

Comparable Pursuits of Hold Out and De Facto Parentage: Tweaking the 2017 Uniform Parentage Act

by
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I. Introduction

In July 2017, the National Conference of Commissioners on Uniform State Law (NCCUSL) approved and recommended for enactment in all states a new Uniform Parentage Act (2017 UPA). This act follows the 1973 and 2000 UPAs of NCCUSL which have been widely adopted both in state statutes and by common law rulings.¹ Unfortunately, the 2017 UPA needs some tweaking.

This article focuses on two sections of the 2017 UPA, the “holding out” and “de facto” parentage sections. The article urges that “de facto” parentage be treated more comparably to “holding out” parentage, so that in each setting parentage may be pursued by those beyond the alleged parents. For now, under the 2017 UPA only alleged “de facto” parents can pursue de facto parentage, while a broader array of petitioners can pursue “holding out” parentage. The difference is weakly defended in

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

the 2017 UPA, varies from many current American state laws, and, most importantly, disserves children and many people who raise them in both childcare and child support settings.

II. 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.²

Where a man so holds out a child as his own, the natural paternity presumption may be determined to exist in an action “at any time” pursued by “any interested party.”³ The presumption “may be rebutted . . . only by clear and convincing evidence,”⁴ via an action “at any time” pursued by “any interested party.”⁵

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.⁶

While the “hold out” presumption no longer spoke to “natural” fatherhood, it now required same household residence with the child “for the first two years of the child’s life.” This paternity presumption, seemingly established, could be overridden by an adjudication, maintained by various petitioners including the child, the child’s mother, and a man whose paternity is to be adjudicated.⁷ An action seeking to “disprove” this presumption could be brought “at any time” as long as “the presumed father never openly held out the child as his own.”⁸ Where there was a

² 1973 UNIF. PARENTAGE ACT § 4(a)(4) [hereinafter 1973 UPA].

³ 1973 UPA § 6(b) (action seeking to determine presumed father-child relationship via “hold out”).

⁴ 1973 UPA § 4(b).

⁵ 1973 UPA § 6(b) (action seeking to determine “non-existence” of presumed father-child relationship via “hold out”).

⁶ 2000 UNIF. PARENTAGE ACT, as amended in 2002, § 204(a)(5) [hereinafter 2000 UPA].

⁷ 2000 UPA § 602.

⁸ 2000 UPA § 607(b).

“hold out” during the child’s early life, the override action “must be commenced not later than two years after the birth of the child,”⁹ an opportunity likely most often to be used by natural fathers (and their blood relationships, perhaps). Such an action, if successful, seemingly would end the possibility of establishing a two year “hold out.”

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

- (a) A individual is presumed to be a parent of a child if: . . .
- (2) the individual resided in the same household with the child for the first two years of the life of the child, including periods of temporary absence, and openly held out the child as the individual’s child.¹⁰

The presumption no longer spoke to fatherhood, allowing any “hold out” individual to become a presumed parent. This parentage presumption may be overcome by a “valid denial of parentage,” accompanying a voluntary parentage acknowledgment by another,¹¹ or by an adjudication.¹² An adjudication to overcome a “hold out” parentage cannot be sought “after the child attains two years of age” even if there was no “same household” residence and no “hold out,” unless there are two (or more) presumed parents.¹³ Any proceeding to adjudicate initially a presumed “hold out” parentage may be maintained by an array of petitioners, including the child, the birth mother who remains a legal parent, another legal parent like a presumed marital parent, an alleged presumed parent, a child-support agency, an adoption agency, and a licensed child-placement agency.¹⁴ Such a proceeding can include child support requests.¹⁵ The results of such an initial proceeding do not bind a child who was not a party or was not represented in the proceeding.¹⁶

⁹ 2000 UPA § 607(a).

¹⁰ 2017 UNIF. PARENTAGE ACT § 204(a)(2) [hereinafter 2017 UPA].

¹¹ 2017 UPA §§ 204(b), 302(b)(1).

¹² 2017 UPA § 204(b).

¹³ 2017 UPA § 608(b).

¹⁴ 2017 UPA § 602.

¹⁵ 2017 UPA § 616(a) (in addition, there may be requests for adoption, childcare, parental rights termination, or marriage dissolution requests).

¹⁶ 2017 UPA § 623(b)(4).

III. De Facto Parentage

An October 2016 draft of what became the 2017 Uniform Parentage Act added a new form of parentage. It says:

- (a) An individual is presumed to be the parent of a child if: . . .
- (6) the individual:
 - (i) resided with the child for a significant period of time;
 - (ii) engaged in consistent caretaking of the child;
 - (iii) accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and
 - (iv) established a bonded and dependent relationship with the child, and the other parent understood, acknowledged, or accepted the formation of that relationship or behaved as though the individual is a parent of the child.¹⁷

The presumption no longer spoke only to marital, “hold out” or acknowledged children. The varying presumptions were subject to varying types of establishment and challenge. As for presumed de facto parentage establishment, an individual seeking judicial recognition “must establish standing” under “a heightened” standard inapplicable to other petitioners for presumed parent status.¹⁸ An attempted rebuttal could only be resolved via an adjudication,¹⁹ where standing to rebut is chiefly limited to children who were not parties or represented in the proceeding earlier establishing de facto parentage.²⁰

The 2017 Uniform Parentage Act did not follow the October 2016 draft. Rather, it says:

- (a) A proceeding to establish the parentage of a child under this section may be commenced only by an individual who: (1) is alive when the proceeding is commenced; and (2) claims to be a de facto parent of the child.
- (b) An individual who claims to be a de facto parent of a child must commence the proceeding (1) before the child is 18 years of age and (2) while the child is alive . . .

¹⁷ Proposed Revised Unif. Parentage Act, Oct. 7, 2016, § 204(a)(6) [hereinafter Proposed 2016 UPA].

¹⁸ Proposed 2016 UPA § 602(c) and Reporter’s Comment.

¹⁹ Proposed 2016 UPA § 204(b).

²⁰ Proposed 2016 UPA § 621(b). Most others with interests in the earlier de facto parent establishment proceeding cannot usually seek rebuttal since they would have been joined in the earlier proceeding. Proposed 2016 UPA § 603(b). Joinder may be impossible in a few such proceedings due to lack of personal jurisdiction. Proposed 2016 UPA § 603(c).

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- (d) In a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, if there is only one other individual who is a parent or has a claim to parentage of the child, the court shall adjudicate the individual who claims to be a de facto parent to be a parent of the child if the individual demonstrates by clear and convincing evidence that:
 - (1) the individual resided with the child as a regular member of the child's household for a significant period;
 - (2) the individual engaged in consistent caretaking of the child;
 - (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial benefit;
 - (4) the individual held out the child as the individual's child;
 - (5) the individual established a bonded and dependent relationship with the child which is parental in nature;
 - (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and
 - (7) continuing the relationship between the individual and the child is in the best interest of the child.
- (e) In a proceeding to adjudicate the parentage of an individual who claims to be a de facto parent of the child, if there is more than one other individual who is a parent or has a claim to parentage of the child and the court determines that the requirements of paragraphs (1) through (7) of subsection (d) are met, the court shall adjudicate parentage under Section 613, subject to other applicable limitations in this [part].²¹

De facto parentage no longer was prompted by a presumption. Once adjudicated a de facto parent, an override is difficult for all but the child,²² because others with possible objections (or interests) were usually given notice of the proceeding to adjudicate de facto parentage. Notice, accompanied by “a right to intervene,” must be given to others, including the birth mother if she remains a legal parent, any other person who has been deemed a parent by a court, and any person claiming parentage by a presumption or a voluntary acknowledgment.²³ Those who

²¹ 2017 UPA § 609(a), (b), (d) and (e). These de facto parent norms already have been presented in several American state legislatures. *See, e.g.*, 2017 Vt. House Bill 562 (introduced Jan. 3, 2018), at §§ 501-502 [hereinafter Vt. 562]; 2017 Wash. Senate Bill 6037 (prefiled Dec. 20, 2017), at § 509 [hereinafter Wash. 6037]; and 2017 R.I. House Bill 7226 (introduced Jan. 18, 2018), at § 15-8.1-6.204 [hereinafter R.I. 7226].

²² 2017 UPA § 623(b)(4) (“child is not bound by a judicial determination” of de facto parentage unless “the child was a party or was represented . . . in the proceeding”).

²³ 2017 UPA § 603(a).

receive notice, whether or not they intervene, are subject to “a defense” involving the earlier “determination of parentage” if they seek “to adjudicate parentage” in “a subsequent proceeding.”²⁴

Thus, while hold out parentage, under each of the UPAs and regardless of any requirement of a minimum period of same house residency, prompts a parentage presumption that is subject to rebuttal, de facto parentage under the 2017 UPA prompts no presumption. Seemingly de facto parentage must be established through court order. How do the establishment devices for hold out and de facto parents differ significantly under the 2017 UPA, and what rationales support the differences?

IV. Pursuing Hold Out and De Facto Parentage

Both presumed hold out parentage and de facto parentage under the 2017 UPA, often, though not always, prompt inquiries into both holding out a child as one’s own and residence with a child. A presumed hold out parent must reside “with the child for the first two years of the life of the child.”²⁵ The Act only demands of de facto parentage “a bonded and dependent relationship with the child” and the promotion (via fostering or supporting) of this relationship by “another parent of the child” (presumably one already recognized as a parent under law), if there is one.²⁶ These (and other) demands seemingly were added, via de facto parentage, to permit legal parentage for would-be parents who undertake childcare sometime after the child’s birth, perhaps long after birth, as well as for would-be parents who undertake childcare at birth where the care ceases before the child reaches two years of age.²⁷ Yet, de facto parentage inquiries will often encompass examinations of the household residences of the would-be parents and children,²⁸ as well as any holding out by the would-be parents.²⁹

²⁴ 2017 UPA § 623(d) (the defense will usually be res judicata).

²⁵ 2017 UPA § 204 (a) (2).

²⁶ 2017 UPA § 609 (d) (6).

²⁷ Joslin, *supra* note 1, at 602 (the de facto parentage provision “captures and protects relationships that may not be covered by the holding-out provision”).

²⁸ 2017 UPA § 609(d)(1).

²⁹ 2017 UPA § 609(d)(4).

The 2017 UPA treats differently those who have standing to pursue a judicial determination of hold out or de facto parentage. As to a possible presumed hold out parent, the Act recognizes “a proceeding to adjudicate parentage may be maintained” by, inter alia, the child, the child’s birth mother who remains a parent, an individual seeking a parentage designation, and a child-support agency.³⁰ As will be seen, such an adjudication seemingly may be pursued to determine judicially the satisfaction of the hold out norms, which might then be followed by a request for child custody/visitation by the hold out parent or by a request for child support by another legal parent, like the birth mother. Also, such an adjudication may be pursued to determine that a particular person’s acts failed to satisfy those norms, which might then be followed by a request for a court order prohibiting further child contact with, or involuntary child support from, the person denied presumed hold out status.

As to a possible de facto parent, the Act severely limits standing because it says a “proceeding to establish” de facto parentage “may be commenced only by an individual who . . . is alive . . . and . . . claims to be a de facto parent of the child.”³¹ The accompanying Comment explains that this “limitation was added to address concerns that the stepparents might be held responsible for child support.”³² While it says that “other legal the-

³⁰ 2017 UPA § 602.

³¹ 2017 UPA § 609. This limit was maintained (at times, with different language) in the state legislative proposals modeled on the 2017 UPA. R.I. 7226, at § 15-8.1-6.204(a); Vt. 562, at § 502(c) (“person seeking to be adjudicated a de facto parent”); Wash. 6037, at § 509(1).

³² 2017 UPA § 609 Comment. Criticisms of this approach to child support appeared early in the drafting process. See, e.g., Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute’s Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1114-16 (2010) (choice is “perplexing”). This limitation runs contrary to the general policies underlying the 2017 UPA. As the 2017 UPA Reporter noted:

When the law fails to recognize and protect functional or social parent-child relationships, children are harmed in a number of ways. Thousands of children have been abruptly cut off from one of the people they looked to and relied upon as a parent. Experience and existing research tells us that this is damaging to children. In addition, children may be denied a range of critical financial protections through that person, including child support and children’s social security benefits, just to name two. As I have previously noted,

ories” utilizing norms comparable to de facto parentage are available, common law child support (as opposed to probate) precedents extending beyond the Act may well be foreclosed in jurisdictions where the standing limitations of the 2017 UPA, and its purpose, are followed.³³ Should one judicially seek de facto parentage under the 2017 UPA for the purpose of establishing childcare opportunities, then perhaps the child support responsibilities of the petitioner, even a stepparent, could be assessed.³⁴

The Comment to the 2017 UPA explains in great detail how its suggested norms on de facto parentage establishment were “modeled” on some existing (and trending) state norms, found within “equitable principles . . . statute and . . . case law.”³⁵ It does not explain, however, why the broader state standing norms on who can pursue de facto parent establishments did not serve as models, even outside stepparent child support settings. In both Delaware and Maine, whose recent enactments were specifically touted in the 2017 UPA,³⁶ standing to pursue de facto parentage seemingly is recognized for a range of litigants who might be interested in either child support or childcare involving those who did not reside with a child for the child’s first two years.³⁷ Else-

“[W]hether children have adequate financial support, and particularly whether they have access to child support, directly impacts their overall development and well-being.”

³³ 2017 UPA § 609 Comment (noting that the 2017 UPA is not, however, intended to preclude comparable de facto parent norms in nonchildcare settings, such as settings involving who are the children of decedents in will contests).

³⁴ 2017 UPA § 203 (“a parent-child relationship established . . . applies for all purposes, except as otherwise provided by law”).

³⁵ 2017 UPA § 609 Comment. References to these norms in most states are compiled in Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260, Appendix C at 2370-72 (2017) (“jurisdictions in which unmarried, nonbiological parents may attain some form of parental recognition without having adopted the child”).

³⁶ 2017 UPA § 609 Comment.

³⁷ See, e.g., DEL. CODE ANN. tit. 13, § 8-201(c) (2013) (de facto parentage “applies for all purposes except as otherwise specifically provided”); ME. REV. STAT. tit. 19-A § 1853 (2016) (similar). Before the recent legislation in Delaware, broad standing to pursue a childcare order was recognized in precedent. See, e.g., *L.M.S. v. C.M.G.*, No. CN04-08601, 2006 WL 5668820 (Del. Fam. Ct. Mar. 4, 2006) (former lesbian partner could pursue a childcare order over the legal parent’s objection under a five-part test for determining de facto parent-

where, there is broader standing for litigants seeking to establish de facto (and comparable forms of imprecise³⁸) parentage in order to obtain inheritance or tort recoveries for children, pursue child support, or secure childcare or child contact orders. As to the last of those, a parent of an alleged de facto parent can sometimes seek a posthumous recognition of de facto parenthood for a deceased son or daughter in order then to pursue third-party child (or special grandparent) visitation involving an alleged grandchild.³⁹ Regarding child support, a single legal parent can

age). *See also* DEL. CODE ANN. tit. 13, § 501(b) (“where the parents are unable to provide a minor child’s minimum needs, a stepparent or a person who cohabits in the relationship of husband and wife with the parent of a minor child shall be under a duty to provide those needs. Such a duty shall exist only while the child makes residence with such stepparent or person and the marriage or cohabitation continues.”).

³⁸ Comparable forms go under varying names, including equitable adoption, parentage by estoppel, and in loco parentis. These forms are comparable to 2017 UPA in that they all recognize legal parenthood arising from conduct occurring at no single point in time. Precise parentage norms include legal parenthood arising from giving birth; marriage at some point [points differ interstate] to the birth mother; adoption; a completed assisted reproduction contract [whether or not there is a surrogate], which may need to be receive later court approval; or a voluntary parentage [or, in some states, paternity] acknowledgment. On the differing forms of precise and imprecise American state parentage laws (both via precedents or statutes), see, e.g., Jeffrey A. Parness, *Challenges in Handling Imprecise Parentage Matters*, 28 J. AM. ACAD. MATRIM. LAW. 401 (2015); Jeffrey A. Parness, *Parentage Law (R) Evolution: The Key Questions*, 59 WAYNE L. REV. 743 (2013) [hereinafter *Parentage Law (R) Evolution*].

³⁹ *See, e.g.,* ALA. CODE § 30-3-4.2(b) (grandparent may seek reasonable visitation rights with respect to the grandchild where the marriage of the “parents . . . has been severed by death”); ARK. CODE ANN. § 9-13-103(b)(1) (“reasonable” visitation rights for a grandparent where the “marital relationship between the parents . . . has been severed by death”), pursued by maternal grandmother and greatgrandmother where birth mother died in *In re Adoption of J.P.*, 385 S.W.3d 266 (Ark. 2011)); N.D. CENT. CODE ANN. § 14-09-05.1(1) (“reasonable” grandparent visitation is in child’s best interests and “would not interfere with the parent-child relationship”). Beyond special grandchild visitation statutes, grandparents seeking grandchild visitation/contact orders over parental objections can utilize more general third-party child visitation/contact statutes, as with laws encompassing a broader array of family members and/or biological relatives. *See, e.g.,* Jeffrey A. Parness & Alex Yorko, *Nonparental Childcare and Child Contact Orders for Grandparents*, 120 W. VA. L. REV. 95, 112-118 (2017). *See also* W.H. v. D.W., 78 A.3d 327, 341 (D.C. 2013) (maternal grandmother, upon mother’s death, could pursue a joint legal and physical cus-

sometimes seek to establish de facto (or other forms of imprecise) parentage in a former domestic partner to secure child support from that partner who attempts to walk away from the dependency, and reasonable expectations, arising from his or her own bonded and dependent parent-child like relationship with a child then in need of support.⁴⁰ As to inheritance or tort claims, legal parents or guardians can sometimes seek on behalf of their children recoveries arising from the deaths of alleged de facto parents.⁴¹

Finally, the 2017 UPA Comment on de facto parentage does not address why parentage establishment standing is now limited though it was not under the quite comparable 1973 UPA provision on presumed natural fatherhood. Recall that the 1973 UPA recognized such a presumption for a man who received the child into his home and held the child out as “his natural child.”⁴² Un-

tody order involving her grandchild with the grandchild’s stepbrother, though she did not meet the criteria for de facto parentage or third-party child custody standing, due to judicial “common law or equitable jurisdiction” over child custody issues). The NCCUSL has been considering a new model act on third-party childcare. *See* Nonparental Child Custody and Visitation Act, Discussion Draft (Sept. 21, 2017).

⁴⁰ *See, e.g.,* *Elisa B. v. Superior Court*, 117 P.3d 660, 667, 670 (Cal. 2005) (one presumed a parent due to reception of a child into one’s home and openly holding out the child as one’s own can be assessed child support, since there was more than a transformation of an “act of kindness into a legal obligation”); *Chambers v. Chambers*, No. CN99-09493, 00-09295, 2005 WL 645220 (Del. Fam. Ct. Jan. 12, 2005) (de facto parent, former lesbian partner, held liable for child support though no specific coverage in the statute; former partner was equitably estopped from denying support obligation); *Weinand v. Weinand*, 616 N.W.2d 1, 7–8 (Neb. 2000) (ex-husband, as stepfather, was only obligated to pay child support after divorce where he engaged in “fraudulent activity” or there was “unusual hardship to the child if the support obligation were not imposed”); *Ulrich v. Cornell*, 484 N.W.2d 545, 548 (Wis. 1992) (stepfather can be assessed child support under equitable estoppel theory if there was an unequivocal representation of intent to support, reliance on this by the legal parent or child, and detriment to the legal parent or child as a result of such reliance).

⁴¹ In the inheritance setting, several American states employ a “contract to adopt” doctrine to determine heirship. *See, e.g.,* *Johnson v. Johnson*, 617 N.W.2d 97, 103–05 (N.D. 2000) (reviewing other state cases) [hereinafter *Johnson I*]. In the tort setting, in Arkansas, beneficiaries in wrongful death cases include children for whom the decedents stood “in loco parentis.” *Zulpo v. Blann*, 2013 Ark. App. 750 (interpreting ARK. CODE § 16-62-102).

⁴² 1973 UPA § 4(a)(4).

like the 2000 UPA, there was no requirement in the 1973 UPA of a hold out during the “first two years of the child’s life.”⁴³ The 1973 UPA hold out parentage and the 2017 UPA de facto parentage are quite similar in that they are not dependent upon some parental-like actions at birth, and thus could often encompass stepparents. But unlike the 2017 UPA, under the 1973 UPA “any interested party” could “bring an action at any time for the purpose of determining the existence or non-existence of the father and child relationship presumed” from the receipt of a child into one’s home while holding out the child as one’s own.⁴⁴ Thus, under the 1973 UPA, but not the 2017 UPA, seemingly parentage establishment in a stepparent, or another, could be undertaken solely for the purpose of prompting a child support order.⁴⁵

The 2017 UPA expresses “concerns” that stepparents who voluntarily undertook significant parental-like responsibilities “might be held responsible for child support when others seek to establish the stepparents as de facto parents.” In fact, at least one American state already expressly recognizes there can be stepparent child support duties even where there is no such significant undertaking and no current parental childcare interests. In North Dakota, by statute a stepparent is “bound to maintain” a former spouse’s dependent children after a marriage dissolution so long as the children “remain in the stepparent’s family.”⁴⁶

Further, even before the ascent of written de facto parentage laws, as in Delaware and Maine, or de facto parent precedents,⁴⁷ some American state equitable estoppel cases

⁴³ 2017 UPA § 204(a)(2).

⁴⁴ 1973 UPA § 6(b). *See also id.* § 6(c) (“an action to determine the existence of the father and child relationship with respect to a child who has no presumed father . . . may be brought by the child, the mother or personal representative of the child, the [appropriate state agency], the personal representative or a parent of the mother if the mother has died, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor”).

⁴⁵ 1973 UPA § 15(a) (court judgment or order “determining the existence . . . of the parent and child relationship is determinative for all purposes”). *See also id.* § 15(c) (such a judgment or order can address “the duty of support”).

⁴⁶ N.D. CENT. CODE ANN. § 14-09-09.

⁴⁷ *See, e.g.,* Conover v. Conover, 146 A. 3d 433, 446-448 (Md. 2016) (re-viewing cases); *In re Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E. 3d 488, 500 (N.Y. 2016) (establishing de facto parentage guidelines because the General Assembly set “too high a bar for reaching a child’s best interest”).

recognized there could be possible child support orders against current nonparents, including stepparents. In one case, a child support order was possible against a nonparent who made an “unequivocal representation of intent to support the child,” where there was also “reliance” by a legal parent and “detriment” to the natural parent.⁴⁸ Yet, such a use of estoppel was often reserved for “exceptional circumstances.”⁴⁹

Exceptional circumstances seem less necessary where there are written de facto parent laws which place all who are acting, or who facilitate others acting, in parental-like ways on notice that state law policies generally favor comparable treatment, for all purposes, of biological, marital, adoptive, and de facto parents – though more definitive personal assessments of de facto parenthood are more difficult.

As to stepparents and others eligible for de facto parent status, possible child support obligations, even in the absence of childcare interests, should not be surprising. Recall that hearings on whether there is clear and convincing evidence justifying de facto parent status under the 2017 UPA embody judicial considerations of whether an alleged de facto parent “undertook full and permanent responsibilities of a parent of the child without expectation of financial benefit”⁵⁰ and established a “dependent relationship with the child which is parental in nature.”⁵¹ Such acts should prompt opportunities for exercises of judicial discretion on child support duties, because the best interests of children and their caretakers would be served, while the reasonable reliances on continuing support and voluntary undertakings of familial responsibilities would be respected.

⁴⁸ *Ulrich v. Cornell*, 484 N.W.2d 545, 549 (Wis. 1992). *Cf. Weinand*, 616 N.W.2d at 8 (equitable estoppel can operate against a divorced stepfather who voluntarily steps in and assumes all of the obligations incident to a parental relationship with the former “stepchild” who then stands, or will stand, “in loco parentis” with the child).

⁴⁹ *Weinand*, 616 N.W.2d at 7-8 (reviewing American state cases).

⁵⁰ 2017 UPA § 609(d)(3).

⁵¹ 2017 UPA § 609(d)(5).

V. New Standards on Pursing De Facto Parentage

The 2017 UPA should be tweaked so that those beyond would-be de facto parents can pursue judicial recognitions of de facto parenthood. The 2017 UPA might also be further amended so that the varying pursuers of de facto parenthood, and the varying purposes behind pursuits of de facto parentage, are expressly recognized. Such purposes could include, at the least, securing a childcare order or securing a child support order (and perhaps securing inheritance or tort recoveries). Thus, de facto parent pursuits should be available, for example, to the parents of deceased alleged de facto parents who seek, as alleged grandparents, continuing childcare/child contact, at times perhaps over the legal parents' objections.⁵² Such pursuits could also be available for a legal parent who seeks continuing child support from an alleged de facto parent, whether or not a former stepparent, even where the alleged obligor has no interest in continuing childcare. And, such pursuits perhaps could be available for an alleged child of a deceased de facto parent who seeks heirship (or wrongful death) standing to recover in a probate⁵³ (or tort⁵⁴) case, at least where state recovery policies favor recognition of

⁵² See, e.g., *Estate of Swift v. Bullington*, 309 P. 3d 102 (N.M. Ct. App. (2013) (putative paternal grandfather can pursue parentage after his son's death which preceded the child's birth; the purpose was to secure visitation for paternal grandparents). The standards for overcoming parental objections to nonparental childcare orders may soon arise from the Uniform Nonparent Custody and Visitation Act, adopted in July, 2018 by the NCCUSL, and from its complete or partial adoption in the states. See NCCUSL, Uniform Nonparent Custody and Visitation Act (April 5, 2018 Draft for Discussion), at § 4 (standards differ between a nonparent "consistent caretaker" and a nonparent who has developed a "substantial relationship," where only in the latter setting must a petitioning nonparent show harm/detriment to the child, defined as an "adverse effect on a child's physical, emotional or psychological wellbeing," per § 2(5)).

⁵³ See, e.g., *Estate of Burden*, 146 Cal. App. 1021 (Cal. App. 2d 2007) (inheritance statute allows post-death parentage establishment via un rebutted Uniform Parentage Act presumption involving the decedent's holding out a child as his or her child).

⁵⁴ See, e.g., ARK. CODE § 16-62-102 (stepchildren, and others, may recover as beneficiaries in wrongful death if they show decedents stood "in loco parentis" via proof submitted after deaths), as read in *Zulpo*, 2013 Ark. App. 750.

employing imprecise parentage standards (like the long lasting “equitable adoption” doctrine).

In the absence of tweaks, if not major amendments, in states where the 2017 UPA is enacted there may be no room for such pursuits via common law precedents, though such pursuits would be supported by strong public policies. Here, courts would defer to the legislatures and their expressed intentions regarding expansions of standing to pursue remedies founded on de facto parentage.⁵⁵

While the factors relevant to de facto parentage in both childcare and child support settings should be somewhat comparable, certain differences seem warranted. For example, a would-be de facto parent might only be able to pursue parentage under the 2017 UPA, presumably to establish eligibility for a parental childcare order, “if there is only one other individual who is a parent or has a claim to parentage of the child.”⁵⁶ This limit would effectively disallow the diminution of the childcare rights of two legal parents that would arise from the recognition of three or more legal parents. The 2017 UPA does not fully embrace three childcare parents, including two biological and one hold out.⁵⁷ Assuming the soundness of this limit,⁵⁸ nevertheless there are good reasons to permit three (or more) legal parents in child support settings. Support duties do not necessarily prompt childcare interests, even where the support obligor has then expressed childcare interests.⁵⁹

⁵⁵ See, e.g., *LP v. LF*, 338 P.3d 908 (Wyo. 2014) (Wyoming Parentage Act left no gap that invites courts to create de facto parentage doctrines). See generally 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) (outlining key principles that should guide state legislatures and courts in determining who should define childcare parents within American states).

⁵⁶ 2017 UPA § 609(d).

⁵⁷ 2017 UPA § 613(c) (two alternatives, with one declaring that a court may not adjudicate a child to have more than two legal parents).

⁵⁸ Three childcare parents, under law, have been recognized in some American state cases and statutes. See, e.g., CAL. FAM. CODE § 7612(c) (more than two parents where otherwise would be detrimental to child); *Smith v. Cole*, 553 So.2d 847 (La. 1989); *C.A.B. v. P.D.K.*, 74 A.3d 170, 179 (Pa. Super. Ct. 2013) (mother, her husband, and biological father “share legal custody”).

⁵⁹ See, e.g., *Baby A.*, 944 So. 2d 380, 395 n. 21 (Fla. Dist. Ct. App. 2006) (unwed biological father’s rights in adoption cases are minimized, while their

Also, while de facto parent childcare under the 2017 UPA requires earlier same household residence, “consistent caretaking,” a relationship that is “parental in nature,” and a child’s best interests in continuing this relationship,⁶⁰ de facto parent child support need only require an enforceable promise to provide child support while the child remains a minor. To avoid confusion over childcare and child support norms, the 2017 UPA should be amended to recognize (perhaps in the Comment) as possible a “contract to adopt” or “equitable adoption” norm (maybe borrowed a bit from inheritance cases) in child support settings⁶¹ while maintaining a narrower “de facto parent” norm in childcare settings. To avoid confusion as well, the UPA could differentiate between who has standing to pursue an order recognizing a de facto parent in varying settings, including requested childcare (where only the alleged de facto parent, and/or perhaps his or her relative may be given standing); requested child support (where a child’s legal parent or guardian or the state (seeking, for example, welfare payment reimbursements) may be given standing); and, perhaps, requested heirship in inheritance, or kinship in tort, settings (where the child of an alleged de facto parent may be given standing).⁶²

obligations in child support cases are maximized). While a biological relationship between a father and his offspring “even if unwanted and unacknowledged remains constitutionally sufficient to support . . . child support requirements,” *N.E. v. Hedges*, 391 F. 3d 832, 836 (6th Cir. 2004), it is not always constitutionally sufficient to support childcare interests, regardless of the father’s sincere interest and commitment. *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (holding it unconstitutional “for the state to give categorical preference” on childcare matters to husbands of birth mothers over the objections of unwed biological fathers).

⁶⁰ 2017 UPA § 609(d)(2), (5), and (7).

⁶¹ Several American state courts have assessed child support under such norms. See, e.g., *Johnson I*, 617 N.W.2d at 101–05 (reviewing other state cases), which led to a child support order recognized in *Johnson v. Johnson*, 652 N.W.2d 315, 322 (N.D. 2002). Cf. *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987) (“equitable adoption” doctrine permitting child support order against a husband who is not the biological father of his wife’s child is only available in a divorce where the husband desires to have parental rights and is “willing to take on the responsibility of paying child support”).

⁶² Concededly, earlier UPAs have been silent about parentage in settings beyond childcare interests (and seemingly child support duties). Should the many tweaked 2017 UPA not speak directly to parentage in probate or tort, its provisions may nevertheless be persuasive. Of course, the UPA parentage

As for hold out and/or de facto parentage in probate and/or tort settings, the UPA could be preempted by other laws specially applicable, like the Uniform Probate Code on the heirship interests of nonbiological and nonadoptive parents when their children die, or of children when their nonbiological or nonadoptive parents die.⁶³ In the absence of special laws, the 2017 UPA's imprecise parentage norms (both hold out and de facto) could be persuasive, if they continue not to speak directly to parentage in probate and/or tort settings. In some settings, a state UPA is already deemed applicable to parentage issues in probate according to the state probate code.⁶⁴

As with de facto parents in childcare and child support settings, the direct or persuasive import of the 2017 UPA de facto and hold out parentage norms may vary in their application in the probate and tort settings. Similarly, the import may also vary in two more comparable, though still distinct, tort settings, as with recoveries for the negligently-caused deaths of alleged parents in and outside of employment.

Thus, heirs in probate in parent-child settings might be limited to earlier, formally recognized family members, prompting much needed certainty in settings where expeditious and lasting resolutions are favored.⁶⁵ Yet claimants in tort in alleged parent-child settings who can pursue their own recoveries for wrongs committed directly against family members might constitute a broader class of parents and children, as by embodying newly recognized de facto or hold out parentage.⁶⁶ Conversely,

norms could also be employed elsewhere, as with kinship adoption preferences and special intrafamily (or domestic) violence laws.

⁶³ See, e.g., UNIF. PROBATE CODE § 2-115(4) (describing who "Functioned as a parent of the child") (2008 amendments).

⁶⁴ See, e.g., Estate of Campbell, No. A148905, 2017 WL 4876005 (Cal. Ct. App. Oct. 30, 2017) (citing to UNIF. PROBATE CODE § 6453).

⁶⁵ See, e.g., McDowell v. Shinseki, 23 Vet. App. 207, 213 (2009), *aff'd per curiam*, 396 Fed. App. 691 (Fed. Cir. 2010) (death of a veteran who was a de facto parent could not prompt the child's recovery from the veteran's estate, because the governing agency regulation required a "biological relationship").

⁶⁶ See, e.g., Caldwell v. Alliance Consulting Group, Inc., 775 N.Y.S.2d 92 (N.Y. App. Div. 2004) (biological father who abandoned his deceased son could collect on the death under the state worker's compensation law, but would not be a surviving parent under the probate code, as in the later case of *Estate of Ball*, 708 N.Y.S.2d 163 (N.Y. App. Div. 2005) (citing MCKINNEY'S EST, POWERS & TRUSTS LAW § 4-1.4(a)).

broader classes of parents and their children might be applicable only in probate, as where there would only be recognized in probate an equitable adoption doctrine.⁶⁷

Further, for claimants seeking their own recoveries for negligent acts committed against de facto parents or their children, standing to pursue de facto parentage may depend on whether the negligence occurred during or outside of employment, so that available worker's compensation remedies (where an accident, not negligence, need be proven) would differ from nonemployment tort remedies.⁶⁸

VI. Conclusion

Unlike its predecessors, the 2017 UPA expressly recognizes two forms of imprecise parentage, that is parentage that arises at no distinct point in time, like parentage resulting from giving birth, marriage to the birth mother, a voluntary parentage acknowledgment, or an adoption. These two forms are hold out parentage (residence with the child since birth for at least two years while holding the child out as one's own) and de facto parentage (bonded and dependent, parental-like relationship with the child). The two forms are differently treated under the Act, since only alleged de facto parents can seek to establish their parentage under law. The different treatment is founded on a concern over possible stepparent child support orders. This rationale fails, especially when considering the consequences for children's best interests. The 2017 UPA on the standing to pursue judicially a de facto parentage order needs tweaking. Broader opportunities for de facto parentage pursuits could be expressly made available in varying settings, including childcare and child support (if not probate and tort).

⁶⁷ See, e.g., *In re Scarlett Z.D.*, 28 N.E.3d 776, 792 (Ill. 2015) ("We agree . . . that the doctrine of equitable adoption . . . is a probate concept to determine inheritance and does not apply to proceedings for parentage, custody and visitation.").

⁶⁸ See, e.g., *Smith v. Smith*, 130 So. 3d 508, 512 (Miss. 2014) (due to differences in statutory language, an "in loco parentis child" was ineligible to recover on a parent's wrongful death, though the same child could recover on the death under either the worker's compensation statute or the Harbor Workers' Compensation Act).

