

ADJUDICATING DE FACTO PARENTAGE

STEPHANIE L. TANG*

State recognition of de facto parentage has significantly increased over the past twenty years. Today, nearly two-thirds of states recognize some form of functional parent, either through common law doctrines, equitable doctrines, or statutes. Such recognition tracks the evolving structure of the American family and allows courts to confer standing and extend parental rights and responsibilities to functional parents who form a parental relationship with a child. Acknowledging this shift, the 2024 inaugural Restatement of the Law: Children and the Law defined de facto parents as distinct from third parties, following in the footsteps of the 2002 American Law Institute Principles of the Law of Family Dissolution, the 2017 Uniform Parentage Act, and the 2018 Uniform Nonparent Custody and Visitation Act.

When state courts analyze de facto parentage claims, they face two primary questions: (1) What procedural steps should courts follow?; and (2) How do deviations in procedural requirements impact whether individuals will be successful in establishing de facto parentage? This Article makes two novel contributions to scholarship in this area by being the first to examine de facto parentage through a procedural lens. The first contribution is descriptive: Through an updated survey of recent case law analyzing de facto parentage claims, this Article links procedural mechanisms that state courts follow when adjudicating de facto parentage with their significant and underappreciated influence on whether individuals asserting de facto parentage will be successful in court. This survey reveals emerging areas of divergence amongst courts that recognize de facto parentage resulting from different procedural hurdles imposed by courts on petitioners. Building on this survey and existing wide-scale empirical legal scholarship, this Article advances the position that de facto parents should be treated as legal parents.

* Associate Professor of Law and Executive Director of the Family Law Clinic, Baylor University School of Law, Waco, Texas (teaching Family Law); former partner at the family law firm, Kogut & Wilson, L.L.C.; graduated *magna cum laude* from the University of Illinois College of Law in 2015; received her B.A. in Psychology and Legal Studies with Honors from Northwestern University in 2012; Chair of the Illinois State Bar Association Family Law Section Council from 2022 to 2023. Thank you to Douglas NeJaime, Courtney G. Joslin, Dara Purvis, the Association of American Law Schools Family & Juvenile Law Works-in-Progress Program attendees, University of Illinois College of Law Invited Lecturer Series attendees, and the Baylor Law Scholarship Committee members for early draft feedback. Thank you to Anthony Bruster for being the best office neighbor sounding board and talking through countless iterations of this Article. Thank you to my husband, Mark Scott, and our kids, Connor and Charlotte, for always inspiring me with your energy, laughter, and kindness. Thank you to Nicole Biloune, Brooke Johnson, Jake Walsh, and Christa Walton for their hard work and excellent research assistance. Finally, thank you to the editors of the *Wisconsin Law Review* for their thoughtful editorial assistance.

This Article's second contribution is prescriptive: It proposes a recommended judicial framework for courts to adopt when adjudicating de facto parentage. This framework addresses the identified areas of existing divergence to better achieve uniformity in the adjudicatory process and minimize barriers facing de facto parents. Using this framework as guidance, this Article proposes recommendations for state legislatures to consider when drafting statutes recognizing de facto parentage. These recommendations protect the constitutional rights of legal parents, de facto parents, and children, and encourage courts and state legislatures to develop and codify procedures that equate de facto parentage with legal parentage.

Introduction	1437
I. The Evolving Rights and Responsibilities of De Facto Parents	1440
A. Departure from the Nuclear Family	1442
B. Are De Facto Parents Legal Parents?.....	1444
1. De Facto Parents as Nonparents	1445
2. De Facto Parents as Parents	1447
3. 2024 Restatement of the Law: Children and the Law.....	1450
C. The Constitutional Rights of De Facto Parents.....	1454
II. Adjudicating De Facto Parentage	1459
A. Establishing Standing	1460
1. The Misplaced Evidentiary Standard	1461
2. Rebuttable Presumptions Against Standing	1465
B. The Rights of De Facto Parents	1467
C. The Responsibilities of De Facto Parents	1471
III. Recommendation	1474
A. The Standing Stage	1477
1. No Evidentiary Standard	1477
2. No Rebuttable Presumptions Against Standing	1477
B. The Adjudication Stage	1478
1. Adjudicating the Merits of the De Facto Parentage Claim.....	1479
a. Burden of Proof.....	1479
b. Factors Considered	1480
c. No Fit Parent Presumption or Requisite Showing of Harm Required	1482
2. Determining Custodial Rights and Attendant Responsibilities	1482
a. Application of the Best Interests Standard in Determining Custody of a De Facto Parent	1482
b. Allocating Responsibilities of De Facto Parents	1483
3. Appointment of Guardian or Attorney <i>ad Litem</i>	1485
IV. Conclusion	1486

INTRODUCTION

Consider the following hypothetical: Alex and Blake begin a romantic relationship when Alex's son is three months old.¹ Despite having no biological tie to the child, Blake functions as the child's parent for four years.² Blake regularly cares for, bonds with, and supports the child.³ Alex fosters and supports Blake's development of a parental relationship with the child until the couple breaks up.⁴ Following the split, Alex cuts off Blake's access to the child.⁵ In response, Blake files a petition seeking legal and physical custody of the child as the child's de facto parent, a person who has "established a bonded and dependent relationship with the child which is parental in nature."⁶

The procedural steps taken by the court adjudicating Blake's claim will impact Blake's ability to successfully establish himself as the child's de facto parent.⁷ For example, in some courts, Blake may be required to meet an evidentiary burden to prove each element of de facto parentage by a preponderance of the evidence just to establish he has standing.⁸ In others, the court may decline to impose such an evidentiary burden at the standing stage.⁹ These steps will also inform both whether Blake's status

1. See *In re Parental Responsibilities of A.C.H.*, 2019 COA 43, ¶ 3, 440 P.3d 1266, 1267 (providing the underlying facts for this hypothetical).

2. See *id.* ¶¶ 3–7.

3. See *id.*

4. See *id.* ¶ 3.

5. See *id.* ¶ 5.

6. UNIF. PARENTAGE ACT § 609(d)(5) (UNIF. L. COMM'N 2017); see *In re Parental Responsibilities of A.C.H.*, 2019 COA 43, ¶ 5.

7. This Article will adopt the term "de facto parent," "under which someone who has been acting as a parent can legally establish his or her [legal] parentage." Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J.F. 589, 592 (2018), https://www.yalelawjournal.org/pdf/Joslin_4srmpiaa.pdf [<https://perma.cc/KU62-FGNJ>]. Courts and scholars have also termed these individuals quasi-parents, psychological parents, *in loco parentis*, parents by estoppel, and functional parents. See Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COLO. L. REV. 941, 944 (2019); Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909, 914, 919 (2019); Joslin, *supra*, at 590–91; Katharine K. Baker, *Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents*, 92 CHI.-KENT L. REV. 135, 136, 142 (2017); Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 71 & n.92 (2017). Notably, while most courts have used "*in loco parentis*" and "de facto" parentage interchangeably, some hold that de facto parentage "focuses primarily on the existence of a psychological relationship between the nonparent and child while the doctrine of *in loco parentis* focuses on whether the nonparent intentionally assumes parental status." 143 AM. JUR. *Trials* 441, § 5, Westlaw (database updated Oct. 2025).

8. See *In re De Facto Parentage of: A.H.*, 536 P.3d 719, 723 (Wash. Ct. App. 2023).

9. See MASS. GEN. LAWS ch. 209C, § 25 (2025).

as a de facto parent make him the child's legal parent, as well as what rights and responsibilities Blake is entitled to that stem from that status. Courts that treat de facto parents as legal parents will automatically confer the full rights and responsibilities of legal parentage on Blake if he establishes himself as a de facto parent.¹⁰ He will not be required to overcome any additional procedural hurdles when seeking custody or visitation of the child against Alex (the child's legal parent) and may be required to pay child support as one of his responsibilities as a legal parent.¹¹ On the other hand, courts that distinguish de facto parentage from legal parentage may impose additional procedural hurdles on Blake and may decline to impose a child support obligation or any other parental responsibility even if he establishes de facto parentage.¹²

Today, approximately two-thirds of states have adopted a functional parent doctrine through which a court confers parental rights on individuals who, through their own conduct, assume a parental role for a child regardless of any biological or adoptive connection.¹³ However, despite consensus amongst these states requiring a finding that an individual formed a parental relationship with the child, states disagree as to whether that individual should be considered a parent, a third-party nonparent, or somewhere in between.¹⁴ Over the past decade, the American Law Institute (ALI) and Uniform Law Commission (ULC) have invested significant efforts into drafting and approving language defining "de facto parent" within the broader category of functional parents.¹⁵ These efforts include the 2017 Uniform Parentage Act (the "2017 UPA"), the 2018 Uniform Nonparent Custody and Visitation Act (the "UNCVA"), and the 2024 Restatement of the Law: Children and the Law (the "Restatement").¹⁶ These efforts focused on the "status" questions: (1) How do individuals establish themselves as de facto

10. See *In re De Facto Parentage of: A.H.*, 536 P.3d at 725.

11. See *id.* at 724–25. The Author's recommendation is that courts apply the same child support formulas to de facto parents as legal parents. See discussion *infra* Section III.B.2.

12. See, e.g., *Green v. Carter*, 900 S.E.2d 108, 122 (N.C. Ct. App. 2024).

13. Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319, 328–30 (2023) [hereinafter Joslin & NeJaime, *How Parenthood Functions*].

14. See Douglas NeJaime, *Parents in Fact*, 91 U. CHI. L. REV. 513, 518–25 (2024) [hereinafter NeJaime, *Parents in Fact*].

15. See *id.* at 524–25.

16. See UNIF. PARENTAGE ACT § 609 & cmt. (UNIF. L. COMM'N 2017); UNIF. NONPARENT CUSTODY & VISITATION ACT (UNIF. L. COMM'N 2018); RESTATEMENT OF THE LAW: CHILDREN AND THE LAW §§ 1.60, 1.62 (A.L.I. Tentative Draft No. 6, 2024) (note that sections 1.60–.62 were previously numbered as sections 1.80–.82 in A.L.I. Tentative Draft No. 2, 2019).

parents?; and (2) Does de facto parentage equal legal parentage?¹⁷ What these efforts mostly do not address are the “procedural” question of what steps courts should take when adjudicating claims of de facto parentage.¹⁸

Analyzing de facto parentage through a procedural lens is also largely absent from existing legal scholarship. There is a significant body of contemporary legal scholarship providing a wide-scale empirical view of de facto parentage doctrines, how they apply, and to whom they apply.¹⁹ This scholarship explores the scope, content, and constitutionality of de facto parentage doctrines.²⁰ At the heart of this scholarship is a hotly contested debate over whether de facto parents should be conceptualized as legal parents or third parties.²¹ What is missing from this debate is an in-depth analysis of the procedural mechanisms that are introduced into de facto parentage doctrines when determining how de facto parentage gets adjudicated. Legal scholarship thus far has overlooked how the procedural requirements imposed during adjudication of de facto parentage claims have significant consequences both for the likelihood of an individual being able to establish de facto parentage and for how scholars and courts view de facto parents.

Failure to explore the impact of these procedural questions has broader implications for access to justice of marginalized populations.²² Professors Courtney G. Joslin and Douglas NeJaime’s empirical study examining all electronically available functional parent decisions issued between 1980 and 2021 found that 33 percent of all cases surveyed involved child welfare, while other cases detailed issues including poverty, housing insecurity, incarceration, or situations wherein one or both legal or biological parents died or struggled with a substance use disorder.²³ Professor Solangel Maldonado asserts that, “[g]iven the

17. See UNIF. PARENTAGE ACT § 609; UNIF. NONPARENT CUSTODY & VISITATION ACT; RESTATEMENT OF THE LAW: CHILDREN AND THE LAW §§ 1.60, 1.62.

18. See UNIF. PARENTAGE ACT § 609 (providing guidance on establishing standing and filing of an initial complaint); UNIF. NONPARENT CUSTODY AND VISITATION ACT (providing no procedural guidance); RESTATEMENT OF THE LAW: CHILDREN AND THE LAW §§ 1.60, 1.62 (providing no procedural guidance).

19. See Solangel Maldonado, *De Facto Parents, Legal Parents, and Inchoate Rights*, 91 U. CHI. L. REV. 557, 565 (2024); NeJaime, *Parents in Fact*, *supra* note 14, at 523; Courtney G. Joslin & Douglas NeJaime, *Multiparenthood*, 99 N.Y.U. L. REV. 1242, 1270 (2024) [hereinafter Joslin & NeJaime, *Multiparenthood*]; Joslin & NeJaime, *How Parenthood Functions*, *supra* note 13, at 329; Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 272 (2020) [hereinafter NeJaime, *The Constitution of Parenthood*]; Higdon, *supra* note 7, at 944; Strauss, *supra* note 7, at 919.

20. Joslin & NeJaime, *Multiparenthood*, *supra* note 19, at 1270; Joslin & NeJaime, *How Parenthood Functions*, *supra* note 13, at 342–44, 384 n.307; Higdon, *supra* note 7, at 944; Strauss, *supra* note 7, at 918–19.

21. Joslin & NeJaime, *How Parenthood Functions*, *supra* note 13, at 339–41, 343–44; Higdon, *supra* note 7, at 944; Strauss, *supra* note 7, at 918–19.

22. See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 13, at 371.

23. See *id.* at 371, 388.

disproportionate representation of low-income and Black and brown families in the child protection system, when de facto parents are extended family members, they and their children are likely to be low-income or of color.”²⁴ Unclear and inconsistent court procedures frustrate efforts of individuals seeking to establish and protect their rights as de facto parents.

This Article is the first to analyze de facto parentage through a procedural lens. Using this perspective, this Article makes two contributions to scholarship in this area. The first is descriptive: This Article provides an updated discussion of state court judicial approaches to adjudicating de facto parentage and the attendant rights and responsibilities of de facto parents. From this discussion, this Article joins the group of legal scholars who assert that de facto parentage is equivalent to legal parentage. The second is prescriptive: This Article lays out a proposed two-stage judicial framework for courts to follow when adjudicating claims for de facto parentage. This framework reconciles the rapidly diverging approaches while protecting the constitutional rights of legal parents, de facto parents, and children. This framework also protects access to justice for individuals seeking to establish themselves as de facto parents who are frequently self-represented.

This Article proceeds as follows: Part I outlines the evolving rights and responsibilities of de facto parents as separate from third parties as well as the constitutional status of de facto parents. Part II surveys state court approaches to adjudicating the rights and responsibilities of de facto parents and highlights the substantial divergence in these approaches. Part III advances a two-stage judicial framework for adjudicating de facto parentage claims considering the emerging discrepancies addressed in Part II. Based on this judicial framework, Part III also presents considerations for future state legislation to stop re-litigation of the same ambiguities that other states have already addressed.

I. THE EVOLVING RIGHTS AND RESPONSIBILITIES OF DE FACTO PARENTS

The structure of the American family has changed drastically over the past century.²⁵ Alongside this shift in household composition has come a shift in the types of individuals who assume parent-like roles for

24. Maldonado, *supra* note 19, at 566.

25. Carolina Aragão, Kim Parker, Shannon Greenwood, Chris Baronavski & John Carlo Mandapat, *The Modern American Family*, PEW RSCH. CTR. (Sep. 14, 2023), <https://www.pewresearch.org/social-trends/2023/09/14/the-modern-american-family/> [https://perma.cc/G2ST-Z7PS].

children.²⁶ Historically, marriage was the only way to establish the parentage of a man, and biological, unmarried fathers were typically not considered legal parents.²⁷ However, this historical conception no longer comports with the reality of the modern American family.²⁸ This Part begins with a discussion of the problems with the current model of American law premised on the traditional two-parent nuclear family. It then summarizes the evolving recognition of de facto parents from third-party nonparents to legal parents and how this shift in status impacts the discourse surrounding the constitutional status of de facto parents.

Understanding the evolving views concerning the status and constitutional rights of de facto parents is necessary to frame the proposed procedural recommendations that follow. States that treat de facto parents as legal parents are less likely to impose additional procedural burdens on individuals seeking to establish de facto parentage.²⁹ Once established, these states will confer the same rights and responsibilities on de facto parents as legal parents, and procedurally, the case will proceed as though it were a custody dispute between legal parents.³⁰ Conversely, states that consider de facto parents as closer to third parties may impose additional procedural hurdles at all stages of the litigation process, including adopting an evidentiary burden to establish standing, requiring the de facto parent to overcome presumptions in favor of the legal parent, and declining to find that de facto parents have the same responsibilities as legal parents.³¹

26. See *id.*

27. See generally Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2311 (2016) (discussing a history of parentage law and rights of unmarried fathers).

28. See Anne-Kristin Kuhnt & Jasmin Passet-Wittig, *Families Formed Through Assisted Reproductive Technology: Causes, Experiences, and Consequences in an International Context*, 14 REPROD. BIOMEDICINE & SOC'Y ONLINE 289, 289 (2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC8907601/> [<https://perma.cc/4ZF6-9CZB>] (discussing the impact of increased availability and use of assisted reproductive technology on family formation).

29. Compare *Ponsaran v. Anker* (*In re Parentage of J.D.W.*), 471 P.3d 228, 238 (Wash. Ct. App. 2020) (equating de facto parentage with legal parentage), with *Wolfram v. Davis-Perkins*, 545 P.3d 444, 448 (Alaska 2024) (imposing additional procedural requirements following a finding of de facto parentage).

30. See *In re De Facto Parentage of: A.H.*, 536 P.3d 719, 725 (Wash. Ct. App. 2023).

31. See *infra* Part II.

A. Departure from the Nuclear Family

The “traditional nuclear famil[y]” was defined as “heterosexual married couples living with their own children.”³² Today, this family composition is still considered “the archetype in American law and politics,”³³ underlying most statutory frameworks that regulate families.³⁴ The Supreme Court most famously acknowledged America’s recent departure from the traditional “nuclear family” in *Moore v. City of East Cleveland*.³⁵ However, nearly fifty years later, the vast majority of American laws are still premised on the nuclear family.³⁶ Within the context of family law, the reliance on the traditional nuclear family is disconnected from the emerging variations of family structures across America.³⁷ The percentage of Americans ages twenty-five to forty-nine living with their spouse and one or more children under the age of eighteen has dropped from 67 percent in 1970 to 37 percent in 2021.³⁸ There are several reasons contributing to this decrease.

First, in the wake of the *Obergefell v. Hodges*³⁹ ruling in 2015 and, more recently, the passage of the Respect for Marriage Act in 2022,⁴⁰ a 2024 study found that over 2.5 million LGBTQ adults are parenting children under the age of eighteen in their homes.⁴¹ The same study found “that about 14% of same-sex couples (167,000 couples) and almost one in five married same-sex couples (18% or 119,000 couples) are parenting minors in their homes.”⁴² Moreover, one of the study’s authors noted that “[m]any LGBTQ households include adult siblings or other relatives, indicating more diversity in family structure.”⁴³ This increasing

32. See June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 880 (2011).

33. See *Developments in the Law: The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2001 (2003).

34. See *id.* at 2002.

35. 431 U.S. 494, 504 (1977) (“The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”).

36. See Higdon, *supra* note 7, at 952; see also *Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.3 (1989) (defining the “unitary family” as “the marital family, but also includ[ing] the household of unmarried parents and their children”).

37. See Higdon, *supra* note 7, at 952.

38. See Aragão, Parker, Greenwood, Baronavski & Mandapat, *supra* note 25.

39. 576 U.S. 644 (2015).

40. Respect for Marriage Act, Pub. L. No. 117–228, 136 Stat. 2305 (2022).

41. See Press Release, Williams Inst., UCLA Sch. of L., More Than 2.5 Million LGBTQ Adults Are Parenting Children Under the Age of 18 (July 17, 2024) (discussing BIANCA D.M. WILSON & LAUREN J.A. BOUTON, WILLIAMS INST., UCLA SCH. OF L., LGBTQ PARENTING IN THE US 2 (2024)), <https://williamsinstitute.law.ucla.edu/press/lgbtq-parenting-2024-press-release/> [<https://perma.cc/RP8C-DRDZ>].

42. *Id.* (discussing WILSON & BOUTON, *supra* note 41, at 2).

43. *Id.*

diversification in family structures is seen more broadly across households nationwide.

Across the United States, approximately 15 percent of children live in blended families, where unrelated stepparents assume parental roles for their stepchildren.⁴⁴ Couples are increasingly cohabiting with their partners but remaining unmarried, residing as a single parent with children, or cohabiting with other family members to assist with childcare.⁴⁵ The percentage of Americans residing in multigenerational households increased from 7 percent to 18 percent between 1971 to 2021.⁴⁶ Approximately 10 percent of all children in the United States live with one of their grandparents, many of whom are being cared for by said grandparent.⁴⁷ Factors contributing to these changes include the rapid growth of minority populations who engage in a higher rate of multigenerational living,⁴⁸ increased financial reliance on family members,⁴⁹ and increased access to and advances in assisted reproductive technologies.⁵⁰

Despite the significant shifts in family structures, family law legislation relating to the support and custody of children remains largely predicated on the traditional nuclear family, particularly in its assumption that two parents raise and support a child.⁵¹ Only in the past couple of decades has the law started recognizing the roles of grandparents, stepparents, and other third parties as part of the childrearing equation.⁵² However, as with most developing areas of the law, statutes were first criticized for giving far too much deference to third parties, and then the

44. See *What Is a Blended Family?*, PSYCH. TODAY: FAM. DYNAMICS, <https://www.psychologytoday.com/us/basics/family-dynamics/blended-family> (last visited Oct. 17, 2025).

45. See Kuhnt & Passet-Wittig, *supra* note 28, at 289.

46. See D'VERA COHN, JULIANA HOROWITZ, RACHEL MINKIN, RICHARD FRY & KILEY HURST, PEW RSCH. CTR., FINANCIAL ISSUES TOP THE LIST OF REASONS U.S. ADULTS LIVE IN MULTIGENERATIONAL HOMES 11 (2022), https://www.pewresearch.org/wp-content/uploads/sites/20/2022/03/PSDT_03.24.22_multigenerationalhouseholds_report.pdf [<https://perma.cc/8L8B-RVKT>].

47. GRETCHEN LIVINGSTON, PEW RSCH. CTR., AT GRANDMOTHER'S HOUSE WE STAY 1 (2013), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2013/09/grandparents_report_final_2013.pdf [<https://perma.cc/Z6VV-DYHV>].

48. *Id.* at 3.

49. *Id.* at 4; see Aimee Picchi, *A Portrait of America's Young Adults: More Debt Burdened and Financially Dependent on Their Parents*, CBS NEWS (Jan. 25, 2024, at 10:16 ET), <https://www.cbsnews.com/news/gen-z-millennial-financial-dependence-on-parents-pew/> [<https://perma.cc/M24E-232V>].

50. See Kuhnt & Passet-Wittig, *supra* note 28, at 289; Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 962 (1996).

51. See Higdon, *supra* note 7, at 948–49.

52. See Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-Troxel?*, 43 ARIZ. L. REV. 751, 772–73 (2001).

pendulum swung back to the other end of the spectrum to severely restrict the rights to third parties—states are now largely sitting in confusion somewhere in the middle.⁵³ Recognition of de facto parents adds to states' confusion by introducing another group of individuals who could potentially be entitled to custody or visitation rights with a child regardless of biological connection.⁵⁴ Some states view de facto parents as merely third parties, oftentimes grouping them with grandparents or stepparents.⁵⁵ Others treat de facto parents as legal parents, thus differentiating de facto parents as a separate category distinct from third parties.⁵⁶ The next Section explores this distinction further.

B. Are De Facto Parents Legal Parents?

At the core of the scholarly debate regarding de facto parents is the question: Are de facto parents *nonparents* to be treated as third parties, *parents*, or something in between?⁵⁷ The past twenty years have marked a shift from de facto parents being viewed as merely third-party nonparents to being considered parents with the same rights and responsibilities as legal parents.⁵⁸ “Third parties” are individuals who are neither a legal parent nor a functional parent, including individuals who are not related through biology or adoption.⁵⁹ At common law, third parties did not have a legal right to visit with children absent parental consent.⁶⁰ As the rates of divorce and number of stepparents and living grandparents increased, states began adopting statutes granting formal recognition to stepparents and grandparents with the aim of adding stability to the lives of children experiencing divorce.⁶¹ Unlike statutes governing de facto parents, these statutes generally applied to third parties based on their status as a grandparent, stepparent, or other defined

53. *Id.* at 802–04.

54. *See generally* Joslin & NeJaime, *How Parenthood Functions*, *supra* note 13 (examining functional parent doctrines across states).

55. *See generally* Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 2–3 (2013) (reviewing third-party custody and visitation rights across states).

56. *See generally* Joslin & NeJaime, *How Parenthood Functions*, *supra* note 13, at 423–33 (listing data collected on functional parent doctrines across states).

57. *See* NeJaime, *Parents in Fact*, *supra* note 14, at 518.

58. *See id.* at 519.

59. *See In re Victoria C.*, 88 A.3d 749, 764 (Md. 2014); *Fish v. Fish*, 939 A.2d 1040, 1043 (Conn. 2008).

60. *See* Atkinson, *supra* note 55, at 2; *In re C.T.G.*, 179 P.3d 213, 216 (Colo. App. 2007).

61. *See* Jeffrey A. Parness, *Third Party Stepparent Childcare*, 67 MERCER L. REV. 383, 387 (2016); Maegen E. Peek, *Grandparent Visitation Statutes: Do Legislatures Know the Way to Carry the Sleigh Through the Wide and Drifting Law?*, 53 FLA. L. REV. 321, 322, 326 (2001).

relationship to the child.⁶² In other words, third-party visitation statutes largely confer standing to sue based on the relationship between the third party and the subject child, regardless of whether the third party has functioned as a parent.⁶³ Additionally, states require third parties seeking visitation under these statutes to demonstrate a significant relationship with the child, but they need not prove they lived with the child.⁶⁴ This Section summarizes the key drafting efforts and case law through which legal scholars and drafters have differentiated de facto parents from third parties seeking visitation.

1. De Facto Parents as Nonparents

British psychoanalyst Anna Freud, Yale Law Professor Joseph Goldstein, and Yale Child Study Center Professor Albert Solnit first introduced the term “psychological parent” into legal discourse in the 1970s.⁶⁵ They argued that the law should protect a child’s relationship with a person who, “on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs.”⁶⁶

While other courts rejected claims for psychological or de facto parentage, the Wisconsin Supreme Court, in an influential decision, held that a judge could award visitation to de facto parents under a best interests of the child standard “if the petitioner first proves that [they have] a *parent-like relationship* with the child and that a significant triggering event justifies state intervention in the child’s relationship with a biological or adoptive parent.”⁶⁷ The court reasoned that recognizing de facto parentage “protects a child’s best interest by preserving the child’s relationship with an adult who has been *like a parent*.”⁶⁸ Under this view, the Wisconsin Supreme Court, and other state courts that followed, held de facto parents were somewhere in between third parties and legal parents.⁶⁹

62. Parness, *supra* note 61, at 387; Peek, *supra* note 61, at 327–28.

63. *E.g.*, MINN. STAT. § 257C.08 (2024); WIS. STAT. § 767.43 (2023–24).

64. *E.g.*, CAL. FAM. CODE § 3104(a)(1) (West 2025) (requiring the court to find there is a “preexisting relationship” between the grandparent and grandchild as a condition precedent to awarding grandparent visitation); MASS. GEN. LAWS ch. 119, § 26B (2025).

65. *See* NeJaime, *Parents in Fact*, *supra* note 14, at 519.

66. *See id.* (quoting JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 98 (1973)).

67. *See Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 421 (Wis. 1995) (emphasis added).

68. *Id.* at 436 (emphasis added).

69. *See, e.g.*, *Bethany v. Jones*, 2011 Ark. 67, at 11, 378 S.W.3d 731, 737 (“[T]he focus should be on what, if any, bond has formed between the child and the *nonparent*.” (emphasis added)); *Boseman v. Jarrell*, 704 S.E.2d 494, 504 (N.C. 2010)

In 2002, ALI recognized de facto parentage in its first family law project, the Principles of the Law of Family Dissolution (the “ALI Principles”).⁷⁰ Unlike a Restatement, the ALI Principles are intended to be normative rather than descriptive.⁷¹ The ALI Principles endorse de facto parentage doctrines but relegate de facto parents to an inferior legal status compared to legal parents.⁷² The ALI Principles define a de facto parent as an individual,

who, for a significant period of time not less than two years,
 (i) lived with the child and,
 (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions,
 (A) regularly performed a majority of the caretaking functions for the child, or
 (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.⁷³

Unlike the other approaches discussed in this Section, the ALI Principles specify a minimum duration of time (two years) during which the individual must have lived with the child.⁷⁴ The temporal requirement has been criticized as arbitrary, and some argue the length of time required should instead depend on the age of the child.⁷⁵ Additionally,

(recognizing that de facto parentage is appropriate when “the natural parent created along with the *nonparent* a family unit in which the two acted as parents, shared decision-making authority with the *nonparent*, and manifested an intent that the arrangement exist indefinitely” (emphasis added)); *In re E.L.M.C.*, 100 P.3d 546, 560 (Colo. App. 2004) (applying test “to determine whether a *nonparent* is a psychological parent” (emphasis added)).

70. See generally PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (A.L.I. 2002) [hereinafter ALI PRINCIPLES] (defining and discussing de facto parent).

71. See Robert A. Hillman, *Drafting Chapter 2 of the ALI’s Employment Law Restatement in the Shadow of Contract Law: An Assessment of the Challenges and Results*, 100 CORN. L. REV. 1341, 1358–59 (2015).

72. ALI PRINCIPLES § 2.03(1) (cleaned up).

73. *Id.* § 2.03(1)(c).

74. *Id.*; see also Douglas NeJaime & Linda C. McClain, *The ALI Principles of the Law of Family Dissolution: Addressing Inequality Through Functional Regulation*, in THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY 337, 353–57 (Andrew S. Gold & Robert W. Gordon eds., 2023) (providing an overview of the history of the ALI Principles and key provisions).

75. See UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM’N 2017) (proposing that an action to establish de facto parentage must begin before the child reaches eighteen years of age).

the ALI Principles require that the individual have performed “as great [a share of caretaking functions] as that of the parent with whom the child primarily lived.”⁷⁶ Scholars criticize this provision of the ALI Principles for its failure to consider the quality of the child’s relationship.⁷⁷ Instead, the ALI Principles assume “that the bond between a child and a de facto parent will be, above all, loving and nurturing.”⁷⁸

Moreover, the ALI Principles provide that a court may “not allocate the majority of custodial responsibility to a de facto parent over the objection of a [fit] legal parent” unless the parent has abdicated parental responsibilities or if awarding the majority of custodial responsibility to the legal parent “would cause harm to the child.”⁷⁹ Accordingly, the ALI Principles favored de facto parents over “*other nonparents*,” seemingly treating them as “quasi-parents” but not full legal parents.⁸⁰

2. De Facto Parents as Parents

In the years following the ALI Principles, several courts began recognizing that de facto parents had standing to seek custody or visitation if the court found it was in the best interests of the child.⁸¹ However, these courts did not confer full legal parentage upon de facto parents.⁸² This meant de facto parents in these states had some, but not all, of the same rights and responsibilities as legal parents. In 2005, the Washington Supreme Court became the first state court of last resort to hold that de facto parents were *parents* with the full scope of rights and responsibilities as legal parents, rather than *third-party nonparents* or *quasi-parents*.⁸³ The Washington Supreme Court held that the “common law recognizes the status of *de facto* parents and places them in parity with biological and adoptive parents.”⁸⁴ Therefore, the court explained, both legal parents and de facto parents “have a ‘fundamental liberty

76. ALI PRINCIPLES § 2.03(1)(c).

77. See Robin Fretwell Wilson, *Limiting the Prerogatives of Legal Parents: Judicial Skepticism of the American Law Institute’s Treatment of De Facto Parents*, 25 J. AM. ACAD. MATRIM. LAWS. 477, 482 (2013).

78. *Id.* (quoting *In re Care and Protection of Sharlene*, 840 N.E.2d 918, 926 (Mass. 2006)).

79. ALI PRINCIPLES § 2.18(1)(a).

80. See NeJaime, *Parents in Fact*, *supra* note 14, at 522 (quoting ALI PRINCIPLES ch. 1, topic 1 (emphasis added)).

81. See, e.g., *In re E.L.M.C.*, 100 P.3d 546, 553 (Colo. App. 2004); *Moriarty v. Bradt*, 827 A.2d 203, 205 (N.J. 2003).

82. See, e.g., *In re E.L.M.C.*, 100 P.3d at 548–49.

83. See *Carvin v. Britain (In re Parentage of L.B.)*, 122 P.3d 161, 177 (Wash. 2005).

84. *Id.* at 178.

interest[]’ in the ‘care, custody, and control’ of [the child].”⁸⁵ Other courts have followed Washington’s lead, finding a de facto parent “is a parent for all purposes.”⁸⁶ State legislatures likewise began adopting statutory provisions that clearly provided that adjudication of an individual as a de facto parent “establishes parentage.”⁸⁷

In 2017, the ULC promulgated the Uniform Parentage Act of 2017, which also equated de facto parentage with legal parentage. Under section 609 of the 2017 UPA, a de facto parent is an individual who shows by clear-and-convincing evidence that:

- (1) the individual resided with the child as a regular member of the child’s household for a significant period;
- (2) the individual engaged in consistent caretaking of the child;
- (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;
- (4) the individual held out the child as the individual’s child;
- (5) the individual established a bonded and dependent relationship with the child which is parental in nature;
- (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and
- (7) continuing the relationship between the individual and the child is in the best interest of the child.⁸⁸

The 2017 UPA requires that an individual hold the child out as their own to qualify as a de facto parent.⁸⁹ Many states that have adopted a de facto parentage doctrine have declined to adopt this “holding out” requirement.⁹⁰ Legal scholars criticize this requirement, as it is thought to preclude certain third parties, including grandparents, siblings, and other relatives who may otherwise establish the requisite parental bond but do not view themselves as the child’s parent.⁹¹ Courts in states that have adopted the “holding out” requirement interpret “holding out” broadly, finding that the requirement does not require a petitioner to claim they are a biological parent.⁹² Instead, the requirement compels the

85. *Id.* (first alteration in original) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

86. *See Pitts v. Moore*, 2014 ME 59, ¶ 32, 90 A.3d 1169, 1182.

87. *See, e.g.*, ME. STAT. tit. 19-A, § 1891 (2025).

88. UNIF. PARENTAGE ACT § 609(d)(1)–(7) (UNIF. L. COMM’N 2017).

89. *Id.* § 609(d)(4).

90. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 cmt. b (A.L.I. Tentative Draft No. 6, 2024).

91. *Id.*

92. *Walker v. Riley*, 498 P.3d 33, 34 (Wash. Ct. App. 2021).

petitioner to “prove that [they] held [themselves] out to the public in a parental capacity as opposed to a caretaker.”⁹³

The 2017 UPA provides that a de facto parent is entitled to the rights and responsibilities of a legal parent.⁹⁴ This means that where a legal parent fosters or supports a parental bond between the individual and the child such that they form a dependent, bonded parent-child relationship, the individual may be recognized as a legal parent.⁹⁵ The 2017 UPA’s approach addresses prior concerns raised by legal scholars criticizing the ALI Principles’ “thinned-out conception of parenthood.”⁹⁶ Namely, the 2017 UPA adds in the consideration of a “bonded and dependent relationship,”⁹⁷ whereas the ALI Principles contained no parallel consideration for the quality of the adult’s relationship with the child.⁹⁸ Courts applying the 2017 UPA language have found that a legal parent “fosters or supports” the de facto parent relationship if the parent is capable of parenting but chooses to absent themselves from the child’s life, leaving the child in the de facto parent’s custody.⁹⁹ As of 2025, ten states have adopted the 2017 UPA, but not all have adopted the Act in full.¹⁰⁰ Notably, some iterations of the Uniform Parentage Act bills currently pending before state legislatures as of the date of this publication exclude the provisions regarding de facto parentage entirely.¹⁰¹

In 2018, the ULC promulgated the Uniform Nonparent Custody and Visitation Act of 2018, which stepped back from the trend toward recognizing de facto parents as parents.¹⁰² Adopting the alternative term “consistent caretaker,” the UNCVA defines “consistent caretaker” as:

- [A] *nonparent* [who,] without expectation of compensation:
- (1) lived with the child for not less than 12 months, unless the court finds good cause to accept a shorter period;
 - (2) regularly exercised care of the child;

93. *Id.* at 34–35.

94. UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM’N 2017).

95. *Id.*; see also *Carvin v. Britain (In re Parentage of L.B.)*, 122 P.3d 161, 170 (Wash. 2005).

96. Wilson, *supra* note 77, at 482–84.

97. UNIF. PARENTAGE ACT § 609.

98. ALI PRINCIPLES § 2.03(1).

99. See, e.g., *Walker v. Riley*, 498 P.3d 33, 35 (Wash. Ct. App. 2021).

100. See *Parentage Act: Legislative Bill Tracking*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f#LegBillTrackingAnchor> (last visited Oct. 17, 2025).

101. See, e.g., H.B. 2568, 104th Gen. Assemb., Reg. Sess. (Ill. 2025).

102. See *Nonparent Custody and Visitation Act: Legislative Bill Tracking*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=e33c7569-9eb3-48ef-b998-cb2e558fa2de#LegBillTrackingAnchor> (last visited Oct. 17, 2025) (noting that Kansas and North Dakota have adopted the Act).

(3) made day-to-day decisions regarding the child solely or in cooperation with an individual having physical custody of the child; and

(4) established a bonded and dependent relationship with the child with the express or implied consent of a parent of the child, or without the consent of a parent if no parent has been able or willing to perform parenting functions.¹⁰³

The elements of a “consistent caretaker” are drawn from those of de facto parentage under the 2017 UPA, but the UNCVA explicitly provides that these individuals are *nonparents*.¹⁰⁴ The UNCVA furthers this distinction by stating that a court may only award custody or visitation to an individual who (1) meets the criteria of a “consistent caretaker” or (2) following *Troxel v. Granville*,¹⁰⁵ where “the denial of custody or visitation would result in harm to the child . . . and . . . an order of custody or visitation to the [third party] is in the best interest of the child.”¹⁰⁶ Moreover, the UNCVA provides that “a decision by a parent regarding a request for custody or visitation by a nonparent is presumed to be in the best interest of the child” and “a nonparent has the burden to rebut the presumption . . . by clear-and-convincing evidence.”¹⁰⁷ This places consistent caretakers closer to the third-party end of the spectrum than the legal parentage end, mirroring the additional burdens third parties must overcome when seeking custody or visitation against a legal parent.¹⁰⁸ To date, only two states have adopted the UNCVA.¹⁰⁹

3. 2024 Restatement of the Law: Children and the Law

The Restatement is the most recent project adding to the legal discourse surrounding the status of de facto parents. The ALI approved

103. UNIF. NONPARENT CUSTODY & VISITATION ACT § 4(b) (UNIF. L. COMM’N 2018) (emphasis added).

104. *Id.* § 4 cmt. 2 (“The elements [of consistent caretaker] are drawn from the American Law Institute Principles of the Law of Family Dissolution, § 2.03(1)(c) (2002); *Restatement on Children and the Law*, §§ 1.80 – 1.82 (Council Draft No. 3, dated Sept. 4, 2018); and the definition of ‘de facto parent’ in the Uniform Parentage Act (UPA), § 609 (2017).”).

105. 530 U.S. 57 (2000).

106. UNIF. NONPARENT CUSTODY & VISITATION ACT § 4(a); *see Troxel*, 530 U.S. at 60.

107. UNIF. NONPARENT CUSTODY & VISITATION ACT § 5.

108. *See Troxel*, 530 U.S. at 67.

109. *Nonparent Custody and Visitation Act: Legislative Bill Tracking*, *supra* note 102 (Kansas and North Dakota have adopted the Act).

the Restatement of the Law: Children and the Law on May 17, 2024.¹¹⁰ The Restatement contains separate sections governing de facto parents and third parties.¹¹¹ The Restatement defines a de facto parent as:

[A] third party who establishes by clear and convincing evidence that:

(1) the third party lived with the child for a significant period of time;

(2) the third party assumed significant obligations of parenthood without expectation of financial compensation;

(3) the third party has been in a parental role for a length of time sufficient to have established a bond and dependent relationship with the child that is parental in nature; and

(4) a parent consented to and fostered the formation of the parent-child relationship between the third party and the child.¹¹²

The Restatement's section on de facto parents deviates from the ALI Principles in three key aspects.¹¹³ First, the Restatement "does not specify a minimum duration of time that the individual must have lived with the child," but instead only requires that the individual "live[] with the child for a significant period of time."¹¹⁴ Further minimizing the shared residence requirement, a comment to the Restatement provides that an individual "who did not live with the child may establish that he or she is a de facto parent if the child spent the majority of the time with the [individual]."¹¹⁵ Second, the Restatement does not require that the de facto parent "regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived."¹¹⁶ Rather, it acknowledges diversified roles within families, where an individual could assume a parenting role through "economic and other noncaretaking contributions."¹¹⁷ Finally, the Restatement does not limit allocation of custodial responsibility to a de facto parent based on whether

110. Press Release, A.L.I., Restatement of the Law, Children and the Law Is Approved (May 17, 2024), <https://www.ali.org/news/articles/american-law-institutes-restatement-law-children-and-law-approved> [<https://perma.cc/FG4R-7UNM>].

111. Compare RESTATEMENT OF THE LAW: CHILDREN AND THE LAW §§ 1.60, 1.61 (A.L.I. Tentative Draft No. 6, 2024) (stating the standard for a court to grant a third party contact with a child and custodial or decision-making responsibility for a child), with *id.* § 1.62 (stating the standard for a court to grant a de facto parent custodial or decision-making responsibility for a child).

112. *Id.* § 1.62(a).

113. See NeJaime, *Parents in Fact*, *supra* note 14, at 529–30.

114. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 & cmt. b.

115. *Id.* § 1.62 cmt. d.

116. ALI PRINCIPLES § 2.03(c)(ii)(B) (cleaned up).

117. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 cmt. e.

a legal parent objects.¹¹⁸ Rather, the Restatement provides that “a court may award a de facto parent primary custodial responsibility if it is in the child’s best interests.”¹¹⁹

Additionally, unlike the 2017 UPA, the Restatement definition does not contain a “holding out” requirement.¹²⁰ The Restatement reasons that a “holding out” requirement “would exclude third parties, such as grandparents, siblings, and other family members who have assumed parental responsibilities and share a parent-child bond and relationship with the child with the support of the parent but do not see themselves as the parent of their son’s or daughter’s or sibling’s child.”¹²¹

The Restatement adopts a consent-based approach to de facto parentage, requiring individuals to prove that “a parent *consented* to and fostered the formation of the parent-child relationship between the [individual] and the child.”¹²² This consent-based approach differs slightly from the 2017 UPA, which requires a legal parent to “foster[] or support[]” the parent-child relationship.¹²³ At first blush, it may appear that “foster and support” seems to operationalize consent, thereby equating the two approaches. Indeed, the comments to the 2017 UPA include the drafters’ intent to allow individuals who form a parental relationship with a child “with the consent and encouragement of [the child’s] legal parent” to be included in parentage determinations.¹²⁴ However, the Restatement drafters deliberately used different language, and the comments to the 2017 UPA do not provide a constitutional rationale for the language the way the Restatement does.¹²⁵

Specifically, the Restatement eliminates a significant procedural hurdle for de facto parents as compared to third parties. Namely, it provides that a finding of de facto parentage rebuts two presumptions: (1) that a legal parent’s decision about a child’s contact with an individual is in the child’s best interest, and (2) that a legal parent has a presumptive right to custodial and decision-making responsibilities for a child.¹²⁶ This means that once an individual establishes by clear and convincing evidence that they are a de facto parent, the de facto parent’s petition for access to the child “is, similar to [a] petition by a legal parent, treated as

118. See ALI PRINCIPLES § 2.18(1)(a) (providing that a court “should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent”).

119. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 cmt. b.

120. NeJaime, *Parents in Fact*, *supra* note 14, at 525.

121. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 cmt. b.

122. *Id.* § 1.62(a)(4) (emphasis added).

123. UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM’N 2017).

124. *Id.* § 609 cmt.

125. See *id.*; RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 cmts. a, h.

126. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62.

a petition for custodial responsibility,” decided under the best interests of the child standard.¹²⁷ In comparison, in cases where an individual is not a de facto parent, the Restatement requires the individual to prove there would be substantial risk of harm to the child,¹²⁸ parental unfitness, or extraordinary circumstances that pose a substantial risk of serious harm to the child before a court may override parental authority.¹²⁹ The Restatement’s distinction of de facto parents from third parties supports a view that de facto parents are on equal footing with legal parents.¹³⁰

Further, the Restatement clarifies that de facto parents have “custodial or legal responsibilit[ies] for [a] child, including the responsibility to provide financial support.”¹³¹ According to the Restatement, this responsibility exists even if, moving forward, the de facto parent does not reside with the child.¹³² In adopting this approach, the Restatement seemingly supports the view that de facto parents not only hold the same *rights* as legal parents, but the same *responsibilities* as well.¹³³

Overall, the “Restatement does not take a position on whether de facto parents are legal parents.”¹³⁴ Legal scholars, including Professor Maldonado, the lead drafter of the Restatement’s de facto parent provisions, explain that this is because the purpose of the Restatement is to summarize common law developments, whereas legal parentage is primarily a statutory matter.¹³⁵ Moreover, Professor Maldonado highlights that “[t]he majority of courts that have adopted the common law de facto parent doctrine recognize that a child can have two legal parents and one or more de facto parents.”¹³⁶ Many of the states that specifically authorize a court to adjudicate claims with more than two *legal* parents and to treat de facto parents as legal parents codified multiparent recognition and de facto parentage contemporaneously.¹³⁷ As drafted, the Restatement allows the majority of states to continue protecting the de facto parent-child relationship even when a child already has two legal parents.¹³⁸

127. *Id.* § 1.62 cmt. b.

128. *Id.* § 1.60.

129. *Id.* § 1.61(a)(1).

130. *See* NeJaime, *Parents in Fact*, *supra* note 14, at 529.

131. *See* RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 cmt. b.

132. *See id.* § 1.62 cmt. a.

133. *See* Maldonado, *supra* note 19, at 560.

134. *Id.*

135. *See id.* at 561.

136. *Id.* at 563.

137. *See, e.g.*, CONN. GEN. STAT. §§ 46b-475(c), 46b-490 (2024); VT. STAT. ANN. tit. 15C, §§ 201(6), 206(b) (2024); ME. STAT. tit. 19-A, §§ 1853(2), 1891(1) (2025).

138. *See* NeJaime, *Parents in Fact*, *supra* note 14, at 532.

Currently, the ALI Principles, 2017 UPA, UNCVA, and Restatement provide different answers to the question of whether de facto parents are legal parents, third parties, or somewhere in between. A particular court's answer to that question necessarily informs the procedure the court will follow when adjudicating the claim of an individual seeking to establish themselves as a de facto parent.

C. The Constitutional Rights of De Facto Parents

A court's view of whether a de facto parent holds constitutional rights, either as a legal parent or as a new category of "de facto parent," further informs the procedural steps necessary for a court to undertake when adjudicating a de facto parentage claim. When courts treat de facto parents as legal parents, they hold that de facto parents possess the same fundamental constitutional right to care, custody, and control of their children under the Due Process Clause of the Fourteenth Amendment as legal parents, which is firmly rooted in longstanding Supreme Court precedent.¹³⁹ If a court considers a de facto parent merely a "third party," the Supreme Court precedent is less clear on the rights of legal parents vis-à-vis third parties and on whether the definition of "parent" extends beyond biological parents for constitutional purposes. While an in-depth analysis of the constitutional rights of de facto parents is beyond the scope of this Article, this Section provides an overview of the recent legal discourse and modern judicial trends framing this discussion.¹⁴⁰ This high-level summary is necessary to frame the subsequent procedural recommendations based on this Article's position that de facto parents are legal parents and, therefore, hold equal constitutional rights.

In the 1970s and 1980s, the Supreme Court issued a string of cases providing guidance on the scope of parental rights.¹⁴¹ One line of cases—*Stanley v. Illinois*,¹⁴² *Quilloin v. Walcott*,¹⁴³ *Caban v. Mohammed*,¹⁴⁴ and *Lehr v. Robertson*¹⁴⁵—specifically addressed the rights of unmarried

139. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion).

140. For in-depth analysis of the constitutionality of de facto parenthood, see generally NeJaime, *The Constitution of Parenthood*, *supra* note 19; Strauss, *supra* note 7, at 919.

141. See *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989); *Lehr v. Robertson*, 463 U.S. 248, 252 (1983); *Caban v. Mohammed*, 441 U.S. 380, 383–84 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 254 (1978); *Smith v. Org. of Foster Fams. for Equal. & Reform (OFFER)*, 431 U.S. 816, 843 (1977); *Stanley v. Illinois*, 405 U.S. 645, 661 (1972) (Burger, C.J., dissenting).

142. 405 U.S. 645 (1972).

143. 434 U.S. 246 (1978).

144. 441 U.S. 380 (1979).

145. 463 U.S. 248 (1983).

biological fathers.¹⁴⁶ Broadly, these cases analyzed a state's ability to terminate a parent-child relationship without notice following close scrutiny of the parent's involvement in caring for and supporting the children.¹⁴⁷ These cases stressed the importance of the *conduct* of parents insofar as they assumed rights and responsibilities for children.¹⁴⁸ For example, in *Quilloin* and *Lehr*, the Court rejected constitutional challenges of unmarried fathers who had failed to financially support or assume a parental role over their genetically related children.¹⁴⁹ The Court reasoned that a biological connection alone merely "offers the natural father an opportunity . . . to develop a relationship with his offspring,"¹⁵⁰ but that "[p]arental rights do not spring full-blown from the biological connection between parent and child" but "require relationships more enduring."¹⁵¹

Three other cases decided during this time period—*Moore v. City of East Cleveland*,¹⁵² *Smith v. Organization of Foster Families for Equality & Reform (OFFER)*,¹⁵³ and *Michael H. v. Gerald D.*¹⁵⁴—offered additional guidance on the role of biology in defining parental rights. In *Moore*, a plurality of the Court held that a zoning ordinance that prevented a grandmother from residing in the same household as her grandson without her grandson's parent was unconstitutional.¹⁵⁵ In that case, *Moore*, who had assumed a parental role for her grandson when his parents died, cited the Court's parental rights cases and argued that the "[t]he right to privacy in family decisions concerning the nurturing of children applie[d] to [her]" because she "[stood] as if she were the child's natural mother."¹⁵⁶ Legal scholars have subsequently argued that

146. See generally NeJaime, *The Constitution of Parenthood*, *supra* note 19, at 272 (describing the development of case law pertaining to the parental rights of unmarried fathers).

147. See *Lehr*, 463 U.S. at 252; *Caban*, 441 U.S. at 383; *Quilloin*, 434 U.S. at 252; *Stanley*, 405 U.S. at 661 (Burger, C.J., dissenting).

148. See *Lehr*, 463 U.S. at 252 (finding that the father "did not live with [the mother or child] after [the child]'s birth, he has never provided them with any financial support, and he has never offered to marry [the mother]"); *Caban*, 441 U.S. at 383 (noting the extensive parenting time exercised by the father); *Quilloin*, 434 U.S. at 251 (finding that the father only provided support on an "irregular basis" and gave toys and gifts "from time to time"); *Stanley*, 405 U.S. at 661, 667 (Burger, C.J., dissenting) (noting that after the death of the children's biological mother, the father "took no action to gain recognition of himself as a father").

149. See *Quilloin*, 434 U.S. at 252; *Lehr*, 463 U.S. at 252.

150. *Lehr*, 463 U.S. at 262.

151. *Id.* at 260 (emphasis omitted) (quoting *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).

152. 431 U.S. 494 (1977).

153. 431 U.S. 816 (1977).

154. 491 U.S. 110 (1989).

155. See *Moore*, 431 U.S. at 501.

156. Brief for the Appellant at 23–25, *Moore*, 431 U.S. 494 (No. 75-6289).

the grandmother in *Moore* was a de facto parent and that the court protected her individual rights attendant with that status.¹⁵⁷ In *Smith v. OFFER*, the Court held that the state's procedures for removal of foster children from their homes were constitutionally adequate, distinguishing foster family relationships, whose relationships are state-created, from biological family relationships.¹⁵⁸ Therefore, it follows that "whatever emotional ties may develop . . . have their origins in an arrangement in which the State has been a partner from the outset."¹⁵⁹ Finally, in *Michael H.*, the Court analyzed the rights of a parent at the most precise level, finding that a biological parent who was not married to the mother at the time of birth did not hold a fundamental right deeply rooted in the nation's history and tradition.¹⁶⁰

The Supreme Court's next significant decision regarding parental rights was *Troxel v. Granville*, which to date is the seminal (and only) case wherein the Court has commented on the rights of legal parents of a child against claims of third parties.¹⁶¹ In *Troxel*, the Court, in a plurality decision, struck down a Washington statute that permitted "[a]ny person [to] petition the court for visitation rights at any time" as unconstitutional.¹⁶² This statute did not require that third parties establish a particular type of relationship with the subject child (grandparent, de facto parent, or otherwise).¹⁶³ The plurality took issue with the fact that the Washington statute "gave no special weight at all to [the mother's] determination of her daughters' best interests."¹⁶⁴ Accordingly, the Court held that the Washington statute, as applied to the legal parent, "violated her due process right to make decisions concerning the care, custody, and control of her daughters."¹⁶⁵ Justices Kennedy and Stevens both acknowledged that the plurality's ruling could negatively impact de facto parents.¹⁶⁶ Justice Kennedy asserted that "a fit parent's right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent or a de facto parent may be another."¹⁶⁷ Justice Stevens raised concerns with cases involving a "once-custodial caregiver" and emphasized children's

157. See NeJaime, *The Constitution of Parenthood*, *supra* note 19, at 306.

158. See *Smith v. OFFER*, 431 U.S. at 843.

159. *Id.* at 845.

160. See *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989).

161. See Higdon, *supra* note 7, at 983; *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

162. *Troxel*, 530 U.S. at 61 (quoting WASH. REV. CODE § 26.10.160(3) (repealed 2021)).

163. See *In re E.L.M.C.*, 100 P.3d 546, 551 (Colo. App. 2004).

164. *Troxel*, 530 U.S. at 69.

165. *Id.* at 75.

166. See *id.* at 85 (Stevens, J., dissenting); *id.* at 100–01 (Kennedy, J., dissenting).

167. *Id.* at 100–01 (Kennedy, J., dissenting) (emphasis omitted).

interests in “[t]he almost infinite variety of family relationships that pervade our ever-changing society.”¹⁶⁸

Following these cases, state courts have split into three main groups based on diverging conceptions of constitutional, non-biological parenthood.¹⁶⁹ The first group has held that parenthood, under these precedential cases, is premised on a biological connection.¹⁷⁰ For example, a Florida court of appeals rejected the claim of a non-biological, unmarried mother, reasoning that “the act of assuming parental responsibilities and actively caring for a child is sufficient to develop constitutional rights in favor of the parent[,] . . . [h]owever, . . . it is the *biological connection between parent and child*” that furnishes the opportunity for a constitutionally protected relationship.¹⁷¹ Similarly, the Court of Appeals of Virginia declined to undertake “[a] judicial expansion of the term ‘parent’ to include someone not bound by blood or law.”¹⁷² Relying on an overbroad reading of *Smith v. OFFER*,¹⁷³ the court reasoned that “family” was based on biological connections.¹⁷⁴ Distinguishing biological from non-biological parenthood, the court reasoned that the former had a pre-political status “predating the bill of rights” whereas the latter was a “legal construct,” or “an arrangement in which the State has been a partner from the outset.”¹⁷⁵ By refusing to recognize non-biological parenthood, legal scholars argue that these courts “are increasingly out of step with family-law developments across the country.”¹⁷⁶ This refusal to recognize de facto parentage is purportedly aiming to protect the constitutional rights of legal parents.

The second group of courts have read Supreme Court cases as saying non-biological parental relationships may be valuable and there are constitutional values that may animate a court’s analysis of a de facto parentage claim.¹⁷⁷ These courts take a different approach to the

168. *Id.* at 85, 90 (Stevens, J., dissenting).

169. *Compare Hawkins v. Grese*, 809 S.E.2d 441, 443, 452 (Va. Ct. App. 2018) (refusing to expand the definition of parents to include someone who was not biologically related), *with Rubano v. DiCenzo*, 759 A.2d 959, 971 (R.I. 2000) (broadening the scope of parentage to include individuals not biologically related).

170. *See, e.g., Hawkins*, 809 S.E.2d at 443, 446–47; *Russell v. Pasik*, 178 So. 3d 55, 59–61 (Fla. Dist. Ct. App. 2015).

171. *Russell*, 178 So. 3d at 60–61.

172. *Hawkins*, 809 S.E.2d at 447.

173. *See Smith v. OFFER*, 431 U.S. 816, 843 (1977).

174. *Hawkins*, 809 S.E.2d at 447.

175. *Id.* (quoting *Smith v. OFFER*, 431 U.S. at 845). Notably, the Court did not decide the question of under what circumstances a non-biological parent-child relationship would be entitled to substantive due process protections.

176. NeJaime, *The Constitution of Parenthood*, *supra* note 19, at 268.

177. *See, e.g., SooHoo v. Johnson*, 731 N.W.2d 815, 822 (Minn. 2007); *Rubano v. DiCenzo*, 759 A.2d 959, 971 (R.I. 2000); *V.C. v. M.J.B.*, 748 A.2d 539, 549–50 (N.J. 2000).

foregoing Supreme Court cases, holding that the cases support extending constitutional protection to individuals who develop a bonded parental relationship with children.¹⁷⁸ The Supreme Court of Rhode Island undertook this analysis, stating that U.S. Supreme Court precedent supports extending constitutional rights based on conduct of the biological parent.¹⁷⁹ The court reasoned that where “the biological parent ‘never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child[,]’ . . . his *constitutional rights were of less weight than those of a married but nonbiological father* who had ‘borne full responsibility for the rearing of his children during the period of the marriage.’”¹⁸⁰ These courts reason that, unlike third party visitation claims, de facto parent claims concern the rights of individuals who have assumed the rights and responsibilities of a parent.¹⁸¹ In other words, a de facto parent is a parent.¹⁸² Therefore, since the de facto parent is a parent, they have a “co-equal fundamental parental interest” in raising a child and maintaining their developed parent-child relationship.¹⁸³ Accordingly, allowing a de facto parent to seek allocation of custodial and decision-making responsibility does not unconstitutionally infringe on the rights of legal parents.¹⁸⁴

178. *SooHoo*, 731 N.W.2d at 822; *Rubano*, 759 A.2d at 971; *V.C. v. M.J.B.*, 748 A.2d at 549–50; see also Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 924 n.215 (1984) (“The Court in *Lehr* protected ‘developed’ relationships, not biological connections.” (quoting *Lehr v. Robinson*, 463 U.S. 248, 261 (1983))).

179. See *Rubano*, 759 A.2d at 973–74.

180. See *id.* (emphasis added) (quoting *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978)); see also *SooHoo*, 731 N.W.2d at 822 (relying on *Lehr* to support its view that an unmarried same-sex couple was part of a “recognized family unit” entitled to protection).

181. See *Rubano*, 759 A.2d at 973–74; *Smith v. Guest*, 16 A.3d 920, 931 (Del. 2011) (“This is not a case, like *Troxel*, where a third party having no claim to a parent-child relationship (e.g., the child’s grandparents) seeks visitation rights.”); *McDermott v. Dougherty*, 869 A.2d 751, 772 (Md. 2005) (distinguishing third parties from psychological parents). See generally NeJaime, *Parents in Fact*, *supra* note 14, at 550 (discussing cases analyzing the constitutional rights of de facto parents).

182. See NeJaime, *Parents in Fact*, *supra* note 14, at 545; see also Maldonado, *supra* note 19, at 565 (“[C]ourts have not been sufficiently concerned with de facto parents’ constitutional rights—and they should be.”).

183. *Smith v. Guest*, 16 A.3d at 931 (cleaned up); see *Rubano*, 759 A.2d at 976. Likewise, legal scholars have argued that children have a constitutional right to family integrity, which could broadly be read to include a right to protect a de facto parent-child relationship. See Rachel Kennedy, *A Child’s Constitutional Right to Family Integrity and Counsel in Dependency Proceedings*, 72 EMORY L.J. 911, 955 (2023); Shanta Trivedi, *My Family Belongs to Me: A Child’s Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 287 (2021); Melissa D. Carter, *An Ounce of Prevention is Worth a Pound of Cure: Why Lawyers Must Champion Preventive Legal Advocacy*, 42 CHILD.’S LEGAL RTS. J. 1, 5 (2021).

184. See *Smith v. Guest*, 16 A.3d at 930–32.

The third group has recognized the constitutional rights of de facto parents when the legal parent has consented to the de facto parent's parental relationship with the child.¹⁸⁵ In states that adopt a consent-based approach to de facto parentage, courts reason that legal parents “choos[e] to forego”¹⁸⁶ or “waive”¹⁸⁷ their constitutionally protected rights by consenting to formation of the de facto parent-child relationship.¹⁸⁸ Once a legal parent waives those rights, courts have found the legal parent cannot then assert those rights to unilaterally terminate the de facto parent-child relationship.¹⁸⁹ The Court of Appeals of South Carolina articulated: “A parent has the absolute control and ability to maintain a zone of privacy around his or her child. However, a parent cannot maintain an absolute zone of privacy if he or she *voluntarily invites* a third party to function as a parent to the child.”¹⁹⁰

As it relates to the constitutional rights of de facto parents, this Article posits that because de facto parents may have constitutional interests as legal parents, there is no constitutional problem when de facto parents seek relief against legal parents. However, even if courts do not consider de facto parents as legal parents, this Article argues that a de facto parent may still have standing to seek custody or visitation against a legal parent if the legal parent has consented to the de facto parent-child relationship, effectively waiving their constitutionally protected rights. Under both of these avenues, courts should minimize procedural hurdles facing de facto parents where there is no potential violation of constitutionally protected rights of legal parents.

II. ADJUDICATING DE FACTO PARENTAGE

As previously set forth, legal scholars have spent significant time and effort over the past twenty years drafting model language for de facto parentage statutes through the ALI Principles, 2017 UPA, 2018 UNCVA, and 2024 Restatement. As of January 1, 2025, fourteen states have adopted statutes recognizing de facto parentage, while seventeen others have recognized claims for de facto parentage at common law.¹⁹¹ Amongst the states that recognize de facto parentage, some recognize de facto parents as legal parents, while some relegate de facto parents to a

185. See *Mason v. Dwinnell*, 660 S.E.2d 58, 67 (N.C. Ct. App. 2008).

186. *Id.* at 67–70.

187. *Green v. Carter*, 900 S.E.2d 108, 112 (N.C. Ct. App. 2024).

188. See *id.*; *Mason*, 660 S.E.2d at 67–69.

189. *Mason*, 660 S.E.2d at 69.

190. *Middleton v. Johnson*, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006) (emphasis added).

191. See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 13, at 423–27 (excluding states adopting a statutory “holding out” presumption).

“quasi-parent” or “third party” status.¹⁹² This leads to additional confusion about whether legal parents are entitled to additional procedural protections against claims of de facto parents to protect their constitutional right to “the care, custody, and control of their children.”¹⁹³ The procedural mechanisms for adjudicating de facto parentage should inform the status and constitutional rights of de facto parents. States that do not recognize de facto parentage as legal parentage may impose significant procedural hurdles to establishing de facto parentage to protect the rights of legal parents. Conversely, states that recognize de facto parents as legal parents may impose fewer procedural hurdles on establishing de facto parentage to allow these individuals to rightfully assume the rights and responsibilities of legal parentage.

The 2017 UPA is the only project of the four discussed in Section I.C that provides guidance to courts on how to adjudicate de facto parentage claims.¹⁹⁴ The 2017 UPA specifically provides guidance for state legislatures that adopt statutes equating de facto parentage with legal parentage, thereby conferring the full suite of rights and responsibilities upon de facto parents.¹⁹⁵ With this limited guidance comes two layers of confusion as it relates to adjudication of de facto parentage nationwide. First, for states that recognize de facto parentage as a matter of common law, courts are left to make procedural decisions on an ad hoc basis. This means judges must make decisions regarding proper procedure, and these decisions are likely clouded by the judge’s perception of whether a de facto parent is a parent. Second, even in states that have adopted the 2017 UPA, courts have already run into issues implementing the procedures set forth in the model act. This Part discusses areas of confusion and divergence that have emerged in the past decade to highlight the need for additional clarity for courts moving forward.

A. Establishing Standing

As a threshold matter, individuals must establish standing before a court moves forward with a merits determination on de facto parentage.¹⁹⁶ Section 609(c) of the 2017 UPA is the only model act guidance available to states detailing court procedure.¹⁹⁷ It provides:

192. See *id.* at 323.

193. See *Troxel v. Granville*, 530 U.S. 57, 62–65 (2000).

194. See UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM’N 2017).

195. *Id.*

196. See generally 143 AM. JUR. *Trials* 441, Westlaw (database updated Oct. 2025) (outlining the procedural steps for proceeding with a civil claim).

197. See UNIF. PARENTAGE ACT § 609(c).

(1) The individual must file an initial verified pleading alleging specific facts that support the claim to parentage of the child asserted under this section. . . .

(2) An adverse party, parent, or legal guardian may file a pleading in response to the pleading filed under paragraph (1). A responsive pleading must be verified and must be served on parties to the proceeding.

(3) *Unless the court finds a hearing is necessary to determine disputed facts material to the issue of standing*, the court shall determine, based on the pleadings under paragraphs (1) and (2), whether the individual has alleged facts sufficient to satisfy by a *preponderance of the evidence the requirements of paragraphs (1) through (7) of subsection (d)*. If the court holds a hearing under this subsection, the hearing must be held on an expedited basis.¹⁹⁸

Following this initial procedure to establish standing, the 2017 UPA provides that a third party must prove by clear and convincing evidence that they meet the seven elements of de facto parentage.¹⁹⁹ The language of the 2017 UPA has already caused confusion in courts attempting to follow its guidance. Much of this confusion stems directly from courts' confusion over what constitutes "disputed facts material to the issue of standing" and how to apply the evidentiary standard of "preponderance of the evidence" at the standing stage.²⁰⁰

1. The Misplaced Evidentiary Standard

Washington was an early adopter of the 2017 UPA²⁰¹ and has recognized de facto parentage for nearly twenty years.²⁰² Despite this longstanding recognition, in the eight years since it adopted the 2017 UPA, Washington courts have struggled to interpret its requirements as it relates to establishing standing to bring de facto parentage claims.²⁰³ This subsection surveys three recent Washington Court of Appeals cases that have struggled to apply the 2017 UPA language as it relates to establishing standing for de facto parentage.

198. *Id.* (emphasis added).

199. *Id.* § 609(d).

200. *See, e.g., Walker v. Riley*, 498 P.3d 33, 38 (Wash. Ct. App. 2021); *Ponsaran v. Anker (In re Parentage of J.D.W.)*, 471 P.3d 228, 240 (Wash. Ct. App. 2020).

201. *Parentage Act: Legislative Bill Tracking*, supra note 100.

202. *Carvin v. Britain (In re Parentage of L.B.)*, 122 P.3d 161, 178 (Wash. 2005).

203. *See, e.g., Walker*, 498 P.3d at 38; *In re Parentage of J.D.W.*, 471 P.3d at 240.

The 2020 case of *In re Parentage of J.D.W.*²⁰⁴ illustrates how the 2017 UPA approach for adjudicating de facto parentage claims operates in practice.²⁰⁵ In a case of first impression following Washington's adoption of its variation of the 2017 UPA procedure,²⁰⁶ Division One of the Washington Court of Appeals found the plain language ambiguous as to what it required for standing in the context of a de facto parentage proceeding.²⁰⁷ The court first outlined its understanding of the process under the statute, which adopted the language of the 2017 UPA:

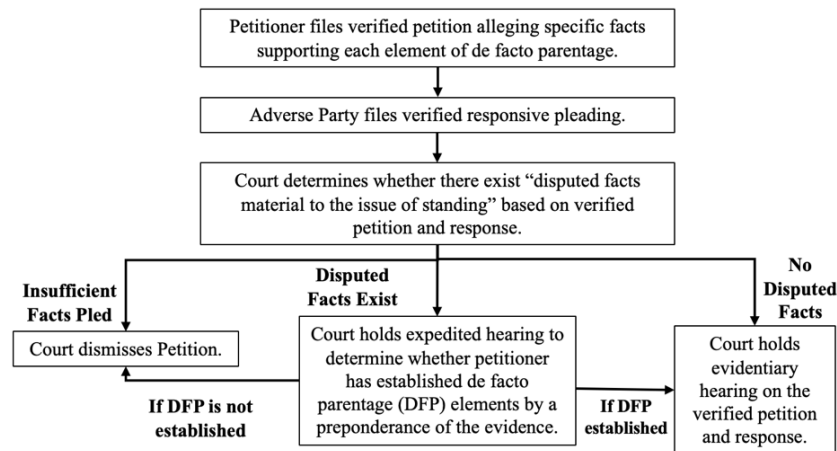


Figure 1. Establishing Standing Under the 2017 UPA per the J.D.W. Court²⁰⁸

The court grappled with interpreting two identified ambiguities in this statutory scheme: (1) a lack of articulation of what standing means in the context of a de facto parentage proceeding, and (2) a lack of clarity of when “disputed facts material to the issue of standing” exist.²⁰⁹ The court highlighted these ambiguities by going through multiple ways the language could be interpreted.²¹⁰ First, a court could merely require the petitioner to show that they meet the requirements for filing a pleading under the statute²¹¹: namely, that the individual “(a) [i]s alive” and “(b) [c]laims to be a de facto parent of the child.”²¹² The court held such a

204. 471 P.3d 228 (Wash. Ct. App. 2020).

205. *Id.* at 240.

206. WASH. REV. CODE § 26.26A.440 (2025).

207. *In re Parentage of J.D.W.*, 471 P.3d at 236.

208. *Id.* at 234, 242.

209. *Id.* at 242.

210. *Id.* at 236.

211. *Id.*

212. WASH. REV. CODE § 26.26A.440 (2025).

low threshold would be inconsistent with the purpose of the statute, which envisioned a “*heightened* standing requirement.”²¹³

Alternatively, a court could read the 2017 UPA language as requiring the court to “look to the seven factors [to establish de facto parentage] . . . and decide if the petitioner has demonstrated by a preponderance of the evidence that he has met all these factors.”²¹⁴ Therefore, a disputed fact would be “material to the issue of standing” if it was material to any of the seven elements of de facto parentage.²¹⁵ The court also rejected this interpretation.²¹⁶ First, it reasoned that “different statutory language should not be read to mean the same thing: When the legislature uses different words in the same statute, we presume the legislature intends those words to have different meanings.”²¹⁷ Because the Washington variation of the 2017 UPA uses the phrase “facts material to the issue of standing” separate from “requirements of [paragraphs (1) through (7)],” it follows that “facts material to the issue of standing” should not be read as “facts material to the requirements of [paragraphs (1) through (7)].”²¹⁸ Second, requiring a party to prove all seven elements to establish standing and at the adjudication stage would render the statute redundant.²¹⁹ Importantly, the Washington variation of the 2017 UPA approach only requires a third party to establish the elements of de facto parentage by a preponderance of the evidence at both the standing and the adjudication stage.²²⁰ This deviates from the 2017 UPA requirement of proving the elements of de facto parentage by clear and convincing evidence at the adjudication stage.²²¹

Further, the court rejected yet another interpretation of the language which read the 2017 UPA language as akin to an inquiry under the state’s applicable statute governing motions to dismiss.²²² This interpretation would have courts presume all facts alleged in the initial petition as true.²²³ The court reasoned this would render meaningless the option of holding an expedited hearing in the event of a “disputed fact material to the issue of standing.”²²⁴

213. *In re Parentage of J.D.W.*, 471 P.3d at 236 (quoting UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM’N 2017) (emphasis added)).

214. *Id.* (second alteration in original).

215. *Id.* (quoting § 26.26A.440(3)(c)).

216. *Id.*

217. *Id.* at 237 (cleaned up) (quoting *Ass’n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 340 P.3d 849, 854 (Wash. 2015)).

218. *In re Parentage of J.D.W.*, 471 P.3d at 237 (quoting § 26.26A.440(3)(c)).

219. *Id.*

220. *Id.* at 237 n.5.

221. *Id.*

222. *Id.* at 236.

223. *Id.*

224. *Id.* (quoting WASH. REV. CODE § 26.26A.440(3)(c) (2025)).

Finally, the court turned to comments of the 2017 UPA itself for guidance in interpreting the standing requirement.²²⁵ Specifically, it emphasized that the statute’s “heightened standing requirement” was imposed “to ensure that permitting proceedings by de facto parents does not subject parents to unwarranted and unjustified litigation.”²²⁶ Accordingly, the court concluded that “whether a fact is ‘material to the issue of standing’ must be determined through the lens of whether continued litigation would be ‘unwarranted and unjustified’ in light of the underlying purpose of the de facto parentage.”²²⁷ This is to “ensure[] that individuals who form strong parent-child bonds with children with the consent and encouragement of the child’s legal parents are not excluded from a determination of parentage simply because they entered the child’s life sometime after the child’s birth.”²²⁸ Accordingly, the court concluded that to establish standing, the petitioner must establish they “unequivocally parented the child as part of the child’s family unit and that a legal parent consented to and fostered a parent-child relationship between the petitioner and the child.”²²⁹ It follows that the “disputed fact [would be] material to the issue of standing if it is material to whether the petitioner unequivocally parented the child as part of the child’s family unit or whether a legal parent consented to and fostered a parent-child relationship between the petitioner and the child.”²³⁰

After Division One of the Washington Court of Appeals decided *In re Parentage of J.D.W.*, Divisions Two and Three of the Washington Court of Appeals subsequently decided cases also seeking clarity on the requirements to establish standing under the Washington statute.²³¹ Declining to follow Division One’s holding, both Divisions Two and Three held that to have standing, a petitioner “must allege facts sufficient to satisfy each of the seven elements of de facto parentage regardless of whether there are disputed facts.”²³² Divisions Two and Three agreed that this reading of the statute seemingly rendered the statute redundant given the identical burden of proof, but they concluded that requiring petitioners to prove each element by a preponderance of the evidence “comports with the language of the statute and the legislative intent.”²³³

225. *Id.* at 237–38.

226. *Id.* at 238 (quoting UNIF. PARENTAGE ACT § 609 cmt. (UNIF. L. COMM’N 2017)).

227. *Id.* (quoting § 26.26A.440(3)(c)).

228. *Id.* (quoting UNIF. PARENTAGE ACT § 609 cmt.).

229. *Id.* at 240.

230. *Id.*

231. *Walker v. Riley*, 498 P.3d 33, 35–36 (Wash. Ct. App. 2021); *In re Parentage of L.J.M.*, 476 P.3d 636, 641–42 (Wash. Ct. App. 2020).

232. *Walker*, 498 P.3d at 37; see *In re Parentage of L.J.M.*, 476 P.3d at 639.

233. *Walker*, 498 P.3d at 38 (discussing the holding in *In re Parentage of L.J.M.*).

As of the date of this publication, the requirements for a petitioner to establish standing to bring a de facto parentage claim remain unresolved by the Washington Supreme Court. However, Washington courts have encouraged petitioners to file documents as exhibits to initial complaints to meet the evidentiary burden of preponderance of the evidence.²³⁴ Such documents may include medical authorizations for disclosure of a child's immunization records, school records and communications showing the petitioner is listed as a parent and has attended parent-teacher conferences, or transcripts of videos wherein a child refers to the petitioner as "mommy" or "daddy."²³⁵

2. Rebuttable Presumptions Against Standing

Rebuttable presumptions against standing allow courts to dismiss claims at the standing stage where petitioners are unable to rebut them.²³⁶ In the context of de facto parentage, presumptions are designed to protect the rights of legal parents while serving as a potential additional hurdle for individuals bringing claims to establish de facto parentage.²³⁷ On January 1, 2025, Massachusetts became the first state to implement a statute incorporating a rebuttable presumption against standing for certain individuals seeking to establish de facto parentage.²³⁸ Specifically, the statute provides that

there shall be a rebuttable presumption against standing if the court finds by a preponderance of the evidence that:

(i) the plaintiff is or was the defendant to [an abuse or harassment prevention order or protection order];

(ii) the department of children and families has made a determination supporting an allegation of abuse against the plaintiff with respect to the subject child or another child in the same household;

(iii) a defendant is engaged or has engaged in military service as defined in 50 U.S.C. App. 511 within the past 3 years, unless the defendant consents in writing and such written consent is filed with the complaint;

234. See, e.g., *In re De Facto Parentage of: A.H.*, 536 P.3d 719, 723–24 (Wash. Ct. App. 2023).

235. See *id.*

236. See generally Melanie Mears, *Revisiting Grandparent Rights Across the United States*, 36 J. AM. ACAD. MATRIM. LAWS. 227, 236 (2023) (explaining that petitioning grandparents must meet a high burden and that courts give deference to parents' decisions).

237. See *id.*

238. See MASS. GEN. LAWS. ch. 209C, § 25 (2025).

(iv) a defendant parent executed a military family care plan and but for the plan, the plaintiff would not meet at least 1 of the [elements of de facto parentage], unless the defendant consents in writing and such written consent is filed with the complaint; or

(v) the plaintiff is or was the foster parent of the child and but for the plaintiff's role as foster parent, the plaintiff would not meet at least 1 of the [elements of de facto parentage]; or

(vi) the plaintiff engaged in duress, coercion or threat of harm to establish any element of de facto parentage ²³⁹

Adopting rebuttable presumptions against standing for certain classes of individuals is designed to mitigate against the risk of potential abuse of de facto parentage doctrines.²⁴⁰ As the Vermont Supreme Court articulated, there is a concern that “third parties could abuse the process by seeking visitation to continue an unwanted relationship or otherwise harass the legal parents.”²⁴¹ In the context of domestic violence, an Ohio magistrate judge expressed their concern that equating de facto parents with legal parents may lead de facto parents to “manipulate and control their victims.”²⁴² In practice, these concerns appear to be overstated.²⁴³ In a 2023 empirical study, Professors Joslin and NeJaime found that fewer than 12 percent of the 669-case dataset of all electronically available functional parent decisions issued between 1980 and late 2021 involved allegations of domestic violence.²⁴⁴ Amongst these cases, “domestic violence allegations [were] more commonly asserted against the legal parent than against the functional parent.”²⁴⁵ Only about 3 percent of those cases (twenty-three cases total) involved allegations of domestic violence against only the functional parent.²⁴⁶

In eighteen of the twenty-three cases, the court determined the individual “alleged to have committed domestic violence *was not a functional parent* under the law and therefore had no standing to seek parental rights under these doctrines.”²⁴⁷ Among these eighteen cases,

239. *Id.* § 25(g).

240. See Courtney G. Joslin & Douglas NeJaime, *Domestic Violence and Functional Parent Doctrines*, 30 VA. J. SOC. POL'Y & L. 67, 75 (2023) [hereinafter Joslin & NeJaime, *Domestic Violence and Functional Parent Doctrines*].

241. *Titchenal v. Dexter*, 693 A.2d 682, 688 (Vt. 1997).

242. See Jacqueline V. Gaines, *The Legal Quicksand 2+ Parents: The Need for a National Definition of a Legal Parent*, 46 U. DAYTON L. REV. 105, 125 (2021).

243. Joslin & NeJaime, *Domestic Violence and Functional Parent Doctrines*, *supra* note 240, at 75.

244. *Id.* at 72, 75.

245. *Id.* at 75.

246. See *id.*

247. *Id.* at 80.

courts did not expressly rely on domestic violence.²⁴⁸ Even in cases that did specifically mention evidence of domestic violence, courts considered this evidence absent an explicit statutory directive.²⁴⁹ For example, in two cases decided in California, the courts were directed to determine, based on “policy and logic,” which presumption of parentage should prevail when two men attempted to establish parentage of a child.²⁵⁰ In another case, decided in Massachusetts prior to the statutory change, the relevant precedent authorized a court to consider whether it was in the child’s best interests to grant petitioner’s request to establish de facto parentage.²⁵¹ In its analysis, the Massachusetts Appeals Court considered, among other factors, the fact that the individual seeking to be established as a de facto parent abused the child’s legal parent from the time the child was born.²⁵²

B. The Rights of De Facto Parents

States that recognize de facto parentage through statutory provisions largely treat de facto parents as legal parents.²⁵³ In other words, these statutory provisions make clear that de facto parents are entitled to the same rights as legal parents.²⁵⁴ Accordingly, courts in these states hold that de facto parents, unlike the grandparents in *Troxel*,²⁵⁵ do not need to overcome a presumption of parental fitness.²⁵⁶ Unlike other third parties, courts reason that a de facto parent who “has undertaken parental obligations . . . shares an emotional bond and parental relationship with the child, may know the child’s needs as well as the parent and may be as motivated as the parent to further the child’s best interests.”²⁵⁷ Consider, for example, Washington and Connecticut. Both states have adopted statutes governing de facto parentage wherein de facto parents

248. *Id.* at 82.

249. *See, e.g., Dayton J. v. Dustin H.*, No. D062820, 2013 WL 2325165, at *2 (Cal. Ct. App. May 29, 2013); *Lauren K. v. Timothy R.*, No. A113231, 2006 WL 3602913, at *6 (Cal. Ct. App. Dec. 12, 2006); *Y.L.R. v. M.K.*, No. 16-P-800, 2017 WL 2705408, at *3 (Mass. App. Ct. June 23, 2017).

250. *See Dayton J.*, 2013 WL 2325165, at *4; *Lauren K.*, 2006 WL 3602913, at *6.

251. *See Y.L.R.*, 2017 WL 2705408, at *3.

252. *Id.*

253. *See, e.g., A.A. v. B.B.*, 384 P.3d 878, 882 (Haw. 2016); *Smith v. Guest*, 16 A.3d 920, 931 (Del. 2011); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1150 (Me. 2004); *Rubano v. DiCenzo*, 759 A.2d 959, 976 (R.I. 2000).

254. *Smith v. Guest*, 16 A.3d at 931; *C.E.W.*, 845 A.2d at 1150.

255. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000).

256. *Smith v. Guest*, 16 A.3d at 931; *C.E.W.*, 845 A.2d at 1150.

257. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 cmt. i (A.L.I. Tentative Draft No. 6, 2024).

are treated as legal parents.²⁵⁸ Specifically, both statutes provide that an individual is “presumed to be a *parent* of a child if” the individual “resided in the same household with the child” for a requisite period of time and “openly held out the child” as their own.²⁵⁹

Courts adjudicating de facto parentage claims at common law are much less definitive as to what rights and responsibilities individuals have if they establish de facto parentage. In contrast to the states that recognize de facto parentage through statute, in states like Colorado, Arkansas, and Mississippi, courts only recognize de facto parentage at common law and do not recognize de facto parents as legal parents. In Colorado, courts permit de facto parents to seek custody,²⁶⁰ whereas in Arkansas, the state distinguishes “custody” from “visitation” and only permits de facto parents to seek “visitation” against legal parents.²⁶¹ Mississippi treats de facto parents not as legal parents at all, but closer to third parties, requiring them to overcome the fit “natural” parent presumption or establish that a child will experience harm if legal custody is awarded to the legal parent.²⁶² This Section proceeds with a discussion of different procedural approaches courts have taken at common law when adjudicating de facto parentage.

First, Colorado case precedent provides an example of courts that do not treat de facto parents as legal parents, but permit de facto parents to seek custody under the same “best interests of the child” standard as legal parents.²⁶³ In *In re E.L.M.C.*,²⁶⁴ the Colorado Court of Appeals held that an individual established de facto parentage.²⁶⁵ Importantly, the court found that:

[The de facto parent met] the most stringent definition of a [de facto] parent: [The legal parent] consented to and fostered [the de facto parent]’s parent-like relationship with [the child]; [the de facto parent and the child] lived together in the same household for seven and one-half years; [the de facto parent] assumed the obligations of parenthood by taking significant responsibility for [the child]’s development, including contributing towards her support, without expectation of financial compensation; and [the de facto parent] established a

258. CONN. GEN. STAT. § 46b-488 (2024); WASH. REV. CODE § 26.26A.115 (2025).

259. CONN. GEN. STAT. § 46b-488(a) (2024) (emphasis added); WASH. REV. CODE § 26.26A.115(1) (2025) (emphasis added).

260. *In re E.L.M.C.*, 100 P.3d 546, 553–54 (Colo. App. 2004).

261. *See, e.g., Bethany v. Jones*, 378 S.W.3d 731, 737 (Ark. 2011).

262. *Davis v. Vaughn*, 126 So. 3d 33, 36–37 (Miss. 2013).

263. *See In re E.L.M.C.*, 100 P.3d at 550–51.

264. 100 P.3d 546 (Colo. App. 2004).

265. *Id.* at 556.

parental role sufficient to create with [the child] a bonded, dependent relationship parental in nature, whereby [the child] recognizes [the de facto parent] as her mother.²⁶⁶

Accordingly, the court found that awarding equal parenting time to the de facto parent without requiring additional evidence to rebut a fit parent presumption or establish harm did not violate the legal parent's constitutional rights.²⁶⁷ Instead, the court applied the "best interests of the child" standard to determine parenting time between the de facto parent and legal parent.²⁶⁸

Arkansas courts take a different approach and limit a de facto parent's ability to stand in parity with legal parents based on whether the de facto parent is seeking *visitation* or *custody*. Unlike legal custody, in these states, visitation does not allow individuals to make major decisions regarding the child's well-being, including decisions concerning education or medical care.²⁶⁹ For example, in *Bethany v. Jones*,²⁷⁰ the Arkansas Supreme Court found that a de facto parent may be awarded *visitation* if the court determines that doing so would be in the best interests of the child.²⁷¹ The court distinguished de facto parentage from the grandparent relationships analyzed in *Troxel*, reasoning that a de facto parent "in all practical respects, was a parent."²⁷² In reaching its conclusion, the court took care to distinguish that under Arkansas case precedent, a de facto parent could only seek visitation, not custody, of a child without needing to overcome the fit natural parent presumption.²⁷³ This raises questions for states that do not distinguish between custody and visitation actions.²⁷⁴

The Supreme Court of Alaska took yet another approach, finding that a de facto parent must overcome a fit parent presumption or establish harm to the child regardless of whether they are seeking custody or visitation.²⁷⁵ In reaching this conclusion, the court has held that legal parents still have a preference over de facto parents.²⁷⁶ Alaska offers two

266. *Id.* at 562.

267. *Id.*

268. *See id.* at 558–59.

269. *See generally* MASS. GEN. LAWS ch. 208, § 31 (2025) (establishing that the parent with legal custody has the responsibility to make major decisions regarding the child's welfare).

270. 378 S.W.3d 731 (Ark. 2011).

271. *Id.* at 738.

272. *Id.* at 736.

273. *Id.* at 737 & n.4 (citing *Stamps v. Rawlins*, 761 S.W.2d 933 (Ark. 1988)).

274. *See, e.g.*, 750 ILL. COMP. STAT. 5/602.5, 5/602.7 (governing "allocation of parental responsibilities").

275. *See Wolfgram v. Davis-Perkins*, 545 P.3d 444, 448–49 (Alaska 2024).

276. *See id.* at 450–51.

alternative avenues for a third party to obtain custody or visitation: “[p]rove ‘by clear and convincing evidence’ *either* ‘that the legal parent is unfit *or* that the welfare of the child requires the child to be in the custody of the third party.’”²⁷⁷ The Supreme Court of Alaska issued a line of cases providing that a legal parent still receives preference over third parties even if they qualify as de facto parents.²⁷⁸ However, courts are directed to consider a third party’s de facto parent status as a factor when determining whether awarding sole custody to the legal parent would cause harm to the child.²⁷⁹ The Supreme Court of Alaska has upheld this framework, finding it adequately protects the rights of legal parents.²⁸⁰ According to the court, this approach allows “trial courts [to] retain discretion to assign appropriate weight to evidence of the child’s relationship with the psychological parent in making custody determinations.”²⁸¹

*Wolfgram v. Davis-Perkins*²⁸² provides an example of how this framework is applied in practice. In the case, Mitchel was in a dating relationship with Nadirah when she gave birth to her daughter, Genevieve.²⁸³ Although he was not biologically related to Genevieve, Mitchel was actively involved with raising Genevieve until she was three years old.²⁸⁴ At that time, Nadirah cut off Mitchel’s contact.²⁸⁵ After determining Mitchel was a de facto parent, the court noted that Nadirah (Genevieve’s legal parent) still received preference over him.²⁸⁶ Mitchel stipulated that Nadirah was a fit and proper parent of Genevieve, so the only remaining issue was whether “the welfare of the child requires the child to be in the custody of the [third party].”²⁸⁷ The court clarified that a third party may still prove that severing a child’s relationship with that third party would be detrimental to the child’s welfare even if the third party stipulates as to the fitness.²⁸⁸ The court further explained that Mitchel’s status as a de facto parent alone was insufficient to entitle him

277. *Id.* at 449 (cleaned up) (quoting *Rosemarie P. v. Kelly B.*, 504 P.3d 260, 264–65 (Alaska 2021)).

278. *See id.* Note that Alaska refers to de facto parents as “psychological parents.” *Id.* at 448 & n.3 (defining “psychological parent” as “an adult who ‘on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological need for an adult’” (quoting *Rosemarie P.*, 504 P.3d at 264)).

279. *Id.* at 448–49.

280. *See id.*

281. *Id.* at 450.

282. 545 P.3d 444 (Alaska 2024).

283. *Id.* at 446.

284. *Id.* at 446–47.

285. *Id.* at 447.

286. *Id.* at 450–51.

287. *Id.* at 449, 451 (alteration in original) (quoting *Rosemarie P. v. Kelly B.*, 504 P.3d 260, 264–65 (Alaska 2021)).

288. *Id.* at 449.

to custody of Genevieve, but that status was relevant for determining whether severing that relationship would be clearly detrimental to the child.²⁸⁹ As the trial court failed to consider Mitchel's status as a de facto parent, the Supreme Court of Alaska remanded the case back to consider evidence of whether Genevieve would suffer a clear detriment if the court awarded Nadirah full custody.²⁹⁰ The Supreme Court noted that if such evidence was introduced on remand, it may be appropriate for a court to award Mitchel joint or sole custody of Genevieve.²⁹¹

Accordingly, the rights a de facto parent holds range widely depending on whether a state recognizes de facto parentage through statute or common law. The determination of a de facto parent's rights necessarily impacts what procedural steps courts take when adjudicating de facto parentage claims. In some circumstances, the court merely engages in an analysis regarding what is in the "best interests of the child" to determine the custody or visitation rights of a de facto parent once de facto parentage is established.²⁹² In other circumstances, the court requires a more exacting inquiry.²⁹³

C. The Responsibilities of De Facto Parents

If courts recognize third parties as de facto parents, they must also address whether those individuals have the same responsibilities as legal parents. In this Section, this Article will focus on the paradigmatic example of a de facto parent's responsibility to financially support their child.²⁹⁴ Jurisdictions are split as to whether the de facto parent-child relationship by itself is sufficient to obligate the de facto parent to pay child support.²⁹⁵ This split necessarily stems in part from the difference in status of de facto parents discussed previously and whether courts treat them as "parents." If courts view de facto parents as "parents," then it naturally follows that they owe financial responsibilities to their child.²⁹⁶ Otherwise, de facto parents are considered as part of a separate category from parents, and their attendant responsibilities become less clear. Where the status of de facto parents is unclear, courts look to the

289. *Id.* at 449–50.

290. *Id.* at 450–51.

291. *Id.* at 451.

292. *See, e.g., In re E.L.M.C.*, 100 P.3d 546, 551 (Colo. App. 2004).

293. *See, e.g., Wolfgram*, 545 P.3d at 449–50.

294. *See, e.g., Pitts v. Moore*, 2014 ME 59, ¶¶ 31–32, 90 A.3d 1169, 1182; *Rubano v. DiCenzo*, 759 A.2d 959, 975–76 (R.I. 2000).

295. *Compare Green v. Carter*, 900 S.E.2d 108, 113 (N.C. Ct. App. 2024) (declining to impose a child support obligation on a de facto parent), *with Pitts*, 2014 ME 59, ¶¶ 31–32 (holding a de facto parent liable for child support).

296. *See In re Parental Responsibilities of A.C.H.*, 2019 COA 43, ¶¶ 35–38, 440 P.3d 1266, 1272.

language and purpose of a state's child support statute when determining whether it should be extended to hold de facto parents liable for support.²⁹⁷

In *Green v. Carter*,²⁹⁸ the North Carolina Court of Appeals held that a third party ("Partner") was not liable to pay child support merely due to her status as a de facto parent.²⁹⁹ The North Carolina child support statute provided, in pertinent part, that "[i]n the absence of pleading and proof that the circumstances otherwise warrant, the *father* and *mother* shall be primarily liable for the support of a minor child."³⁰⁰ Interestingly, North Carolina separately provides that a person may be "secondarily liable" for child support if they "voluntarily assume[] the obligation of support in writing."³⁰¹ Neither the child support statute nor the North Carolina Divorce and Alimony Code provisions define "mother" or "father."³⁰² After finding Partner was a de facto parent, the trial court ordered her to pay child support, reasoning that "[Partner] is a parent to [the child] in the same sense as the heterosexual terms 'Mother' and 'Father' are used. The court finds it is appropriate to apply those terms in a gender-neutral way."³⁰³ On appeal, the North Carolina Court of Appeals reversed the trial court's ruling as to child support, finding the trial court erred in applying a gender-neutral interpretation to extend and impose primary liability for child support.³⁰⁴ The court further found that Partner could not be held secondarily liable for child support because she did not "voluntarily assume[] the obligation of support in writing."³⁰⁵ The court clarified that Partner's execution of in vitro fertilization (IVF) paperwork was insufficient to satisfy this writing requirement because it only addressed the medical risks and rewards of IVF, not the assumption of legal responsibilities.³⁰⁶

The Colorado Court of Appeals reached the opposite conclusion in *In re Parental Responsibilities of A.C.H.*³⁰⁷ In *A.C.H.*, the court again considered whether it could order a de facto parent to pay child

297. See *id.* ¶ 2; *Green*, 900 S.E.2d at 115–17.

298. 900 S.E.2d 108 (N.C. Ct. App. 2024).

299. See *id.* at 113, 125 (using the terms "*in loco parentis*" and "de facto parent" interchangeably).

300. *Id.* at 120 (emphasis added) (quoting N.C. GEN. STAT. § 50-13.4(b) (2023)).

301. See *id.* (quoting § 50-13.4(b)).

302. See *id.* at 115.

303. *Id.* at 113.

304. *Id.* at 125.

305. *Id.*

306. *Id.* at 122.

307. See *In re Parental Responsibilities of A.C.H.*, 2019 COA 43, ¶¶ 35–39, 440 P.3d 1266, 1272.

support.³⁰⁸ The Colorado child support statute does not include the gender-specific terms of “mother” and “father.”³⁰⁹ Instead, it provides that a court “may order either or both *parents* . . . to pay an amount reasonable or necessary for the child’s support.”³¹⁰ Similar to Partner’s argument in *Green*, the de facto parent³¹¹ argued that the plain language of the Colorado child support statute did not expressly include de facto parents.³¹² Rejecting this argument, the Colorado Court of Appeals required the de facto parent to pay child support.³¹³ However, the court emphasized “that the mere existence of a [de facto] parent-child relationship, on its own,” does not establish a support obligation under Colorado law.³¹⁴ Rather, the court limited the applicability of its opinion to de facto parents who have “established themselves as ‘parents,’ rather than ‘guardians’” and “sought and received an intended-to-be-permanent allocation of parental responsibilities.”³¹⁵ The court made this distinction to distinguish responsibilities of a de facto parent from those of a stepparent who merely “[grew] to love his stepchildren and want[ed] to maintain a post-separation relationship with them.”³¹⁶

In most cases, a court will likely determine child support between a de facto parent and one legal parent.³¹⁷ However, the case of *Moore v. McGillis*³¹⁸ provides guidance on a de facto parent’s continuing responsibility in the event a second legal parent intervenes, seeking custody of the child.³¹⁹ In *McGillis*, a stepfather (“Stepfather”) sought legal and physical custody over his six-year-old stepson as a de facto parent.³²⁰ The child’s biological father had been absent from the child’s

308. See *id.* ¶ 2.

309. See COLO. REV. STAT. § 19-4-105(1)(d) (2025).

310. See *In re Parental Responsibilities of A.C.H.*, 2019 COA 43, ¶ 13 (alteration in original) (quoting COLO. REV. STAT. § 14-10-115(2)(a) (2018)).

311. For purposes of this case summary, the Author uses “de facto parent,” but Colorado uses the term “psychological parent.” See *id.*

312. See *id.* ¶¶ 33–35.

313. See *id.* ¶ 39.

314. *Id.* ¶ 36.

315. *Id.* See generally *A.S. v. I.S.*, 130 A.3d 763, 770 (Pa. 2015) (ordering stepfather to pay child support where stepfather had “taken sufficient affirmative steps legally to obtain parental rights”).

316. *In re Parental Responsibilities of A.C.H.*, 2019 COA 43, ¶ 31 (quoting *A.S.*, 130 A.3d at 770).

317. See Joslin & NeJaime, *Multiparenthood*, *supra* note 19, at 1270 (finding only 13 percent of cases surveyed under statutory multi-parent provisions where “each of the three recognized or alleged parents acted as the primary caregiver of the child at some point”).

318. 408 P.3d 1196 (Alaska 2018).

319. See *id.* at 1198–99.

320. See *id.* For purposes of this case summary, the Author uses “de facto parent,” but Colorado uses the term “psychological parent.” See *id.* at 1198.

life since birth.³²¹ The court found Stepfather was a de facto parent and ordered him to pay child support to the child's mother (and legal parent).³²² When the child was about eleven years old, his biological father filed a "Petition to Intervene in Custody Action and Request for Allocation of Parental Rights and Responsibilities."³²³ Stepfather agreed to the biological father's intervention and agreed he could assume parental responsibilities, including Stepfather's child support obligation.³²⁴ Although the trial court did not modify Stepfather's legal and physical custody of the child, it ruled that Stepfather's "child support obligation effectively ceased when he acceded to [the biological father's] intervention in this matter and [the biological father's] request to have parental rights and obligations imposed."³²⁵ The Supreme Court of Alaska reversed, finding that the trial court erred in terminating Stepfather's child support obligation.³²⁶ Following similar reasoning to the Colorado Court of Appeals, the court found that since Stepfather "fought for and obtained continued physical and legal custody of the child," he should continue to be obligated to financially support the child.³²⁷ More broadly, this holding may seemingly be extended to potentially obligate both a de facto parent and a legal parent to pay child support for the same child.

III. RECOMMENDATION

Courts that have declined to recognize de facto parentage largely hold that recognizing a new category of legal parentage should properly be the role of the state legislature, not the courts.³²⁸ The Utah Supreme Court reasoned that adoption of a de facto parentage doctrine at common law "would exceed the proper bounds of the judiciary" by asking the court to make "social policy" determinations.³²⁹ Mistakes when making these determinations, the court asserted, "may not be corrected until an

321. *See id.*

322. *See id.* at 1198–99.

323. *Id.* at 1199.

324. *Id.*

325. *Id.* at 1200 (cleaned up).

326. *Id.* at 1203.

327. *Id.*

328. *See, e.g., James R.D. v. Maria Z. (In re Parentage of Scarlett Z.-D.)*, 2014 IL App (2d) 120266-B, ¶¶ 41–42, 50, 11 N.E.3d 360, 373, 376–77; *Smith v. Gordon*, 968 A.2d 1, 14–15 (Del. 2009), *superseded by statute*, DEL. CODE ANN. tit. 13, § 8-201 (2013).

329. *Jones v. Barlow*, 2007 UT 20, ¶¶ 32, 34, 154 P.3d 808, 816–17 (citing *Van v. Zahorik*, 597 N.W.2d 15, 18 (Mich. 1999)).

appropriate case wends its way through the system and arrives before [the court] once again.”³³⁰

While state legislation providing such guidance is preferred, absent state legislation governing de facto parentage, state courts of last resort must be equipped to provide guidance to trial courts adjudicating de facto parentage petitions.³³¹ Many states have recognized de facto parentage through common law for many years before the state legislature has taken action to adopt a statute defining the rights of de facto parents.³³² Accordingly, while this Article acknowledges and agrees that the issue of whether to recognize de facto parents as legal parents is ideally addressed by state legislatures, in the interim, state courts can offer invaluable direction to drive consistent adjudication of de facto parentage.³³³ Moreover, the court’s role as *parens patriae* requires it to extend its equitable powers to protect the best interests of children in all pending court actions, even if the legislature has not directly addressed the issue.³³⁴

This Part proposes a procedural framework for courts to follow when adjudicating de facto parentage. This procedural framework is premised on this Article’s position that once de facto parentage is established, courts should treat de facto parents as legal parents. Recognizing de facto parents as parents best protects the interests of children and individuals who have developed close parent-child relationships and embraces the reality of the shifting role of individuals undertaking significant parental responsibilities with the consent of a legal parent.³³⁵

In other family law contexts, once an individual establishes parentage of a child, they have the ability to seek custody or visitation of the child so long as it is in the child’s best interests. Distinguishing de

330. *Id.* ¶ 36.

331. *See, e.g., Pitts v. Moore*, 2014 ME 59, ¶¶ 18–19, 90 A.3d 1169, 1177.

332. *See, e.g., id.* ¶ 18 (“Although we have been discussing de facto parenthood for almost thirteen years, there is currently no Maine statutory reference to de facto parenthood.” (footnote omitted)), *superseded by statute*, ME. STAT. tit. 19-A, § 1891 (2016).

333. *See Cheshire Med. Ctr. v. W.R. Grace & Co.*, 49 F.3d 26, 33 (1st Cir. 1995) (“Ordinarily issues of public policy are in the first instance appropriate for a legislature’s determination by statute and, if not determined by statute, may be determined by a state court of last resort in its decisions setting precedents.”).

334. *Conover v. Conover*, 146 A.3d 433, 452 (Md. 2016) (quoting *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 890 (Mass. 1999)); *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 424–25 (Wis. 1995) (“Nor did the legislature intend the . . . visitation statute to supplant or preempt the courts’ long standing equitable power to protect the best interest of a child by ordering visitation in circumstances not included in the statute.”).

335. *See Joslin & NeJaime, How Parenthood Functions*, *supra* note 13, at 415–16.

facto parentage has no basis in family law jurisprudence and runs contrary to the state's *parens patriae* interest of protecting the best interest of the child.³³⁶ Moreover, Professors Joslin and NeJaime's seminal empirical study found that recognition of functional parents generally can help preserve a child's existing home.³³⁷ Consider one illustrative example: A child is residing with and primarily raised by an individual who is not their biological or adoptive mother or father and not otherwise biologically related. This individual has cared for the child for many years, has assumed a parental role, and otherwise satisfies the requirements of de facto parentage. Absent recognition of de facto parents as parents, children like these may be removed from their stable homes and placed in foster care, and the de facto parent would not have any avenue to establish themselves as the child's parent.³³⁸

Further, treating de facto parents as legal parents comports with the realities of shifting parental roles. As previously discussed, in recent years, the parental role has shifted away from primarily being assumed by parents who are the biological or adoptive mother and father of their children.³³⁹ Today, only 62 percent of children live with two biological parents.³⁴⁰ Nine percent of children are raised by a stepparent.³⁴¹ 3.7 percent of children are primarily raised by a grandparent serving a parental role.³⁴² Individuals who meet the exacting requirements to establish de facto parentage should be entitled to the same rights as legal parents, particularly considering one of the requirements is that the legal parent "foster and support" or "consent" to the development of the de facto parent-child relationship.³⁴³

Based on the proposition that de facto parents should be treated as legal parents, the following proposed procedural framework seeks to minimize procedural barriers to both establishing standing to bring de facto parentage claims and establishing de facto parentage on the merits. The framework proceeds in two stages. First is the *standing stage*, wherein the court determines whether an individual has standing to bring a de facto parentage claim. Once the individual establishes they have

336. See *Conover*, 146 A.3d at 451–52.

337. See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 13, at 416.

338. See *id.*

339. See *supra* Section I.A.

340. Kasey J. Eickmeyer, *American Children's Family Structure: Two Biological Parent Families*, BOWLING GREEN ST. U.: NAT'L CTR. FOR FAM. & MARRIAGE RSCH. (2017), <https://doi.org/10.25035/ncfmr/fp-17-17>.

341. *Id.*

342. *Grandchildren Being Raised by Grandparents*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/wb/topics/grandparents-raising-grandkids> [<https://perma.cc/46VL-F5YS>] (last visited Oct. 21, 2025).

343. See UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM'N 2017); RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 (A.L.I. Tentative Draft No. 6, 2024).

standing, the second phase is the *adjudication phase*, wherein the court makes two determinations: (1) whether the individual prevails on the merits of establishing they are a de facto parent, and (2) any determinations regarding custody and allocation of responsibilities of the de facto parent.

A. The Standing Stage

To establish standing, states should only require the moving party to file an affidavit under penalty of perjury, appended to their initial complaint, attesting that they meet the elements of de facto parentage. This Section argues that imposing an evidentiary standard or rebuttable presumptions against standing unnecessarily limits the ability of de facto parents to establish de facto parentage and to protect their developed, parent-child relationship to the detriment of the child.

1. No Evidentiary Standard

The only evidentiary standard for courts analyzing de facto parentage claims should be in the actual adjudication of the claim, not at the standing stage. States generally do not impose an evidentiary standard to establish standing in family law or other areas of law, and one is not appropriate for establishing de facto parentage.³⁴⁴ Accordingly, states should decline to adopt the evidentiary standard for standing as set forth in the 2017 UPA.³⁴⁵ The previous case study of recent Washington court cases sets forth the confusion by courts in a state that has recognized de facto parentage for decades in trying to interpret the 2017 UPA as to standing.³⁴⁶ Imposing this additional evidentiary standard unduly introduces an unnecessary procedural hurdle for individuals seeking to establish themselves as de facto parents that not even third parties face in most jurisdictions.

2. No Rebuttable Presumptions Against Standing

State legislatures should not adopt statutory rebuttable presumptions because they impose unnecessary hurdles on establishing de facto parentage. As discussed in the previous cases, courts analyzing claims

344. See, e.g., TEX. FAM. CODE ANN. § 102.003 (West 2025); PA. CONS. STAT. § 5324 (2024) (providing standing to four classes of individuals: (1) a parent, (2) a person who stands *in loco parentis*, (3) a grandparent in certain circumstances, and (4) any individual who establishes certain criteria by clear and convincing evidence); *Virginia HH. v. Elijah II.*, 179 N.Y.S.3d 803, 805–06 (N.Y. App. Div. 2022).

345. See UNIF. PARENTAGE ACT § 609.

346. See *supra* Section II.A.1.

seeking to establish de facto parentage where there was prior history of domestic violence have considered evidence related to domestic violence without express statutory direction or presumptions.³⁴⁷ Necessitating a hearing on whether a rebuttable presumption is met is an unnecessarily burdensome step at the standing stage. Instead, courts should find that an affidavit appended to an initial complaint setting forth the elements of de facto parentage establishes a *prima facie* showing of the existence of standing.³⁴⁸ If the respondent objects, or if a court objects *sua sponte*, the burden would then shift back to the petitioner to prove standing.

Additionally, states should also follow the alternative statutory approach adopted in Connecticut, Rhode Island, and Vermont that imposes no barriers at the standing stage but rather encourages introduction of evidence at the adjudication stage.³⁴⁹ These states provide instead that a legal parent “may use evidence of duress, coercion[,] or threat of harm to contest” an element of de facto parentage, namely that “the [legal] parent fostered or supported a bonded and dependent relationship [between the alleged de facto parent and the child].”³⁵⁰ Evidence of domestic violence does not automatically preclude a finding of de facto parentage.³⁵¹ Rather, a court may use such evidence to help show that an individual does not meet the requisite elements of de facto parentage and, therefore, the individual is not a parent.³⁵²

B. The Adjudication Stage

Once the petitioner establishes they have standing to proceed on the de facto parent claim, the court shall hold an evidentiary hearing on the underlying verified petition and/or response.³⁵³ Based on prior empirical findings surveying case law concerning de facto parentage, most of these cases will likely be adjudicating a de facto parent’s rights against one legal parent.³⁵⁴ Otherwise, courts must defer to any statutes that limit adjudication of more than two parents for one child.³⁵⁵

347. See *supra* Section II.A.2.

348. See *Gray v. Varone*, 956 N.Y.S.2d 573, 574–75 (N.Y. App. Div. 2012).

349. See CONN. GEN. STAT. § 46b-490 (2024); 15 R.I. GEN. LAWS § 15-8.1-501(a)(1) (2025); VT. STAT. ANN. tit. 15C, § 501(a)(1) (2025).

350. CONN. GEN. STAT. § 46b-490(b) (2024); 15 R.I. GEN. LAWS § 15-8.1-501(a)(2) (2025); VT. STAT. ANN. tit. 15C, § 501(a)(2) (2025).

351. Joslin & NeJaime, *Domestic Violence and Functional Parent Doctrines*, *supra* note 240, at 83.

352. *Id.*

353. See, e.g., *W.N. v. S.M.*, 424 P.3d 483, 485 (Haw. 2018).

354. See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 13, at 366–67.

355. See, e.g., WASH. REV. CODE § 26.26A.460(3) (2025) (“The court may adjudicate a child to have more than two parents under this chapter if the court finds that failure to recognize more than two parents would be detrimental to the child.”).

Based on the potential harm to a child of having their relationship with a de facto parent severed for a significant period of time, courts should endeavor to hold a final evidentiary hearing on establishment of de facto parentage on an expedited basis. However, if this is not possible due to the court's docket size, the court should have the authority to enter temporary orders awarding the petitioner custody or visitation on a temporary basis without prejudice. Without temporary orders, by the time a case is adjudicated, there is a risk the petitioner will not see the child for so long that even if they establish they are a de facto parent, they could not prove it is in the best interests of the child for them to be awarded custody or visitation. Issuing a temporary order advances the idea that a petitioner is a legal parent and should be viewed as a legal parent, not a third-party stranger.

The court should make two separate determinations during the adjudication stage: (1) a determination of whether the petitioner prevails on the merits of their de facto parentage claim, and (2) a determination of the petitioner's custodial rights and any attendant responsibilities. This Section discusses the proposed procedural steps for courts to take in making these determinations and then concludes with a discussion of how a guardian *ad litem* may play a role in this stage.

1. Adjudicating the Merits of the De Facto Parentage Claim

A court first needs to determine whether an individual can prove their de facto parentage claim. This subsection discusses the proposed burden of proof for establishing de facto parentage, proposes adopting the factors test articulated in the 2024 Restatement, and clarifies that because de facto parents are parents, they are not subject to the additional procedural hurdles of overcoming a fit parent presumption and are not required to show harm prior to seeking custody against a legal parent.

a. Burden of Proof

Individuals should be required to prove they are a de facto parent by clear and convincing evidence.³⁵⁶ The higher evidentiary standard protects legal parents from unconstitutional intrusions on their fundamental liberty interests in the care, custody, and control of the child.³⁵⁷ A clear and convincing evidentiary standard most appropriately

356. See generally MINN. STAT. § 257C.03, subdiv. 6 (2024) (requiring proof of the elements of de facto parentage by clear and convincing evidence); S.C. CODE ANN. § 63-15-60 (2024) (requiring proof of the elements of de facto parentage by clear and convincing evidence).

357. See generally *Santosky v. Kramer*, 455 U.S. 745, 755–56 (1982) (holding a “preponderance of the evidence” standard was unconstitutional in termination of parental rights cases).

weighs the liberty interest of legal parents against a state's *parens patriae* interest in preserving and promoting the welfare of the child.³⁵⁸ That is, it affords deference to a parent's choice about their children unless their choice "is plainly contrary to a child's best interests."³⁵⁹ Requiring clear and convincing evidence mirrors the burden of proof required for third-party visitation claims.³⁶⁰ The Supreme Court of Minnesota articulated that "requiring the party seeking visitation to prove the requirements of [the third-party visitation statute] by clear and convincing evidence is necessary to protect against the risk of erroneously depriving a parent of his or her interest in the care, custody, and control of his or her children."³⁶¹ As with any other evidentiary hearing, evidence sufficient to meet this burden of proof in the de facto parentage context may be testimonial, expert, or documentary in nature.³⁶²

b. Factors Considered

Courts should adopt the factors articulated in the 2024 Restatement when adjudicating de facto parentage. Namely, a petitioner should be required to prove each of the following factors by clear and convincing evidence:

- (1) the [petitioner] lived with the child for a significant period of time;
- (2) the [petitioner] assumed significant obligations of parenthood without expectation of financial compensation;
- (3) the [petitioner] has been in a parental role for a length of time sufficient to have established a bond and dependent relationship with the child that is parental in nature; and
- (4) a parent consented to and fostered the formation of the parent-child relationship between the [petitioner] and the child.³⁶³

These factors substantially mirror the factors of the 2017 UPA, but exclude the requirement that "the individual held out the child as the individual's child" (the "holding out" requirement) and the requirement

358. See *id.* at 756, 766–67; *Thorndike v. Lisio*, 2017 ME 14, ¶ 17–19, 154 A.3d 624, 627; *Kulstad v. Maniaci*, 2009 MT 326, ¶¶ 28, 58, 220 P.3d 595, 600, 604; *David N. v. Jason N.*, 608 S.E.2d 751, 753 (N.C. 2005).

359. *Ross v. Bauman*, 353 P.3d 816, 825 (Alaska 2015) (emphasis omitted) (quoting *Evans v. McTaggart*, 88 P.3d 1078, 1089 (Alaska 2004)).

360. ALA. CODE § 30-3-4.2 (2025); OKLA. STAT. tit. 43, § 109.4 (2024); S.C. CODE ANN. § 63-3-530(A)(33); UTAH CODE ANN. § 81-9-402 (West 2025).

361. *SooHoo v. Johnson*, 731 N.W.2d 815, 824 (Minn. 2007).

362. See 143 AM. JUR. *Trials* 441, § 1, Westlaw (database updated Oct. 2025).

363. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62(a) (A.L.I. Tentative Draft No. 6, 2024).

that “continuing the relationship between the individual and the child is in the best interest of the child” (the “best interests” requirement).³⁶⁴ As previously discussed, the “holding out” requirement precludes certain individuals, including grandparents, siblings, or relatives, from establishing themselves as de facto parents if they do not hold the child out as “their child.”³⁶⁵ Critics may point to the fact that, in practice, the courts that have adopted a “holding out” requirement interpret it broadly, only requiring that they “[hold themselves] out to the public in a parental capacity as opposed to a caretaker.”³⁶⁶ However, this seemingly duplicates the analysis already required for Restatement factor three, which requires the relationship be “parental in nature,”³⁶⁷ rendering the additional factor unnecessary.

This Article joins the existing legal scholarship that argues against the use of the best interests requirement in the de facto parentage determination.³⁶⁸ Some courts that have analyzed the best interest requirement³⁶⁹ have confusingly extended this analysis beyond a “consideration of whether continuing a ‘parental’ relationship is in a child’s best interest; rather, it requires a broader consideration of the relationship between the person seeking de facto parentage and the child.”³⁷⁰ This, again, appears to largely duplicate the analysis already undertaken when analyzing the other de facto parentage factors.³⁷¹ Other courts analyzing best interests in de facto parentage make determinations based on the child’s immediate circumstances, leading to a misguided focus on temporary circumstances rather than the permanent nature of parenthood.³⁷² For example, in *In re Parentage of A.P.*,³⁷³ the Washington Court of Appeals found the best interest requirement weighed against the petitioner where the child was “in a good place *right now*,” the child expressed she did not want to have contact with the petitioner “*at this point in time*,” and was well settled in her home with

364. See UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM’N 2017).

365. See RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 cmt. b.

366. See *Walker v. Riley*, 498 P.3d 33, 34–35 (Wash. Ct. App. 2021).

367. RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62(a)(3).

368. See Akshat Agarwal, ‘New Parents’ and the Best Interests Principle, 35 YALE J.L. & FEMINISM 288, 338 (2024) (criticizing application of the best interests principle to parentage law).

369. See, e.g., CONN. GEN. STAT. § 46b-490(a)(7) (2024); 15 R.I. GEN. LAWS § 15-8.1-501(a)(1)(vii) (2025); VT. STAT. ANN. tit. 15C, § 501(a)(1)(G) (2025); WASH. REV. CODE § 26.26A.440(4)(g) (2025).

370. *Peralta v. Brannan*, 2020 VT 100, ¶ 42, 247 A.3d 509, 520 (quoting *Lanfear v. Ruggerio*, 2020 VT 84, ¶ 33, 254 A.3d 168, 177) (applying VT. STAT. ANN. tit. 15C, § 501(a)(1)(G) (2025)).

371. See Agarwal, *supra* note 368, at 326.

372. See *id.*

373. *Martin v. Martin (In re Parentage of A.P.)*, No. 82839-8-I, 2022 WL 2052985 (Wash. Ct. App. 2022).

her mother.³⁷⁴ These considerations are inappropriate for an initial determination of an individual's parentage and are better left for the court to consider later in the adjudicatory process when a court is determining custody or visitation rights of a de facto parent.

c. No Fit Parent Presumption or Requisite Showing of Harm Required

If an individual establishes the elements of de facto parentage by clear and convincing evidence, the court should find they are legal parents with all attendant rights, including the constitutional right to care, custody, and control of their children.³⁷⁵ Because de facto parents are legal parents, they would not have to overcome the fit parent presumption or show significant harm will occur.³⁷⁶ In terms of judicial procedure, this means as soon as a court finds petitioner has established they are a de facto parent, the court need only determine what allocation of custody and visitation between the de facto parent and any other legal parents would be in the best interests of a child. Courts should not draw arbitrary lines between allowing de facto parents to seek visitation, but not custody, without overcoming presumptions in favor of legal parents.

2. Determining Custodial Rights and Attendant Responsibilities

Once a court determines the petitioner has met the requisite elements of de facto parentage by clear and convincing evidence, it should, within the same evidentiary hearing or trial, hear evidence and make rulings on custody and allocation of responsibilities of the de facto parent.

a. Application of the Best Interests Standard in Determining Custody of a De Facto Parent

All fifty states have adopted a “best interests of the child” standard when adjudicating custody between two legal parents.³⁷⁷ States should apply the best interests of the child standard when adjudicating custody between a de facto parent and another parent in the same way they apply the standard in other child custody cases in their jurisdiction. The majority of states have adopted statutory factors that guide the court's analysis when applying the best interests of the child standard.³⁷⁸ The remaining states either adopt discretionary factors through common law

374. See *id.* at *4 (emphasis added).

375. See *supra* Section II.B.

376. See RESTATEMENT OF THE LAW: CHILDREN AND THE LAW § 1.62 cmt. a (A.L.I. Tentative Draft No. 6, 2024).

377. See Stephanie L. Tang, *Best Interests of the Child and the Expanding Family*, 14 U.C. IRVINE L. REV. 263, 281–82 (2024).

378. *Id.*

for courts to consider or determine the best interests of the child on a case-by-case basis.³⁷⁹ Broadly, this Article recognizes as valid the criticisms of the best interests legal standard generally, even in the context of custody disputes.³⁸⁰ Namely, that the consistency of the application of the standard varies drastically based on a number of factors, including (1) whether the state has adopted statutory best interests factors for courts to consider, (2) whether the state mandates that court consider those factors, and (3) whether the state requires specific findings of fact for each factor.³⁸¹ This Article does not attempt to tackle the imperfections of the underlying legal standard; rather, it seeks to advance more broadly that de facto parents should be subjected to an identical legal standard as parents when courts determine custody.

Adjudicating custody in the same manner as a court would between legal parents recognizes de facto parents in legal parity with legal parents for purposes of seeking custody. It is possible that under certain circumstances this will lead to allocation of custodial and decision-making responsibilities between more than two parents.³⁸² However, empirical research surveying case law regarding de facto parents indicates that the majority of cases involving de facto parents are not cases with more than two parents who act as primary caregivers of the children.³⁸³ Moreover, even where there is a multi-parent custody scenario, courts have still applied the same best interests standard in reaching a multi-parent custody arrangement.³⁸⁴

b. Allocating Responsibilities of De Facto Parents

De facto parents should have the same responsibilities as legal parents. Using child support as a paradigmatic example, courts should thus obligate de facto parents to pay child support as a legal parent.³⁸⁵ This is premised on the underlying policy that with parental rights should come the duties of financial support.³⁸⁶ An individual seeking to establish

379. *Id.* at 282.

380. *Id.* at 281–82; Janet L. Dolgin, *Why Has the Best Interest Standard Survived? The Historic and Social Context*, 16 CHILD.'S LEGAL RTS. J. 2, 8 (1996).

381. For a fifty-state survey of approaches to the best interests of the child standard, see Tang, *supra* note 377, at 304–11.

382. *See generally* Jessica Feinberg, *Multi-Parent Custody*, 108 MINN. L. REV. 1489 (2024) (surveying emerging multi-parent custody statutes).

383. *See* Joslin & NeJaime, *Multiparenthood*, *supra* note 19, at 1270 (finding only 13 percent of cases surveyed under statutory multi-parent provisions where “each of the three recognized or alleged parents acted as a primary caregiver of the child *at some point*”).

384. *See Dawn M. v. Michael M.*, 47 N.Y.S.3d 898, 902 (N.Y. Sup. Ct. 2017).

385. *See In re Parental Responsibilities of A.C.H.*, 2019 COA 43, ¶ 38, 440 P.3d 1266, 1272.

386. *See id.* ¶ 36.

themselves as a de facto parent affirmatively seeks adjudication as a parent of a child in a permanent capacity.³⁸⁷ Along with an order to pay child support, a court may also order a de facto parent to contribute to other child-related expenses, including but not limited to health insurance premiums, child care expenses, and other expenses not contemplated in the child support order.³⁸⁸

In the vast majority of cases where child support is being calculated between a de facto parent and a legal parent, a court should determine the amount of child support in accordance with the child support model adopted by the state. In situations where there are two legal parents whose rights have not been terminated in addition to the de facto parent, a child support order against a de facto parent should not automatically relieve a legal parent from their duty to support their child.³⁸⁹ Likewise, if a legal parent is ordered to pay child support, this should not relieve a de facto parent from being ordered to pay child support.³⁹⁰

In the rare tri-custodial case, the child support calculation may become more challenging if a state has not contemplated multi-parenthood in its child support formula.³⁹¹ State legislatures may consider expanding the existing child support model in contemplation of these potential scenarios, particularly where states consider parenting time as part of the child support calculation.³⁹² Alternatively, a court may opt to deviate from the child support guidelines amount in accordance with the child's financial needs.³⁹³

When drafting and passing a statute recognizing de facto parentage, state legislatures should consider the potential implications on existing related statutes, including child support. For example, say a state's child support statute and statute governing contribution to children's expenses only require "mothers" or "fathers" or even "parents" to contribute, but do not provide a definition of those terms.³⁹⁴ A court engaging in a strict reading of the plain language of the statutes may reach the same conclusion as the North Carolina Court of Appeals in *Green v. Carter*, wherein the court declined to extend child support liability to de facto

387. See *id.*

388. See *id.* ¶ 20.

389. See *id.* ¶ 36.

390. See *Moore v. McGillis*, 408 P.3d 1196, 1198 (Alaska 2018).

391. As of the date of this publication, the only state that contemplates multi-parenthood situations is California. See CAL. FAM. CODE § 4053 (West 2025).

392. See Tang, *supra* note 377, at 282.

393. See *id.* at 311.

394. See, e.g., N.C. GEN. STAT. § 50-13.4 (2024); OKLA. STAT. tit. 10, § 83(A) (2024) ("Both the mother of a child born out of wedlock and an individual who has been legally determined to be the father of a child by acknowledgment or by judicial or administrative order are each liable for the support and education of the child.").

parents.³⁹⁵ State legislatures should affirmatively amend existing statutory definitions to explicitly include de facto parents where they contemplate de facto parents may be held liable for the duties of a legal parent.³⁹⁶ For example, Michigan, New Jersey, and Wisconsin all adjudicate de facto parentage claims at common law and define “parent” for purposes of child support liability as limited to a natural or adoptive parent of a child.³⁹⁷ A court engaging in a narrow reading of these statutes, following the North Carolina Court of Appeals approach, may find a de facto parent does not fall under the categories of individuals who may be held liable for child support. However, such a reading would go against the underlying policy behind de facto parentage doctrines, intending to confer both rights and *responsibilities* of legal parents on individuals who establish themselves as de facto parents.³⁹⁸

3. Appointment of Guardian or Attorney *ad Litem*

Courts should consider appointing a guardian or attorney *ad litem* to represent the child’s best interests or, where appropriate, their direct wishes. The guardian or attorney *ad litem* can assist in interviewing the child about their relationship with the alleged de facto parent and provide information relevant to the elements of de facto parentage.³⁹⁹ As an example, in *In re Parentage of A.P.*, a Washington trial court relied upon the investigation and written report of a guardian *ad litem* that recommended against petitioner’s de facto parentage claim.⁴⁰⁰ The guardian *ad litem* found that the child’s biological mother had not supported the child’s relationship with the petitioner and that continuing the petitioner’s relationship with the child was not in the child’s best

395. 900 S.E.2d 108, 111 (N.C. Ct. App. 2024); *see supra* Section III.C (further discussing *Green v. Carter*); *see also* *Boseman v. Jarrell*, 704 S.E.2d 494, 500 (N.C. 2010) (“[C]ourts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” (quoting *In re D.L.H.*, 694 S.E.2d 753, 757 (N.C. 2010))).

396. *See generally In re Clayton-Marcus Co.*, 210 S.E.2d 199, 203 (N.C. 1974) (“Where, however, the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be.”).

397. *See* MICH. COMP. LAWS § 722.22(i) (2025); N.J. STAT. ANN. § 9:2-13(f) (West 2025); WIS. ADMIN. CODE DCF § 150.02(22) (2025).

398. *See supra* Section II.C.

399. *In re De Facto Parentage of: A.H.*, 536 P.3d 719, 730 (Wash. Ct. App. 2023) (remanding the case back to the trial court to consider on the record whether appointment of a guardian *ad litem* was necessary to adequately represent the child’s interests).

400. *See Martin v. Martin (In re Parentage of A.P.)*, No. 82839-8-I, 2022 WL 2052985, at *2 (Wash. Ct. App. 2022).

interests.⁴⁰¹ In a related context, in *Slaughter v. Black*,⁴⁰² a Minnesota trial court relied heavily on the appointed guardian *ad litem*'s input and testimony when determining custody and parenting time of a de facto custodian.⁴⁰³ Alternatively, a court may consider conducting an in-camera interview with a child to discuss the elements relevant to de facto parentage.⁴⁰⁴

IV. CONCLUSION

Within jurisdictions that recognize de facto parentage, there are a whole host of unanswered questions about how to build the infrastructure for adjudication. Those questions have serious consequences for the status of de facto parents that no other legal scholar has explored in depth. The way these questions are answered is animated not only by our understandings of what process should look like for de facto parents, but also by what kinds of burdens should be placed on this group of litigants.

Justice Kennedy first acknowledged that de facto parents may be entitled to different treatment under the law compared to third parties in his *Troxel v. Granville* dissent back in 2000.⁴⁰⁵ Over the past twenty-five years since the Supreme Court decided *Troxel*, more than two-thirds of states have recognized rights of de facto parents.⁴⁰⁶ In multiple instances, states first adopted the de facto parentage doctrine for several years, even decades, at common law before state legislatures passed a de facto parentage statute.⁴⁰⁷ Given the recent influx of these claims, it is imperative that courts are mindful of the impact their procedural decisions have on the ability for individuals to establish de facto parentage. Imposing additional procedural hurdles at the standing and adjudication stages has significant implications on whether de facto parents are considered parents. Each of these hurdles potentially serves as an avenue to throw out the valid claims of de facto parents.

401. See *id.* at *4; see also *In re Dependency of C.R.O'F.*, 493 P.3d 1235, 1237–38, 1240 (Wash. Ct. App. 2021) (describing a court's use of a guardian *ad litem* in a de facto parentage proceeding); *Dean v. Burnette*, No. 2013–CA–00139–ME, 2014 WL 356600, at *2–3 (Ky. Ct. App. 2014) (same); *Stitt v. Daugherty (In re C.D.)*, No. 11 HA 5, 2012 WL 4478448, at *7–8 (Ohio Ct. App. 2012) (same).

402. No. A14–0348, 2014 WL 6863207 (Minn. Ct. App. 2014).

403. See *id.* at *3–4.

404. See *In re C.D.*, 2012 WL 4478448, at *7.

405. 530 U.S. 57, 98–101 (2000) (Kennedy, J., dissenting).

406. See Joslin & NeJaime, *How Parenthood Functions*, *supra* note 13, at 323.

407. See, e.g., *Carvin v. Britain (In re Parentage of L.B.)*, 122 P.3d 161, 165 (Wash. 2005) (first recognizing de facto parentage at common law); WASH. REV. CODE § 26.26A.440 (2025) (Washington statute passed in 2019 with statutory avenue for adjudicating claim of de facto parentage).

This Article advances an updated review of recent judicial approaches to adjudication of de facto parentage to demonstrate the need for careful consideration on the parts of both state courts and legislatures when crafting court procedures. In providing recommendations at both the standing and adjudication stages, this Article streamlines these procedures and minimizes the hurdles facing de facto parents seeking to protect their bonded parent-child relationship. Addressing these procedural questions fills a gap in the current legal discourse surrounding de facto parentage in hopes of encouraging courts and legislatures to be mindful of how procedures are shaped—as the procedures not only impact the rights and responsibilities of de facto parents but the rights of children as well.

* * *