NEW MOTHERS KNOW BEST? SECOND-PARENT CHOICES AT BIRTH

Jeffrey A. Parness*

TABLE OF CONTENTS

I. INTRODUCTION

Professor Jessica Feinberg recently observed that state laws governing the ability of an individual who gives birth ("gestating parent") "to exercise meaningful choice within the determination of who is deemed the child's second legal parent differ drastically depending on factors such as their marital status, the method of the child's conception, and the gender of the desired second parent."[1] She found many of the differences "problematic," having "no underlying theory that provides a consistent explanation for the law's current approach."[2] Moreover, she urged "reform . . . to create a more coherent and just legal framework governing the degree of meaningful choice individuals who give birth have in at-birth determinations of the child's second legal parent."[3] Reform efforts, she concluded, should primarily focus on "the law's approach to married gestating parents and the eligibility requirements for establishing parentage through [voluntary

* Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D. The University of Chicago.

1 Jessica Feinberg, *Parent Zero*, 55 UC DAVIS L. REV. 2273, 2273 (2022).

2 *Id.* at 2275.

3 *Id.*

acknowledgements of parentage]."[4] Here, she advised "that the gestating parent should be able to exercise a significant degree of meaningful choice in the determination of who is deemed the child's second legal parent at birth,"[5] with the choice to be given "special weight."[6]

Professor Feinberg is not the first to urge that significant, if not absolute, deference be given to gestating parents in regard to the determination of a child's second legal parent at birth.[7] In 2006, Professor E. Gary Spitko concluded, "the biological mother enjoys the right to control access to her child including the right to determine who else shall be allowed to become a parent of the child."[8]

In 2006, Professor Karen Syma Czapanskiy proposed that a birth mother be "empowered to decide whether she will be the child's sole legal parent or whether she will designate . . . whomever she wants" with the choice "not constrained by presumptions in favor of her spouse or the child's biological father."[9]

In 2016, Professor Melanie B. Jacobs, focusing on "at-birth parentage determinations,"[10] opined that "all parents must sign an intentional acknowledgment of parenthood that establishes the maternity and/or

---

4 *Id.* at 2274; *id.* at 2325 ("[T]here are two areas of the law – the framework governing married gestating parents and gender-based VAP eligibility restrictions – that are most clearly in need of legal reform."); *What's a Voluntary Acknowledgment of Paternity,* MILLER L. GRP., P.C. (Oct. 28, 2020), https://www.apmillerlawgroup.com/blog/2020/october/what-s-a-voluntary-acknowledgment-of-paternity-/ (explaining that when an unmarried couple has a child, paternity is established through the signing of a voluntary acknowledgment of paternity).

5 Feinberg, *supra* note 1, at 2325.

6 *Id.* at 2320. Feinberg reiterated this view (though less categorically) while also discussing deference to second parent choices by gestating parents in settings beyond parentage in spousal and VAP settings. Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. REV. 307, 309 (2022). She opined that "there is relatively strong argument that a standard [on new parentage] that does not require the express consent of all existing parents for multi-parentage establishment [three or more parents] through equitable parenthood doctrines and similar mechanisms [as with residential/hold out and de facto parentage] that require an established parent-child relationship is sound, both constitutionally and as a matter of policy." *Id.* at 320-21, 348. Seemingly on the constitutional front, she aligns with the dissent in E.N. v. T.R., 255 A.3d 1, 42 (Md. 2021), wherein the dissent found an express consent norm covering all parents "fails to sufficiently provide for children's interests" and would inevitably result in judicial determinations that harm children. *Id.* at 40. She concluded the "express consent of all existing legal parents" is more likely required in parenthood arising from VAPs and assisted reproduction. Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. REV. 307, 348 (2022).

7 E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 99 (2006).

8 *Id.* at 147.

9 Karen Syma Czapanskiy, *To Protect and Defend: Assigning Parental Rights When Parents Are Living in Poverty*, 14 WM. & MARY BILL RTS. J. 943, 943 (2006).

10 Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465, 466 (2016).

paternity of the child."[11] Under her approach, "a child will have a minimum of one parent,"[12] presumedly the gestating parent.[13] Effectively, she suggests no one else may be a parent at birth, even if married to the gestating parent, unless the biological mother recognizes the parentage of the other person or persons in writing.[14]

In response, this article presents alternative reforms of new mothers-know-best laws.[15] Part II reviews the laws on prebirth and at-birth choices of second parents by gestating parents that take effect at birth. Part III contemplates better laws on second-parent choices while recognizing that some nationwide coherence is compelled by U.S. Supreme Court precedents. This article also highlights that certain interstate variations are invited by other court precedents and argues that new laws should be assessed on a state-by-state basis.

II. PREBIRTH AND AT-BIRTH CHOICES OF SECOND PARENTS EFFECTIVE AT BIRTH

A. Introduction

At the time of birth, there are two major avenues for a gestating parent to choose a second legal parent for a child born of consensual sex.[16] They are spousal parentage, a choice usually made before birth (and often before conception),[17] and voluntary acknowledgment of paternity (VAP) parentage,

---

11 *Id.* at 496 (focusing on at birth acknowledgments, Dean Jacobs suggests that "intentional parenthood" establishment might be undertaken "six or twelve months" after birth).

12 *Id.*

13 *Id.* ("[A]ll parents must sign an intentional acknowledgment of parentage" and "a child . . . may possibly have two, three or more parents.").

14 *Id.* at 466 (suggesting "elimination of status-based parentage at birth" and "traditional status-based parentage" includes "genetic connection" and "marriage").

15 Noy Naaman, *Timing Legal Parenthood*, 75 ARK. L. REV. 59, 109 (2022) ("I acknowledge that a framework recognizing the richness of becoming a parent has the potential to interfere with a gestational parent's self-determination or to minimize the role of pregnancy. Indeed, this is a concern that policymakers must consider seriously. And, certainly, it is vital to approach this task with caution, as feminists have been long warning us about the undesired outcomes for mothers of de-gendering family laws . . . . But as the suggestions I offer herein reflect, such concerns need not stand in the way of a more inclusive approach to legal parenthood.").

16 Feinberg, *supra* note 1, at 2275.

17 *Id.* at 2277. Spousal parentage can also arise from certain post-birth marriages to those who gave birth to children born of consensual sex. Such marriages are sometimes guided by the 1973 Uniform Parentage Act [UPA] of the National Conference of Commissioners on Uniform State Laws [NCCUSL], the 2000 UPA of the NCCUSL, or the 2017 UPA of the NCCUSL. *See* UNIF. PARENTAGE ACT § 4(d)(3) (UNIF. L. COMM'N 1973) (stating that a "man is a presumed 'natural father' with a post-birth marriage and parental acknowledgment, consent, or support"); UNIF. PARENTAGE ACT § 204(a)(1)(C) (UNIF. L. COMM'N 2000) (providing that an "individual is a presumed 'parent' with a post-birth marriage and a parentage assertion in a record or a birth certificate recognition"). The UPAs have special provisions on births from assisted reproduction.

a choice usually made right after birth.[18] These two forms of choice differ.[19] Regarding VAP parentage, the gestating parent intentionally chooses a person to become the second legal parent of an expected or existing child.[20] In contrast, spousal parentage arises even when newly married couples do not anticipate children will be born into the marriage.[21] In the case of spousal parentage, the actual choice is to marry, not the choice to rear a child.[22]

Other than spousal and VAP parentage, a gestating parent can choose by agreement a second legal parent, effective at the time of birth, for a child born of assisted reproduction (AR).[23] Such a choice is similar to a VAP choice in that it involves a particular expected child.[24] However, unlike a VAP choice, AR parent choices by certain agreements generally cannot be made once a child is conceived or born.[25]

B. Spousal Parentage

As to spousal parentage, Professor Feinberg recognizes that "any proposal" for reform that "gives gestating parents greater power in identifying someone other than their spouse as the child's second legal parent" would likely "face significant pushback,"[26] including opposition founded on lingering "problematic attitudes and beliefs" underlying "the historical subordination of married women to their husbands."[27] In line with her identified core principles, she suggests that for births arising from consensual sex, new laws should allow "gestating parents to opt-out of the

---

UNIF. PARENTAGE ACT § 5 (UNIF. L. COMM'N 1973); UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM'N 2000); UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM'N 2017).

18 Feinberg, *supra* note 1, at 2275. VAP parentage can also arise from prebirth choices that are effective upon birth. Such choices are sometimes guided by the UNIF. PARENTAGE ACT § 304(b), (c) (UNIF. L. COMM'N 2017) (explaining a VAP filed prebirth "takes effect on the birth of the child").

19 Feinberg, *supra* note 1, at 2287.

20 *Id.*

21 *Id.* at 2276.

22 *Id.* (noting that some courts find that gestating parents may prompt second parentage not by choices, but by waivers of their superior parental rights (wherein earlier consents to shared parentage may help to determine whether there are waivers)). *See, e.g.*, Mullins v. Picklesimer, 317 S.W.3d 569, 578-81 (Ky. 2010). Gestating parents also may prompt opportunities for nonparents (not second parents) to secure allocations of parental responsibilities without affirmative consents by the gestating parents. *See, e.g., In re* E.K., 511 P.3d 605 (Colo. 2022) (construing COLO. REV. STAT. § 14-10-123(1)(c) (2021)).

23 Feinberg, *supra* note 1, at 2290.

24 *Id.*

25 UNIF. PARENTAGE ACT § 803 (UNIF. L. COMM'N 2017) (stating an individual consents to AR "by a woman with the intent to be a parent of a child conceived" by AR); *id.* at § 801(3) (stating a surrogacy agreement wherein a "woman agrees to become pregnant").

26 Feinberg, *supra* note 1, at 2327.

27 *Id.* at 2328. She also finds that an unmarried gestating parent has "significantly greater meaningful choice with regard to who is deemed the child's second legal parent at birth" for a child born of sex. *Id.* at 2286.

marital presumption regardless of whether their spouse consents."[28] Similarly, Professors Spitko,[29] Czapanskiy,[30] and Jacobs[31] propose a mother-knows-best approach to a second-parent choice, even though the spouse of a gestating parent is entitled to a parentage presumption.[32]

However, these suggestions are problematic where the spouse has genetic ties, whether through consensual sex or mutually agreed assisted reproduction with a prospective gestating parent.[33] Under the United States Supreme Court precedent in *Lehr v. Robertson*, such a spouse, like the unwed genetic father in *Lehr*, has a constitutionally recognized parental opportunity interest.[34] Beyond *Lehr*, there may be additional state constitutional substantive due process interests for a person, including a spouse who is genetically tied to a child, such as custodial interests in raising the child, not simply parental opportunity interests in developing a relationship with the genetic child.[35] Moreover, a state may have public policy interests in establishing custodial parentage when there are no federally-mandated interests, such as custodial interests of intended parents of children born to

---

28 *Id.* at 2329 (discussing Professor Feinberg hints that such an opt-out might be conditioned on its exercise "at the hospital following the child's birth" that is accompanied by the execution of "some version of voluntary acknowledgement of parentage with someone other than their spouse." Second parentage for births to married gestating parents arising from assisted reproduction (with or without a surrogate) at times does not arise from spousal parent laws). *See, e.g.*, UNIF. PARENTAGE ACT § 701 (UNIF. L. COMM'N 2017); Gatsby v. Gatsby, 495 P.3d 996 (Idaho 2021) (finding Artificial Insemination Act is a controlling statute); Jeffrey A. Parness, *DIY Artificial Insemination: The Not-So-Great Gatsby*, 55 CREIGHTON L. REV. 465, 467 (2022) (criticizing Gatsby v. Gatsby).

29 Spitko, *supra* note 8, at 147 (discussing a biological mother should enjoy "the right to control access to her child including the right to determine who else should be allowed to become a parent of the child" and asserting that the right to control access to her child involves an ability to withdraw consent to her spouse's parentage "at any time prior to the vesting of the status of constitutional parent" in the spouse).

30 Czapanskiy, *supra* note 10, at 943 (stating a biological mother has the power to choose a second parent, unconstrained "by presumptions in favor of her spouse").

31 Jacobs, *supra* note 11, at 496 (suggesting "elimination of status-based parentage at birth," which includes marriage).

32 Spitko, *supra* note 8, at 147.

33 *See generally id.* at 141.

34 Lehr v. Robertson, 463 U.S. 248, 262 (1983) (providing unwed biological father of a child born to unwed gestating parents has an "opportunity . . . to develop a relationship with his offspring"). Lehr was not extended in Michael H. v. Gerald D., 491 U.S. 110 (1989) (arguing a biological father of a child born to a gestating parent married to another, in an intact marriage, may be barred, by state law, from asserting a Lehr parental opportunity interest). Professor Feinberg observes that not everyone reads Lehr this way. Feinberg, *supra* note 1, at 2304 (finding "many scholars disagree" that Lehr holds "biological fathers . . . have a constitutionally protected opportunity interest in forming a parent-child relationship," citing Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 479-83 (2017)); *cf.* Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 350 (1984) (stating constitutional right if biological ties are coupled with "parental performance").

35 *See* Callender v. Skiles, 591 N.W.2d 182, 191 (Iowa 1999) (stating "liberty interest" of unwed genetic father in child born to a married gestating parent).

gestational surrogates.[36] Extending beyond *Lehr*, greater protections of parental interests for spouses with genetic ties could include automatic parentage regardless of whether parental-like relationships were established.[37] Such interests now vary interstate, with differences likely to continue.[38] Thus, suggestions on any new mothers-know-best laws should take account of interstate variations and, thus, be contextualized to the spousal-parentage laws of particular states.[39]

Opting out of the spousal-parent presumption is generally easier under current laws for a gestating parent where the spouse has no genetic ties.[40] Yet, a married gestating parent's choice of a second parent at birth may still be limited, such as where a child is born of extramarital sex and the putative genetic father has childcare standing in a paternity case.[41] Incidentally, as with genetically tied spouses (male or female), unwed parents who are genetically tied to their children have parental opportunity interests under *Lehr* and related state laws.[42] Such interests may be exercised through

---

36 *See id.* (stating "liberty interest" of unwed genetic father in child born to a married gestating parent).

37 Lehr v. Robertson, 463 U.S. 248, 263 (1983) (discussing dual parental financial support duties would benefit children, as would the potential for positive parent-child relationships with second parents. However, the Court also notes that child custody orders are available on a case-by-case basis when non-gestating genetic parents do not undertake healthy parental childcare).

38 *See* Jeffrey A. Parness, *Federal Constitutional Childcare Parents*, 90 ST. JOHN'S L. REV. 965, 968 (2016) (stating U.S. Supreme Court deference to state lawmakers as to who are constitutionally protected childcare parents).

39 *See generally* Emily J. Stolzenberg, *Nonconsensual Family Obligations*, 48 BYU L. REV. 625, 682-86 (2022) (discussing within a single state, spousal parentage laws should also be contextualized, as one can be, e.g., a spousal parent for child support purposes but not for childcare (custody/visitation) purposes); *see also In re* H.S., 805 N.W.2d 737, 745-6 n. 4 (Iowa 2011) (reviewing statutes and cases where child support continues past termination of parental rights).

40 *See generally Lehr*, 463 U.S. at 262; Michael H v. Gerald D, 491 U.S. 110, 128-29 (1989).

41 *See Michael H.*, 491 U.S. at 111.

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

proceedings in paternity[43] or maternity,[44] such as with birth via fertilized egg implantation.[45]

Professor Feinberg supports broad, though not absolute, opt-out powers for married gestating parents as she says second-parent choices deserve "special weight."[46] Professors Spitko,[47] Czapanskiy,[48] and Jacobs[49] support even broader options. Yet the *Lehr* precedent and some state constitutional rights and public policies do not allow such broad authority for gestating parents.[50]

C. VAP Parentage

As to VAP parentage, Professor Feinberg opines that laws on "gender-based VAP eligibility restrictions . . . are . . . clearly in need of legal reform."[51] She suggests, "VAP laws should be amended so that men, women, and non-binary individuals who comply with the relevant procedures are able to establish parentage through VAPs."[52] She describes such amendments as "modest reforms," including changes "eliminating the requirement on some states' VAP forms relating to the signer attesting to being the child's biological parent."[53] Such reforms, requiring statutory/regulatory rewrites,

---

43 *See, e.g.*, Michael N. v. Brandy M., 844 S.E.2d 450, 462 (W. Va. 2020) (stating that a putative father may have standing where he was prevented from developing a parent-child relationship or had developed such a relationship, and no harm would come to child). Any such interests in children born to those married to others can be overridden if state laws protect extant families wherein the children are being well raised. *Michael H.*, 491 U.S. at 129-30 (finding no interests); *id.* at 133 (Stevens, J., concurring) ("I . . . would not foreclose the possibility"); *id.* at 136 (Brennan, J., dissenting) (observing that five justices refuse to foreclose such an interest) (finding a "liberty interest that cannot be denied without due process of law"). Not all states offer similar protection to extant families. *See* Callender v. Skiles, 591 N.W.2d 182, 191 (Iowa 1999) (finding it "unconstitutional under our state constitution" to deny unwed biological father standing to overcome paternity in spouse of birth mother). *But see* Jennifer S. Hendricks, *Fathers and Feminism: The Case Against Genetic Entitlement*, 91 TUL. L. REV. 473, 484-85 (2017) (suggesting that recognizing such standing is subject to "heightened scrutiny" where it overrides "the child-rearing decisions of a fit parent," under Troxel v. Granville, 530 U.S. 57 (2000)).

44 *See* Adoption of Kelsey S., 823 P.2d 1216, 1237 (Cal. 1992) (stating an unwed father must commit to parental responsibilities to negate a proposed adoption); *In re* Adoption of A.A.T., 196 P.3d 1180, 1195 (Kan. 2008).

45 *See* K.M. v. E.G., 117 P.3d 673, 675-76 (Cal. 2005) (outlining that egg donors who were gestating parents, but was partner of gestating parent, was a parent).

46 Feinberg, *supra* note 1, at 2325.

47 Spitko, *supra* note 8, at 147.

48 Czapanskiy, *supra* note 10, at 943 (stating no constraint on gestating parent by presumption in favor of other biological parent).

49 Jacobs, *supra* note 11, at 466-68 (eliminating the status-based parentage founded on "genetic connection").

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

51 Feinberg, *supra* note 1, at 2325.

52 *Id.* at 2325-26.

53 *Id.* at 2326.

are surely not modest. Keeping in mind the precedent in *Lehr*, they would undermine the longstanding substantive state public policies on the parental childcare interests/child support duties of the genetic parents of children born of consensual sex.[54]

Similarly, Professor Spitko discusses VAP parentage for individuals with and without genetic ties.[55] For parents with or without such ties, he contends that VAP parentage is constitutionally protected only where the "biological mother" has "invited" that person to be a second legal parent, as by signing a VAP, and where that person's "labor" has resulted in "a functional parent-child relationship."[56] Under this approach, the gestating parent could seemingly undo a VAP "at any time before" the other VAP signatory developed a functional parent-child relationship.[57] Professor Spitko's approach is problematic on several fronts.[58] It conflicts with current federal guidelines on VAP recissions (within 60 days) and on VAP challenges (need to show fraud, duress, or material mistake of fact after 60 days).[59] This approach also invites significant uncertainties and possible litigation, especially where there is no fixed measure of time as to when the other VAP signatory develops a functional parent-child relationship.[60]

Professor Czapanskiy did not speak directly on VAPs.[61] Yet, on the freedoms that should be bestowed upon gestating parents in regard to naming second legal parents at the time of birth, she seemingly supported freedoms whose limits were narrower[62] than Professor Feinberg's suggestion of giving

---

54 *Lehr*, 463 U.S. at 262. The childcare interests of genetic fathers in nonmarital children can have state constitutional foundations. *Id.* State constitutional childcare interests of genetic fathers in children born to gestating parents who are married to others has even been recognized in some American states. *See, e.g.*, Callender v. Skiles, 591 N.W.2d 182, 190 (Iowa 1999). The general recognition of child support duties for the genetic parents of children born of consensual sex is recognized in N.E. v. Hedges and *In re* Stephen Tyler R. N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004); *In re* Stephen Tyler R., 584 S.E.2d 581 (W. Va. 2003) (child support duties continue though custodial rights are terminated); *see also* Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 IDAHO L. REV. 421 (2020) (describing the varying American state laws on the child support duties of parents by consent are generally described).

55 Spitko, *supra* note 8, at 132 (stating mother has "the right to invite another adult biologically unrelated to the child into the child's life to act as a parent").

56 *Id.*

57 *Id.*

58 *See* 42 U.S.C. § 666(a)(5)(D)(ii), (iii); Katharine K. Baker, Equality and Family Autonomy, 24 U. PA. J. CONST. L. 412 (2022).

59 42 U.S.C. § 666(a)(5)(D)(ii), (iii). Procedures under which voluntary acknowledgement of paternity is considered a legal finding of paternity are subject to the right of signatory to rescind the VAP before 60 days, or the date of an administrative or judicial proceeding relating to the child if the signatory is a party, whichever is earlier. *Id.* Moreover, the VAP may only be challenged after the 60-day period if the challenger can show fraud, duress or material mistake of fact. *Id.*

60 *See, e.g.*, Katharine K. Baker, *Equality and Family Autonomy*, 24 U. PA. J. CONST. L. 412 (2022) (stating functional approaches to childcare parentage vest too much power in judges and disrupt communities of people of color and of LGBTQ orientation).

61 *See generally* Czapanskiy, *supra* note 10.

62 *See generally id.*

"special weight" to the choices of these parents."[63] For example, Professor Czapanskiy stated:

> My proposal centers on the birth mother because . . . doing what is good for young children usually means doing what seems best to the child's key caretaker. In the case of infants, the key caretaker is almost always the birth mother. Under my proposal, she is empowered to decide whether she will be the child's sole legal parent or whether she will designate another as her parental partner. If she decides to designate a partner, she can designate whomever she wants; she is not constrained by presumptions in favor of her spouse or the child's biological father. If she decides not to designate a partner, or if someone not designated wants to be designated, a court can overrule her decision only in narrow circumstances designed to protect her capacity to act in the child's best interests.[64]

In contrast, Professor Jacobs supported "intentional parenthood as the default framework to establish all at-birth parent-child relationships."[65] This led her to suggest replacing current VAP practices with a document "similar" to a current VAP that would be "offered to all parents."[66] Without such a document, there would be "a minimum of one parent,"[67] the gestating parent. She then opined that other parents would be possible where recognized by the individual signatures of the gestating parent and all other parents.[68] A gestating parent is the one parent, at a minimum, who need not sign a form if there is to be no second legal parent at birth.[69]

D. Assisted Reproduction Parentage

Another form of choice of a second legal parent by a gestating parent that is effective at birth involves a child born via assisted reproduction (AR).[70] An AR agreement regarding a second parent can involve artificial

---

63 Feinberg, *supra* note 1, at 2320.

64 Czapanskiy, *supra* note 10, at 946. Her expressed limits on who can seek to override a gestating parent's choice of a second parent at birth "includes only the mother's marital or civil union partner, the child's biological father, and people who provided the mother with substantial material and nonmaterial support during the mother's pregnancy and after the birth of the child." *Id*.

65 Jacobs, *supra* note 11, at 469.

66 *Id*. at 497.

67 *Id*. at 496.

68 *Id*. (stating a child will usually always have one parent and "may possibly have two, three or more parents").

69 *Id*. at 475 ("[A] woman who achieves pregnancy through intercourse would be a legal mother so long as she does not relinquish her parental rights.").

70 As Professor Strauss notes, such agreements should not be confused with nonpregnancy contracts. Gregg Strauss, *Parentage Agreements Are Not Contracts*, 90 FORDHAM L. REV. 2645, 2647, 2650 (2022) (stating parentage agreements "share few moral similarities with legal contracts").

insemination (AI), with or without a genetic surrogate, or a fertilized egg implantation (FEI), with or without a gestational surrogate.[71] A genetic surrogate conceives a child using her own eggs and generally cannot enter an AR agreement until after the child is born.[72] On the other hand, a gestational surrogate carries a child conceived by the eggs of an intended parent or anonymous donor.[73] Unlike genetic surrogacy, gestational surrogates may enter AR agreements with second parents before birth.[74] Of course, AR births can occur without any prior agreements on second parenthood.[75] Where there is no earlier agreement, there may be second legal parentage at the time of birth through spousal parentage[76] or a VAP.[77]

Professor Feinberg differentiates between the laws on AR agreements involving married and unmarried gestating parents, though she does not address any possible differences between AI and FEI births.[78] For married gestating parents, the laws on such agreements are said not to "expand the class of individuals who can be established at birth as the second parent."[79] These laws can only be "utilized to establish the spouse as the child's second parent."[80] She finds that in "every state" the "martial presumption of parentage . . . provides the gestating parent's spouse with a rebuttable presumption of legal parentage at birth regardless of the method of conception"[81] and "regardless of whether this is what the gestating parent desires."[82] She concludes that states should deem a non-gestating spouse (man or woman) to be the second parent even when attempted AR consent by a gestating parent to second parentage does not follow statutory or common law guidelines.[83] This constitutes a questionable conclusion given some current state laws.[84]

---

71 *Id.* at 2654.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.* at 2651.

76 Not all spouses of those who bear children will be spousal parents, as where children are born of AR. In Idaho, the statutes on spousal consent to AR births have been deemed "controlling" and thus preemptive of the general spousal parent presumption. Gatsby v. Gatsby, 495 P.3d 996, 1002 (Idaho 2021).

77 In some states, though, VAPs are unavailable for children born of AR. *See, e.g.*, UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N 2017) (allowing a VAP to be signed with the gestating parent by "an alleged genetic father" or an "intended parent" under a non-surrogacy AR agreement); *cf.* UNIF. PARENTAGE ACT § 301 (UNIF. L. COMM'N 2000) (allowing a gestating parent and "a man claiming to be the genetic father" to sign a VAP).

78 *See generally* Feinberg, *supra* note 1.

79 *Id.* at 2286.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 *See, e.g.*, Gatsby v. Gatsby, 495 P.3d 996, 1002 (Idaho 2021) (stating no "marital presumption" of parentage for a child born of assisted reproduction as the Artificial Insemination Act was

For unmarried gestating parents, Professor Feinberg finds state laws on AR births are problematic where second-parent consent to AR can only be undertaken by "a man."[85] The problems for prospective female second parents are unavoidable since VAPs cannot "be utilized to establish the parentage of women" who are not gestating parents.[86] Here, she is quite correct that there are real problems.[87]

One issue with Professor Feinberg's approach is that she fails to distinguish second-parent choices by gestating parents for children born of AI and of FEI.[88] However, distinctions are needed. For example, if *Lehr* or state laws demand that biological ties alone, without genetic ties, are sufficient for parentage, FEI births must be differentiated where three persons (two women and one man) have biological ties.[89]

Regarding parentage with non-surrogacy assisted reproduction births, Professor Spitko opines "constitutional protection or lack thereof" for a sperm donor "should be the same . . . whether the claimant biological father was involved in conception through artificial insemination or through sexual intercourse."[90] Thus, the donor may only become a second parent if the donor developed a functional parent-child relationship,[91] the gestating parent invited the donor "into the child's life to serve as a co-parent,"[92] and the

---

"controlling" since it is "the more recent and specifically applicable statute"); *cf.* VT. STAT. ANN. tit. 15, § 705(a) (2018) (discussing a spouse normally has two years from birth to challenge spousal parentage arising from an AR birth).

85 Feinberg, *supra* note 1, at 2290 ("In thirteen of . . . sixteen jurisdictions, the law is written in gender neutral terms with regard to the individual who is deemed a legal parent at birth based upon their consent to the unmarried gestating parent's use" of Assisted Reproductive Technology [or ART, *Id.* at 2283]).

86 *Id.* at 2291 (referencing *Id.* at 2289-90).

87 The gender bias problems with such AR laws are recognized in D.M.T. v. T.M.H. and *In re* Parentage of M.F. D.M.T. v. T.M.H., 129 So.3d 320, 344 (Fla. 2013) [D.M.T.]; *In re* Parentage of M.F., 475 P.3d 642, 653-54 (Kan. 2020).

88 *See generally* Feinberg, at *supra* note 1.

89 Lehr v. Robertson, 463 U.S. 248, 268 (1983). If Lehr is read to demand that DNA ties are important, there are typically only two interested parties. *Id.* Yet such a reading on DNA rather than on the import of nongenetic biological ties clashes with language in certain U.S. Supreme Court precedents on legal parentage protections for a gestating parent. *Id.* Parental rights protection could be grounded on a gestating parent's "labor," not on DNA, to use Professor Spitko's term. *See also* Spitko, *supra* note 8, at 132; *see also* St. Mary v. Damon, 309 P.3d 1027, 1036 (Nev. 2013); *see, e.g.*, Tuan Anh Nguyen v. INS, 533 U.S. 53, 59, 64-65 (2001) (stating to secure parental custody rights, unwed biological (i.e., DNA connected) father under Lehr must also show "real, everyday ties" connecting father to child in order to ensure there is an "opportunity for a meaningful relationship" between father and child; the opportunity for a meaningful parent-child relationship in a gestating parent inheres "in the very event of birth"); K.M. v. E.G., 117 P.3d 673, 680-81 (Kan. 2007) (contemplating dual parentage by acknowledging both egg donor and gestating parent in FEI birth are "mothers" under state parentage laws); D.M.T. v. T.M.H., 129 So.3d 320, 339 (Fla. 2013) (concluding egg donor in FEI birth to former partner had inchoate interest in child that developed into protected due process right to parent).

90 Spitko, *supra* note 8, at 134.

91 *Id.* at 135.

92 *Id.*

invitation was not withdrawn at any time prior to the development of that relationship.[93] Under some current laws, however, withdrawn invitations are not allowed where AR contracts are enforceable.[94]

Concerning parentage with surrogacy-assisted reproduction births, Professor Spitko discusses a genetic surrogate, who is said to be able to "exclude the biological father from the child's life" if she changes her mind about intended parentage in the father before he (or his partner) create a functional parent-child relationship.[95] The withdrawal period again is quite uncertain, extending much longer than the three days under the 2017 Uniform Parentage Act (UPA).[96]

Professor Spitko further discusses parentage when birth is given by a "gestational surrogate" employing a fertilized egg implant, pursuant to a contract, where the sperm donor intends to parent, but the egg donor does not.[97] Again, the gestating parent "has the right to exclude" the biological father (and any partner) "from parenting the child."[98]

Professor Spitko also discusses a gestational mother who delivers a child through an FEI where both the sperm and egg donor, pursuant to a contract, wish "to raise the resulting child."[99] Here, he deems the egg donor was the "first person to perform sufficient parental labor with the intent to exercise parental authority as constitutional parent," whereas the gestational surrogate, though giving birth, would not necessarily have a constitutionally protected parent-child relationship.[100] Professor Spitko recognizes that with an FEI leading to birth, the egg donor and gestating parent, who the egg donor intended to be a co-parent, would each be a constitutional parent at birth as each provided "labor," albeit differently, leading to the birth of a child.[101] The sperm donor, even if intended to be a co-parent, would not be a constitutional parent at birth because he, unlike the egg donor, did not undertake sufficient

---

93 *Id.* at 132 ("A biological mother has a constitutional right to withdraw her consent to the biological father's parenting of her child at any time before the father's own constitutional parental rights vest as a result of his labor developing a functional parent-child relationship.").

94 *See, e.g.*, UNIF. PARENTAGE ACT § 707 (UNIF. L. COMM'N 2017) (concerning enforceability of parentage agreements involving non-surrogacy assisted reproduction births, an individual who consents to AR "may withdraw consent at any time before a transfer that results in a pregnancy"); *compare* CONN. GEN. STAT. § 46b-515(a) (2022), *with* WASH. REV. CODE § 26.26A.630(1) (2019).

95 Spitko, *supra* note 8, at 137.

96 UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM'N 2017). *Compare* COLO. REV. STAT. § 19-4-108(1) (2021) (allowing termination of a genetic or gestational surrogacy pact), *with* § 19-4.5-103(8), (9) ("at any time before a gamete or an embryo transfer.").

97 Spitko, *supra* note 8, at 141.

98 *Id.*

99 *Id.* at 142.

100 *Id.* at 143.

101 *Id.* at 144.

"labor" in the conception and during the pregnancy.[102] Again, under this approach, there would be no contract enforcement.[103]

Professor Czapanskiy does not speak directly about parentage with either non-surrogacy or surrogacy-assisted reproduction.[104] However, she proposes generally that "the birth mother is the only person initially assigned as parent to the child," without distinguishing between births by sex and births by assisted reproduction.[105] Under this approach, a mother can designate another parent at birth, but she may "revoke the designation" if she "changes her mind within the first month of the child's life."[106] A gestating parent's failure to designate a certain person as a second parent can enable that person "to petition to be designated over the mother's objection."[107] But such a petition must be sought within 60 days after birth[108] and must demonstrate the petitioner "has provided the mother with substantial material and non-material support, has no history of violence involving the mother, and has the capacity to co-parent with the mother."[109] As with Professor Spitko, Professor Czapanskiy invites significant and uncertain legal issues, especially with a sixty-day deadline, because there is not much time to provide "substantial" support with the gestating parent's unilateral control over a genetic parent's parentage under the law.[110]

On parentage with non-surrogacy and surrogacy-assisted reproduction births, Professor Jacobs opined that "legislatures should consider intentional parenthood as the default, at-birth parentage establishment model."[111] As for what this would entail, she indicated that her "future work will develop a particular implementation strategy."[112] Yet, she contemplated at the time that she would likely support VAP availability at the time of birth regardless of the means of conception, though a VAP should be unavailable to a gestational surrogate if there were a "pre-birth agreement" on intended parenthood excluding the surrogate.[113] However, according to Jacobs, a VAP for a non-gestational parent would require the "requisite intent" to be a parent around the time of birth and an undertaking of "parental obligations to earn the legal

---

102 *Id*. at 143; Spitko, *supra* note 8, at 138 (asserting there is no labor by sperm donor); *id*. at 143 (asserting there is extensive labor by egg donor, including needles, anesthesia, and "various medications and hormones over a period of several weeks to manipulate" the "ovulation cycle").

103 *Id*. at 138.

104 *See generally* Czapanskiy, *supra* note 10.

105 *Id*. at 946.

106 *Id*.

107 *Id*.

108 *Id*. at 947.

109 *Id*.

110 Czapanskiy, *supra* note 10, at 947.

111 Jacobs, *supra* note 11, at 466.

112 *Id*. at 496.

113 *Id*. at 497.

parent title."[114] Under Jacobs' approach, the effect of the VAP would remain uncertain for some time after signing, which is contrary to the federal statutory mandates on VAPs to be employed by states participating in certain federal welfare subsidy programs.[115]

Beyond VAPs, Professor Jacobs expressed support for the intentional parenthood norms in assisted reproduction birth settings found in the Uniform Parentage Act (the 2000 version, as amended in 2002)[116] and the American Law Institute's "Principles of Dissolution."[117] Here, as with births from consensual sex, "status-based parentage at birth"[118] founded on marriage or genetic ties is inappropriate.

III. BETTER LAWS ON SECOND-PARENT CHOICES AT BIRTH

Professor Feinberg urges others to weigh in on "a more coherent and just legal framework"[119] governing choices (made pre-birth or at birth) by a gestating parent on "who is deemed the child's second legal parent at birth."[120] Earlier, Professors Spitko, Czapanskiy, and Jacobs argued that second-parent choices by gestating custodial parents be given special weight, if not absolute deference.[121]

Where a gestating parent chooses a second parent at birth, whether by marriage, parentage acknowledgment, or an assisted reproduction undertaking, any governing framework must confront some realities and several important questions overlooked by distinguished professors.[122] One question involves the uncertainties arising from the *Lehr* decision regarding the breadth of the federal constitutional parental opportunity interests for non-gestating genetic parents in their offspring born of consensual sex,[123] as well as the similar (or somewhat comparable) parental opportunity interests in children born of assisted reproduction.[124] With children born of assisted reproduction, genetic donors and gestating parents anticipate future children

---

114 *Id.*

115 *See* Jeffrey A. Parness and David A. Saxe, *Reforming the Processes for Challenging Voluntary Acknowledgments of Paternity*, 92 CHI.-KENT L. REV. 177 (2017) (discussing the mandated federal norms, and recommendations for reforms).

116 Jacobs, *supra* note 11, at 472-73, 482-83 (noting the 2017 UPA had not yet been completed and approved).

117 *Id.* at 480-81 (referring to the ALI's Principles of the Law of Family Dissolution).

118 *Id.* at 466.

119 Feinberg, *supra* note 1, at 2271.

120 *Id.* at 2325.

121 Spitko, *supra* note 8, at 132; Jacobs, *supra* note 11, at 496.

122 Spitko, *supra* note 8, at 132; Jacobs, *supra* note 11, at 496.

123 *See generally* Lehr v. Robertson, 463 U.S. 248 (1983).

124 On applying Lehr to the interests of non-gestating parents in children born of assisted reproduction, *see, e.g.*, D.M.T. v. T.M.H., 129 So.3d 320, 337 (Fla. 2013) (stating interest of egg donor); McIntyre v. Crouch, 780 P.2d 239 (Or. App. 1989) (stating interest of sperm donor, recognized under *Lehr* if there was a parentage agreement with gestating parent).

quite differently than they do for children born of sex.[125] Agreements are far more likely when assisted reproduction births are anticipated, though the limits on enforceable contracts vary for those involved in non-surrogacy artificial insemination, gestational surrogacy, and genetic surrogacy pacts.[126]

A reality point is that state constitutional interests reliant upon genetic ties for legal parenthood can further limit second-parent choices by gestating parents, as state laws can extend the interests recognized under *Lehr*.[127] Here, the question arises of whether such interests should vary depending on whether children are born of consensual sex or assisted reproduction.[128] In the latter setting, there are more likely mutual desires by potential genetic parents to have and raise children.[129] For now, varying state constitutional interests foreclose a one-size-fits-all approach to mothers-know-best laws.[130]

A further reality point is that the *Lehr* decision and state laws on the parental opportunity interests of those genetically tied to children sometimes extend to those biologically, but not genetically, tied to children.[131] Such an extension occurs with an AR birth to a gestating parent whose conception was prompted by FEI.[132] The 2017 UPA on surrogacy pacts treats the parental opportunity interests of genetic surrogates and gestational surrogates differently.[133] Under the Act, genetic surrogates are given three days after

---

125 S*ee generally* Feinberg, *supra* note 1.

126 *Compare* UNIF. PARENTAGE ACT § 701(a) (UNIF. L. COMM'N 2017) (stating non-gestating individual who consents to AR "may withdraw consent before" a transfer that results in a pregnancy), *with* § 808(a) (stating termination of agreement by gestational surrogate before "embryo transfer"), *and* § 814(a)(2) (stating termination of agreement by genetic surrogate any time before 72 hours have passed since birth).

127 Lehr v. Robertson, 463 U.S. 248, 266 (1983).

128 Not unlike the U.S. Supreme Court after *Lehr*, state court decisions on parentage opportunity interests have chiefly involved births by consensual sex. *But see* D.M.T. v. T.M.H., 129 So.3d 320, 337-39 (Fla. 2013) (applying *Lehr* to a mutually agreed assisted reproduction birth to same sex couple).

129 *Lehr*, 463 U.S. at 266.

130 *Id.* at 267.

131 *See, e.g.*, *In re* Baby, 447 S.W.3d 807, 834 (Tenn. 2014) (holding that no prebirth waiver of parental rights by traditional (i.e., gestational) surrogate is required); Lefever v. Matthews, 971 N.W.2d 672, 685 (Mich. App. 2021) (explaining that a gestating parent is a "natural parent" under Child Custody Act though there are no genetic ties). *Compare* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (explaining that a gestating surrogate is not "natural mother" as she had no gamete contribution), *with P.M. v. T.B.*, 907 N.W.2d 522, 540 (Iowa 2018) (holding that a gestational surrogacy pact is enforceable).

132 *See, e.g.*, *In re* Baby, 447 S.W.3d 807, 834 (Tenn. 2014); Lefever v. Matthews, 971 N.W.2d 672, 685 (Mich. App. 2021). *Compare* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), *with P.M. v. T.B.*, 907 N.W.2d 522, 540 (Iowa 2018).

133 UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM'N 2017) (mandating that a genetic surrogate "may withdraw consent any time before 72 hours after the birth"); *id.* at § 808(a) (stating termination of gestational agreement "at any time before an embryo transfer"). In Washington and the District of Columbia a genetic surrogate has 48 hours after birth to withdraw consent. WASH. REV. CODE ANN. § 26.26A.765(2) (2019); D.C. CODE ANN. § 16-401(23) (2016) ("traditional surrogate"); *id.* at § 16-411(4). Vermont and Maine follow the Uniform Parentage Act of 2017 on

birth, whereas gestational surrogates must sign a waiver of parentage opportunity prior to conception.[134]

Further questions include whether certain gestating parents whose second-parent choices at birth should be given little or no deference, and whether certain gestating parents whose second-parent choices at birth should be given "heightened" or "special" or "absolute" deference.[135] The amount of deference given to a gestating parent may depend on the context in which a controversy arises. For example, consider a gestating parent who now seeks to deny legal parentage to one who is biologically tied or contractually tied (in an assisted reproduction birth) to a child.[136] Can denial of parentage be sanctioned simply because a post-birth suit for wrongful child death based on medical (or other) negligence will yield significant monetary awards to any legal parent?[137] Perhaps little or no deference should be afforded in this situation. However, there is deference when child custody is at issue.[138] Questions on deference may need to be answered contextually, though harmony in public policy terms across contexts should be maintained. The professors do not discuss the ramifications of their preferences outside the parental custody context, though custodial rights often define parental rights in other contexts, such as in probate.[139]

Additionally, consider a gestating parent who seeks to deny parentage in an artificial insemination setting to a sperm donor whom that parent earlier

---

ending "gestational carrier" agreements. VT. STAT. ANN. tit. 15C, § 806(a) (2018) and ME. STAT. tit. 19-A, § 1936(1) (2016).

134 UNIF. PARENTAGE ACT § 814(a)(2) (UNIF. L. COMM'N 2017); *id.* at § 808(a). In Washington and the District of Columbia a genetic surrogate has 48 hours after birth to withdraw consent. WASH. REV. CODE ANN. § 26.26A.765(2) (2019); D.C. CODE ANN. § 16-401(23) (2016); *id.* at § 16-411(4). Vermont and Maine follow the Uniform Parentage Act of 2017 on ending "gestational carrier" agreements. VT. STAT. ANN. Tit. 15C, § 806(a) (2018) and ME. STAT. tit. 19-A, § 1936(1) (2016).

135 *See, e.g.*, Sieglein v. Schmidt, 120 A.3d 790 (Md. Spec. App. 2015); *see also* N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004) (explaining that legal parentage can vary by context. Thus, one can be responsible for child support though ineligible to seek parental child custody/visitation orders). *See, e.g.*, Caldwell v. Alliance Consulting Group, Inc., 775 N.Y.S.2d 92 (N.Y. App. Div. 3d 2004) (holding that even in damage recovery settings legal parentage can vary, as between parent beneficiaries for child death in worker's compensation and in wrongful death proceedings). *See*, e.g., Jeffrey A. Parness, *Who Is a Parent? Intrastate and Interstate Differences*, 34 J. AM. ACAD. MATRIM. LAW. 455 (2022) (explaining contextual differences in parentage laws generally).

136 *See, e.g.*, Sieglein v. Schmidt, 120 A.3d 790 (Md. Spec. App. 2015); *see also* N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004). *See, e.g.*, Caldwell v. Alliance Consulting Group, Inc., 775 N.Y.S.2d 92 (N.Y. App. Div. 3d 2004). *See*, e.g., Jeffrey A. Parness, *Who Is a Parent? Intrastate and Interstate Differences*, 34 J. AM. ACAD. MATRIM. LAW.455 (2022).

137 *See, e.g.*, Sieglein v. Schmidt, 120 A.3d 790 (Md. Spec. App. 2015); *see also* N.E. v. Hedges, 391 F.3d 832, 836 (6th Cir. 2004). *See, e.g.*, Caldwell v. Alliance Consulting Group, Inc., 775 N.Y.S.2d 92 (N.Y. App. Div. 3d 2004). *See*, e.g., Jeffrey A. Parness, *Who Is a Parent? Intrastate and Interstate Differences*, 34 J. AM. ACAD. MATRIM. LAW.455 (2022).

138 *See, e.g.*, ME. STAT. tit. 18-C, § 2-115 (2019) (for purpose of intestate succession, parentage arises under the Parentage Act, ME. STAT. tit. 19-A, § 61 (2016)).

139 *See, e.g.*, *id.*

recognized as a second legal parent.[140] Should deference be given where the gestating parent seeks to negate the donor's future parental rights solely due to the negligent acts of a sperm bank in completing or failing to complete the consent forms strictly required by statute?[141] Again, perhaps little or no deference should be afforded to the gestating parent in this context. By contrast, absolute deference typically seems warranted where a child's birth resulted from nonconsensual sexual relations, perhaps even where the gestating parent had earlier consented to shared parenting.[142]

More questions involve which safeguards, if any, found in formal adoption laws should be incorporated into the legal guidelines on informal adoption choices by gestating parents regarding second parents that take effect at birth.[143] For example, some inquiry into a child's interests may be warranted even where a gestating parent's choice receives "special weight."

Finally, there are questions surrounding the forms of consent to second parenthood.[144] A rigorous informed consent analysis should be required with VAPs to ensure a gestating parent fully understands the consequences of these choices. Unlike surrogacy settings, generally there are likely no legal advisors present when VAPs are executed.[145] Similarly, special consent laws seem appropriate for those undertaking do-it-yourself artificial insemination.[146]

With few federal law constraints,[147] one reality of future laws on second-parentage choices by gestating parents effective at birth is that the laws will likely continue to vary interstate.[148] Thus, state-by-state analyses will be needed to determine whether there is a "coherent legal framework" on second-parent choices, with different but sensible frameworks possible

---

140 *But see In re* K.M.H., 169 P.3d 1025, 1039-40 (Kan. 2007) (concluding that statutory requirement of written agreement between gestating parent and sperm donor was not followed so there was no opportunity for donor to seek parentage).

141 *But see id.*

142 *See, e.*g., 750 ILL. COMP. STAT. ANN. 46/622 (2015) (construed in *In re* D.S., 197 N.E.3d 92 (Ill. App. 1st 2021) to demand absolute deference, disagreeing with the statutory reading in Deaver v. Jordan, 2020 IL App (5th) 200084-U).

143 *Cf.* 750 ILL. COMP. STAT. ANN. 50 (1998).

144 *See* CAL. FAM. CODE § 7613.5(a) (2020) (seeking to ensure informed consent in this setting by providing a form contract, which when used, will be enforced).

145 *See id.*

146 *See id.*

147 *See* Jeffrey A. Parness, *Federal Constitutional Childcare Parentage*, 90 ST. JOHN'S L. REV. 965 (2016) (explaining the significant, and troubling, dependence on state laws for defining who are federal constitutional custodial parents). *See also* Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183 (2020) (explaining the limits on expanding federal constitutional childcare parentage via state laws).

148 On the significant, and troubling, dependence on state laws for defining who are federal constitutional custodial parents, *see* Jeffrey A. Parness, "Federal Constitutional Childcare Parentage," 90 ST. JOHN'S L. REV. 965 (2016). On the limits of expanding federal constitutional childcare parentage via state laws, *see* Jeffrey A. Parness, "Unconstitutional Parenthood," 104 MARQ. L. REV. 183 (2020).

across borders.[149] Consider, for example, the analyses necessary on the variations in state laws on challenges to spousal parentage where a marital family is extant and where the unwed biological father of a child born of sex into the family seeks to undo the spousal parent presumption in the spouse.[150] Consider, as well, the necessary analyses when there are interstate variations in parentage laws and relevant acts in two or more states involving assisted reproduction.[151] Further, consider how a state's presumption of joint custody upon marriage dissolution impacts the state policies on mothers-know-best laws that are effective at birth.[152] At some point, given the U.S. Supreme Court's recent limits on recognizing new unenumerated constitutional liberty interests (including extending the parental "care, custody and control" interests in the *Troxel*[153] case),[154] Congress may choose to enter the fray on second-parent choices at birth to establish some national uniformity.[155]

Whatever the federal law limits, in-state analyses seeking a "coherent legal framework" for mothers-know-best laws on choosing second parents at birth should take account of the state's laws on the second-parent choices of gestating parents that take effect long after birth. Such laws include

---

149 *See* Jeffrey A. Parness, *Federal Constitutional Childcare Parentage*, 90 ST. JOHN'S L. REV. 965 (2016); *see also* Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183 (2020).

150 Such potential variations were condoned in Michael H. v. Gerald D., 491 U.S. 110, 131 (1989).

151 *See* Peter Nicolas, *Straddling the Columbia: A Constitutional Law Professor's Musings on Circumventing Washington State's Criminal Prohibition on Compensated Surrogacy*, 89 WASH. L. REV. 1235 (2014) (describing one same sex couple's inquiry into where to secure a genetic surrogacy birth that is least likely to prompt issues of the couple's parentage). *See generally Jeffrey A. Parness, Choosing Parentage Laws in Multistate Conduct Cases*, 35 J. AM. ACAD. MATRIM. LAW. 669 (2023).

152 *See, e.g.*, ARK. CODE ANN. § 9-13-101(a)(1)(A)(iv)(a) (2021) (creating a "rebuttable presumption that joint custody is in the best interests of the child" in a "divorce or paternity matter"); *see also* W. VA. CODE ANN. § 48-9-102 (2022) (creating a rebuttable presumption that "equal (50-50) custodial allocation is in the best interests of the child"). *Cf.* MO. ANN. STAT. § 452.375 (2023) (no presumption).

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

154 On those limits, *see, e.g.*, Jeffrey A. Parness, *Dobbs Unenumerated Parental Custody Rights and Interests*, 14 CONLAW NOW 117 (2023).

155 U.S. Const. amend. XIV, § 5. The legitimate constitutional bases for such Congressional action are murky, with perhaps legislation to "enforce" substantive due process. Congress could also effectively prompt (though not absolutely mandatory) second-parent guidelines by employing its spending authority and tying state financial subsidies to following uniform norms, as it has done with VAPs. *See, e.g.*, Jeffrey A. Parness and Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 BALT. L. REV. 53, 56-63 (2010).

residential/hold-out parentage laws,[156] de facto parentage laws,[157] and formal adoption laws.[158] Where there exists broad support for validating second-parent choices effective after birth and legitimate reasons to await validation until sometime after birth—as with laws respectful of affording parental opportunity interests to grasp parenthood, laws seeking to assure the chosen second parent has accepted parental-like responsibilities, and laws seeking to protect a child's best interests—there is less need for laws that validate second-parent choices by gestating parents effective at birth.[159]

---

156 There are two basic statutory types of residential/hold out parentage laws. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973) (stating a "man is presumed to be the natural father" (or a person per judicial interpretation) if he receives a child into his (or the person's) home and "openly holds out the child as his (or the person's) natural child."); *cf.* Elisa B. v. Superior Court, 117 P.3d 660, 667 (Cal. 2005). The other type, usually arising from either the 2002 UPA or the 2017 UPA, involves a "man" or an "individual" who resides in the same household with the child and "openly holds out the child as one's own for the first two years of the child's life." UNIF. PARENTAGE ACT § 204(a)(5) (UNIF. L. COMM'N 2002) ("man"); UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017) ("individual"); UNIF. PARENTAGE ACT § 203(1) (UNIF. L. COMM'N 2002) (recognizing a form of residential/hold out parentage by envisioning "a parent by estoppel," who is "not a legal parent" but who "lived with the child since the child's birth," while holding out and accepting full and permanent responsibilities as parent as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities).

157 UNIF. PARENTAGE ACT § 4 (UNIF. L. COMM'N 2017) (recognizing, unlike its predecessors, "de facto" parenthood as a form of childcare parentage for those without biological or formal adoption ties. This parenthood is dependent upon meeting far more explicit terms than is required by residential/hold out parentage. For de facto parentage, an existing legal parent must have "fostered or supported" a "bonded and dependent relationship" between the child and the nonparent which is "parental in nature;" the nonparent must have held out the child as the nonparent's own child and undertaken "full and permanent" parental responsibilities; and the nonparent must have "resided with the child as a regular member of the child's household for a significant period of time."). PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c), 3.02(1)(c); RESTATEMENT OF THE LAW: CHILD. AND THE L. § 1.72(a) (AM. L. INST., TENTATIVE DRAFT 2023) (recognizing types of "de facto" parentage for those without biological or formal adoption ties, with each type requiring both common residence and consent by an existing legal "parent.").

158 MONT. CODE ANN. § 42-4-309 (2021) (providing deference to a custodial gestating parent's wish on the formal adoption of that parent's child, including stepparent adoptions. In stepparent adoptions, a custodial gestating parent, when in the child's best interests, can request the court to "waive the requirement of a preplacement evaluation and the 6-month postplacement evaluation and report and grant a decree of adoption"). *See also* MONT. CODE ANN. § 42-4-310 (2021) (requiring an adopting stepparent to obtain an order terminating the parental rights of any noncustodial parent by the time of a petition to adopt). *See also* ALA. CODE § 26-10A-27(1) (1975) (requiring a stepparent pursuing adoption to have resided with the adoptee for a year unless the court waives this requirement "for good cause shown"). In non-step-parent adoptions, *see generally* Teri Dobbins Baxter, *Respecting Parents' Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children*, 67 RUTGERS UNIV. L. REV. 905, 907 (2015) (reviewing relevant laws while arguing "that fit parents who choose to voluntarily terminate their rights and consent to adoptions of their children have a constitutional right to choose who will adopt and raise their children").

159 MONT. CODE ANN. § 42-4-309 (2021); *see also id.* at § 42-4-310; *see also* ALA. CODE § 26-10A-27(1) (1975). In non-step-parent adoptions, *see generally* Teri Dobbins Baxter, *Respecting Parents'*

IV. CONCLUSION

Professor Feinberg invites others to join her in seeking "a more coherent legal framework"[160] that recognizes a "gestating parent should be able to exercise a significant degree of meaningful choice in the determination of who is deemed the child's second legal parent at birth."[161] She concludes that reform efforts should focus primarily on "the law's approach to married gestating parents and the eligibility requirements for establishing parentage through VAPs."[162] She follows Professors Spitko, Czpanskiy, and Jacobs, who all earlier supported significant, if not exclusive, control by gestating parents over second-parent choices that take effect at birth.[163]

This article accepts the invitation. It comments on spousal parenting and VAP laws regarding gestating parents' choices of second-parents at birth.[164] It also adds thoughts on second-parent choices in assisted reproduction settings.[165] Specifically, this article posits that the legal framework for mothers-know-best laws must take into consideration variations in state laws. Moreover, the amount of deference afforded to the gestational parent may need to be answered contextually, while still maintaining harmony in public policy terms across such contexts.

Others should join Professors Feinberg, Spitko, Czapanskiy, Jacobs, and myself in reflecting on gestational-parent choices of second parents effective at birth. We all seemingly agree that spousal, VAP, and AR laws are in need of serious reconsideration. Family structures, proposed uniform laws, and state statutes and precedents have all changed dramatically in recent years.[166] Legal recalibrations are necessary to protect not only gestating parents, but also the parental privacy interests of others and the best interests of children, especially given the somewhat scant and unlikely future of U.S. Supreme Court precedents on those warranting custodial parentage.[167]

Fundamental Rights in the Adoption Process: Parents Choosing Parents for Their Children, 67 RUTGERS UNIV. L. REV. 905, 907 (2015).

160 Feinberg, *supra* note 1, at 2325.

161 *Id.* at 2320 (providing the choice should be given "special weight").

162 *Id.* at 2325.

163 *See id.* at 2271.

164 *See id.*

165 *See id.*

166 Spitko, *supra* note 8; Jacobs, *supra* note 11; Feinberg, *supra* note 1.

167 Spitko, *supra* note 8; Jacobs, *supra* note 11; Feinberg, *supra* note 1.