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# FORMAL DECLARATIONS OF INTENDED CHILDCARE PARENTAGE

*Jeffrey A. Parness\**

## INTRODUCTION

Legal parentage for childcare purposes under American state law is significantly and rapidly expanding. The new parentage norms are growing increasingly imprecise.<sup>1</sup> No longer is childcare parentage—that is, the superior right of a parent to the “care, custody, and control” of a child<sup>2</sup>—only established by precise terms, such as distinct moments in time (i.e., birth), the existence of certain biological ties, a person’s status as married to the birth mother at time of her child’s birth, the inclusion of one’s name on a birth certificate, or formal adoption. While these forms of precise childcare parentage establishment are still common, in increasing numbers, both men and women can now become childcare parents where the timing of the events establishing legal parentage is imprecise. Under such circumstances, establishing parentage typically requires assessing a person’s earlier parental-like acts, such as the provision of financial support or the holding out of a child as one’s own. Intent to be a parent, and not simply to be a child caretaker, is also usually key.<sup>3</sup>

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1 See, e.g., Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003 (2014) (advocating, upon reviewing imprecisions in the law, for a reimagined formalism rather than an expanded functionalism regarding parentage within nontraditional families).

2 *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (noting that this parental interest “is perhaps the oldest of the fundamental liberty interests recognized by this Court”).

3 Intent to parent, whether in precise or imprecise laws, is often not critical when, for example, support rather than childcare parentage is at issue. Generally, child support obligations arise for unwed biological fathers of children born of consensual sex whether or not they have childcare opportunities. See Jason M. Merrill, Note, *Falling Through the*

Both precise and imprecise forms of establishing childcare parentage can now be overridden under new imprecise parentage disestablishment norms. Whether labeled as rebuttals or rescissions of parental status under law, parentage disestablishments today often depend on assessing the parent-figure's earlier conduct that occurred at no singular point in time, like the failure of the biological father of a child born of consensual sex to establish a bonded and dependent familial relationship with his child.

Applying establishment and disestablishment norms of childcare parentage is often quite challenging due to the frequency of human relocation and legal variations in childcare parentage across states. For example, complications can arise when a child is born to a woman and jointly raised for a while by her and another in one state, but then the birth mother and child move to a new state. After the move, there is alleged to be a new second childcare parent, as well as a disestablished former second parent due to circumstances occurring at no single moment, but at times long after birth. As one distinguished commentator observed: "The relative importance of biology, intent, contract, and parental function varies tremendously by jurisdiction and even by individual case, adding confusion and unpredictability to a determination of critical importance."<sup>4</sup>

Judicial inquiries into imprecise childcare parentage in both establishment and disestablishment settings would be greatly facilitated if American state lawmakers created new mechanisms for formal expressions of earlier and current parental and parental-like intentions. As intent to parent often is quite relevant in such inquiries, these new mechanisms should facilitate determinations of imprecise childcare parentage. Part I of this Essay first reviews current state imprecise childcare parentage laws and then considers the importance of parental intentions in such laws. Part II suggests new mechanisms for formal declarations of intended childcare parentage. Such declarations would not necessarily determine childcare parentage under law. Still, they would be quite helpful when courts assess earlier actions when determining imprecise childcare parentage issues.

## I. IMPRECISE CHILDCARE PARENTAGE LAWS

Imprecise childcare parentage laws can lead to surprising, if not shocking, parental childcare interests. In one case, childcare parentage was possible for a couple who cared for a child for ten years, after the birth

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*Cracks: Distinguishing Parental Rights From Parental Obligations in Cases Involving Termination of the Parent-Child Relationship*, 11 J.L. & FAM. STUD. 203 (2008).

<sup>4</sup> Joanna L. Grossman, *Family Law's Loose Canon*, 93 TEX. L. REV. 681, 703 (2015) (reviewing JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* (2014)).

mother left the one-year-old with the couple, then strangers, at a gas station after a few minutes of conversation.<sup>5</sup>

Numerous factors contribute to the surprises caused when applying imprecise nature of childcare parentage laws. These include variances in terminology, differing standards for the same situation in different states, differing parentage standards in different contexts within the same state, inconsistent disestablishment norms both inter- and intrastate, and choice of law complications in assessing childcare parentage. This Part explores each of these factors in turn, and then examines the import of parental intentions to imprecise childcare parentage.

### A. *Common Elements of Childcare Parentage Establishment*

A preliminary challenge with childcare parentage laws is that they utilize varying titles, including *de facto* parenthood, presumed parent, equitable adoption, and parentage by estoppel.<sup>6</sup> In a single state, two or more appellations might be used to cover differing forms of imprecise childcare parentage.<sup>7</sup> Sometimes, the same appellation has different meanings in different states.<sup>8</sup> Further, imprecise childcare parentage appellations do not always mean what they appear to mean. For example, a woman married to a birth mother is sometimes eligible to become a presumed childcare “father.”<sup>9</sup> Finally, a person’s imprecise parentage establishment can sometimes follow the rebuttal of that person’s precise parentage establishment, such as when a child’s mother’s former husband loses his marital paternity presumption due to lack of biological ties, but

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5 *In re M.M.G.*, 287 P.3d 952, 953–54 (Mont. 2012) (remanding to determine possible parentage for the couple).

6 For a comprehensive survey of such laws, see Jeffrey A. Parness, *Parentage Law (R)Evolution: The Key Questions*, 59 WAYNE L. REV. 743, 752–63 (2013).

7 Consider the imprecise childcare parentage laws in Delaware, where there is a “*de facto*” parent, DEL. CODE ANN. tit. 13, § 8-201(c)(3) (West 2016) (*de facto* parentage where one acts in a “parental role”), and a “presumed parent,” *id.* § 8-204(a)(5) (establishing presumed parentage where one “held out the child as [one’s] own”).

8 Consider *de facto* parent status. In Delaware, there is childcare parentage for a *de facto* parent, DEL. CODE ANN. tit. 13, § 8-201(c), while in the District of Columbia one can seek “third party” custody as a “*de facto* parent,” D.C. CODE ANN. § 16-831.01, 831.03.

9 See TEX. FAM. CODE §§ 160.106, 160.201(b), 160.204(a) (West 2015) (providing that paternity provisions, as with the law establishing presumed paternity for a man holding out a child as one’s own, apply to maternity determinations); see also *In re Guardianship of Madelyn B.*, 98 A.3d 494, 502 (N.H. 2014) (holding that presumed “father” statute applied equally to a man or a woman); *Chatterjee v. King*, 280 P.3d 283, 287–88 (N.M. 2012) (holding that former lesbian partner of an adoptive mother can be a presumed natural parent under a statute on presuming a “man . . . to be the natural father of a child” (quoting Uniform Parentage Act, N.M. STAT. ANN. § 40-11-5(A)(4) (1986), *repealed by* New Mexico Uniform Parentage Act, N.M. STAT. ANN. §§ 40-11A-101 to -903 (2010)).

receives imprecise parentage establishment under the equitable parent doctrine.<sup>10</sup>

Many imprecise childcare parentage establishment laws—both statutory and common law—demand that a person reside with the child as a prerequisite to parentage. While some laws set out a minimum period of residency,<sup>11</sup> others do not.<sup>12</sup> These laws frequently lead to recognition of a second parent on equal footing with the child’s custodial biological or adoptive parent.<sup>13</sup>

A second common requisite for establishing imprecise childcare parentage requires that the person provided prior financial support to the child. While some laws require significant support and specify requirements,<sup>14</sup> others do not.<sup>15</sup>

Yet another common element involves whether the alleged new childcare parent previously held himself out in the community as a parent. Some laws specifically require a person to hold out the child as his or her own on the basis of natural or biological bonds.<sup>16</sup> Others, though, are less precise, and simply require that the child be held out as the person’s own.<sup>17</sup>

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10 See, e.g., *Vanderark v. Vanderark*, No. 291216, 2009 WL 2448293 (Mich. Ct. App. Aug. 11, 2009) (per curiam) (overcoming, seemingly, husband’s presumed paternity, a doctrine recognized in *Barnes v. Jeudevine*, 718 N.W.2d 311, 314 (Mich. 2006)).

11 See, e.g., WYO. STAT. ANN. § 14-2-504(a)(v) (West 2016) (requiring that a presumed parent resides “in the same household” for first two years of child’s life).

12 See, e.g., MONT. CODE ANN. § 40-6-105(1)(d) (West 2015) (presuming natural fatherhood for man who “receives the child” into his home “while the child is under the age of majority”).

13 See, e.g., *Morgan v. Weiser*, 923 A.2d 1183, 1187 (Pa. Super. Ct. 2007) (stating that once established, rights and liabilities arising from in loco *parentis* relationship are the same as those arising from biological or formal adoptive parenthood); see also DEL. CODE ANN. tit. 13, §§ 8-201(c), 8-203 (West 2016) (mandating that de facto parentage establishes a parent-child relationship on par with the parent-child relationship of a birth or formal adoptive parent).

14 See, e.g., ALA. CODE § 26-17-204(a)(5) (West 2016) (presuming parentage where person established “a significant parental relationship with the child by providing emotional and financial support for the child”).

15 See, e.g., N.J. STAT. ANN. § 9:17-43(a)(5) (West 2016) (presuming parentage may be founded, in part, for one who “provides support for the child”).

16 See *id.* (stating that a presumed parent holds out child as a “natural child”); see also MINN. STAT. ANN. § 257.55(d) (West 2016) (defining presumed parent as one who “holds out the child as his biological child”).

17 See DEL. CODE ANN. tit. 13, § 8-204(a)(5) (West 2016) (deeming one a presumed parent if he “openly held out the child as his own”); WYO. STAT. ANN. § 14-2-504(a)(v) (West 2016) (deeming one a presumed parent if he “openly held out the child as his own”).

### B. Contextual Challenges to Parentage Establishment Intrastate

Even within a single state, imprecise childcare parentage laws pose challenges because there are sometimes wide variations in the definition of “parentage” across contexts. Parentage for childcare purposes often differs from parentage in other settings. Some parentage establishment laws in probate settings recognize parentage when there is a subjective intent to adopt, while such intent is insufficient to establish parentage in childcare settings.<sup>18</sup> Further, parentage can differ between childcare and child support settings. For example, state laws usually deem biological fathers financially responsible for their children born to unwed mothers; yet, these same fathers are often not entitled to seek childcare orders since their parental childcare opportunities have been initially seized, or their seized childcare opportunity has not yielded continuing childcare worthy of parental status.<sup>19</sup>

A Florida case in May 2006 recognized intrastate legal parentage variations dependent upon context.<sup>20</sup> In the case, an unwed biological father claimed parentage in an adoption proceeding. There was inconsistency between the Florida statutes on formal adoptions—especially the provisions on putative father registry filings, which entitled only those unwed biological fathers who registered to notice of, and participation in, later adoption proceedings—and the provisions on child support paternity lawsuits involving unwed biological fathers, which allowed money orders founded solely on biological ties.<sup>21</sup> The court observed:

This case demonstrates that Florida has taken substantially different statutory approaches to the rights and responsibilities of biological fathers of children born to unmarried mothers depending upon the issue at stake. In cases of adoption, we wish to minimize unmarried

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18 Compare *Greenfield v. Daniels*, 51 So. 3d 421, 429 (Fla. 2010) (holding that the deceased biological father did need to acknowledge responsibility in order to be obligated to provide child support), and *DeHart v. DeHart* 986 N.E.2d 85, 104 (Ill. 2013) (stating that “objective evidence of an intent to adopt” by decedent can prompt recognition of an equitable adoption in a probate setting; no recognition if evidence only shows a person (like a foster parent or stepparent) treats a child “lovingly and on an equal basis with his or her natural or legally adopted children”), with *C.G. v. J.R.*, 130 So. 3d 776, 780–81 (Fla. Dist. Ct. App. 2014) (holding that child did not have survivor’s claim, regardless of recognition, related to deceased biological father where child had been born into an intact marriage that closed off biological father’s childcare interests), and *In re Scarlett Z.-D.*, 428 N.E.3d 776, 792 (Ill. 2015) (holding that subjective intent to adopt that is employed for equitable adoption in probate setting does not apply to “proceedings for parentage, custody, and visitation”).

19 See, e.g., *In re C.N.*, 839 N.W.2d 841, 844–45 (N.D. 2013); see also *In re Adoption of Baby A.*, 944 So. 2d 380 (Fla. Dist. Ct. App. 2006).

20 *In re Adoption of Baby A.*, 944 So.2d 380.

21 *Id.* at 389–91.

biological fathers' rights. When the state seeks to declare a child dependent, the unmarried biological father's rights are guarded in the hopes the father will fulfill his parental obligations to the child. In cases of child support, especially when the state seeks reimbursement of welfare payments, we attempt to maximize the unmarried biological father's responsibilities. Whether Florida needs a unified policy for the rights of such biological fathers or whether varying policies can coexist is an interesting issue that is raised, but certainly not resolved, in this case.<sup>22</sup>

As the Florida court suggests, intrastate contextual variations in legal parentage can be reasonable. For example, some biological fathers should have no participation rights in any formal adoption proceedings involving their offspring, but nevertheless should be held accountable for child support for those same offspring should there be no formal adoption. Sensibly, child abandonment ends paternal adoption notice interests, but not paternal financial support duties.

Similarly, some biological fathers may have no custody or visitation rights with their children who reside with their birth mothers, but nevertheless will be held responsible for child support. On such variations, the Sixth Circuit in *N.E. v. Hedges* observed:

[T]here are no judicial decisions recognizing a constitutional right of a man to terminate his duties of support under state law for a child that he has fathered, no matter how removed he may be emotionally from the child. Child support has long been a tax fathers have had to pay in Western civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring—even if unwanted and unacknowledged—remains constitutionally sufficient to support paternity tests and child support requirements. We do not have a system of government like ancient Sparta where male children are taken over early in their lives by the state for military service. The biological parents remain responsible for their welfare. One of the ways the state enforces this duty is through paternity laws. This responsibility is not growing weaker in our body politic . . . but stronger.<sup>23</sup>

Other intrastate variations in legal parentage are less reasonable. In Iowa, for example, a man is a father “for certain purposes” due to a marital paternity presumption, requiring childcare opportunities and child support responsibilities, but is not a “parent” who is a necessary party when his child is subject to a statutory proceeding involving a child in need of

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22 *Id.* at 395 n.21. The court's *Baby A.* ruling was disapproved by *Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 203 (Fla. 2007), but not the quoted language.

23 391 F.3d 832, 836 (6th Cir. 2004); accord *Ex parte M.D.C.*, 39 So. 3d 1117, 1133 (Ala. 2009). See generally *In re H.S.*, 805 N.W.2d 737, 745 n.4 (Iowa 2011); Merrill, *supra* note 3.

assistance.<sup>24</sup> And in Mississippi, a child, per the *in loco parentis* doctrine, cannot recover on a parent's death under the wrongful death statute, but can recover under the workers' compensation statute.<sup>25</sup> Whether reasonable or not, these examples illustrate the importance of context in many American states' childcare parentage laws.

### C. *Disestablishment of Childcare Parentage Intrastate and Interstate*

Whether established at precise or imprecise moments, childcare parentage can be rebutted, rescinded, or otherwise overridden under the law. As with parentage establishment, there are imprecise parentage disestablishment standards that vary not only intrastate in differing contexts, but also interstate within the same context.

Two common forms of precise childcare parentage are a voluntary parentage acknowledgment (VAP) and a marital parentage presumption. Each form designates one a parent under law at a precise point in time: a VAP usually does so at the moment of execution or filing, and the marital parentage presumption typically recognizes parentage in a person at the moment his or her spouse becomes pregnant, is pregnant, or gives birth. Both VAP and marital parentage presumption usually contemplate the possibility of biological ties between a child and a newly recognized parent who is not the birth mother.

Standards for challenging or rescinding a VAP differ intrastate from those for rebutting a marital presumption. While establishment of both of these forms of childcare parentage occurs at a precise time, their respective disestablishment standards sometimes depend upon conduct occurring at no precise point in time. VAP disestablishment norms are driven, in large part, by federal statutes. Federal laws generously allow rescissions by VAP signatories within sixty days of signing; but federal laws bar VAP challenges after sixty days by signatories in the absence of fraud, duress, or material mistake of fact.<sup>26</sup> By contrast, rebuttal norms for marital parentage presumptions favoring the spouses of birth mothers are left entirely to state lawmakers,<sup>27</sup> regardless of when challenges are presented.

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<sup>24</sup> *In re J.C.*, 857 N.W.2d 495, 501, 505 (Iowa 2014).

<sup>25</sup> *Estate of Smith v. Smith*, 130 So. 3d 508, 512–15 (Miss. 2014) (en banc) (differentiating disparate results due to the express language in the two statutes).

<sup>26</sup> 42 U.S.C. § 666(a)(5)(D)(ii)–(iii) (2012). States participating in certain federal welfare programs are required to adhere to § 666. 42 U.S.C. § 654(20). The federal statutes are described in Jayna Morse Cacioppo, Note, *Voluntary Acknowledgments of Paternity: Should Biology Play a Role in Determining Who Can Be a Legal Father?*, 38 IND. L. REV. 479, 486–88 (2005). The state rescission statutes are listed and described in Paula Roberts, *Truth and Consequences: Part III. Who Pays When Paternity is Disestablished?*, 37 FAM. L.Q. 69, 82–90 (2003).

<sup>27</sup> Broad state lawmaking, within federal constitutional limits of course, was recognized in *Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989) (plurality opinion), and

Within a single state, there are different imprecise disestablishment norms relevant to VAPs and to marital parentage presumptions. Thus in Louisiana, as in other states, VAPs may be contested by male signatories after sixty days if there is shown fraud, duress, or material mistake of fact,<sup>28</sup> circumstances often not occurring at a precise moment in time. But in Louisiana, though not in all other states, a husband may seek a disavowal of a marital paternity presumption<sup>29</sup> more than one year after birth if he acts within “one year” of “the day the husband knew or should have known that he may not be the biological father of the child,” again a circumstance that need not occur at a precise moment in time.<sup>30</sup> In California, as well, different imprecise parentage disestablishment norms operate for VAPs and for marital parentage presumptions.<sup>31</sup>

As to childcare parentage disestablishment norms interstate, consider again VAPs. Notwithstanding the aforementioned federal statutory norms, there are significant interstate variations in VAP parentage

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confirmed when the very California marital parentage presumption laws affirmed in *Michael H.* were later amended via CAL. FAM. CODE § 7541(a) (West 2016). Compare 750 ILL. COMP. STAT. ANN. 45/8(a)(3) (1984) (repealed 2015) (stating marital paternity presumption may be disestablished by presumed father-husband within two years after he obtained “knowledge of relevant facts”), and 750 ILL. COMP. STAT. ANN. 46/205(b) (West 2016) (using similar language to original statute: “knew or should have known of the relevant facts”), with *In re* Parentage of John M., 817 N.E.2d 500, 511 (Ill. 2004) (stating that standards on biological father’s opportunity to disestablish husband’s presumed marital parentage and to establish his own paternity under Illinois law are unclear, and involve “public policy” issues better addressed by the General Assembly). See generally Roberts, *supra* note 26, app. at 94–95 (state marital paternity presumption rebuttal statutes are listed and described).

28 LA. STAT. ANN. § 9:406(B)(1) (2016) (indicating a male signatory can revoke after sixty days by showing that he “is not the biological parent of the child,” an opportunity contrary to federal law mandates for states participating in the federal (Title IV-D) welfare subsidy program, 42 U.S.C. § 666(a)(5)(D) (ii)–(iii), and rendering superfluous the statutory fraud, duress, and mistake conditions for VAP contests); see also *Rousseve v. Jones*, 704 So. 2d 229, 233 (La. 1997) (stating that when acknowledgment of biological ties between man and child is “ultimately untrue, the acknowledgment may be null, absent some overriding concern of public policy”). This approach is not employed to disavowals of marital paternity presumptions as only there are children legitimated. See e.g., DEL. CODE ANN. tit. 13, § 8-201(c) (West 2016); D.C. CODE ANN. § 16-831.01, 831.03 (West 2016).

29 Though not for “a child born to his wife as a result of an assisted conception to which he consented.” LA. CIV. CODE ANN. art. 188 (2016).

30 *Id.* art. 189.

31 Compare CAL. FAM. CODE § 7612(e) (West 2016) (stating that male VAP signor, a presumed parent per § 7611, may only have the VAP set aside if it is deemed in “the best interest[] of the child”), with *id.* § 7541 (stating that notwithstanding marital paternity presumption, within two years of birth, a husband can seek blood tests; where husband is found not to be the biological father, “the question of paternity of the husband shall be resolved accordingly”).

disestablishment guidelines.<sup>32</sup> These differing disestablishment guidelines include both precise and imprecise norms. Precise statutory norms speak to matters like the time limits on VAP challenges and who may challenge.<sup>33</sup> Imprecise norms speak to matters like estoppel, barring VAP challenges due to earlier post-signing conduct that occurred at no precise point in time.<sup>34</sup>

There are also significant interstate variations in the standards for rebutting a marital parentage presumption. To establish such a presumption, state parentage laws are generally quite precise, with parentage dependent upon satisfying specific conditions at certain moments in time. There are differences in the relevant conditions or moments in time across states. For example, concerning the timing of the marriage, some state laws look at marriage at the time of birth or conception<sup>35</sup> while others look only to marriage at the time of birth.<sup>36</sup> As to the rebuttal of such a presumption, again there can be precise laws, such as those barring a rebuttal after a certain period of time after birth.<sup>37</sup> But there can also be imprecise marital parentage rebuttal norms.

In some states there can be no rebuttal of a marital parentage presumption by anyone outside the marriage so long as the married couple is “committed to remaining married” and to raising “the child as issue of

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32 Incidentally, there are sometimes also significant variations in the precedents in a single state, especially where the statutes on acknowledgement are unclear. *See, e.g.*, Kelly M. Greco & Stephanie R. Hammer, *Challenging Voluntary Acknowledgments of Paternity*, 102 ILL. B.J. 432, 452 (2014) (pointing to “[u]ncertainty in Illinois law”).

33 *Compare* DEL. CODE ANN. tit. 13, § 8-308(a)(1) (West 2016) (“a signatory of an acknowledgment”), *with* MICH. COMP. LAWS ANN. § 722.1011(1) (repealed 2012) (mother, signing man, child, or prosecuting attorney), *and* UTAH CODE ANN. § 78B-15-307(1) (West 2016) (“signatory” or “a support-enforcement agency”), *with* ALA. CODE 26-17-609(b) (2016) (“If a child has an acknowledged father, an individual, who is not a signatory to the acknowledgment of paternity and who seeks an adjudication of paternity of the child may maintain a proceeding at any time after the effective date of the acknowledgment if the court determines that it is in the best interest of the child.”).

34 *See* 750 ILL. COMP. STAT. ANN. 46/610(a) (West 2016) (inequity and “child’s best interests”); N.Y. FAM. CT. LAW § 516-a(b) (McKinney 2016) (after sixty days, equitable estoppel can operate); Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 87 (2010) (surveying rescission requirements in several states); Cacioppo, *supra* note 26, at 494–99 (reviewing VAP challenge cases).

35 *Compare* 750 ILL. COMP. STAT. ANN. 45/5(a)(1) (1984) (repealed 2015) (“born or conceived”), *with* 750 ILL. COMP. STAT. ANN. 46/204(a)(1) (West 2016) (“born”). *See also* ME. R. EVID. 302 (West 2016) (“born” or “conceived”); WIS. STAT. ANN. § 891.41(1)(a) (West 2015) (“conceived or born”).

36 CAL. FAM. CODE § 7611(a) (West 2016) (“child is born during the marriage”).

37 *See, e.g.*, Roberts, *supra* note 26, app. at 94–95 (reviewing state statutes).

the marriage,”<sup>38</sup> circumstances often not occurring at precise moments. Elsewhere, rebuttals of a marital parentage presumption can be pursued by only certain biological fathers via an action to establish a parent-child relationship, with such fathers distinguished statutorily by their earlier acts occurring at no precise point in time,<sup>39</sup> like “abandonment” or “desertion.”<sup>40</sup> And as to a husband’s rebuttal, it can sometimes be foreclosed via the common law doctrine of paternity by estoppel as long as the child’s best interests are served, again a circumstance occurring at no precise time.<sup>41</sup>

#### D. Choice of Parentage Laws

Finally, when imprecise parentage law disputes involve conduct in two or more states (or two or more countries), the significant interstate (and international) variations in parentage establishment and disestablishment norms within a single context can lead to difficult choice of law issues. The need to choose among competing laws (such as where there are “true conflicts”) too often goes unrecognized, resulting in some odd rulings.

The extreme case of *Johnson v. Johnson*, resolved by the North Dakota Supreme Court in 2000,<sup>42</sup> illustrates one such ruling. There, Antonyio Johnson first sought to divorce Madonna Johnson in North Dakota in July 1998. Madonna sought child support for her granddaughter, Jessica, who Madonna urged had been equitably adopted by Antonyio under North Dakota law.<sup>43</sup>

The Johnsons were married in September 1986, with no child ever born to Madonna during the marriage. But in August 1988, the Johnsons, then living in New Jersey, took custody of Jessica, then three months old

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38 R.P. v. K.S.W., 320 P.3d 1084, 1093, 1099 (Utah Ct. App. 2014) (interpreting UTAH CODE ANN. § 78B-15-607(1) (West 2016) and assuming “no constitutional challenge”); see also OR. REV. STAT. ANN. § 109.070(1)(b), (2) (West 2016); Strauser v. Stahr, 726 A.2d 1052 (Pa. 1999).

39 See, e.g., 750 ILL. COMP. STAT. ANN. 46/608(a) (West 2016) (allowing two years to file from time petitioner “knew or should have known of the relevant facts”). The circumstances allowing such an establishment remain, however, unclear. See 750 ILL. COMP. STAT. ANN. 46/610(a)(2)–(3) (West 2016) (stating it to be inequitable to disestablish husband as presumed parent; in child’s best interest not to allow establishment).

40 See, e.g., *In re Waites*, 152 So. 3d 306, 314 (Miss. 2014) (en banc) (holding that for child born of adultery to wife during marriage, biological father can seek custody as long as there is “no clear and convincing evidence of abandonment, desertion, immoral conduct detrimental to the child, and/or unfitness” and husband may not seek custody if there is no such evidence though he has “standing *in loco parentis*,” which allows him to seek third party visitation (quoting *Davis v. Vaughn*, 126 So. 3d 33, 37 (Miss. 2013))).

41 See, e.g., *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012).

42 617 N.W.2d 97 (N.D. 2000).

43 *Id.* at 101.

and the natural granddaughter of Madonna, in Pennsylvania.<sup>44</sup> While Jessica was scheduled to remain with the Johnsons for only a month, ten years later, at the time of the North Dakota divorce, Jessica was still with the Johnsons.<sup>45</sup> During that decade, Jessica was raised as the Johnsons' child. The Johnsons had initiated formal adoption proceedings in New Jersey and Kentucky—where Jessica's natural parents lived—but neither of those proceedings were completed due to the Johnsons' military work transfers.<sup>46</sup> From August 1988 to May 1997 the Johnsons resided in New Jersey and Florida, with Antonyio sometimes deployed overseas. Antonyio was sent to Grand Forks, North Dakota, in May 1998.<sup>47</sup> By then, Antonyio and Madonna were not living together. Madonna and Jessica therefore never lived in North Dakota.

The North Dakota Supreme Court looked to cases on “contract to adopt” only in the context of inheritance law.<sup>48</sup> It determined that the public policy of the state supported application of the doctrine of equitable adoption “to impose a child support obligation under certain circumstances” and that nothing in North Dakota law forbade it.<sup>49</sup> The court remanded for resolution of factual issues involving the application of the North Dakota equitable adoption doctrine to Antonyio.<sup>50</sup>

A dissenting justice began: “This is a case of a grandmother and her grandchild who have never lived in North Dakota.”<sup>51</sup> He went on: “[I]t is clear that if an ‘equitable adoption’ took place, it took place in New Jersey or Kentucky and would therefore be governed by the law of one of those states.”<sup>52</sup> In both New Jersey and Kentucky there is no equitable adoption doctrine.<sup>53</sup> New Jersey or Kentucky law was deemed appropriate by the dissent under North Dakota choice of law rules for contract cases.<sup>54</sup>

The majority did not respond to these observations. Unfortunately, no opinion in *Johnson* considered utilizing an interest analysis to determine

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44 *Id.* at 100.

45 *Id.*

46 *Id.*

47 *Id.* at 101.

48 *Id.* at 103.

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

50 *Id.* at 109–10.

51 *Id.* at 112 (Sandstrom, J., dissenting).

52 *Id.*

53 *Id.*

54 *Id.* at 123 (“[I]t objectively appears that our precedent would mandate the application of another forum’s law because the alleged contract arose in either Kentucky or New Jersey and was performed in either of those states, the subject matter was in either of those states, and the domicile of all parties was in either of those states at the time the alleged contract was made.”).

which state's imprecise parentage law on equitable adoption in the child support context might operate. And no opinion considered whether to decline jurisdiction altogether, or at least over the parentage, if not the child support, issue as to Antonio.<sup>55</sup> Further, no opinion addressed any difference between Antonio's legal parenthood in child support and childcare settings.

*E. The Importance of Parental Intentions to Imprecise Parentage*

In the childcare context—as well as others, like child support—imprecise American state parentage establishment and disestablishment laws frequently require courts to look back in time to assess both an alleged new legal parent's and an existing legal parent's earlier intentions regarding the alleged new parent's future relationship with the existing parent's child. In looking back, courts do not focus on a precise point in time as they often do with VAPs or marital parentage presumptions. Accordingly, formal declarations of such intentions would greatly assist the courts in looking back at past events. Such declarations could or could not be registered with the state<sup>56</sup> and should involve processes assuring the declarations were likely truthful when made. Before further exploring how such declarations might be made, this Section briefly reviews the roles played by such intentions in imprecise childcare parentage laws.

Imprecise childcare parentage laws can directly or indirectly speak to an existing parent's intentions regarding a nonparent who may one day become a parent. Direct speech is exemplified by a Delaware statute that says that a de facto parent can only be recognized where a parental-like relationship developed between a child and a nonparent with the “support and consent” of a legal parent.<sup>57</sup> Indirect speech on a legal parent's intent—that is, a statute implying there needs to be parental intent without expressly saying so—is exemplified by a New Jersey statute that declares there can be “presumed” childcare parentage for a nonparent who earlier openly held out the child as his natural child and provided support for the child,<sup>58</sup> actions that are likely known and sanctioned by a legal parent.

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55 See N.D. CENT. CODE ANN. § 14-14.1-18 (West 2016) (stating that trial court may decline to exercise its child custody jurisdiction if it provides an “inconvenient forum,” measured, for example, by the nature and location of any evidence, the length of time the child resided outside North Dakota, and the financial resources of the parties).

56 Unregistered formal declarations of intent that are later utilized include wills, while registered formal declarations of intent that are later utilized include certifications on putative father registries for adoption notice purposes.

57 DEL. CODE ANN. tit. 13, § 8-201(c)(1) (West 2016).

58 See N.J. STAT. ANN. § 9:17-43(a)(4)–(5) (West 2016) (indicating no need for a legal parent's knowledge or agreement, where the nonparent attains equal footing with the legal parent per N.J. STAT. ANN. § 9:17-40).

Comparably, imprecise childcare parentage laws can also speak directly or indirectly to a nonparent's intentions regarding the development of a new or continuing parental-like relationship with a child. Speaking directly, some state presumed childcare parentage laws require that the nonparent hold out the child as his or her own "natural child."<sup>59</sup> Speaking indirectly, and thus not expressly demanding parental intentions, some states' imprecise childcare parentage laws require that the nonparent provided financial assistance to the child while holding out the child as one's own, but require no actions indicating any belief as to biological ties, which more clearly suggest one's consciousness of possible legal parentage.<sup>60</sup>

Incidentally, some intent from an existing legal parent regarding a potential new legal parent seems constitutionally required. It is fundamentally unfair, for example, for an existing parent to now have to share—and battle for—custody, visitation, parental responsibility allocations, and the like with another who had neither actual or presumed biological ties, nor formal adoptive ties to the child, where the legal parent did nothing to encourage the parental-like acts of the other and, in fact, intended always to remain a single parent under law.<sup>61</sup> Likewise, it is fundamentally unfair for a one-time nonparent to be saddled with future child support obligations, perhaps accompanying new childcare opportunities as a new legal parent, where the nonparent never did, or never will, pursue childcare interests in court and, in fact, always intended not to develop a parental-like relationship with, nor to provide support for, the child.<sup>62</sup>

## II. FACILITATING FORMAL DECLARATIONS OF ASSUMED OR INTENDED PARENTAL CHILDCARE

Courts often recognize the importance of express written declarations of assumed or intended childcare parentage. Wills sometimes indicate assumed childcare parentage by decedents for purposes of property disposition upon death. Putative father registries indicate intended future childcare parentage for purposes of later adoption proceedings. Written declarations of current or future childcare are only produced in court when there is a need to examine an alleged current or future parent-child relationship. Earlier declarations of assumed childcare, or of future

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<sup>59</sup> See *id.* § 9:17-43(a); see also ALA. CODE § 26-17-204(a)(5) (2016) (nonparent holding out that there are "natural" ties can establish parentage).

<sup>60</sup> See DEL. CODE ANN. tit. 13, § 8-204(a)(5) (West 2016); see also Jeffrey A. Parness, *Constitutional Constraints on Second Parent Laws*, 40 OHIO N.U. L. REV. 811, 830 (2014) (describing similar state laws).

<sup>61</sup> See, e.g., Parness, *supra* note 60, at 811.

<sup>62</sup> *Id.* at 842–45.

parental childcare intentions, could be used, to assist later courts in imprecise parental childcare settings. As this Part shows, the guidelines on wills and putative father registries provide much aid for those contemplating new laws on the employment of declarations of assumed and intended parental-like acts in later imprecise childcare parentage disputes.

### *A. Wills*

Illinois law illustrates how earlier formal declarations of assumed childcare parentage involving those now deceased are employed in property dispositions during probate. One law recognizes a duty in one “named as executor of the will of a deceased person” to “institute a proceeding,” usually geared to having “the will admitted to probate.”<sup>63</sup> Within six months after the admission, “any interested person may file a petition . . . to contest the validity of the will.”<sup>64</sup> Only then will a determination of imprecise childcare parentage formally declared in the will be made.<sup>65</sup> Comparably, when there is no will, a probate court will explore parentage in the decedent relevant to intestacy laws, where legal parentage is often determined for the first time based upon the decedent’s earlier informal declarations on parenthood, such as through oral statements indicating promises or intentions to adopt, as well as formal declarations of parenthood, like private written acknowledgments.<sup>66</sup>

### *B. Putative Father Registries*

Comparably, earlier formal declarations of intended childcare via putative father registries by alleged biological fathers, who are not then presumed, adjudicated, or acknowledged fathers (usually of children born of consensual sex), are employed in later adoption proceedings (often initiated by the post-birth husbands of the birth mothers, by prospective

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63 755 ILL. COMP. STAT. ANN. 5/6-3(a) (West 2016) (stating that the proceeding may also involve a named executor declaring a “refusal to act as executor”).

64 *Id.* 5/8-1(a).

65 *See, e.g., id.* 5/2-4(c) (“For purposes of inheritance from the child . . . a child is adopted when the child . . . is declared or assumed to be the adopted child of the testator or grantor in any instrument bequeathing or giving property to the child.”).

66 *See, e.g., DeHart v. DeHart*, 986 N.E.2d 85, 93, 104–05 (Ill. 2013) (recognizing a nonmarital child who was never formally adopted by the decedent could nevertheless be “the natural object” of the decedent’s bounty via the common law doctrine of equitable adoption); *see also* MICH. COMP. LAWS ANN. § 700.2114(b)(iii) (West 2016) (stating that a “man is considered to be the child’s natural father for purposes of intestate successions” if the “man and the child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either”).

adopting persons, or by couples after birth mothers relinquish custody).<sup>67</sup> Such formal declarations usually can be filed before birth, but sometimes must be filed no later than very shortly after birth (fifteen to thirty days).<sup>68</sup> Frequently, they must precede the filing of an adoption petition or a petition for termination of parental rights.<sup>69</sup>

### C. *Formal Declarations of Assumed or Intended Parental Childcare*

Formal declarations of earlier assumed parental childcare appear in wills where such declarations may or may not be persuasive in later probate proceedings. Formal declarations of earlier intended parental childcare appear in putative father registries where such declarations may or may not be persuasive in later adoption or parental rights termination proceedings. Comparably, formal declarations of assumed or intended parental childcare could be persuasive in later imprecise childcare parentage proceedings.

New laws on assumed or intended parental childcare declarations in imprecise parentage proceedings can be modeled on the California laws allowing, but not requiring, the use of General Assembly forms on intended parentage in later parentage disputes involving children “conceived through assisted reproduction” not involving “agreements for gestational carriers or surrogacy agreements.”<sup>70</sup> There, the optional forms reflect the statutory “writing requirement” on parentage in varied assisted reproduction settings.<sup>71</sup> Credibility is enhanced as the forms demand notarized signatures and recognize the potential penalty of perjury. Like wills, and unlike putative father registrations, the California forms are not filed with the government at the time of execution.

As in California, other state legislatures or agencies could develop forms in and outside of assisted reproduction that reflect their own state’s imprecise childcare parentage norms operating in both the parentage establishment and disestablishment settings. One or more persons could

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67 Putative father registry laws are well reviewed in Mary Beck, *A National Putative Father Registry*, 36 CAPITAL U. L. REV. 295 (2007) (supporting a national registry established by Congress), which is accompanied by Lindsay Biesterfeld, Appendix, *Survey of Putative Father Registries by State*, 36 CAPITAL U. L. REV. 339 (2007).

68 Biesterfeld, *supra* note 67, at 339–61 (thirty days after birth in Delaware, Illinois, Ohio, and Minnesota; fifteen days after birth in Missouri; ten days after birth in New Mexico; and seventy-two hours after birth in Montana).

69 *Id.* (prior to adoption petition in Arkansas and Indiana and prior to petition for termination of parental rights in Florida, Idaho, Indiana, Iowa, and Massachusetts).

70 CAL. FAM. CODE § 7613.5(a), (c) (West 2016) (stating that use of form does “not preclude a court from considering any other claims to parentage under California statute or case law”).

71 *Id.* § 7613.5(d) (referencing § 7613). Available forms include assisted reproduction undertaken by two married or unmarried people, where the signatories may or may not have used their own sperm or eggs to conceive a child.

sign the optional forms. A biological father of a child born of sex could declare that he has no intent to childcare. A birth mother could declare her acquiescence in her new partner assuming a parental-like role. Both a birth mother and her soon-to-be spouse could declare their intentions to raise her child jointly upon marriage.

Credibility should be promoted, as in California, by dictates on notary acknowledgments, warnings of possible perjury charges, and encouragements of attorney consultations. Informed declarations should also be promoted by including within the forms the legal requisites—set forth in plain language—and citations to relevant statutes, regulations, and judicial precedents. State governments could give parties the choice to file their forms with the relevant governmental department at the time of execution.

Singular signature intended childcare parentage forms could include reformulated prebirth putative father registrations, which would be deemed directly relevant by statute outside of adoption-parental rights termination proceedings.<sup>72</sup> These earlier registrations indicating a desire to undertake childcare of any future child could be employed in a later paternity proceeding involving an alleged or actual unwed biological father seeking a childcare order involving an existing child over the birth mother's objection. Comparably, earlier prebirth registrations by alleged or actual biological fathers indicating desires not to undertake childcare of any later-born children could be employed in any later proceeding involving attempts by those fathers to establish their own de facto parentage. Prebirth declarations as to future childcare intentions would help courts determine whether unwed biological fathers have federal constitutional childcare interests since those interests typically only arise if the fathers formed a

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<sup>72</sup> Putative father registries are now chiefly used in adoption proceedings to determine whether unwed biological fathers must be noticed about, and given chances to participate in, adoption proceedings involving their children born of consensual sex to unwed mothers who may (i.e., stepfather adoption) or may not continue as childcare parents. *See, e.g.*, Mary Beck, *Toward A National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1033 (2002) (reviewing American state laws and arguing “for a national putative father registry database,” in part, because paternity efforts can now be thwarted by interstate travel); Karen Greenberg et al., *A National Responsible Father Registry: Providing Constitutional Protections for Children, Mothers and Fathers*, 13 WHITTIER J. CHILD & FAM. ADVOC. 85, 86 (2014) (same). Putative father registries outside of adoption or parental rights termination can be deemed pertinent, for example, in de facto childcare parent settings where intentions to assume legal parenthood are relevant, if not dispositive. *But see* CAL. FAM. CODE § 7612(g) (“A person’s offer or refusal to sign a voluntary declaration of paternity may be considered as a factor, but shall not be determinative, as to the issue of legal parentage in any proceedings regarding the establishment or termination of parental rights.”).

“significant custodial, personal, or financial relationship” with the children.<sup>73</sup>

Singular signature intended childcare parentage forms could also include paternity acknowledgments, like those recommended within the 1973 (though not the 2000) Uniform Parentage Act.<sup>74</sup> There, a man is a presumed natural father if he acknowledges paternity in writing within the state and the birth mother “does not dispute” the acknowledgment in a writing filed with the state “within a reasonable time after being informed.”<sup>75</sup>

Multiple signature forms indicating earlier assumed and continuing, or newly intended, childcare parentage can include premarital or mid-marriage declarations addressing current and/or intended parental-like childcare by a prospective or current stepparent of a child who is in the sole custody of the one parent then recognized under law. In 2012, the Uniform State Law Commissioners recognized that such declarations, while not contracts that bind courts, should “guide” courts making childcare decisions.<sup>76</sup>

Multiple signature forms containing declarations of intended childcare parentage might be registered with the state at the time of execution, unlike premarital or mid-marriage pacts containing similar declarations. Consider domestic partnership registrations, which could include not only intentions regarding future property distribution, but also intentions that will guide courts during future childcare disputes.<sup>77</sup>

State statutes (or enabling regulations) recognizing the import of earlier formal declarations of assumed or intended parental childcare in imprecise childcare parentage settings, via discretionary forms available for

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73 *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

74 UNIF. PARENTAGE ACT (UNIF. LAW COMM’N 1973).

75 *Id.* § 4(a)(5). The recommendation has not been widely adopted. *But see* 15 R.I. GEN. LAWS ANN. § 15-8-3(a)(4) (West 2016) (providing that man is a “presumed to be the natural father” via such an acknowledgement).

76 *See, e.g.*, Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GA. ST. U. L. REV. 343 (2015) (reviewing the recommendation while demonstrating how such agreements could guide judges hearing childcare, child support, and child creation disputes).

77 To date, domestic partnership registration laws have addressed property and inheritance rights, but have not contemplated childcare declarations. *See, e.g.*, ME. REV. STAT. ANN. tit. 22, § 2710(6)(c) (2016); WASH. REV. CODE ANN. § 43.07.400(2)(b) (West 2016). *But see* *Gardenour v. Bondelle*, 60 N.E.3d 1109 (Ind. Ct. App. 2016) (child born of consensual assisted reproduction into a same-sex registered domestic partnership has two childcare parents, per precedents, with non-birth mother also a childcare parent due to marital parentage presumption). For a more expansive view of possible family formation registrations—including cohabitation arrangements between those with no sexual relationships, including siblings; older children and their parents; and best friends, see generally Pamela Laufer-Ukeles & Shelly Kreiczer-Levy, *Family Formation and the Home*, 104 KY. L.J. 449 (2016).

use during later judicial assessments in childcare disputes, could follow—and be modeled on—earlier, instate common-law precedents. Such precedents, for example, would have addressed the role of childcare agreements between parents and nonparents, or of singular acknowledgments of the parental-like intentions of nonparents. Where forms are utilized, factual disputes as to earlier childcare intentions—as in assisted reproduction settings—can be more easily resolved.<sup>78</sup> As imprecise childcare parentage norms differ widely interstate, lawmakers—perhaps guided by the earlier works of in-state lawyers in drafting parental childcare pacts in marriage dissolution, premarital agreement, and assisted reproduction settings—must become familiar with their own state’s imprecise childcare parentage norms.

#### CONCLUSION

The fluidity of imprecise childcare parentage laws in American states, together with the significant intrastate and interstate variations in these laws, presents significant challenges to courts. The same appellation, like “equitable adoption” or “de facto parent,” can have different meanings intrastate and interstate. Women can be presumed legal fathers. Stepparents and grandparents can morph into fathers and mothers without formal adoptions due to earlier parental-like actions, which did not occur at precise moments in time.

Imprecise American state childcare parentage establishment and disestablishment laws increasingly require courts to look back in time to assess parental-like conduct. This retrospective inquiry is often quite difficult, as the parties at that point are frequently emotional, or motivated to interpret the same conduct differently, if not to fabricate. Such retrospective inquiry is also often difficult when an existing single custodial parent dies.

Courts would be aided in their inquiries into earlier parental-like acts in imprecise parentage childcare cases if clear indications of childcare intentions were earlier expressed by existing legal parents and by those looking forward to (further) pursuing a parental role. Voluntary paternity acknowledgements do not now, and should not ever, cover such expressions. They were meant, and should remain, for alleged biological fathers of children born of consensual sex. States having imprecise parentage laws should facilitate later judicial inquiries into earlier parental-

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<sup>78</sup> See *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 490 n.1, 500 (N.Y. 2016) (holding that where unwed same-sex female couple agreed to conceive and raise a child together, nonbiological, nonadoptive partner can be a childcare parent over birth mother’s objection; in the case, there was no written agreement or formal declaration of intent, and the facts involving alleged oral agreements and understandings about childcare were disputed).

like acts by establishing new mechanisms for formal declarations of assumed and intended parentage. Such declarations would not control courts making childcare parentage determinations. Rather, they would guide, helping courts apply their states' imprecise childcare parentage laws that depend upon earlier actions and intentions of parents and nonparents regarding the continuing or future care and support of children. New state mechanisms for formal declarations of assumed and intended childcare parentage should be developed after imprecise childcare parent laws are established through statutes or court decisions. Such laws can demand respect for premarital or mid-marriage childcare pacts dealing, for example, with assumed and intended stepparent childcare, as well as for cohabitation pacts between single parents and their significant others.