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Relational Parents: When Adults Receive Rights in Children Because of Their Relationship with a Parent



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Abstract and Keywords

Significant changes in family forms and dynamics (such as increases in nonmarital cohabitation, children cared for by extended family, and same-sex couples with children) have prompted policymakers to rethink the question of who is a legal parent. Specifically, the law is grappling with which adults will be granted parental status or rights based on their relationship with a child's parent and why. This chapter reviews the mounting number of doctrinal hooks used by courts, legislatures, and law reformers for deciding when adults can make claims in children. It examines traditional parentage and family privacy doctrines, reviews justifications for a dramatic widening of the parental tent, and then turns to a set of fairness and child-welfare concerns raised by these concepts, highlighting four major worries. It argues that costs of considering the parentage claims of relational parents—both to the legal parent and to the child—have received inadequate weight to date.

Keywords: legal parentage, relational parentage, family privacy, same-sex couples, psychological parent, de facto parent, parent by estoppel, in loco parentis, child welfare, Haleigh Poutre, Uniform Parentage Act, American Law Institute, Uniform Law Commission

1. The Morphing of Family Patterns

Professor David Meyer noted more than a decade ago that “[j]udges and legislators around the country are wrestling with the question [of parentage] as never before.”¹ The challenge has only intensified since then, particularly as a result of equal treatment in law for same-sex couples. It raises numerous subsidiary questions that go to the nature of parentage: What features make the adult-child relationship worthy of respect and of obligations under the law? Should the live-in partner of a child's adoptive or biological parent (together, “legal parents”) be able to force visitation or shared custody over the

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legal parent's objection after the adults break up? How long should the adult have been in a child's life for the state to respect that tie when the legal parent objects?

The pressure to embrace broadened understandings of parentage comes from seismic shifts in how Americans form families today. As recently as 1970, 80 percent of adults formed families within marriage.² When children were born, the law generally "knew" who the child's parents were—the woman who gave birth and her husband—and ascribed parentage accordingly.³ While infidelity occurred,⁴ the marital presumption assigned parentage to the mother's husband; notions of family privacy shrouded from view the possibility that another man might have fathered the child.⁵

By 2016, the number of marriages performed annually in the United States had ebbed to "the lowest share on record"; just over half of US adults lived with a spouse.⁶ Still, marriage outstrips other family forms. In 2016, 60.25 million married couples lived in America, compared to 7.2 million cohabitating-partner households.⁷ As a fraction, cohabiting partners represent 6.1 percent of all American households.⁸

These shifts transcend socio-economic lines but disproportionately impact poorer families. Thirteen percent of adults who did not finish high school or who have incomes below the 20th percentile are cohabiting with a partner, compared to 5 percent of persons with middle and higher incomes.⁹ Among US adults, 26 percent of persons with family income "below the 20th percentile or who are high school dropouts" have married, compared to 56 percent of those with income in the top half.¹⁰ Differences occur by education level, too.¹¹

This morphing of family structure involves not just adults, but children. Today 40 percent of US children are born outside of marriage; unmarried births as a fraction of all births have crested 70 percent in some communities.¹² Of course, whether a birth occurs inside or outside marriage is not dispositive of whether a child lives with both biological or adoptive parents. With a married birth mother, the child might have resulted from a relationship outside marriage; an unmarried birth mother might be cohabiting with the baby's biological father.

However, approximately 3 million cohabiting-partner households include children in the household who are the offspring of only one partner.¹³ Other households are "mixed," containing children who are the biological or adoptive children of both parents, as well as children who are the legal child of only one of the adults.¹⁴ A great number of children live with only one legal parent, usually the child's mother. This is true today for 11.7 million households—in 9.5 million of these (81 percent), children live with their mothers.¹⁵

As a result of these many different household types, children often come into contact with the adults who are transient in the legal parent's life. One in three children will "experience two or more mother partnerships (either marriage or cohabitation)" by the time they turn fifteen.¹⁶

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Extended families have taken on bigger roles in many children's lives, too. One in ten children live with a grandparent, usually together with the child's legal parent.¹⁷ For one in ten of these children (1 percent of all children), the grandparent is the only caregiver.

Added to this are same-sex couples raising children who might be the biological or adoptive children of one, but not both adults.¹⁸ Until *Obergefell v. Hodges*, these couples were denied the ability to marry in much of the country and so clearly could not use any marital presumption to legally connect both parties to the child, and today it remains uncertain in many states to what extent marital presumptions apply to same-sex spouses. In 2017, the US Supreme Court held that if a state confers legal-parent status on a man married to a woman who conceives by artificial insemination of donated sperm then it must likewise confer legal-parent status on a woman who is married to a woman at the time she conceives using donated sperm, as a matter of equal protection.¹⁹ Birth certificates for children conceived by sperm donation, the majority said, are not markers of biology, regardless of the sex of the mother's spouse, but rather simply a "form of legal recognition."²⁰

This demographic sea change in a matter of decades, combined with technological changes in assisted conception,²¹ naturally has "raised a number of questions that, 30 years ago, would have been unheard of"²²; Answering these thorny questions about who precisely is a child's parents has fallen largely to state lawmakers, courts, and law reform bodies in the face of "sustained silence" by the US Supreme Court about the essence and outer boundaries of claims that one is a child's legal parent.²³

The result: a set of doctrines that sometimes protect the interests of adults involved in the child's life, usually as a result of living with the child's parent or because the child's parent sought and accepted help in caring for the child. These claims to be legally determined the child's parent—or to receive rights in the child like those given to parents—may be grouped under the heading of "relational parentage."

This chapter reviews the mounting number of doctrinal hooks used by courts, legislatures, and law reformers for deciding when adults can make claims in children. It examines traditional parentage and family privacy doctrines, reviews justifications for a dramatic widening of the parental tent, and then turns to a set of fairness and child-welfare concerns raised by these concepts, highlighting four major worries. It argues that costs of considering the parentage claims of relational parents—both to the legal parent and to the child—have received inadequate weight to date.

2. Traditional Notions of Parentage and Family Privacy

Historically, legal parentage was predicated solely and directly on biology for mothers, and indirectly on biology in the case of men married to birth mothers via a nearly irrebuttable marital presumption. In the 1800s, though, adoption developed in modern

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western societies as a way to allow unrelated adults to become legal parents of a child whose birth parents voluntarily relinquished parental rights or lost them because of unfitness.²⁴

Notions of who counted as one's family then remained largely "settled" until *Stanley v. Illinois*, in 1972, the seminal unwed father case.²⁵ In *Stanley*, the court considered the constitutionality of Illinois's statutory scheme, which, like most states' laws early in US history, did not confer legal parenthood on fathers of children born outside marriage. Peter Stanley had lived with his children for most of their lives, while living intermittently with their mother for eighteen years. When she passed away, the children became wards of the state even though Stanley wanted custody. The Court held that the US Constitution's due process guarantees entitled Stanley, because of his biological connection and his having participated substantially in raising the children, to legal parenthood if he could demonstrate in a hearing that he was fit to raise them.

Stanley and four subsequent Supreme Court decisions regarding unwed fathers "make clear" that connections other than biology also matter: "past caregiving, diligence, and the nature of the mother's relationships with the biological father and, if she is married, her husband."²⁶ Indeed, "no single criterion controls the constitutional definition of parenthood."²⁷ Because "the Court has never systematically addressed the basic question of how parenthood should be defined for purposes of the Fourteenth Amendment,"²⁸ however, a burgeoning scholarship has emerged to flesh out where that constitutional floor should fall.²⁹

However defined, a braiding of liberty interests form a protective cocoon around intimate life, which have "emerge[d] piecemeal": marriage, kinship, contraception, abortion, and the right to rear one's child.³⁰ The Court in *Obergefell* suggested that even children have constitutionally protected interests in family life.³¹ Together, these "liberties" secure a family's privacy and freedom from state intrusion.³²

As a result of legislative and court decisions to protect parents' desires to control children's upbringing, a child's legal parents can control who is part of the child's life, without oversight by any state agency. The Maine Supreme Court once explained that "forcing a parent to expend time and resources defending against a third-party claim to a child is itself an infringement on the fundamental right to parent."³³ During an intact relationship, the law has little to say about who the parent admits into the child's life, absent abuse and neglect—relying on the parent's "natural bonds of affection" to secure the child's welfare.³⁴

Claims of relational parentage arise when the legal parent does not voluntarily accede to access by an adult the parent previously included in the child's life or when such an adult wants no further obligation to the child. The first hurdle facing such a claimant is standing. Allowing standing when a legal parent opposes that adult's continued presence in the child's life, in the view of many, allows that adult "to interfere with the biological

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mother's rights over her children."³⁵ Yet denying standing might cut off relationships important to a child's wellbeing and support.

With respect to a same-sex partner of a legal parent, courts generally grant standing to seek shared custody or visitation if they would have found standing for similarly situated men. Thus, in *Chatterjee v. King*, one woman in a same-sex couple adopted a child from Russia, who was co-parented by the other woman until their relationship ended.³⁶ When the adoptive mother tried to end her partner's relationship with the child, the partner sought a declaration of parentage and shared custody. The trial court dismissed the suit and the appeals court concluded the partner could not seek parentage absent the adoptive mother's unfitness. The New Mexico Supreme Court reversed. Because the partner alleged facts that would establish "a presumption that a man is a natural parent," the partner qualified as "an interested party who has standing to pursue joint custody."³⁷ Animating the decision in part was the state's "public policy [of] encourag[ing] the support of children, financial and otherwise, by providers willing and able to care for the child."³⁸

Some have argued for a robust gatekeeping function when deciding standing, to minimize the burden on legal parents, such that a claimant would have to make a prima facie showing that he or she is likely to satisfy the relevant substantive test for relational parenthood.³⁹ The Uniform Law Commission's 2017 proposals require claimants to "allege[] facts sufficient to satisfy [one test, de facto parenthood] by a preponderance of the evidence."⁴⁰ The Uniform Law Commission is a group of lawyers, judges, legislators, and professors that proposes model laws that states may enact to promote consistency across the states.⁴¹ Their proposals can be very influential with state legislators.

As the next Part shows, legislatures and courts in many jurisdictions have recently expanded the substantive rules for conferring legal-parent status to include relational parents. "Widely disparate standards" for parenthood have resulted.⁴²

3. The Contours of and Rationale for Relational Parentage

A cluster of cases pushes notions of parentage, all arising out of a very common phenomenon: a legal parent relies upon or accepts caretaking for a child for a period of time from another adult, until a rupture occurs in the adults' relationship. At rupture, claims of parentage might be brought by the legal parent as a device to secure continued support for the child or by the now-excluded adult as a device for maintaining the relationship to the child.

3.1. Relationships Giving Rise to Claims of Relational Parentage

Five very different fact patterns give rise to claims of continuing contact with a child—or more rarely, as a ground for imposing a continuing support duty upon an adult who is not

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related to the child through biology or adoption but has been in the child's life as a result of his or her relationship with a child's legal parent, usually the mother. These claims to be a relational parent raise very different equities.

3.1.1. Cuckolded Husbands

Probably the oldest legal mechanism for assigning parental rights and duties to adults who lack a biological or adoptive connection to a child is the presumption of paternity. The law presumed that a child born to a married mother was the child of the mother's husband, even though in some fraction of cases the child's father was another man.⁴³ In limited circumstances, the presumption could be rebutted by the husband or wife by showing that the husband is not in fact the biological father, thus precluding both visitation and child support if the couple separated.⁴⁴ The presumption ensured the family's privacy against state intrusion and provided a bright line for paternity determinations at a time before blood and DNA tests.

More recently, states have developed devices for assigning parentage outside of marriage. A man can sign a voluntary acknowledgment of paternity.⁴⁵ Increasingly, a man who is living with the child at birth or during a time frame 300 days prior will be presumed to be the child's parent as well.⁴⁶

Presumed fathers who rankle at supporting a child they knew or discover is "not their own" might seek to "disestablish paternity" after breakup.⁴⁷ A slight majority of states allow men to rescind voluntary acknowledgments of paternity,⁴⁸ and a growing number allow actions to set aside a determination of paternity for fraud or some similar circumstance.⁴⁹

3.1.2. Live-In Partners

A second classic case involves adults who come into a child's life after birth by forming a relationship with an existing legal parent. These partners might marry the child's legal parent, or the adults might cohabit. They could be in the child's life for long spans of time or brief periods. They might be willing to adopt the child while the adults are together but unable to do so. Because in nearly all US states a child can have only two legal parents,⁵⁰ a willing relational parent cannot cement ties to the child through adoption without an existing parent (e.g., the biological or adoptive parent who is not the relational parent's partner) agreeing to forfeit his or her parental rights. In these cases, the legal parent's partner might seek custody or visitation of the legal parent's child after the couple parts ways, or the child's legal parent might seek continued financial support. Parts 4-6 synopsise a number of these cases.

3.1.3. Same-Sex Couples

The third classic case involves same-sex couples. As *Chatterjee* illustrated, often one member of the couple has a biological or adoptive connection to the child, placing them in a position to bar the other from the child's life. Prior to *Obergefell v. Hodges* and the extension of the marital presumption for cases of donor-assisted reproduction in *Pavan*, same-sex couples who jointly raised a child faced hurdles to having both partners

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recognized as legal parents. Some states allowed second-parent adoption in such cases,⁵¹ but most did not.

3.1.4. Grandparents and Extended Family

Often, a legal parent lives with a member of his or her extended family who shares or does the majority of the caretaking for a child. This might be because the legal parent is absent for extended periods because of work obligations, substance use, or other reasons.⁵² The legal parent might use this time to gain an education or otherwise improve the parent's life chances, after which the parent might seek to re-establish the bond with the child after an absence and limit or end contact with the caretaker family member, who then seeks visitation or even custody.

In the 1990s, states enacted statutes allowing award of visitation to grandparents in a variety of circumstances.⁵³ Some permit visitation to be awarded to *any interested person* if the court determines that a continued relationship with the child would be in the child's best interests⁵⁴ or, more narrowly, prevent detriment to the child.⁵⁵ In some cases, grandparent visitation rights have survived the termination of the parent's parental rights.⁵⁶

These statutes have been challenged as invading parents' rights to the care and custody of their children, under both state constitutions and the US Constitution's Due Process Clause. In *Troxel v. Granville*, the mother of two children appealed a Washington court order, applying Washington law, that granted visitation with her two children by the children's paternal grandparents after the children's father died; the mother did not object to visitation altogether but rankled at the amount.⁵⁷ Washington law allowed a court to award visitation with a child to any person at any time based on a finding that this would be in the child's best interests.

The US Supreme Court found that the Washington statute, as applied, infringed on the "fundamental right of parents to make decisions concerning the care, custody, and control of their children."⁵⁸ But the plurality decision required merely that states "accord at least some special weight to the parent's own determination" of what is in the child's best interests. The plurality speculated that without such respect for the parent's view, a judge's personal values or biases would often determine outcomes for children.⁵⁹ *Troxel* precipitated a veritable "avalanche of state court litigation over the constitutionality of child custody and visitation laws."⁶⁰ However, though *Troxel* "limits state power to redefine the substantive prerogatives accorded parents," it does not "place any constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family."⁶¹

3.1.5. Death of the Child's Legal Parent

Finally, a legal parent might predecease her minor child, raising the difficult question of who will care for the child now. The child might not know or have little connection to her other biological parent, and might have lived with and been cared for by the deceased parent's spouse or partner. Maintaining the connection with that caregiver would give the

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child security and stability and likely be preferable to awarding custody to an absent biological parent.

Consider *In re Marriage of Winczewski*.⁶² There, a married mother and father in Oregon received joint custody of their two children upon divorce.⁶³ The father later obtained sole custody after the mother exhibited “substantial emotional problems” impacting her parenting ability.⁶⁴ His parents pitched in, providing “substantial assistance in caring for the children.”⁶⁵ One year before the father died of cancer, the grandparents intervened in a pending custody action between the parents.⁶⁶ After the father’s death, and as the litigation proceeded, the mother took the children to live with her.⁶⁷ The mother focused on her own grief and blamed the father for developing cancer; she denied the children therapy that might have prevented mental and emotional problems they later exhibited.⁶⁸ The mother neglected both children’s medical needs; she discontinued anti-depressant medication for one child with “explosive outbursts, [who was] losing control, ... was depressed, physically, [and] having nightmares.” The other child’s tooth decay, vision, and learning disabilities went untreated.⁶⁹ The mother planned to home school the children despite one child’s speech problems and her own lack of education training. And she required the children to sleep in the same bed with her and her husband.⁷⁰ After finding the grandparents had rebutted the statutory presumption that the mother acted in her children’s best interests, the court awarded custody to the grandparents, finding it was necessary to avoid serious physical and emotional problems with the children.⁷¹

In all these instances, an adult claiming relational parent status has a connection to a child by virtue of a relationship with a legal parent, and the legal parent (if alive) is seeking to either keep the relational parent in the child’s life as a source of support *or* seeking to exclude the relational parent.

3.2. The Grounding of Rights and Obligations by Relational Parents

States have used a cluster of doctrines to decide when to award rights of association, care, decision-making, and even full custody for a child to relational parents, doctrines undergirded by very different intuitions. Some rest on the nature of the bond, recognizing relationships the preservation of which will be in the child’s best interests. In many instances, the individual making a claim is the only father a child has ever known.⁷²

A second explanation is that because of a bond, the relational parent eventually is seen by the child as a parent: “[a] person who provides a child’s daily care and who, thereby, develops a close bond and personal relationship with the child becomes the psychological parent to whom the child turns for love, guidance, and security.”⁷³

A third explanation stresses the harm that will follow from disrupting the bond that has developed between the claimant and the child, often captured in the idea of “irreparable harm” to the children.⁷⁴ One potential harm is loss of financial support. For example, where an inmate held out his wife’s child as his own even though conceived while he was in prison, the court of appeals estopped the husband from denying paternity during the

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couple's divorce because his conduct meant the mother need not seek support from the biological father.⁷⁵

Some courts and legislatures emphasize fairness to the adult making the claim: he or she is entitled to maintain that relationship. This might occur, for example, in a family where only one of the two adults is permitted under state law to adopt a child. Without relational parentage, the adoptive parent would receive all rights in the children, with no recourse by his or her partner. Recognizing rights of continued association for adults who take on responsibility for children will encourage more adults to do so.⁷⁶

Bolstering fairness concerns are the legal parent's conduct in encouraging the relationship with his or her child. Equitable doctrines might prevent a legal parent from back-walking assertions during the intact relationship that the relational parent is the child's parent. Thus, a mother's conduct, in holding out a person as the child's father or second mother, might estop her from later denying a claim for relational parentage.⁷⁷

Some scholars stress intent during the intact relationship. For example, Professor Higdon argues that parentage should obtain in cases where parentage was always meant to be imbued: Intent would be present when *the individual is an intended parent before, at the time of conception, or early in the child's life*.⁷⁸ Intent to co-parent would not only distinguish parties who meant to share parenting before relations soured from more transient individuals who share the parent's life during the child's minority, but it would also better protect parentage determinations from invidious discrimination, for example, against LGBT persons.⁷⁹

With estoppel and intent, of central importance is how one gauges the legal parent's assent. Sensitive to encroaching on the prerogatives of the legal parent, Montana requires active promotion.⁸⁰ Delaware's parentage law requires that the mother not only consents to receiving assistance with the child's upbringing but also nurtures the relationship between the child and de-facto parent.⁸¹ Others credit only relationships that began "with the consent and encouragement of the child's legal parent."⁸² By contrast, under the American Law Institute's test for de facto parenthood, simply allowing a live-in partner to help with things like taking a child to the doctor (in equal measure to one's own efforts) opens the legal parent to having the partner in the child's life until the child becomes an adult.⁸³ If there is a single area of agreement, it is that paid caretaking should not be the grounds for awarding parental rights.⁸⁴ As the next part shows, the tests for recognizing relational parents manifest as much variability as the explanations.

3.3. The Legal Hooks

Because the US Supreme Court has not established clear or comprehensive guidelines for states' conferral of initial legal-parent status, state legislators, courts, and law reform bodies have been left to outline the boundaries of parentage.⁸⁵ Courts, legislators, and others have used four doctrinal "hooks" to permit an adult to press a claim for legal

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status as a relational parent. These threshold tests outline the essence of the kind of relationships the state considers worthy of protection.⁸⁶

3.3.1. Psychological Parenthood

In some tests for psychological parenthood, care for a child matters only when it crosses a tipping point and the child turns to that person “for love, guidance, and security.”⁸⁷ The “close bond and personal relationship” results from “provid[ing] a child’s daily care.”⁸⁸ In other jurisdictions, a psychological parent is someone doing the day-in-day-out job of parenting: “a psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child’s psychological and physical needs for a parent and provides for the child’s emotional and financial support.”⁸⁹ Presumably, in both conceptions, one is unlikely to fulfill this role without living with the child.

3.3.2. In Loco Parentis

Some jurisdictions give standing to any adult who literally has stood in the place of a parent, in loco parentis. A person puts him or herself “in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption.”⁹⁰ Two aspects are crucial: “first, the assumption of a parental status, and, second, the discharge of parental duties.”⁹¹

3.3.3. Parent by Estoppel

Claims that one is a parent by estoppel might be advanced by the legal parent—to secure support, or by an adult being excluded from the child’s life—as a device for maintaining contact. In New Mexico, estoppel might apply if the partner was “providing full-time emotional and financial support for the child.”⁹² Some jurisdictions and law reform proposals confine parent by estoppel to instances when an individual “lived with the child since the child’s birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child’s legal parent ... to raise a child together each with full parental rights and responsibilities.”⁹³ In some cases, a person might be estopped from denying parentage despite not having lived with the child, such as after signing a voluntary acknowledgment of paternity.

3.3.4. De Facto Parent

Twenty-four states have adopted some version of a de facto parent test.⁹⁴ What makes one a de facto parent and what rights or obligations that status carries have eluded a single consistent understanding. For the Maine Supreme Court, a de facto parent must have “a permanent, unequivocal, committed, and responsible role.”⁹⁵ The new Uniform Parentage Act (UPA) treats as “parents in fact” those who come into the child’s life after birth for a “significant period” and provide consistent caretaking, hold the child out as their own, and undertake “full and permanent responsibilities of a parent,” when that results in a “bonded and dependent relationship with the child which is parental in nature.” If the child’s legal parent “fostered or supported” the relationship and continuing it is in the child’s best interests, that individual can receive the full panoply of

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parenting rights.⁹⁶ As a de facto parent, the individual has “parity with any other legal parents, including genetic parents, for all purposes.”⁹⁷ However, de facto parent status under the 2017 UPA operates as a one-way ratchet—it can be asserted by those seeking rights, but not by those seeking continued support for a child.⁹⁸

As Professor Jeffrey Shulman aptly observes, proposals for relational parentage rights “almost always come packaged with the assurance that there is a well-defined perimeter to the circle of parental candidates.”

Figure 1 graphically captures the variability among conceptions of what makes one a relational parent. The Appendix more fully captures the variability in approaches.

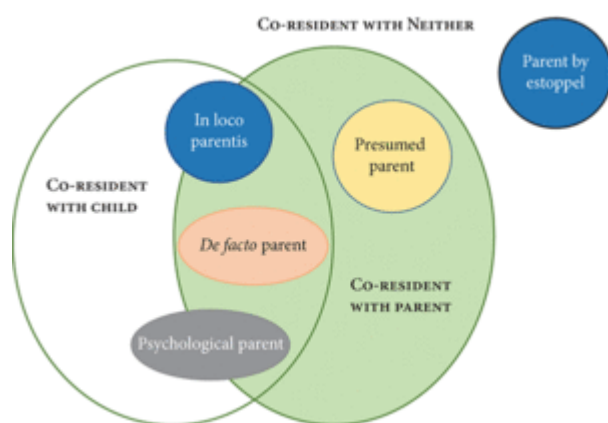


Figure 1

3.4. The Relational Parent’s Bundle of Rights

Exacerbating this variability is precisely what rights and obligations flow from relational parentage. As noted above, the 2017 UPA would place parents by estoppel and de facto parents “in parity with ... genetic parents for all purposes.”⁹⁹ Similarly, Maine’s Supreme Court has allowed de facto parents to exercise all the rights of a legal parent.¹⁰⁰ Some scholars believe that states have “broad authority to identify nontraditional care givers as parents,” but must “afford their child-rearing decisions the same strong protection afforded more traditional parental figures.”¹⁰¹

For some courts, equality of treatment goes too far. In *Clifford S. v. Superior Court*,¹⁰² the California Court of Appeals concluded that the US Constitution does not require the state to accord the same rights to de facto parents that are enjoyed by legal parents. Often, legal parents retain priority over a relational parent unless harm is likely to result to the child. Thus, in *McAllister v. McAllister*,¹⁰³ Robin McAllister met and moved in with Mark McAllister while she was pregnant with another man’s child.¹⁰⁴ Mark sought custody of the child, E.M., after he and Robin divorced.¹⁰⁵ After being found to be E.M.’s psychological parent, Mark ultimately received reasonable visitation and communication rights; Robin retained decision-making responsibility and primary-residential responsibility.¹⁰⁶ The court explained that in a contest between a psychological parent and a natural parent, the natural parent’s paramount right to custody prevails unless it is

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in the child's best interests to award custody to the psychological parent to prevent serious harm or detriment to the child.¹⁰⁷ A number of courts adopting tests for relational parentage have limited the right received to visitation.¹⁰⁸ Obviously, the smaller the bundle of rights conferred on relational parents, the greater the control the legal parent enjoys.¹⁰⁹

Whether to impose duties of support on relational parents has long perplexed lawmakers. Many states by statute require stepparents to provide financial support for stepchildren, but only as a backup should the legal parent fail to provide support and only while the child lives in the stepparent's home—not after the adults' relationship ends.¹¹⁰ Correspondingly, former stepparents per se have no legal rights regarding the child. "Traditionally, whoever had rights had responsibilities."¹¹¹ Thus, courts that have deemed someone a *de facto* parent have generally also imposed a support obligation.¹¹²

3.5. The Costs of Variability

The tests for recognizing relational parents have grown more scattered, if not "more incoherent,"¹¹³ with time. Though some states recognize relational parentage claims by statute,¹¹⁴ most have developed doctrines through the common law, and courts are not "equipped to gather broad public input and distill public preferences for handling the hard choices and complex issues involved in determining third-party custody and visitation from the many options available."¹¹⁵ The variability across states means that whether someone is deemed a relational parent might depend on where venue lies for one's case. It also means that the legal rules might not be clear to the public; consequently, many people might not fully understand the legal implications of entering into or continuing an intimate relationship. Legal parents might "unknowingly compromise[] substantial parental rights," and adults in the child's life might "involuntarily assume[] ... significant parental duties."¹¹⁶

4. Child Protection Concerns

Many question whether "granting rights to more and more parental claimants or ... creating new varieties of constitutionally protected parenthood" in fact serves children's best interests.¹¹⁷ Relational parents, like biological parents, are not subject to the background checks and home studies that formal adopters undergo,¹¹⁸ though a best-interests element of the legal rule might serve that function to some extent. Thus, some worry that "states have few mechanisms in place to thwart socially undesirable parentage via *de facto* adoptions."¹¹⁹ The remainder of this chapter considers three cautionary cases.

In 2005, 11-year-old Haleigh Poutre was rushed to the hospital by her adoptive mother, Holli, and Holli's husband, Jason, for what they labeled "flu like symptoms." Haleigh was unresponsive. Doctors would later determine that Haleigh's brain stem had "partly sheared"¹²⁰ as a result of a traumatic brain injury "similar to those caused by high speed car wrecks." Haleigh's body was also riddled with "bruises, sores and scabbed-over

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burns;” her “teeth were broken, her face was swollen,” and she was “extremely thin, [and] her abdomen was sunken.”¹²¹ Dr. Christine Barron, a child-abuse specialist, would later say that “many of the wounds were telltale signs of cigarette burns, ligature marks, and severe whippings with a cord or beltlike object.”¹²² The resulting investigation would turn out to be the fourteenth time in three-plus years that the Massachusetts Department of Social Services (MDSS) had investigated Haleigh’s treatment. We “missed signs of abuse,” Commissioner Harry Spence acknowledged.¹²³

Plunged into a coma, Haleigh would lose her adoptive mother less than two weeks later, when the mother was murdered by her own grandmother.¹²⁴ Haleigh’s biological father’s parental rights had been terminated long before, leaving a void.¹²⁵ Jason then stepped forward to make medical decisions for Haleigh.¹²⁶ Indeed, Jason would satisfy most tests for a *de facto* parent, as they focus on behaviors more than assessment of the quality of the relationship. During his marriage to Haleigh’s adoptive mother, Jason was:

the person who the children call[ed] daddy, the person who they cuddle[d] up to, the person who they play[ed] ball [with] in the backyard, the person who they practice[d] with for their softball team, or who coache[d] their team, or who [brought] them to their activities, or who work[ed] very hard so that their after school activities [could] be paid for.¹²⁷

A mechanic, Jason had taught Haleigh how to “work[] on cars.”¹²⁸ Haleigh “handed him tools and ... kept him company” while he worked.¹²⁹ Jason “renovat[ed Haleigh’s] bedroom, carpeting[,] and wallpapering there and throughout the house.”¹³⁰ On Friday and Saturday nights, Haleigh, her half-brother, Jason and Holli “would have movie night. They would all pop corn, sit and watch movies together, have family fun, and other relationships.”¹³¹ At least one family friend believed that “Jason seemed to have a heart for Haleigh.”¹³²

Given Haleigh’s grim prognosis, MDSS asked authorities to enter a do-not-resuscitate (DNR) order in Haleigh’s medical record, but Jason strenuously objected. At a hearing, Jason asked to make decisions for Haleigh as her *de facto* father, but exercised his Fifth Amendment prerogative not to speak.¹³³ By insisting that Haleigh remain on life support, Jason could avoid a potential murder charge.¹³⁴ In denying Jason’s claim to make medical decisions for Haleigh, the trial judge drew “a negative inference” from his asserting the Fifth Amendment and concluded that Jason had “not ... met the specific[] test”¹³⁵ for *de facto* parenthood in Massachusetts. Jason appealed, but the Massachusetts Supreme Judicial Court affirmed,¹³⁶ stating that “[t]o recognize [Jason] as a *de facto* parent, in order that he may participate in medical ... decision [making for Haleigh] ... would amount to an illogical and unprincipled perversion of the doctrine.”¹³⁷ Despite the test’s focus “explicitly on the existence of a significant preexisting relationship,” that “standard *presumes* that the bond between a child and a *de facto* parent will be, above all, loving and nurturing.”¹³⁸ Faced with the ludicrousness of giving Haleigh’s abuser parental rights, the court concluded that henceforth the gravamen of a parent–child relationship—a loving, bonded, dependent relationship between the child and that adult—must always

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be shown. Ultimately, a jury found Jason guilty on five counts of battering Haleigh or allowing Haleigh's adoptive mother to beat her with a bat, and he was sentenced to twelve to fifteen years in state prison.

5. Parents Lose the Ability to Control Who Is in the Child's Life

Lowering the bar to standing also creates risks for children. Legal parents might be shocked to learn that they could lose control over who is in the child's life going forward simply by living together with a romantic interest *even for a brief time*. This could occur even if the short-term partner has been abusive or terrorized the parent or children. Consider the Maine Supreme Court's 2014 case, *Pitts v. Moore*.¹³⁹ There, a man, Pitts, and a woman, Moore, had an off-and-on relationship for eight years. During a separation, Moore became pregnant by another man. Pitts and Moore later reunited, the child was born, and the adults stayed together for eleven months longer. After the two split, they briefly attempted to reconcile—which ended with Moore filing for protection from abuse against Pitts. Pitts was barred from seeing the child for a month.

Pitts nevertheless petitioned the Maine District Court for parental rights and responsibilities concerning the child, stipulating that he was not the child's biological father. Based on his eleven-month involvement with Moore following the child's birth, the lower court found Pitts to be a *de facto* parent. It awarded Pitts unsupervised contact with the child, but imposed no financial or other parental responsibility.¹⁴⁰ Moore litigated for three more years before the Supreme Court of Maine finally reversed that lower court decision.

6. People Dangerous to Children Can Claim Rights

Relational parent rules create danger not only for children, but also for legal parents who might find themselves hopelessly entangled in ongoing conflict with an abuser claiming to be a relational parent. Consider *Moreau v. Sylvester*.¹⁴¹ A mother of two children was in a relationship with a man for nine years, but they never married. Neither child was his. After the adults separated, the man continued to care for the children at times and sometimes threatened not to return the children. In one instance three years after their break-up, the man sent a text to the children's mother that read "I promise you, for the rest of my life, I will find my girls and I will never stop, ever." At 2:00 a.m., he showed up at the house where she and the children were staying, banging loudly on the door until the police arrived. The mother and her children had no means of escape while this occurred.¹⁴² After a hearing, a trial court determined that the man had placed the mother and children in imminent fear of serious physical harm and issued an order preventing the man from contacting or interacting with them for a year.¹⁴³

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Separately, the man filed an emergency petition in family court seeking sole physical and legal custody of the mother's children. The trial court dismissed the action because he was not related to the children in any way; he appealed, claiming he was a de facto parent.¹⁴⁴ The Vermont Supreme Court rejected his argument and affirmed the trial court's decision to dismiss.¹⁴⁵ Altogether, it took twenty-five months for the mother to exclude from their lives a man who had placed her and her children in fear of serious harm.

7. Conclusion

States and courts have splintered over whether rights are due to individuals who form relationships with children as a result of their relationship to the child's legal parent. Because the US Supreme Court "has never systematically addressed the basic question of how parenthood should be defined for purposes of the Fourteenth Amendment,"¹⁴⁶ lawmakers and courts have written on a blank constitutional slate. Using a variety of legal doctrines, they have given rights in children to many "relational parents"—adults who have no biological or adoptive tie to the child but who have interacted with the child as a result of a relationship with the child's legal parent. Despite the recommendations of some law reform bodies, judges nearly always also impose corresponding duties of support for the child. The result: a deep incoherence over what precisely should make someone a child's "parent." Emerging cases reveal the risks from a still-undertheorized extension of parenting rights, including how difficult it is for legal parents, usually mothers, to exclude bad influences and even dangerous persons from their children's lives.

Appendix

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Required Elements	Presumed Parent § 204 UPA 2017	Non marital Presumed Parent State Statutes	De Facto Parent § 609 UPA 2017	De Facto Parent State Statutes	Parent by Estoppel (not in UPA 2017)	Psychological Parent	In Loco Parentis	Step-parent Visitation
Married	X							X
Listed as parent in official document	X							
Developed parent-like relationship		X [AL ¹ 47]	X	X [SD, ¹ 48 NM, 149 WI ¹ 50]	X	X		X [WI, ¹ 51 OR, ¹ 52 UT ¹ 53]
Support & consent of the child's parent		X [IN ¹ 54]	X	X [DE, ¹ 55 ME ¹ 56]		X		
Parent absent				X [MN 157]				X [CA, ¹ 58 DE, ¹ 59 OR, ¹

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t or unfit								60 UT, ¹ 61 VA ¹ 62]
Provided financial support		X [MO, ¹⁶³ AL ¹ 64]		X [KY, ¹ 65 IN ¹ 66]	X		X	X [TN, ¹ 67 UT ¹ 68]
Resided in the same household with the child	X	X [CO, ¹ 69 IN, ¹ 70 MN, 171 MT, ¹⁷² AL, ¹⁷³ WY, 174 DE, ¹⁷⁵ TX ¹⁷⁶]	X	X [KY, ¹ 77 MN, 178 IN, ¹ 79 CO, ¹ 80 NM, 181 ME ¹⁸²]		X	X	X [DE ¹ 83]
Openly held out the child as his or her own	X	X [CO, ¹ 84 IN, ¹ 85 MN, 186 MT, ¹⁸⁷ AL, ¹⁸⁸ WY, 189 DE, ¹⁹⁰ TX ¹⁹¹]	X					
Detriment to child if not recognized								

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Exercised parental responsibility without expecting financial gain			X	X [NM, 192 ME ¹⁹³]	X	X	X	
Served as primary caretaker, performed >50 percent of caretaking tasks				X [SD, ¹⁹⁴ KY, ¹⁹⁵ MN, ¹⁹⁶ IN ¹⁹⁷]	X	X	X	X [UT ¹⁹⁸]
Home study required	No	No	No	No	No	No	No	No
Explicit mention of best interests of child			X	X [ME ¹⁹⁹]	X			X [TN, ²⁰⁰ WI, ²⁰¹ CA, ²⁰² OR, ²⁰³ VA ²⁰⁴]

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What Rights in the Child ?								
Standing to sue	X	X	X	X	X	X	X	X
Custody	X	X		X [SD, ²⁰⁵ KY, ²⁰⁶ , MN, ²⁰⁷ IN, ²⁰⁸ NM, ²⁰⁹ DE, ²¹⁰ ME ²¹¹]				X
Contact with child	X	X		X [SD, ²¹² WI, ²¹³ CO, ²¹⁴ DE, ²¹⁵ ME ²¹⁶]	X	X	X	
Decision-making	X	X		X [DE, ²¹⁷ ME ²¹⁸]		X	X	
Child support obligation	Yes	Yes	?	Yes [ME ²¹⁹]	Possible	Possible	Possible	Possible

(*) “Bonded and dependent relationship with the child that is parental in nature”

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Notes:

(1.) See David D. Meyer, "The Constitutionality of 'Best Interests' Parentage," *William & Mary Bill of Rights Journal* 14, no. 3 (2016): 857.

(2.) W. Bradford Wilcox and Wendy Wang, "The Marriage Divide: How and Why Working-Class Families Are More Fragile Today," *American Enterprise Institute* (September 2017), 13, <http://www.aei.org/wp-content/uploads/2017/09/The-Marriage-Divide.pdf>.

(3.) See Jane C. Murphy, "Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children," *Notre Dame Law Review* 81, no. 1 (2005): 325.

(4.) See Naomi Cahn, "The New ART of Family: Developments in the Law of Assisted Reproductive Technologies," *Illinois Law Review* (forthcoming).

(5.) See, e.g., Uniform Parentage Act § 204 (2017).

(6.) Jay L. Zagorsky, "Why Are Fewer People Getting Married?" *The Conversation*, June 1, 2016, <http://theconversation.com/why-are-fewer-people-getting-married-60301>.

(7.) "Number of Married Couples in the United States from 1960 to 2017 (in Millions)," Statista, updated 2018, <https://www.statista.com/statistics/183663/number-of-married-couples-in-the-us>; *Unmarried-Partner Households by Sex of Partner*, Census Reporter (2017), https://censusreporter.org/data/table/?table=B11009&geo_ids=01000US&primary_geo_id=01000US (6.1% are unmarried-partners).

(8.) *Unmarried-partner Households by Sex of Partner American Community Survey 1-Year Estimates*, Census Reporter (2017), https://censusreporter.org/data/table/?table=B11009&geo_ids=01000US&primary_geo_id=01000US.

(9.) Wilcox, *The Marriage Divide*, 2-3.

(10.) *Ibid.*, 3.

(11.) In 2015, 63 percent of college graduates between 25 and 55 were married, compared to 51 percent for those with some college and 48 percent for those who did not finish high school. *Ibid.*, 13.

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(12.) Joyce A. Martin, et al., "Births: Final Data for 2016," *National Vital Statistics Reports* 67, no. 1 (Jan. 31, 2018): 6, https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_01.pdf; Rachel Sheffield, "The Economic Inequality of Unwed Births," Heritage Foundation, updated May 22, 2012, <https://www.heritage.org/marriage-and-family/commentary/the-economic-inequality-unwed-births> (women without a high school diploma).

(13.) U.S. Census Bureau, *Table UC3: Opposite Sex Unmarried Couples by Presence of Biological Children Under 18, and Age, Earnings, Education, and Race and Hispanic Origin of Both Partners* (2016), <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html>.

(14.) For instances of this, see U.S. Census Bureau, *Table FG6. One-Parent Unmarried Family Groups with Own Children Under 18, by Labor Force Status of the Reference Person: 2016* (2016), <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html>.

(15.) The vast majority of single custodial parents are women. *Ibid.* (reporting approximately 9.5 million single mothers and 2.2 million single fathers).

(16.) Ron L. Deal, "Marriage, Family, & Stepfamily Statistics," updated April 2014, <https://www.smartstepfamilies.com/view/statistics>. See also James G. Dwyer, *Liberal Child Welfare Policy and its Destruction of Black Lives* (Oxford: Routledge, 2018), 29.

(17.) U.S. Census Bureau, *10 Percent of Grandparents Live With a Grandchild, Census Bureau Reports* (2012), <https://www.census.gov/newsroom/press-releases/2014/cb14-194.html>.

(18.) See Katharine K. Baker, "Asymmetric Parenthood," in *Recovering the Family: Critique on the American Law Institute's Principle of the Law of Family Dissolution* (2006), 121.

(19.) *Pavan v. Smith*, 137 S. Ct. 2075 (2017) (per curiam).

(20.) *Ibid.*, 2078–2079.

(21.) For discussion of the status of gamete donors, see chapter by Cahn, in this volume.

(22.) Michael J. Higdon, "Constitutional Parenthood," *Iowa Law Review* 103, no. 4 (2018): 1486.

(23.) *Ibid.*

(24.) See Ann M. Haralambie, *Handling Child Custody, Abuse & Adoption Cases*, 3rd ed. (Thomas Reuters, 2017). For a history of competing notions of family from the beginning of the American project, see Mark E. Brandon, *State of Union: Family and Change in the American Constitutional Order* (Lawrence: University Press of Kansas, 2013).

(25.) *Stanley v. Illinois*, 405 U.S. 645 (1972). See Meyer, "'Best Interests' Parentage," 859.

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(26.) David W. Meyer, "Family Diversity and the Rights of Parenthood," in *What Is Parenthood: Contemporary Debates About the Family*, ed. Linda C. McClain and Daniel Cere (New York: New York University Press, 2013), 130–131.

(27.) *Ibid.*

(28.) Higdon, "Constitutional Parenthood," 1492. Professor Higdon argues that constitutional parenthood should be confined to the most compelling instances for assigning legal parentage—at the very least, when a couple both bring a child into existence that they intend to co-parent and upon the death of a child's legal parent.

(29.) *Ibid.*; Meyer, "'Best Interests' Parentage," 859; Jeffrey Shulman, *The Constitutional Parent: Rights, Responsibilities, and the Enfranchisement of the Child* (London: Yale University Press, 2014), 205.

(30.) David D. Meyer, "The Paradox of Family Privacy," *Vanderbilt Law Review* 53 (2000): 528.

(31.) *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

(32.) Meyer, "The Paradox of Family Privacy," 528.

(33.) *Pitts v. Moore*, 2014 ME 59, ¶ 35 (2014).

(34.) *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

(35.) See *Moreau v. Sylvester*, 196 Vt. 183, 188 n.3 (2014) (finding standing when the relational parentage claim was "not facially ridiculous").

(36.) *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012).

(37.) *Ibid.*, 285.

(38.) *Ibid.*, 286.

(39.) E.g., Jeffrey, "Dangers in De Facto Parenthood," 43.

(40.) UPA § 609 (c)(2) (2017). The mere filing of a claim requires the legal parent to file a "responsive pleading," after which the court must hold a hearing "on an expedited basis." *Ibid.*

(41.) "About the ULC," Uniform Law Commission, updated 2018, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC>.

(42.) Higdon, "Constitutional Parenthood," 1486.

(43.) See Murphy, "Legal Images of Fatherhood," 325–386.

(44.) See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); see also Blackstone's Commentaries 1:456, ed. J. Chitty (1826).

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(45.) See generally Paula Roberts, "Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children," *Center For Law & Social Policy* (2003): 1-46, <https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/01111.pdf> (listing 28 states).

(46.) See, e.g., N.C. Gen. Stat. § 50-13.13 (2016).

(47.) Parness, "Dangers in De Facto Parenthood," 27; Leslie Joan Harris, "Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality," *Michigan State Law Review* (2013): 1295-1340.

(48.) See generally Roberts, "Truth and Consequences," 1-46.

(49.) N.C. Gen. Stat. § 50-13.13 (2016).

(50.) See generally Melanie B. Jacobs, "Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents," *Journal of Law and Family Studies* 9 (2007): 309-339

(51.) See N.Y. Dom. Rel. Law § 110 (McKinney 2018); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); but see, *In re* Adoption of Luke, 640 N.W.2d 374 (Neb. 2002).

(52.) See, e.g., *Bennett v. Jeffreys*, 356 N.E.2d 277 (Ct. App. N.Y. 1976).

(53.) Stephen E. Averett, "Grandparent Visitation Statutes," *Brigham Young University Journal of Public Law* 13, no. 2 (1998): 355-377.

(54.) See, e.g., Va. Code Ann. § 20-124.2 (West) ("The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest.").

(55.) See Haw. Rev. Stat. § 571-46(7) (2016).

(56.) See, e.g., *J.M.S. v. J.W.*, 20 A.3d 458 (N.J. Sup. Ct. App. Div. 2011).

(57.) *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

(58.) *Ibid.*, 66.

(59.) *Ibid.*, 70.

(60.) Adam Winkler, "Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts," *Vanderbilt Law Review* 59, no. 3 (2006): 793, 864.

(61.) See Meyer, "'Best Interests' Parentage," 867 (quoting *In re* Parentage of L.B., 122 P.3d 161, 178 (Wash. 2005)).

(62.) 72 P.3d 1012, 1013, 1021-1029 (2003).

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(63.) Ibid., 1012.

(64.) Ibid.

(65.) Ibid.

(66.) Ibid.

(67.) Ibid., 1013.

(68.) Ibid., 1024–1025.

(69.) Ibid., 1021–1024.

(70.) Ibid., 1026–1028.

(71.) Ibid., 1028–1029.

(72.) See Principles § 2.03 reporter's notes cmt. b, at 142.

(73.) *McAllister v. McAllister*, 2010 N.D. 40, 779 N.W.2d 652, 658 (N.D. 2010).

(74.) *Kulstad v. Maniaci*, 220 P.3d 595, 606–608 (Mont. 2009).

(75.) *Sheetz v. Sheetz*, 63 N.E.3d 1077 (Ind. Ct. App. 2016).

(76.) See, e.g., Harris, "Reforming Paternity Law," 480.

(77.) *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005).

(78.) Higdon, "Constitutional Parenthood," 1526.

(79.) Ibid.

(80.) See, e.g., *Kulstad v. Maniaci*, 244 P.3d 722 (Mont. 2010).

(81.) Del. Code tit. 13 § 8-201(c)(1).

(82.) *In re Clifford K.*, 619 S.E.2d 138, 157 (W.Va. App. 2005).

(83.) *Principles of the Law of Family Dissolution: Analysis and Recommendations* (St. Paul, Minnesota: American Law Institute Publishers, 2000), 131–132, (§ 2.03).

(84.) See, e.g., *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005), cert. denied sub. nom.; *Britain v. Carvin*, 547 U.S. 1143 (2006); *Principles of the Law of Family Dissolution* § 2.02. cmt. c(ii).

(85.) Meyer, "'Best Interests' Parentage," 866.

(86.) Meyer, "Family Diversity and the Rights of Parenthood," 136.

(87.) *McAllister v. McAllister*, 2010 N.D. 40, 779 N.W.2d 652, 658 (N.D. 2010).

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(88.) Ibid.

(89.) *In re Clifford K.*, 619 S.E.2d 138, 157 (W.Va. App. 2005).

(90.) *T.B. v. L.R.M.*, 786 A.2d 913, 916–917 (Pa. 2001).

(91.) Ibid.

(92.) *Chatterjee v. King*, 280 P.3d 283, 285 (N.M. 2012).

(93.) *A.H. v. M.P.*, 447 Mass. 828, 842–843 (Mass. 2006) (quoting ALI Principles § 2.03(1) (b)). See also Courtney G. Joslin, “Nurturing Parenthood Through the UPA (2017),” *Yale Law Journal - Forum* 127 (2018): 601–602.

(94.) Gregg Strauss, “What Role Remains for De Facto Parenthood?” *Florida State University Law Review* (forthcoming).

(95.) *Pitts v. Moore*, 2014 M.E. 59, ¶ 35 (2014). See also *Moreau v. Sylvester*, 196 Vt. 183, 188 n.3 (2014).

(96.) Uniform Parentage Act § 609 (2017).

(97.) Joslin, “Nurturing Parenthood,” 601–602.

(98.) Uniform Parentage Act §609.

(99.) Joslin, “Nurturing Parenthood,” 601–602.

(100.) *Pitts v. Moore*, 90 A.3d 1169 (Me. 2014).

(101.) Emily Buss, “‘Parental’ Rights,” *Virginia Law Review* 88 (2002): 635, 636.

(102.) *Clifford S. v. Superior Court*, 45 Cal. Rptr. 2d 333, 337 (App. Ct. 1995).

(103.) *McAllister v. McAllister*, 779 N.W.2d 652.

(104.) Ibid., 655.

(105.) Ibid.

(106.) Ibid., 662.

(107.) Ibid., 658.

(108.) See, e.g., *Youmans v. Ramos*, 711 N.E.2d 165 (Mass. 1999); *R.D. v. A.H.*, 912 N.E.2d 958 (Mass. 2009).

(109.) Parental rights are a zero-sum proposition: Time given to a relational parent means less time for the child’s legal parents. An award of visitation also means the legal parent must devote time and energy to drop-offs and pick-ups and must navigate schedule

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changes. Requiring shared decision-making with a relational parent means less discretion for the legal parent to decide matters for a child.

(110.) 15 Vt. Stat. Ann. § 296 (2015).

(111.) See Baker, "Asymmetric Parenthood," 127.

(112.) See Robin Fretwell Wilson, "Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents," *Hofstra Law Review* 38 (2010): 1159-1168.

(113.) Meyer, "'Best Interests' Parentage," 880.

(114.) *Smith v. Guest*, 16 A.3d 920 (Del. 2011) (applying Del. Code Ann. tit. 13 § 8-201 (2011)).

(115.) McAllister, 779 N.W.2d at 666 (Crothers, J., concurring).

(116.) Jeffrey A. Parness, "Dangers in De Facto Parenthood," *University of Arkansas at Little Rock Law Review* 37, no. 1 (2014): 43.

(117.) Shulman, *The Constitutional Parent*, 106.

(118.) *Background Checks for Prospective Foster, Adoptive, and Kinship Caregivers* (Child Welfare Information Gateway, 2016).

(119.) Parness, "Dangers in De Facto Parenthood," 26.

(120.) "Accused Abuser Seeks to Keep Victim Alive," *Chicago Tribune*, December 8, 2005, http://articles.chicagotribune.com/2005-12-08/news/0512080202_1_justices-jason-strickland-holli-strickland.

(121.) Buffy Spencer, "Haleigh Lifeless, 'Freezing Cold,' Nurse Testifies," *Republican Newsroom*, November 6, 2008, at A1; "Accused Abuser Seeks."

(122.) Patricia Wen, "Stepfather Convicted in Poutre Abuse Case," *Boston Globe*, November 27, 2008, at A1.

(123.) Patricia Wen, "DSS Sought Early End to Life Support," *Boston Globe*, January 20, 2006, at A1.

(124.) Patricia Wen, "Poutre Stepfather Gets 12-15 Years in Prison," *Boston Globe*, December 19, 2008, at B1.

(125.) *Ibid.*, B1.

(126.) Wen, "Poutre Stepfather"; Patricia Wen, "Bid to End Life Support Was Quick," *Boston Globe*, February 7, 2006, at B2.

(127.) *Ibid.*, B2.

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(128.) Brief for Petitioner/Appellant Jason Strickland at 30; *In re A Juvenile*, No. SJC-09629 (Mass. Sup. Ct. Oct. 6, 2005).

(129.) *Ibid.*

(130.) *Ibid.*

(131.) Transcript of Hearing on a Motion and Preliminary DNR Hearing at 22, *In re Care & Prot. of Poutre*, No. CP05H0068 (Juv. Ct. Hampden County Sept. 26, 2005) at 10.

(132.) Patricia Wen, "Haleigh Reported Hurting Herself, Specialist Says," *Boston Globe*, November 21, 2008, at B4.

(133.) See *In re Care & Prot. of Sharlene*, 840 N.E.2d 918, 920, 923 (Mass. 2006); Transcript of Hearing, 24, 28 (DSS argued that Jason "was either participating in the infliction of [Haleigh's] injuries or totally ignoring the fact").

(134.) Patricia Wen, "Accused Stepfather Fights to Keep Girl Alive," *Boston Globe*, November 6, 2005, at A1.

(135.) Transcript of Hearing, 27-28.

(136.) *In re Sharlene*, 840 N.E.2d at 926, 930; see *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 890-891 (Mass. 1999).

(137.) *In re Sharlene*, 840 N.E.2d at 927.

(138.) *Ibid.*, 926 (emphasis added).

(139.) 90 A.3d 1169 (Me. 2014).

(140.) *Ibid.*, 1173.

(141.) 95 A.3d 416 (Vt. 2014).

(142.) *Ibid.*, 417-418.

(143.) *Ibid.*, 418.

(144.) *Ibid.*

(145.) *Ibid.*, 423-424.

(146.) Higdon, "Constitutional Parenthood," 1492.

(147.) Ala. Code § 26-17-204(a)(5).

(148.) S.D. Codified Laws § 25-5-29.

(149.) N.M. Stat. Ann. § 40-10B-3(A), (C).

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- (150.) Wis. Stat. Ann. § 767.43(1).
- (151.) Ibid.
- (152.) Or. Rev. Stat. § 109.119(1) & (3)(a).
- (153.) Utah Code Ann. § 30-5a-103(2)-(4).
- (154.) Ind. Code § 31-14-7-2(a).
- (155.) Del. Code tit. 13 § 8-201.
- (156.) Maine Rev. Stat. tit. 19-A § 1891.
- (157.) Minn. Stat. § 257c.01(2)(a).
- (158.) Cal. Fam. Code § 3101(a).
- (159.) Del. Code tit. 13 § 733.
- (160.) Or. Rev. Stat. § 109.119(1) & (3)(a).
- (161.) Utah Code Ann. § 30-5a-103(2)-(4).
- (162.) Va. Code Ann. § 20-124.1.
- (163.) Mo. Rev. Stat. § 210.822(1)(3)(c).
- (164.) Ala. Code § 26-17-204(a)(5).
- (165.) Ky. Rev. Stat. Ann. § 403.270(1)(a).
- (166.) Ind. Code § 31-9-2-35.5.
- (167.) Tenn. Code Ann. § 36-6-303.
- (168.) Utah Code Ann. § 30-5a-103(2)-(4).
- (169.) Colo. Rev. Stat. § 19-4-105(1)(d).
- (170.) Ind. Code § 31-14-7-2(a).
- (171.) Minn. Stat. § 257.55(d).
- (172.) Mont. Code Ann. § 40-6-105(1)(d).
- (173.) Ala. Code § 26-17-204(a)(5).
- (174.) Wyo. Stat. Ann. § 14-2-504(a)(v).
- (175.) Del. Code Ann. tit. 13 § 8-204(a)(5).
- (176.) Tex. Fam. Code § 160.204(a)(5).

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- (177.) Ky. Rev. Stat. Ann. § 403.270(1)(a).
- (178.) Minn. Stat. § 257c.01(2)(a).
- (179.) Ind. Code § 31-9-2-35.5.
- (180.) Colo. Rev. Stat. § 14-10-123(1)(c).
- (181.) N.M. Stat. Ann. § 40-10B-3(A), (C).
- (182.) Maine Rev. Stat. tit. 19-A § 1891.
- (183.) Del. Code tit. 13 § 733.
- (184.) Colo. Rev. Stat. § 19-4-105(1)(d).
- (185.) Ind. Code § 31-14-7-2(a).
- (186.) Minn. Stat. § 257.55(d).
- (187.) Mont. Code Ann. § 40-6-105(1)(d).
- (188.) Ala. Code § 26-17-204(a)(5).
- (189.) Wyo. Stat. Ann. § 14-2-504(a)(v).
- (190.) Del. Code Ann. tit.13 § 8-204(a)(5).
- (191.) Texas Fam. Code § 160.204(a)(5).
- (192.) N.M. Stat. Ann. § 40-10B-3(A), (C).
- (193.) Maine Rev. Stat. tit. 19-A § 1891.
- (194.) S.D. Codified Laws § 25-5-29.
- (195.) Ky. Rev. Stat. Ann. § 403.270(1)(a).
- (196.) Minn. Stat. § 257c.01(2)(a).
- (197.) Ind. Code § 31-9-2-35.5.
- (198.) Utah Code Ann. § 30-5a-102(2)(e).
- (199.) Maine Rev. Stat. tit. 19-A § 1891.
- (200.) Tenn. Code Ann. § 36-6-303.
- (201.) Wis. Stat. Ann. § 767.43(1).
- (202.) Cal. Fam. Code § 3101(a).
- (203.) Or. Rev. Stat. § 109.119(1) & (3)(a).

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- (204.) Va. Code Ann. § 20-124.1.
- (205.) S.D. Codified Laws § 25-5-29.
- (206.) Ky. Rev. Stat. Ann. § 403.270(1)(a).
- (207.) Minn. Stat. § 257c.01(2)(a).
- (208.) Ind. Code § 31-9-2-35.5.
- (209.) N.M. Stat. Ann. § 40-10B-3(A), (C).
- (210.) Del. Code tit. 13 § 8-201.
- (211.) Maine Rev. Stat. tit. 19-A § 1891.
- (212.) S.D. Codified Laws § 25-5-29.
- (213.) Wis. Stat. Ann. § 767.43(1).
- (214.) Colo. Rev. Stat. § 14-10-123(1)(c).
- (215.) Del. Code tit. 13 § 8-201.
- (216.) Maine Rev. Stat. tit. 19-A § 1891.
- (217.) Del. Code tit. 13 § 8-201.
- (218.) Maine Rev. Stat. tit. 19-A § 1891.
- (219.) Ibid.

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