home and openly holds out as his natural child) and § 4(a)(3) (a man is presumed to be the natural father of a child if he marries the child's mother after the child's birth and promises in writing to support the child).

6. Law reforms supporting all expecting parents, including those who give birth, are suggested in Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173 (2019).

legal parents include those who have already been vested with “care, custody, and control” interests in living children.

Avenues to parentage by consent include certain forms of spousal parentage; voluntary acknowledgment parentage (VAPs); residency/ hold out parentage; de facto parentage; and assisted reproduction parentage. Consent may be written or oral; express or implied; revocable or irrevocable; entered preconception, postconception but prebirth, or postbirth; and effective to prompt parentage immediately (as with VAPs) or only after other conditions for legal parentage are met (as with de facto parentage).

Expansions of childcare parentage by consent in U.S. states will likely continue.⁷ Such expansions raise significant federal (and state⁸) constitutional issues.⁹ This paper argues that some expansions of parentage by consent prompt undue infringements on the federal Due Process child custody rights of expecting and/or existing legal parents. While some infringements do not fully eliminate the custodial interests of expecting or existing parents, they still diminish those interests by recognizing that child custody must now be shared. Other infringements eliminate altogether the custodial interests of expecting or existing legal parents. Particularly problematic forms of parentage by consent negatively impacting the custodial interests of expecting and existing legal parents involve what can be called “innocent losses” and/or “agent waivers” of Due Process interests.

Innocent losses of Due Process child custody interests can involve actions by an expecting or existing legal parent that lead to the diminution of that parent’s and a second legal parent’s Due Process custodial interests. Here, there can be lost interests by a second parent, who, while aware of the relevant actions, could not control them and did much to assume/preserve his/her full custodial interests. Innocent losses, for example, arise when an expecting or existing legal parent

7. There is some resistance to these likely state law developments. See, e.g., Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J. L. & GENDER 119 (2018) (urging that the relationship between prospective parents should be a factor in determining legal parentage; that legal parentage should usually be determined at-birth; and that at-birth legal parentage determinations—whether children are born of sex or assisted reproduction—should be all-inclusive and permanent). There have also been calls for the U.S. Supreme Court to “offer more guidance on how states may define constitutional parenthood.” Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1483 (2018) (urging the Supreme Court to provide “a more contemporary definition—one that, at a minimum, both recognizes and protects the rights of intentional parents”) [hereinafter *Constitutional Parenthood*].

8. Of course, state constitutional law protections related to legal parentage can only reach beyond federal constitutional protections. See, e.g., *Hodes & Nauser, MDS, P.A. v. Schmidt*, 440 P.3d 461 (Kan. 2019) (right to abortion under the Kansas Constitution’s Bill of Rights).

9. In focusing on the federal (and some state) constitutional issues arising for parents by consent in both custody and support contexts, this article does not address any nonconstitutional or public policy issues on such parentage. It also does not address issues involving others who are impacted by the emerging laws on parent by consent, including donors in assisted reproduction settings and siblings and other family members in all parent by consent settings. On such issues, see Jill Hasday, *Siblings in Law*, 65 VAND. L. REV. 897 (2012) (need for more focus in law on the importance of children’s relationships with their siblings). See also Naomi Cahn, *The New “Art” of Family: Connecting Assisted Reproductive Technologies & Identity Rights*, 2018 U. ILL. L. REV. 1443 (opining that assurances of anonymity to donors involved in assisted reproduction are “questionable” and that there should be some rights for donor-conceived offspring to learn the identity of their donor(s)).

invites a nonparent into his/her home and allows that nonparent to hold himself/herself out as the child's third parent, at times where the child may only have two parents under law.

Innocent losses of Due Process child custody interests can also involve actions by an expecting or existing legal parent, prompting losses for both that parent and a second parent, where the second parent was unaware of the relevant actions. Here, awareness and protective legal processes were available to the second parent. Such innocent losses can arise, for example, when an existing legal parent places a child for adoption shortly after birth, where the second legal parent suffers custodial interest losses where he/she did not know, but could have become aware, of the pregnancy, or where he/she had available a process to protect custodial interests, like a putative parent registry, which were unknown and thus not employed.

Agent waivers of Due Process child custody interests involve actions by an expecting or existing legal parent leading to custodial interest losses (whole or partial) incurred by another expecting or existing legal parent who is unaware of, and could not reasonably have known of, the relevant actions, and thus could not have employed any protective process. Here, the principals had no idea about their agents' actions. They had not, expressly or implicitly, delegated authority to waive their child custody interests. Agent waivers arise, for example, when one custodial parent allows a nonparent to sign a voluntary acknowledgment of parentage without the knowledge or support of the second custodial parent whose Due Process custody interests are nevertheless negatively impacted, and perhaps wholly eliminated.

In recognizing a parent by consent under law for child custody purposes, there can arise simultaneously both an innocent loss and an agent waiver of parental custody interests. Consider a scenario where one of two existing legal parents shares a residence with his/her child and with a nonparent who assumes familial responsibilities while acting in a parental-like way. Some U.S. state laws allow such a nonparent later on, as when the one parent and the nonparent are no longer romantic partners, to be judicially designated a parent by consent on equal footing with any existing legal parent. The residential parent will incur an innocent loss of custodial interests when he/she had no understanding of U.S. state residency/hold out parentage laws. The nonresidential parent will effectively have his/her child custody interests negatively impacted solely due to the residential parent's acts, even where the nonresidential parent did not know, and could not have known, of the residency/hold out acts. The nonresidential parent's loss, as will be seen, might be justified as that parent and the residential parent shared "common authority" regarding childcare.

This paper further argues that some expansions of parentage by consent prompt undue infringements on the substantive Due Process rights of newly-named parents by consent who can then be pursued for child support. Although the rights of newly-named child support parents are less constitutionally protected than the

child custody rights of expecting or existing child custody parents,¹⁰ their Due Process interests nevertheless are sometimes infringed by judicial child support orders.

The paper first explores child custody and support parentage by consent in the UPAs, ALI pronouncements, and current U.S. state laws, where there are no biological or formal adoption ties. In focusing on “consent” to parentage, it shuns the often-used label “intended” parent. It recognizes that when the term consent (or intent if you wish) is used, in certain instances custodial parentage arises for one then a nonparent without the actual or apparent consent to (or intent about) such instances. It also recognizes that sometimes support parentage arises for one then a nonparent without actual or apparent consent to (or intent about) such instances. Here, the consent is akin to the ALI's recognition of a “presumed consent” in the intentional tort setting wherein public policy justifications deem actual or apparent consent to harmful acts to be irrelevant when the one harmed seeks redress, but is denied due to consent.¹¹

Upon review of parentage by consent in UPA, ALI and state law pronouncements, the paper then explores how U.S. Supreme Court precedents protect constitutional Due Process interests in and outside of childcare. It follows with an exploration of the Due Process constitutional limits on expanding childcare parentage by consent for either custody or support purposes.¹² It urges reforms to

10. The paper does not address all imaginable Due Process interests arising in parentage by consent cases. For example, it does not cover any undue constitutional infringements on the interests of those beyond expecting, existing, and putative alleged parents that are prompted by childcare parentage forms independent of biological ties and formal adoptions. Consider, *e.g.*, the impact on the current intimate family members of a nonparent who is now found responsible for child support for a child outside the intimate family. *See, e.g.*, *In re Marriage of Rushing*, 127 N.E.3d 769 (Ill. App. Ct. 2018) (former husband responsible for child support for two children born into his earlier marriage, where his ex-wife has “sole” custody, with visitation for him; his level of support must be assessed utilizing “the joint income” of him and his current wife, with whom he lived with an adopted child and a stepchild). The paper does not address certain instances where constitutions might protect those nonparents who earlier agreed to share, with existing legal parents, custody of children with whom they have no biological or formal adoptive ties, but who are later denied the custodial benefits of their pacts. *See, e.g.*, *Sheardown v. Guastella*, 920 N.W.2d 172 (Mich. Ct. App. 2018) (pre-pregnancy assisted reproduction agreement did not prompt custodial parentage for birth mother’s same sex partner because there were no biological or formal adoptive ties), *appeal denied*, 905 N.W.2d 421 (Mich. 2018). The paper also does not address certain instances where constitutions might protect those who earlier agreed to forfeit custody of children with whom there are some biological ties, but who later seek to undo their pacts, as with assisted reproduction sperm donors and surrogates.

11. *See infra* notes 24–26.

12. U.S. state laws on childcare parentage by consent prompt additional constitutional issues. For example, there are federalism issues which are often overlooked. Interstate relations are implicated when consents to parentage occur in one state and are used in childcare parentage cases in a different state. The 2017 and 2000 UPAs simply declare that state courts always apply their own state’s laws on parentage adjudications regardless of the child’s place of birth or the child’s past or present residence. UNIF. PARENTAGE ACT § 105 (UNIF. LAW COMM’N 2017) [hereinafter 2017 UPA]; 2000 UNIF. PARENTAGE ACT § 103 (UNIF. LAW COMM’N 2000 (amended 2002)) [hereinafter 2000 UPA]. Elsewhere I have argued that the application of forum state parentage laws in parentage by consent settings sometimes undermines federalism principles, including Full Faith and Credit mandates. *See* Jeffrey A. Parness, *Faithful Parents:*

parentage by consent laws in order to protect better the rights of expecting and existing child custody parents and the rights of putative child support parents.¹³

II. CUSTODIAL PARENTAGE BY CONSENT UNDER THE UPAS AND U.S. STATE LAWS

The UPAs have always recognized some forms of custodial parentage that are independent of biological ties and formal adoptions.¹⁴ Under all three UPAs custodial parentage by consent can arise under standards involving earlier actions of expecting or existing legal parents and of nonparents. Such standards encompass certain marital births; certain VAPs; residency/hold out parentage; de facto parentage; and certain assisted reproduction births. At times the consent of an expecting or existing legal parent to legal parentage in one who is then a nonparent is crucial. At other times, the consent of one who is then a nonparent is key. Certain standards require multiple consents, as with a consent by either a current expecting or existing legal parent and a consent by one who is then a nonparent.

Consents to custodial parentage under law can arise at a precise point in time, or can arise only upon a finding of certain conditions occurring at no precise point

Choice of Childcare Parentage Laws, 70 MERCER L. REV. 325 (2019) [hereinafter *Faithful Parents*]. As well, there are equal protection issues which are less frequently overlooked. Equality issues arise, for example, when men and women are treated differently with insufficient reasons, as in marital or residency/hold out parentage presumption laws that only expressly recognize the male spouses of birth mothers, as in *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (residency/hold out parentage) and *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006) (spousal parentage). Consider, as well, cases where men who desire to rear their biological children, but are treated differently for insufficient reasons, as in adoption notice laws distinguishing between unwed biological fathers who are and are not unilaterally precluded from assuming legal parentage. See, e.g., *Adoption of Kelsey S.*, 823 P.2d 1216, 1238 (Cal. 1992) (absent finding of unfitness, an unwed biological father cannot be precluded from his child's adoption proceeding when he demonstrated timely action to assume parental responsibilities, but was unilaterally precluded by the birth mother). On equality concerns with certain state parentage laws, see Jeffrey A. Parness, *Marriage Equality, Parentage (In)Equality*, 32 Wis. J. L. Gender & Society 179 (2017) [hereinafter *Marriage Equality*].

13. The paper does not support a return to childcare parentage laws (or either child custody or child support laws) founded only on biological ties or formal adoptions. Compare, e.g., *Stone v. Thompson*, 833 S.E.2d 266 (S.C. 2019) (in eliminating the institution of common-law marriage prospectively, court establishes a bright-line test due, in part, to the benefits of standardized formal marriage requirements such as predictability, judicial economy, and upholding the salutary purposes of the statutes on marriage; the fact that common-law marriage requirements are a "mystery to most;" and the fact that mutual assent is required of those seeking "to obtain a lawful license" to marry). The paper also does not address the possible autonomous rights of children in family integrity. See, e.g., Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019).

14. Granted, the attributes attending custodial parentage are difficult to discern. See, e.g., Dara E. Purvis, *The Constitutionalization of Fatherhood*, 69 CASE W. RES. L. REV. 541, 594–95 (2019) (finding U.S. Supreme Court decisions recognize that the attributes include transmitting values, establishing a private home, and raising children) [hereinafter Purvis]; see also David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 844 (1999) (finding U.S. Supreme Court decisions recognize that the attributes include "the right to know one's child and to be known by one's child, to be involved in the child's life, and to play a meaningful role in influencing the child's upbringing") [hereinafter Meyer].

in time. Immediate custodial parentage in a nonparent arises when an expecting or existing legal parent executes a VAP with the nonparent (though VAPs, once executed, can be rescinded or challenged later). Conditional custodial parentage arises in de facto parent settings where an existing legal parent earlier agrees to coparent his/her child with a nonparent and then the nonparent actually coparents and develops a parental-like relationship with the child over time.

Agreements as to future childcare parentage may be written, as with VAPs, or oral, as with joint parenting pacts. They may be express or implied. Further, parentage by consent under law need not involve actual consents. Parental status sometimes arises due to parental-like acts by some nonparents who do not even anticipate possible legal parenthood for child support purposes. And parentage by consent need not involve actual consents by an expecting or existing legal parent to legal parenthood in one then a nonparent who will later share custodial parent status.

How might consent to parent, or consent to custodial parentage status in another, or consent to support parentage, arise where there is no actual consent? Consider the ALI approaches, in its 2019 Draft of a Restatement on Intentional Torts, to consent to specific intentional torts.¹⁵ The ALI approaches to consent, a defense to an intentional tort claim, are germane since in both the tort and parentage settings, there is conduct deemed consensual that can then prompt adverse legal consequences.¹⁶

The ALI on torts generally recognizes that an actor should not be liable to another for otherwise tortious intentional conduct¹⁷ if the actor "gives legally effective consent to that conduct." Categories of effective consent include actual consent, apparent consent, and presumed consent.¹⁸

Legally effective consent by one otherwise wronged by an intentional tortfeasor per the ALI includes "actual consent."¹⁹ This encompasses consent to conduct where a person is "willing for that conduct to occur," with willingness either "express or . . . inferred from the facts,"²⁰ as long as the conduct "is not substantially different in nature from the conduct that the person is willing to permit."²¹

15. ALI Restatement of the Law on Intentional Torts to Persons, Tentative Draft Number 3, scheduled for presentation on September 20, 2019 [hereinafter 2019 ALI INTENTIONAL TORTS DRAFT]. On the goals of a Restatement, see *supra* note 4.

16. For a different view of consent in parentage by consent settings (described as "de facto" parenthood), see Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. L. REV. 909 (2019) (upon deeming consent "a notoriously slippery concept," involving "moral magic," Professor Strauss focuses on "performative consent" and "subjective" consent involving an "intentional mental state").

17. On intent by a tortfeasor, the ALI generally suggests, at least for the tort of battery, that a tort is intended where the actor intends to cause "a contact" with another, or where the actor's intent constitutes "transferred intent." 2019 ALI Intentional Torts Draft, *supra* note 15, at § 1 ("transferred intent" is defined as under § 11 (not yet available)).

18. *Id.* at § 12.

19. *Id.* at § 12(a).

20. *Id.* at § 13(a).

21. *Id.* at § 14(a).

Legally effective consent by one otherwise wronged per the ALI also includes "apparent consent."²² This encompasses intentional acts undertaken with a reasonable belief that the person acted upon, due to his/her conduct, "actually consents to the conduct."²³

Finally, and most problematically,²⁴ legally effective consent by one who is otherwise wronged per the ALI includes "presumed consent."²⁵ This encompasses intentional acts by an actor who "is justified in engaging" in the acts without the "actual consent" or the "apparent consent" of the person acted upon.²⁶ Thus, the presumed consent by the one who is harmed by an otherwise intentional tort does not depend upon the acts of the one who is harmed.²⁷ So, for example, in the custodial parentage setting, a nonresidential custodial parent may be harmed due to the diminishment, if not elimination, of custodial interests resulting from the intentional acts of a nonparent in childcaring, with a residential custodial parent, for a child under circumstances where justifications are found later for deeming the nonparent also to be a custodial parent.²⁸

A review of varying forms of child custody parentage by consent in the UPAs, the ALI parentage guidelines, and U.S. state laws follows. It reveals how earlier consents in varying forms by expecting or existing custodial legal parents can lead to later child custody parentage in nonparents over the current objections of the expecting or existing parents. In the following section, the UPAs, the ALI, and U.S. state laws on child support parentage are reviewed, revealing how earlier consents in varying forms by nonparents can lead to later child support parentage over the current objections of the one-time, but now obliged, nonparents. In both child custody and support settings, parentage by consent can arise, as in the ALI Torts Draft, through presumed consent, meaning there is no inquiry into the conduct of the one adversely impacted, be it an expecting or existing legal parent whose child

22. 2019 ALI Intentional Torts Draft, *supra* note 15, at § 12(b).

23. *Id.* at § 16(a).

24. *See, e.g., Green v. United States*, 355 U.S. 184, 191 (1957) (waiver is a "vague term used for a variety of purposes, good and bad . . . In any normal sense . . . it connotes some kind of voluntary knowing relinquishment of a right.").

25. 2019 ALI Intentional Torts Draft, *supra* note 15, at § 12(c).

26. *Id.* at § 16(b).

27. The ALI similarly recognizes certain consents by those who have not acted in any "actual" or "apparent" ways in its Restatement of Contract. RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. b (AM. LAW INST. 1981) (noting that quasi-contracts, unlike implied contracts, "are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises;" rather, quasi-contracts "are obligations created by law for reasons of justice," as with one spouse's duty to pay for "necessary clothing and supplies" purchased by the other spouse where the spouses are separated and the obligated spouse must pay though that spouse directed the seller not to furnish such clothing and supplies).

28. Of course, all forms of consent recognized by the ALI in intentional tort settings need not operate in a single U.S. state. *See, e.g., Kruger v. Hamm*, No. 2018-CA-000553-ME, 2019 WL 2063922 (Ky. Ct. App. May 10, 2019) (upon reviewing Kentucky precedents on nonbiological and nonadoptive parentage for one then a nonparent arising from the acts of an existing legal parent, the court finds Kentucky law requires the "equivalent to an express waiver" of "superior" custodial rights by the existing legal parents).

custody interests are diminished (if not eliminated) or a nonparent whose assets are diminished for child support purposes.

A. Spousal Parentage

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

The 2000 UPA, as amended in 2002, similarly recognizes presumptive male spousal parentage for children born of sex³¹ and nonpresumptive spousal and nonspousal male parentage via consent to “assisted reproduction.”³² Further, it recognizes nonpresumptive spousal as well as nonspousal male and female parentage via a “validated” gestational mother “agreement.”³³ No actual biological ties are required in many instances of spousal parentage.

The marital parent presumption in the 2000 UPA expressly applies to a man married to the mother when “the child is born,” or who was married to the mother as long as 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 provide sperm or consent.³⁶ However, if the husband did not provide sperm and did not consent, he may pursue “at any time” an adjudication of nonpaternity where

29. UNIF. PARENTAGE ACT § 4(a)(1) (UNIF. LAW COMM’N 1973) [hereinafter 1973 UPA]. 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. UNIF. PARENTAGE ACT § 4(a)(2)-(3) (UNIF. LAW COMM’N 2017) [hereinafter 2017 UPA].

30. 1973 UPA § 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 § 4(a)(1) (husband is presumed natural father of a child born to his wife “during the marriage”).

31. UNIF. PARENTAGE ACT § 204(a) (UNIF. LAW COMM’N 2000 (amended in 2002)) [hereinafter 2000 UPA].

32. 2000 UPA §§ 703–705.

33. *Id.* at § 201(b)(6).

34. 2000 UPA § 204(a)(1)–(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 § 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 § 204(a)(4).

35. 2000 UPA §§ 703–04.

36. *Id.* at § 705(a).

he and the mother “have not cohabited since the probable time of assisted reproduction” and he “never openly held out the child as his own.”³⁷ As to a child born to a gestational carrier where there is a validated agreement, a man and woman are parents³⁸ unless the agreement is terminated.³⁹

The 2017 UPA also recognizes spousal parentage presumptions. They apply to both male and female spouses⁴⁰ who are married to the birth mothers at the time of birth; married to the birth mothers within 300 days of the marriage’s termination; or married to the birth mothers after the child’s birth as long as the spouses “asserted parentage.”⁴¹ Such presumptive parentage does not, and should generally not, arise for those marrying expecting or existing legal fathers. Here, the typical bar on three legal parents is implicated since there is also another expecting or existing legal parent, a birth mother whose constitutional custodial interests are fundamental. Spousal presumptive parentage does not arise where births occur through assisted reproduction.⁴²

Nonpresumptive parentage under the 2017 UPA attaches to consenting individuals who agree with birth mothers on joint future parentage where the mothers give birth via “assisted reproduction.”⁴³ Further, nonpresumptive parentage also attaches to married spouses, unmarried couples, “or one or more intended parents” where there are either gestational or genetic surrogacy agreements.⁴⁴

In each UPA, marital-like acts can also prompt spousal parentage. Attempts to marry which do not result in actual marriages can trigger parentage in the would-be spouse. For example, under the 2017 UPA there is presumed parentage in a person who married the birth mother after the birth of the child, even if the marriage “is or could be declared invalid.”⁴⁵ No UPA explicitly addresses the application of the spousal parentage norms to those in common law marriages.⁴⁶

37. *Id.* at § 705(b).

38. *Id.* at § 801(b).

39. *Id.* at § 806.

40. 2017 UPA, *supra* note 29, at § 204(a) (“an individual is a presumed parent”). To date, only a few states recognize marital parentage in the female spouse of a birth mother for a child born of sex. *See, e.g.*, WASH. REV. CODE § 26.26.A.115(1)(a) and 15C VT. STAT. § 401(a)(1).

41. 2017 UPA, *supra* note 29, at § 204(a)(1).

42. *Id.* at § 701.

43. *Id.* at § 703 (consent by an “individual,” with the consent requisites in Section 704).

44. *Id.* at § 801(3). *See also* 2017 UPA §§ 802–07 (comparable requirements for each form of agreement, with additional special rules for gestational surrogacy pacts, at Sections 808–12, and for genetic surrogacy pacts, at Sections 813–818).

45. *Id.* at § 204(a)(1)(C) (assuming the person is “in a record filed” with the state agency maintaining birth records or is named on the child’s birth certificate). *See also* 1973 UPA § 4(a)(3) (similar) and 2000 UPA § 204(a)(4) (similar). State laws include 750 ILL. COMP. STAT.. 46/204(a)(3) and Cal. Fam. Code Ann. § 7611(b).

46. *See, e.g.*, *Valentine v. Wetzel*, 2019 WL 1130441 (Pa. Super. Mar. 12, 2019) (while state law barred common law marriages entered into after January, 2005, court applies the earlier common law

So, varying forms of conduct can prompt custodial parentage in spouses, where at times there is no explicit consent to childcare ahead of time and where explicit consent is unlikely, as when a wife's extramarital affair prompts for her a pregnancy, birth, and custodial parentage, and for her spouse a comparable custodial parentage, with his or her "willingness" for such parentage "inferred" from the fact of marriage.

Current state laws generally reflect the policies of the UPAs on custodial parentage for spouses of legal parents, though all states do not comparably implement these policies. For example, spousal parentage can arise from a marriage in existence at the time of birth or at the time of conception, or from a marriage in existence sometime during pregnancy though not at conception or birth.⁴⁷

Spousal parentage, as a form of parentage by consent for those without biological or formal adoption ties, is grounded in the inferred consents to share custody that inheres in actual or purported marriages between expecting or existing legal parents and their actual or would-be spouses. Consents arise when the marriage ceremony occurs or is attempted. Consents to parentage encompass future children, whether or not now conceived, as well as some current living children. While such consents are undertaken comparably by actual or prospective birth mothers and their spouses, the circumstances allowing later spousal parentage disestablishments might vary, as, for example, where only one of the spouses knows of an existing pregnancy at the time of marriage.

Variations in spousal parentage disestablishments should arise when state public policies differ on the import of biological ties for an alleged legal parent who is not the birth mother. Biological ties are less, or not, important when marriage, as in *Obergefell* where opportunities for same sex marriages were deemed constitutionally demanded, is viewed as "the basis for an expanding list of governmental rights, benefits and responsibilities," including child custody and

marriage norms to conduct before 2005 since the bar was not made retroactive); In re Marriage of Hogsett & Neale, 2018 WL 6564880 (Col. App. VI 2018) (*Obergefell* v. Hodges, 135 S.Ct. 2584 (2015) [hereinafter *Obergefell*] applied retroactively to give same-sex couple right to prove common law marriage for purposes of a dissolution proceeding) [hereinafter *Hogsett*], cert. gr., 2019 WL 4751467; and Gill v. Nostrand, 206 A.3d 869 (D.C. App. 2019) (common law marriage doctrine applied in case involving alimony and marital property).

47. See, e.g., 2017 UPA, at § 204(a)(1)(A) (except in surrogacy settings, "an individual is presumed to be a parent of a child if... the individual and the woman who gave birth to the child are married to each other and the child is born during the marriage."); GA. CODE ANN. § 19-7-20 (1988) (child "born in wedlock or within the usual period of gestation thereafter"); ARIZ. REV. STAT. § 25-814(a)(1) (2017) (marriage "at any time in the ten months [] preceding the birth"); and MICH. COMP. LAWS ANN. § 722.1433(e) (West 2015) (marriage at time of conception or birth). And see *State v. EKB*, 35 P.3d 1224 (Wyo. 2001) (two spousal parents as birth mother was married twice during pregnancy; first husband was presumed spousal parent as child was born within 300 days of his divorce, while second husband was presumed spousal parent as he was married to birth mother at the time of birth); and *Ex Parte Kimbrell*, 180 So. 3d 30 (Ala. Civ. App. 2015) (child born to woman and her supposed second husband, though there was no divorce from her first husband; both men were presumed spousal parents).

support.⁴⁸ Thus in Vermont, biological ties are less important as a presumed parent is a person who is married to the birth mother at the time of the birth of a child born of consensual sex, where an alleged unwed genetic father may challenge the presumption within two years of discovering "the potential genetic parentage," but where the court may not disestablish the presumed parentage.⁴⁹ By contrast, biological ties are not important where a child is born of consensual sex into a marriage where the nonbirth spouse is not a genetic parent, but is a presumed parent whose child custody parentage presumption may not be overcome at all by a person (like an alleged genetic father) outside the marriage.⁵⁰

Spousal parentage by consent involves a very different inferred consent when there are common law marriages. Here, there is no actual or attempted ceremony. Rather, a marriage is judicially recognized only after there is sufficient proof of an earlier marital-like relationship which usually is not be deemed to have arisen on a particular date, as does a formal marriage. While the UPAs and written state laws do not expressly address custodial interests in common law spouses of birth mothers, seemingly such a spouse can attempt to pursue custody by proving a common law marriage existed at the time of conception, pregnancy or birth (depending on the state law) so that the child can be deemed born into a marriage.

B. Voluntary Parentage Acknowledgment

All UPAs recognize custodial parentage in those who have undertaken a voluntary parentage acknowledgment. Unlike spousal parentage, with VAPs there are clearly actual consents to parentage by those then either expecting or existing legal parents and by those then nonparents who may have no biological or marital ties.

The 1973 UPA recognizes "a man is presumed to be the natural father of a child," thus prompting custodial parentage, 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."⁵¹ Rebuttal of such a presumption occurs only with "clear and convincing evidence of no biological ties" and "a court decree

48. *Obergefell v. Hodges*, 575 U.S. 644 (2015); *See, e.g., McLaughlin v. Jones*, 401 P.3d 492, ¶¶ 11, 13 (Ariz. 2017) (marital paternity presumption applies to female spouse of birth mother; Arizona spousal parentage presumption statute, ARIZ. REV. STAT. 25-814(A)(1), does not specifically reference any likelihood of biological ties in the spouse, but rather addresses the spouse's rights and responsibilities).

49. VT. STAT. ANN. tit. 15C, §§ 401(a)(1), 402(b)(2) (2019).

50. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (federal constitution does not bar a marital parentage presumption law where the presumption cannot be rebutted by an unwed genetic parent); *Strauser v. Stahr*, 726 A.2d 1052 (Pa. 1999) (marital presumption not rebuttable by genetic father where marriage is intact). *Cf. B.S. v. T.M.*, 782 A.2d 1031 (Pa. Super. Ct. 2001) (no irrebuttable marital parent presumption here as marriage was not intact at relevant times). While an unwed biological father may not himself be able to petition for an adjudication of custodial parentage, he may still be able to be pursued, as by state welfare officials seeking welfare payment reimbursements, for an adjudication of child support parentage, especially when a cuckolded husband is disestablished as a presumed parent. *See, e.g., Vargo v. Schwartz*, 940 A.2d 459 (Pa. Super. Ct. 2007).

51. 1973 UPA § 4(a)(5).

establishing paternity of the child by another man.”⁵²

The 2000 UPA, recognizes no custodial parentage presumption for a male VAP signor.⁵³ It does 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.”⁵⁴ The 2000 UPA declares a VAP can be rescinded within 60 days of its effective date by a “signatory.”⁵⁵ Thereafter, a signatory can commence a court case to “challenge” the VAP, but only on “the basis of fraud, duress, or material mistake of fact” within two years of the VAP filing.⁵⁶

The 2017 UPA also recognizes that VAPs prompt nonmarital parent-child relationships without a presumption.⁵⁷ Parentage establishments can be undertaken by an expanded field of VAP signatories, including those who claim to be “an alleged genetic father” of the child born of sex;⁵⁸ a presumed parent (man or woman) due to an alleged or actual marriage; a presumed parent due to a holding out of the child as one’s own while residing in the same household with the child “for the first two years of the life of the child;”⁵⁹ and, an intended parent (man or woman) in a nonsurrogacy, assisted reproduction setting.⁶⁰ Further, VAPs may be undertaken “before or after the birth of the child”.⁶¹

As with the 2000 UPA, signatories may rescind within 60 days.⁶² 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.”⁶³ While nonsignatory VAP challenges may be pursued within “two years after the effective date of the acknowledgement”, such challenges usually will only be sustained when a judge finds the child’s “best interest” is served.⁶⁴ Nonsignatory challengers are limited. Those with standing include the child; a parent under the 2017 UPA; “an individual whose parentage is to be adjudicated;” an adoption agency; and a child support, or other authorized, governmental agency.⁶⁵

The explicit recognition in the 2017 UPA that VAPs may be undertaken by those with no biological ties to the children whom they acknowledge is new, and

52. *Id.* § 4(b).

53. 2000 UPA at § § 4(b).

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

55. *Id.* § 307.

56. *Id.* § 308(a).

57. 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 § 204(a)(c)(i).

58. *Id.* § 301.

59. *Id.* §§ 301, 204(a).

60. *Id.* §§ 301, 703.

61. *Id.* § 304(c).

62. 2000 UPA § 308(a)(l) (within two months of their effective dates).

63. *Id.* § 309 (a).

64. *Id.* §§ 309(b), 610(b)(1)–(2).

65. 2017 UPA §§ 610(b), 602. Thus, the parents or siblings of an alleged biological father of a child born of consensual sex seemingly cannot challenge a VAP.

revolutionary. The 2017 UPA allows circumvention of formal adoption laws and the safeguards they provide for children, including background checks and best interest findings. A Comment in the 2000 UPA laments that the federal statutes guiding state VAP laws do not expressly “require that a man acknowledging paternity must assert genetic paternity;” further, it indicates the 2000 UPA was “designed to prevent circumvention of adoption laws by requiring a sworn statement of genetic parentage of the child.”⁶⁶ In 2017, the UPA policy on VAPs thus changes dramatically.

So, a VAP can prompt custodial parentage in one then a nonparent through consents by an expecting or existing legal parent and by the nonparent. The consents will be “actual” as there is an “express” willingness for shared parental authority.

Many current state laws reflect the policies of the UPAs on VAPs. Only a few states to date have extended VAP authority to a same-sex female couple where a child is born of consensual sex.⁶⁷ VAP opportunities are not, and could not be, extended to a same-sex male couple where one of the men conceived a child born of sex. In this setting, the birth mother is a parent and no states, as yet, recognize VAPs for third parents.⁶⁸

State VAP statutes today only sometimes involve parentage presumptions. With or without presumptions,⁶⁹ VAP statutes typically recognize that signed and state-filed parentage declarations establish custodial parentage for signors who are not birth mothers. Sometimes VAPs operate without alleged biological ties. They always operate without formal adoptions.

State VAP establishment laws vary significantly. They differ on whether there needs to be an express requirement of possible biological ties by a signing male. As well, state VAP laws vary in their disestablishment standards, though all norms, due to federal welfare subsidy mandates, must conform to the federal Social Security

66. 2000 UPA § 301 cmt.

67. See, e.g., VT. STAT. ANN. tit. 15C §§ 301(a)(4), 401(a)(1) (person married to birth mother at time child is born can undertake voluntary parentage acknowledgment); WASH. REV. CODE ANN. § 26.26A.200 (West 2019) (birth mother and “presumed parent” may sign acknowledgment; presumed parent includes the spouse of birth mother under § 26.26A.115(1)(a)(i)); On the need for allowing VAPs for same-sex female couples, see, e.g., Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 97 (2018) (same-sex female couples who conceive children using donated sperm). On the problems with two women VAPs for children born of consensual sex, see Jeffrey A. Parness, *Unnatural Voluntary Acknowledgments Under the 2017 Uniform Parentage Act*, 50 UNIV. OF TOL. L. REV. 25 (2018) [hereinafter *Unnatural VAPs*].

68. In California there can be three parents under law. CAL. FAM. CODE § 7612(c) (2020). But one such parent cannot be a parent via a VAP. See CAL. FAM. CODE §§ 7612(c), 7611 (2020) (voluntary parentage acknowledgment does not prompt presumed parentage).

69. State voluntary acknowledgment statutes are reviewed in Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53 (2010) [hereinafter *For Those Not John Edwards*] and Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479 (2005) [hereinafter *Cacioppo*].

Act.⁷⁰

VAP statutes most often are employed by birth mothers and unwed men who seek to establish legal paternity.⁷¹ VAPs are typically distinguished from birth certificate recognitions of childcare parents encompassing those married to birth mothers, who frequently are presumed parents, but who never undertake VAPs.⁷² VAP parents who reside and hold out children as their own also differ from residency/hold out parents who never undertake VAPs,⁷³ a VAP is more difficult to challenge than is a residency/hold out parentage.

In Alaska and Nevada, the VAP forms do not speak to biological ties. The signing man indicates only that he is the “father.”⁷⁴ In Wyoming and Washington, there is no explicit requirement that the signing man affirm a belief in biological ties, though the signor elsewhere is referred to as the “natural father.”⁷⁵ In Vermont, a woman residing with a birth mother for the first two years of a child’s life is eligible to sign a VAP.⁷⁶

In only some states can VAPs can be filed prior to birth.⁷⁷ And only in some states must information as to any completed genetic testing be submitted; may forms be used by residents for out-of-state births; are witnesses or notaries needed; and must forms require parental or guardian consent when the signing mothers are young.⁷⁸

Further, notwithstanding any statutorily-designated “conclusive” status, VAPs usually may be rescinded by signatories within sixty days.⁷⁹ After sixty days, however, VAPs may only be challenged in court on the basis of fraud, duress or material mistake of fact, in states participating in federal welfare subsidy programs. These standards are required by the federal Social Security Act.⁸⁰ Yet, state cases reflect significant interstate variations in the guidelines for such VAP challenges,

70. 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 Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 44–53, 82–90 (2003) (including table citing all statutes).

71. *But see In re Sebastian*, 879 N.Y.S.2d. 677 (N.Y. Sur. Ct. 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).

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

73. *See, e.g.,* VT. STAT. tit. 15C, §§ 301(a)(4), 401(a)(4) (a presumed holdout/residency parent may, but need not, sign a VAP).

74. 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 later cited VAP forms were collected for Those Not John Edwards, and are on file with the author).

75. 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). *See Cacioppo, supra* note 69, at 489–91.

76. VT. STAT. ANN. tit. 15C, § 301(a)(4) (2018); § 401(a)(4).

77. *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); VT. STAT. ANN. tit. 15C, § 304(b) (West 2018).

78. Parness et al., *supra* note 69, at 63–87

79. 42 U.S.C. § 666(a)(5)(D)(ii) (2014).

80. *Id.* at § 666(a)(5)(D)(iii). At least one state statute combines its norms on disestablishing presumed marital paternity and its norms on challenging VAPs. ALA. CODE § 26-17-608(a)(1) (2008).

with no Congressional or federal court movement, as yet, to unify state VAP challenge standards.⁸¹

Beyond the definitions of fraud, duress, and mistake, there are other differences in current U.S. state VAP challenge laws. For example, there are varied time limits on VAP challenges. Even with fraud, duress or mistake, challenges must be commenced per written law within a year in Massachusetts,⁸² within two years in Delaware,⁸³ and within four years in Texas.⁸⁴ 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.⁸⁵ Where there are no written time limits, (often quite broad) trial court discretion reigns.⁸⁶ Further, there are interstate differences in whether a successfully challenged VAP eliminates past child support arrearages.⁸⁷

Importantly, particularly for nonsigning biological fathers of children born of consensual sex, U.S. state laws vary on circumstances beyond fraud, duress and mistake available to challenge VAPs. Consider challenges by nonsigning biological fathers who did not know that other men, or women in some states, were signing VAPs alongside birth mothers, and who did not know of, and did not reasonably foresee, their “potential parentage” for some time. In Vermont, such a father may challenge VAPs within two years after discovery of his “potential parentage,” as in cases where there was “concealment” of the pregnancy and/or birth though there was no fraud, duress, or mistake.⁸⁸ Elsewhere, “concealment” of a pregnancy and/or of a live birth by the birth mother (and, at times, others) may not extend the time for a biological father to challenge a VAP, as where there operate strict repose periods.⁸⁹

Further, again particularly important for nonsigning biological fathers (and their family members), U.S. state laws vary on the nonsignatories with standing to

81. See, e.g., Jeffrey A. Parness & David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI.-KENT L. REV. 177 (2017) [hereinafter *Reforming VAPs*].

82. MASS. GEN. LAWS § 209C(11)(a) (2018). See also *Kansas ex rel. Secretary of Department for Children and Families 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).

83. DEL. CODE ANN. tit. 13, § 7-308(a)(2). See also VT. STAT. ANN. tit. 15C, § 308(a)(2); *Paul v. Williamson*, 322 P.3d 1070 (Okla. Civ. App. 2014) (employing Oklahoma two-year limit against alleged biological father per OKLA. STAT. ANN. tit. 10, § 7700-609(B) (West 2006)); LA. STAT. ANN. § 9:406 (2016) (two-year prescriptive period previously imposed for revocation of authentic acts of acknowledgement was repealed in 2016).

84. TEX. CODE ANN. § 160.308(1).

85. UTAH CODE ANN. § 78B-15-307 (2008).

86. 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).

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

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

89. See, e.g., Parness et al., *supra* note 69, at 198–200 (also noting that VAP challenges within the relevant time limits may be foreclosed by laches or estoppel).

challenge VAPs. Again in Vermont, challenges are available to “a person not a signatory.”⁹⁰ Elsewhere, standing is far more limited, as with statutory standing provisions encompassing particular types of challengers, like children and governments.⁹¹

C. Residency/Hold Out Parentage

All UPAs recognize custodial parentage in some who have resided with children whom they held out as their own. Residency/hold out parentage, as a form of parentage by consent for those without biological or formal adoption ties, can be grounded on the actual, apparent, or presumed consents by existing legal parents to share custody with their partners, their roommates, their family members, or others.⁹² Here, the consents are in some ways like the consents in common law marriage settings in that generally they are only recognized by the state after family relationships end. Of course, implied consents to marriage are in some important ways distinct from implied consents to dual parentage.

The 1973 UPA itself is quite different than later UPAs on residences/hold out parentage.

The 1973 Uniform Parentage Act has this parentage presumption:

- (a) A man is presumed to be the natural father of the child if...
 - (4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child.⁹³

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.⁹⁴

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

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

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

91. See, e.g., Parness et al., *supra* note 69, at 188–94. While the 2017 UPA expressly recognizes a VAP may be challenged by a nonsignatory, 2017 UPA at §§ 309(b) and 610 (proceeding “brought by an individual other than the child”), the 2000 UPA only explicitly recognizes signatory challenges, 2000 UPA at § 308(a). And see 1973 UPA at §§ 4(a)(5) and 6(b) (“any interested party may sue to disestablish an acknowledged father”).

92. To date, there are no residency/hold out parents recognized for child custody purposes wherein there are consents to share custody involving expecting legal parents (i.e., pregnant women and those awaiting formal adoption approval) and their partners or others. Expecting parents and their partners or others can utilize other forms of parentage by consent (like agreements regarding assisted reproduction births) to attempt to prompt parentage by consent.

93. 1973 UPA § 4(a)(4).

94. 2000 UPA § 204(a)(5).

(2) the individual resided in the same household with the child for the first two years of the life of the child, including periods of temporary absence, and openly held out the child as the individual's child.⁹⁵

While expanding the VAP route to custodial parentage in 2017 by including women, the last two UPAs limit custodial parentage opportunities for those living with, and supporting, nonmarital, nonbiological, and nonadoptive children without VAPs or assisted reproduction pacts.⁹⁶ Since 2000, an alleged residency/hold out parent must begin to childrear upon the child's birth.⁹⁷

Many current U.S. state laws reflect the policies of the UPAs on residency/hold out parentage, though only a few to date have expressly extended it to same-sex couples.⁹⁸ Nevertheless, residency/hold out parentage seems available to a female partner of a birth mother given equality demands.⁹⁹ Residency/hold out parentage is generally unavailable to a male partner of a birth father where there is a birth mother who is a legal parent since three parent state law policies are quite limited.¹⁰⁰

There are varying U.S. state laws reflecting the distinct UPA approaches to residency/hold out parentage. In California, following the 1973 UPA, a man is "presumed to be the natural father of a child" if he "received the child into his home and openly holds out the child as his natural child."¹⁰¹ There is no explicit

95. 2017 UPA § 204(a)(2).

96. *Id.*

97. 2000 UPA § 204(a)(5).

98. See, e.g., VT. STAT. ANN. tit. 15C, § 401 (a)(4)(b) (2018) ("person," not man); WASH. REV. CODE § 26.26A.115(1)(b) ("individual," not man). Cf. *Marriage Equality*, *supra* note 12, at 188–89 (on the need to treat equally men and women involved in same-sex residency/hold out parentage settings).

99. See, e.g., *Elisa*, 117 P.3d at 670 (finding former unwed lesbian partner a child support parent under California statutory law on presumed natural hold out fathers); *Miller-Jenkins*, 912 A.2d at 972 (upon dissolution of civil union of lesbian couple, both women are custodial parents as statute making husband the presumed "natural parent" of a child born to his wife was applicable via a second statute saying that civil union and married couples shall have the "same" rights. VT. STAT. ANN. tit. 15, § 308(4) (West 2018); § 1204(f)). Similar equality mandates operate when there is common law, rather than statutory, hold out parentage. See e.g., *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845 (N.Y. Sup. Ct., 2014). See also Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 L. & CONTEMP. PROBS. 195, 212–219 (2014) (even where statutes only explicitly recognize residency/hold out parentage for men, women are sometimes deemed parents under the statutes).

100. In California, though, there can sometimes be three legal parents, including the birth mother, her spouse, and a residency/hold out parent. Compare CAL. FAM. CODE § 7612(c) (West 2020) (three parents where recognition of only two parents "would be detrimental to the child") with *C.G. v. J.R.*, 130 So.3d 776, 782 (Fla. Dist. Ct. App. 2014) (Florida law does not support enforcement of an agreement on sharing child custody which was entered into by the married birth mother, her spouse, and the biological father of a child born of sex).

101. CAL. FAM. CODE § 7611(d) (West 2020). 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. Ct. App. 2015) (preponderance of evidence norm used to establish presumption). As to what constitutes receipt into the home, see *In re N.V.*, 2014 Cal. App. LEXIS 8870 (Cal. App. 1st Dist, Dec. 12, 2014) (reviewing cases).

requirement that a man who holds out a child as “his natural child” needs to have any beliefs about his actual biological ties. Thus, California cases¹⁰² have recognized as presumed fathers men who knew there were no biological ties, but who acted in the community as if there were.¹⁰³ By contrast, other states recognize possible residency/hold out parentage only for those who help to raise children from birth,¹⁰⁴ following the 2000 and 2017 UPA.

There are other variations interstate in custodial parentage based on residency/hold out. For example, some U.S. state laws do not require receipt into the home.¹⁰⁵ Some U.S. state laws more explicitly require existing legal parents to agree to such matters as residency or hold outs by nonparents who can later morph into new childcare parents on equal footing with existing legal parents.¹⁰⁶

Importantly, as with VAPs for nonresident biological fathers of children born of sex, U.S. state laws vary on the circumstances allowing, and the standing available to present, a challenge to residency/ hold out parentage. Consider challenges by nonresident biological fathers who did not know, and could not reasonably have known, that residency/ hold out was being undertaken by a nonparent together with an existing legal parent (often the birth mother). In Vermont, such a father may challenge a hold out/residency parentage within two years of “discovering the potential genetic parentage” in cases where there was no earlier actual or reasonably assumed knowledge of the potential due to “material misrepresentation or concealment.”¹⁰⁷ Elsewhere, there are different time limits,¹⁰⁸

102. See *e.g.* In re Jesusa V., 85 P.3d 2, 15 (Cal. 2004) (both Paul (also the husband) and Heriberto (also the biological father) were each judicially declared to be “presumed” California fathers because each had received Jesusa V. into his home and held her out as his natural child) [hereinafter *Jesusa V.*]. See also *Barnes v. Cypert*, No. F049259, 2006 WL 3361790 (Cal. Ct. App. Nov. 21, 2006) (birth mother’s uncle is a presumed parent) and In re Jerry P., 95 Cal. App. 4th 793, 816 (Cal. Ct. App. 2002) (presumed residency/hold out parent need not have, or even claim to have, biological ties) [hereinafter *Jerry P.*].

103. How long an alleged residency/hold out parent must so act is determined on a case-by-case basis. See, *e.g.*, In re J.B., 2019 WL 1451304 (Cal. Ct. App. April 2, 2019) (two day hold out is insufficient for presumed parent status).

104. Compare TEX. FAM. CODE ANN. § 160.204(a)(5) (2015), § 160.205(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. REV. CODE § 26.26.116(2) (2019).

105. See, *e.g.*, N.J. STAT. § 9:17-43(a)(4) (2019) (either receives into his home or “provides support for the child”) and DEL. CODE TIT. 13, § 8-201(c) (2013) (“parental role” and “bonded and dependent relationship . . . that is parental in nature”).

106. See, *e.g.*, D.C. CODE § 16-831.01(1) (2020) (single parent’s “agreement” to same household residency for one wishing to be deemed a de facto parent) and VT. STAT. tit. 15C § 401 (a)(4) (2017) (presumed residency/ hold out parent if in child’s first 2 years, where “another parent” of child jointly held child out as presumed parent’s child). Compare N.J. STAT. § 9:17-43(a)(4)-(5), 9:17-40 (2019) (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”).

107. VT. STAT. tit. 15C § 401(a)(4), 402(b)(2) (2017).

108. Compare, *e.g.*, 2017 UPA § 204(a)(2) (residence/hold out in child’s first two years) § 204(b), and 608(b) (presumption rebuttal usually must be presented before the child turns two) to 1970 UPA § 4(a)(4) (residence/hold out where child is “under the age of majority”) and § 6(b) (“at any time”).

as well as the unavailability of “concealment” as a condition of extending the normal time limits for challenging hold out/residency parents.¹⁰⁹

D. De Facto Parentage

The 2017 UPA, but neither of its predecessors, expressly recognizes “de facto” parenthood as a form of parentage by consent for those without biological or formal adoption ties.¹¹⁰ De facto parenthood is grounded in far more explicit agreements for shared custody between existing legal parents and nonparents than in any agreements leading to residency/hold out parentage.¹¹¹ For de facto parentage, an existing legal parent must have “fostered or supported” a “bonded and dependent relationship” between the child and the nonparent who may become a de facto parent.¹¹² The nonparent must have undertaken “full and permanent” parental responsibilities.¹¹³

The 2017 UPA’s de facto parentage provision is far more precise in its details on parental-like acts than is its provision on the two-year residency/hold out parentage presumption. While both de facto parentage and residency/hold out parentage encompass human acts occurring at no particular time or in no particular place, only de facto parentage requires all of the following conditions:

- (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.
- (b) An individual who claims to be a de facto parent of a child must commence a proceeding . . . (1) before the child attains 18 years of age; and (2) while the child is alive. . . .
- (d) In a proceeding to adjudicate parentage of an individual who claims to be a de facto parent of the child, if there is only one other

109. Compare, e.g., 2017 UPA § 204(a)(2), 204(b), 608(b) (two year limit on challenging residency/hold out parentage of an “individual” does not operate when the individual is “not a genetic parent, never resided with the child, and never held out the child as the presumed parent’s child”); 2000 UPA § 204(a)(5), 204(b), 607(b) (two year limit on actions to disprove earlier determined presumed residency/hold out parentage in a “man” does not operate when there was, in fact, no cohabitation or sexual intercourse during the probable time of conception and the presumed parent never openly held out the child as his own); and 1970 UPA § 4(a)(4), 6(b) (presumed residency/hold out parentage can be challenged “at any time”).

110. The term “de facto” parent did not originate in the 2017 UPA. The Comment to the Act indicates its de facto parentage standard was modeled on Maine and Delaware statutes. 2017 UPA § 609 cmt.

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

112. *Id.* at § 609(d)(6).

113. *Id.* at § 609(d)(3).

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) Subject to other applicable limitations in this [part], if in a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, 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 613.¹¹⁴

Clearly, de facto parentage, but not residency/hold out parentage, requires human acts that the actor and others recognize as embodied within very positive parent-child relationships.

Of particular note is the 2017 UPA requirement that an existing legal parent (i.e., "another parent") "fostered or supported" the parental-like relationship between the child and the nonparent.¹¹⁵ This fostering and support seemingly can qualify as "actual consent" (whether "express" or "inferred"), as "apparent consent," or as "presumed consent" to shared custody by the existing legal parent. While addressing childcare arrangements between one legal parent and a nonparent, there is no mention in the 2017 UPA of any conduct—consensual or otherwise—involving any second existing legal parent (like a VAP parent or a presumed spousal parent), or any expecting legal parent (like a biological father of a child born of sex who maintains a paternity opportunity interest). Such an unmentioned parent may not even know of "another" parent's fostering and support. Under the UPA language, it is quite conceivable that the nonparent is later

114. *Id.* at § 609(a), (b), (d), (e).

115. *Id.* at § 609(d)(6).

deemed a de facto parent concurrent with the (effective) termination of the unaware second legal or existing parent's custodial parentage interests.¹¹⁶

Also of note is the 2017 UPA provision that a proceeding to establish de facto parentage may be commenced only by a living individual claiming to a de facto parent.¹¹⁷ Thus, upon a breakup of a family relationship between an individual and an existing legal parent and his or her child, the parent or the child may not proceed to establish de facto parentage for child support purposes. By contrast, an existing legal parent and/or the child (and others, like a child-support agency) may pursue an alleged residency/hold out parent for support.¹¹⁸ The differences in the standing norms present significant Equal Protection and public policy concerns.¹¹⁹

On challenges to earlier determined de facto parentage, the 2017 UPA is relatively silent. It does provide, however, that a child is not bound by an earlier de facto parentage finding unless "the child was a party or was represented" in the earlier proceeding.¹²⁰ Further, it recognizes that a party with standing "to adjudicate parentage"¹²¹ may not challenge an earlier de facto parentage finding if

116. 2017 UPA § 613 (where there is no state law recognition of the possibility of three or more custodial parents, a court must "adjudicate parentage in the best interest of the child," with guiding factors enumerated). In the 2017 UPA, there is provided no express and significant mechanism for a second existing legal, or an expecting legal parent, to challenge a petition to establish de facto parentage. See, e.g., 2017 UPA, at § 609(e) (beyond the birth or adoptive parent, if there is another individual "who is a parent or has a claim to parentage of the child" for whom an alleged de facto parent seeks parental status, that individual's interests must be adjudicated. Yet how would a court learn of this individual? And is it reasonable to assume that such an individual would likely know of the de facto parent petition and thus be able to intervene?

In Vermont, which substantially enacted the 2017 UPA, an alleged de facto parent's petition to adjudicate his/her "claim to parentage" is to be determined by "clear and convincing evidence," with no explicit statutory mention of the participatory rights of a nonresidential person with "a claim to parentage." VT. STAT. ANN. tit. 15C, § 501(a)(1), (b) (2020). *But see* VT. STAT. ANN. tit. 15C, §§ 501(b), 206(a)(6) (2020) (in considering claims of de facto parentage, courts must consider the "likelihood" of "harm to the child"). Compare DEL. CODE ANN. tit. 13, § 8-201(c) (2020) (de facto parent norms, wherein there is not any presumed parentage if the norms are met) and *Id.* at § 8-609(b) (adjudicated father may be challenged no later than two years after the adjudication). While findings of de facto parentage in favor of petitioners can effectively terminate parentage or parental opportunity interests for many, such findings—unlike findings in formal adoption proceedings—need not, at least expressly under the statutes, be preceded by reasonable attempts to notify those whose parental interests are possibly terminated should the petitions be granted.

117. 2017 UPA § 609(a).

118. *Id.* at §§ 602, 204(a)(2) (residency/hold out parent) and 203 ("a parent-child relationship established under this [act] applies for all purposes").

119. See, e.g., Jeffrey A. Parness, *Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act*, 31 J. OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 157 (2018).

120. 2017 UPA, at § 623(b)(4).

121. 2017 UPA, at § 602 (standing recognized for an individual [personally or through an authorized legal representative] "whose parentage of the child is to be adjudicated").

that party was a party in the earlier proceeding or received notice of that earlier proceeding.¹²²

In Vermont, an adjudication of de facto parentage “does not disestablish the parentage of any other parent.”¹²³ Such an adjudicatory proceeding may include judicial consideration of “a claim to parentage of the child” by another,¹²⁴ though there is no explicit requirement that anyone with a competing claim to parentage be noticed.¹²⁵ So, a birth mother’s husband who is not the biological father of the child born of sex could seek de facto parent status, to accompany his presumed marital parent status. He may do so to lessen—if not eliminate—any custodial parentage interest in the biological father of a child born sex or with the birth mother’s former residential, intimate partner who also childcared for a while. Similarly, a birth mother’s husband may also undertake a VAP. A VAP is often more difficult to overcome than is a spousal parent presumption.¹²⁶

Both the 2000 ALI Principles¹²⁷ and the 2019 ALI Parental Authority Draft¹²⁸ also recognize forms of “de facto” parentage. Each of the forms requires both residence and consent by an existing legal parent.

The 2000 ALI Principles recognize a “parent by estoppel,” who is an individual who lived with the child for at least two years, with “a reasonable, good-faith belief” of biological ties and who continued to accept the responsibilities of fatherhood when the belief ended; an individual who lived with the child for at least two years pursuant to an agreement with the child’s legal parent (or, if there are two legal parents, both parents) and who held out parentage while accepting “full and

122. 2017 UPA, at § 611(b) (with notice governed by § 603, which includes “an individual whose parentage of the child is to be adjudicated,” which seemingly could include a nonbirth mother who claims to be a biological parent and thus claims protected parentage opportunity interests). Of course, as in formal adoption proceedings, notice may never reach such a biological parent, as when notice is served by publication.

123. 15C Vermont Stat. 501(c).

124. 15C Vermont Stat. 501(b) and 206 (guidelines for “adjudicating competing claims of parentage”).

125. Vermont Stat. 502(a) (petitions served on “all parents and legal guardians of the child”). *But see* Vermont Stat. 502(b) (“adverse party,” presumably including an intervenor, may file a response to a petition).

126. Post sixty day challenges to VAPs, but not to spousal parentage, at least by VAP signatories must be grounded on fraud, duress or material mistake of fact as well as on the lack of biological ties. Reforming VAPs, at 194-196. Spousal parentage sometimes can be challenged solely due to lack of biological ties. *See, e.g., In re Waites*, 152 So.3d 306 (Miss. 2014). Biological ties are less important when state public policies more strictly view spousal parent rights and responsibilities, as “essential attributes” of marriages, as per *Obergefell*, 135 S.Ct. at 2599, as in *McLaughlin*, 401 P.3d at ¶ 11 (spousal parentage not dependent upon presumptive biological ties) or when state public policies more significantly promote the best interests of children (especially as to two parent support), as in *LC v. MG*, 420 P.3d 400, 424–25 (Haw. 2018) (majority opinion on Part III B) (not allowing female spouse to rebut marital parentage due to spouse’s failure to consent to assisted reproduction involving her wife since the child’s best interests require “a child have two parents to provide financial benefits”) [hereinafter LC].

127. 2000 ALI Principles, at §§ 2.03(1)(c) and 3.02(1)(c) (requirements include residence with the child, as well as “the agreement of a legal parent to form a parent-child relationship” unless the legal parent completely fails, or is unable, to perform caretaking functions”).

128. 2019 ALI Parental Authority Draft, at § 1.82(a) (requirements include residence with the child, as well as establishing that “a parent consented to and fostered the formation of the parent-child relationship”).

permanent” parental responsibilities, assuming the child’s best interests are served; or an individual who lived with the child since birth pursuant to “a prior co-parenting an agreement with the child’s legal parent (or, if there are two legal parents, both parents), assuming the child’s best interests are served.¹²⁹

The 2000 ALI Principles recognize as a “de facto parent” one who is “other than a legal parent or a parent by estoppel”¹³⁰ and who lived with and cared for the child for at least two years under an “agreement of a legal parent to form a parent-child relationship.”¹³¹ A de facto parent, unlike a legal parent or a parent by estoppel, has no presumptive right to an allocation of decision-making responsibility for the child.¹³² And a de facto parent has no presumptive right of “access to the child’s school and health-care records to which legal parents have access by other law.”¹³³

The 2019 ALI Draft describes a de facto parent as a third party who establishes that he/she “lived with the child for a significant period of time;” was “in a parental role” long enough that he/she established “a bond and dependent relationship . . . parental in nature;” he/she had no “expectation of financial compensation;” and “a parent” consented to third party’s parental-like role.¹³⁴ So, the 2019 Draft, but not the 2000 Principles, invite a new custodial parentage designation that adversely impacts the custodial interests of an existing legal parent with no actual or apparent consent. As with intentional torts, here too the ALI supports a presumed consent approach.

Before and since 2017, some U.S. states had or have statutes or common law precedents on nonmarital, nonbiological, and nonadoptive custodial parentage similar to the suggested UPA and ALI de facto parent norms. For example, before

129. 2000 ALI PRINCIPLES, at §§ 2.03(1)(b)(ii), 2.03(1)(b)(iv), and 2.03(1)(b)(iii).

130. A “legal parent” is “an individual who is defined as a parent under other state law.” 2000 ALI PRINCIPLES, at § 2.03(1)(a).

131. 2000 ALI PRINCIPLES, at § 2.03(1)(c)(ii). Alternatively, a de facto parent is one who is other than a legal parent or a parent by estoppel and who lived with and cared for the child for at least two years “as a result of a complete failure or inability of any legal parent to perform caretaking functions.” *Id.*

Precedents predating the 2000 ALI Principles recognize the concept of de facto parentage in different settings. *See, e.g., In re Kieshia E.*, 859 P.2d 1290, 1296 (Cal. 1993) (standing of a de facto parent in a juvenile delinquency proceeding); *In re Dependency of J.H.*, 815 P.2d 1380, 1384 (Wash. 1991) (in a delinquency case, permissive intervention, not intervention as of right, is available to some foster parents claiming de facto (or psychological) parent status); and *In re B.G.*, 523 P.2d 244, 254 n. 21 (Cal. 1974) (not resolving whether a de facto parent may have the same rights of notice, hearing or counsel as have natural parents in Juvenile Court Law proceedings under due process or equal protection principles). The Reporter’s Notes to the 2000 ALI Principles observes the “law that most closely approximates the criteria for a ‘de facto’ parent relationship is that of Wisconsin” where “visitation (but not custody) may be awarded to an individual who has formed a ‘parent-like relationship’ with a child.” § 2.03, at Comment c.

132. 2000 ALI PRINCIPLES, at § 2.09(2).

133. *Id.* at § 2.09(4).

134. 2019 ALI PARENTAL AUTHORITY DRAFT, at § 1.82(a) (proof by clear and convincing evidence is required).

2017 there were quite comparable Maine¹³⁵ and Delaware statutes¹³⁶ and a less comparable Wisconsin Supreme Court precedent,¹³⁷ that were utilized by the drafters of the 2017 UPA.¹³⁸ Since 2017, a few states have statutorily recognized de facto parenthood under the 2017 UPA guidelines.¹³⁹

Current de facto parentage laws vary.¹⁴⁰ In Delaware, a de facto parent can be judicially recognized for one who had “a parent-like relationship” with “the support and consent of the child’s parent;” who exercised “parental responsibility;” and who “acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.”¹⁴¹ In Washington, a de facto parent resides with the child for a significant period; engages in consistent childcare; expects no financial compensation for acting in parental-like way; has a bonded and dependent relationship parental in nature; and has the support of another parent.¹⁴²

On occasion, statutes within a single U.S. state can recognize both residency/hold out and de facto parents who are neither biologically-tied to, nor formal adopters of, children. Thus the Maine Parentage Act, effective in July, 2016, provides for presumed parents who resided since birth with a child for at least 2 years and “assumed personal, financial, or custodial responsibilities,”¹⁴³ as well as for de facto parents who, inter alia, resided with the child “for a significant period of time,” established with the child “a bonded and dependent relationship,” and “accepted full and permanent responsibilities as a parent . . . without expectation of financial compensation.”¹⁴⁴ Similarly, there are both residency/hold out and de facto parents in Delaware,¹⁴⁵ Washington,¹⁴⁶ and Vermont.¹⁴⁷

135. ME. REV. STAT. ANN. tit. 19-A, § 1891 (2016).

136. DEL. CODE ANN. tit. 13, § 8-201(c) (2013).

137. *In re Custody of H.S.H.-K.*, 533 N.W. 2d 419 (Wis. 1995) (parental-like relationship can prompt visitation rights when in child’s best interests).

138. UNIFORM PARENTAGE ACT Comment to § 609 (Nat’l Conf. of Comm’rs. on Unif. State Laws, 2017).

139. *See, e.g.*, WASH. REV. CODE ANN. § 26.26A.440 (2019); Vt. Stat. Ann. tit. 15.

140. Many of the laws are summarized in 2019 ALI Parental Authority Draft, at § 1.82, Comment I.

141. DEL. CODE ANN. tit. 13, §§ 8-201(c) (2013) (the three factors to attain “de facto parent status”); *See also, Id.*, 8-201(a–b) (2013) (applying the three factors to either a mother or father). De facto parents are on equal footing with biological or adoptive parents. *See, e.g.*, *Smith v. Guest*, 16 A.3d 920 (Del. 2011). *But see In re Bancroft*, 19 A.3d 730 (Del. Family 2010) (finding statute overbroad and violative of fit mother’s and father’s due process rights when the mother’s boyfriend seeks to be a third parent). *Cf. K.A.F. v D.L.M.*, 96 A. 3d 975, 980 (N.J. Super, Mercer Cty. 2014) (former female domestic partner of birth mother has standing to seek childcare order where birth mother ceded some of her parental authority, but where adoptive parent had not; former partner must show “exceptional circumstances” per *Watkins v. Nelson*, 748 A. 2d 539, 558 (N.J. 2000)).

142. WASH. REV. CODE § 26.26A.440(4) (2019) (utilizing a preponderance of evidence standard).

143. ME. REV. STAT. tit. 19-A § 1881(3) (2016).

144. *Id.* § 1891(3) (2016).

145. DEL. CODE ANN. tit. 13, § 8-204 (a)(5) (presuming residency/hold out parent); DEL. CODE ANN. tit. 13, § 8-201(c) (2013) (de facto parent).

146. WASH. REV. CODE § 26.26A.115(b) (2019) (presuming residency/hold out parent “for the first four years”); WASH. REV. CODE § 26.26A.440 (2019) (de facto parent).

147. VT. STAT. ANN. tit. 15C, § 401(a)(1) (2018) (presuming residency/hold out parent after the first two years); VT. STAT. ANN. Tit. 15C, § 501(a) (2018) (de facto parent).

Beyond statutes, some judicial precedents recognize de facto parentage. In 2008 the South Carolina Supreme Court,¹⁴⁸ adopting a Wisconsin high court analysis, determined that a nonparent was eligible for psychological parent status if a four-prong test was met. This test included the requirements that the petitioning prospective parent show (1) the biological or adoptive parents consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.¹⁴⁹ And in 2009, a federal appeals court¹⁵⁰ noted that the Mississippi Supreme Court had long recognized that a person standing "in loco parentis," meaning "one who has assumed the status and obligations of a parent without a formal adoption," has the same "rights, duties and liabilities" as a natural parent.

By contrast, in some U.S. states where there are no de facto parent statutes, courts choose not to develop precedents even where they are sympathetic to the pleas for establishing de facto parentage. In Illinois¹⁵¹ and elsewhere,¹⁵² high courts have refused to act because any new de facto parentage norms are the responsibility of state legislators. Beyond separation of power concerns, in these states there are expansive and detailed statutory schemes on most aspects of parentage, in and outside of childcare, which already balance competing individual and societal interests.

Whether in statutes or precedents, de facto childcare parentage sometimes arises in U.S. states without the "actual consent" or "apparent consent," per the 2019 ALI Torts Restatement Draft, of an existing legal parent (like a VAP or spousal parent), as well as without the knowledge of an expecting legal parent (like an unwed biological father). Such de facto parentage is condoned by the 2017 UPA as

148. *Marquez v. Caudill*, 656 S.E.2d 737, 743–44 (S.C. 2008) (following *In re Custody of H.S.H.-K.*, 533 N.W. at 435-436, which set out norms for nonparent child visitation orders). See also *Conover v. Conover*, 146 A.3d 433, 446-447 (Md. 2016) (using *In re Custody of H.S.H.-K.* in recognizing de facto parent doctrine).

149. *Caudill*, 656 S.E.2d at 743–44.

150. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 182–83 (5th Cir. 2009) (relying on, *inter alia*, *Farve v. Medders*, 128 So. 2d 877, 879 (Miss. 1961)).

151. See, e.g., *In re Parentage of Scarlett Z.-D.*, 28 N.E.3d 776, 789, 795 (Ill. 2015) (stating that while there is a need for a "comprehensive solution," it must come from the legislature).

152. See, e.g., 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) [hereinafter *More Principled Allocations*]. For a forceful argument on the need for continuing the common law "equitable parenthood doctrine" even where there are statutes, see Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOKLYN L. REV. 55 (2017).

only “another parent” needs to foster or support the de facto parent’s¹⁵³ dependent relationship, as well as the 2019 ALI Parental Authority Draft as it requires “a parent” to consent to the “formation of the parent-child relationship.”¹⁵⁴

E. Parentage Arising from Assisted Reproduction Births

Parentage by consent for birth mothers and nonbirth mothers in assisted reproduction settings¹⁵⁵ typically involve few instances of inferred, apparent or presumed consent, as express consents reign. As with VAPs, there could be, but there generally are no, state-required forms indicating “express” consent. In California, however, in nonsurrogacy settings there are statutorily consent forms that may be used, but are not required.¹⁵⁶

i. Without Surrogate

The 1973 UPA recognizes, but generally does not deal with, the “many complex and serious problems raised by the practice of artificial insemination.”¹⁵⁷ It does, however, address “one fact situation that occurs frequently,”¹⁵⁸ a “consent” by a husband to the artificial insemination of his wife with “semen donated by a man not her husband.” Here, the husband is to be “treated in law as if he were the natural father” where the consent was in writing and “signed by him and his wife,” with certification undertaken and the consent then filed by the supervising “licensed physician” with state governmental officials.¹⁵⁹ No model form is suggested for such a consent. The semen donor who is not the husband is to “be treated in law as if he were not the natural father.”¹⁶⁰

In response to the increasing numbers of children born of assisted reproduction, the 2017 UPA proposes distinct articles on nonsurrogacy and surrogacy births. 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.”¹⁶¹ The 2017 UPA thus recognizes that a donor, in the absence of an early consent to legal parentage or of 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.”¹⁶² Such consent must

153. UNIFORM PARENTAGE ACT § 609 (d)(6) (Nat’l Conf. of Comm’rs. on Unif. State Laws, 2017).

154. 2019 ALI Parental Authority Draft, at § 1.82(a)(4).

155. 42 U.S.C. § 263a-7(1) (2018) (defining assisted reproductive technology). *See also* Jenna Casolo et al., *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313 (2019).

156. Cal. Fam. Code § 7613.5(d) (2020) (forms on assisted reproduction pacts by two married or unmarried people, where signatories may or may not have used their own genetic material to prompt a pregnancy).

157. 1973 UPA § 5.

158. *Id.*

159. *Id.* at § 5(a) (all papers and records pertaining to the insemination are to be kept confidential, though subject to inspection pursuant to a court order “for good cause shown”).

160. 1973 UPA § 5(b).

161. 2017 UPA § 701 cmt..

162. *Id.* at §§ 702–04.

be signed by the birth mother and "an individual who intends to be a parent," though the "record" need not be certified by a physician.¹⁶³ The lack of such a consent does not foreclose custodial parentage for an intended parent where there is found clear-and-convincing evidence of an "express agreement" between the individual and the birth mother "entered before conception."¹⁶⁴ As well, the lack of such consent does not foreclose an individual's parentage where the child was held out as the individual's own in the child's first two years.¹⁶⁵ The nonparental status of one married to a birth mother of a child 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.¹⁶⁶

Nonsurrogacy assisted reproduction parentage for a child, including a birth mother and an intended parent, frequently arises from the express willingness of each of two people to share custodial parentage. Written preimplantation pacts can guide later custodial parentage disputes, though even here disputes can arise as when terms are ambiguous, conditions are not anticipated or circumstances surrounding formation and/or signing are unconscionable. Where there are no writings, consents can be "inferred" from findings of facts regarding, for example, the consequences that should follow if a "turkey baster" baby is born.¹⁶⁷

Assessments of intent and conscionability would be greatly facilitated if there were state suggested (if not, at times, state required) forms on nonsurrogacy assisted reproduction pacts, as there are forms on VAPs. There are now suggested forms in California covering varying persons (e.g., wed and unwed) entering into nonsurrogacy arrangements.¹⁶⁸

The nonsurrogacy parentage norms in the UPAs are now reflected, to at least some degree, in both U.S. state statutes¹⁶⁹ and precedents untethered to

163. *Id.* at § 704(a). The lack of a need for physician certification seemingly recognizes the prospect of turkey baster or other do-it-yourself forms of assisted reproduction.

164. *Id.* at § 704(b)(1).

165. *Id.* at § 704(b)(2).

166. *Id.* at § 705.

167. *See, e.g., McIntyre v. Crouch*, 780 P.2d 239 (Or. App. 1989) (semen donor has federal constitutional interests in childcare parentage where he and birth mother agreed preconception to his fatherhood). *But see* *In re K.M.H.*, 169 P.3d 1025 (Kan. 2007) (sperm donor's paternity following a do-it-yourself implantation and related birth is dependent upon a written agreement with birth mother, per statute, even if the donor notoriously or in his own writing recognized his paternity). *Cf. E.E. v. O.M.G.R.*, 20 A.3d 1171 (N.J. Super. 2011) (parental rights of sperm donor in a do-it-yourself assisted reproduction birth could not be terminated simply through a requested consent order submitted to the court by the birth mother and the donor; statute on doctor-assisted conception did not apply).

168. Cal. Fam. Code § 7613.5 (2020).

169. American state statutes include TEX. FAM. CODE § 160.7031 (2019) (fatherhood for unwed man, intending to be father, who provides sperm to licensed physician and consents to the use of that sperm for assisted reproduction by an unwed woman, where consent is in a record signed by man and woman and kept by the physician); N.H. REV. STAT. ANN § 5-C:30(l)(b) (2020) (unwed mother has sperm donor "identified on birth record" where "an affidavit of paternity" has been executed); DEL. CODE ANN.

statutes,¹⁷⁰ with significant interstate variations.¹⁷¹ The 2017 UPA provisions have been enacted in a few states.¹⁷²

ii. With Surrogate

As to surrogacy, the 1973 UPA is silent.¹⁷³ The 2017 UPA-like the 2000 UPA, as amended in 2002, distinguishes between genetic (“traditional”) and gestational surrogacy.¹⁷⁴ Unlike its 2000 predecessor, the 2017 UPA does not require “all agreements to be validated by a court order prior to any medical procedures.”¹⁷⁵ The 2017 UPA imposes differing requirements for the two surrogacy forms, with “additional safeguards or requirements on genetic surrogacy agreements,”¹⁷⁶ as only they involve a woman giving birth while “using her own gamete.”¹⁷⁷ The 2017 UPA recognizes there can be “one or more intended parents.”¹⁷⁸ The common requirements include signatures in a record, “attested by a notarial officer or witnesses;” independent legal counsel for all signatories; and execution before

tit. 13 § 8-704(a) (“Consent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man.”); WYO. STAT. ANN. § 14-2-904(a) (like Delaware). *See also* N.M. STAT. ANN. § 40-11A-703 (“A person who provides eggs, sperm, or embryos for or consents to assisted reproduction as provided in Section 704 [“record signed . . . before the placement”] . . . with the intent to be the parent of a child is a parent of the resulting child”).

170. Precedents include *Shineovich & Kemp*, 214 P.3d 29 (Or. Ct. App. 2009) (to avoid constitutional infirmity, assisted reproduction statute as written solely for married opposite sex couple applied to same sex domestic partners); *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789 (Cal. App. 2d 2014) (though the statute (both pre-2011 and post 2011) indicated explicitly a lack of paternity for this particular semen donor when his unwed partner delivered a child conceived via assisted reproduction, the statute on presumed parentage for one (either male or female) who receives a child into the home and openly holds out the child as one’s own natural child can support – in certain circumstances – legal paternity for the semen donor); *Ramey v. Sutton*, 362 P.3d 217 (Okla. 2015) (unwritten preconception agreement prompts in loco parentis childcare status for former lesbian partner of birth mother, though she contributed no genetic material); and *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E. 3d 488 (N.Y. 2016) (agreement between lesbian partners can prompt parentage in non-birth mother) [hereinafter *Brooke S.B.*].

171. The laws are reviewed and critiqued in Deborah L. Forman, *Exploring the Boundaries of Families Created with Known Sperm Providers: Who’s in and Who’s Out?*, 19 U. PA. J.L. & SOC. CHANGE 41 (2016).

172. UNIF. PARENTAGE ACT §§ 701–708 (UNIF. LAW COMM’N 2017) (suggested assisted reproduction statutes involving no surrogates), followed by Wash. Rev. Code § 26.26A.610 (2020) and Vt. Stat. Ann. tit. 15C § 701 (2020).

173. UNIF. PARENTAGE ACT § 5 cmt. (UNIF. LAW COMM’N 1973) (while addressing husband-wife pacts on assisted reproduction where the wife bears the child and intends to parent, the Act “does not deal with many complex and serious legal problems raised by the practice of artificial insemination”).

174. 2017 UPA § 801 cmt..

175. *Id.* at § 808 cmt..

176. *Id.* at § 801 cmt.. The common safeguards or requirements for all surrogacy pacts are found in *id.* at §§ 802–07. *See also id.* at §§ 808–12 (special requirements for gestational surrogacy agreements) and § 813–18 (special requirements for genetic surrogacy agreements).

177. *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 §§ 808–12, while the special rules for genetic surrogacy pacts are found in *id.* at §§ 813–818.

178. *Id.* at § 801(3).

implantation.¹⁷⁹ Special provisions for gestational surrogacy pacts include opportunity for "party" termination "before an embryo transfer" and opportunity for a prebirth court order declaring parentage vesting at birth.¹⁸⁰ Special provisions for genetic surrogacy pacts include the general requirement that "to be enforceable," an agreement must be judicially validated "before assisted reproduction" upon a finding that "all parties entered into the agreement voluntarily" and understood its terms;¹⁸¹ that a genetic surrogate may withdraw consent "in a record" at any time before 72 hours after the birth;¹⁸² and that a genetic surrogate cannot be ordered by a court to "be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures."¹⁸³

As with nonsurrogacy assisted reproduction parentage, in the surrogacy setting there is often clear evidence on consents to future custodial parentage and nonparentage within written preimplantation pacts. In the absence of a writing, consents can also be inferred regarding, again, "turkey baster" babies later born to alleged genetic surrogates.

UPA surrogacy parentage norms are now reflected both in U.S. state statutes¹⁸⁴ and precedents untethered to statutes.¹⁸⁵ Certain provisions of the 2017

179. 2017 UPA § 803(6), (7) and (9).

180. *Id.* at §§ 808(a) and 811(a).

181. *Id.* at § 813(a) and (b).

182. *Id.* at § 814(a)(2).

183. *Id.* at § 818(b).

184. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 47/20(b)(1) and (2) (2017) (intended parents can include unwed heterosexual couple where each contributes "at least one of the gametes resulting in a pre-embryo that the gestational surrogate will attempt to carry to term" and the couple has "a medical need for the gestational surrogacy"). In New Hampshire, before insemination pursuant to a surrogacy contract that will be deemed "lawful," N.H. REV. STAT. ANN. § 168-B:16(I) (2014), a court "shall" be petitioned for "judicial preauthorization," N.H. REV. STAT. ANN. § 168-B:21(I) (2014). Requirements include that the "intended mother" is "psychologically unable to bear a child without risk to her health or to the child's health;" the "intended father" "provided a gamete;" and either the intended mother or surrogate provided the ovum. Authorization is permitted only where the "surrogacy contract is in the best interest of the intended child." N.H. REV. STAT. ANN. § 168-B:23(III)(d) (2013) (current version at N.H. REV. STAT. ANN. § 168-B:12 (2014)). Gestational surrogacy statutes are reviewed in Douglas Ne Jaime, *The Nature of Parenthood*, 126 Yale L.J. 2260, 2376-2381 (2017).

185. Precedents recognizing judicial discretion to enforce surrogacy arrangements include *In re Paternity of F.T.R.*, 833 N.W. 2d 634, at ¶173 (Wis. 2013) (enforcing surrogacy pact between two couples as long as child's best interests were served, while urging the legislature to "consider enacting legislation regarding surrogacy" to insure "the courts and the parties understand the expectations and limitations under Wisconsin law"); *In re Baby*, 447 S.W.3d 807 (Tenn. 2014) ("traditional surrogacy contracts do not violate public policy as a general rule" where surrogate artificially inseminated with sperm of intended father, who was not married to intended mother); *In re Amadi*, 2015 WL 1956247 (Tenn. Ct. App. 2015) (gestational surrogate for married couple is placed on birth certificate, as said to be required by statute where intended father's/husband's sperm used with egg from unknown donor and intended mother/wife was recognized by all parties as legal mother; reiterates plea from *In re Baby*, *infra*, that the legislature should enact a comprehensive statutory scheme); *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011) (biological father's male domestic partner can also be intended parent of a child born to a gestational surrogate). Beyond enforcing a surrogacy pact in the absence of statute, an intended parent (also the sperm donor) who employed a gestational surrogate was allowed in one case to adopt formally his genetic offspring. *Matter of John*, 174 A.D.3d 89 (N.Y. App. Div. 2019).

UPA have been enacted in a few states.¹⁸⁶ Elsewhere, major sections of the 2000 UPA on surrogacy often operate.¹⁸⁷ There are no major state required forms as with VAPs. Few suggested forms have yet appeared. But there are suggested forms for nonsurrogacy assisted reproduction births in California.¹⁸⁸ The increased use of required forms, and the increased availability of suggested forms, would diminish significantly individual case disputes over consents to parentage or nonparentage.

III. SUPPORT PARENTAGE BY CONSENT UNDER THE UPAS AND U.S. STATE LAWS

The circumstances prompting custodial parentage by consent frequently also prompt support parentage by consent. Sometimes, however, child support parentage arises for one who has no, and perhaps can never realistically have, child custody parentage. Yet, child custody parentage nearly always prompts child support parentage.

As with custodial parentage where consents can operate immediately or only if later conditions are met, support parentage can arise through consents that operate either immediately or conditionally. Support duties immediately arise from consents in enforceable agreements, as with premarital or midmarriage agreements between parents and stepparents involving future childcare.¹⁸⁹ Support duties arise conditionally, as where a nonparent, who agrees to cohabit with an existing legal parent while promising to support his/her child, then must hold the child out as one's own for some extended time while cohabiting in order to be responsible for future child support.¹⁹⁰

The UPAs have always declared in some way that its custodial parentage norms, once met, generally operate in other parentage contexts, including support. The 1973 UPA says the "parent and child relationship" arising from the Act "confers or imposes rights, privileges, duties, and obligations."¹⁹¹ It further states that such a relationship, when determined by a "court judgment or order," is "determinative for all purposes."¹⁹² The 2000 UPA says that "a parent-child relationship established" under the Act "applies for all purposes, except as otherwise specifically provided."¹⁹³ The 2017 UPA follows the 2000 UPA regarding the general applicability of its parentage norms "for all purposes."¹⁹⁴

Some U.S. state laws expressly recognize this general parity between custodial and support parentage by consent. Thus, lawmakers in Washington and Vermont

186. See, e.g., WASH. REV. CODE ANN. § 26.26.A.715 (2019) (gestational or genetic surrogacy agreement); VT. STAT. ANN. tit. 15C § 801(2018) (gestational carrier agreements).

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

188. See CAL. FAMILY CODE § 7613.5 (2020).

189. See, e.g., Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GEOR. ST. UNIV. L. REV. 343, 357–58 (2015) [hereinafter *Parentage Prenups*].

190. *Id.*

191. 1973 UPA § 1.

192. *Id.* at § 15(a).

193. 2000 UPA § 203. See also, *id.* at § 103(c) (the Act "does not create, enlarge, or diminish parental rights or duties under other law" of the state).

194. 2017 UPA §§ 203 and 103(b).

have enacted the "for all purposes" language of the 2017 UPA.¹⁹⁵

However, parity between custodial and support parentage does not always continue. Some U.S. state laws recognize that the elimination of custodial parentage by consent, earlier established, does not simultaneously prompt the elimination of support parentage by consent. No parity here. Thus, the termination of custodial parentage due to child abuse, for example, does not always end support parentage.¹⁹⁶

Further, some U.S. state laws effectively recognize child support by consent in situations where there is not, and there never was, custodial parentage by consent. Again, there is no parity. Some nonparents may never be custodial parents under law, but nevertheless have parental or parental-like child support obligations. For example, occasionally there can be child support obligations for stepparents or grandparents who were never contemplated as custodial parents under law.¹⁹⁷ Thus, consents to support can arise in premarital or midmarriage pacts between couples where only one is a legal parent.¹⁹⁸ As well, child support duties, shared with custodial parents, can be found for one-time putative parents of future children to be born of assisted reproduction where any custodial interests were lost, or never matured, before the children were born, as due to postpregnancy and prebirth financial support failures.¹⁹⁹

As with custodial parentage by consent, support parentage by consent can arise due to varying forms of consent, including actual (express or inferred), apparent and presumed. And as with custodial parentage by consent, most problematic is a child support obligation based on consent by a support obligor that is presumed, that is, where the acts of the obligor, as under the 2019 ALI Intentional

195. See WASH. REV. CODE ANN. § 26.26A.110 (2019) ("except as otherwise provided by law"); VT. STAT. ANN. tit. 15C § 203 (2018) (all purposes, include "the rights and duties of parentage under the law").

196. See, e.g., *In re H.S.*, 805 N.W.2d 737, 745 n. 4 (Iowa 2011) (reviewing cases where child support continues past termination of parental rights). See 2000 ALI Principles, at § 3.02(1)(b) (a child support parent includes a person "required by state law to support a child despite termination of the person's parental rights").

197. See N.D. CENT. CODE ANN. § 14-09-09 (2013) (former stepparent's duty to continue with child support after marriage dissolution if child remains part of the former stepparent's family); WIS. STAT. § 49.90(1)(a)(2) (2020) (grandparent support when grandchild's parent is a "dependent person" under the age of 18); CONN. GEN. STAT. ANN. § 46b-215(8)(B) (West 2015) (court may order "relatives to contribute to . . . support" for a child who is a ward of the state). See, e.g., Jeffrey A. Parness and Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769 (2018).

198. See, e.g., *Parentage Prenups*, *supra* note 189 at 357–8. See also 2000 ALI Principles, at § 3.03(1) ("parental support obligation" of "a person who may not be the child's parent under state law where prior affirmative conduct estops a denial of the obligation"); N.D. CENT. CODE ANN. § 14-03.2-09 (West 2013) (term in premarital or marital agreement is not enforceable if it "adversely affects a child's right to support," though a term positively affecting a child's right to support "is not binding on the court").

199. See, e.g., 2017 UPA § 707 (an individual who consents to assisted reproduction "may withdraw consent any time before a transfer that results in a pregnancy;" seemingly, an individual who fails to support postpregnancy though contractually obligated may lose custodial, but not support, parental status). On prebirth pregnancy support failures leading to termination of parental rights where there was no contractual duty, see, e.g., Jeffrey A. Parness, *Pregnant Dads: The Crimes and Other Misconduct of Expectant Fathers*, 72 OR. L. REV. 901 (1993).

Torts Draft, are not considered at all because others are “justified in engaging” in child support pursuits.

U.S. state laws sometimes can justify support pursuits against spousal parents who have no biological ties to children born into marriage; who in no way consented (i.e., neither actually or apparently) to the extramarital affairs (or the artificial insemination) of their spouses; who never acted in parental-like ways with the children; and, who objected to support assessments as soon as they learned of, or suspected, the lack of biological ties. Child support pursuits are justified because the children are needy, resulting in the inability of the spousal parents to rebut, or otherwise shed, their spousal parent status. These laws are longstanding, are supported by a significant public policy, and operate only with the support obligor’s consent, albeit a consent to marry one who may commit adultery or employ assisted reproduction and therefrom deliver a child into the marriage.

Comparably, support pursuits against VAP parents are justified though the nonbirth parents who acknowledge their parentage have no biological ties, have not acted in parental-like ways, and have timely objected to support assessments upon learning of the lack of ties, even where the VAP parents have been prompted to sign due to the maternal deceptions and/or their own (understandable) mistakes of fact.²⁰⁰ While VAPs are far more recent than spousal parentage presumptions, here the obligor did consent to sign and thereby to support a child even if later shown to lack biological ties. Less sympathy, for me, for the VAP signor than for the cuckolded husband, as the VAP signor usually could have secured DNA testing before or shortly after signing, while the husband usually could not have stopped the extramarital affair.

IV. LOST DUE PROCESS INTERESTS GENERALLY

Whether by actual, apparent, or presumed consent, governmental expansions of legal parentage by consent for child custody and/or child support purposes are subject to federal (and sometimes additional state)²⁰¹ constitutional limits. Limits disallow custodial and support parentage expansions which (unduly) burden the Due Process interests of expecting, existing or putative parents.

The Due Process limits on expanding parentage by consent might be

200. VAPs are sometimes not subject to challenge 60 days after signing even where there were clearly mistakes of fact regarding biological ties by the birth and/or nonbirth parent, and at times even where a nonbirth parent signs in relevance on deceit by the birth mother (and perhaps others). *See, e.g.*, Reforming VAPs, at 185–203 (reviewing variations in VAP challenge laws nationally).

201. *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 190 (Iowa 1999) (putative unwed biological father of a child born into an intact marriage has an Iowa Due Process interest in challenging husband’s legal paternity); In Interest of J.W.T., 872 S.W.2d 189, 198 (Tex. 1994) (similar ruling regarding Texas “due course of law” guarantee). Such rulings are quite distinct from what federal Due Process requires for governmental protections of comparable putative unwed fathers. *See, e.g.*, Michael H., 491 U.S. at 129-130 (protection, if any, left to state lawmakers).

Comparably, nonparentage federal constitutional interests may have extended protections beyond any afforded by the Fourteenth Amendment through independent interpretations of state constitutions. *See, e.g.*, State v. Ingram, 914 N.W. 2d 794, 820-821 (Iowa 2018) (privacy interests in governmental property searches); La Keith Faulkner and Christopher R. Green, *State Constitutional Disagreement With the Supreme Court: The Fourth Amendment*, __ Miss. L.J. __ (forthcoming).

significantly guided, if not fully directed, by established federal constitutional limits on Due Process infringements operating outside of parentage. Little guidance, beyond persuasive authority, will be provided, however, by these established precedents if the federal constitutional limits on parentage by consent simply incorporate state law policies. This is possible because of the general deference recognized for U.S. state laws on the initial establishment and later disestablishment of federal constitutional childcare parentage.²⁰² To date, the U.S. Supreme Court has recognized the dominant, though not exclusive, roles of state legislatures and courts in defining who are and who continue to be childcare parents.

Yet the U.S. Supreme Court has not yielded wholly to state policies. Rather, the Court recognizes the value in some national uniformity. For example, there are nationwide procedural Due Process precedents on the right to counsel and on the burden of proof in proceedings involving the termination of existing parental custody rights (if not parental support duties).²⁰³ As well, federal constitutional guidelines operate for notice and participation rights for unwed biological fathers in formal adoption proceedings involving children born of consensual sex with unwed mothers where the fathers, yet to possess “care, custody, and control” interests in their children, nevertheless have federal constitutional opportunity interests in securing such rights.²⁰⁴

202. See, *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) (“in the vast majority of cases, state law determines the final outcome” when resolving “the legal problems arising from the parent-child relationship”). See generally, Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 St. John’s L. Rev. at 972–76, where I conclude some interstate variations on federal constitutional childcare rights holders are problematic, *id.* at 989–92.

Childcare parentage norms are more likely guided by federal statutes for children born overseas to U.S. citizens, children born to non-U.S. citizens in the U.S., and children born in the U.S. to Native Americans. See, e.g., Carlie Smith, Comment, *Establishing Paternity Under the Indian Child Welfare Act*, 2018 BYU L. Rev. 1451 (state laws vary on what qualifies under the Act as an acknowledgment or establishment of paternity by an unwed biological father).

203. See, e.g., *Lassiter v. Dept. of Soc. Serv. Of Durham County, N.C.*, 452 U.S. 18, 33 (1981) (sometimes indigent parents must be appointed counsel); *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (clear and convincing evidence standard must be employed). Distinguished commentators have recently urged additional nationwide norms emanating from U.S. Supreme Court precedents are needed. See, e.g., Michael J. Higdon, *Constitutional Parenthood*, 103 Iowa Law Rev., 1483 (2018) (U.S. SUPREME COURT SHOULD OFFER MORE GUIDANCE ON HOW STATES MAY DEFINE FEDERAL CONSTITUTIONAL PARENTHOOD); Joanna L. Grossman, *Constitutional Parentage*, 32 Const. Comment. 307, 339 (2017) (federal constitutional “parentage law is still in a state of relative chaos”). Congressional actions to unify the norms have been resisted. See, e.g., Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 St. John’s L. Rev. 965, 994 (“nationalization” of parentage norms “outside of federal constitutional judicial precedents seemingly is foreclosed by the Article I and other limits on congressional authority, as well as by the related Tenth Amendment’s reservation of certain powers to the states,”).

204. *Lehr*, 463 U.S. at 262–63. The vesting of such rights, generally prompts for fathers “the right to veto an adoption and the right to prior notice of any adoption proceeding.” *Id.* at 266. As the biological father in *Lehr* had failed to seize this interest in a timely fashion, though his opportunity to do so was “adequately protected,” *id.* at 262–263, the court did not elaborate on how his notice and participation rights would compare to the notice and participation rights of existing legal parents, like most birth mothers who secure “care, custody, and control” parentage interests automatically at birth.

Thus, there are and will continue to be some minimally-required Due Process national norms on U.S. state law policies applicable to childcare parentage by consent.²⁰⁵ U.S. Supreme Court norms should be expanded to recognize and protect better the interests of expecting, existing and putative parents. Necessary safeguards should be guided, but only somewhat, by the established precedents on generally protecting "life, liberty and property" interests. As the U.S. Supreme Court has noted, waiver/consent analyses applicable to lost Due Process interests differ depending upon the nature of the particular interest.²⁰⁶ Thus, interests involving the rights to counsel and to guilty pleas in criminal cases are approached differently than the right to be free from unreasonable searches or seizures.²⁰⁷

Current precedents on losses of nonparentage Due Process interests provide alternate approaches to new Due Process norms in parentage settings. One approach requires knowing, informed and voluntary individual consent when that individual's interests are impacted. A quite different approach allows an individual's interests to be impacted by his/her own involuntary acts, or even solely by the acts of others.²⁰⁸ The following materials review how these quite varied approaches to Due Process protections operate for hearing opportunities in litigation (civil and criminal), for privacy interests in governmental searches, and for formal adoptions. In the following section, these approaches will be explored in settings where the Due Process interests of expecting legal parents, existing legal parents, and/or putative parents are now negatively, and often wrongly, impacted by parentage by consent laws.

A. Jury Trial Rights

The federal laws on losses of federal constitutional criminal and civil jury trial rights in the federal district courts demonstrate the variations in the justifications for Due Process infringements. Procedural laws significantly insure criminal jury trial waivers are actually consensual, that is, they are informed, voluntary, and undertaken only by the rightsholders. By contrast, civil jury trial waivers can be far less voluntary, as when prompted solely by the careless conduct of agents of the rightsholders, usually lawyers.

205. Of course, in any state there can be additional state Due Process norms applicable to parentage by consent. *See, e.g., In Interest of M.D.*, 921 N.W.2d 229 (Iowa 2019) (violation where incarcerated parent involved in parental rights termination proceeding could only give testimony by telephone).

206. Waiver/consent analyses do not come into play when Due Process interests prompt "constitutional command" to the courts to act in certain ways. *See, e.g., U.S. v. Garcia*, 936 F.3d 1128, 1141 (10th Cir. 2019).

207. *Schneekloth v. Bustamonte*, 412 U.S. 218, 246 (1973). On the need for a reconsideration of the Bustamonte waiver/consent analysis, *see Susan A. Bandes, Police Accountability and the Problem of Regulating Consent Searches*, 2018 U. Ill. L. Rev. 1759, 1766 (2018).

208. Whether voluntary or involuntary, and regardless of the level of Due Process protection, certain acts may not prompt lost Due Process interests even where claims of protection are not properly made, as when there is "plain error." *See, e.g., Fed. R. Evid. 103(e)* (court can take notice of "plain error" even if claim of error "was not properly preserved"); *In re J.P.*, 125 Ill. App. Ct. 1229, (2019) (guidelines on employing "plain error doctrine" in reviewing on appeal "unpreserved claims of error" occurring in the trial court).

Federal Criminal Procedure Rule 11 speaks to criminal jury trial waivers when pleas are taken. The rule seeks to insure actual consent by the rightsholder, the criminally accused. The rule provides that before accepting a plea of guilty or nolo contendere, “the court must address the defendant personally in open court... and determine that the defendant understands... the right to a jury trial.”²⁰⁹ The plea may only be accepted if the court determines “that the plea is voluntary and did not result from force, threats or promises (other than promises in a plea agreement).”²¹⁰ As well, any judgment entered on a plea is contingent on a finding that “there is a factual basis for the plea.”²¹¹ State criminal procedure laws are similar,²¹² often deemed to embody the requisites of the federal constitutional criminal jury trial right.²¹³ It should be noted that there are some nonconstitutional requirements on criminal guilty plea colloquies prompting conflicting precedents.²¹⁴

Where a criminal case is not resolved by a plea and will be tried in a federal district court, if “the defendant is entitled to a jury trial, the trial must be by jury unless... the defendant waives a jury trial right in writing... the government

209. FED. R. CRIM. P. 11(B)(1)(C); *Compare* People v. Bracey, 213 N.E.2d 265, 270 (2004) (jury trial waiver is valid if made by criminal defense counsel in open court in the defendant’s presence, without any objection by the defendant).

210. FED. R. CRIM. P. 11(B)(2). A written waiver by one criminally accused may, by itself, be insufficient to constitute a voluntary waiver. *See, e.g.,* People v. Johnson, Ill. App. Ct. 162517, ¶16 (2019).

211. FED. R. CRIM. P. 11(B)(3). This is not to say that in practice, federal criminal case pleas are usually taken fairly. *See, e.g.,* Julian A. Cook III, *Federal Guilty Pleas: Inequities, Indigence, and the Rule 11 Process*, 60 B.C.L. Rev. 1073, 1074 (2019) (explaining “why expediency and facial compliance with Rule 11 (as opposed to searching inquiries regarding a defendant’s knowledge and coercive influences) characterize federal-court procedure,” while discussing how the shortfalls affect federal defendants generally, and the indigent and minorities in particular and proposing reforms). On the need for more U.S. Supreme Court guidance on how plea-deals should be construed when disputes arise, *see* Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C.L. Rev. 31 (2018) (urging a need to incorporate into Fed. R. Crim. P. 11 an implied covenant of good faith and fair dealing).

212. *See, e.g.,* ARIZ. C.P.R. 17.3; COLO. C.P.R. 11(B). *But see* People v. Burge, 2019 Ill. App. Ct. 170399, ¶125 (2019) (Criminal Procedure Code has separate, “directory,” provisions on criminal pleas “at arraignment” that differ from the rule provisions on postarraignment pleas, though the statute may violate separation of powers principles by intruding on Supreme Court rulemaking).

213. *See, e.g.,* State v. Hernandez, 431 P.3d 1274, 1286-89 (Haw. 2018).

214. *See, e.g.,* State v. Hagan, 126 N.E.3d 1214, 1220-21 (Ohio CT. App.) (2019) (conflict over whether a trial court must specifically notify a criminal defendant of the community notification requirements attending a guilty plea to certain sex offender crimes). *See also,* United States v. Yansane, 370 F. Supp. 3d 580, 589-90 (D. Md. 2019); United States v. Lisle, 2019 WL 2648771, 4 (D. Me. 2019) (each recognizing open question on the requirements of Padilla v. Kentucky, 559 U.S. 356, 357 (2010) on trial judges speaking to the immigration consequences of criminal guilty pleas that are direct rather than collateral). Colloquy failures will be nonconsequential in harmless error settings. *See, e.g.,* United States v. Zacahua, 940 F. Supp. 3d 342 (7th Cir. 2019).

Relatedly, there are ongoing disputes on when a criminal defense counsel’s failure to notify a defendant of a plea’s immigration consequences render the counsel’s representation ineffective. *See, e.g.,* State v. Romero, 129 N.E.3d 404 (Ohio 2019). Similar disputes exist regarding a criminal prosecutor’s duty to reveal exculpatory evidence during the pretrial plea bargaining process. *See, e.g.,* Burley v. Baltimore Police Dept., 2019 WL 4325295, at 29-33 (D. Md. 2019).

consents... and... the court approves."²¹⁵

Federal Civil Procedure Rule (FRCP) 38 speaks very differently about jury trial waivers. The rule requires a timely written jury trial demand, whose absence can prompt a waiver by a party.²¹⁶ One prominent federal civil practice treatise concludes that "it is clear that the test of waiver that is applied to other constitutional rights, that there must have been 'an intentional relinquishment or abandonment of a known right or privilege,' is not applicable to this right to trial by jury."²¹⁷ While civil jury trial waivers may be overlooked upon request per district court discretion under FRCP 39(b), there is sometimes no abuse of discretion in failing to overlook a waiver founded on counsel's inadvertence.²¹⁸ State civil procedure laws are similar.²¹⁹ So, where lawyers represent civil litigants, the failures by lawyers to undertake effective jury trial demands prompt client Due Process jury trial right losses. There are no in-court hearings or writing requirements seeking to insure the losses are knowing and voluntary, either on the part of the lawyers or their clients.²²⁰

B. Hearing Opportunities Beyond Jury Trial Rights

Federal constitutional hearing opportunities beyond jury trial rights in both criminal and civil actions can be lost by unintentional conduct. Such conduct includes procedural law violations like deficient or untimely requests to be heard.

The constitutional hearing opportunities of those criminally accused, whether in federal or state trial courts, traditionally have been more protected, as very significant life, liberty and property interests are often at stake. Thus, before a guilty plea can prompt a federal court judgment embodying a conviction, district judges must personally address the criminally accused and be assured that there are voluntary and informed waivers of such hearing opportunities as "the right at trial to confront and cross-examine adverse witnesses... to testify and present evidence,

215. FED. R. CRIM. P. 23(A). Again, state rules are often similar. *See, e.g.*, ME. R. CRIM. P. 23(A); W. VA. R. CRIM. P. 23(A). Of course, criminal defense counsel can impact negatively a defendant's exercise of the jury trial right, as by conceding during closing statement the defendant's guilt on some counts. *See, e.g.*, *People v. Burns*, 38 Cal. App. 5th 776 (2019).

216. FED. R. CIV. P. 38(B); (D).

217. CHARLES ALAN WRIGHT ET AL., 9 FEDERAL CIVIL PRACTICE AND PROCEDURE, CIVIL 2321 (3d ed. 2018 update) (though noting "there is a presumption against waiver of jury trial").

218. *See, e.g.*, *BCCI Holdings (Luxembourg), S.A. v. Khalil*, 214 F.3d 168, 172 (D.C. Cir. 2000) (collecting cases).

219. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-1105(A) (2015) (untimely civil jury trial demand by either a plaintiff or a defendant prompts a jury trial right waiver); CAL. CIV. P. 631(F) (civil jury trial waiver by, e.g., by failing to timely pay the required nonrefundable fee or by failing to announce that a jury is required at the time the cause is first set for trial should the cause be set upon notice or stipulation); and FLA. CIV. P. 1.430(D) (civil jury trial right waived if not properly demanded).

220. Case precedents are more reluctant to find waivers, however, where actions by lawyers were inadvertent or where the litigants are proceeding pro se. *See, e.g.*, *Solis v. County of L.A.*, 514 F.3d 946, 956 n.12 (9th Cir. 2008).

and to compel the attendance of witnesses.”²²¹ Judges will reject proposed plea agreements where there were no such knowing and voluntary waivers.²²² Similar protections are generally afforded in state criminal cases.²²³

Notwithstanding significant protections in guilty plea proceedings involving constitutional hearing opportunities beyond jury trials held by the criminally accused, similar protections may not be afforded when a criminal case proceeds to trial. Then, explicit consents to waivers by the accused are not usually needed, and the hearing opportunities of the accused can be lost or diminished through actions by their counsel that are not explicit waivers. Thus, as for the accused's right to a speedy trial, the protection can be lost due to "delay caused by defendant's counsel,"²²⁴ though this "general rule attributing to the defendant delay caused by . . . counsel is not absolute."²²⁵ Attribution of counsel's actions to a criminal defendant seemingly is more likely when the defendant, through counsel, attempts "to evade the consequences of an unsuccessful tactical decision."²²⁶ While state laws can provide the criminally accused with greater hearing opportunities than are

221. FED. R. CRIM. P. 11(b)(1)(E). On the rationales for requiring such colloquies, *see, e.g.*, *United States v. Shorty*, 741 F.3d 961, 966 (9th Cir. 2013). The attributes of the colloquies between trial judges and criminal defendants regarding constitutional right waivers can differ depending upon the right. *See, e.g.*, *Tatum v. Foster*, 847 F.3d 459, 466 (7th Cir. 2017) (difference between competency to stand trial and self-representation colloquy); *People v. Johnson*, 2019 Ill. App. Ct. 162517 (2019) (colloquy regarding trial waiver though defendant had signed a jury trial waiver form); and *Dunn v. State*, 434 P.3d 1, ¶¶8-12 (Okla. 2018) (due process right to be present at evidentiary hearing on a motion to withdraw a plea cannot be waived by counsel alone).

Certain hearing opportunities for the criminally accused may be waived by counsel acting "without indication of particular consent from" the client, but perhaps only in settings involving tactical decisions. *See, e.g.*, *Gonzalez v. Unites States*, 553 U.S. 242, 248–51 (2008) (these hearing opportunities include having a federal district judge, not a magistrate judge, preside over voir dire and jury selection; what arguments to pursue; what evidentiary objections to raise; and what agreements to conclude regarding the admission of evidence).

222. *See, e.g.*, *Unites States v. Soon Dong Han*, 181 F. Supp. 2d 1039 (N.D. Cal. 2002) (rejecting proposed plea).

223. *See, e.g.*, *ARIZ. C.P.R. 17.2(a)(3)* (court must address criminal defendant in determining "the defendant understands... the constitutional rights that the defendant foregoes by pleading guilty"); *ARK. C.P.R. 24.4*; *But see, Unites States v. Desotell*, 929 F.3d 821, 827 (7th Cir.) (2019) (circuit split on a criminal defense lawyer's ability to waive a defendant's objection to a search by not raising the issue in an opening brief during an appeal).

224. *Vermont v. Brillon*, 556 U.S. 81, 91 (2009).

225. *Id.* at 94 (delay resulting from a systemic breakdown in the public defender system will not be charged to the defendant). *See also, Mathewson v. State*, 438 P.3d 189, 209–12 (Wyo. 2019) (reviewing and applying speedy trial right guidelines set out in *Barker v. Wingo*, 407 U.S. 514, 30–33 (1972)).

226. *United States v. Mezzanatto*, 513 U.S. 196, 203 (1995) (quoting *United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991) where a criminal defendant could not complain on appeal about the admission into evidence of testimony to which there was no objection per FRE 103(a)). *See also, People v. Massey*, 436 Ill. App. 3d 803, 809 (2019) (ineffective assistance of criminal trial counsel means "performance was objectively unreasonable" and caused a "different" outcome; great deference to counsel's strategic decisions, with counsel's acts strongly presumed to be reasonable); *People v. Walker*, 433 Ill. App. 3d 97, 102 (2019) (a decision by criminal defense counsel on sharing/discussing items received in discovery "is a matter of trial strategy" entitled to "strong presumption" of attorney competence).

afforded under the federal constitution,²²⁷ here too hearing opportunity losses can arise through counsel's actions.

By contrast, the constitutional hearing opportunities of civil litigants, whether in federal or state trial courts, are less protected.²²⁸ For example, civil litigants can lose hearing opportunities on their claims where their attorneys have settled the claims without client consultations, perhaps even over their clients' express rejections of the offers to which the clients are then bound. Losses can arise due to the apparent²²⁹ or presumed²³⁰ attorney settlement authority which may not then be able to be overcome.²³¹ Lost hearing opportunities also can result from other attorney conduct involving, for example, pleading²³² or discovery²³³ failures.

The constitutional hearing opportunities of certain civil litigants are heightened when more significant life, liberty or property interests are at stake. More significant interests are recognized in proceedings involving involuntary civil commitment (e.g., as with a sexual predator), punitive damage assessments,²³⁴ child guardianships,²³⁵ and termination of parental rights.²³⁶ Here, hearing opportunities for civil litigants are more difficult to lose. Yet the protections against such losses typically are not as strong as certain of the hearing opportunity

227. See, e.g., *State v. Vincenty*, 202 A.3d 1273, 1278 (N.J. 2019) (common law privilege against self-incrimination affords greater protection than does the federal constitution); *State v. Shaw*, 237, 246 N.J. 588 (2019) (N.J. constitution is more protective than federal constitution "when it comes to consent searches").

228. Some civil litigants, like those facing involuntary civil commitments or terminations of parental rights, do have greater procedural Due Process rights than most other civil litigants. On involuntary civil commitments of sexually dangerous persons, see 725 ILL. COMP. STAT. ANN. 205/3.01 (West 2017)

(proof beyond a reasonable doubt) and 725 ILL. COMP. STAT. ANN. 205/5 (West 2017) (rights to counsel and jury trial), reviewed in *People v. Trainor*, 196 Ill. 2d 318 (2001). On parental rights terminations, see, *J.B. v. Fla. Dep't of Children and Families*, 170 So. 3d 780, 791 (Fla. 2015) (parents have right to effective counsel when state seeks to terminate their parental rights).

229. See, e.g., *Robertson v. Alling*, 351 P.3d 352, 356 (Ariz. 2015) (citing ALI Restatement of the Law Third, The Law Governing Lawyers, at § 27); *Reutzel v. Douglas*, 870 A.2d 787, 789 (Pa. 2005) (apparent authority recognized even where settling attorney commits fraud).

230. See, e.g., *In re Artha Mgmt, Inc.*, 91 F.3d 326, 329 (2d Cir. 1996).

231. See, e.g., *Brewer v. Nat'l R.R. Passenger Corp.*, 649 N.E.2d 1331, 1334 (Ill. 1995) (presumption of attorney's in-court settlement authority rebutted by client's and attorney's affidavits); *Condon and Cook, LLC v. Mavrakis*, 69 N.E.3d 274, 85-86 (2016 IL 151923) (no overcoming presumed in-court attorney settlement authority where client ratified attorney's acts).

232. See, e.g., FED. R. CIV. P. 12(b)(6) (dismissal for failure to state a claim upon which relief may be granted). But see, FED. R. CIV. P. 11(c)(4) (sanction is "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated").

233. See, e.g., FED. R. CIV. P. 26(g)(3) (sanction for signing failure by attorney regarding discovery "request, response or objection" can be imposed on "the party on whose behalf the signer was acting").

234. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996) (federal Due Process limits on punitive damage awards).

235. See, e.g., *In re Adoption of J.E.V.*, 226 N.J. 90, 114 (2016) (need for colloquy with parent who wants self-representation) [hereinafter J.E.V.].

236. See, e.g., *Santosky v. Kramer*, 456 U.S. 745, 769 (1982) (federal Due Process requires clear and convincing evidence before any termination of parental rights through a court judgment).

protections afforded the criminally accused.²³⁷

Civil litigants can lose other civil case hearing opportunities, sometimes before their civil actions are commenced. For example, if a party is incarcerated, that party has no constitutional right to be made available in person in order to testify in a pending civil action.²³⁸ Further, future civil litigants can lose in advance their jury trial rights,²³⁹ as well as their Due Process protections afforded nonresidents, under choice of law or personal jurisdiction norms.²⁴⁰

C. Privacy Interests in Property Searches by Government

Federal constitutional privacy interests involving governmental property searches can be lost through earlier consent. Often, such consent is undertaken by the one whose property is then sought to be searched.²⁴¹ At times, as with a probationer (like one involved in home detention), consent may be given in advance of any governmental search.²⁴²

Yet an earlier consent by one occupant to a governmental search of physical premises whose occupancy is shared by two people with similar privacy interests can effectively negate the nonconsenting co-occupant's privacy interests in, and Fourth Amendment objections to, the search.²⁴³ The rationales behind broad consensual search cases might support allowing one custodial parent to consent to a privacy infringement on a second legal parent's "care, custody and control"

237. See, e.g., *J.E.V.*, 226 N.J. at 114 (colloquy with parent who wants self-representation "need not be as comprehensive as the colloquy mandated when a criminal defendant seeks to proceed unrepresented"); *In re K.C.*, 2019 WL 1766072 (W. Va. 2019) (factors used in determining whether incarcerated parent has a right to attend a parental rights termination proceeding in person)

238. See, e.g., *Myers v. Emke*, 476 N.W.2d 84, 85 (Iowa 1991) (noting inmate could supply his testimony by deposition) and *Clements v. Moncrief*, 549 So.2d 479, 481 (Ala. 1989) (similar) and *Curtiss v. Curtiss*, 886 N.W.2d 565, 568 (N.D. 2016) (prisoners have "diminished constitutional protections, but they maintain a due process right to reasonable access to the courts"). Compare, *Hazelett v. Hazelett*, 119 N.E. 3d 153, 161 (Ind. App. 2019) (father's absence due to military service could not be considered a factor in awarding mother sole legal custody of child).

239. See, e.g., Federal Arbitration Act of 1947, 9 U.S.C.A. § 9.

240. See, e.g., *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) (choice of law clause); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (forum selection clause).

241. While consent may seemingly be given, nevertheless it can be deemed involuntary under certain circumstances. See, e.g., *United States v. Russell*, 664 F.3d 1279, 1281 (9th Cir. 2012) (circumstances include "(1) whether defendant was in custody; (2) whether the arresting officers have their guns drawn; (3) whether *Miranda* warnings have been given; (4) whether the defendant was told he has a right not to consent; and (5) whether defendant was told a search warrant could be obtained").

242. See, e.g., *McElroy v. State*, 133 N.E.3d 201, 206 (Ind. App. 2019).

243. The U.S. Supreme Court has explained that while a criminally accused needs to waive personally, via a knowing, voluntary and intelligent decision, constitutional rights promoting a fair trial, a waiver of the constitutional right involving a governmental search or seizure can be undertaken differently, and with lesser protections, since Fourth Amendment rights are not indispensable to obtaining a fair trial. *Schneekloth*, 412 U.S. at 238.

Of course, additional constitutional privacy protections can arise under state constitutions. See, e.g., *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994) (applying Privacy Initiative of state constitution to nongovernmental searches).

interests in a child by facilitating a nonparent's relationship with the child, leading to a diminution (or elimination) of the existing second parent's childcare rights. Such rights can be negatively impacted not only due to the nonparent acquiring custodial parent status, but also due to nonparent (like grandparent or stepparent) acquiring child visitation interests later recognized over the current objections of the two custodial parents.

An effective consent to a premises search impacting Fourth Amendment privacy interests in the premises for one who did not actually consent to the search, was recognized in 2014 by the U.S. Supreme Court in *Fernandez v. California*.²⁴⁴ There, Walter Fernandez told police officers who had come to his apartment, then also occupied by Roxanne Rojas, that they didn't "have any right to come in."²⁴⁵ Fernandez was arrested shortly thereafter at the apartment for attacking both Rojas and Abel Lopez, whose attack in the neighborhood prompted the visit to the apartment.²⁴⁶ About an hour later, the arresting detective returned to the apartment where Rojas then gave "oral and written consent" to a search of the apartment.²⁴⁷ The search led to evidence which was used in obtaining a criminal conviction of Fernandez, who had sought evidence suppression on Fourth Amendment grounds.²⁴⁸ The Court sustained the search since "a person who shares a residence with others assumes the risk that anyone of them may admit visitors."²⁴⁹ It did recognize that any consent by Rojas to a search would not bind Fernandez if he was present at the apartment and then objected to any police search.²⁵⁰ Yet, as Rojas was the sole occupant present when consent from Rojas was sought, the Court found that by recognizing her consent could bind all occupants, her "rights" would be respected as would "her independence."²⁵¹

"Common authority" between Fernandez and Rojas over the apartment

244. *Fernandez v. California*, 571 U.S. 292, 307 (2014).

245. *Id.* at 296–97.

246. *Id.* at 295–97.

247. *Id.* at 296. Where consents are not truly voluntary, evidence obtained during the search will be barred from trial under the Fourth Amendment. *See, e.g.,* *Pagán-González v. Moreno*, 919 F.3d 582, 86–87 (1st Cir. 2019) (deception vitiates voluntariness of consent to search) [hereinafter *Moreno*]. On promoting more truly voluntary consents to searches, *see, e.g.,* Susan A. Bandes, "Police Accountability and the Problem of Regulating Consent Searches," 2018 U. ILL. L. REV. 1759.

248. *Id.* at 297. Had the search been undertaken by a tribal officer that involved property on a reservation, likely there would be a similar bar. *See, e.g.,* *United States v. Cooley*, 919 F.3d 1135, (9th Cir. 2019)(Indian Civil Rights Act, the Fourth Amendment counterpart, operates).

249. *Fernandez*, 571 U.S. at 301 (citing *Georgia v. Randolph*, 547 U.S. 103, 111 (2006)). Even one who does not share a residence may consent to a warrantless search of the residence where the fruits of the search are admissible as evidence, as long as there was apparent authority to consent. *See, e.g.,* *Moore v. Andreno*, 505 F.3d 203, 209 (2d Cir. 2007).

The assumption of risk analysis has also been used to validate governmental access to much, but not all (e.g., cell site location information), of an individual's digital records held by third parties (like phone companies). For a criticism of this third party doctrine in Fourth Amendment cases, *see, e.g.,* Laura K. Donohue, *Functional Equivalence and Residual Rights Post-Carpenter: Framing a Test Consistent with Precedent and Original Meaning*, 2018 Sup. Ct. Rev. 347.

250. *Id.* (citing *Randolph*, 547 U.S. at 122–23).

251. *Id.* at 307. For Rojas, a warrantless search pursuant to only her consent would also avoid a "delay" caused by the time necessary to obtain a warrant; dispel more quickly police "suspicion" regarding her possible role in the crimes committed by Fernandez; and allow speedy police removal of any "dangerous contraband" found in the residence. *Id.* at 307.

allowed Rojas to consent to a police search while Fernandez was away, even if Fernandez was only away because of a police arrest.²⁵² Common authority was said by the court to be shared by those described alternately as "occupants," "residents" and "tenants."²⁵³ Earlier precedents found shared authority over premises arises when two people possess "common authority over or other sufficient relationship to the premises or effects sought to be inspected."²⁵⁴ The same approach has been employed to justify searches of other property, including a residential home,²⁵⁵ a computer hard drive,²⁵⁶ and a duffel bag,²⁵⁷ based on a single person's consent where there was common authority over the property. Of course, consents to property searches may not justify searches extending beyond reasonable limits.²⁵⁸

These precedents on consents have not yet been generally extended to consents involving non property in which there are shared privacy interests, like the

252. *Id.* At times, at least for me, "common authority" cases are difficult to distinguish from "apparent authority" cases, as in *United States v. Amratel*, 622 F.3d 914, 916–17 (8th Cir. 2010). *And see United States v. Murray*, 821 F.3d 386, 391–92 (3d Cir. 2016) ("when an individual possesses only apparent authority, rather than actual, common authority, the Fourth Amendment is not violated if the police officer's entry is 'based upon the consent of a third party whom the police, at the time of entry, reasonably believe to possess common authority over the premises, but who in fact do not do so.'") and *United States v. Jackson*, 598 F. Supp. 3d 340, 348–49 (7th Cir. 2010) (mother's apparent authority to consent to search of her adult child's computer case).

253. *Fernandez*, 571 U.S. at 294 n.1(citing *United States v. Matlock*, 415 U.S. 164, 171 (1974)).

254. *Matlock*, 415 U.S. at 171. *See also id.* at 171 n.7 ("mutual use of property by persons generally having joint access or control for most purposes," with assumptions of risk that another "might permit the common area to be searched") and *United States v. Sawyer*, 929 F.3d 497, 500 (7th Cir. 2019) (co-owner of empty rental property, who had "common control," could agree to search of a backpack brought into the property by a trespasser). *Compare State v. Licari*, 659 N.W.2d 243, 251–52 (Minn. 2003) (landlord could not consent to search of criminal defendant's rented storage locker, as there was no "mutual use" of the locker even if there was joint access), *with United States v. Waller*, 426 F.3d 838 (6th Cir. 2005) (luggage owner retained sufficient expectation of privacy for bag stored in an apartment resident's bedroom closet, and there was no "common authority" with the resident for the bag).

255. *See, e.g., Coolidge v. N. H.*, 403 U.S. 443, 486–90 (1971) (spouse volunteers guns and clothing of her husband) and *United States v. Jones*, 861 F.3d 638, 640 (7th Cir. 2017) (girlfriend of the criminal defendant consented to a search of the mobile home she shared with him). There can be portions of a residential home or apartment which are not shared, and thus may not be searched because where "common authority" over those portions is not shared. *See, e.g., United States v. Wright*, 63 F. Supp. 3d 109 (D.C. Cir. 2014) (search of criminal defendant's backpack and attached bag found in his son's room in an apartment the defendant shared with his mother was okay as the mother, the child's guardian, consented) and *United States v. Peyton*, 745 F.3d 546, 554 (D.C. Cir. 2014) (criminal defendant's great-grandmother, with whom defendant shared an apartment, could not consent to police search of defendant's shoebox which was defendant's "personal property" and was stored in an area of the apartment where there was only the defendant's property).

256. *See, e.g., U.S. v. King*, 604 F.3d 125 (3rd Cir. 2010) (computer owner could consent to seizure of her computer containing a defendant's hard drive where she and the defendant shared the computer "without any password protection") and *U.S. v. Thomas*, 818 F.3d 1230, 1241–1242 (11th Cir. 2016) (similar, as defendant and his wife - who consented to a forensic search of a shared computer - maintained no separate login name and password, and defendant did not encrypt his files).

257. *See, e.g., Frazier v. Cupp*, 394 U.S. 731, 740 (1986).

258. *See, e.g., U.S. v. Moore-Bush*, 381 F. Supp. 3d 139 (D. Mass. 2019) (search involving eight month video log of a criminal defendant's house [driveway and front door] violates "reasonable expectation of privacy" test).

"common authority" involving the "care, custody and control" of children for whom there are two existing legal parents.²⁵⁹ So, actual consent by one existing legal parent to a nonparent's shared custody has not generally been deemed to justify a finding of custodial parentage in the nonparent over the objection of a second existing legal parent who did not give actual consent. Yet the UPAs and the ALI pronouncements support the notion that consent by only one existing legal parent, in the absence of apparent consent, is sometimes sufficient for a nonparent to gain eligibility for custodial parent status over the objection of a second, nonconsenting existing legal parent. Here, norms in the ALI 2019 Intentional Torts Draft on "presumed consent" are implicated.

The "common authority" precedents do not support, however, the UPA and ALI pronouncements which effectively recognize the "presumed consent" doctrine of the ALI 2019 Intentional Torts Draft operating in parentage by consent settings. The "common authority" cases under the Fourth Amendment ask not only whether one, like a co-tenant, has actually consented to a search, but also whether the absent person whose property is searched has a continuing and reasonable expectation of privacy in the property, though it is within the shared premises. One court ruled that "a person has an expectation of privacy in his or her private closed containers and does not forfeit that expectation of privacy merely because the container is located in a place that is not controlled exclusively by the container's owner."²⁶⁰ An absent custodial parent's child is in the "container," not in the shared space.

Beyond "common authority" search precedents, Fourth Amendment cases on consents to property searches notwithstanding governmental deceptions may guide lost Due Process analyses in other constitutional privacy settings, including parental "care, custody and control" interests. These rulings recognize that not all governmental deceptions will vitiate uninformed consents to warrantless searches. Thus, it is generally held that "the Fourth Amendment may be violated when consent is obtained through a law enforcement officer's false claim of authority or lies conveying an exigent need for the search."²⁶¹ By contrast, an undercover law enforcement officer's deception, as with the purpose behind a requested purchase of illegal drugs, will not vitiate the consent by the drug seller to later privacy intrusions because "the targeted seller has freely made the choice to expose his criminal activity to others."²⁶²

Clearly, these Fourth Amendment deceit cases differ in that the (mis)conduct

259. See, e.g., 750 ILCS 5/600 (definitions involving parental responsibility allocations between two legal parents, where one parent may have both "parenting time and significant decision-making responsibilities with respect to a child" while the other parent has "caretaking functions and non-significant decision-making responsibilities with respect to the child").

260. *U.S. v. Davis*, 332 F.3d 1163, 1167 (9th Cir. 2003) (citing *U.S. v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1997 while recognizing similar property interests carry privacy expectations, including property constituting a gym bag, suitcase, briefcase and cardboard box) [hereinafter *Davis*]).

261. *Moreno*, *supra* note 247, at 596 ("uniform" judicial recognition); see also *United States v. Jackson*, 149 F. Supp. 3d 1366, 1368 (N.D. Ga. 2016) (homeowner was told police officer was a cousin of homeowner's nephew's girlfriend, and thus her allowing search of her home involved a "deception" which cause the homeowner not to truly consent).

262. *Moreno*, *supra* note 247, at 592.

is undertaken by governmental agents, not by private parties (often in intimate relationships with those whose parental privacy interests are negatively impacted). Nevertheless, these cases on governmental deceit suggest the possibility that in the childcare context, custodial interests may sometimes be lost or child support duties may sometimes arise due to an existing legal parent's deceit (as with biological paternity of a child born of sex) or other (mis)conduct (as with shielding a biological parent from contact with his/her child). Lost custodial interests for a putative legal father due to an existing legal parent's (mis)conduct arguably arose in the paternity opportunity context in the *Lehr* case, which follows.

D. Privacy Interests in Paternity Opportunity

Constitutionally-protected privacy interests extend beyond property subject to governmental searches. As with property searches, other privacy interests may be shared between two (or more) people who possess somewhat similar interests. For example, all biological parents of children born of consensual sex to unwed mothers have interests in rearing their children with the mothers without governmental interference. Yet the interests of the parents differ. For example, while most women (i.e., nonsurrogates) clearly have constitutionally-protected "care, custody, and control" interests when their children are born,²⁶³ most men who are not married to the birth mothers possess only paternity opportunity interests.²⁶⁴ These opportunity interests, when timely seized, may only then prompt comparable "care, custody, and control" authority for the men. When not timely seized, the chance for such male parental authority can be permanently lost. Losses often occur in formal adoption proceedings where the biological fathers are found to be without veto/participation rights. These process rights, as with protections against unwanted governmental property searches, can be lost by men when the birth mothers, who share similar parental childcare interests, act unilaterally, not unlike the consents to searches by one of two who share privacy

263. See, e.g., *Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 62 (2001) (for birth mothers "real, every day ties" to their children arising from pregnancies prompt childcare interests at birth; for biological fathers of children born of sex, "real, every day ties" require more than genetic connections).

264. *Lehr v. Robertson*, 463 U.S. 248, 261–62 (1983). There are those who read *Lehr* differently. One commentator opines that under *Lehr* an unwed genetic father's childcare interests "depend solely on whether he has formed a sufficient relationship with the child," regardless of whether or not he is "at fault for the lack of relationship." Jennifer Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 481 (2017) [hereinafter *Fathers and Feminism*].

Some unwed biological fathers of children born of sex do, however, have coequal "care, custody and control" authority at birth, as when they sign (with pregnant women) prebirth Voluntary Acknowledgment of Parentage (VAP) forms that are effective upon live birth. See, e.g., VT. STAT. ANN. tit. 15, § 304(b), (c) (West 2020). But such authority is subject to differing standards for overrides for birth mothers and for VAP parents; only the latter may be negated without parental rights termination hearings. On VAP challenges, see *Reforming VAPs*, *supra* note 81, at 185–203.

interests in apartments, houses or hard drives.²⁶⁵

Easily (and somewhat innocent) lost paternity opportunity interests are illustrated by the 1983 U.S. Supreme Court ruling in *Lehr v. Robertson*. The case involved a biological father's rights in an adoption proceeding involving his nonmarital daughter.²⁶⁶ In *Lehr*, the details surrounding the birth of Jessica via nonconsensual sex in November, 1976 to an unmarried couple, Lorraine and Jonathan, were "far different" depending on who was the storyteller.²⁶⁷ In *Lehr*, six justices listened mostly to Lorraine while three dissenters chiefly heard Jonathan.²⁶⁸ A close exploration of *Lehr* is key to further understanding how parental childcare interests, without biological or formal adoptive ties, have expanded dramatically.

The majority, through Justice Stevens, focused on Jessica, her mother Lorraine and Richard Robertson, Lorraine's current husband who had married Lorraine eight months after Jessica's birth.²⁶⁹ The case involved Richard's petition to adopt Jessica, filed shortly after Jessica's second birthday.²⁷⁰ Jonathan Lehr, the unwed biological father, contested the adoption, arguing that he was entitled to, but not given, advance notice of (and a chance to be heard at) the adoption proceeding.²⁷¹ New York statutory law entitled a biological father of a child born of sex to an unmarried woman to notice (assuming no abandonment)²⁷² of any pending adoption only if he had his name listed on "the putative father registry;" he had married the mother before the child was six months old; or, he had lived "openly" with the child and the child's mother while holding himself out as the child's father.²⁷³ Though conceding he did not meet any of the statutory criteria, Jonathan urged that "special circumstances gave him a constitutional right to notice and a hearing before Jessica was adopted" by Richard.²⁷⁴ Those circumstances included his filing "a visitation and paternity petition" in a second New York court a month

265. Unilateral acts by one existing legal parent might also prompt parental interest losses for another existing legal parent. In Michigan, at least, significant Due Process protections are recognized for a nonacting parent when another legal parent acts in ways prompting state inquiries into that parent's fitness. *In re Sanders*, 852 N.W.2d 524, 539, 543 n.8 (Mich. 2014) (state pursuing unfitness finding against one legal parent at a dispositional hearing cannot prompt even a temporary deprivation of custody for the other legal parent "without any finding that he or she is unfit").

266. *Lehr*, 463 U.S. at 249–50.

267. *Lehr*, 463 U.S. at 270.

268. *Id.* at 249, 268. (Stevens, J., writing the opinion for the court) (Rehnquist, J., Powell, J., Burger, J., Brenner, J., and O'Conner J., concurring) (White, J., Marshall, J., and Blackmun J., dissenting).

269. *Id.* at 250.

270. *Id.*

271. *Id.* at 248.

272. *Id.* at 266–68.

273. *Lehr*, 463 U.S. at 251. Once recognized in law, a parent, including an unwed biological father, has a much greater opportunity to veto a proposed adoption. Compare OKLA. STAT. ANN. tit. 10 § 7505-4.2(B) (West 2020) (consent to adoption is not required of a parent who failed to support child for 12 of last 14 months immediately preceding the filing of the adoption petition), with IND. CODE ANN. § 31-19-9-8(a) (2) (West 2020) ("a parent of a child in the custody of another person" must consent to an adoption unless the parent "fails without justifiable cause to communicate significantly with the child when able to do so" or "knowingly fails to provide support... when able to do so"), and OHIO REV. CODE ANN. § 3107.07(A) (West 2020) (parent's consent to formal adoption not required where for last year parent "failed without justifiable cause to provide more than de minimis contact with child or to provide for the maintenance and support of the minor as required by law or judicial decree").

274. *Lehr*, 463 U.S. at 252.

after the formal adoption proceeding began.²⁷⁵ It was over a month after his filing that Jonathan actually learned of the adoption petition.²⁷⁶ Four days after learning of the pending adoption case, Jonathan sought to halt it so that only his paternity case would proceed.²⁷⁷ His request was met with a telephone account by the adoption court judge indicating that an adoption order had been signed earlier that same day, even though the judge had been aware of Jonathan's pending paternity case.²⁷⁸ Seemingly, Lorraine and Richard had learned of the paternity case by Jonathan about two weeks earlier.²⁷⁹ The adoption court judge concluded that no notice to Jonathan was required because none of the relevant statutory norms (including mailing a postcard to the state putative father registry) had been met.²⁸⁰

Two New York appellate courts sustained the adoption by Richard.²⁸¹ In the U.S. Supreme Court, the legal issues included "whether the New York statutes are unconstitutional because they inadequately protect the natural relationship between parent and child", as well as whether these statutes "draw an impermissible distinction between the rights of the mother and the rights of the father."²⁸²

Regarding protection of "the natural relationship between parent and child," the U.S. Supreme Court distinguished between an unwed biological father who had formed a "significant custodial, personal, or financial relationship" with his child, thereby acquiring "substantial" federal constitutional childrearing interests, from an unwed biological father who had not yet formed such a relationship, though for some time, at least, he possessed a less weighty federal constitutional interest in forming such a relationship, at least where the mother was not married to another.²⁸³ In *Lehr*, the Court found that Jonathan had formed no such relationship with Jessica and that, in fact, he had not sought "to establish a legal tie until after she was two years old."²⁸⁴ The Court then assessed whether New York had "adequately protected" Jonathan's opportunity to form a parent-child relationship

275. *Id.*

276. *Id.*

277. *Id.* at 252–53.

278. *Id.* at 253.

279. *Id.* at 252–53.

280. *Lehr*, 463 U.S. at 254.

281. *Lehr*, 463 U.S. at 253. The New York high court affirmed largely because it found that the lack of notice to Jonathan made no difference. *Id.* at 253–54 (citing *In the Matter of the Adoption of Jessica "XX"*, 434 N.Y.S.2d 772 (1980)) (holding "that appellant's commencement of a paternity action did not give him any right to receive notice of the adoption proceeding, that the notice provisions of the statute were constitutional, and that *Caban v. Mohammed*, 441 U.S. 380 (1979) was not retroactive"). It said that a notice of an adoption proceeding is intended to afford a genetic father such as Jonathan the chance "to provide the [adoption] court with evidence concerning the best interest of the child." *Lehr*, 463 U.S. at 254. Here, the New York high court concluded that Jonathan had "made no tender indicating any ability to provide any particular or special information relevant to Jessica's best interest." *Id.* at 254.

282. *Lehr*, 463 U.S. at 255 n.10.

283. *Id.* at 271.

284. *Id.* at 262.

with Jessica.²⁸⁵ It found adequate protection.²⁸⁶

The U.S. Supreme Court thus deemed sufficient the New York statutory conditions on advance notice of formal adoption proceedings to unwed biological fathers.²⁸⁷ It observed that in the case, “the right to receive notice was completely within” Jonathan’s control; he simply needed to mail a postcard to the putative father registry.²⁸⁸ Jonathan’s ignorance of this requirement was no defense.²⁸⁹ The Court rejected Jonathan’s plea that his case was “special” because both the adoption court and the mother knew of his pending paternity case before the adoption order was entered.²⁹⁰ The U.S. Supreme Court noted that requiring strict compliance with state statutes served the public interest in facilitating expeditious formal adoptions of young children and was fair here because Jonathan was “presumptively capable of asserting and protecting” his own rights.²⁹¹ The Court effectively reasoned that Jonathan could not sleep on his parental rights after he slept with Lorraine.²⁹²

Regarding the distinction that New York drew between maternal and paternal rights, the Court recognized the need for there to be “a legitimate governmental objective” in order to sustain a legal distinction between the sexes.²⁹³ The state adoption procedures distinguished between women and men who were biological parents by allowing all birth mothers, but not all biological fathers, “the right to veto an adoption and the right to prior notice of any adoption proceeding.”²⁹⁴ The distinctions were said to serve the objectives of promoting the best interests of children and of insuring opportunities for all interested parties in securing prompt and final adoptions of “illegitimate” (or nonmarital or out-of-wedlock) children by allowing veto and participation rights only to those biological parents who had established, and had not later abandoned, “custodial, personal, or financial” relationships with their children born of sex.²⁹⁵ Birth moms, but not dads, of children born of sex always initially had such established relationships.²⁹⁶ The U.S. Supreme Court found that the New York statutes sufficiently recognized biological

285. *Id.* at 262–63.

286. *Id.* at 264.

287. *Lehr*, 463 U.S. at 263.

288. *Id.* at 264.

289. *Id.* at 265.

290. *Id.* at 264; *cf.* T.G.G. v. H.E.S., 932 N.W.2d 830 (Minn. Ct. App. 2019) (biological father barred from pursuing paternity action once adoption proceeding begins if he failed to register with Department of Health less than 30 days after the birth of the child, per MINN. STAT. ANN. § 259.52 subdiv. 7 (West 2019)).

291. *Lehr*, 463 U.S. at 265.

292. Paternal interest in parenthood, in order to have a voice in any later adoption, sometimes must be demonstrated during pregnancy, as when state statutes require actions by putative unwed fathers before adoptions are pursued by birth mothers and when birth mothers pursue adoptions very soon after birth. *See, e.g.*, P.K. v. H.M., 2014 Cal. App. LEXIS 7561 (Oct. 22, 2014).

293. *Lehr*, 463 U.S. at 265.

294. *Id.* at 266.

295. *Id.* at 266–67.

296. *Id.*

fathers who came forward to participate in childrearing,²⁹⁷ noting that the statutory scheme did not likely “omit many responsible fathers” and did not necessarily estop biological fathers who failed to step up for reasons beyond their control.²⁹⁸

The dissenters in *Lehr*²⁹⁹ focused more on the story told by Jonathan, resulting in a very different approach to the adequacy of protections afforded by New York to Jonathan’s “natural relationship” with Jessica.³⁰⁰ According to Jonathan (whose account was never subject to an evidentiary hearing), Jonathan and Lorraine “cohabited for approximately 2 years, until Jessica’s birth,” during which time Lorraine acknowledged to friends and relatives that Jonathan was Jessica’s father.³⁰¹ Lorraine later reported to the New York State Department of Social Services that Jonathan was the father of Jessica when she sought public aid.³⁰² Jonathan “visited Lorraine and Jessica in the hospital every day during Lorraine’s confinement.”³⁰³ Upon discharge of Lorraine and Jessica from the birth hospital (in November, 1976), until August, 1977, Lorraine largely concealed her whereabouts from Jonathan, though he sporadically located her and visited with Lorraine and Jessica (and Lorraine’s other child) “to the extent” Lorraine was willing to permit it.³⁰⁴ From August, 1977 until August, 1978, Jonathan was unable to locate Lorraine and Jessica, though he never ceased looking for them.³⁰⁵ Jonathan did locate them again in August, 1978, “with the aid of a detective agency.”³⁰⁶ He then first learned of Lorraine’s marriage to Richard.³⁰⁷ Jonathan offered financial assistance and a

297. *Id.* at 266–68. Adoption statutes sometimes distinguish the adoption participation rights of legal fathers, as when the state seeks to facilitate only certain adoptions (like stepparent adoptions). See, e.g., *Adoption of I.M.*, 180 Cal. Rptr. 3d 818 (Cal. Ct. App. 2014) (holding no consent needed in stepparent adoption, pursued by custodial parent, from noncustodial parent who willfully failed to communicate with and support child for over one year; otherwise, termination of noncustodial parent’s rights require intent to abandon child, applying CAL. FAM. CODE §§ 7822, 8604(b)).

298. In a footnote in *Lehr*, the U.S. Supreme Court noted: “There is no suggestion in the record that [the birth mother] engaged in fraudulent practices that led [the unwed biological father] not to protect his rights.” *Lehr*, 463 U.S. at 265 n.23.

For a very different reading of *Lehr*, see *Fathers and Feminism*, *supra* note 264, at 485–86, 536 (“all of the states give more substantive rights to genetic fathers than Supreme Court precedents require...at the expense of mothers’ parental rights;” “genetic essentialism” flowing from *Lehr* allows a “male-centered definition of parenthood” leading to acquiescence to “patriarchal demands for authority over women and children”).

As for what is within the control of unwed biological fathers of children born of consensual sex, see, e.g., *In re Adoption of A.A.T.*, 196 P.3d 1180 (Kan. 2008) (adoption process was fair to natural father as it was reasonable for him to have discovered the birth mother’s lies about having undergone an abortion).

299. *Lehr*, 463 U.S. at 268–76 (White, J., dissenting).

300. *Id.* at 269.

301. *Id.* at 268–69.

302. *Id.* at 269.

303. *Id.*

304. *Id.*

305. *Lehr*, 463 U.S. at 269.

306. *Id.*

307. *Id.*

trust fund for Jessica, but that aid was refused by Lorraine.³⁰⁸ Lorraine also rejected Jonathan's request to visit Jessica and "threatened" him "with arrest unless he stayed away."³⁰⁹ Thereupon, Jonathan retained counsel who wrote to Lorraine early in December, 1978, requesting visitation for Jonathan and threatening legal action.³¹⁰ This was closely followed by Richard's adoption petition, filed on December 21, 1978, and Jonathan's visitation and paternity case, filed early in 1979.³¹¹

With this "far different picture," the dissenters concluded "that but for the actions" of Lorraine, Jonathan would have stepped up to fatherhood and gained veto and participation rights in any adoption proceeding.³¹² They looked to a 1980 statutory amendment in New York, too late for Jonathan, requiring that consent to adoption be obtained from a biological father who was "prevented" from establishing a significant parent-child relationship by the birth mother or another "having lawful custody of the child."³¹³ They concluded that blood ties, together with interference with an inquiring biological father who actually parented for some time, were sufficient to prompt adoption notice and participation rights for Jonathan.³¹⁴

The dissenters went further by suggesting that adoption proceeding rights might arise for most biological fathers (i.e., nonrapists) even without maternal interference.³¹⁵ They hinted that the "mere biological relationship" between a child born of sex to an unwed mother and a man might itself be sufficient to prompt "a protected interest" under federal constitutional law for the biological father.³¹⁶

As well, the dissenters reasoned that Jonathan's paternity case was so comparable to a few of the explicit New York statutory factors prompting notice and veto rights that any judicial failure to recognize Jonathan's effective compliance with the statute amounted to the "sheerest formalism," serving no legitimate governmental interests in Jessica's best interests or in an expeditious and final adoption.³¹⁷

The dissent further hinted that there could be Equal Protection difficulties with statutory distinctions between varying biological fathers "who have made themselves known."³¹⁸ That is, it may be improper to distinguish between biological

308. *Id.*

309. *Id.*

310. *Id.*

311. *Lehr*, 463 U.S. at 269

312. *Id.* at 271.

313. *Id.* at 271, n. 3. Compare, e.g., OHIO REV. CODE ANN. § 3107.07(A) (parent's consent to adoption not needed if parent "failed without justifiable cause" to provide for or have contact with child), applied in *In Matter of: P.L.B. Adoption*, No. 18CA19, 2019 WL 1349794, at ¶¶ 24-34 (Ohio Ct. App. Mar. 14, 2019).

314. *Lehr*, 463 U.S. at 272-73.

315. *Id.* at 274.

316. *Id.* at 271-72.

317. *Id.* at 274. Sheer formalism can foreclose the voices of birth mothers as well, as when, after the state moves to end parental rights, they fail to file a written motion within a designated time period although they did object to parental rights losses in other ways, as by visiting the court clerk's offices and telephoning the courts. *B.M. vs. J.R. (In re Adoption of K.M.)*, 31 N.E.3d 533 (Ind. Ct. App. 2015).

318. *Lehr*, 463 U.S. at 274.

fathers who have formally acknowledged paternity under some, but not other, governmental schemes, since all schemes serve the same legislative purpose of designating fathers under law. Here, while Jonathan had not listed his name on the state's putative father registry, his name was known to a state social service agency, his efforts to locate his daughter were significant, and he petitioned for paternity before there was an adoption. The dissent focused more on what Jonathan did in order to parent Jessica rather than on what Jonathan did not do, that is, not enlist his name with some bureaucrat.

Finally, the dissenters observed that states could better insure participation by biological fathers in formal adoption proceedings by requiring unwed birth mothers "to divulge," if they know, the names of (actual or possible) biological fathers.³¹⁹ They remarked that states could even do so when it is the spouse of the birth mother like Richard who seeks adoption, at least when the marriage followed long after birth so that there was no marital presumption favoring a husband like Richard.³²⁰ The dissenters noted that U.S. governments already require such identifications in other settings, as when public aid is sought by mothers on behalf of their children.³²¹ There, a "good faith" cooperation duty is owed by the mother in naming the biological father of the child born of sex for whom the mother seeks federal Social Security Act aid (now TANF).³²² In *Lehr*, Lorraine had, in fact, told a New York social services agency that Jonathan was Jessica's biological father when she sought public assistance.³²³

The *Lehr* opinions address difficult childcare parentage issues. While unwed biological fathers like Jonathan *Lehr* seemingly have some "opportunity for a meaningful relationship" with their children who are born to unwed mothers, at least where there are as yet no second parents via marriages, adoptions, or otherwise, the Jonathan *Lehrs* of the world may be left under state law to their own devices. They may need to seize rather quickly their parental opportunities.

Seizures of parental opportunity interests by Jonathan *Lehrs* are made more difficult with certain maternal acts, which may or may not involve concealment or deception. Unwed mothers like Lorraine generally have no obligation to inform their Jonathans of their pregnancies, of their prebirth and postbirth whereabouts, or of their parental actions in initiating formal adoptions even after they learned that the Jonathans were definitely interested in childcare.³²⁴ Maternal conduct can

319. *Id.* at 271. Surely, this information should be maintained confidentially, to be used only in assessing formal adoption requests.

320. *Id.* at 273 n.5 ("Likewise, there is no reason not to require such identification when it is the spouse of the custodial parent who seeks to adopt the child.")

321. *Id.* (per "Aid to Families with Dependent Children Program," now TANF).

322. 42 U.S.C. § 654.

323. *Lehr*, 463 U.S. at 269 (J. White, dissenting).

324. See, e.g., *Gonzalez v. Saldivar* (In Matter of Parentage of A.M.C.), 182 Wash. App. 1048 (2014) (while no duty to inform, in absence of "fiduciary relationship", mother commits fraud when making an affirmative misrepresentation about paternity); *In re Adoption of B.Y.*, 356 P.3d 1215 (Utah

sometimes thwart the Jonathan Lehrs.³²⁵ Can these Jonathans reasonably complain about maternal acts foreclosing or inhibiting their privacy interests, or have they assumed the risks of such acts by voluntarily associating with the birth mothers, even when the Lorraines deceived the Jonathans regarding birth control usage?³²⁶ Of course, here there arguably is no state action, or perhaps less state action (the state does provide the formal adoption process), than in the Fourth Amendment "common authority" search cases.

As well, the Lehr majority suggests that an unwed biological father might be foreclosed from legal paternity in a formal adoption setting if he fails to comply with technical statutory challenge requirements encompassing parental acts (like enlisting in the putative father registry), even if he undertook quite similar parental acts (like providing prebirth support) that were not statutorily recognized. Form can prevail over substance. The "sheerest formalism"³²⁷ can negate childcare paternity for a biological father early in a child's life. To date, there are some, but no significant, precedents on the irrationality of such distinctions under Equal Protection.³²⁸

The Lehr rationale suggests that legal paternity for childcare purposes may also be unavailable to an unwed biological father even where no other person beyond the birth mother is expected to be designated a legal parent, as through a

2015) (biological father cannot intervene in his child's adoption proceeding as he did not sue in paternity before adoption placement, though he and mother had agreed during pregnancy that she would not place any child for adoption, he would not sue in paternity, and they would jointly raise the child). See also UTAH CODE ANN. § 78B-6-110.5 (for certain children placed for adoption by an unwed mother, the mother shall make specific declarations (e.g., name, address, knowledge and/or support of pregnancy/child) about "each potential birth father"), enacted in 2014 after Utah was found to be a magnet state for fraudulent adoptions); TEX. FAM. CODE ANN. § 161.002 (only when child is over one year of age does a would-be adopter have to undertake "due diligence" to find a biological father who "has not registered with the paternity registry").

The U.S. Supreme Court in *Lehr* had no occasion to address what, if any, differing analysis would be used if the Lorraines deceived the Jonathans. 463 U.S. at 265 n.23.

325. Laura E. Oren, Thwarted or Pop-Up Pops? How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children, 40 FAM. L.Q. 153, 159–171 (2006).

326. The so-called "third-party doctrine" in Fourth Amendment warrantless search cases, like *Carpenter v. U.S.*, 138 S.Ct. 2206, 2213–18 (2018), demonstrates the difficulties in the question of assumption of risk. There, the court held that the voluntary sharing of information with a third-party sometimes permits governmental access to the information with the cooperation of the third-party because the initial information holder voluntarily conveyed the information to the third-party, thereby assuming the risk of third-party divulgence. Yet there are limits to governmental reliance on inferred consent, especially where the "privacies of life" are involved, as was recognized in *U.S. v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) and later affirmed in *Carpenter*, 138 S.Ct. at 2216. The application of *Carpenter* to cases involving government access via third-parties to direct-to-consumer genetic testing information. See Ayesha Rasheed, *Personal Genetic Testing and the Fourth Amendment*, 2020 U. Ill. L. Rev. 1249 (2020).

327. *Lehr*, 463 U.S. at 275 (White, J., dissenting).

328. See, e.g., *David C. v. Alexis S.*, 375 P.3d 945, 949 (Ariz. 2016) (under ARIZ. REV. STAT. ANN. § 8-111, timely paternity action prompts role for alleged biological father in adoption proceeding). Some cases avoid findings of noncompliance with technical statutory requirements and of any Due Process violations by recognizing alternative challenge forms under state law which negate possible Due Process problems. See, e.g., *Brummond v. Lucio*, 407 P.3d 553 (Ariz. Ct. App. 2017) (VAP challenge via "independent action").

formal adoption.³²⁹ Under *Lehr*, an unwed birth mother, who knows the unwed biological father's whereabouts and interests in parenting, can nevertheless, with accommodating state laws, become the sole legal parent by shielding the child from the expecting legal father.³³⁰ Because such accommodating laws are not constitutionally required federally, they should be more limited by state lawmakers in order to afford expecting legal parents greater opportunities to exercise their custodial interests.³³¹ Innocent losses of Due Process custodial interests should be discouraged. Public policy generally should not place significant blame, for example, on an unwed biological father for not knowing about putative father registries before his child, who he was assured would be in his life, is placed for adoption,³³² or on an intended nonbirth parent, whose genetic material helped prompt nonsurrogacy assisted reproduction birth, for not anticipating that the expectant birth mother would flee and take up residence, or cosign a VAP, with a different romantic partner.

The ruling in *Lehr* further suggests that an unwed biological father like Jonathan may be afforded very little time to step up to fatherhood in order to secure a childcare order through a paternity case.³³³ In *Lehr*, Richard sought to adopt Jessica more than two years after her birth (and only after Jonathan threatened, but had not yet taken, legal action).³³⁴ The New York statute, however, also would have foreclosed for Jonathan any notice and a chance to be heard in the adoption proceeding even where the adoption petition had been pursued only days after Jessica's birth. Though Jonathan had visited Lorraine in the hospital and may

329. See, e.g., *In re D.S.*, 179 Cal. Rptr. 3d 348 (Ct. App. 2014) (employing a *Lehr* approach to a putative father's participation rights in a dependency proceeding).

330. *Lehr*, 463 U.S. at 274 (J. White, dissenting).

331. Comparably, parents should not easily be able to thwart recognized nonparental childcare interests, for example, by shielding their children. See, e.g., *D.G. v. W.M.*, 118 N.E.3d 26 (Ind. App. 2019) (mother held in contempt for systematically depriving paternal grandparents of their grandchild visitation interests earlier awarded by the court).

332. Even if unwed biological fathers like Jonathan *Lehr* knew of such registries, should public policies harshly blame them simply for noncompliance? Consider that such registries invite men to inform the state of the often very private conduct of women who, quite frequently, would usually deem such conduct to be none of the government's business. Further, consider that men could protect their interests in other ways, as by filing paternity suits.

333. *Lehr*, 463 U.S. at 274 (White, J., dissenting). A more recent U.S. Supreme Court ruling opens the door to thwarting legal childcare parentage for unwed biological fathers like Jonathan *Lehr* solely, or perhaps predominantly, due to prebirth abandonment. In *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 653–56 (2013), the court recognized the significance, in a formal adoption notice setting, of the unwed biological father's prenatal abandonment of his later-born child born of sex; it thus recognized the participatory rights of unwed biological fathers in formal adoptions can depend on providing pregnancy support. See, e.g., Mary M. Beck, *Prenatal Abandonment: 'Horton Hatches the Egg' in the Supreme Court and Thirt-Four States*, 24 Mich J. Gender & L. 53, 79–81 (the case supports the conclusion that unwed biological fathers of children born of sex to unwed mothers "should have the right to protect their parental rights if they can prove they provided consistent and meaningful prenatal support commensurate to their ability to pay"). Such dependence is recognized in *Adoption of Kelsey S.*, 823 P.3d at 1238 (unwed fit father can veto proposed adoption where he promptly came forward and demonstrated "a full commitment to his parental responsibilities").

334. *Lehr*, 463 U.S. at 250.

have been recognized as the potential father in the community by Lorraine during her pregnancy,³³⁵ Jonathan seemingly would have had no role in an adoption proceeding two days after birth. Under the prevailing New York statute, his name was not listed on the putative father registry and his “cohabiting” with Lorraine during her pregnancy is not the same, under the New York statute, as living “openly” later with Lorraine and her child, conduct which Jonathan obviously could not undertake on his own.³³⁶

While the *Lehr* decision generally recognizes that U.S. state lawmakers are free to afford very little opportunity for “care, custody, and control” to unwed biological fathers of children born of sex, it does not foreclose to state lawmakers who choose to do so the ability to impose child support obligations on those same unwed fathers whose child custody interests were lost and will continue to be lost. State child support laws can act retroactively to the child’s date of birth.³³⁷ Support orders sometimes are not barred even where the birth mothers concealed the child’s existence from the unwed biological father for a significant time.³³⁸

The New York statutory scheme in *Lehr* not only presents barriers to paternity for certain biological fathers, but also invites others to achieve parental status for children born to unwed mothers. The New York statute recognized legal paternity, in the adoption notice and participation setting, for a man who lived “openly” with Lorraine and her child while holding himself out in the community as the biological father.³³⁹ A man can hold himself out as a father even though he is not the biological father. There can be a residency/hold out, or a de facto nonbiological parent (father or mother), invited into the birth mother’s family by her without any governmental oversight, meaning that there may never be an inquiry into the child’s best interests. Imagine how the *Lehr* case would have been decided had Lorraine and Richard established a home together a few days after Jessica’s birth. If Lorraine later wished to place Jessica for adoption, Richard would likely be entitled to notice. But there would be no required notice to Jonathan, even though Jonathan, the biological father, continued to search for Jessica with a private detective and even though Jonathan’s whereabouts were known all along by Lorraine.³⁴⁰ This approach

335. *Id.* at 252.

336. For a more sympathetic view of a biological father’s federal constitutional childcare opportunity, even when there is no de facto parentage, see, e.g., *Adoption of Baby Boy W.*, 232 Cal. App. 4th 438 (Ct. App. 2014) (relying on *Kelsey S.*, 1 Cal. 4th at 450–53).

337. See, e.g., *In re Paternity of Brad Michael L.*, 564 N.W.2d 354 (Wis. Ct. App. 1997) (father did not learn of child’s birth for 15 years).

338. See, e.g., *N.M. ex rel. Salazar v. Roybal*, 963 P.2d 548 (N.M. Ct. App. 1998) (retroactive child support to 20-year-old son from biological father who was not informed of pregnancy or birth from 1975-1976 to 1994). But, see also *Clark v. Clark*, 335 P.3d 1254 (Okla. Civ. App. 2014) (mother can be barred from seeking child support arrearages by laches or equitable estoppel, as when she unilaterally denied father visitation and unreasonably disputed his paternity).

339. *Lehr*, 463 U.S. at 251. See also N.Y. DOM. REL. LAW § 111-a(2)(e) (McKinney 2013).

340. The *Lehr* court, and comparable state law, analyses depriving biological fathers like Jonathan of any possible childcare orders for their children born of consensual sex are employed outside of formal adoption and paternity proceedings. See, e.g., *In re D.S.*, 179 Cal. Rptr. 3d 348 (Cal. Ct. App. 2014) (deprivation in child dependency proceeding); *H.T. v. Super. Ct.*, A144922, 2015 WL 4035374 (Cal.

is wrong.³⁴¹

Biological ties do not always yield paternity recognition to biological fathers under formal adoption laws, however, even when a child is born to an unwed mother as a result of consensual sex and even when the child otherwise has as yet no second parent under law, and perhaps even when the biological father expressed interest, and acted on that interest, in childrearing immediately upon learning of pregnancy or birth.³⁴² Children can be denied loving, family relationships with their biological fathers where the children's best interests are not well served and where they are not even considered.³⁴³ By not allowing biological fathers like Jonathan Lehr even to participate in an adoption case of a child like Jessica, notwithstanding their federal constitutional paternity opportunity interests, it will never be known whether children like Jessica would have benefitted from a relationship with their biological fathers, who clearly now wish to rear their children. The ruling in Lehr surely is relevant to the constitutional limits on parentage by consent laws, for here too possible parentage opportunity and "care,

Ct. App. June 30, 2015) (no right to child reunification services). Significant public policy debates over the appropriateness of these analyses focus on the individual rights of the biological parents, the best interests of their children, and the social science studies on "fragile families" and "relationship dynamics." See, e.g., Leslie Joan Harris, *Family Policy After the Fragile Families and Relationship Dynamics Studies*, 35 L. & INEQ. 223 (2017) (taking issue with Clare Huntington, *Family Law and Nonmarital Families*, 53 FAM. CT. REV. 233 (2015), who supports laws recognizing unmarried biological parents of children born of sex as "co-parents").

341. Some state adoption notice statutes are more sympathetic to unwed biological fathers whose children are placed for adoption. See, e.g., ALA. CODE § 26-10A-9(a)(1) (2020) (implied consent or relinquishment by father in adoption proceeding "with reasonable knowledge of the pregnancy" who fails to offer financial and/or emotional support for a period of six months prior to birth); FLA. STAT. § 39.806(1)(b) (2019) (grounds for termination of parental rights include child abandonment "when the identity of the parent . . . is unknown and cannot be ascertained by diligent search within 60 days"); IND. CODE § 31-19-9-15(a)(1) (2020) (putative father's consent to adoption is "irrevocably implied" if he fails to file a paternity action not more than 30 days after receiving "actual notice . . . of the mother's intent to proceed with an adoptive placement of the child"); 23 PA. CONS. STAT. § 2511(a)(6) (2018) (with adoption of newborn, rights of parent may be terminated if "the parent knows or has reason to know of the child's birth" and fails to provide "substantial financial support").

342. Not all unmarried biological fathers whose children born of sex are placed for formal adoption face the results encountered by Jonathan Lehr. See, e.g., *In re Baby R.P.S.*, 942 So.2d 906 (Fla. Dist. Ct. App. 2006) (pending paternity action by putative father must be ruled on before addressing his parental rights termination and then a formal adoption, though he had not registered with the Florida Putative Father Registry); *David C. v. Alexis S.*, 375 P.3d 945 (Ariz. 2016) (timely filing of paternity action prompts role for biological father in adoption proceeding though he did not register as putative father); and *In re Adoption of K.P.M.A.*, 341 P.3d 38 (Okla. 2014) (biological fathers had due process right to notice of child's existence, to be effected by both birth mother and adoption agency). As well, compare state adoption laws that require, as in *In re Adoption of H.N.R.*, 47 N.E.3d 803, 808 (Ohio 2015) (per OHIO REV. CODE ANN. § 3107.01(H) (West 2020)), or do not always require, as in *In re J.J.*, 39 N.E.3d 1184, 1187 (Ind. Ct. App. 2015) (per IND. CODE § 31-19-5-12 (2007)), putative father registration within 30 days after birth).

343. Children are also harmed in other ways when their biological fathers fail to step up to legal parentage in timely fashions. See, e.g., *Stennett v. Miller*, 245 Cal. Rptr. 3d 872 (Cal. Ct. App. 2019) (nonmarital biological child of absentee father has no standing to sue for the father's wrongful death if no court order declaring paternity was entered during the father's lifetime).

custody, and control" interests can be negatively impacted, if not wholly eliminated, for one person by the actions of another person.

Further relevant to new parentage by consent laws are the ways that formal adoption notice laws today can bar interested biological fathers, with paternity opportunity interests, from childrearing for reasons beyond putative father registry failures. For example, strict time limits can foreclose paternal challenges to finalized adoptions even when the reason the challengers failed to challenge earlier was due to maternal fraud. Thus in Oklahoma, no adoption can be challenged after three years, "regardless of whether the decree is void or voidable," not an unreasonable limit.³⁴⁴ By contrast, there is less time to challenge a pending adoption case in Arizona; there, a putative registry filing must be made within 30 days of "prompt discovery of birth," even where the biological father promptly petitioned for custody as soon as he knew of his child's birth.³⁴⁵

Notwithstanding *Lehr*, U.S. state laws on parentage by consent should not permit many of the losses of parental opportunity interests that are currently allowed. New laws can originate in independent state constitutional precedents, as well as through the discretion on child custody interests afforded by the U.S. Supreme Court (and Congress) to U.S. state legislators and judges.

The requirements in formal adoption cases regarding notices to biological fathers of children born of assisted reproduction sensibly operate quite differently. Here, sperm donors typically waive future parental childcare interests preimplantation, with these donors deemed outside any adoption notice requirements and participation rights.³⁴⁶ Where sperm donors undertake no such waivers, and, in fact, always intended to rear their biological offspring, more pertinent to their possible childcare interests are any agreements on future

344. OKLA. STAT. tit. 10, § 7505-2.1 (2020), applied in *Gee v. Belair*, 403 P.3d 1 (Okla. Civ. App. 2017) (deeming the statute of repose time limit could not be tolled even if the father was misled).

345. The Arizona statute requiring putative father registration within 30 days of "prompt discovery" of birth, ARIZ. REV. STAT. ANN. § 8-533(B) (2014), was applied to bar a putative father's challenge to an ongoing adoption proceeding where he seemingly timely filed a paternity action in California and did not know of the birth mother's relocation to Arizona. *Frank R. v. Mother Goose Adoptions*, 402 P.3d 996, 998 (Ariz. 2017). The bar was recognized as prompting "a harsh result" for the putative father, as the conduct of both the birth mother and adoption agency were deplored. The high court deemed a contrary ruling would prompt "a harsh result" in "separating the child from adoptive parents," then in Tennessee. Yet these parents were "prospective" only since further proceedings were contemplated in Tennessee. *Id.* at 999 and 1003. The rationale for the bar included "the child's need for a 'loving, permanent and continuous home and family life during his childhood with the only parents' the 'child has ever known,'" as well as a need to promote the "legislative intent" regarding the "finality" of adoptions. *Id.* at 1003. The harshness of disallowing opportunities for participation in adoption proceedings by biological fathers who filed timely paternity suits has been recognized, though it was not enough to stop an Indiana appeals court from strictly following the paternity registration deadline. *In re K.A.W.*, 99 N.E.3d 724, 727 (Ind. Ct. App. 2018) ("no true reason" for deeming lack of registration bars participation in adoption proceeding; while a bar feels "not only nonsensical, but unjust," court imposes bar).

346. See, e.g., *In re Adoption of a Minor*, 29 N.E. 3d 830 (Mass. 2015).

childcare rather than any putative father registrations.³⁴⁷ Here, there is much sense in laws that focus on preconception agreements/promises/contracts anticipating future legal parentage.

As noted, while *Lehr* can be read to allow "the sheerest formalism" to deny biological fathers their paternity opportunity interests, there is often no good reason for U.S. state lawmakers to do so.³⁴⁸ A birth mother, who is automatically deemed to have a substantial and enduring parent-child relationship (assuming she is not a surrogate), typically faces less sheer formalism. For example, she often is given a long period before she loses her parental rights by neglect or by failure to communicate.³⁴⁹ And, when she is neglectful, required parental reunification

347. Consider, e.g., sperm donors anticipating future childcare interests in children born of assisted reproduction to surrogates. *See, e.g.*, 2017 UPA, at § 802(b) (eligible intended parents). As with sperm donors, agreements can protect egg donors anticipating future childcare interests in children born of assisted reproduction to other women. *See, e.g.*, D.M.T. v. T.M.H., 129 So.3d 320, 337-38 (Fla. 2013) (utilizing *Lehr* to find "a biological connection gives rise to an inchoate right to be a parent that may develop into a protected fundamental constitutional right based on the actions of the parent").

348. The Supreme Court itself suggested that unwed biological fathers could be protected (and may need to be protected constitutionally) when their failure to seize parentage in a timely fashion was due to "fraudulent practices." *Lehr v. Robertson*, 463 U.S. 248, 265, n.23 (1983). *Compare In re Baby Girl T.*, 298 P.3d 1251, 1257 (Utah 2012) (different result if there are shown "failures of state-controlled processes" where the biological father did all he could do to comply with the statutory requirements), with *In re Adoption of B.Y.*, 356 P.3d 1215 (Utah 2015) (relying on UTAH CODE ANN. §§ 78B-6-106(1) and (2) (West 2020), unwed biological father who relied on mother's promises not to place the child for adoption is not excused from following the statute, though the court did recognize the birth mother may be subject to suit for fraud). *But see* UTAH CODE ANN. § 78B-6-121(2)(a) (2020) (for a child placed with prospective adoptive parents more than 6 months after birth, unwed biological father's failure to develop a parent-child relationship is excused when he "was prevented...by the person or authorized agency having lawful custody of the child"). *See also In re Adoption of J.Q.P.*, 903 N.W. 2d 736 (S.D. 2017) (no six month abandonment by unwed biological father as birth mother stymied his efforts to contact the child; father has continued to pay child support); *In re Baby R.P.S.*, 942 So.2d 906, 910 (Fla. Dist. Ct. App. 2006) (pending paternity action by putative father must be ruled on before addressing his parental rights termination and then a formal adoption, though he had not registered with the Florida Putative Father Registry), *aff'd.*, *J.C.J. v. Heart of Adoptions, Inc.*, 989 So.2d 32 (Fla. Dist. Ct. App. 2008) (stipulation on father's paternity, but termination of paternal rights due to abandonment); *David C. v. Alexis S.*, 375 P.3d 945 (Ariz. 2016) (timely filing of paternity action prompts role for biological father in adoption proceeding though he did not register as putative father); and *In re Adoption of K.P.M.A.*, 341 P.3d 380 (Okla. 2014) (biological fathers had due process right to notice of child's existence, to be effected by both birth mother and adoption agency). *See* Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 FAM. L. Q. 153 (2006). And consider *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998) (biological father who was kept in the dark while his child was adopted receives \$8 million award against birth mother's brother and parents, and an adoption attorney, though he could not sue the birth mother) and OKLA. STAT. tit. 10, § 7505-2.1 (2020), applied in *Gee*, 403 P.3d at ¶13 (deeming the statute of repose time limit could not be tolled even if the father was misled).

349. *See, e.g.*, *Rodgers v. Rodgers*, 519 S.W.3d 324 (Ark. 2017) (failure to "communicate" with child for one year prompts a lack of need for a birth mother's consent to a stepparent adoption; neglect by birth mother can lead to her exclusion from adoption proceeding).

proceedings may need to precede any termination of parental rights.³⁵⁰ Paternity opportunity interests merit greater constitutional protections, even though it is reasonable to afford those interests fewer protections than are afforded parental childcare interests subject to terminations on grounds of unfitness.

E. As Applied and Facial Due Process Challenges to Governmental Actions

Federal constitutional Due Process interests can be lost, sometimes only by truly intentional conduct and sometimes inadvertently. The guidelines on such losses, appearing in written laws allowing "life, liberty or property" deprivations, can be challenged on at least two grounds. One involves a governmental policy that may be stricken on its face so that the policy will no longer apply to anyone. Facial challenges to written laws have succeeded where there are losses of Fourth Amendment privacy interests.³⁵¹ Recall that even for the *Lehr* majority, questions can be raised regarding formal adoption schemes that likely omit "many responsible" unwed biological fathers who failed to grasp paternity for reasons beyond their control.

Yet the U.S. Supreme Court favors limiting its statutory strikes to particular governmental actions causing deprivations, so that the relevant underlying policies remain, though narrowed. Such a disposition means that many laws on parentage by consent, when properly challenged, will be narrowed judicially rather than wholly stricken.

The U.S. Supreme Court disposition for finding only particular governmental actions are invalidated, without striking entirely the policies on which they were grounded, is demonstrated in the 1987 case of *U.S. v. Salerno*.³⁵² There, the majority expressed its preferences for as applied challenges as follows:

A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the... Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly

350. See, e.g., ME. REV. STAT. ANN. Tit. 22, § 4041 (2020) ("responsibility for reunification and rehabilitation of the family" where a child is placed in foster care); CAL. WELF. & INST. CODE § 361.5(a) (West 2018) ("family reunification services"); GA. CODE ANN. § 15-11-202(a) ("reasonable efforts . . . to preserve or reunify families"); OHIO REV. CODE ANN. § 2151.419 (West 2014) ("reasonable efforts" to prevent or discontinue a child's removal from the child's home); and MONT. CODE ANN. § 41-3-609(1)(f) (West 2019) (before termination of parental rights, "clear and convincing evidence" that "an appropriate court-approved treatment plan" was not followed), employed *In re R.J.F.*, 443 P.3d 387, 394-5 (Mont. 2019).

351. See, e.g., *City of Los Angeles v. Patel*, 576 U.S. 409 (2015) (successful facial challenge to city ordinance requiring hotel operators to provide police with certain information about hotel guests since the ordinance did not sufficiently constrain police discretion).

352. *United States v. Salerno*, 481 U.S. 739 (1987).

invalid, since we have not recognized an “overbreadth” doctrine outside the limited context of the First Amendment.³⁵³

While the Salerno description has been deemed by some as “draconian,” so that it should be treated as “unwise dictum” that is to be “ignored,”³⁵⁴ judicial disposition for as applied strikes of governmental policies continues.³⁵⁵ This disposition should operate in Due Process challenges to governmental policies on parentage by consent.³⁵⁶

V. THE CONSTITUTIONAL INTERESTS OF EXPECTING LEGAL PARENTS, EXISTING LEGAL PARENTS, AND PUTATIVE PARENTS IN PARENTAGE BY CONSENT SETTINGS

The foregoing review of proposed norms and laws on parentage by consent reveals how putative parents can assert child custody/visitation/parental responsibility allocation [herein custody] interests over the current objections of expecting or existing legal parents who earlier consented, as well as how expecting or existing legal parents can seek financial child support from currently objecting putative parents who earlier consented. The objections can be constitutionally based, as when existing legal parents urge there are undue intrusions on, though not complete elimination of, their custodial decisionmaking interests, like with certain forms of residency/hold out parentage. Expecting legal parents, as with unwed biological fathers, can argue against the complete elimination of their custodial decisionmaking interests, as with certain VAPs signed by others. Alleged putative parents by consent can object to undue deprivations of their property interests, as with certain child support duties. Questions linger. What protections are warranted for expecting or existing legal parents in custody disputes? What protections are warranted for putative parents in support disputes? Do current UPA norms, ALI pronouncements, and current U.S. state laws, provide adequate

353. *Id.* at 745. The court, in conclusion, disposed of the facial challenge before it by saying that challenged legislation need only be “adequate” with respect to “at least some” who the government pursue. *Id.* at 751.

354. *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175-76 (1996) (Stevens, J., dissenting to a denial of a petition for certiorari).

355. A recent U.S. Supreme Court case utilizing an “as applied” analysis is *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (rejecting as applied Eighth Amendment challenge to Missouri’s single-drug lethal-injection protocol in death penalty cases). Unsettled, however, is whether the “overbreadth” doctrine ever operates for facial challenges beyond the First Amendment. *See, e.g.*, *Janklow*, 517 U.S. at 1176–81 (Scalia, J., dissenting to the certiorari denial while noting a circuit split on the application of Salerno in the abortion context); *Sheesley v. Wyoming*, 437 P.3d 830, ¶¶ 7–11 (Wyo. 2019) (reviewing “overbreadth doctrine’s ostensible confinement to First Amendment challenges”).

356. Here, as elsewhere, vagueness challenges can also be mounted where the constitutional standards for definiteness and clarity are not met. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999). On vagueness challenges generally, *see, e.g.*, Michael J. Zydner Mannheim, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049 (2020) (reviewing how vagueness doctrine has been called into question and suggesting its replacement with an analysis involving “impossibility of compliance”).

protection? How germane to these questions are the litigation process and privacy precedents on losses of nonparental constitutional Due Process interests?

There is no need, of course, to consider these precedents if the federal constitutional interests in custodial decisionmaking and in avoiding support may only be lost by actual consent at the times that petitions for custody or for support are first pursued. While it is true, as noted earlier, that certain federal constitutional interests, like the right to a criminal jury trial³⁵⁷ (unlike the right to civil jury trial³⁵⁸), may only be waived in on-the-record court proceedings, federal constitutional interests involving child custody and child support have long been limited, as noted earlier, by presuit pacts later enforced in on-the-record court proceedings. Certain agreements entered presuit (and even preconception) especially have been afforded legal significance if they involve promised support for future children.³⁵⁹

For children born of sex who are subject to formal adoption proceedings, earlier parental consents, undertaken either before or after proceedings are filed, have been recognized.³⁶⁰ For children born of assisted reproduction, with and without surrogates, again earlier presuit and postsuit consents by birth mothers to joint parentage in others have been recognized,³⁶¹ as have earlier consents to parentage by husbands³⁶² or to nonparentage by sperm donors.³⁶³

Protections are significantly afforded when expecting, existing and putative parents expressly, directly and clearly consented earlier to the disputed parentage by consent. Such consent is most easily proven when it is declared in a written,

357. See, e.g., FED. R. CRIM. P. 11(b) (codifying ILL. SUP. CT. R. 402(a), and *Boykin v. Alabama*, 395 U.S. 238 (1969)).

358. Consider, e.g., civil jury trial waivers under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16 (2012), and varying American state Uniform Arbitration Acts, as with 710 ILL. COMP. STAT. 5/1–23 (2020) (though state statutory exceptions can be called into question under *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) (finding FAA preemption of West Virginia policy barring compelled arbitration agreements for wrongful death claims against nursing homes)). See also, FED. R. CIV. P. 38(b) (stipulating requisites for timely demand for civil jury trial); *Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1063–64 (9th Cir. 2005) ("failure to make a timely jury trial request in federal court would ordinarily mean that she waived her right to trial by jury," though the court will "indulge every reasonable presumption against waiver," quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)).

359. Child support promises can be enforced even where there was no consideration exchanged for the promises. See, e.g., *Parentage Prenups*, *supra* note 189, at n.32.

360. See, e.g., WASH. REV. CODE § 26.33.080(3) (2020) (written consent to adoption may be filed before the child's birth, but not if the child is an Indian child). See also TEX. FAM. CODE ANN. 161.103(a) (2015) ("affidavit of voluntary relinquishment of parental rights" can only be signed 48 hours after birth, though before formal adoption proceedings have begun).

361. See, e.g., CAL. FAM. CODE § 7613(a)(1) (2020) (woman conceives through assisted reproduction "with the consent of another intended parent" who is then treated in law as a natural parent), and 750 ILL. COMP. STAT. 47/25(b) (2005) ("gestational surrogacy contract . . . shall be executed prior to the commencement of any medical procedures (other than . . . evaluations . . .)").

362. See, e.g., TEX. FAM. CODE ANN. § 160.703 (2001).

363. See, e.g., *id.* at § 160.702 ("A donor is not a parent of a child conceived by means of assisted reproduction").

state-recognized form, which may or may not be required to be effective³⁶⁴ and which may or may not be filed with the state.³⁶⁵ Proof is more challenging when express, direct and clear consents are recognized though only given in a less formal writing, or orally. Even more challenging are proofs of earlier implicit consents on parentage, as through conduct or words that only circumstantially suggest consent. Implicit parentage consents occurring before litigation pose significant constitutional difficulties, as when expecting or existing parents object to custody pursuits by putative parents, or when putative parents object to child support pursuits by expecting or existing parents.

Beyond the difficulties with issues involving proving consents to parentage, there are other Due Process issues, including the appropriate burdens of proof. Should the custody interests of expecting or existing parents be diminished, but not ended, by allowing custody for putative parents when there is only a preponderance of evidence on parentage consents?³⁶⁶ In cases involving the total termination of existing parental custody rights, the burdens of proof are higher, as there is a need for at least clear and convincing evidence.³⁶⁷ And what of cases involving possible child support from a putative parent by consent? Here, if not in custody settings, perhaps preponderance of the evidence should be sufficient.

Further, with putative parents by consent in support cases, there are sometimes issues involving unidentified biological parents, usually men who

364. A written voluntary acknowledgment by an expecting or existing parent of new parentage in another, to be effective, usually must be undertaken in a writing conforming to a state recognized form. *See, e.g.*, CAL. FAM. CODE § 7574 (2020). Parentage arising from the birth to a surrogate, at least in California, may, but need not, flow from the use of a state-recognized form. *Id.* at § 7613.5.

365. Written voluntary parentage acknowledgments typically are filed with the state. *See, e.g.*, CAL. FAM. CODE § 7573 (2020). Effective surrogacy pacts need not be filed with the state. *Id.* at § 7613(a)(1).

366. *See, e.g.*, Meyer, *supra* note 14, at 841, wherein U.S. Supreme Court cases are found to suggest that lesser protections are needed when parental custody interests are diminished but not ended, as with the appointments of child guardians. Professor Meyer, *id.*, concludes:

So, while a parent's interest in custody plainly falls within the scope of family privacy, the protection afforded by the Constitution to parents' rights appears to take the form of a sliding scale, requiring aggressive scrutiny of action that would destroy the relationship but applying more deferential forms of review to action that imposes lesser burdens on parental child-rearing authority. Certainly, the court has yet to apply true strict scrutiny to state action that merely interferes with parental authority or custody without threatening the continuity of the parent-child relationship itself.

Compare id., with *Matter of Visitation of A. A. L.*, 927 N.W.2d 486, ¶ 42 (Wis. 2019) ("a fit parent has a fundamental liberty interest in the care and upbringing of his or her child and therefore to be applied constitutionally, the Grandparent Visitation Decision must withstand strict scrutiny. . . . We conclude that the Grandparent Visitation Statute is narrowly tailored to further a compelling state interest because it requires a grandparent to overcome the presumption in favor of a fit parent's visitation decision with clear and convincing evidence that the decision is not in the child's best interest"). A case discussing the distinct attributes of kinship legal guardianships versus formal adoptions is *New Jersey Div. of Child Protec. and Permanency v. M.M.*, 209 A.3d 227 (N.J. Super. Ct. App. Div. 2019).

367. *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982).

fathered children born of consensual sex who could still be pursued for child support. Should a reasonable effort to collect child support from a biological parent be a necessary condition before a putative parent by consent can be pursued for support?

The following materials explore further some of the heretofore overlooked Due Process issues arising in child custody and support settings involving governmental policies on parentage by consent adversely affecting the "life, liberty or property" interests of expecting legal parents, existing legal parents, and/or putative parents.

A. Expecting Legal Parents

The custody interests of expecting legal parents, that is, those who have "care, custody, and control" interests that will arise at the time of birth,³⁶⁸ or that can (or will likely) arise sometime shortly after birth (as with anticipated adoptions), are negatively impacted, though perhaps not entirely lost, when parents by consent are afforded child custody interests postbirth due to their prebirth interactions with the expecting legal parents who later, as existing legal parents, object. Here, expecting parents include those anticipating future parentage with or without current pregnancies, so that actions can be undertaken either preconception or postconception but prebirth. Such prebirth actions involving expecting parents usually are (or at times must be) undertaken in writing, as with nonsurrogacy or surrogacy assisted reproduction pacts. On occasion they can be effective through oral agreements. They may be effective through express, implied, or presumed consents. They may be judicially recognized prebirth via court orders on future parentage by consent, or postbirth via court orders on current parentage due to prebirth consents to parentage. Prebirth consents may be revocable. When parentage by consent is sustained, the earlier desires of then expecting parents on "care, custody, and control" of their future children are often respected even though their desires on childcare have changed. When parentage by consent is founded on "presumed consent," as described in the ALI Intentional Torts Draft, there is no current or earlier express or apparent consent to infringements on custodial interests.

i. Illustrative Case

Arrangements on future childcare between a person and an expecting legal parent (who could be a prospective pregnant woman, a prospective adoptive parent, or a pregnant woman and/or her spouse), when sustained, illustrate how the Due Process interests of an expecting legal parent can be lost via the parentage

368. There is both commentary and precedent on how prebirth neglect of developing fetuses can prompt losses of parental custody interests at birth for those who would otherwise be legal parents at birth. See, e.g., Jeffrey A. Parness, *Prospective Fathers and Their Unborn Children*, 13 U. OF ARK. LITTLE ROCK L.J. 165 (1991) (reviewing prebirth duties of both prospective mothers and fathers), and Jeffrey A. Parness, *Arming the Pregnancy Police: More Outlandish Concoctions?*, 53 LA. L. REV. 427 (1992) (describing appropriate governmental efforts to promote live and healthy births of children where voluntary pregnancy terminations are not chosen).

by consent doctrine. Such application would recognize postbirth a second (or third) legal parentage in the other person(s). Consider the 2013 Florida Supreme Court ruling in the D.M.T. case.³⁶⁹

T.M.H. and D.M.T. were involved in a committed same sex female relationship from 1995 until 2006.³⁷⁰ They lived together and owned real property as joint tenants.³⁷¹ Additionally, both women deposited their income into a joint bank account which they used to pay their bills.³⁷²

The couple decided to have a baby that they would raise together.³⁷³ When they sought reproductive medical assistance, they learned that D.M.T. was infertile.³⁷⁴ The couple, using common funds, paid a reproductive doctor to withdraw ova from T.M.H., have them fertilized with the sperm of an anonymous donor, and have the fertilized ova implanted into D.M.T.³⁷⁵ The two women told the reproductive doctor that they intended to raise the child together.³⁷⁶ They also went for counseling with a mental health professional to prepare themselves for parenthood.³⁷⁷

A child was born in Florida in January, 2004.³⁷⁸ The couple gave the child a hyphenation of their last names.³⁷⁹ Although the birth certificate lists only D.M.T. as the mother and does not list a father, a maternity test revealed a 99.99% certainty that T.M.H. was the biological mother.³⁸⁰ The couple sent out birth announcements with both their names, declaring, "We Proudly Announce the Birth of Our Beautiful Daughter."³⁸¹ Both women participated at their child's baptism and took active roles in the child's early education.³⁸²

The women separated in May 2006.³⁸³ The child lived with D.M.T. Initially, T.M.H. made regular child support payments, which D.M.T. accepted.³⁸⁴ T.M.H. ended certain support payments when she and D.M.T. agreed to divide the child's time evenly between them.³⁸⁵ They continued to divide the costs of education.³⁸⁶

After the couple's relationship deteriorated, D.M.T. severed T.M.H.'s contact with the girl.³⁸⁷ The child had not distinguished between the biological parent and

369. D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013).

370. *Id.* at 329 (quoting appellate court review of "undisputed facts").

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *D.M.T.*, 129 So. 3d at 329.

376. *Id.*

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *D.M.T.*, 129 So. 3d at 329.

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.* at 329–30.

386. *Id.* at 330.

387. *D.M.T.*, 129 So. 3d at 330.

the birth parent.³⁸⁸ Each woman was simply a parent until D.M.T. absconded with the girl to an undisclosed location after the adult relationship soured.³⁸⁹

Upon locating D.M.T. in Australia, T.M.H. sought to establish parental rights in Florida under Florida laws.³⁹⁰ One Florida statute recognized parentage in a “commissioning couple,” defined as an intended mother and father of a child who will be conceived through assisted reproductive technology using the biological material of at least one of the intended parents, as well as in a father who executed a preplanned adoption agreement.³⁹¹ Otherwise, an egg or sperm donor was said to relinquish any claim to parental childcare and lost any support obligation.³⁹²

In response, D.M.T. alleged that T.M.H. lacked parental rights as a matter of law regardless of the couple’s earlier intentions.³⁹³ The trial court granted D.M.T.’s summary judgment motion, explaining that it felt constrained by the written law while expressing hope that a higher court would reverse since D.M.T.’s actions were “morally reprehensible.”³⁹⁴ The trial court determined that the birth mother and the biological mother, as a same-sex couple, were not a “commissioning couple.”³⁹⁵

The District Court of Appeal reversed, holding that the trial court’s application of the statute violated T.M.H.’s constitutional rights.³⁹⁶ It reasoned that T.M.H.’s protected parental rights could not, consistent with the Florida and U.S. Constitutions, be extinguished through the application of the statute.³⁹⁷ The court also found T.M.H. was not a “donor” under the statute so as to be deprived of parental rights “because she did not intend to give her ova away,” as “she always intended to be a mother to the child born from her ova.”³⁹⁸

The appeals court also rejected the contention that the T.M.H. had relinquished her rights by signing an informed consent form in the reproductive doctor’s office, concluding that the preprinted form did not constitute a waiver.³⁹⁹ The court found that both women had agreed to raise any future child as equal parental partners and that both had complied with that agreement for several years.⁴⁰⁰ The court found it “very revealing” that the birth mother never attempted to assert a waiver claim until she relocated the child to Australia in order to deprive T.M.H. of any further contact.⁴⁰¹

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.* at 333 (FLA. STAT. § 742.14 (2016)).

393. *D.M.T.*, 129 So. 3d at 330.

394. *Id.*

395. *Id.*

396. *Id.* at 331 (citing *T.M.H. v. D.M.T.*, 79 So. 3d 787, 800 (Fla. Dist. Ct. App. 2011) *rev’d*, 129 So.3d 320 (Fla. 2013)).

397. *Id.*

398. *Id.*

399. *D.M.T.*, 129 So. 3d at 331.

400. *Id.*

401. *Id.*

A concurring opinion found that the statute did not apply to T.M.H. because the statute “was not designed to resolve the problem of how to treat children born through in vitro fertilization to a same-sex couple.”⁴⁰²

The Florida Supreme Court deemed the statute did apply to deny parentage to T.M.H.⁴⁰³ But it went on to find the statute “unconstitutional” as applied to T.M.H.⁴⁰⁴ Further, it found that T.M.H. had not waived any parental childcare interest by signing the consent form.⁴⁰⁵

In finding the Florida statute, as written, covered the case so that T.M.H. was a donor who relinquished all maternal rights and obligations, the high court found the legislature intended to limit the exceptions to the general waiver norm for sperm, eggs, and preembryo donors. The policy rationale was to protect those utilizing assisted reproduction technology who were outside the statute.⁴⁰⁶

But the court found the statute to be unconstitutional as applied to T.M.H. The court relied on “long-standing constitutional law that an unwed biological father has an inchoate interest that develops into a fundamental right to be a parent protected by the Florida and United States Constitutions when he demonstrates a commitment to raising the child by assuming parental responsibilities.”⁴⁰⁷ This inchoate interest was said to be possessed by all biological parents, regardless of sex or of the method of conception. But, to be clear, a “biological relationship per se” would not have “constitutional significance” for an unwed biological father, for T.M.H.,⁴⁰⁸ or for any other person whose genetic material prompted a birth.

In determining there was no waiver of rights by T.M.H., the high court deemed the single form before it that was signed by T.M.H. simply served to inform her of “the procedures that would be undertaken, the goals of the procedures and the risks related thereto.”⁴⁰⁹ The form was characterized as “not tailored to characterize the relationship” of D.M.T. and T.M.H.⁴¹⁰

The Supreme Court was not unanimous in its ruling, as it was a 4-3 vote.⁴¹¹ In dissent, Justice Polston found that T.M.H. had, in fact, waived any parental rights via her signature on the two forms provided at the time of donation.⁴¹² One form, an “informed consent donor form,” had been found by the majority as not in the court record.⁴¹³ Justice Polston characterized the majority’s analysis as having “no seeming or logical end point,” opening the door to varying avenues for parentage

402. *Id.* at 331–32 (citing 79 So.3d at 803 (Monaco, J., concurring)).

403. *Id.* at 332.

404. *Id.* at 334.

405. *D.M.T.*, 129 So. 3d at 341, 347.

406. *Id.* at 345–47.

407. *Id.* at 327–28 (relying upon *Lehr v. Robertson*, 463 U.S. 248, 256 (1983)).

408. *Id.* at 328 (quoting *In re Adoption of Doe*, 543 So. 2d 741, 748 (Fla. 1989)).

409. *Id.* at 347.

410. *Id.*

411. See *D.M.T.*, 129 So. 3d. at 347.

412. *Id.* at 351–53.

413. *Id.* at 345.

by consent for future childcare.⁴¹⁴ Illustrative of problematic arrangements were those anticipating two mothers and a father, or two fathers and a mother.⁴¹⁵ Justice Polston was also worried about the impact of the majority's analysis in other settings where expecting parents arrange for parentage by consent, as with "voluntary waivers leading to adoption."⁴¹⁶

Even if there was no waiver by T.M.H., Justice Polston opined the case would require remand as "D.M.T. never conceded that she and T.M.H. had jointly agreed to co-parent."⁴¹⁷ Further, he found the statute not only applicable, but also capable of constitutional application to T.M.H. because her claims were not "so rooted in the traditions and conscience" of U.S. citizenry "as to be ranked as fundamental."⁴¹⁸

ii. As Applied Concerns

The earlier reviews of UPAs and current state laws on the custody interests of parents by consent, as well as the D.M.T. case, demonstrate how there can be negative impacts on the custodial interests of expecting legal parents deemed to have consented prebirth to postbirth custodial parentage in others. Such impacts on the custodial interests of those who, as expecting legal parents, entered into preconception custodial agreements should arise infrequently when children are born of sex. Any prebirth promises by pregnant women, also then expecting legal parents, to share custody of later-born children, whether made to biological fathers or to others, are seemingly more likely to be used by the promisees in postbirth attempts to secure custodial interests over the objection of those who by then have become legal parents.

Much more likely, there will be disputes about the breadth of the custodial interests of existing parents who object to enforcing their preconception childcare agreements involving children to be born of assisted reproduction. Requests for postpregnancy but prebirth judicial declarations of parentage by consent leading to postbirth custodial interests are even imaginable.⁴¹⁹ Cases like D.M.T. are more difficult where prebirth consent by the birth mother alone, that is, without the use of the nonbirth mother's ova, is employed to justify future custodial parentage interests in the nonbirth mother. Here there is no Lehr-related biological parentage opportunity interest.

Comparably, there can be disputes about the breadth of the custodial interests of existing parents in formal adoptions who then object to enforcing their preadoption agreements on future shared custody, as well as disputes about the obligations of those who agreed with prospective adopting parents to future shared

414. *Id.* at 356.

415. *Id.*

416. *Id.*

417. *D.M.T.*, 129 So. 3d at 350.

418. *Id.* at 355 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

419. It is possible that some agreements on future parentage will be sustained when entered into by people who were not then expecting parents. Consider when to be a potential grandparent agrees with an offspring who is a potential parent to assume, if there is no later judicial bar, parental (or parental-like) caretaking should the offspring die or otherwise be unable to fully childcare for his or her later conceived and born child.

support. Here, the enforcement of such agreements⁴²⁰ may depend on whether or not the agreements embodied specific children who had been designated for adoption.⁴²¹

As for the UPAs on an expecting legal parent who consents to future custodial parentage in another for a child to be born of sex, seemingly the 1970, 2000, and 2017 UPAs, and their state law counterparts, on the marital parentage presumption (explicitly expanded in 2017 to include female spouses of birth mothers) are relevant. Here, at the time of marriage, seemingly inferred consents arise under law by a future birth mother and her spouse to automatic, shared custodial parentage.⁴²² Though such parentage by consent is rebuttable, it is not necessarily disestablished when the spouse has no biological ties, where rebuttal is sought by the birth mother, the spouse, or a biological parent other than the birth mother.

Relevant as well for children born of sex are the few state laws allowing VAPs to be undertaken by expecting birth mothers and those with whom she signs as second expecting parents.⁴²³ Again, even while such VAPs may be subject to postbirth challenges, as by unwed biological fathers with parentage opportunity interests under *Lehr*, the challengers may not always succeed even though there are no biological ties in the signing nonbirth parents. So, a VAP signed and filed by a female spouse of an expecting birth mother, per the 2017 UPA, becomes effective “on the birth of the child” and is not void as of the time of the signing where the unwed biological father is not an expecting presumed parent (i.e., not wed to the expecting birth mother), an acknowledged parent, or an adjudicated parent.⁴²⁴

As for the UPAs on an expecting parent who consents to future custodial parentage in another for a child to be born of nonsurrogacy assisted reproduction,

420. Possible enforcement of agreements on future shared custody with prospective adopters, of course, depends on laws allowing formal adoptions without the termination (by waiver or otherwise) of the parental interests of all existing or expecting legal parents.

Where such agreements are enforceable, U.S. State laws differ on the circumstances allowing revocations of earlier consents by expecting or existing legal parents to later formal adoptions by others. For example, consents to adoptions are irrevocable upon execution unless there was fraud or duress in Illinois. 750 ILL. COMP. STAT. ANN. 50/11(a) (West 2020). Revocations within 30 days are recognized in Pennsylvania, 23 PA. STAT. AND CONST. STAT. ANN. § 2711(c)(1) (West 2020), while there is a 10 day revocation period in Arkansas, ARK. CODE ANN. § 9-9-209(b)(1) (West 2020). In Kentucky, a consent to an adoption must come at least 72 hours after birth; once done, it is irrevocable 72 hours after it is signed. KY. REV. STAT. ANN. § 199.500(5) (West 2020).

421. *See, e.g.*, *K.G. v. C.H.*, 79 N.Y.S.3d 166 (N.Y. App. Div. 2018) (agreement needs to be in effect at the time a certain child is identified for a potential adoption). Where such agreements are unenforceable, nonadoptive parentage may be established through such doctrines as equitable estoppel or *de facto* parentage which are dependent upon postadoption childcare and not on express childcare agreements.

422. In some states the spousal parentage presumption arises at the time of conception, while elsewhere it arises at the time of birth. *See, e.g.*, GA. CODE ANN. § 19-7-20(a) (West 2020) (child “born in wedlock or within the usual period of gestation thereafter”); ARIZ. REV. STAT. ANN. § 25-814(a)(1) (2020) (marriage “at any time in the ten months preceding the birth”); and MICH. COMP. LAWS ANN. § 722.1433(e) (West 2020) (marriage at time of conception or birth).

423. *See, e.g.*, VT. STAT. ANN. tit. 15C § 304(b)–(c) (West 2018) (an acknowledgment of parentage may be signed and filed before the birth of a child, but then takes effect on the date of the child’s birth).

424. 2017 UPA, *supra* note 29, at §§ 304(b)–(c), 302(b)(1)–(2).

the 1973 UPA is silent as to nonmarital births.⁴²⁵ The 2000 UPA, updated in the 2017 UPA only in its application to same-sex as well as opposite sex couples,⁴²⁶ recognizes that a unwed gamete donor is a parent if there is consent.⁴²⁷ A spouse of a birth mother, even if a gamete donor, may attain nonparental status under the 2017 UPA by showing a lack of consent.⁴²⁸

As for the UPAs on an expecting parent, like a gamete donor who consents with another to shared future custodial parentage for a child to be born to a surrogate via assisted reproduction, the 1973 UPA is silent.⁴²⁹ The latter two UPAs speak to preconception surrogacy pacts. The 2017 UPA-like the 2000 UPA as amended in 2002-distinguishes between genetic ("traditional") and gestational surrogacy.⁴³⁰ Unlike its 2000 predecessor, the 2017 UPA imposes differing requirements for the two surrogacy forms, with "additional safeguards or requirements on genetic surrogacy agreements,"⁴³¹ as only they involve a woman giving birth while "using her own gamete."⁴³²

State statutes, as with the UPAs, generally recognize the implicit consents of future birth mothers as expecting parents, and their spouses, to custodial parentage in the spouses, whether the marriages preceded or postdated pregnancies. Spousal parentage is generally presumed. State laws, however, differ on the rebuttal norms attending spousal parentage.⁴³³ Thus, some consents and presumptions are more enduring than others. For example, rebuttals are easier in Mississippi and Iowa.⁴³⁴ Rebuttals are more difficult in Pennsylvania and Louisiana.⁴³⁵ Marital parentage presumption laws that limit, or disallow altogether,

425. 1973 UPA, *supra* note 29, at § 5. Even as to marital births, it only speaks to assisted reproduction employed by a married woman "under the supervision of a licensed physician," with the consent of her husband and where the semen is provided by a man who is not the projected birth mother's husband. *Id.*

426. 2017 UPA, *supra* note 29, at Comment preceding § 701.

427. *Id.* at §§ 702-03.

428. *Id.* at § 705.

429. *See* 1973 UPA, *supra* note 29.

430. 2017 UPA, *supra* note 29, at Comment preceding § 801.

431. *Id.*. The common safeguards or requirements for all surrogacy pacts are found in *id.* at §§ 802-07. *See also id.*, at §§ 808-812 (special requirements for gestational surrogacy agreements) and §§ 813-818 (special requirements for genetic surrogacy agreements).

432. *Id.* § 801(1). Gestational surrogacy covers births to a woman who uses "gametes that are not her own." *Id.* § 801(2). The special rules for gestational surrogacy pacts are found in *id.* §§ 808-12, while the special rules for genetic surrogacy pacts are found in *id.* §§ 813-18.

433. *See, e.g.,* Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 *Fam. L.Q.* 55, app. F at 94-95 (2003).

434. *See In re Waites*, 152 So.3d 306, 314 (Miss. 2014) ("natural-parent presumption" of biological father in a child born to a woman married to another can only be overcome by "clear and convincing evidence of abandonment, desertion, immoral conduct detrimental to the child, [or] unfitness;" child was born in 2004 and biological father first sued for custody in 2011); *Callender v. Skiles*, 591 N.W.2d 182, 192 (Iowa 1999) (state due process interest of alleged biological father in challenging marital paternity presumption).

435. *See Strausser v. Stahr*, 726 A.2d 1052, 1053-55 (Pa. 1999) (unwed biological father cannot rebut marital paternity presumption if marriage continues unless he can prove the husband's lack of access to his wife during the period of conception or the husband's sterility); *L.J.D. v. M.V.S.*, 212 So.3d 581, 584 (La. Ct. App. 2017) (biological father has no more than one year to seek to rebut a marital paternity presumption).

rebuttal petitions by biological fathers can prompt state constitutional challenges where they operate to preclude the biological fathers' custodial interests. Paternity opportunity interests, recognized in *Lehr*, though not necessarily available to adulterers per the U.S. Supreme Court's Michael H. ruling, have been recognized under state constitutional Due Process liberty interests.⁴³⁶

Paternity opportunity interests, which can prompt custodial interests, for unwed biological fathers in children born of sex to either wed or unwed birth mothers can also be thwarted by the prebirth utilization of VAP processes by the prospective birth mothers and intended parents without genetic ties. The prebirth thwarting of such Due Process paternity opportunity interests should be discouraged by the VAP processes, as otherwise one expecting parent (like a pregnant woman) can foreclose the parentage interests of another expecting parent (like an actual biological father who is a prospective legal parent).⁴³⁷ In *Lehr*, the U.S. Supreme Court recognized that U.S. state parentage schemes were suspect when they were "likely to omit many responsible" interested putative biological fathers,⁴³⁸ especially where the schemes facilitated the "fraudulent practices" by birth mothers causing such fathers "not to protect" their potential interests.⁴³⁹ Prebirth VAP laws that do not allow many, if any, challenges by actual biological fathers of children born of sex to the parentage of the VAP signing nonbirth mothers would be such a scheme, warranting a label the Court called "procedurally inadequate."⁴⁴⁰ Here, as applied constitutional challenges seem viable. Consider, for example, the unfairness of a very short repose period for any VAP challenge by an actual biological father who did not know of a prebirth VAP that took effect at birth, and who was informed repeatedly prebirth and postbirth that he was not to be, or was not, the biological parent.

Comparable thwarting via VAPs of the parentage opportunity interests of nonbirth biological parents can arise for children born of assisted reproduction. As with actual biological fathers of children born of consensual sex, a woman whose ova was used to prompt a pregnancy for and birth to another woman has, per *Lehr* according to the D.M.T. ruling, parentage opportunity interests. Such interests should be recognized, for example, when the donor's understanding with the projected birth mother of her intended second parentage is shown, together with a showing of no intended parentage in the sperm donor (thus avoiding any no three parent bar). Similarly, a sperm donor may have an understanding with the projected

436. See, e.g., Callender, 591 N.W. 2d at 188–92 (following Justice Brennan's dissent in *Michael H.* in ruling on Iowa Due Process claim of putative biological father of a child born into an intact marriage).

437. See, e.g., *Unnatural VAPs*, *supra* note 67, at 30–31.

438. *Lehr v. Robertson*, 463 U.S. 248, 263–64 (1983).

439. *Lehr*, 463 U.S. at 265 n.2. Fraudulent practices are to be distinguished from nonfraudulent actions by birth mothers, like failure to notify the biological fathers of the pending adoption proceedings involving their children. See, e.g., Purvis, *supra* note 14, at 558 (reading *Lehr* to regard as "irrelevant" the birth mother's prevention of the biological father having time to establish a parent-child relationship).

440. *Lehr*, 463 U.S. at 264 n.3.

birth mother of his later second parentage by consent. In each setting, under the 2017 UPA and some current U.S. state laws, the birth mother's spouse at the time of the birth can pursue a VAP,⁴⁴¹ which would then be difficult for the donor of genetic material, an alleged parent by consent, to override.⁴⁴² In some instances at least, such thwarting of intended parents' child custody interests should prompt significant Due Process concerns.

Some U.S. state statutes, like the UPAs, further address agreements on future custodial parentage for children to be born of assisted reproduction, both in nonsurrogacy and surrogacy settings. In nonsurrogacy assisted reproduction birth settings in California, there is a writing requirement by an intended parent beyond the birth mother. Compliance is greatly facilitated by statutory forms, which are discretionary, but which, if used, constitute the necessary writing.⁴⁴³ The availability of such forms is quite useful in assuring actual understanding of, and consent, to postbirth custodial arrangements. Alternately, state lawmakers can help assure actual understanding of the custodial consequences of earlier agreements upon nonsurrogacy births, as well as reduce the numbers of postbirth parentage disputes, by requiring certain forms to be used in such agreements. In such agreements there would be made declarations as to future intended parentage.⁴⁴⁴ The consequences of failing to employ the required forms should lead to equitable common law decisionmaking on a case-by-case basis, best done with some explicit statutory guidelines.

In surrogacy assisted reproduction birth settings, some U.S. state statutes, like the recent UPAs, recognize both genetic ("traditional") and gestational surrogacy. Where each is recognized, there may be different standards regarding informed consents.⁴⁴⁵ Elsewhere, as in Illinois, there are only statutorily recognized gestational surrogacy pacts.⁴⁴⁶ In Illinois, significant eligibility and contract terms are mandated, as are certain requirements insuring informed consents by all contracting parties.⁴⁴⁷ As with nonsurrogacy assisted reproduction, state-recognized forms providing avenues for intended parentage declarations would

441. 2017 UPA, *supra* note 29, §§ 204(a)(1), 301 (a "presumed parent," i.e., a spouse of the birth mother at the time of birth can sign a VAP).

442. Under the 2017 UPA, § 602(4), an individual whose parentage of a child is to be adjudicated can challenge a VAP, under § 610(b), but must only do so within 2 years of the VAP and only "if the court finds permitting the proceeding is in the best interest of the child."

443. CAL. FAM. CODE § 7613(a), 7613.5(a) Form 1 (2020).

444. *See, e.g.*, Jeffrey A. Parness, *Formal Declarations of Intended Childcare Parentage*, 92 NOTRE DAME L. REV. ONLINE 87 (2017).

445. For example, there are both genetic and gestational surrogacy pacts in Washington state. WASH. REV. CODE § 26.26A.700 (2018). While births to gestational carriers prompt legal parentage at birth for intended parents, *id.* § 26.26A.740, genetic surrogates can withdraw their consents to intended parentage in others any time within 48 hours after birth, *id.* § 26.26A.765.

446. *See, e.g.*, Gestational Surrogacy Act, 750 ILL. COMP. STAT 47/1 -75 (2005)(per section 20(b)(1) and (2), a single intended parent, or one of two intended parents, need to be a "gametes" contributor and needs to have "a medical need for the gestational surrogacy"). *See also* N.J. STAT. ANN. §§ 9:17-61 (West 2018) (gestational carriers only); N.H. REV. STAT. ANN. § 168-B:1 (West 2015) (gestational carriers only).

447. 750 ILL. COMP. STAT 47/25 (two witnesses, information transfers, and a writing).

reduce litigation and prompt more certainty regarding the effects of conduct involving future parentage by consent.

B. Existing Legal Parents

The custody interests of existing legal parents, that is, those whose “care, custody, and control” interests arose or were established at birth or thereafter, are negatively impacted, though not entirely lost, when parents by consent are awarded custodial interests due to the earlier actions by the existing (i.e., postbirth) parents who now object. Such postbirth actions prompting parentage by consent can (or at times must) be written. They may be oral. They may constitute express, implied, or presumed consents. They may be revocable. Relevant actions can be undertaken in the very judicial proceedings wherein parentage by consent is sought, or they can occur before any judicial proceedings are commenced.

i. Illustrative Case

The 2004 California Supreme Court decision in *In re Jesusa V.*⁴⁴⁸ illustrates how a state law on parentage by consent can prompt shared “care, custody, and control” interests in a child born of sex to a birth mother, an existing legal parent, and her spouse, himself a presumed parent and thus an existing legal parent. Jesusa V. was born in 1999 to Jesusa, who was married to Paul at the time.⁴⁴⁹ Jesusa had five other children by Paul.⁴⁵⁰ The couple had separated before Jesusa V.’s birth.⁴⁵¹ Heriberto was Jesusa V.’s biological father.⁴⁵² An unusual living arrangement ensued whereby Jesusa V. and her mother lived with Heriberto during the week and with Paul and Jesusa’s other children on weekends.⁴⁵³

Jesusa and Heriberto had a tempestuous relationship.⁴⁵⁴ Before Jesusa V.’s second birthday, Heriberto was arrested for raping Jesusa.⁴⁵⁵ Jesusa V. was taken into protective custody on April 1, 2001; the Los Angeles County Department of Children and Family Services then petitioned the juvenile court to declare Jesusa V. a dependent of the court.⁴⁵⁶ The court appointed counsel to represent Heriberto,

448. *In re Jesusa V.*, 85 P.3d 2, 11 (Cal. 2004) (the mother’s sometime live-in boyfriend is also a presumed parent, via a statute on residency/ hold parentage. CAL. FAM. CODE § 7611(d) (West 2020)). Later cases include *In re Danny M.*, A138844, 2014 WL 2465116 (Cal. Ct. App. June 3, 2014) and *In re L.L.*, 220 Cal. Rptr. 3d 904 (Cal. Ct. App. 2017).

449. *In re Jesusa V.*, 85 P.3d at 27 (Kennard, J., dissenting).

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.*

455. *In re Jesusa V.*, 85 P.3d at 27 (Kennard, J., dissenting).

456. *Id.* at 6 (majority opinion).

who denied the rape allegations and asserted that he, not Paul, was Jesusa V.'s legal father.⁴⁵⁷ Heriberto was later pleaded no contest to the charge of rape.⁴⁵⁸

A paternity hearing established Paul was a sergeant in the Air Force in San Diego.⁴⁵⁹ Paul and Jesusa had been married for nearly 18 years, though they often lived apart for the last 3 years.⁴⁶⁰ Jesusa had recently lived with Paul, however, "when her mother came to San Diego to visit her other children."⁴⁶¹ The most recent visit occurred in March, 2001.⁴⁶² As to parenting, Heriberto was not only Jesusa V.'s biological father, but also held himself out as her father and received her into his home.⁴⁶³ Paul also held himself out as Jesusa V.'s father, received her into his home, and treated her as his own.⁴⁶⁴ As well, Paul lived with Jesusa V. "for a significant period of time in her young life."⁴⁶⁵

At the hearing on July 17, 2001, none of the parties were personally present.⁴⁶⁶ Jesusa, distraught over the paternity proceedings, had walked out of the courtroom, followed by Paul.⁴⁶⁷ With Heriberto's lawyer present, the court ruled that because Heriberto was not Jesusa V.'s legal father but a "mere biological father," he was "not even entitled to notice and an opportunity to be heard."⁴⁶⁸ Because the attorneys representing Paul and the mother did not challenge the allegations of biological ties in the dependency petition, the court found them to be true.⁴⁶⁹ There were no blood tests entered into evidence.⁴⁷⁰ The court ordered the child placed with Paul; allowed Jesusa unmonitored visits; and forbade Heriberto from having any contact with Jesusa V.⁴⁷¹

In a 4-3 ruling, the California Supreme Court affirmed the custody order favoring Paul.⁴⁷² All seven justices examined the varying California statutes on paternity preferences, categorical and otherwise. They all agreed that both Paul and Heriberto were "presumed" natural fathers under the California Family Code.⁴⁷³ Paul qualified because Jesusa V. was born to his wife.⁴⁷⁴ Both Paul and Heriberto qualified because each had received Jesusa V. into his home and openly held her out as his natural child.⁴⁷⁵ Thus, the residency/ hold out parentage by

457. *Id.* at 27 (Kennard, J., dissenting).

458. *Id.* at 6-7 (majority opinion).

459. *Id.* at 7.

460. *Id.*

461. *In re Jesusa V.*, 85 P.3d at 7.

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.*

466. *Id.* at 28 (Kennard, J., dissenting).

467. *In re Jesusa V.*, 85 P.3d at 28 (Kennard, J., dissenting).

468. *Id.*

469. *Id.*

470. *Id.* at 20 (majority opinion).

471. *Id.* at 7.

472. *Id.* at 27.

473. *Id.* at 11 (citing CAL. FAM. CODE § 7611 (2020)).

474. *Id.* at 11.

475. *Id.* *But see* Greer *ex rel.* Farbo v. Greer, 324 P.3d 310 (Kan. Ct. App. 2014) (employing KAN. STAT. ANN. § 23-2208(a)(5) and (c) to a similar paternity showdown in Kansas involving a marital child, where the unwed biological father was a presumed parent because of positive genetic tests).

consent doctrine, initially at least, applied to the two men, even if neither man was the biological father of the child born of sex. Because eventually there could be “only one presumed father,”⁴⁷⁶ another Code provision became operative. It said that the choice between two competing presumed fathers must be determined on “the weightier considerations of policy and logic.”⁴⁷⁷ These vague statutory norms on choosing between two fathers led to a split in the court. Four justices chose Paul,⁴⁷⁸ while three chose Heriberto, though at least two of them recognized “the juvenile court may well have been right that Paul rather than Heriberto was likely to be a better parent to Jesusa.”⁴⁷⁹ The choice of Heriberto over Paul by the three dissenters was grounded on the view that the relevant statutes pointed to determining paternity by biological ties.⁴⁸⁰

The majority agreed with the juvenile court judge that the prevailing policy involved the preservation and protection of the “family unit” and of “parent/child relationships which give young children social and emotional strength and stability” rather than the recognition of “biological ties.”⁴⁸¹ It found that the man who provides the stability and permanence is more important to a child than the man who has mere biological ties,” especially since Heriberto had taken no “legal steps to formalize his relationship” to Jesusa V. until after the alleged rape and the filing of the dependency petition.⁴⁸² The failure of Heriberto to take formal action earlier was important to the four justices as a Family Code section declared that “a completed voluntary declaration of paternity . . . that has been filed with the Department of Child Support Services shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court.”⁴⁸³ The section also said that this voluntary declaration “shall be recognized as a basis for the establishment of an order for child custody, visitation and child support.”⁴⁸⁴ Voluntary paternity declarations in California, technically at least, can only be pursued by men with actual or alleged biological ties. Heriberto may have

476. *Jesusa V.*, 85 P.3d at 11 (quoting *In re Kiana A.*, 113 Cal. Rptr. 2d 669, 675 (Ct. App. 2001).

477. CAL. FAM. CODE § 7612(b) (2020); *see also* CAL. FAM. CODE § 7612(c) (2020) (opening the door by the California legislature to three possible parents by indicating that in a showdown between two presumed parents where there is also a birth mother, no choice between the two presumed parents need be made where “recognizing only two parents would be detrimental to the child”); *see* Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007) for a discussion on why lawmakers should recognize at times more than 2 parents at any one time.

478. *Jesusa V.*, 85 P.3d at 12.

479. *Id.* at 29 (Kennard, J., dissenting, concurred in by Werdegar, J.).

480. *Id.* at 30; *id.* at 32 (Chin, J., dissenting).

481. *Id.* at 15 (majority opinion).

482. *Id.* at 16. *But see* S.M. v. E.C., F065817, 2014 WL 2921905, at *13 (Cal. Ct. App. June 27, 2014) (Poochigian, J., concurring and dissenting) (suggesting federal constitutional superior parental rights might demand male biological parents always prevail over presumed parents when the biological parents have established “sufficiently profound” actual relationships with their biological offspring born of sex).

483. *Jesusa V.*, 85 P.3d at 17 (citing CAL. FAM. CODE § 7573 (2011)).

484. CAL. FAM. CODE § 7573 (2011).

won by a 7-0 vote if he had signed a voluntary paternity declaration, regardless of the best interests of Jesusa V.⁴⁸⁵

The Jesusa V. ruling demonstrates how Paul, an existing legal parent, may lose - or need to further share if three legal parents are recognized - "care, custody and control" of Jesusa V. because of the actions of Jesusa and Heriberto that may have been largely beyond his control.⁴⁸⁶ Seemingly, there was no actual, informed and wholly voluntary consent by Paul to share, along with Jesusa, custodial interests in Jesusa V. with Heriberto. But by not halting, or not trying to halt,⁴⁸⁷ the partial common residence of Jesusa V., Jesusa and Heriberto, assuming he was aware of it, did Paul inferentially agree to Heriberto's later possible parentage of Jesusa V., as did Jonathan Lehr to Richard's possible parentage when he failed to register his sexual encounter with Lorraine with the state? Is it not likely that many existing legal parents like Paul, and potential legal fathers like Jonathan, have no knowledge, or even suspicions, of the laws that can negatively impact their constitutional childcare interests/opportunities? Without an ability to infer from the facts Paul's actual consent to Heriberto's possible parentage, and with no reasonable basis for Heriberto to believe Paul consented to Heriberto's later possible parentage, is there justification to presume consent by Paul to the intentional residency/hold out acts of Jesusa and Heriberto that prompted, under state law, "presumed" parentage in Heriberto?⁴⁸⁸

Regardless of the relevant laws, some birth mothers, like Jesusa, may subjectively believe that their intimate partners, like Heriberto, are simply helping

485. Comparable showdowns between a husband and a person other than the birth mother involving marital children occur elsewhere. *See, e.g., Greer ex rel. Farbo v. Greer*, 324 P.3d 310, 321 (Kan. App. 2014) (biological father and husband). And comparably, there are no showdowns when one of the two men seeking parentage under law took formal action, not only via a voluntary declaration, but also via a secured court judgment as to parentage, like in *In re Mia G.*, 2014 WL 3510747 (Cal. Ct. App. July 16, 2014).

486. One precedent would find Paul could not ever lose his custodial parentage to Heriberto since the recognition of a third custodial parent would always violate the parental rights of two existing and fit legal parents. *Bancroft v. Jameson*, 19 A.3d 730 (Del. Fam. Ct. 2010). *See also T.H. v. J.R.*, 84 N.Y.S.3d 676 (N.Y. Fam. Ct. 2018) ("psychological parent" petitioner has no standing to seek custody as biological father, who shared custody with birth mother, never consented to a possible third parent). *But see* *Schnedler v. Lee*, 445 P.3d 238 (Okla. 2019) (in assisted reproduction setting, a sperm donor need not acquiesce or encourage the development of "in loco parentis" status invited by the birth mother, even though there was no record that the sperm donor waived his parental interests; in the case, the sperm donor had maintained "some relationship- albeit minimal and covert" with his daughter).

487. Had Paul tried to halt, via court proceedings, any prospective custodial parentage in Heriberto arising from common residency/hold out, he may have lacked standing. *See* CAL.FAM. CODE § 7611(d) (home residence and hold out, which need not start at birth, can prompt presumed parentage) and 7630(a)(2) (no explicit recognition of standing to seek declaration of nonexistence of parent-child relationship though there is common residence).

488. Without Paul's consent, and even without any residency/hold out by Heriberto, would Paul still lose the paternity battle to Heriberto should the Lehr ruling on seizure of the parental opportunity interests by unwed biological fathers be found met by Heriberto, as seemingly was done by one dissenter?

In re Jesusa V., 85 P.3d at 54 (J. Chin, dissenting) (majority's reading of statutes is "unconstitutional").

around the house, as Professor Wilson has observed.⁴⁸⁹ Those subjective beliefs will not, however, bar custodial parentage by consent at times for the partners, as again there is recognized presumed consent by the existing legal parents should there be found residency/hold out by their romantic partners or others.⁴⁹⁰ Assuming Paul disestablished his marital parentage and did not urge residency/ hold out parentage, *Jesusa*-by opening her doors to Heriberto-effectively opened the door to his shared or exclusive custody of *Jesusa V.*, assuming-of course-the alleged rape was never proven.

ii. As Applied Concerns

Beyond the *Jesusa V.* ruling, the earlier reviews of UPAs and current U.S. state laws on establishing custodial interests in parents by consent demonstrate how there can be further negative impacts on the custodial interests of existing parents who then object to their earlier consents, or who object to the consents given by other legal parents (as with Paul's childcare interests impacted by *Jesusa's* consent to reside with Heriberto).

As for the UPAs, they all recognize that unwed mothers who gave birth to children born of sex effectively can consent, as existing legal parents, to shared custodial parentage with some who they marry after birth. The circumstances include that the marriages occur within certain times after the births. The 1973 UPA expressly recognizes a marital parent presumption in a man who marries a birth mother and who recognizes her child in some writing, which need not be filed with the state.⁴⁹¹ The 2000 UPA recognizes a marital parent presumption in a man who marries a birth mother, with a similar writing necessary.⁴⁹² The 2017 UPA recognizes a marital parent presumption, but in either a man or woman who marries a birth mother, again with a similar writing requirement.⁴⁹³ The writing requirements invite unintended custodial consequences for existing legal parents unaware of the parentage presumption. An existing legal parent may well view a new spouse as a stepparent, not a coequal parent even when the new spouse has promised child support in a writing.

When marriages are undertaken by soon-to-be spouses with minor children, U.S. state laws should prompt awareness in the existing parents of any parentage (presumption) upon marriage. For example, notices of the laws on (presumptive) spousal parentage should accompany issuances of marriage certificates to couples

489. Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1158 (2010) (critical of childcare parentage laws that lead to "full-blown parental rights based only on a bare showing of time-in residence and chores performed for a child").

490. See FAM. § 7611(d) (home residence and hold out, which need not start at birth, can prompt presumed parentage).

491. 1973 UPA, *supra* note 29, at § 4(a)(3) (writing may be a paternity acknowledgment, a birth certificate recognition, or a written voluntary child support promise).

492. 2002 UPA, *supra* note 31, at § 204(a)(4).

493. 2017 UPA, *supra* note 29, at § 204(a)(1)(C).

expecting the birth of a child. Laws should also prompt more significant awareness by existing legal parents of any residency/hold out and/or de facto parentage doctrines.⁴⁹⁴ Such reforms more reasonably allow state lawmakers to utilize actual inferred consent, apparent consent and/or presumed consent principles in parent by consent norms.

All three UPAs, though varied in their requirements, recognize a form of residency/hold out parentage. Unlike postbirth marriages, there are no writing requirements, resulting often in parentage arising from the presumed consents of existing legal parents. But, as with Jesusa, does residence with one's child, and with an intimate partner (or even a nonintimate family member) who holds out the child as his/her own for such purposes as school pickups, medical appointments, daycare drop-offs, and swimming lesson registrations, mean an existing legal parent, like Jesusa, has welcomed the establishment of the partner (or family member) as a co-parent? Any best interest analysis serving to limit residency/hold out parentage establishments would focus on the child's needs, not on the loss of custodial interests for the existing legal parent. In the absence of significant rebuttal opportunities for existing legal parents involving such (presumed) parentage once initially established, are losses of an existing legal parent's Due Process interests in the "care, custody and control" of a child adequately justified through a "presumed consent" analysis? Even if justification is sometimes warranted, should the burden of proof on residency/ hold out be more than preponderance of the evidence because existing parental Due Process interests are at stake?⁴⁹⁵

All three UPAs recognize some form of VAPs available to existing legal parents and others who will effectively become, upon signing, parents by consent to children born of sex. As with prebirth VAPs, postbirth VAPs at times thwart the paternity opportunity interests of unwed biological fathers. Again such VAPs are especially problematic when undertaken with "fraudulent practices."⁴⁹⁶

C. Putative Parents by Consent

The financial interests of putative parents by consent are negatively impacted when expecting or existing legal parents are awarded support for prebirth pregnancy expenses and/or postbirth childcare expenses due to earlier actions by those now deemed financially responsible parents by consent. Actions prompting child support from nonparents newly deemed parents by consent can (or at times must) be written. They may be oral. They may constitute express, implied, or

494. Thanks to Professor Marc D. Falkoff for the phrase, and the thoughtful discussion thereon.

495. While preponderance of the evidence is the standard used in some common law marriage cases where it is "unlikely that an express agreement to be married will exist," *In Re Marriage of Hogsett and Neale*, No. 17CA1484, 2018 WL 6564880, at ¶¶ 13–14, (Col. App. VI. Dec. 13, 2018), there is no comparable infringement on an existing "life, liberty, or property" interest as there is with a residency/hold out parentage by consent finding and as a marriage can more easily be undone than can a coparent's custodial interests.

496. *Lehr v. Robertson*, 463 U.S. 248, 265 (1983). Problematic, as well, are VAPs signed by nonbirth mothers "without informed consent." See, e.g., Tianna N. Gibbs, *Paper Courts and Parental Rights: Balancing Access, Agency, and Due Process*, 54 Harv. C.R.-C.L. L. Rev. 549, 556 (2019). See also Caroline Rogus, *Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws*, 21 Mich. J. Gender & L. 67, 115–17 (2014).

presumed consents. They may be revocable. Relevant actions can be undertaken by some parents by consent in the very judicial proceedings wherein parentage for support purposes is sought (as via written agreements), or they can be undertaken long before any childcare proceedings have been commenced.

i. Illustrative Case

The 2000 North Dakota case of *Johnson v. Johnson*⁴⁹⁷ illustrates how a state parentage by consent law can prompt child support obligations for one with no biological or formal adoptive ties. In the case the Johnsons, Antonyio and Madonna, had married in September 1986.⁴⁹⁸ No child was born during this marriage.⁴⁹⁹ 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.⁵⁰⁰ While Jessica was scheduled to remain with the Johnsons for only a month, ten years later Jessica was still living with the Johnsons.⁵⁰¹ Until she was nine Jessica believed that Madonna and Antonyio were her biological parents.⁵⁰² 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.⁵⁰³ The Johnsons did initiate two separate formal adoption proceedings, one in New Jersey and one in Kentucky (where Jessica's natural parents lived).⁵⁰⁴ But neither proceeding was completed.⁵⁰⁵ From August 1988 to May 1997, the Johnsons resided primarily in New Jersey and Florida, with Antonyio occasionally deployed overseas.⁵⁰⁶

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

497. *Johnson v. Johnson*, 617 N.W.2d 97 (N.D. 2000).

498. *Id.* at 100.

499. Brief for Appellant at ¶ 1, *Johnson v. Johnson*, 617 N.W.2d 97 (N.D. 2000) (No. 990353).

500. *Johnson*, 617 N.W.2d 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 Johnsons requesting help and the Johnsons 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).

501. *Id.*

502. Brief for Appellant, *supra* note 499 at ¶ 4, (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]'").

503. *See id.* at ¶ 3-4.

504. *Johnson*, 617 N.W.2d at 100.

505. *Id.* (due to the Johnsons' military work transfers).

506. *See id.* at 100-01.

away; she never did.⁵⁰⁷ In June 1998, Antonyio was sent to Grand Forks, North Dakota.⁵⁰⁸ By then, Madonna and Jessica were living in Kentucky.⁵⁰⁹

Antonyio filed for divorce in North Dakota in July 1998.⁵¹⁰ There, Madonna sought child support for Jessica, whom she urged had been equitably adopted by herself and Antonyio.⁵¹¹ From 1997 to some time in 1998, Antonyio voluntarily sent Madonna \$500.00 per month for support; the North Dakota trial court ordered support to continue from July 1998 until the beginning of the divorce trial in April 1999, at which point Antonyio stopped making support payments.⁵¹²

The North Dakota Supreme Court concluded that “North Dakota law clearly recognizes the doctrine of equitable adoption” founded on “contract to adopt” principles.⁵¹³ The court cited North Dakota cases on “contract to adopt” in inheritance settings.⁵¹⁴ Yet, it recognized that the contract principles in the two settings should differ, with a more significant commitment to continuing parent-like care necessary in the child support setting.⁵¹⁵

Without any North Dakota cases directly on point, the North Dakota high court referenced three out-of-state cases imposing a child support duty upon an equitable adoption parent. In one, 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 the child.⁵¹⁶ In another, 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;

507. *Id.* See generally Brief for Appellant, *supra* note 499 at ¶ 4. (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).

508. Brief for Appellant, *supra* note 499 at ¶ 4.

509. *Johnson*, 617 N.W.2d at 101.

510. *Id.*

511. *Id.*

512. *Johnson v. Johnson*, 652 N.W.2d 315, 318 (N.D. 2002).

513. *Johnson*, 617 N.W.2d at 101.

514. *Id.* at 102–03 (cases cited to include *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); and *Geiger v. Estate of Connelly*, 271 N.W.2d 570 (N.D. 1978)). It also cited *Cegłowski v. Zachor*, 102 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).

515. *Johnson*, 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.

516. *Id.* at 104 (finding “instructive” *Wener v. Wener*, 312 N.Y.S. 2d 815, 817–18 (N.Y. App. Div. 1970)).

and, acted to terminate the parental rights of the child's natural father.⁵¹⁷ In a third, a soon-to-be ex-husband was the obligor because he brought the child to Maryland from Iran; made adoption promises to his wife and to the Republic of Iran; and lived with the child for four months.⁵¹⁸ While employing these cases, the Johnson court recognized that there were differing approaches elsewhere.⁵¹⁹

The Johnson court determined that North Dakota public policy supported application of an equitable adoption doctrine "to impose a child support obligation under certain circumstances."⁵²⁰ It found that no North Dakota statutes forbade it.⁵²¹ All high court members failed to address in great detail, however, the distinctions between Antonyio's legal parenthood in child support and inheritance settings,⁵²² as only in the latter was there a "contract to adopt" approach. Seemingly, the court deemed it more important for children to access support than to access inheritance from those who acted as parents though without any plans to adopt. The Court remanded for resolution of the factual issues germane to the North Dakota equitable adoption doctrine on child support.⁵²³

Upon remand, the lower court found that Antonyio and Madonna had equitably adopted Jessica. It then set child support for Antonyio under North Dakota law.⁵²⁴ The case returned again to the Supreme Court on the issue of the amount of support owed by Antonyio.⁵²⁵ The North Dakota high court held that

517. *Id.* (finding "instructive" *Frye v. Frye*, 738 P.2d 505, 505 (Nev. 1987)).

518. *Id.* (finding "instructive" *Geramifer v. Geramifer*, 688 A.2d 475 (Md. 1997)).

519. *Id.* at 104 n.2.

520. *Id.* at 109.

521. *Johnson*, 617 N.W.2d 97, 109 (N.D. 2000). Such an application of the equitable adoption doctrine, however, was "limited" as the court expressed "preference for adherence to statutory procedures" on adoptions. *Id.* at 106 n.3.

522. *Id.* at 101. Antonyio never sought child custody or visitation; 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 custody settings.

523. *Id.* at 109–10. In applying North Dakota law, the majority did not inquire into the governmental interests of New Jersey, Pennsylvania, Florida or Kentucky, though a dissenting justice opined "that if an equitable adoption took place, it took place in New Jersey or Kentucky," so that "the law of one of those states" should have been used. *Id.* at 112 (not recognizing that any adoption might be governed by Pennsylvania or Kentucky law). On principles that should guide choice of law in interstate parentage by consent cases, see *Faithful Parents*, at 373–79. Similar principles on choice of law would seemingly operate in cases involving marriage, or cohabitation for palimony purposes, with multistate connections. See, e.g., *Winebrenner v. Godwin*, 2019 WL 1856471 (Tenn. App. 2019 Apr. 25, 2019) (choosing between California and Tennessee laws on palimony).

524. Brief for Appellant at ¶ 6, *Johnson v. Johnson*, 652 N.W.2d 315 (N.D. 2002) (No. 20010288) (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).

525. 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

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 2001.⁵²⁶ It also ruled the \$669.00 support order should operate after the end of the second trial, in October 2001.⁵²⁷ 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.⁵²⁸ Although Antonyio never sought a childcare order, he was still liable for child support to Madonna, who had custody of Jessica in Kentucky.⁵²⁹

ii. As Applied Concerns

The earlier reviews of the UPAs and the current U.S. state laws on parental child support duties demonstrate the negative impacts on those who earlier consented in some express, apparent or presumed way to support parentage though they were without biological or formal adoptive ties. Such parents by consent at times cannot object later though they no longer wish to be recognized as parents and no longer wish to provide child support. The Johnson case illustrates how Antonyio Johnson's inability to escape North Dakota equitable adoption law prompted Due Process property losses without his express consent, and arguably, without, his apparent consent, as supported by his failure to follow through with a formal adoption of Jessica. Per the 2019 ALI Intentional Torts Draft, Antonyio could be "presumed" to consent to child support parentage due to the acts of Madonna, not unlike, one roommate's consent to a search authorized by another roommate.⁵³⁰

Objections to child support duties are not particularly compelling when the putative parents by consent earlier benefitted, or sought to benefit, from their alleged parent-child relationships, as by undertaking voluntarily, and enjoying, a parent-child or parental-like relationship for some time or by pursuing child custody

April 1999, which was "intended to be child support." Johnson, 652 N.W. 2d. at 318–19. While Antonyio was 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.*

526. *Id.*

527. *Id.* at 320 (explaining that 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).

528. *Id.* (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 (decedent acted as a father from 1917 to 1956, when he died) and Ceglowski, 102 F. Supp. at 514–15 (decedent acted as mother for at least 27 years).)

529. *Id.*

530. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12(c) (AM. LAW INST. 2019)

over the objections of existing legal parents.⁵³¹ Comparably, objections to support duties by putative parents (or others, like grandparents) should be easy to sustain where support parentage (or nonparentage support) arises from explicit promises of future child support, as in a premarital or midmarriage pact,⁵³² regardless of the present or future nature of the promisors' relationships with the children.⁵³³

Parentage by consent for support purposes can arise due to residency/hold out conduct, as well as due to equitable adoption. Consider a man who for some time believed in his biological ties to the child, even if it is later proven erroneous (and perhaps where maternal deceit caused the error). At times, guided by the 1970 UPA, parentage by inferred consent can arise due to residency/hold out conduct occurring when an intimate partner moves in (whether wed or unwed) with one then a nonparent who then cares in the household for a child born to the partner before the couple met. Here, consent to parentage for support purposes at least arises due to earlier actual assent to shared childcare.

Somewhat differently, support parentage by inferred consent can arise, as shown earlier, due to marriage to a birth mother sometime before a then anticipated childbirth, which is not coupled with a writing acknowledging the forthcoming marital parentage presumption; with a different writing (as with one declaring likely biological ties, as in a VAP); or with a writing promising child support (as with a future stepparent's pledge of aid in a premarital agreement even though there are or may be no acknowledged biological ties). The most problematic inference involves a postbirth marriage establishing parentage where neither the newly-established parent nor the existing legal parent knew of the consequences of marriage on legal parentage.⁵³⁴ Here, the consent to parentage arises due to an earlier marriage, though in many instances each newlywed at least knew of the pregnancy and expected, later birth.

Somewhat differently, as well, from such marital support parentage is marital support parentage arising where imminent childbirth is not anticipated because one spouse is then not carrying a prospective child. Consider a married woman who conceives and bears a child in a U.S. state via adultery or via assisted reproduction technology where her spouse was unaware of the pregnancy until after live birth and could not reasonably have been aware of or agreed to the pregnancy-related

531. See generally *In re A.C.H.*, 440 P.3d 1266 (Col. App. 2019) (finding "psychological parent" who fought for and obtained parenting time with his ex-girlfriend's child could be held responsible for child support; similar cases in other states are reviewed).

532. The Uniform Premarital and Marital Agreements Act, for example, recognizes agreements on "custodial responsibility" can be enforced. *Parentage Prenups*, *supra* note 189 at 344–46. State laws also recognize certain child support promises arising from parental-like relationships are enforceable. See, e.g., CAL. FAMILY CODE § 7614(a)(2014); HAW. REV. STAT. § 584-22(a) (2020); NEV. REV. STAT. § 126.900(1)(2013); and N.J. STAT. ANN. § 9:17-58(a)(2020).

533. See, e.g., CAL. FAMILY CODE § 7614(a)(2014) (promise in writing to furnish support for a child by "alleged" parent "does not require consideration"); HAW. REV. STAT. § 584-22(a) (2020).

534. See, e.g., MASS. GEN. LAWS ch. 209C § 6(3)(ii) (2020) (man is presumed father if he marries the birth mother after the child's birth and "engaged in any... conduct which can be construed as an acknowledgment of paternity"); N.J. STAT. ANN. § 9:17-43(a)(3)(c) (man is a presumed biological father if he marries birth mother with a child and "openly holds out the child as his natural child").

acts, as when he/she is deployed or employed overseas. Such a spouse is usually, as shown earlier, a presumed spousal parent, where a presumed consent justification seemingly operates and where the spousal parent presumption may not be able to be rebutted.⁵³⁵ Here, the marital parent presumption prompts not only Due Process property losses for the nonbirth spouse who is later deemed obliged to provide child support, but also Due Process liberty losses for the birth mother who may later need to share child custody.

Certain applications of child support parentage by inferred consent are troublesome, even if not unconstitutional. Fairness to those responsible for child support would be advanced if the forms of support parentage by consent (and of nonparentage support by consent) were better understood within society. Understandings would need to vary interstate because, as shown earlier, there are major interstate variations. Better understandings would also be advanced if, upon obtaining a marriage certificate, for example, parties were informed of the child support effects of the marriage where one or both parties have prospective or actual children when the marriage will take effect. Fairness to those responsible for child support would also be advanced if U.S. state laws more effectively deterred deceits/ mistakes involving biological ties of those later responsible for support.

VI. CONCLUSION

Parentage by consent is quickly expanding across U.S. states, with no sign of letup. All three UPAs and recent ALI pronouncements recognize childcare parentage forms that are dependent upon neither (real or presumed) biological ties nor formal adoptions. Increasingly, there are new forms of parentage by consent for children born of sex and for children born of assisted reproduction. Childcare parentage can prompt nonfinancial interests, as with custody, visitation and parental responsibility allocations, and/or financial obligations, as with support duties.

The emerging childcare parentage laws independent of biology and formal adoption utilize varying forms of consent. Consents can involve actions by those who are then nonparents, as well as actions by those who are then either expecting or existing legal parents. Expecting legal parents include those who will very likely be vested with “care, custody, and control” interests in later-born children whose births are then reasonably anticipated, or in living children who have been placed with them for formal adoption. Existing legal parents include those who have already been vested with “care, custody, and control” interests in living children.

Avenues to parentage by consent include certain forms of spousal parentage; certain forms of voluntary acknowledgment parentage; residency/hold out parentage; de facto parentage; and certain forms of assisted reproduction parentage.

535. See, e.g., *LC v. MG*, 430 P.3d at 424–25 (female spouse of birth mother could not disestablish her legal (marital) parentage though the child was unborn of assisted reproduction to her spouse without her consent), *cert. denied*, 140 S. Ct. 234 (2019) (Fourteenth Amendment infringement urged).

Expansions of parentage by consent prompt significant federal (and state) constitutional Due Process concerns. Some new forms of parentage by consent cause undue infringements on the rights of expecting or existing legal parents in the “care, custody, and control” of their children. Such infringements often do not fully eliminate custodial interests, but only diminish them by recognizing that these legal parents must now share child custody.

Some new forms of parentage by consent cause undue infringements on the substantive Due Process rights of newly-named parents who can then be pursued for child support. Such rights are less constitutionally protected, however, than the custodial rights of expecting or existing legal parents.

The parameters of the Due Process limits on childcare parentage by consent are, however, uncertain. Assessments of such limits are difficult since the Due Process limits on “life, liberty and property” infringements outside of parentage are not uniform. In fact, they are quite varied, as illustrated by the criminal and civil jury trial right cases.

Reforms are needed to protect better the rights of expecting legal parents, existing legal parents, and putative parents by consent. In particular, there needs to be a reassessment of employing what the ALI Torts Draft has called a “presumed consent” concept in order to diminish or eliminate the custodial interests of expecting and existing legal parents, as well as to validate child support obligations of putative parents. Such reassessments should be made when there are challenges to statutes or precedents on parentage by consent, with refinements made through “as applied” analyses.

Further, there needs to be a better understanding of the revolutionary changes occurring in U.S. state parentage laws.⁵³⁶ Increased knowledge should be facilitated by new federal and state legislation, including laws on expanded informational requirements when VAPs are signed and when marriage licenses are secured by those with current or expected minor children (e.g., “marital Miranda”⁵³⁷), as well as new laws on promoting understanding of the legal ramifications of employing assisted human reproduction technology, especially for the do-it-yourselfers.

Innocent losses of custodial interests by expecting and existing legal parents should be diminished-even if they cannot be wholly eliminated-so that parental opportunity interests and superior parental rights are not lost to those who did all, or most of what, they could to preserve their custodial interests. Agent waivers prompting losses of custodial interests for expecting and existing parents should be more significantly foreclosed, especially where the agent’s actions are contrary to

536. As Professor Meyer observed regarding the tragedies arising when earlier-adopted children are torn from their current families due to adoption process flaws involving unwed biological fathers, where all concerned “mostly struggled . . . within the confines of an unwieldy legal regime they only dimly comprehended.” Meyer, *supra* note 14, at 845.

537. Again, thanks to Professor Marc D. Falkoff for his suggestion and advice.

the principal's desires and earlier conduct. Thus, one existing custodial parent, without the acquiescence (or even the knowledge) of a second custodial parent, should not always be able to allow a nonparent to secure custodial interests via residency/ hold out, de facto, or VAP parentage that negatively impacts that second parent's custody interests, especially when that second parent has, in the past, strongly exercised those interests. Fourth Amendment "common authority" consent to search cases are dissimilar, as mutual responsibilities for rearing a child do not prompt "assumptions of risk" by one parent that the other parent "might permit" another person to become a parent.⁵³⁸ And these shared responsibilities cannot be deemed to constitute a basis for eliminating a parent's reasonable expectation of privacy regarding yielding childcare authority to a third person.⁵³⁹

As well, U.S. state laws on support parentage by consent should promote a general awareness about possible child support obligations on the part of nonparents who are then prospective parents by consent. Thus, romantic partners and family members (like grandparents or stepparents), especially those who reside with custodial parents while helping to childrear, need to understand better that child support obligations can later arise even when common residence, or and perhaps familial relationships, end. Further, those who marry women who may later bear children born of adultery or of assisted reproduction on their own need to understand better that unknown (and to them objectionable) spousal acts leading to births within marriages may not relieve them of financial obligations to children born into their marriages.

538. See, e.g., *Matlock*, 415 U.S. at 171 n.7 (one mutual property user assumes the risk that the other user "might permit" the common property area to be searched).

539. See, e.g., *Davis*, 332 F.3d at 1167-68 (recognizing that while sharing a residence, one does not forfeit the reasonable expectation of privacy in many personal property items (like a purse, gym bag, suitcase, or other closed container) within the residence).