HOW PARENTHOOD FUNCTIONS

Courtney G. Joslin & Douglas NeJaime***

Approximately two-thirds of states have functional parent doctrines, which enable courts to extend parental rights based on the conduct of forming a parental relationship with a child. Different jurisdictions use different names—including de facto parentage, in loco parentis, psychological parenthood, or presumed parentage—and the doctrines arise from different sources of authority—common law, equitable, and statutory. While much has been written about functional parent doctrines, relatively little is known about how they work in practice.

This Article fills that gap by documenting how functional parent doctrines operate, examining when, how, and to whom courts apply them. We collected and coded every electronically available functional parent decision issued between 1980 and 2021—669 cases in all—from every jurisdiction that has a functional parent doctrine.

Our study reveals that common assumptions about functional parent doctrines fail to reflect the contexts in which such claims arise, the individuals who assert such claims, and the roles that the parties played in the children's lives. Among cases in our data set, relatives, and grandparents in particular, constitute a large share of the functional parents. In the overwhelming majority of cases, the functional parent has been the child's primary caregiver. And courts routinely apply functional

* Martin Luther King Jr. Professor of Law, U.C. Davis School of Law.

** Anne Urowsky Professor of Law, Yale Law School. For helpful comments, we thank Bruce Ackerman, Muneer Ahmad, Albertina Antognini, Barbara Atwood, Kathy Baker, Brian Bix, Courtney Cahill, June Carbone, Mary Anne Case, Jessica Clarke, Polly Crozier, Anne Dailey, David Emer, Bill Eskridge, Dov Fox, Cynthia Godsoe, Miriam Gohara, Michele Goodwin, Josh Gupta-Kagan, Jill Hasday, Susan Hazeldean, Clare Huntington, Christine Jolls, Amy Kapczynski, Elizabeth Katz, Al Klevorick, Issa Kohler-Hausmann, Katie Kraschel, Solangel Maldonado, Linda McClain, Robert Post, Rachel Rebouché, Judith Resnik, Aníbal Rosario Lebrón, Naomi Schoenbaum, Reva Siegel, Gregg Strauss, Jim Whitman, Andrew Woods, and Mary Ziegler. We also thank participants at the 2022 AALS Meeting, Family and Juvenile Law Section, 2022 Baby Markets Roundtable at the University of Pennsylvania, Children's Rights Roundtable at the University of Connecticut School of Law, 2022 Family Law Scholars and Teachers Conference at Temple Law School, 2022 Annual Meeting of the Law & Society Association, LGBTQ Rights Roundtable at Vanderbilt Law School, Workshop on Regulation of Family, Sex, and Gender at the University of Chicago Law School, Reproductive Rights/Reproductive Justice Roundtable, and faculty workshops at George Washington University Law School, University of Arizona James E. Rogers College of Law, and Yale Law School. For their outstanding work on this large research project, we thank Alex Johnson and Sonia Qin. For excellent research assistance, we thank Lyle Cherneff, Grace Choi, Ellie Driscoll, Clare Elizondo, Leah Fessler, Margaret House, Susannah Howe, Jim Huang, Charlie Jiang, Joe Landman, Colette Le Brannan, Rosalyn Leban, Michael Loedel, Scott Lowder, Bo Malin-Mayor, Caroline Markowitz, Jake Mazeitis, K.N. McCleary, Thomas Ritz, Grace Sullivan, and Molly Teague.

parent doctrines to protect children's relationships with the person who is parenting them. In sum, we find that courts commonly apply the doctrines in ways that make children's lives more stable and secure by protecting their relationships with their primary caregivers and preserving their home placements.

INTRODUCTION

Ronda and her newborn daughter, Brittanae, lived with Ronetta, Ronda's mother and Brittanae's grandmother, until Ronda died when Brittanae was nineteen months old.[1] After her mother's death, Brittanae remained with her grandmother.[2] Almost a decade later, Brittanae's father, Adrian, sought custody of her.[3] Adrian testified that during that decade, he had contacted Brittanae by phone or in person at least monthly.[4] At the time of trial, Brittanae was thirteen.[5] She testified that she lived with Ronetta, whom she called "mom" her entire life, and wanted to remain with her.[6] Indeed, she testified that "it would be extremely stressful or unbearable to move in with Adrian."[7] The trial court found that Ronetta stood in loco parentis—"a person who has fully put himself or herself in the situation of a lawful parent by assuming all the obligations incident to the parental relationship and who actually discharges those obligations."[8] Having reached that conclusion, the Nebraska courts further determined that "Ronetta's continued custody is clearly in Brittanae's best interests."[9]

Karina had a child with Jose.[10] When the child was eighteen months old, Karina began living with Gabriel.[11] Around that time, Jose moved halfway across the country.[12] After moving, Jose was "largely absent" from the child's life.[13] "[A]lthough he engaged in periodic phone calls every three to four months," he visited the child only once during the four years from 2012 to 2016.[14] During this same period, Karina and Gabriel lived together as a family. Gabriel was the "only father [the child] knew"; the child considered Gabriel her father and called him "dad."[15] Karina and Gabriel became engaged, but, before they could marry, Karina was murdered.[16] The child was five at the time.[17] Both Gabriel and Jose sought

---

1. State ex rel. Combs v. O'Neal, 662 N.W.2d 231, 233–34 (Neb. Ct. App. 2003).
2. Id.
3. Id.
4. Id. at 234.
5. Id.
6. Id.
7. Id. at 235.
8. Id. at 236–37.
9. Id. at 237.
10. In re Custody of S.A.-M., 489 P.3d 259, 261 (Wash. Ct. App. 2021).
11. Id.
12. See id. (noting that Jose moved to Oklahoma from Washington, where Karina remained).
13. Id. at 262.
14. Id.
15. Id.
16. Id.
17. See id. at 261.

custody.[18] After the trial court began transitioning custody to Jose, the child's "grades in school fell, and her mental health deteriorated."[19] Eventually, the Washington courts recognized Gabriel as the child's de facto parent and awarded him primary custody.[20]

When L.M. was born, his biological mother, who had a substance use disorder, asked another woman, M.W., to "take and raise" him.[21] The biological mother "had no contact with M.W. or [L.M.]" for several years.[22] M.W. "was his sole caretaker, and provided for all his needs."[23] M.W. "enrolled [L.M.] in school and took him to medical appointments, representing herself as his mother."[24] Teachers and the parents of other children "all knew M.W. as [L.M.'s] mother, as did the members of M.W.'s church."[25] When he was six, L.M. found out that M.W. was not his biological mother. This fact came to light when the state initiated abuse and neglect proceedings against his biological mother based in part on "the fact that [she] had not cared for the minor since his birth nor was she able to adequately do so."[26] The California courts recognized M.W. as L.M.'s presumed parent because she "held the minor out as her own."[27] As a result, L.M. was able to remain living with the person who had parented him his entire life, rather than being placed in the state's custody.[28]

In the first case, Nebraska's functional parent doctrine—in loco parentis—allowed the court to recognize the parent–child bond that existed between Ronetta and Brittanae, despite their lack of a biological or adoptive parent–child relationship.[29] In the absence of this doctrine, Brittanae likely would have been removed from the only home she had ever known and placed with a man who had "not assume[d] the obligations incident to being a parent," even though he "knew that he was Brittanae's father."[30] The other route for protection—the state's grandparent visitation statute—authorizes only an award of *visitation*, not custody.[31]

---

18. Id. at 262.

19. Id.

20. Id. at 267.

21. See In re L.M., No. C072731, 2014 WL 5841572, at *1 (Cal. Ct. App. Nov. 12, 2014).

22. Id.

23. Id. at *4.

24. Id.

25. Id.

26. Id. at *3.

27. Id. at *4.

28. Id. at *8 (noting that the state could not claim jurisdiction over L.M. since there were "no allegations . . . that the minor was at risk in M.W.'s care").

29. See State ex rel. Combs v. O'Neal, 662 N.W.2d 231, 234 (Neb. Ct. App. 2003).

30. Id. at 237.

31. See Neb. Rev. Stat. § 43-1802(1) (2016) (providing that "[a] grandparent may seek visitation with his or her minor grandchild if," among other conditions, the child's parents are deceased).

In the second case, Gabriel amended his original complaint to include a claim under Washington's newly enacted de facto parent statute.[32] Because, under Washington law, a de facto parent "stands in legal parity with an otherwise legal parent,"[33] the custody dispute turned on the child's best interest. Accordingly, the court ruled based on the "strength, nature, and stability" of the parent–child relationship that existed in fact.[34]

In the third case, California's functional parent doctrine—a presumption of parentage based on "receiv[ing] the child into [one's] home" and "hold[ing] the child out as [one's] own"—allowed the court to avoid "tear[ing] from the minor the only parent he has ever known."[35] In fact, if M.W.'s parentage petition had been denied, the state likely would have taken custody of L.M., given evidence demonstrating that the biological mother was unable to care for the child.[36]

Today, approximately two-thirds of the states have a functional parent doctrine.[37] Different jurisdictions capture functional parenthood through different doctrines. These doctrines include ones scholars have long addressed—such as de facto parentage, psychological parenthood, in loco parentis, and the "holding out" presumption of parentage.[38] They also include doctrines that have received relatively little attention—such as de facto custodian and equitable caregiver statutes and a presumption based on "notoriously" recognizing parentage.[39] These doctrines arise from different sources of authority across jurisdictions—common law, equitable, and statutory.[40] In some jurisdictions, like Nebraska, the doctrines are judicial creations; in others, like California, they are codified.[41] And some states, like Washington, have multiple doctrines.[42] These doctrines yield different rights and obligations across jurisdictions, with some granting full legal parentage and others extending only limited parental rights.[43]

In recent years, functional parent doctrines—at least the more familiar types—have garnered significant attention from scholars, judges,

---

32. In re Custody of S.A.-M., 489 P.3d 259, 263 (Wash. Ct. App. 2021). Prior to the enactment of the statute, Washington applied a common law de facto parent doctrine. See Carvin v. Britain (In re Parentage of L.B.), 122 P.3d 161, 163 (Wash. 2005) (holding that "Washington's common law recognizes the status of *de facto* parents").

33. *In re Custody of S.A.-M.*, 489 P.3d at 265 (quoting *In re Parentage of L.B.*, 122 P.3d at 177).

34. Id. at 266 (quoting Wash. Rev. Code Ann. § 26.09.187(3)(a) (West 2022)).

35. In re L.M., No. C072731, 2014 WL 5841572, at *3, *6 (Cal. Ct. App. Nov. 12, 2014).

36. Id. at *8.

37. We identify thirty-four such jurisdictions. See infra Part II. Appendix A identifies the various functional parent doctrines in the jurisdictions we include.

38. See infra Part II.

39. See infra Part II.

40. See infra Part II.

41. See infra Part II.

42. See infra Part II.

43. See infra notes 132–144 and accompanying text.

lawmakers, advocates, and the media.[44] Yet, cases like the ones from Nebraska, Washington, and California discussed above are rarely part of the conversation. Instead, commentary tends to make assumptions about how the doctrines operate without a solid empirical basis.[45] For all that is written about functional parent doctrines, relatively little is known about how these doctrines work in practice. In what kinds of cases do functional parent claims arise? Who are functional parents in these cases, and what is their relationship to the legal parents and to the child? What role do the functional parents serve in the child's life? Answering these questions and others can provide important insights with which to evaluate, design, and refine functional parent doctrines.

This Article documents how functional parent doctrines operate in practice, examining when, how, and to whom they apply. It does so by providing an empirical account of functional parent case law. We have collected and coded all electronically available judicial decisions from 1980 to 2021 in every U.S. jurisdiction that has what we categorize as a functional parent doctrine.[46] By this we mean a doctrine that extends parental rights to an individual based on the conduct of forming a parental

---

44. With regard to legal scholarship, a Westlaw search in "Law Reviews & Journals" for ["de facto parent!" & da(aft 01/01/2010)] turns up 588 articles as of February 26, 2023. A few of the hundreds of articles in this long list include the following: Libby Adler, Inconceivable: Status, Contract, and the Search for a Legal Basis for Gay & Lesbian Parenthood, 123 Penn St. L. Rev. 1 (2018); Katharine K. Baker, Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents, 92 Chi.-Kent L. Rev. 135 (2017) [hereinafter Baker, Quacking]; Courtney Megan Cahill, Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life, 54 Ariz. L. Rev. 43 (2012); William N. Eskridge Jr., Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules, 100 Geo. L.J. 1881 (2012); 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 (2017); Susan Hazeldean, Illegitimate Parents, 55 U.C. Davis L. Rev. 1583 (2022); Michael J. Higdon, The Quasi-Parent Conundrum, 90 U. Colo. L. Rev. 941 (2019); Clare Huntington & Elizabeth S. Scott, Conceptualizing Legal Childhood in the Twenty-First Century, 118 Mich. L. Rev. 1371 (2020); Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, Between Function and Form: Towards a Differentiated Model of Functional Parenthood, 20 Geo. Mason L. Rev. 419 (2013); Gregg Strauss, What Role Remains for De Facto Parenthood?, 46 Fla. St. U. L. Rev. 909 (2019).

45. See infra Part IV.

46. We used Westlaw to collect cases. While we undertook some investigation to ensure that Westlaw and Lexis searches turned up the same cases, it could very well be that comprehensive searches of other databases, including Lexis, would produce additional decisions. At least with respect to federal appellate decisions, recent work has shown that for some federal courts of appeals, Lexis and Bloomberg contain more decisions than Westlaw, whereas for other federal courts of appeals, Westlaw contains more decisions than Lexis and Bloomberg. See Merritt E. McAlister, Missing Decisions, 169 U. Pa. L. Rev. 1101, 1126 (2021) (comparing the number of merits decisions self-reported by the twelve courts of appeals with the numbers of circuit court opinions found on Westlaw, Lexis, and Bloomberg).

relationship with the child and parenting the child.[47] Our data set includes doctrines in thirty-two jurisdictions. Functional parent doctrines now exist in thirty-four jurisdictions, but the statutes in Georgia and Connecticut took effect in 2019 and 2022, respectively, and yielded no electronically available cases during the period we studied.[48]

In total, our data set includes 669 decisions.[49] It includes cases decided under judicially created doctrines, like in loco parentis and psychological parenthood, as well as codified provisions, such as the "holding out" presumption and de facto custodian.[50] It includes doctrines that treat functional parents as legal parents, as well as those that grant functional parents only some parental rights, such as standing to seek custody.[51] Some jurisdictions have more than one relevant doctrine.[52] Where this is the case, all of the relevant doctrines are included in the data set.

Although, like all empirical studies, our study has limitations, it nonetheless provides a clear-eyed and thorough assessment of functional parent doctrines and how they operate in litigation. In the overwhelming majority of cases in the data set, the functional parent appears to have been the child's primary caregiver.[53] In many cases in our study, the functional parent is the only person who has consistently cared for the child.[54] Seeking to avoid disruption of this parent–child relationship, courts in our study routinely apply functional parent doctrines to protect children's relationships with the person who is in fact parenting them.

The account this Article offers looks different than the picture presented in contemporary commentary.[55] Scholars and advocates typically assume a paradigmatic claimant in functional parenthood cases: the

---

47. In Part I, we describe the universe of functional parent doctrines and explain why we generally exclude third-party custody statutes and doctrines that turn on an individual's status (e.g., a grandparent or stepparent).

48. See Ga. Code Ann. § 19-7-3.1 (2022) (providing for "equitable caregiver" status and noting that statutory scheme was enacted in 2019); Pub. Act No. 21-15 (Conn. 2022), https://www.cga.ct.gov/2021/act/pa/pdf/2021PA-00015-R00HB-06321-PA.pdf [https://perma.cc/7H85-9R3G].

49. As explained infra in Part II, all but twenty-eight decisions in our data set are appellate decisions. See infra note 178 and accompanying text.

50. See infra notes 78–95 and accompanying text.

51. See infra notes 183–187 and accompanying text.

52. See infra note 182 and accompanying text.

53. We use the term "functional parent" to include all claimants under functional parent doctrines, even though the status of the person as a functional parent is what the court is being asked to determine. In other words, "functional parent" as used in this Article's discussion of the empirical study includes persons *alleged* to be functional parents in these cases, even if the court ultimately determines that the person does not meet the legal standard to be a functional parent.

54. See infra section III.B; see also Courtney G. Joslin & Douglas NeJaime, Multi-Parent Families: Real and Imagined, 90 Fordham L. Rev. 2561, 2579–85 (2022) (describing such cases based on our West Virginia data set) [hereinafter Joslin & NeJaime, Multi-Parent Families].

55. See infra Part IV.

nonbiological parent in a same-sex couple. On this view, the doctrines' primary beneficiaries are LGBTQ parents who had been excluded from protections under discriminatory parentage rules.[56] Commentators also typically imagine a paradigmatic context—post-dissolution custody disputes—in which functional parent claims arise.[57] In this vision, the doctrines primarily arise when a former intimate partner who had cared for the child alongside the legal parent seeks custody or visitation over the legal parent's objection.[58] It is assumed that, but for the functional parent's claim, the state would otherwise not be involved in the lives of the legal parent or child.[59] Because bitter custody disputes are not good for children, scholars and advocates worry that functional parent doctrines will create or exacerbate conflict and instability in children's lives.[60]

These assumptions about who functional parent claimants are, how their claims arise, and what effects the claims have on children support normative arguments against using function as a basis for assigning parental rights and responsibilities. Based on these assumptions, critics claim that the doctrines are unnecessary, intrusive, unwieldy, unpredictable, and

---

56. See, e.g., Baker, Quacking, supra note 44, at 135 (describing "[t]he typical functional parent doctrine claim in the same-sex parent context").

57. See, e.g., id. at 165–68 (discussing "[c]ontested custody disputes" to critique functional parent doctrines and asserting that "[h]igh conflict legal disputes between parents are notoriously bad for children").

58. See Brian Bix, Against Functional Approaches, Jotwell (Jan. 12, 2022), https://family.jotwell.com/against-functional-approaches/ [https://perma.cc/Z2U2-XAV2] ("[O]ften one member of a couple is resisting the claim . . . , and the resisting partner will not want the claim recognized and will almost certainly not want the intrusiveness of the inquiry." (emphasis omitted)).

59. See Laufer-Ukeles & Blecher-Prigat, supra note 44, at 461 (writing supportively of functional doctrines while observing that "functional parenthood makes formal parents uneasy about state interference with the parent–child relationship").

60. See Katharine K. Baker, Equality and Family Autonomy, 24 U. Pa. J. Const. L. 412, 443, 465 (2022) [hereinafter Baker, Equality] (noting that "[w]hen the judicial system inserts itself into parental decision-making[,] . . . the results are at best ineffective and at worst catastrophic for children, parents, and the polity"). This observation also relates to the concern that, without biological connection and formal ties anchoring parenthood, the number of parents for any one child is without limit. See, e.g., Jacqueline V. Gaines, The Legal Quicksand 2+ Parents: The Need for a National Definition of a Legal Parent, 46 U. Dayton L. Rev. 105, 121–22 (2021) ("The legal recognition of more than two parents . . . further stretches the child's time between multiple households. As a result, there will be potentially three or more houses that the child is shuttled to and from." (footnote omitted)); Elizabeth A. Pfenson, Too Many Cooks in the Kitchen?: The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California's Recently-Proposed Multiple-Parents Bill, 88 Notre Dame L. Rev. 2023, 2060 (2013) ("Children may be more harmed than benefited by maintaining relationships with multiple adults because a child can only be emotionally dependent on a limited number of people."). We respond to these arguments in another article. See Joslin & NeJaime, Multi-Parent Families, supra note 54, at 2582–85 (describing multi-parent cases based on our West Virginia data); see also Courtney G. Joslin & Douglas NeJaime, The Next Normal: States Will Recognize Multiparent Families, Wash. Post (Jan. 28, 2022), https://www.washingtonpost.com/outlook/2022/01/28/next-normal-family-law/ (on file with the *Columbia Law Review*) [hereinafter Joslin & NeJaime, The Next Normal].

wrongheaded.[61] Although framed as normative objections, these diverse criticisms rest on empirical claims or assumptions about what the doctrines do or what they will do if adopted.[62]

At times, empirical claims about functional parent doctrines are made without citation to significant evidentiary support—as though the doctrines are novel and thus that we do not, and could not, know how they apply.[63] Even when sources are cited, commentators tend to rely on a handful of cases without providing grounds for concluding that those cases are representative.[64] Ultimately, the burgeoning debate over functional parent doctrines operates largely at the level of speculation or unsupported generalization.

This need not be the case. Functional parent doctrines have long existed, offering ample evidence to collect and examine.[65] This Article develops a more thorough, detailed, and accurate account of functional parent doctrines in action. It also provides data with which to assess the empirical assumptions that pervade accounts of functional parent doctrines. Rather than LGBTQ parents representing the dominant class of claimants, relatives constitute the largest share of functional parents in the data set. Rather than post-dissolution custody disputes overwhelmingly predominating, the data set includes a range of scenarios that give rise to functional parent claims, including cases involving parental death and child welfare intervention. Rather than finding that courts use functional parent doctrines in ways that disrupt and unsettle children's lives, our study finds that courts typically apply the doctrines in ways that secure children's relationships with the individuals who are in fact parenting them. In a large swath of cases in the data set, protection of the functional parent–child relationship does not fundamentally alter the existing dynamic between the biological or legal parent and the child.[66] Instead,

---

61. See infra Part II.

62. See infra Part II.

63. See, e.g., Robin Fretwell Wilson, Undeserved Trust: Reflections on the ALI's Treatment of De Facto Parents, *in* Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution 90, 100 (Robin Fretwell Wilson ed., 2006) [hereinafter Wilson, Undeserved Trust] ("[O]ne can easily imagine that the rights the ALI seeks to confer on Ex Live-In Partners could be exploited not as an opportunity to stay in the children's lives, but as an opportunity to control a child or her mother.").

64. See, e.g., Baker, Quacking, supra note 44, at 145–59 (drawing primarily on cases involving same-sex couples).

65. Our study begins in 1980, but some of the doctrines predate that starting point. See, e.g., Spells v. Spells, 378 A.2d 879, 882 (Pa. Super. Ct. 1977) (explaining the state's in loco parentis doctrine and observing that a "stepfather who lives with his spouse and her natural children may assume the status 'in loco parentis'"); D'Auria v. Liposky, 177 A.2d 133, 137 (Pa. Super. Ct. 1962) (remanding for new trial to determine whether longtime foster parents stood in loco parentis).

66. In this Article, the term "legal parent" generally describes a parent of the child other than the functional parent. Three caveats: First, in most cases, the legal parent is also the biological parent, and so at various points, and in reference to specific cases or scenarios,

courts in our study routinely apply the doctrine in ways that preserve the child's existing living arrangement with the person who is serving as their primary caregiver.[67] In short, evidence from our study does not lend significant support to the assumptions on which skepticism of functional parent doctrines often rests.[68]

Not only do our data not support the empirical assumptions that undergird normative objections to functional parent doctrines, but our data lend support to arguments in favor of functional parent doctrines on child-centered grounds.[69] Our study shows how the doctrines are applied by courts to preserve relationships between children and their primary caregivers.[70] In doing so, judicial application of the doctrines routinely makes children's lives more stable and secure, not less.[71] Ultimately, this Article's examination of how functional parent doctrines operate on the ground can reorient the normative debate over these doctrines in both academic and lawmaking domains.

This Article proceeds in five Parts. Part I describes existing functional parent doctrines, offering a more comprehensive and accurate account than currently exists. This Part shows that functional parent doctrines are more widespread than commonly understood and that they are not a red-state or a blue-state phenomenon. Instead, they appear in two-thirds of U.S. jurisdictions—jurisdictions that are politically and geographically diverse. Part II describes the empirical study, explains key limitations, and reports some general findings. Because the data set includes only electronically available decisions, we do not make claims about the universe of litigated functional parent cases or about the role of functional parent doctrines in disputes that never reach court. Instead, we report

---

we use the term "biological parent." But we do not mean to suggest that all biological parents are legal parents, or vice versa. To the contrary, some legal parents are not biological parents, and some biological parents are not legal parents. Second, if a court adjudicates a person to be a functional parent, in some jurisdictions, as we describe in Part I, that person would also be a legal parent. Third, in a few cases, a biological parent is seeking to be adjudicated a functional parent. These cases typically involve either a biological parent whose parental rights had been terminated but who continued to have a relationship with the child, or a person who was a gamete donor and thus could not establish parentage based on a biological connection.

67. See infra section III.D.

68. See infra Parts III–IV.

69. See infra Part V. Scholars have traditionally invoked children's interests as the justification for functional parent doctrines. See, e.g., Joseph Goldstein, Anna Freud & Albert J. Solnit, Beyond the Best Interests of the Child 27 (1973) ("Where legal recognition is withheld from [the psychological parent–child relationship] and the child removed, the forcible interruption of the relationship . . . is reacted to by the child with emotional distress and a setback of ongoing development."); Martha Minow, Redefining Families: Who's In and Who's Out?, 62 Colo. L. Rev. 269, 284 (1991) (defending "the functional test as a way of achieving the child's interests").

70. See infra Part V.

71. See infra Part V.

findings regarding the available decisions. Part III focuses on specific aspects of the data, examining the identities of functional parents, the roles that functional parents play in children's lives, the contexts in which functional parent claims arise, and how courts adjudicate functional parent claims. Part IV draws on our empirical study to evaluate some of the concerns that scholars, judges, and advocates have raised about functional parent claims. This Part shows that our data do not offer significant support for many of these concerns. Finally, Part V explains how our empirical analysis lends support to functional parent doctrines on child-centered grounds.

The insights offered by this Article come at a particularly critical moment. Families that include nonbiological, nonadoptive, and nonmarital parent–child relationships have long been a feature of American households.[72] Contemporary circumstances, however, amplify the significance of these relationships. A number of demographic trends—including increasing rates of nonmarital child-rearing and cohabitation—have resulted in greater numbers of children being raised by individuals other than their biological parents.[73] In addition, a range of different forces—from the opioid epidemic to the COVID-19 pandemic—have resulted in relatives, including grandparents, taking on caregiving roles at increasing rates.[74] In light of these developments, understanding how functional parent doctrines operate in practice is especially pressing.

I. FUNCTIONAL PARENT DOCTRINES

This Part canvasses a range of doctrines that we categorize as functional parent doctrines and distinguishes functional parent doctrines from other related but distinct doctrines. Functional parent doctrines extend parental rights and obligations to a person based on their conduct

---

72. For example, from the 1870s to 1940s, between 7% and 10% of American children lived in multigenerational households. Natasha V. Pilkauskas, Mariana Amorim & Rachel E. Dunifon, Historical Trends in Children Living in Multigenerational Households in the United States: 1870–2018, 57 Demography 2269, 2277 (2020).

Anthropologists, as well as researchers in other disciplines, have long observed "alloparenting" in human populations—"caretaking from individuals other than an offspring's mother." J.S. Martin, E.J. Ringen, P. Duda & A.V. Jaeggi, Harsh Environments Promote Alloparental Care Across Human Societies, 287 Proc. Royal Soc'y B 1, 1 (2020) ("Alloparental care is central to human life history, which integrates exceptionally short interbirth intervals and large birth size with an extended period of juvenile dependency and increased longevity."); see also James K. Rilling, The Neural and Hormonal Bases of Human Parental Care, 51 Neuropsychologia 731, 732 (2013) ("Humans are an alloparental species, meaning that although mothers are usually the primary caregiver, they typically receive help from fathers, grandmothers, sisters, brothers, older children, etc." (citation omitted)).

73. Pilkauskas et al., supra note 72, at 2272.

74. See Christina J. Cross, Extended Family Households Among Children in the United States: Differences by Race/Ethnicity and Socio-Economic Status, 72 Population Stud. 235, 247 (2018) ("[O]ver one in three youth spend some time in an extended family before age 18.").

of having parented the child and, as a result, formed a parent–child bond. In other words, a person is a functional parent under these doctrines when they have been functioning as a *parent*.[75]

As this Part shows, a broad array of doctrines—some relatively familiar, others more obscure—recognize functional parents. Typically, scholarship on the topic addresses only some of the doctrines that we treat as functional parent doctrines.[76] The discussion that follows, along with Appendix A,[77] supplies a more comprehensive account of the diverse array of functional parent doctrines than currently exists in the literature.

A. *The Range of Functional Parent Doctrines*

The most cited doctrines come under the rubric of common law or equitable concepts, such as de facto parent, psychological parent, in loco parentis, equitable parent, and parent by estoppel. Maryland's de facto parent standard illustrates this approach. The person seeking to be adjudicated a de facto parent must show:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child;
>
> (2) that the petitioner and the child lived together in the same household;
>
> (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and
>
> (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[78]

---

75. For example, the most commonly used equitable doctrine requires, among other things, that the person demonstrate they "form[ed] . . . a parent-like relationship with the child" and took on "significant responsibility for the child[] . . . without expectation of financial compensation." Holtzman v. Knott (In re Custody of H.S.H.-K.), 533 N.W.2d 419, 435–36 (Wis. 1995). Similarly, under codified de facto parent doctrines in a number of states, among other things, the person must demonstrate that they: "undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation," "held out the child as the individual's child," and "established a bonded and dependent relationship with the child which is parental in nature." Unif. Parentage Act § 609(d)(3)–(5) (Unif. L. Comm'n 2017).

76. See, e.g., Baker, Equality, supra note 60, at 451–58 (discussing equitable doctrines and the "holding out" presumption); Gaines, supra note 60, at 127–28 (discussing equitable doctrines and statutory de facto parent provisions); Laufer-Ukeles & Blecher-Prigat, supra note 44, at 448–54 (discussing common law and equitable doctrines). But see Hazeldean, supra note 44, at 1610, 1688–95 (including a broad range of statutes and doctrines).

77. Appendix A lists every jurisdiction that we categorize as having a functional parent doctrine and catalogs the doctrine or doctrines that exist in each such jurisdiction.

78. Conover v. Conover, 146 A.3d 433, 446–47 (Md. 2016).

This standard has also been adopted in other jurisdictions.[79]

Common law and equitable doctrines in other states vary in their requirements. For example, West Virginia's psychological parent doctrine applies to "a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support."[80] The person must also show that the parent–child relationship is "of substantial, not temporary, duration" and that it "beg[a]n with the consent and encouragement of the child's legal parent or guardian."[81] This approach, like those in some other jurisdictions, reflects foundational work at the intersection of law and child development, specifically adopting the psychological parent concept elaborated in the 1970s by Joseph Goldstein, Anna Freud, and Albert Solnit.[82] Some doctrines have less specific requirements. For example, Pennsylvania's in loco parentis status applies "to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption."[83] Despite variations across jurisdictions, these common law and equitable doctrines generally attempt to capture people who have functioned as parents by providing consistent care and taking on parental responsibilities.

Commentators often treat application of these doctrines to same-sex couples as the paradigmatic case.[84] Yet, long before the doctrines were applied to LGBTQ-parent families, they were applied to men in different-sex couples, as well as to grandparents, as Nancy Polikoff documented in her foundational treatment of functional parenthood more than three

---

79. See id. at 447 (adopting "the multi-part test first articulated by the Wisconsin Supreme Court"); V.C. v. M.J.B., 748 A.2d 539, 551–52 (N.J. 2000) (adopting the Wisconsin standard under the heading of "psychological parent" doctrine); Carvin v. Britain (In re Parentage of L.B.), 122 P.3d 161, 176–77 (Wash. 2005) (same under the heading of a "de facto parent" doctrine).

80. In re K.H., 773 S.E.2d 20, 26 (W. Va. 2015) (citation omitted); see also Kinnard v. Kinnard, 43 P.3d 150, 154 (Alaska 2002) (articulating Alaska's doctrine similarly).

81. *In re K.H.*, 773 S.E.2d at 26.

82. See Goldstein et al., supra note 69, at 98.

83. See T.B. v. L.R.M., 786 A.2d 913, 916 (Pa. 2001); see also Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 17 (Neb. 1991) (utilizing similar language).

84. See, e.g., Strauss, supra note 44, at 911 ("De facto parent doctrines spread widely over the last twenty years, as courts and legislatures sought to alleviate discrimination against gay and lesbian parents. Most of the seminal de facto parenthood cases have similar facts." (footnotes omitted)); cf. Laufer-Ukeles & Blecher-Prigat, supra note 44, at 431 ("The expansion of same-sex families poses perhaps the most significant challenge to traditional formal parenthood and the greatest push towards recognizing functional parenthood.").

decades ago.[85] It was only later, often drawing on these prior precedents, that courts applied the doctrines to same-sex parent families.[86]

While scholarly attention tends to focus on de facto parenthood and its analogues, functional parents long have been recognized under other common law and equitable doctrines. Courts in some states apply various "estoppel" doctrines that turn not on the "classic" estoppel elements of misrepresentation and detriment as between the adults[87] but instead on the relationship between the adult and the child.[88] For example, in

---

85. See Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Geo. L.J. 459, 483, 512 (1990) [hereinafter Polikoff, Two Mothers] (noting, for example, that Zack v. Fiebert, 563 A.2d 58 (N.J. Super. Ct. App. Div. 1989), involving a claim by a child's grandparents, "recogni[zed] . . . the concept of a 'third party parent'"). Courts applied equitable estoppel to husbands to preclude them from denying responsibility to their nonbiological children, and they applied the in loco parentis doctrine to stepparents. See, e.g., Carter v. Brodrick, 644 P.2d 850, 855 (Alaska 1982) (applying the in loco parentis doctrine to a stepfather); Gribble v. Gribble, 583 P.2d 64, 68 (Utah 1978) (same), abrogated by Jones v. Barlow, 154 P.3d 808 (Utah 2007). For applications of these doctrines to claims by grandparents, see, e.g., Mansukhani v. Pailing, 318 N.W.2d 748, 754 (N.D. 1982) (noting the "strong parent–child type relationship" formed between the children and grandparents); In re Custody of Cottrill, 346 S.E.2d 47, 49–50 (W. Va. 1986) (applying a best-interests-of-the-child standard when child's mother had "implicitly surrendered" custody to grandparents).

86. See, e.g., V.C. v. M.J.B., 748 A.2d 539, 549–50 (N.J. 2000) (citing, in a case involving a former same-sex partner, a number of precedents involving foster parents and grandparents, beginning in 1979 and running through 1998).

87. See, e.g., Strauss, supra note 44, at 943 (noting in work on de facto parenthood that "estoppel focuses on misrepresentations").

Thus, to be clear, we characterize only some estoppel doctrines as functional parent doctrines. For example, we exclude equitable estoppel cases from Connecticut *because* they require proof of these "classic" estoppel elements. See, e.g., W. v. W., 728 A.2d 1076, 1082 (Conn. 1999) ("Estoppel rests on the misleading conduct of one party to the prejudice of the other.").

We also exclude cases in which a party is invoking estoppel to prevent a person from challenging their presumed or determined status as a parent. Accordingly, we exclude cases in which the party was previously adjudicated to be a parent or previously signed an acknowledgment of paternity, and the doctrine of estoppel is being invoked to preclude a challenge to that adjudication or acknowledgment. See, e.g., S.A. v. M.R., No. 2012-CA-000140-ME, 2012 WL 4473295, at *7 (Ky. Ct. App. Sept. 28, 2012) (applying estoppel to preclude mother's request to vacate a prior judgment determining a man who was not the child's genetic parent to be a legal parent). Likewise, we exclude cases in which the party was married to the birth parent at the time of the child's birth and the doctrine of estoppel is being invoked to prevent the rebuttal or challenge to that status. See, e.g., T.W. v. A.W., 541 A.2d 265, 266 (N.J. Super. Ct. App. Div. 1988) (precluding former husband's attempt to challenge his parentage of a thirteen-year-old child born during the parties' marriage); see also Strauss, supra note 44, at 942 ("Courts often use estoppel to prevent parties from rebutting the parentage presumptions.").

88. See, e.g., Lisa L. v. Kelvin P., No. XX-09, 2008 WL 5549446, at *2 (N.Y. Fam. Ct. Nov. 14, 2008) ("Resolution of 'the issue [equitable estoppel] does not involve the equities between the two adults; the case turns exclusively on the best interests of the child . . . the child is entirely innocent and by statute the party whose interests are paramount.'" (quoting Shondel J. v. Mark D., 853 N.E.2d 610, 616 (N.Y. 2006)) (alterations in original)); Gulla v. Fitzpatrick, 596 A.2d 851, 858 (Pa. Super. Ct. 1991) ("[I]t is the nature of the conduct and

applying equitable estoppel in paternity proceedings, New York courts have declared that "the predominant concern is the best interests of the child"[89] and therefore have focused on whether the person "assumed the role of a parent."[90] Similarly, Pennsylvania's paternity by estoppel doctrine applies when "the father openly holds out the child to be his and either receives the child into his home or provides support for the child."[91]

In other states, courts may protect functional parent–child relationships where there is evidence of an agreement between the parties treating the functional parent as a parent. For example, in Oklahoma, courts will extend standing to seek custody and visitation to a person who can show a co-parenting agreement with the biological parent.[92] West Virginia courts will enforce agreements to transfer permanent custody of a child from a parent to a person who is not a legal parent.[93] Here, too, as with other doctrines we include, the interests of the child remain a focus, and courts will not enforce such an agreement if the legal parent can show that shifting custody back to the legal parent would "constitute a significant benefit to the child."[94] Relatedly, in other states, courts address claims by functional parents by inquiring whether the biological or legal parent essentially waived their superior rights to custody.[95]

---

the effect on the father and the child and their relationship that is the proper focus of [the court's] attention.").

Indeed, the Pennsylvania Supreme Court has approvingly cited the "parent by estoppel" provision in the American Law Institute's Principles of Family Dissolution. See K.E.M. v. P.C.S., 38 A.3d 798, 807 n.6 (Pa. 2012). That provision resonates with the contemporary "holding out" presumption, and the reporters deliberately crafted it to create a functional parent doctrine. See Linda C. McClain & Douglas NeJaime, The ALI Principles of the Law of Family Dissolution: Addressing Family Inequality Through Functional Regulation, *in* The American Law Institute: A Centennial History (Andrew S. Gold & Robert W. Gordon eds., forthcoming 2023) (manuscript at 16–18), https://ssrn.com/abstract=4119927 [https://perma.cc/GXP6-RBA6].

89. *Lisa L.*, 2008 WL 5549446, at *2.

90. Lorraine D.S. v. Steven W., 120 N.Y.S.3d 297, 298 (App. Div. 2020). Similarly, the Pennsylvania courts have explained in applying the state's paternity by estoppel doctrine that "it is the parent/child bond and the nature of that relationship that is our primary focus." In re Green, 650 A.2d 1072, 1075 (Pa. Super. Ct. 1994).

91. 23 Pa. Stat. and Cons. Stat. Ann. § 5102(2) (West 2022).

92. See, e.g., Eldredge v. Taylor, 339 P.3d 888, 895 (Okla. 2014).

93. See, e.g., In re J.C., No. 17-0362, 2017 WL 4772949, at *3 (W. Va. Oct. 23, 2017) ("[T]he agreement in question expressly provided that petitioner intended to transfer permanent custody of the child to the grandparents. As such, we find no error in the circuit court's decision to enforce the agreement at issue." (footnote omitted)). Ohio has a similar doctrine. See Masitto v. Masitto, 488 N.E.2d 857, 860 (Ohio 1986) ("Parents may undoubtedly waive their right to custody of their children and are bound by an agreement to do so." (citation omitted)).

94. Overfield v. Collins, 483 S.E.2d 27, 36 (W. Va. 1996).

95. This may occur through statutory mechanisms or common law doctrines. Compare Mont. Code Ann. § 40-4-228 (West 2022) (authorizing custody upon showing that "(a) the natural parent has engaged in conduct that is contrary to the child-parent relationship; and (b) the nonparent has established with the child a child-parent relationship, . . . and it is in

Though the literature on functional parent doctrines tends to focus on common law and equitable doctrines, functional parent recognition arises through statutory means as well. Many jurisdictions maintain statutory presumptions of parentage that assign parentage based on parental function. Some trace their origins to the original 1973 version of the Uniform Parentage Act (UPA). The 1973 UPA provides that a man is presumed to be a child's father if, while the child is a minor, he lives with the child and holds the child out as his "natural child."[96] Until relatively recently,[97] it was not possible to determine with accuracy whether a person was a child's genetic parent.[98] Accordingly, even when the presumption primarily functioned to treat unmarried genetic fathers as legal fathers, some men who were not genetic fathers undoubtedly were held to be parents under the "holding out" presumption based on their parenting behavior.[99]

In the twenty-first century—with proof of genetic parentage more readily accessible—some states applied this "holding out" presumption to people *known to be* nonbiological parents, first to fathers[100] and later to

---

the best interests of the child to continue that relationship"), with Boseman v. Jarrell, 704 S.E.2d 494, 502–05 (N.C. 2010) (awarding custody under a common law doctrine that inquires into "whether defendant has engaged in . . . conduct inconsistent with her paramount parental status," such as by "intentionally and voluntarily creat[ing] a family unit in which plaintiff was intended to act—and acted—as a parent").

96. Unif. Parentage Act § 4(a)(4) (1973) (Unif. L. Comm'n, amended 2017) ("[A] man is presumed to be the natural father of a child if[,] . . . while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child . . . .").

97. Courts did not begin to admit DNA testing for the purposes of identifying children's biological parents until the late 1980s and early 1990s. See, e.g., Randi B. Weiss, G. Criston Windham, Patricia G. Scales, Brandy K. Gillenwater & Drew H. McNeill, The Use of Genetic Testing in the Courtroom, 34 Wake Forest L. Rev. 889, 908 n.197 (1999) (citing cases from the late 1980s and early to mid-1990s in which "some courts" found "DNA testing admissible in paternity case[s]").

98. See Shari Rudavsky, Blood Will Tell: The Role of Science and Culture in Twentieth-Century Paternity Disputes 339 (1996) (Ph.D. dissertation, University of Pennsylvania) (on file with the *Columbia Law Review*) (noting that "[u]ntil the HLA test," a blood test first used for paternity testing in the 1960s, "there would have been no way to determine for sure whether [an individual] was the biological progenitor of [a] child"); see also Courtney G. Joslin, Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond, 70 Ohio St. L.J. 563, 603 (2009) ("While blood grouping could potentially *exclude* a person as a genetic parent, the test was not able to reveal whether a person *was* a child's genetic parent.").

99. As we explain below, we do not include the "holding out" presumption in our study as a general matter. Instead, we include the "holding out" presumption only when there is case law in the jurisdiction applying the presumption to individuals who are known not to be the genetic parent of the child. It is only in such cases where parenting alone provides the basis for assigning parentage.

100. See, e.g., Alameda Cnty. Soc. Servs. Agency v. Kimberly H. (In re Nicholas H.), 46 P.3d 932, 933–34 (Cal.), modified on denial of reh'g (Cal. 2002) (applying "holding out" presumption in a case where "the presumed father [sought] parental rights but admit[ted] that he [wa]s not the biological father of the child").

mothers.[101] It is this application—to individuals who are clearly not biological parents—that renders the "holding out" presumption a functional parent doctrine. In some of the foundational cases, these functional parents were partners of biological parents.[102] In other cases, they were not.[103] For example, in one case, the functional parent was the child of the biological parent—that is, the half-sibling of the child at issue in the case. This person raised her half-sibling as a parent after her mother, who was also the biological mother of the half-sibling, passed away.[104]

The 2002 version of the UPA added a time limitation to the "holding out" presumption, requiring that the man live with and hold out the child as his own for the first two years of the child's life.[105] Importantly, though, when the Uniform Law Commission promulgated this provision,[106] it

---

101. See, e.g., Elisa B. v. Superior Ct., 117 P.3d 660, 668 (Cal. 2005) (applying "holding out" presumption to a nonbiological mother in a former same-sex couple); Partanen v. Gallagher, 59 N.E.3d 1133, 1139 (Mass. 2016) (same).

102. See *Elisa B.*, 117 P.3d at 663; *In re Nicholas H.*, 46 P.3d at 934–35; *Partanen*, 59 N.E.3d at 1133.

103. See, e.g., Kern Cnty. Dep't of Hum. Servs. v. Monica G. (In re Salvador M.), 4 Cal. Rptr. 3d 705, 706 (Ct. App. 2003) (biological half-sister); L.A. Cnty. Dep't of Child. & Fam. Servs. v. Leticia C. (In re Karen C.), 124 Cal. Rptr. 2d 677, 678 (Ct. App. 2002) (woman alleged to be child's nonbiological parent); Chatterjee v. King, 280 P.3d 283, 284 (N.M. 2012) (nonmarital partner of adoptive parent).

104. *In re Salvador M.*, 4 Cal. Rptr. 3d at 706–07.

105. Unif. Parentage Act § 204(a)(5) (2002) (Unif. L. Comm'n, amended 2017) ("A man is presumed to be the father of a child if: . . . for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.").

106. The "holding out" presumption had been eliminated from the 2000 version of the Act. See Unif. Parentage Act § 204 (2000) (Unif. L. Comm'n, amended 2017). This version of the Act omitting the "holding out" presumption was submitted to the American Bar Association (ABA) for approval in 2001. After concerns were raised by the ABA, however, the ABA delayed approval while the interested entities engaged in further negotiations. John J. Sampson, Preface to the Amendments to the Uniform Parentage Act (2002), 37 Fam. L.Q. 1, 1–2 (2003).

Among the objections raised by the ABA was the concern that "the proposed uniform act treated children of an unmarried couple differently than those of a married couple." Id. It did so by, among other things, omitting the previously existing "holding out" presumption and, as a result, leaving "[d]isputes between unmarried parents . . . to resolution by scientific parentage testing," while the same was not the case for married parents. Id. at 2–3; see also Unif. Parentage Act § 204 cmt. (2002) (Unif. L. Comm'n, amended 2017) ("[T]he 2000 version . . . limited presumptions of paternity to those related to marriage. [A number of ABA entities raised concerns] that this could result in differential treatment of children born to unmarried parents . . . .").

One of us participated in those negotiations between the ABA and the Uniform Law Commission. See Sampson, supra, at 3 n.5 (noting that Courtney Joslin represented the ABA Individual Rights and Responsibilities Section in the negotiations between the ABA and the Uniform Law Commission).

Ultimately, the "holding out" presumption was "restored" to the Uniform Parentage Act, albeit with a new time limitation. Unif. Parentage Act § 204 cmt. (2002) (Unif. L. Comm'n, amended 2017) ("To more fully serve the goal of treating nonmarital and marital

codified what some courts had already concluded[107]—that the provision could be applied to a nonmarital, *nonbiological* parent, and that the presumption would not necessarily be rebutted by evidence that the person was not a genetic parent.[108] Unsurprisingly, courts have since applied the "holding out" presumption to nonbiological parents.[109]

While the earlier versions of the "holding out" presumption were facially gendered and envisioned biological father–child relationships,[110] more recently adopted versions, including provisions based on the 2017 UPA, are explicitly gender-neutral and nonbiological.[111] Under these doctrines, an individual of any gender can be found to be a parent if the individual resided with the child and held the child out as the individual's child for the first two years of the child's life.[112] Some states also protect "holding out" for a period after the child's adoption.[113]

---

children equally, the 'holding out' presumption is restored, subject to an express durational requirement that the man reside with the child for the first two years of the child's life.").

107. Six states—Delaware, New Mexico, North Dakota, Oklahoma, Texas, and Wyoming—have "holding out" presumptions based on the 2002 UPA. See Del. Code tit. 13, § 8-204(5) (2022); N.M. Stat. Ann. § 40-11A-204(A)(5) (2022); N.D. Cent. Code § 14-20-10(1)(e) (2022); Okla. Stat. tit. 10, § 7700-204(A)(5) (2022); Tex. Fam. Code Ann. § 160.204(a)(5) (West 2022); Wyo. Stat. Ann. § 14-2-504(a)(v) (2022).

108. See Unif. Parentage Act § 608(a) (2002) (Unif. L. Comm'n, amended 2017) (providing that "the court may deny a motion [to] order . . . genetic testing . . . if . . . (1) the conduct of the mother or the presumed . . . father estops that party from denying parentage; and (2) it would be inequitable to disprove the father–child relationship").

109. See, e.g., Partanen v. Gallagher, 59 N.E.3d 1133, 1142 (Mass. 2016) (holding that "a person without a biological connection to a child may be that child's presumed parent under [the holding out presumption]"); In re Guardianship of Madelyn B., 98 A.3d 494, 501 (N.H. 2014) ("Accordingly, we conclude that the lack of a biological connection between [the child and the adult] is not a bar to application of the holding out presumption.").

110. See Unif. Parentage Act § 4(a)(4) (1973) (Unif. L. Comm'n, amended 2017) ("A man is presumed to be the natural father of a child [in prescribed circumstances] . . . ."); Unif. Parentage Act § 204(a)(5) (2002) (Unif. L. Comm'n, amended 2017) (utilizing similarly gendered language). Importantly, though, the UPA long has included a gender-neutral rule of statutory construction. See Unif. Parentage Act § 21 (1973) (Unif. L. Comm'n, amended 2017) (providing that the Act, which elsewhere refers explicitly only to establishing father and child relationships, "appl[ies] . . . insofar as practicable" to "determin[ations] [of] the existence or nonexistence of a mother and child relationship"); Unif. Parentage Act § 106 (2002) (Unif. L. Comm'n, amended 2017) (including a similar gender-neutral rule of statutory construction).

111. See Unif. Parentage Act § 204(a)(2) (Unif. L. Comm'n 2017) ("An individual is presumed to be a parent of a child if . . . the individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child."); see also supra note 106.

112. Five states—Connecticut, Maine, Rhode Island, Vermont, and Washington—have "holding out" presumptions based on the 2017 UPA. See Conn. Gen. Stat. Ann. § 46b-488(a)(3) (West 2022); Me. Rev. Stat. Ann. tit. 19-a, § 1881(3) (West 2022); 15 R.I. Gen. Laws § 15-8.1-401(a)(4) (2022); Vt. Stat. Ann. tit. 15C, § 401(a)(4) (2022); Wash. Rev. Code Ann. § 26.26A.115(1)(b) (West 2022).

113. See, e.g., Conn. Gen. Stat. Ann. § 46b-488(a)(3).

We identify "holding out" presumptions, whether under the 1973, 2002, or 2017 versions of the UPA, as functional parent doctrines *only when they apply to parents who are known not to be the child's biological parent.* This category includes individuals who knew from the outset that they were not the biological parent as well as men who at one point mistakenly believed they were the biological father. The presumption treats a person as a parent based on the conduct of forming a parent–child relationship, *regardless* of the genetic relationship between the parent and child.

These "holding out" presumptions are not the only statutory functional parent doctrines. For example, under Kansas parentage law, a man can be recognized as a parent if he has "notoriously or in writing recognize[d] paternity of the child."[114] This provision, too, has been applied in a gender-neutral fashion to reach nonmarital, nonbiological mothers.[115] When this doctrine reaches nonbiological parents, we treat it as a functional parent doctrine.

Statutory functional parent doctrines go beyond parentage presumptions. Recently, some jurisdictions, including some that adopted the 2017 UPA, codified the common law de facto parent concept.[116] While some of these jurisdictions previously employed the common law doctrine,[117] others introduced the doctrine for the first time through legislation.[118]

Other states incorporated common law or equitable functional parent categories, such as psychological parent or in loco parentis, into their custody statutes.[119] Under these statutory provisions, if a person who is not a legal parent establishes that they acted as a parent to a child, they are entitled to seek custody or visitation *as a functional parent*, rather than as a nonparent third party.

---

114. Kan. Stat. Ann. § 23-2208(a)(4) (West 2022).

115. See Frazier v. Goudschaal, 295 P.3d 542, 553 (Kan. 2013) (holding that "a female can make a colorable claim to being a presumptive mother . . . without claiming to be the biological or adoptive mother, and, therefore, can . . . bring an action to establish the existence of a mother and child relationship"). The statutory "holding out" presumption at issue in the case was subsequently renumbered.

116. Five states—Connecticut, Maine, Rhode Island, Vermont, and Washington—have statutory de facto parent provisions based on the 2017 UPA. See Conn. Gen. Stat. Ann. § 46b-490; Me. Rev. Stat. Ann. tit. 19-a, § 1891; 15 R.I. Gen. Laws § 15-8.1-501; Vt. Stat. Ann. tit. 15C, § 501(a); Wash. Rev. Code Ann. § 26.26A.440(4).

117. This is true, for example, in Maine. Maine enacted a statutory de facto parent provision in 2015. See Maine Parentage Act, 2015 Me. Laws 712 (codified as amended at Me. Rev. Stat. Ann. tit. 19-a, § 1881(3)). Prior to that statutory enactment, Maine recognized and applied an equitable de facto parent doctrine. C.E.W. v. D.E.W., 845 A.2d 1146, 1151 (Me. 2004) ("[W]hen an individual's status as a de facto parent . . . has been so determined by a court . . . , the court may consider an award of parental rights and responsibilities to that individual as a parent . . . , based upon a determination of the child's best interest[s] . . . .").

118. This is the case, for example, in Connecticut. Conn. Gen. Stat. Ann. § 46b-490.

119. See, e.g., 23 Pa. Stat. and Cons. Stat. Ann. § 5324 (West 2022) (providing that "[a] person who stands in loco parentis to the child" "may file an action under this chapter for any form of physical custody or legal custody").

Still other states codified functional parent doctrines through new statutory statuses, such as "de facto custodian" or "equitable caregiver."[120] Some of these statutes impose specific requirements. Georgia's equitable caregiver statute includes many of the same requirements seen in de facto parent standards.[121] Kentucky's de facto custodian statute requires that the person served as "the primary caregiver for, and financial supporter of, [the] child" and resided with the child for six months of the previous two years if the child is under three, or for one year if the child is at least three or has been placed by child welfare authorities.[122] Other de facto custodian statutes include less specific criteria. For example, Hawaii's statute applies to "[a]ny person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person."[123]

B. *Requirements of Functional Parent Doctrines*

Although the universe of functional parent doctrines is expansive and varied, the doctrines generally aim to identify and protect relationships between children and people who are engaging in conduct that is "parental in nature."[124] Indeed, many doctrines turn on a qualitative assessment of what makes a relationship *parental*. To be sure, what constitutes "parental" conduct is contested.

Some of the doctrines set forth specific criteria to guide courts. Such criteria may look explicitly to how the person presented the relationship to others. For example, the "holding out" presumption asks whether the person "held out" the child as their child.[125] In some jurisdictions, the de facto parent standard includes a similar requirement.[126] In applying doctrines of this kind, courts might place weight on whether the parent and child used specific terms like "mom" or "dad" and whether the person presented themselves as a parent to others, such as the child's school.[127]

In other jurisdictions, functional parent doctrines turn less on how the person presented the relationship and more on the specific conduct that is thought to characterize a parent–child relationship. For example, some states' common law or equitable psychological parent doctrines, drawing on work in child development, look to whether the person, "on a

---

120. Ga. Code Ann. § 19-7-3.1 (2022) (defining equitable caregiver); Ky. Rev. Stat. Ann. § 403.270(1)(a) (West 2022) (defining de facto custodian).

121. Ga. Code Ann. § 19-7-3.1.

122. Ky. Rev. Stat. § 403.270(1)(a). Kentucky courts have also adjudicated functional parent claims through other doctrinal mechanisms. See infra note 190 and accompanying text.

123. Haw. Rev. Stat. Ann. § 571-46(a)(2) (West 2022).

124. Vt. Stat. Ann. tit. 15C, § 501(a)(1)(E) (2022).

125. See, e.g., id. § 401(a)(4).

126. See, e.g., Wash. Rev. Code Ann. § 26.26A.440(4) (West 2022) (providing that a person who claims to be a de facto parent must demonstrate that, among other things, they "held out the child as the individual's child").

127. See infra notes 296–297 and accompanying text.

continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs."[128] Similarly, "de facto custodian" statutes attempt to capture primary caregiving relationships, regardless of whether the person and the child use parental terms or present themselves as parent and child.[129]

While functional parent doctrines generally seek to identify people engaged in parenting, some employ different criteria to identify functional parents. As a result, different doctrines may not capture the same universe of relationships. For example, de facto parent standards commonly require that the person resided with the child for a significant period of time at some point during the child's minority, while some versions of the "holding out" presumption require that the person resided with the child for the first two years of the child's life.[130] Doctrines that require the person to have "held out" the child as their "own" tend to exclude many relatives, as relatives are less likely to identify the child as *their own child* even when they are providing primary caregiving for the child.[131]

C. *Legal Effects of Functional Parent Doctrines*

The legal effects of functional parent doctrines vary. There is a trend toward recognizing functional parents as legal parents. But, in many jurisdictions, the status is less than that of a legal parent. In some jurisdictions, it is not entirely clear whether functional parents are treated as legal parents or, alternatively, whether they stand in parity with legal parents for purposes of a custody or visitation dispute but are not otherwise

---

128. See In re Clifford K., 619 S.E.2d 138, 143 (W. Va. 2005) (quoting Goldstein et al., supra note 69, at 98); see also Restatement of Child. & the L. § 1.82 cmt. g (Am. L. Inst., Tentative Draft No. 2, 2019) (explaining that a person "establishes that he or she shares a bond and dependent relationship with the child that is parental in nature by demonstrating that he or she is a psychological parent").

129. Ky. Rev. Stat. Ann. § 403.270(1)(a) (West 2022); see also Restatement of Child. & the L. § 1.82 cmt. e (Am. L. Inst., Tentative Draft No. 2, 2019) (explaining that requiring the person to have performed significant "caretaking functions help[s] to ensure that the [person] functions as a parent and shares a parental relationship and bond with the child").

130. Compare Vt. Stat. Ann. tit. 15C, § 501(a)(1)(A) (requiring, under a de facto parent standard, that "the person resided with the child as a regular member of the child's household for a significant period of time"), with id. § 401(a)(4) ("[A] person is presumed [a parent if] . . . the person resided in the same household with the child for the first two years of the life of the child, . . . and the person and another parent of the child openly held out the child as the person's child.").

131. Among the ninety cases in this Article's data set based on nonbiological application of the "holding out" presumption, eighty-one (90%) involve married or unmarried partners; these cases include twenty-two featuring different-sex spouses, forty-three featuring different-sex unmarried partners, one featuring a same-sex spouse, and fifteen featuring same-sex unmarried partners. Of the remaining nine cases, six (7%) involve nonrelatives and three (3%) involve relatives. Other functional parent doctrines, including statutory de facto parent provisions in a number of states, likewise require that the person "held out" the child as their child. See, e.g., id. § 501(a)(1)(D).

recognized as legal parents. Moreover, even in the latter situation, courts sometimes state that the functional parent stands "in parity" with the legal parent in the action but, simultaneously, apply different standards to the functional parent. For example, the Pennsylvania courts have declared that "[t]he rights and liabilities arising out of an *in loco parentis* relation are, as the words imply, exactly the same as between parent and child."[132] Yet, the person alleging themselves to be a functional parent must meet a heightened evidentiary standard to gain custody over a legal parent.[133]

Some common law and equitable doctrines clearly yield some, but not all, parental rights.[134] In many states, de facto or psychological parent status gives an individual standing to seek custody under a best-interests-of-the-child standard.[135] In contrast, Wisconsin's doctrine, which is based on a frequently cited de facto parent case, yields standing merely to seek visitation.[136] In some jurisdictions, a biological or legal parent can seek child support from a functional parent.[137] But in others, parental rights granted under the doctrines are not paired with parental obligations.[138]

Over time, states have extended more comprehensive protections to functional parents through statutes and case law.[139] Statutory de facto

---

132. Peters v. Costello, 891 A.2d 705, 710 (Pa. 2005) (quoting T.B. v. L.R.M., 786 A.2d 913, 916–17 (Pa. 2001)).

133. See Jones v. Jones, 884 A.2d 915, 917 (Pa. Super. Ct. 2005) (requiring "clear and convincing evidence that it is in the best interests of the children to maintain that relationship or be with that person").

134. See, e.g., Courtney G. Joslin, De Facto Parentage and the Modern Family, Fam. Advoc., Spring 2018, at 31, 33 (noting that "courts initially extended only fairly limited rights to functional parents under . . . equitable doctrines").

135. See, e.g., *Jones*, 884 A.2d at 917 (authorizing custody to the functional parent upon a showing "that it is in the best interests of the children to maintain that relationship or be with that person").

136. In re Custody of H.S.H.-K., 533 N.W.2d 419, 435 (Wis. 1995) ("[W]e conclude that a circuit court has equitable power to hear a petition for visitation when it determines that the petitioner has a parent-like relationship with the child . . . .").

137. See, e.g., L.S.K. v. H.A.N., 813 A.2d 872, 878 (Pa. Super. Ct. 2002) (holding that a nonbiological mother who stood in loco parentis was "responsible for the emotional and financial needs of the children"); Hamilton v. Hamilton, 795 A.2d 403, 406 (Pa. Super. Ct. 2002) (holding that "[w]here a step-father holds the child out as his own, he . . . may be estopped from denying paternity" and thus be liable for child support).

138. See, e.g., Bowden v. Korslin (In re Placement of A.M.K.), No. 2011AP2660, 2013 WL 4746428, ¶ 9 (Wis. Ct. App. Sept. 5, 2013) ("We agree with the parties' apparent stipulation that there is no statutory basis upon which a court may order a non-parent to pay child support to the biological parent."); see also Courtney G. Joslin, Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology, 83 S. Cal. L. Rev. 1177, 1198–1209 (2010) [hereinafter Joslin, Protecting Children] (examining "whether and to what extent children have a right [under functional parent doctrines] to child support from their functional but nonlegal parents").

139. See, e.g., Courtney G. Joslin, Leaving No (Nonmarital) Child Behind, 48 Fam. L.Q. 495, 495 (2014) (noting that "it is increasingly the case that these nonbiological parents are treated as full and equal legal parents").

parentage provisions that track the 2017 UPA,[140] for example, treat a functional parent as a legal parent.[141] The "holding out" presumption also yields full parentage.[142] In other jurisdictions, case law further developed the principle that a functional parent stands in parity with a legal parent and is entitled to the same "rights and responsibilities which attach to parents."[143]

Importantly, an increasing number of states have multiple functional parent doctrines. For example, Maine long recognized de facto parenthood as a common law matter.[144] More recently, it enacted statutes providing for both de facto parentage and a "holding out" presumption that applies to nonbiological parents.[145] Both statutes treat the person as a legal parent. In contrast, in some states with more than one functional parent doctrine, the doctrines offer different protections. For instance, in Massachusetts, a person recognized under the common law de facto parent doctrine is not treated as a legal parent,[146] while a person recognized as a parent under the "holding out" presumption is.[147] Similarly, functional parent doctrines within the same jurisdiction do not necessarily cover all of the same individuals. Washington's codified de facto parent provision, for example, covers individuals who formed a parent–child relationship while the child was under eighteen,[148] while the "holding out" presumption requires that the person reside with and "hold out" the child as the person's child for the first four years of the child's life.[149]

---

140. Currently, five states—Connecticut, Maine, Rhode Island, Vermont, and Washington—have a codified de facto parent provision that tracks the 2017 UPA. See Conn. Gen. Stat. Ann. § 46b-490 (West 2022); Me. Rev. Stat. Ann. tit. 19-a, § 1891 (West 2022); 15 R.I. Gen. Laws § 15-8.1-501 (2022); Vt. Stat. Ann. tit. 15C, § 501 (2022); Wash. Rev. Code Ann. § 26.26A.440 (West 2022).

141. See, e.g., Me. Rev. Stat. tit. 19-a, § 1891 (providing that a "court may adjudicate a person to be a de facto parent" and that an "[a]djudication of a person under this subchapter as a de facto parent establishes parentage"); Unif. Parentage Act § 201 (Unif. L. Comm'n 2017) (listing bases for establishing parentage).

142. Unif. Parentage Act § 204(a)(2) (Unif. L. Comm'n 2017); Unif. Parentage Act § 204(a)(5) (2002) (Unif. L. Comm'n, amended 2017). So too does Kansas's analog. Kan. Stat. Ann. § 23-2208(a)(4) (West 2022).

143. See, e.g., Carvin v. Britain (In re Parentage of L.B.), 122 P.3d 161, 176–77 (Wash. 2005).

144. C.E.W. v. D.E.W., 845 A.2d 1146, 1151 (Me. 2004) (applying equitable de facto parent doctrine).

145. Me. Rev. Stat. Ann. tit. 19-a, §§ 1881(3), 1891 (providing for the "holding out" presumption and codifying de facto parentage).

146. See, e.g., E.N.O. v. L.M.M., 711 N.E.2d 886, 891–92 (Mass. 1999) (distinguishing between "an adjudication of legal paternity" and "rights [securable] as a de facto parent").

147. See, e.g., Partanen v. Gallagher, 59 N.E.3d 1133, 1135 (Mass. 2016) ("[W]e consider the question whether a person may establish herself as a child's presumptive parent under [the holding out presumption], in the absence of a biological relationship with the child. We conclude that she may.").

148. Wash. Rev. Code Ann. § 26.26A.440(2)(a) (West 2022).

149. Id. § 26.26A.115(1)(b).

In states with multiple doctrines,[150] a litigant may be able to choose which doctrine or doctrines to invoke. In many jurisdictions, however, there may be only one functional parent doctrine. The available doctrine may be a more limited one, like the de facto parent doctrine in Wisconsin,[151] or one that yields full legal parentage, like the "holding out" presumption in California.[152]

D. *Distinguishing Other Doctrines*

Before moving on, it is important to explain what sorts of doctrines we *do not* characterize as functional parent doctrines. We do not include doctrines that turn on a person's status in relationship to the legal parent. Accordingly, we exclude grandparent and stepparent visitation statutes, which accord rights to seek visitation based on an individual's *status* as a grandparent or a stepparent, rather than on the formation of a parent–child relationship.[153] Similarly, we exclude the marital presumption of parentage, which may recognize a spouse as a parent in the absence of genetic parentage.[154] The marital presumption treats the person as a parent based on their *status* as the birth parent's spouse. While the existence of a parent–child relationship between the spouse and the child may be relevant to determinations of whether genetic evidence should rebut the presumption in particular cases, the presumption does not arise due to parental conduct.[155] Similarly, we also exclude assisted reproduction statutes that recognize people as parents, both married and unmarried, based on their intent to be parents.[156] Such statutes treat a person as a parent

150. As noted above, Maine, for example, has two relevant statutory provisions—a de facto parent provision and a "holding out" presumption. See supra notes 144–145 and accompanying text.

151. See In re Custody of H.S.H.-K., 533 N.W.2d 419, 435–36 (Wis. 1995) (providing the four-part test "[t]o demonstrate the existence of [a] parent-like relationship with the child").

152. See Cal. Fam. Code § 7611(d) (2020) (creating parentage presumption for persons who "receive[] the child into their home and openly hold[] out the child as their natural child").

153. See, e.g., id. § 3101(a) ("Notwithstanding any other provision of law, the court may grant reasonable visitation to a stepparent, if visitation by the stepparent is determined to be in the best interest of the minor child.").

154. See, e.g., id. §§ 7540(a), 7611(a).

155. Michigan's equitable parent doctrine is currently limited to spouses. We exclude cases arising under this doctrine when the dispute arises over a "child of the marriage," such that the alleged equitable parent should be treated as a presumed parent by virtue of the marital presumption. See Soumis v. Soumis, 553 N.W.2d 619, 622 (Mich. Ct. App. 1996); Atkinson v. Atkinson, 408 N.W.2d 516, 518 (Mich. Ct. App. 1987). In contrast, we include cases in which the spouse was not married to the birth parent at the time of the child's birth. See, e.g., Van v. Zahorik, 597 N.W.2d 15, 16 (Mich. 1999). On September 23, 2022, the Michigan Supreme Court announced it would consider whether the equitable parent doctrine should extend to unmarried couples, specifically in the case of a same-sex couple who could not legally marry at the relevant time. See Pueblo v. Haas, 979 N.W.2d 335, 335 (Mich. 2022) (mem.).

156. See, e.g., Cal. Fam. Code § 7613(a) ("If a woman conceives through assisted reproduction . . . , with the consent of another intended parent, that intended parent is treated in law as if that intended parent is the natural parent of a child thereby conceived.").

based on conduct other than actual parenting—that is, consent to assisted reproduction with the intent to be a parent of the resulting child.

We generally do not treat third-party custody and visitation statutes as functional parent doctrines. Some such statutes do not look to the person's relationship with the child at all.[157] Other statutes require a showing of a relationship between the person and the child but do not require proof of a *parent–child* relationship or parenting behavior.[158] We do not include these statutes or cases decided under them. In addition to the fact that most do not turn on proof of a parental relationship, the third-party custody statutes that we exclude routinely place higher burdens on claimants than do functional parent doctrines.[159] Under many of these statutes, the person must show that the child would be harmed by the denial of custody or visitation, rather than that custody or visitation would be in the child's best interests.[160] Going further, some states require that the person show that the legal parents are unfit.[161] States also often limit

157. See, e.g., Mass. Gen. Laws Ann. ch. 209C, § 10(d) (West 2022) (permitting an order of custody to a nonparent upon a showing of consent by or unfitness of the legal parents).

158. See Unif. Nonparent Custody & Visitation Act § 4(a)(1)(B) (Unif. L. Comm'n 2018) ("A court may order custody or visitation to a nonparent if the nonparent proves that . . . the nonparent . . . has a substantial relationship with the child and the denial of custody or visitation would result in harm to the child . . . .").

159. See Restatement of Child. & the L. § 1.80 cmts. g, j (Am. L. Inst., Tentative Draft No. 2, 2019) (explaining how in many jurisdictions third parties must show "proof of harm or substantial risk of harm to the child" and are subject to "a heightened standard of proof"). We include Alaska's psychological parent doctrine, even though custody to the psychological parent requires a showing that custody exclusively to the legal parent would cause "clear detriment" to the child. See Dara v. Gish, 404 P.3d 154, 161 (Alaska 2017) (quoting Osterkamp v. Stiles, 235 P.3d 178, 185 (Alaska 2010)). We do so because the Alaska Supreme Court has reasoned that detriment inheres in the finding of psychological parenthood, such that "severing the bond between the psychological parent and the child may well be clearly detrimental to the child's welfare." Buness v. Gillen, 781 P.2d 985, 989 n.8 (Alaska 1989). Accordingly, whereas third parties generally would need to show "clear detriment," a psychological parent typically shows detriment by establishing status as a psychological parent. Id.

160. See, e.g., Ala. Code § 30-3-4.2 (2022) (requiring a petitioner to show that "the loss of opportunity to maintain a significant and viable relationship between the petitioner and the child has caused or is reasonably likely to cause harm to the child"); Ark. Code Ann. § 9-13-103(e) (2022) (requiring a similar showing); Conn. Gen. Stat. Ann. § 46b-59(b) (West 2022) (same); Utah Code § 30-5a-103(2)(f) (2022) (same); Crockett v. Pastore, 789 A.2d 453, 457 (Conn. 2002) (requiring that, to award visitation, denial thereof would lead to "real and significant harm" to child); Blixt v. Blixt, 774 N.E.2d 1052, 1059 (Mass. 2002) (requiring a similar showing); Moriarty v. Bradt, 827 A.2d 203, 205 (N.J. 2003) (same); Craig v. Craig, 253 P.3d 57, 63 (Okla. 2011) (same); Smallwood v. Mann, 205 S.W.3d 358, 363 (Tenn. 2006) (same); see also Restatement of Child. & the L. § 1.80 cmt. g (Am. L. Inst., Tentative Draft No. 2, 2019) ("At least 21 states (as of February 2019) require a third party seeking contact with a child to establish harm or substantial risk of harm to the child if contact is denied.").

161. See, e.g., Iowa Code § 600C.1.3 (2022) (allowing an award of visitation to a grandparent if "[i]t is in the best interest of the child," "[t]he grandparent . . . has established a substantial relationship with the child," and "[t]he parent is unfit to make [the decision regarding visitation]"); In re Blake, 786 N.E.2d 78, 80 (Ohio Ct. App. 2003) ("Ohio law clearly does not permit a nonparent to obtain custody of a child without showing the

the circumstances under which third-party petitions may be filed—by, for example, allowing petitions only when the legal parents have divorced.[162] Some states also limit the classes of individuals who can make claims under the statute—by, for example, allowing petitions only by relatives of the child.[163] In imposing various limits and substantive hurdles, third-party custody and visitation statutes generally are premised on, and maintain, the person's status as a *nonparent*.

In contrast, we *do* include doctrines that make reference to or derive from a statute that could be read as limited to third parties but have been interpreted by courts to apply differently to functional parents.[164] We also include "de facto custodian" statutes that expressly require a specific period during which the person has been the child's primary caregiver or require a showing that a parent–child relationship has developed.[165]

---

parents to be unsuitable."); see also Restatement of Child. & the L. § 1.81 cmt. e (Am. L. Inst., Tentative Draft No. 2, 2019) (documenting "cases holding that a third party may rebut the parent's presumptive right to custodial and decisionmaking responsibility by establishing that the parent is unfit"). Indeed, some courts have reasoned that "the conduct required for a finding of parental unfitness in a third-party custody dispute is the same as that which could lead to termination of parental rights in a civil-child-protection proceeding." Id. (citing authorities).

162. See Barbara A. Atwood, Marriage as Gatekeeper: The Misguided Reliance on Marital Status Criteria to Determine Third-Party Standing, 58 Fam. Ct. Rev. 971, 972 (2020) [hereinafter Atwood, Marriage as Gatekeeper] (noting that "[a]bout half of the states today have laws that condition nonparent standing on the marital status of a child's parents"); see also Restatement of Child. & the L. § 1.80 cmt. g (Am. L. Inst., Tentative Draft No. 2, 2019) (noting that states "limit[] the category of individuals who have standing to petition for contact with a child and the circumstances under which those individuals may petition for contact").

163. Josh Gupta-Kagan, Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents, 12 N.Y.U. J. Legis. & Pub. Pol'y 43, 75 (2008) [hereinafter Gupta-Kagan, Children, Kin, and Court].

While we include "de facto custodian" statutes from other jurisdictions, we do not include Idaho's because it limits standing to individuals "related to [the] child within the third degree of consanguinity." Idaho Code § 32-1703(1)(a) (2022). We also do not include Idaho's separate "de facto custodian" provision that is not limited to relatives because that provision governs only guardianship proceedings. Id. § 15-5-213(2) (giving "a de facto custodian . . . the same standing that is given to each parent in proceedings for appointment of a guardian of a minor").

164. See, e.g., Haw. Rev. Stat. Ann. § 571-46(a)(2) (West 2022) ("Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall be entitled prima facie to an award of custody."); A.S. v. C.L., No. CAAP-13-0005068, 2016 WL 6833916, at *1 (Haw. Ct. App. Nov. 18, 2016) (holding that "Family Court's finding that [functional parent] met the requirements for a 'de facto' parent necessarily means that [the functional parent] satisfied the supreme court's requirements . . . for standing to seek custody under HRS § 571-46(a)(2)").

165. See, e.g., Ky. Rev. Stat. Ann. § 403.270(1)(a) (West 2022) (requiring that the person served as the "primary caregiver for, and financial supporter of, [the] child" for a certain period of time depending on the child's age); Minn. Stat. § 257C.08(4)(2) (2022) (requiring that "the petitioner and child had established emotional ties creating a parent and child relationship").

* * *

Ultimately, this Part gives a more comprehensive, fine-grained account than currently exists of functional parent doctrines across U.S. jurisdictions. Drawing upon our empirical study, Parts II and III offer a more accurate understanding of the application of the full range of these doctrines than currently exists.

II. AN EMPIRICAL STUDY OF FUNCTIONAL PARENT DOCTRINES

This Part describes the contours and limitations of our empirical study and reports some general findings. We have collected and coded all electronically available judicial decisions issued between 1980 and 2021 in every U.S. jurisdiction that has a functional parent doctrine.[166] Our study includes 669 decisions. Again, by "functional parent doctrine," we mean a doctrine that expressly extends parental rights to an individual based on the individual's conduct of having formed a parental relationship with the child and functioned as a *parent*.[167]

As Figure 1 shows, we identify thirty-four jurisdictions—two-thirds of all U.S. jurisdictions—with at least one functional parent doctrine.[168] These jurisdictions are spread across the country. They are politically liberal, moderate, and conservative. They include large states and small states. They include more urban jurisdictions and more rural jurisdictions. Many of these jurisdictions have had a functional parent doctrine for decades, though in some jurisdictions functional parent doctrines are relatively new.[169]

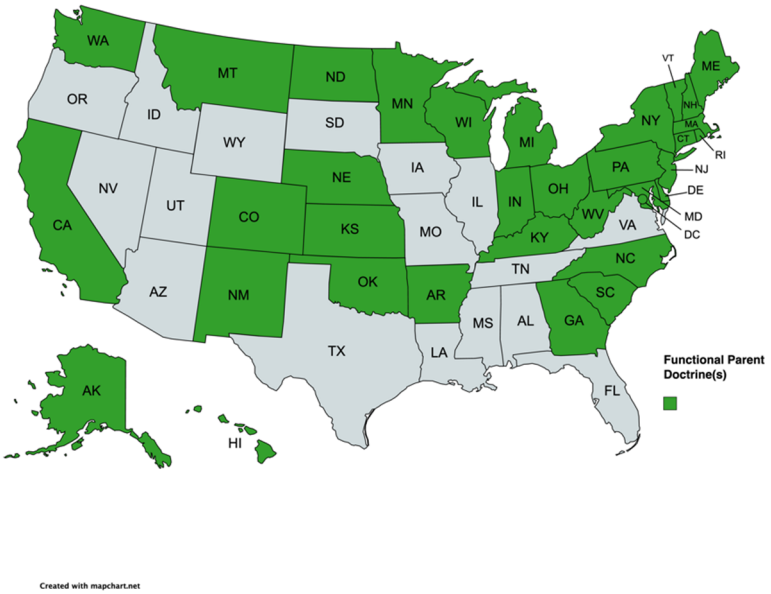
166. Again, we used Westlaw to collect cases. We used search techniques and Shepardized select cases to ensure that we captured the full set of cases. Obviously, not all cases that searches and Shepardizing produced were included in the data set. Some cases did not raise a functional parent question, even if they cited a relevant statute. We also excluded non-family law and non-dependency cases, such as wrongful death or inheritance cases. This data set includes all cases available through September 30, 2021 and is available in interactive form online. Courtney G. Joslin & Douglas NeJaime, Functional Parent Doctrines Database, Version 1.0 (2023), https://documents.law.yale.edu/functional-parent-doctrines/ (on file with the *Columbia Law Review*) [hereinafter Joslin & NeJaime, Database].

167. For the estoppel, third-party, and status-based doctrines we do not include, see supra notes 87, 153–163 and accompanying text.

168. Appendix A identifies the various functional parent doctrines in the included jurisdictions. Determining which states to include was not always straightforward. For a slightly different account, see Hazeldean, supra note 44, at 1688–95 tbl.3 (including Mississippi, Missouri, Nevada, Oregon, South Dakota, and Texas, but omitting Michigan and South Carolina); see also Restatement of Child. & the L. § 1.82 (Am. L. Inst., Tentative Draft No. 2, 2019) (covering functional parent doctrines).

169. See infra note 196.

FIGURE 1. JURISDICTIONS WITH FUNCTIONAL PARENT DOCTRINE(S)



In total, our data set includes 669 state court decisions across thirty-two jurisdictions.[170] Even though we count thirty-four jurisdictions as having a functional parent doctrine, we have no decisions from two jurisdictions: Connecticut's "holding out" presumption and de facto parent statute went into effect in 2022, after the period we studied;[171] Georgia's "equitable caregiver" statute went into effect in 2019, but no relevant electronically available decisions were issued during the period we studied.[172]

---

170. These jurisdictions are: Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Hawaii, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Vermont, Washington, West Virginia, and Wisconsin. We do not include jurisdictions that have a "holding out" presumption but have not been clear that the presumption applies to nonbiological parents. See, e.g., Tex. Fam. Code Ann. § 160.204 (West 2022).

171. See Conn. Gen. Stat. Ann. § 46b-488(a)(3) (West 2022) (effective Jan. 2, 2022); id. § 46b-490 (effective Oct. 1, 2022).

172. See Ga. Code Ann. § 19-7-3.1 (2022) (effective July 1, 2019). The only electronically available decision issued during the period we studied is Wallace v. Chandler, 859 S.E.2d 100 (Ga. Ct. App. 2021). In denying the custody claims of foster parents, the court noted that, "[w]hile [the equitable caregiver statute] was not in effect at the time the [petitioners] first filed their petition, it does provide another avenue for a non-relative to obtain custody of a child in their care." Id. at 104.

We coded each case along the following dimensions: (1) jurisdiction; (2) published or unpublished; (3) doctrine (e.g., de facto parent, "holding out" presumption); (4) legal authority (common law, equitable, or statutory); (5) identity of the functional parent (e.g., same-sex unmarried partner, grandparent, different-sex marital stepparent, foster parent); (6) affirmative or defensive claims (e.g., functional parent asserting claim to recognition, legal parent asserting claim against functional parent); (7) post-dissolution disputes (i.e., whether the claim is asserted after the dissolution of an intimate relationship) and the basis of such disputes (e.g., former partner seeking custody, legal parent seeking support); (8) judicial determination (e.g., merits decision recognizing functional parent, merits decision denying functional parent claim, non-merits decision denying functional parent recognition); (9) role of the functional parent (e.g., primary caregiver, never lived with child); (10) role of the legal parent (e.g., primary caregiver, involved but not primary caregiver); (11) domestic violence allegations and the identity of the individual(s) against whom allegations are made;[173] (12) child abuse and neglect allegations and the identity of individual(s) against whom allegations are made; (13) child welfare involvement (i.e., whether child welfare authorities were involved in any capacity with respect to the child at issue, including investigation of abuse and neglect allegations, removal of the child from the home, or placement of the child into foster care); (14) intended parents (i.e., whether the case involves intended parents and, if so, whether the child was conceived through assisted reproduction or was adopted); and (15) parental death (i.e., whether a legal parent had died).[174] We then created a pivot table, which allowed us to run multiple combinations of fact patterns (e.g., cases in which a legal parent had died and a court recognized a grandparent as a functional parent).

Our study develops a more detailed and accurate account of functional parent doctrines in action than currently exists. Of course, it has important limitations. The data set includes only litigated cases, which do not represent the complete universe of functional parent disputes. The

---

173. For purposes of our study, we use the term "domestic violence" to refer only to conduct between adults. We use the terms "abuse and neglect" to capture conduct with regard to the child.

174. In consultation with one of us, a team of research assistants from Yale Law School collected and coded the cases. A single research assistant, who also created the pivot table, reviewed that coding. We reviewed the cases and coding and made adjustments. A second team of research assistants reviewed all of the coding that had been done, and we reviewed any cases for which a member of that team identified discrepancies or questions. We continued to review and refine the coding, with a single research assistant charged with integration of all new data and changes. Ultimately, at least three individuals, including at least one of the authors, reviewed each case. Of course, when cases presented insufficient, unclear, or conflicting information, we needed to exercise judgment in coding for particular fields. We recognize that others may have made different judgments, and we are making our data public in part to allow others to observe and question the judgments we made.

broader universe of disputes may look different, with respect to both the quality of the claims and the characteristics of the disputants. Generally, one would expect the strongest and the weakest claims to be less likely to result in litigation.[175] Also, given the costs of litigation, the average income of individuals in cases that are not litigated may, as a general matter, be lower than the average income of the individuals in the cases that are litigated. Other differences might exist between the cases in the data set and the broader universe of functional parent disputes.

There may be some reasons to think that functional parent disputes will depart from patterns assumed in models of the litigation process. These cases involve very high stakes—often whether the person will be able to maintain custody of or contact with a child. The fact that the stakes in these cases are so high and the issues so emotionally charged may result in a higher percentage of overall disputes being litigated than might be observed in cases involving, for example, primarily monetary stakes.[176] Conversely, again due to the highly important personal relationships at stake, there likely are some disputes involving strong claims that do not get litigated. This could be true, for example, in a case involving a relative who has developed a strong parent–child bond with a child. The relative may choose not to litigate because they do not want to upset or undermine

---

175. For an influential exploration of a "selection effect" of relying only on litigated cases, see George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1, 17 (1984) (arguing that the process of negotiation and settlement weeds out cases in which either side has a "powerful case," leaving "problematic" closer calls to be litigated, resulting in trial court win rates around 50% in cases in which the parties have symmetric stakes). For critiques of the Priest–Klein hypotheses, see, e.g., Theodore Eisenberg, Testing the Selection Effect: A New Theoretical Framework With Empirical Tests, 19 J. Legal Stud. 337, 342 (1990); Samuel R. Gross & Kent D. Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319, 322 (1991); Donald Wittman, Is the Selection of Cases for Trial Biased?, 14 J. Legal Stud. 185, 211–12 (1985). For a review of some of the literature testing the selection effects hypothesis, see Daniel Kessler, Thomas Meites & Geoffrey Miller, Explaining Deviations From the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation, 25 J. Legal Stud. 233, 242 (1996).

176. See Priest & Klein, supra note 175, at 20 (noting that the "50 percent implication derive[s] from the assumption of symmetric stakes to the parties from the litigation"); see also Kessler et al., supra note 175, at 242.

To be clear though, because the stakes are so high, even if they are symmetric, there still may be reason to question the assumption that the parties will litigate only the "problematic," closer cases. This observation is consistent with other scholars' observations in family law matters. See Amy Farmer & Jill Tiefenthaler, Conflict in Divorce Disputes: The Determinants of Pretrial Settlement, 21 Int'l Rev. L. & Econ. 157, 164 (2001) ("Given the highly emotional element present in [divorce] cases, players may receive utility or disutility from the final position of the other party . . . . Thus, we may find that the leading theories of bargaining failure do not completely explain court usage in divorce cases."); Kathie Nichols & Patrick Nichols, Psychological Obstacles and Barriers to Settlement in Family Law Cases, 24 Am. J. Fam. L. 140, 141 (2010) (explaining how "biases that lead to suboptimal decision making . . . are often compounded in family law matters by the emotional intensity of the issues").

their relationship with the legal parent(s), who may be the functional parent's own family member(s).

Another limitation of the study's inclusion only of electronically available decisions is that almost all such decisions are appellate decisions.[177] That is, 96% of the decisions in the data set were issued by a state's intermediate or high court. Only twenty-eight decisions were issued by a trial court, and these decisions come from only four states.[178]

The prevalence of appellate decisions may skew the characteristics of both the claims and the claimants. Less colorable claims may be more common at the trial court level because litigants with less colorable claims may be less likely to appeal adverse trial court decisions.[179] Given that litigation is expensive and many of the parties in these appellate proceedings are represented by private attorneys, parties in appellate cases may also, on the whole, have higher income levels as compared to the population of complainants in cases overall.

We are not making claims about all functional parent disputes or about all litigated cases featuring functional parent claims. Instead, we are making claims about the universe of electronically available decisions.[180]

---

177. About half of the decisions are "unpublished" or designated "not for publication."

178. There are fourteen cases from Delaware, two from New Jersey, and six each from New York and Pennsylvania. For features of the trial court opinions standing alone, see infra Appendix B.

Most states do not report trial court decisions on electronic databases, and no previous research of which we are aware studies functional parent doctrines at the trial court level. We are collecting trial court data on de facto parent petitions in Connecticut, where the doctrine took effect on July 1, 2022.

179. That said, our data do not suggest that determinations of whether the person is a functional parent differ dramatically at the appellate level. Among appellate decisions in our data set, 69% feature a court affirming the trial court's determination of whether a party is a functional parent. For more specific data on rates of affirmance, see infra note 270. In 25% of appellate decisions, the court reversed the functional parent determination. In 6% of appellate decisions, the court vacated the trial court determination on the functional parent issue or remanded to the trial court without resolving the functional parent issue.

180. For similar empirical studies within the context of family law, see generally Albertina Antognini, Nonmarital Contracts, 73 Stan. L. Rev. 67 (2021) (examining cases involving contracts between nonmarital partners); Joan S. Meier, Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law, 110 Geo. L.J. 835 (2022) (examining child custody cases involving claims of abuse and parental alienation). For examples outside of family law, see generally Jessica A. Clarke, Inferring Desire, 63 Duke L.J. 525 (2013) (examining employment discrimination cases); Brian Soucek, Perceived Homosexuals: Looking Gay Enough for Title VII, 63 Am. U. L. Rev. 715 (2014) (examining employment discrimination cases); cf. Christopher Ewell, Oona A. Hathaway & Ellen Nohle, Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment, 107 Cornell L. Rev. 1205, 1210–11 (2022) (examining 531 published cases involving claims brought under the Alien Tort Statute between 1789 and 2021); David Horton & Andrea Cann Chandrasekher, Probate Lending, 126 Yale L.J. 102, 130–31 (2016) (using a data set that includes 668 testate and intestate administrations from one county in California to explore probate lending practices); Reid Kress Weisbord & David Horton, Boilerplate and Default Rules in Wills Law: An Empirical Analysis, 103 Iowa L. Rev. 663, 686

Because the data set includes nearly 700 cases across multiple jurisdictions, we can make empirically grounded claims about features of functional parent decisions and the operation of functional parent doctrines in court.

Moreover, while scholars warn against using outcome rates of litigated cases to predict the outcome rates of all such disputes, that is not our aim.[181] Instead, the goal is to provide a more accurate picture of the universe of electronically available functional parent decisions. Specifically, while the existing literature on functional parent doctrines often makes assumptions about the operation of these doctrines, our data allow us to provide a more precise account of who is involved in functional parent litigation, as well as the context in which these cases arise. As addressed in Part IV, the results depart, strikingly, from common assumptions that pervade contemporary debates. Ultimately, the data set, even with its limitations, yields important insights for scholars, judges, lawmakers, and advocates.

The data set includes the full universe of functional parent doctrines described in Part I. Across jurisdictions, the doctrines have different names and emerge from different sources of authority. Some jurisdictions have more than one relevant doctrine, all of which are included in our study. Each jurisdiction and its relevant doctrine(s) are identified in Appendix A.[182]

Some of the doctrines grant legal parentage to functional parents, while others extend only some parental rights, such as standing to seek custody or visitation. As Figure 2 illustrates, of the thirty-four jurisdictions that currently have at least one functional parent doctrine, in our estimation, fifteen jurisdictions have one or more functional parent doctrines that clearly treat the person as a legal parent.[183] Twenty jurisdictions have a status that at least accords the person standing to seek custody or visitation, even if the person may not be treated as a legal

(2018) (using a data set that includes court probate and estate files from one county in New Jersey to study boilerplate and default rules in wills law).

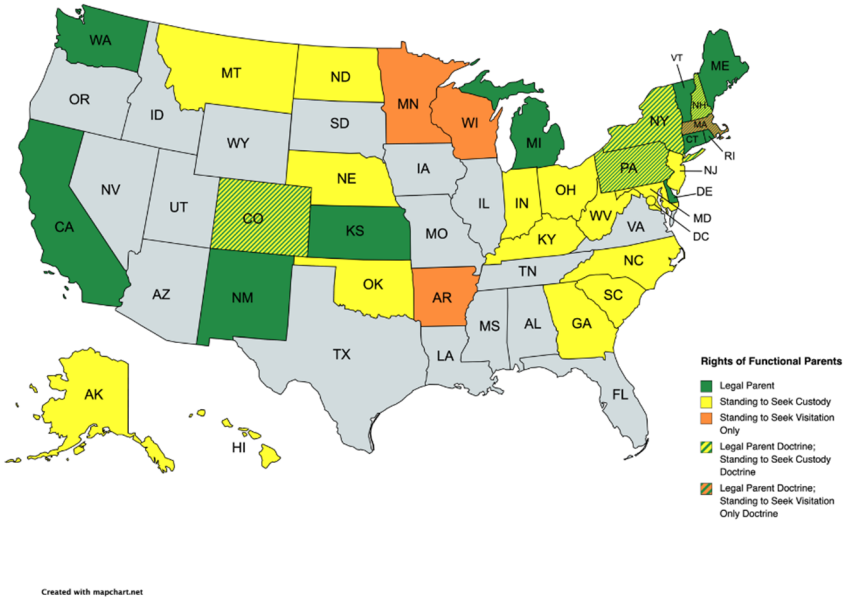
181. While, again, our goal is not to predict the likely outcomes of functional parent disputes, we note that our findings show some differences in win/loss rates across a variety of axes, including, importantly, whether the functional parent served as a primary caregiver for the child, and whether a legal parent had ever served as a primary caregiver. See infra section III.D.

182. For example, Maine has recognized the equitable de facto parent doctrine. It also has a statutory "holding out" presumption and a codified de facto parent provision. See supra notes 144–145. West Virginia recognizes an equitable functional parent doctrine. Court decisions in that state also permit courts to enforce permanent transfers of custody. Joslin & NeJaime, Multi-Parent Families, supra note 54, at 2575–77.

183. These jurisdictions are California, Colorado, Connecticut, Delaware, Kansas, Maine, Massachusetts, Michigan, New Hampshire, New Mexico, New York, Pennsylvania, Rhode Island, Vermont, and Washington.

parent.[184] In some jurisdictions in this category, the status *may* give the person more than standing to seek custody. In fact, some of these jurisdictions should arguably be included in the first category, given that, as explained in Part I, courts have at times referred to the functional parent as entitled to the same rights and responsibilities as a legal parent.[185] Yet, the cases typically implicate only a specific issue, such as custody, and therefore do not offer the court an opportunity to expressly identify the rights and obligations that the status yields. Further, the courts sometimes speak in inconsistent and ambiguous terms about the rights and responsibilities of functional parents.[186] Finally, four jurisdictions have a status that gives the person standing to seek visitation only.[187]

FIGURE 2. LEGAL RIGHTS OF FUNCTIONAL PARENTS IN JURISDICTIONS WITH FUNCTIONAL PARENT DOCTRINE(S)



All but a few of the cases in the data set feature situations in which the functional parent is seeking recognition under a functional parent doctrine. Specifically, while the circumstances under which the claims

184. These jurisdictions are Alaska, Colorado, District of Columbia, Georgia, Hawaii, Indiana, Kentucky, Maryland, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, and West Virginia.

185. See supra note 132 and accompanying text.

186. See supra note 133 and accompanying text.

187. These jurisdictions are Arkansas, Massachusetts, Minnesota, and Wisconsin.

arise vary, in 95% of the cases, the court is confronting a claim asserted by a person who is stepping forward as a functional parent. In other words, in the overwhelming majority of cases, the functional parent is willingly seeking (some or all of) the legal rights and responsibilities of parenthood.

In the remaining cases, the functional parent claim arises in some other posture. In 5% of cases in the data set, a legal parent or the government is claiming that a person is a functional parent for the purpose of imposing parental duties, such as an obligation to financially support the child.[188]

Three states—California, Kentucky, and Pennsylvania—account for 47% of all cases in the data set, with 82, 122, and 108 cases, respectively. To capture functional parents, California has a "holding out" presumption requiring that the person "receive[d] the child into their home" and held out the child as their own at some point during the child's minority.[189] Kentucky primarily relies on a de facto custodian statute, which applies to a person who has been "the primary caregiver for, and financial supporter of, a child" and has lived with the child for a specified time period.[190] Pennsylvania primarily uses an in loco parentis doctrine, which applies "to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption."[191] Pennsylvania also has a paternity by estoppel doctrine that resembles a "holding out" presumption.[192] California's "holding out" presumption and Pennsylvania's paternity by estoppel doctrine yield legal parentage,[193] while the de facto custodian doc-

188. In some jurisdictions, the functional parent doctrine grants standing only to the person who seeks to be adjudicated a functional parent. This is true, for example, of jurisdictions that adopted the 2017 UPA's de facto parent provisions. See Unif. Parentage Act § 609 (Unif. L. Comm'n 2017). In these jurisdictions, the doctrine could not be applied to an unwilling functional parent.

189. See Cal. Fam. Code § 7611(d) (2022).

190. Ky. Rev. Stat. Ann. § 403.270(1)(a) (West 2022) (specifying a period of six months of the previous two years if the child is under three, or for one year if the child is three or older or has been placed by child welfare authorities). Kentucky courts have also adjudicated functional parent claims through other doctrinal mechanisms. First, a Kentucky statute grants jurisdiction to Kentucky courts to determine custody if the child and "a person acting as a parent" have "a significant connection to the state." Id. § 403.822(1). A person is acting as a parent if the person has, or has had, physical custody of the child for six consecutive months within the year preceding initiation of the child custody proceeding. Id. § 403.800(13). Second, Kentucky courts have allowed functional parents to claim custody by showing that the legal parent waived their superior right to custody; waiver may be express or implied. See, e.g., L.W. v. M.P., No. 2008-CA-000760-ME, 2009 WL 485054, at *2 (Ky. Ct. App. Feb. 27, 2009). Despite these two doctrines, the vast majority of the Kentucky cases in our data set arise under the "de facto custodian" statute. See Joslin & NeJaime, Database, supra note 166.

191. T.B. v. L.R.M., 786 A.2d 913, 916 (Pa. 2001). In loco parentis was purely a common law doctrine until the Pennsylvania legislature codified the status in its custody statute in 2010. See 23 Pa. Stat. and Cons. Stat. Ann. § 5324 (West 2022).

192. 23 Pa. Stat. and Cons. Stat. Ann. § 5102(2) ("[T]he father openly holds out the child to be his and either receives the child into his home or provides support for the child.").

193. See Cal. Fam. Code § 7630(a); 23 Pa. Stat. and Cons. Stat. Ann. § 5101(2).

trine in Kentucky and the in loco parentis doctrine in Pennsylvania yield at least standing to seek custody under a best-interests-of-the-child standard.[194] Like the entire group of jurisdictions in our study, these three states are dissimilar along geographical, political, and demographic dimensions. Table 1 shows the number of cases from each jurisdiction, in descending order.

TABLE 1. FUNCTIONAL PARENT DECISIONS BY JURISDICTION

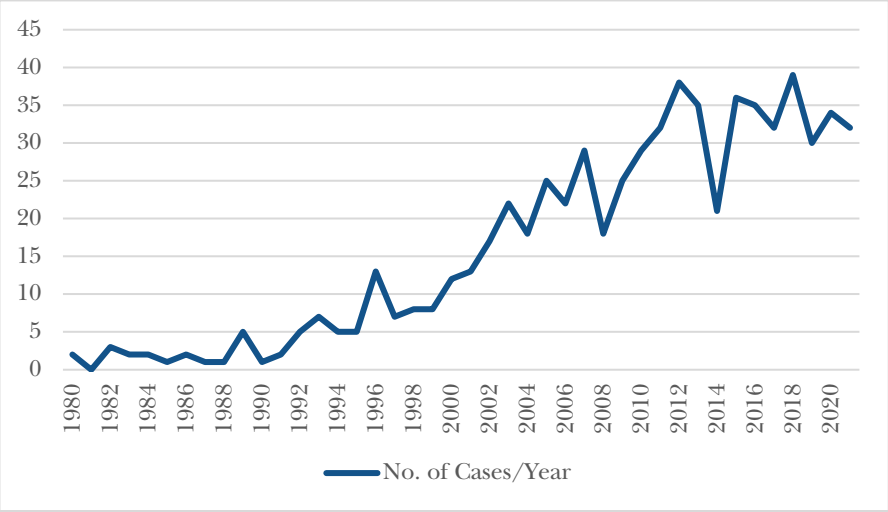
Jurisdiction	Number of Cases
Kentucky	122
Pennsylvania	108
California	82
New Jersey	28
West Virginia	28
New York	26
North Carolina	26
Washington	26
Nebraska	24
Indiana	17
Ohio	16
Delaware	15
Massachusetts	15
Maine	14
Montana	13
Michigan	12
North Dakota	12
South Carolina	11
Arkansas	10
Maryland	9
Alaska	7
Colorado	7
Kansas	7
Oklahoma	6
Minnesota	5
New Hampshire	5
Vermont	5

194. Ky. Rev. Stat. Ann. § 403.270(1)(a); 23 Pa. Stat. and Cons. Stat. Ann. § 5324.

Jurisdiction	Number of Cases
Wisconsin	4
Rhode Island	3
District of Columbia	2
Hawaii	2
New Mexico	2

The data set covers a period of more than forty years. Figure 3 shows the number of functional parent cases in the data set for each year covered by our study. Despite variation, the number of decisions clearly grew over time, as more jurisdictions adopted functional parent doctrines.[195] Representing a high point, the data set includes thirty-nine decisions from 2018.

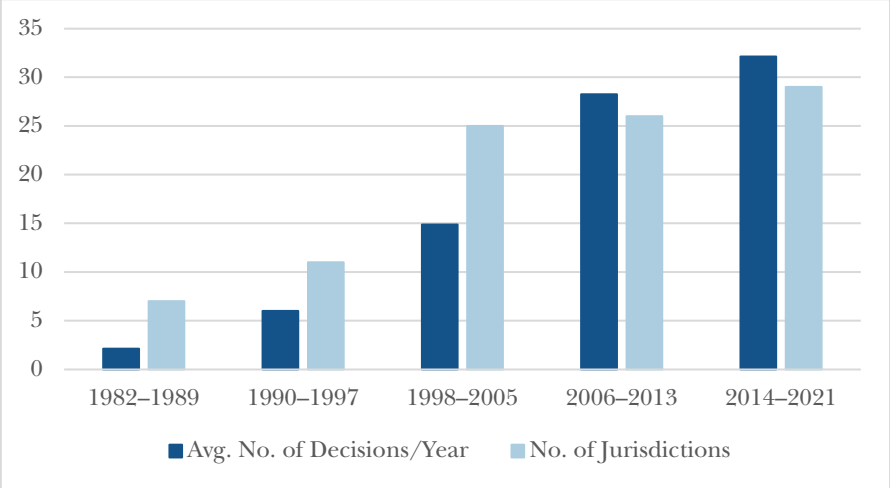
FIGURE 3. FUNCTIONAL PARENT DECISIONS BY YEAR



195. In jurisdictions in which the functional parent doctrine emerges from a presumption of parentage, such as the "holding out" presumption, the particular jurisdiction does not appear in the data set until a court explicitly applies the presumption to a nonbiological parent. For example, it was not until 2002 that the California Supreme Court held that its functional parent doctrine—based on the "holding out" presumption—could be applied to a person even if the person knew they were not the child's genetic parent. Alameda Cnty. Soc. Servs. Agency v. Kimberly H. (In re Nicholas H.), 46 P.3d 932, 934 (Cal.), modified on denial of reh'g (Cal. 2002). As a result, most of the California cases—cases that make up a significant share of all of the cases in our data set—were decided in the last two decades. To be clear, however, some California Court of Appeal decisions applied the "holding out" presumption to nonbiological fathers prior to the California Supreme Court's 2002 decision in *In re Nicholas H.* These cases are included in our data set. See, e.g., In re Spencer W., 56 Cal. Rptr. 2d 524, 525 (Ct. App. 1996); Steven W. v. Matthew S., 39 Cal. Rptr. 2d 535, 539 (Ct. App. 1995).

Figure 4 shows the average number of decisions per year in eight-year intervals beginning in 1982. (The data set includes only two decisions before 1982.) It also shows the number of jurisdictions represented by decisions in each period.[196]

FIGURE 4. FUNCTIONAL PARENT DECISIONS OVER TIME



The average number of decisions per year rose across the period studied, as did the number of jurisdictions represented in the data. As more jurisdictions adopted and applied functional parent doctrines, more functional parent cases appeared in the data.[197]

196. Appendix C provides data on decisions over time in the three jurisdictions most represented in the data set: California, Kentucky, and Pennsylvania.

197. In the first period (1982–1989), the seven jurisdictions represented are: Alaska, Michigan, New Hampshire, North Dakota, Pennsylvania, South Carolina, and West Virginia.

In the second period (1990–1997), the eleven jurisdictions represented are: California, Michigan, Montana, Nebraska, New Hampshire, New York, North Carolina, North Dakota, Pennsylvania, West Virginia, and Wisconsin.

In the third period (1998–2005), the twenty-five jurisdictions represented are: Alaska, Arkansas, California, Colorado, Delaware, Indiana, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Washington, West Virginia, and Wisconsin.

In the fourth period (2006–2013), the twenty-six jurisdictions represented are: Alaska, Arkansas, California, Colorado, Delaware, District of Columbia, Indiana, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Vermont, Washington, West Virginia, and Wisconsin.

In the fifth period (2014–2021), the twenty-nine jurisdictions represented are: Alaska, Arkansas, California, Colorado, Delaware, Hawaii, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New

The next Part turns to specific findings.

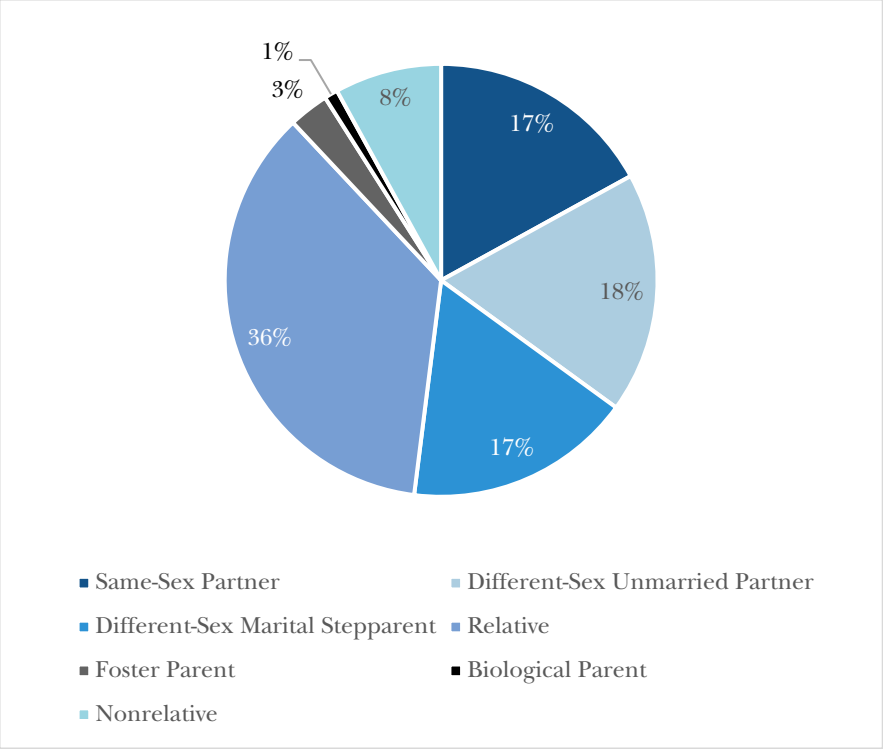
III. THE OPERATION AND APPLICATION OF FUNCTIONAL PARENT DOCTRINES IN COURT

This Part focuses on specific features of the cases in the data set: (1) who functional parents are; (2) what roles functional parents serve in children's lives; (3) the contexts in which functional parent doctrines are invoked; and (4) judicial application of the doctrines.

A. *Who Functional Parents Are*

This section reports findings on the population of functional parents in electronically available decisions. Functional parents are a diverse group, composed mainly of relatives, stepparents, and unmarried partners. Figure 5 illustrates the composition of the functional parents in the data set.

FIGURE 5. WHO ARE FUNCTIONAL PARENTS?



Mexico, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Vermont, Washington, and West Virginia.

The largest category of persons alleged to be functional parents—more than a third of the cases in the data set—are relatives. Grandparents make up almost two-thirds of the cases within this category and represent almost a quarter of all cases in the data set. The remainder of the relatives are a range of different family members, including aunts and uncles, great-grandparents, and more distant relatives.

Different-sex unmarried partners constitute 18% of functional parents in the data set. Different-sex marital stepparents and same-sex partners each constitute 17% of the functional parents in the cases in the data set. These populations can be combined in different ways. More than a third of the cases feature claims involving former different-sex partners. Just under a fifth of the cases feature stepparents, almost all of whom are different-sex marital stepparents.[198]

The remaining cases include a range of other types of functional parents. Of the twenty-three cases involving foster parents, six feature a foster parent who is also a relative of the child or an unmarried partner of the legal parent.[199] Four cases involve biological parents seeking rights or protections under functional parent doctrines, usually after their parental rights had been terminated.[200]

Only one case involves someone described as a paid caregiver or nanny who is alleged to be a functional parent.[201] Some functional parent doctrines expressly exclude individuals who assumed parental responsibilities with the "expectation of financial compensation."[202] Notably, in the one case featuring a person described as a "nanny," the person is also a relative—the paternal grandmother of one of the

198. Only 8 of these 125 stepparent cases involve same-sex stepparents. For more than half of the period studied, same-sex couples were not permitted to legally marry in any U.S. jurisdiction.

199. See Osterkamp v. Stiles, 235 P.3d 178, 181 (Alaska 2010) (unmarried partner and foster parent); K.C. v. L.A., 128 A.3d 774, 776 (Pa. 2015) (aunt and foster parent); In re S.B., No. 1105 EDA 2015, 2015 WL 7354770, at *1 (Pa. Super. Ct. Nov. 20, 2015) (aunt and foster parent); In re S.H.J., 78 A.3d 1158, 1160 (Pa. Super. Ct. 2013) (aunt and foster parent); In re G.D., 61 A.3d 1031, 1033 (Pa. Super. Ct. 2013) (great-aunt and foster parent); D.M.P. v. C.M.Y., No. 1028 WDA 2012, 2013 WL 11287688, at *1 (Pa. Super. Ct. Jan. 11, 2013) (aunt and foster parent).

200. See K.A.S. v. J.L.W., No. 99-09-08TN, 2007 WL 3197752, at *11 (Del. Fam. Ct. Aug. 17, 2007) (biological father); In re D.M., 995 A.2d 371, 377–78 (Pa. Super. Ct. 2010) (biological mother); Morgan v. Weiser, 923 A.2d 1183, 1189 (Pa. Super. Ct. 2007) (biological father). In the fourth case, a sperm donor was precluded from establishing parentage based on his genetic tie, but he could establish parentage based on "holding out" the child as his own. See Jason P. v. Danielle S., 215 Cal. Rptr. 3d 542, 559 (Ct. App. 2017). In this fourth case, the biological parent was also a different-sex unmarried partner.

201. In re B.C., No. 14-1174, 2015 WL 3752039, at *2 (W. Va. June 15, 2015) (involving an alleged functional parent described as a "nanny," though it is unclear whether she received compensation for her caregiving).

202. Me. Rev. Stat. Ann. tit. 19-A, § 1891(3)(D) (West 2022).

children.[203] The issue arose in the context of an abuse and neglect proceeding against the mother based on multiple allegations of physical abuse.[204] And the court rejected the functional parent claim.[205]

The overwhelming majority of children in the cases in the data set were conceived through sexual intercourse in the context of different-sex relationships. Typically, the functional parent is a partner of a parent who came into the child's life after conception or a family member who stepped in to parent the child. In 11% of cases, the functional parent was an "intended parent" of a child conceived through assisted reproduction, meaning that the legal parent and the functional parent planned to have and raise the child together.[206]

As the number of functional parent cases decided per year grew over time,[207] so did the total number of cases per year featuring particular kinds of claimants. Figure 6 shows the average number of cases, across five eight-year periods, featuring the most common types of functional parents in the data set: grandparents, same-sex partners, different-sex marital stepparents, and different-sex unmarried partners.[208]

---

203. *In re B.C.*, 2015 WL 3752039, at *1 (noting that the father of one of the children at issue was the "adult adoptive son of" the alleged de facto parent, making the alleged de facto parent the child's grandparent).

204. Id. ("In May of 2014, the [Department of Health and Human Resources] filed an abuse and neglect petition following an investigation initiated by nine-year-old D.C.'s report to a teacher that his mother, P.C., grabbed him by the neck and hit his head into a doorknob earlier that day."). The mother was also criminally charged for conduct related to the child. Id. ("[T]he petition alleged that the mother violated the circuit court's initial custody order by removing B.C.–2 from his foster home and, as a result, was charged with felony child concealment and multiple misdemeanors.").

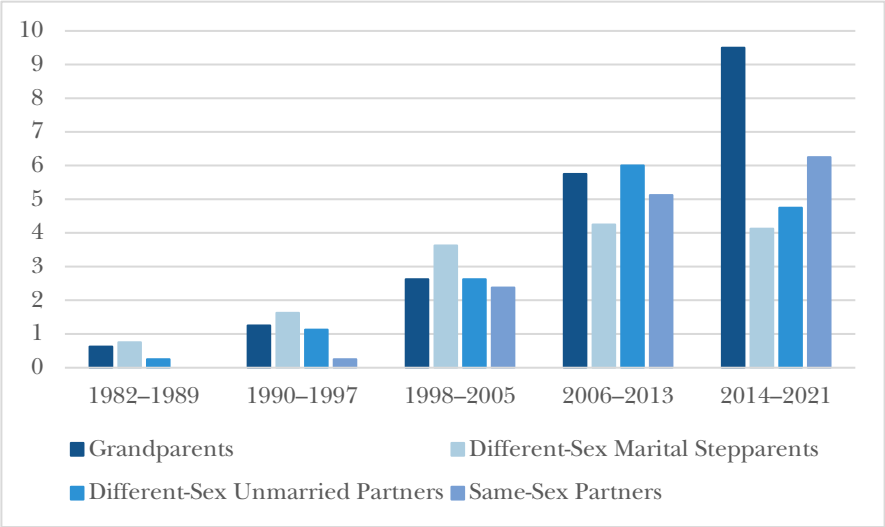
205. Id. at *4 (affirming trial court decision finding that "petitioner failed . . . to adduce any evidence that she is . . . [the children's] psychological parent").

206. Among the ninety cases based on the "holding out" presumption of parentage, 17% involve intended parents.

207. Supra Figure 3.

208. Appendix C provides data on the number of decisions featuring these groups of functional parents, across the five eight-year periods, in the three jurisdictions most represented in the data set: California, Kentucky, and Pennsylvania. The notable differences—particularly the overrepresentation of grandparent cases in Kentucky and the overrepresentation of different-sex couple cases in California—likely relate to the criteria that the respective functional parent doctrines use. The functional parent doctrine in California requires that the person held out the child as their child, while Kentucky has no such requirement. See infra Appendix A. It is less likely that a relative will hold the child out as *their child*—often relatives hold the child out as their relative. Relatives are more likely to be able to meet the requirements of Kentucky's de facto custodian statute, which requires that the person served as the child's primary caregiver and financial supporter for a specified period. See supra note 120 and accompanying text. Of course, other factors could also account for differences across jurisdictions.

FIGURE 6. NUMBER OF FUNCTIONAL PARENT DECISIONS OVER TIME AND BY GROUP



Decisions featuring grandparents appear to have grown most dramatically, with the trend continuing. The highest number of grandparent decisions in a single year in our study is fourteen, which occurred in 2015. The noticeable rise in grandparent cases is consistent with important demographic trends. Census data show a dramatic rise in the number of children living only with their grandparents.[209] Today, it is estimated that "[m]ore than 2,500,000 grandparents in the United States are the primary caretaker of their grandchildren."[210] While we do not have data on the racial demographics of the population of functional parents in the data set, it is important to note that African American grandparents are especially likely to become primary caregivers of their grandchildren.[211]

209. Lynne M. Casper & Kenneth R. Bryson, Co-Resident Grandparents and Their Grandchildren: Grandparent Maintained Families (U.S. Bureau of the Census, Population Div. Working Paper No. 26, 1998), https://www.census.gov/content/dam/Census/library/working-papers/1998/demo/twps0026.pdf [https://perma.cc/PRQ2-BJFA].

210. Supporting Grandparents Raising Grandchildren Act, Pub. L. No. 115-196, § 2, 132 Stat. 1511, 1511 (2018).

211. Esme Fuller-Thomson, Meredith Minkler & Diane Driver, A Profile of Grandparents Raising Grandchildren in the United States, 37 Gerontologist 406, 409 (1997) (reporting that, compared to all other racial groups, African American grandparents "had twice the odds of becoming caregiving grandparents"); see also Sandra Edmonds Crewe, Guardians of Generations: African American Grandparent Caregivers for Children of HIV/AIDS Infected Parents, 12 J. Fam. Strengths 1, 6 (2012) ("Approximately 48% (47.6%) [of African American grandparents] are the primary caregivers of their own grandchildren under 18 years of age."). Census data show that "[w]hile African American children make up 14 percent of all children in the United States, they comprise over 25 percent of all children in grandfamilies and 23 percent of all children in foster care." Generations United,

Approximately 40% of African Americans live in a multi-generational household, and 13% live in a skipped-generation household.[212] Among the more than 1.3 million households headed by African American grandparents in the United States, almost half feature grandparents serving as primary caregivers of grandchildren under eighteen years old.[213]

Decisions featuring same-sex couples also grew over time for most of the period of our study. Given that planned same-sex parent families are a fairly recent phenomenon,[214] it is not surprising that the first case in our data set appears in 1995.[215] Such cases then grew steadily, with a high point of ten cases in 2018.

Decisions featuring different-sex couples grew over time but decreased slightly in the last period of the study. The first case featuring different-sex unmarried partners appears in the data in 1989.[216] Notably, the number of cases of this kind increased at a more dramatic pace than cases featuring different-sex marital stepparents.[217] This relative growth

---

African American Grandfamilies: Helping Children Thrive Through Connection to Family and Culture 12 (2020), https://www.gu.org/app/uploads/2020/07/AA-Toolkit-WEB-2.pdf [https://perma.cc/9V2N-GKH9].

212. Paul Taylor, Jeffrey Passel, Richard Fry, Richard Morin, Wendy Wang, Gabriel Velasco & Daniel Dockterman, Pew Rsch. Ctr., The Return of the Multi-Generational Family Household 8 (2010), https://www.pewresearch.org/wp-content/uploads/sites/3/2010/10/752-multi-generational-families.pdf [https://perma.cc/CD5A-3LQT].

213. Crewe, supra note 211, at 5–6. These families are more likely to be single-parent and low-income households. See Lindsey A. Baker, Merril Silverstein & Norella M. Putney, Grandparents Raising Grandchildren in the United States: Changing Family Forms, Stagnant Social Policies, 7 J. Societal & Soc. Pol'y 53, 55 (2008) ("By almost every available measure, families in which children are being raised by grandparents are among the most vulnerable in the United States, over-represented by single-mother and low income families who arrived at their status due to substance abuse, teen pregnancy, AIDS, and incarceration in the middle generation."); see also Annie E. Casey Found., Stepping up for Kids: What Government and Communities Should Do to Support Kinship Families 4 tbl.2 (2012), https://assets.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf [https://perma.cc/Q9UG-EUZM] (noting that such families are "more likely to be poor, single, older, less educated, and unemployed than families in which at least one parent is present").

214. See, e.g., Douglas NeJaime, Marriage Equality and the New Parenthood, 129 Harv. L. Rev. 1185, 1197 (2016) [hereinafter NeJaime, New Parenthood] (noting that "[t]he 1980s and 1990s saw what many commentators refer to as the 'lesbian baby boom'").

215. See In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995). Earlier in the decade, courts in California and New York had refused to apply a functional parent doctrine to protect the relationship between a child and a nonbiological mother in a same-sex couple. See Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Ct. App. 1991); Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991).

216. See Buness v. Gillen, 781 P.2d 985, 986 (Alaska 1989).

217. While we are using the legal status of being a stepparent (i.e., married to a legal parent), estimates of stepparent families vary, at least in part because some people describe a child as a stepchild even if the person is not married to the child's legal parent. Compare Rose M. Kreider & Renee Ellis, U.S. Census Bureau, Living Arrangements of Children: 2009, at 6 (2011), https://www2.census.gov/library/publications/2011/demo/p70-126.pdf [https://perma.cc/RDN5-FMLU] (estimating that 5.6 million children live with a stepparent), with Rose M. Kreider & Daphne A. Lofquist, U.S. Census Bureau, Adopted

appears to reflect demographic trends. Rates of nonmarital child-rearing and cohabitation grew dramatically in recent decades,[218] as marriage rates continued to decline.[219] For example, in 1990, there were an estimated 2.9 million nonmarital cohabiting couples in the United States.[220] By 2010, that number had increased to 7.5 million.[221] Many of these unmarried couples—approximately 40% of them—have a child in the household.[222] Within the growing number of nonmarital families, mothers are increasingly likely to be living with an unmarried partner, who may not be the child's genetic parent.[223] Again, while we do not have data on the race or ethnicity of functional parents in the data set, rates of marriage, nonmarital child-rearing, and cohabitation correlate with race and ethnicity.[224] Black children, for example, are less likely than children from

---

Children and Stepchildren: 2010, at 5 (2014), https://www.census.gov/content/dam/Census/library/publications/2014/demo/p20-572.pdf [https://perma.cc/C99J-QNTQ] (estimating that between 2.8 and 4.6 million children live with a stepparent).

218. Gretchen Livingston, Pew Rsch. Ctr., The Changing Profile of Unmarried Parents 6 (2018), https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents/ [https://perma.cc/7ZSH-JSDE]; Paul Taylor, Richard Fry, D'Vera Cohn, Wendy Wang, Gabriel Velasco & Daniel Dockterman, Pew Rsch. Ctr., Living Together: The Economics of Cohabitation 1 (2011), https://www.pewresearch.org/social-trends/2011/06/27/living-together-the-economics-of-cohabitation/ [https://perma.cc/BE9T-ZGQQ] (explaining that "[t]he share of 30- to 44-year-olds living as unmarried couples has more than doubled since the mid-1990s"); see also Daniel T. Lichter, Sharon Sassler & Richard N. Turner, Cohabitation, Post-Conception Unions, and the Rise in Nonmarital Fertility, 47 Soc. Sci. Rsch. 134, 134 (2014) (reporting that, in 2014, "22% of *all* first U.S. births – more than one in five – occurred within cohabiting [nonmarital] unions, up from 12.4% in 2002").

219. See D'Vera Cohn, Jeffrey S. Passel, Wendy Wang & Gretchen Livingston, Pew Rsch. Ctr., Barely Half of U.S. Adults Are Married—A Record Low 1 (2011), https://www.pewresearch.org/social-trends/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/ [https://perma.cc/G8MR-D2PX] (describing marriage in the United States as "losing 'market share' for the past half century").

220. Judith A. Seltzer, Families Formed Outside of Marriage, 62 J. Marriage & Fam. 1247, 1249 (2000).

221. Sheela Kennedy & Catherine A. Fitch, Measuring Cohabitation and Family Structure in the United States: Assessing the Impact of New Data From the Current Population Survey, 49 Demography 1479, 1479 (2012).

222. Id. at 1481 ("Currently, about 40% of cohabiting couples are raising resident children . . . .").

223. Livingston, supra note 218, at 6 (finding a rise in cohabiting nonmarital parents).

224. In the United States, rates of nonmarital birth and cohabitation are higher in Black and Hispanic populations. See Lichter et al., supra note 218, at 140 tbl.2. Relatedly, marriage rates are lower in these populations. See Lisa Carlson, Marriage in the U.S.: Twenty-Five Years of Change, 1995–2020, Nat'l Ctr. for Fam. & Marriage Rsch. (2020), https://www.bgsu.edu/ncfmr/resources/data/family-profiles/carlson-25-years-change-marriage-1995-2020-fp-20-29.html [https://perma.cc/US8F-QU59] (observing that "the [relative] proportion of women ever married declined the most among Black women" and that Hispanic women experienced "the greatest decline" in the absolute share of married women from 1995 to 2020); see also R. Kelly Raley, Megan M. Sweeny & Danielle Wondra, The Growing Racial and Ethnic Divide in U.S. Marriage Patterns, 25 Future Child. 89, 93 fig.1 (2015) (showing that the percentage of U.S. women aged 40–44 years who had ever married varied by race, with both Black and Hispanic women being much more likely

other racial and ethnic groups to be living with two married parents.[225] Black children are more likely to be born to an unmarried mother who is not cohabiting with the child's biological father, while Hispanic children are most likely to be living with two unmarried parents.[226]

* * *

Overall, no one group predominates. Relatives, and grandparents specifically, represent a large swath of functional parents in the data set. Different-sex couples, both married and unmarried, also constitute a sizable share. And same-sex couples are present in numbers that clearly exceed their representation in the general population. Perhaps what is most striking about the group of functional parents in our study is its diversity.

B. *What Functional Parents Do*

This section examines the relationships between the functional parents and the children in the cases in the data set. In the overwhelming majority of cases, the functional parent was a primary caregiver to the child. In about half of the cases, a legal parent was not serving as the child's primary caregiver at the time of the proceeding. Ultimately, the cases paint a striking picture of how centrally involved functional parents are in the lives of the children at issue.

In reviewing the cases, we sought to determine whether the functional parent served as a primary caregiver of the child.[227] Based on the court's assessment of the factual record, we considered whether the child lived with the functional parent, whether the functional parent engaged in consistent caretaking of the child, and whether the functional parent routinely made decisions about the child's care. When confronted with

---

to be unmarried than white women, especially after the 1980s). Unmarried parents and cohabitants also generally have lower incomes than their married counterparts. See Livingston, supra note 218, at 4 (noting that it is "well-established that married parents are typically better off financially than unmarried parents"). Moreover, single mothers face more difficult economic circumstances than single fathers. See Yuan-Chiao Lu, Regine Walker, Patrick Richard & Mustafa Younis, Inequalities in Poverty and Income Between Single Mothers and Fathers, 17 Int'l J. Env't Rsch. & Pub. Health 135, 141, 145 (2020).

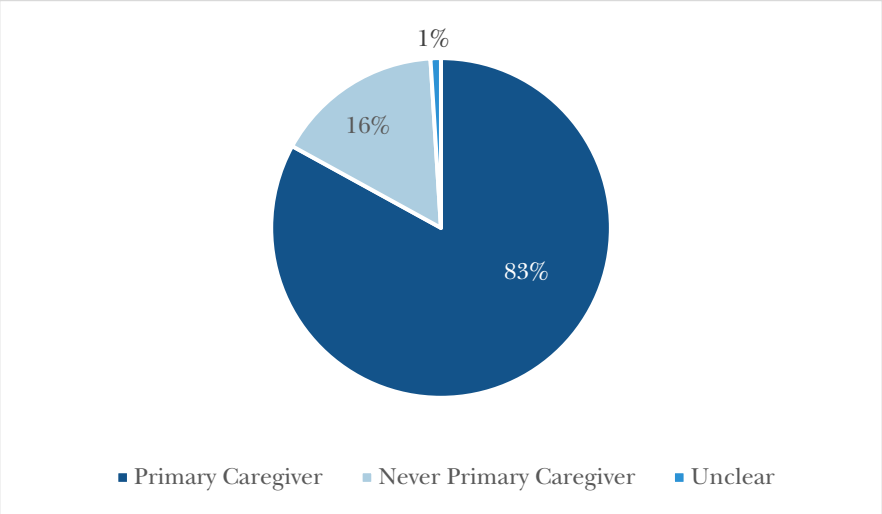
225. See Paul Hemez & Chanell Washington, Percentage and Number of Children Living With Two Parents Has Dropped Since 1968, U.S. Census Bureau (Apr. 12, 2021), https://www.census.gov/library/stories/2021/04/number-of-children-living-only-with-their-mothers-has-doubled-in-past-50-years.html [https://perma.cc/8E4S-VUFC].

226. See id.; see also Lichter et al., supra note 218, at 139–40.

227. As Melissa Murray argues, "family law understands caregiving as parenting." Melissa Murray, The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers, 94 Va. L. Rev. 385, 388 (2008). Scholars with more formal views of parenthood (i.e., parenthood based on biology, adoption, or even contract) might object that the functional parent doctrines capture relationships that should not be treated as parental. For present purposes, though, we are analyzing how courts apply doctrines that, by design, view the relationship in functional, rather than formal, terms.

competing or insufficient facts, we erred on the side of *not coding* the functional parent as a primary caregiver. This should mean that our estimate of functional parents serving in primary caregiver roles is conservative. Nonetheless, we acknowledge that others may have made different decisions about how to code particular cases and whether a person should be categorized as a primary caregiver. We do not believe that the relatively small number of cases in which there would be disagreement detracts from the general finding regarding the incidence of primary caregiving by functional parents.

FIGURE 7. THE FUNCTIONAL PARENT'S ROLE IN THE CHILD'S LIFE



As Figure 7 illustrates, the data reveal that the functional parent appears to have served as a primary caregiver of the child in 83% of the cases.[228] In 22% of the cases, the functional parent had been the child's primary caregiver and, at a different time, a legal parent had been the primary caregiver. In another 42% of all cases, the functional parent and a legal parent had been co-primary caregivers.

Co-parenting is a consistent feature in cases involving same-sex intended parents. Of the ninety cases involving same-sex intended parents who adopted or conceived through assisted reproduction, the functional parent was a co-primary caregiver with the adoptive or biological parent in 93%. Co-parenting is also a common feature of cases involving stepparents and different-sex unmarried partners. Of the 117 cases involving different-

228. There are six cases in which the role of the functional parent is extremely unclear, and so the status of the functional parent as a primary caregiver is not coded for these cases.

Among the ninety cases based on the "holding out" presumption of parentage, the functional parent seems to have been a primary caregiver in sixty-eight cases (76%).

sex marital stepparents, the stepparent was a co-primary caregiver with their spouse (the legal parent) in 73%. Of the 118 cases involving different-sex unmarried partners, the functional parent was a co-primary caregiver with their unmarried partner (the legal parent) in 44%. Co-parenting is less common in cases involving relatives, occurring in 15% of cases.

Cases involving relatives were more likely to feature situations in which the functional parent was serving as the primary caregiver when a legal parent was not serving as a primary caregiver. In 87% of cases involving relatives, the functional parent appears to have been a primary caregiver of the child. In 47% of those cases, the legal parent and the functional parent served as the child's primary caregiver at different times. In another 30% of those cases, no legal parent had been a primary caregiver of the child.

Consider cases involving grandparents. The court found the grandparent to be a functional parent in 72 of the 158 grandparent cases in the data set. In all but one of those 72 cases, at the time the relevant proceeding was initiated, the grandparent was a primary caregiver of the child.[229] In 68 of those 72 cases, no legal parent was serving as a primary caregiver of the child at the time of the proceeding.[230]

In some cases, a legal parent had at one point been a primary caregiver, but by the time of the litigation, the grandparent was the child's primary caregiver. For example, in *Fenton v. Fenton*, the child's biological parents placed the child, who was a toddler, with the paternal grandparents and left the state.[231] Even when they returned, the parents did not attempt to regain custody of the child.[232] Testimony revealed that the child's legal parents showed little interest in the child, while the grandparents served as consistently "excellent caregivers."[233] In *Sherfey v. Sherfey*, an older child left his parents' home to reside with his grandparents, and his parents eventually moved out of state, "voluntarily leaving [the child] behind."[234] The grandparents raised the child for the next two years, during which time the child had little contact with his parents.[235]

---

229. The lone outlier, In re Antonio R.A., 719 S.E.2d 850 (W. Va. 2011), is discussed below. See infra notes 243–246 and accompanying text.

230. For the four cases in which this was not the case, see L.M. v. D.W., No. 959 WDA 2017, 2018 WL 298997, at *1 (Pa. Super. Ct. Jan. 5, 2018) (child splitting time between mother and paternal grandparents); Alukonis v. Smith, 846 S.E.2d 600, 603 (S.C. Ct. App. 2020) (child alternating between homes of grandfather and father); *In re Antonio R.A.*, 719 S.E.2d at 854 (child living with mother for three years); In re N.A., 711 S.E.2d 280, 283 (W. Va. 2011) (children living with mother and grandparents).

231. No. 2011-CA-002056-ME, 2012 WL 2160199, at *1 (Ky. Ct. App. June 15, 2012).

232. Id.

233. Id. at *2.

234. 74 S.W.3d 777, 779 (Ky. Ct. App. 2002).

235. Id.

In other cases, the legal parent had been involved in the child's life, but only the grandparent had been the child's primary caregiver.[236] For example, in *M.J.S. v. B.B.*, the child's mother and grandmother lived together; the grandmother was the child's primary caregiver, and the mother eventually entered an in-patient drug treatment program.[237] In *C.P. v. S.C.*, the father resided with his child and his own parents, who "provided daily care" for the child, and the grandparents continued to serve as the primary caregivers after the father's incarceration.[238]

In some cases, the grandparent was the only parent the child had known. For example, in *In Interest of D.R.J.*, the child lived with the grandmother from birth.[239] When the child was two years old, the grandmother notified the state that the child had been abandoned by the child's mother.[240] Four years later, when the child was six, the mother sought custody.[241] In *State ex rel. Combs v. O'Neal*, discussed at the start of this Article, the grandmother raised the child for thirteen years, at which point the father sought custody.[242]

In re Antonio R.A. is the one case (out of seventy-two) in which a grandparent was recognized as a functional parent but was not serving as the child's primary caregiver *at the time of the proceeding*.[243] The grandmother, however, *had been* the child's sole caregiver for a decade, at which point the child's mother took custody of him.[244] A few years later, the child was removed from his mother's home based on an emergency protective order and returned to his grandmother's home; four days later, the grandmother filed a petition to maintain custody of the child.[245] Taken together, in each of the seventy-two cases in the data set in which the court treated a grandparent as a functional parent, the grandparent served as a primary caregiver of the child for a significant period.[246]

---

236. Indeed, in West Virginia, 61% of the functional parent cases (17 of 28 cases) appear to involve situations in which "the legal parents had contact with their child, but the child was not living with either of their legal parents, and the legal parents were not making decisions for the child." Joslin & NeJaime, Multi-Parent Families, supra note 54, at 2579. While this percentage may not reflect the percentage in other states, these are far from the only cases presenting this fact pattern.

237. 172 A.3d 651, 653 (Pa. Super. Ct. 2017).

238. No. 1277 WDA 2019, 2020 WL 829471, at *1 (Pa. Super. Ct. June 23, 2020).

239. 317 N.W.2d 391, 392 (N.D. 1982).

240. Id. at 393.

241. Id.

242. 662 N.W.2d 231, 233, 236 (Neb. Ct. App. 2003).

243. 719 S.E.2d 850, 854 (W. Va. 2011).

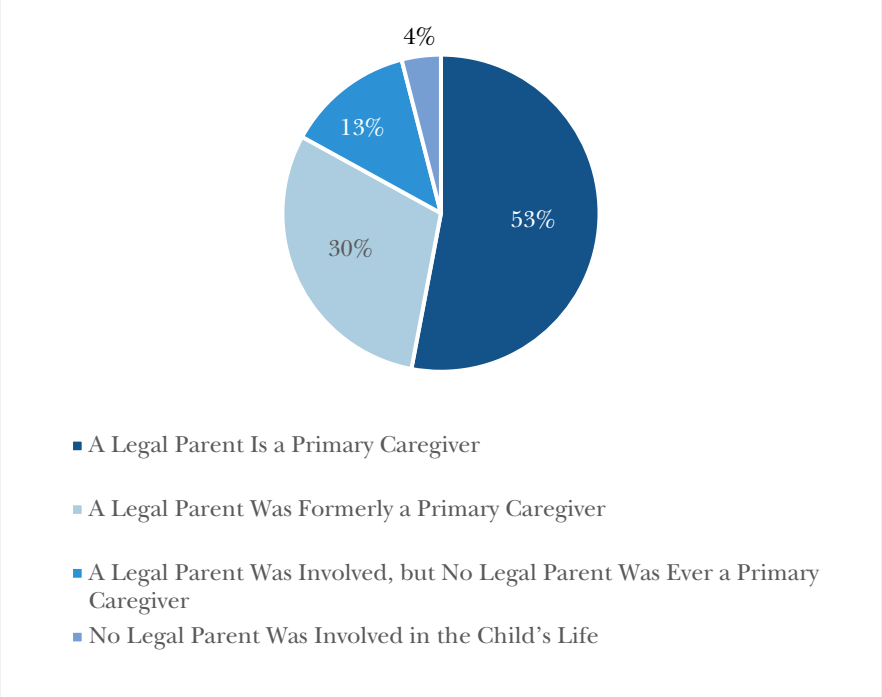
244. Id.

245. Id.

246. This is not to say that the grandparent was always an exemplary caregiver. See In re N.A., 711 S.E.2d 280, 285 (W. Va. 2011) ("[The biological father] testified that . . . he and the Appellee Grandfather had gotten into a physical altercation in the presence of one of the children. The altercation resulted in a battery charge being filed against the Appellee

We also examined the relationship between the legal parent(s) and the child in the cases in the data set. Figure 8 shows the involvement of a legal parent in the child's life, coded by the greatest involvement of any legal parent. In other words, if one legal parent was a primary caregiver and the other had no involvement in the child's life, the case was coded as involving a legal parent as a primary caregiver and not as a legal parent having no involvement.

FIGURE 8. A LEGAL PARENT'S ROLE IN THE CHILD'S LIFE



In just over half of the cases in the data set, a legal parent was serving as the child's primary caregiver at the time of the petition raising the functional parent issue.[247] In another 30% of cases, a legal parent had been

Grandfather."). The point, instead, is that the grandparent had stepped into the role of primary caregiver for the child. Moreover, even in cases in which the court rejected the grandparent's functional parent claim, the grandparent often served as the child's primary caregiver for long periods of time. See, e.g., P.T. v. M.H., 953 A.2d 814, 815 (Pa. Super. Ct. 2008) (grandparents served as primary caregivers until child was three and again took on such responsibilities when child was five).

247. Among the ninety cases based on the "holding out" presumption of parentage, a legal parent was serving or had served as the child's primary caregiver in 88% (seventy-nine cases), and a legal parent had not served as a primary caregiver in 12% (eleven cases). Again, the higher rate of legal parents as primary caregivers, as compared to the data set generally, may reflect the fact that "holding out" presumption cases are more likely to feature married

but was no longer a primary caregiver of the child. In 17% of cases in the data set, no legal parent had ever been the child's primary caregiver. This includes cases in which a legal parent was involved in the child's life but not as a primary caregiver, as well as cases in which no legal parent had ever been involved in the child's life.[248]

In examining the cases in the data set, we also related the role of the functional parent to the role of the legal parent(s). In 16% of cases, the functional parent was the child's primary caregiver and no legal parent had consistently provided care for the child.[249]

* * *

Ultimately, the cases in the data set paint a striking picture of functional parents. In the vast majority of cases, functional parents have played a central role in the child's life, serving as the child's primary caregiver. Among the cases involving intimate couples, the functional parent often has played this role alongside a legal parent. Yet, in a not-insignificant share of the overall body of cases in the data set, the functional parent has been the child's primary caregiver, and a legal parent has not.

C. *How Functional Parent Claims Arise*

This Article turns now from the identities and roles of functional parents to the posture in which functional parent claims arise. We examined the cases in the data set to determine the types of conflicts and situations that place courts in the position of adjudicating functional

---

and unmarried couples where one member of the couple is a legal parent. In addition, in some jurisdictions, the presumption requires co-residence with not only the child but also the legal parent. See, e.g., Conn. Gen. Stat. Ann. § 46b-488(a)(3) (West 2022) ("The person, jointly with another parent, resided in the same household with the child . . . .").

248. These cases fall into three general categories: (1) cases in which the child was removed after birth by child welfare authorities, see In re S.B., No. F049798, 2006 WL 3317969 (Cal. Ct. App. Nov. 16, 2006); In re Jerry P., 116 Cal. Rptr. 2d 123 (Ct. App. 2002); (2) cases in which the legal parents informally transferred custody to others, see In re Tyler D., No. C041188, 2003 WL 1522215 (Cal. Ct. App. Mar. 25, 2003); In re Karen C., 124 Cal. Rptr. 2d 677 (Ct. App. 2002); and (3) cases in which the birth parent placed the child for adoption, see In re Adoption of Wims, 685 A.2d 1034 (Pa. Super. Ct. 1996); T.J.B. v. E.C., 652 A.2d 936 (Pa. Super. Ct. 1995).

249. See, e.g., N.J. Div. of Youth & Fam. Servs. v. A.S., No. A-1666-10T2, 2014 WL 2197805, at *1 (N.J. Super. Ct. App. Div. May 28, 2014) (involving a child who "is now nine years old and has spent most of her life living with [her aunt and uncle]"); N.J. Div. of Youth & Fam. Servs. v. V.W., No. A-5196-08T4, 2010 WL 4075325, at *5 (N.J. Super. Ct. App. Div. July 12, 2010) (involving a child who had lived "for most of her life" with her great-grandmother); see also Joslin & NeJaime, Multi-Parent Families, supra note 54, at 2579 (noting that "63 percent[] of [multi-parent functional parent] cases [from West Virginia] . . . fit within this category," where "the legal parents had contact with their child, but the child was not living with either of the legal parents, and the legal parents were not making decisions for the child").

parent claims. As expected, in a large share of the cases, the functional parent claim is asserted after an intimate relationship dissolves, either when a married couple divorces or when an unmarried couple breaks up. But the cases also presented other, less expected situations. In a small but not-insignificant slice of the cases, the functional parent claim arose after the death of a legal parent. In addition, nearly a third of the cases in the data set featured child welfare involvement of some kind, suggesting that in many cases the functional parent claim responds to, rather than prompts, state intervention in the family.

1. *Post-Dissolution Disputes*. — Post-dissolution custody disputes constitute a sizable share of functional parent cases in the data set. Among the cases, 44% feature this type of dispute. In such cases, a legal parent and a functional parent typically lived together with the child, either in a marital or nonmarital relationship.[250] Upon divorce or dissolution, the parties litigate the question of whether the functional parent should have custody or visitation.[251]

A much less common post-dissolution dispute implicates child support. In 4% of cases in our data set, a legal parent asks a court to recognize a former intimate partner as a functional parent so as to impose a child support obligation.[252]

Skeptics raise a host of concerns about post-dissolution disputes, which Part IV addresses. Here, we identify findings from our data set that relate to one such concern—the fear that abusive ex-partners will make claims to parental recognition as a way to control and harass the child's legal parent.[253] Because the data set includes only electronically available decisions, it does not show whether and how functional parent doctrines

---

250. We include in this group of 291 cases, seven cases in which the former intimate partners never lived with each other.

251. Among the ninety cases based on the "holding out" presumption of parentage, 82% (seventy-four cases) involve post-dissolution custody disputes.

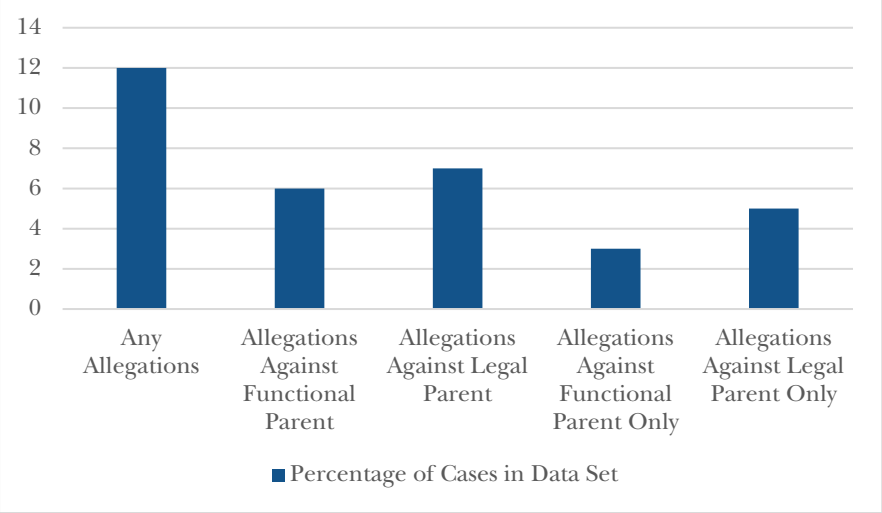
252. Some post-dissolution disputes involving child support, though, do not involve such a straightforward scenario. Take *Dinkle v. Dinkle*, No. 2016/11482, 2019 WL 4850350 (N.Y. Sup. Ct. Oct. 1, 2019). The case involved a married couple who served as primary caretakers for the biological child of the girlfriend of the husband's son for a period of seven years. Id. at *1. It was "undisputed" that, during this time, "the biological mother was unable to sufficiently care for the child due to mental health issues." Id. During the couple's divorce proceeding, the wife argued that the husband should be obligated to support the child. As she argued in the case, while he "has now removed himself from the child's life," "[he] acted as a parent for several years and only now denies a parental connection to the child to avoid paying child support." Id. at *2.

253. See, e.g., Moreau v. Sylvester, 95 A.3d 416, 424–25 n.12 (Vt. 2014) ("Will every relief-from-abuse proceeding present an avenue for defendant partners to counterattack with de facto parentage complaints?"); Strauss, supra note 44, at 952 (identifying "concern cohabitants could use the doctrine for harassment"). We address this concern more extensively in a forthcoming article. See Courtney G. Joslin & Douglas NeJaime, Domestic Violence and Functional Parent Doctrines, 30 Va. J. Soc. Pol'y & L. (forthcoming 2023) (on file with the *Columbia Law Review*).

may be used for these purposes *outside of litigation*. In addition, because most trial court cases are not reported on electronic databases, the data set also does not reveal the prevalence of domestic violence allegations in *all* functional parent litigation. Instead, we are able only to assess domestic violence allegations in the cases included in the data set.

As Figure 9 illustrates, 12% of the cases in the data set feature allegations of domestic violence between adults. Roughly half of these cases—representing 6% of all cases in the data set—involve allegations that the functional parent engaged in domestic violence. Of those cases, roughly half feature situations in which allegations of domestic violence are lodged against the functional parent and no other party—representing 3% of cases in the data set. In the remaining cases involving allegations of domestic violence asserted against the functional parent, there are also allegations of domestic violence against a legal parent.

FIGURE 9. ALLEGATIONS OF DOMESTIC VIOLENCE IN FUNCTIONAL PARENT CASES



One would expect that allegations of domestic violence arise more often in cases involving former intimate partners as compared to disputes between relatives and legal parents. Of the seventy-nine cases that include allegations of domestic violence, approximately 60% feature intimate partners (i.e., married or unmarried couples). This means that among the cases in the data set involving intimate partners, allegations of domestic violence are a feature in 14% of them. Of the forty-eight intimate partner cases with domestic violence allegations, thirty-seven feature allegations against the functional parent, twenty-two of which feature allegations against the functional parent and no other party. Among the cases in the data set involving

unmarried different-sex couples, roughly a fifth feature domestic violence allegations. Among these twenty-five cases, allegations against the functional parent arise in eighteen cases, fourteen of which involve allegations against the functional parent and not against the legal parent.[254]

2. *Parental Death.* — Over half of the cases in the data set do not involve post-dissolution custody disputes. One such class of non-dissolution cases features parental death. In these cases, the functional parent claim arises not after relationship dissolution but instead after the death of a legal parent.

About 13% of the cases in the data set involve cases in which a legal parent of the child has died.[255] In three quarters of those cases, the legal parent who died had served as the child's primary caregiver. In only a fifth of the parental death cases was a surviving legal parent a primary caregiver of the child at the time of the other legal parent's death.

In more than 60% of cases involving parental death, a functional parent had been the child's primary caregiver *before the legal parent's death*. For example, in *In re Custody of S.A.-M.*, discussed at the outset of this Article, the child's mother was murdered.[256] For the four years prior to her death, the mother and her child from a prior relationship lived with the mother's fiancé.[257] The court found that the fiancé "was heavily involved in [the child's] life and was the only father she knew. He took [the child] to school nearly every day and was involved in her education. The two had a close and bonded relationship. [She] considered [him] her father and always referred to him as 'dad.'"[258] After the mother's death, the fiancé sought custody of the child as a functional parent.[259] The Washington court concluded that the fiancé was the child's de facto parent and should have primary residential custody.[260]

---

254. Recall that among the ninety cases based on the "holding out" presumption of parentage, eighty-one cases (90%) feature intimate partners. Among these eighty-one cases, twenty-five (31%) feature allegations of domestic violence. Twenty of those cases feature allegations against the functional parent, twelve of which feature allegations against the functional parent and no other party.

255. In two of these cases, both legal parents had died. See Redmond v. Flanary, No. 2019-CA-000070, 2020 WL 1074786, at *1 (Ky. Ct. App. Mar. 6, 2020) (both parents died in car accident); In re Custody of M.W., 374 P.3d 1169, 1171 (Wash. 2016) (same). Some scholars support functional doctrines that recognize stepparents or cohabitants in the event of the custodial parent's death, as a way to preserve the child's stable placement and relationship with the functional parent. See, e.g., 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, 953–54 (1984) (addressing stepparents); Cynthia Grant Bowman, The Legal Relationship Between Cohabitants and Their Partners' Children, 13 Theoretical Inquiries L. 127, 149 (2012) (addressing cohabitants).

256. 489 P.3d 259, 262 (Wash. Ct. App. 2021).

257. Id.

258. Id. at 262.

259. Id.

260. Id. at 267.

In just over a quarter of the parental death cases, the functional parent became the child's primary caregiver after—and often as a result of—the legal parent's death. For example, in *C.Y.R. v. C.M.*, after the mother died from a stab wound incurred during a fight with the father, the child's maternal aunt and uncle were granted temporary custody of the child.[261] Ultimately, the New Jersey courts returned custody of the child to the father, finding that the aunt and uncle failed to meet the psychological parent standard—in large part because the father had not "consented to and fostered the parental relationship" between the aunt and uncle and the child.[262]

3. *Cases Involving Child Welfare Authorities.* — The single largest category of cases that do not involve post-dissolution custody disputes features some involvement of child welfare authorities.[263] In all, 33% of cases in the data set feature child welfare involvement,[264] meaning that state authorities investigated abuse or neglect allegations involving the child, removed the child from the home, placed the child with foster or adoptive parents, or terminated the rights of a legal parent. In these cases, the original intervention typically was initiated by the state, not the functional parent.[265] Often, in the context of these actions, the functional

---

261. No. A-2764-16T2, 2018 WL 2949466, at *1 (N.J. Super. Ct. App. Div. June 13, 2018). The father alleged that while he and the mother were arguing, "[the mother] retrieved a knife, they struggled over the knife, and [the mother] accidentally stabbed herself in the chest." Id. After an investigation, the father was not charged in connection with the mother's death. Id.

262. Id. at *4; see also N.J. Div. of Child Prot. & Permanency v. K.E., No. A-4535-15T4, 2017 WL 4414109, at *1 (N.J. Super. Ct. App. Div. Oct. 5, 2017) (involving child placed with maternal grandparents, initially after abuse allegations against biological mother and then continuing basis after mother's death); In re Involuntary Termination of Parental Rts. & Duties Concerning K.M.T., No. 1915 EDA 2014, 2015 WL 7572210, at *1, *8–10 (Pa. Super. Ct. Mar. 12, 2015) (awarding custody, after mother's death from childbirth complications, to an unrelated individual rather than to father, who had three other children under the age of five and was unable to care for infant at issue).

263. We note that many scholars and advocates reject the term "child welfare." Some, like Dorothy Roberts, instead use the term "family policing." Dorothy Roberts, How I Became a Family Policing Abolitionist, 11 Colum. J. Race & L. 455, 461–63 (2021). Others contend that the system is more accurately described as one of "family regulation." See, e.g., Nancy D. Polikoff & Jane M. Spinak, Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being, 11 Colum. J. Race & L. 427, 431–32 (2021) ("*Family regulation* reflects the pervasive impact legally-constructed agencies and courts have on every aspect of the families they touch."). Despite these compelling critiques, we use the term "child welfare" here to track that used in the case law.

264. Among the ninety cases based on the "holding out" presumption of parentage, fifty-nine (66%) feature some involvement of child welfare authorities.

265. In some cases, the functional parent may have reported the alleged abuse or neglect or petitioned for state intervention. But this is not a common scenario. We count fewer than twenty cases in our data set in which it is clear that the functional parent reported the alleged abuse or neglect. See In re Nicole S., No. B234868, 2012 WL 5397201, at *1 (Cal. Ct. App. Nov. 6, 2012); In re K.A., No. F060276, 2011 WL 438639, at *1 (Cal. Ct. App. Feb. 9, 2011); J.B. v. R.L., 2016 WL 2591327, at *4 (Del. Fam. Ct. Mar. 10, 2016); T.G. v. M.G., No.

parent then seeks to participate in the proceedings to protect their relationship with the child and, commonly, to secure the current living arrangement of the child with the functional parent.[266]

There is not a complete overlap between cases involving child welfare authorities and cases involving child abuse or neglect allegations. That is, not every case involving child welfare intervention includes an express allegation of child abuse or neglect. In some cases, the legal parent voluntarily placed the child into state custody to facilitate the child's adoption.[267] Likewise, not every case with allegations of child abuse or neglect against a legal or functional parent involves child welfare intervention. For example, the claim that a legal or functional parent engaged in abuse or neglect might be made by another legal or functional parent in a post-dissolution family court proceeding.

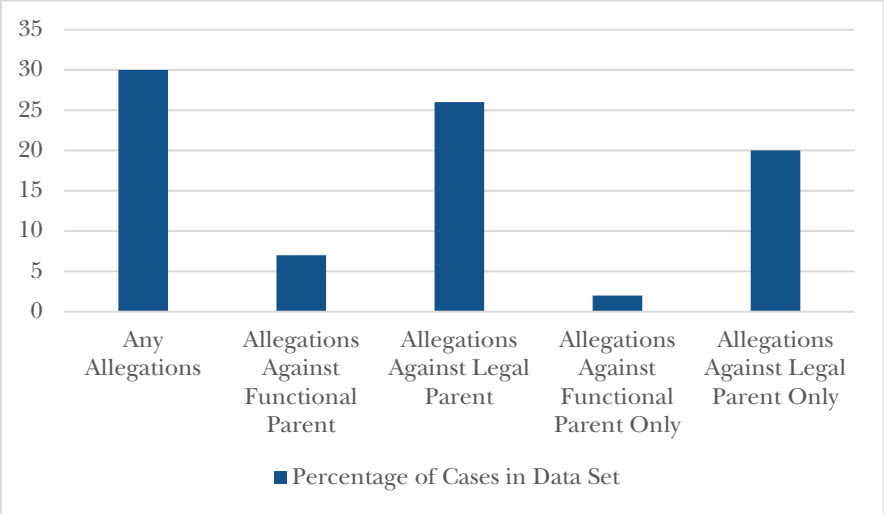
As Figure 10 illustrates, among cases in the data set, 30% feature allegations of child abuse or neglect. Among cases in which such allegations have been made by someone—a parent, a functional parent, a child, a mandatory reporter, or a state official—nearly a quarter involve allegations that the functional parent engaged in child abuse or neglect. Almost a third of these cases involving allegations against the functional parent feature allegations against only the functional parent and not against any other party. In the remaining approximately two-thirds of these cases, there are also allegations against another individual; all but one of the cases in this group include allegations against a legal parent. Figure 10 illustrates the prevalence of allegations against the functional parent and the legal parent in cases in the data set.

18A-JC-1906, 2019 WL 1071584, at *1 (Ind. Ct. App. Mar. 7, 2019); Simon v. Busbee, No. 02A03-1612-JP-02811, 2017 WL 3222710, at *2 (Ind. Ct. App. July 31, 2017); Meinders v. Middleton, 572 S.W.3d 52, 54 (Ky. 2019); Lambert v. Lambert, 475 S.W.3d 646, 648 (Ky. Ct. App. 2015); Spreacker v. Vaughn, 397 S.W.3d 419, 420 (Ky. Ct. App. 2012); Ball v. Tatum, 373 S.W.3d 458, 460 (Ky. Ct. App. 2012); Scott v. Mihelic, No. 2010-CA-001270-ME, 2011 WL 560414, at *1 (Ky. Ct. App. Feb. 18, 2011); A.R.J. v. Donald H., No. 2007-CA-002373-ME, 2009 WL 2971545, at *1 (Ky. Ct. App. Sept. 18, 2009); V.C. v. T.C., No. 291 MDA 2013, 2013 WL 11260339, at *1 (Pa. Super. Ct. July 10, 2013); Middleton v. Johnson, 633 S.E.2d 162, 165 (S.C. Ct. App. 2006); In re Custody of A.F.J., 314 P.3d 373, 375 (Wash. 2013) (en banc); In re Custody of H.A.R., 200 Wash. App. 1071, 1071 (2017); In re Dependency of D.M., 149 P.3d 433, 434 (Wash. Ct. App. 2006); J.E. v. L.A., No. 14-0137, 2015 WL 3751807, at *1 (W. Va. June 15, 2015).

266. To be clear, we are making only an observation about how functional parent cases arise, not about the propriety of child welfare intervention in the first place. On the race- and class-based inequalities that pervade the system, see generally Dorothy E. Roberts, Shattered Bonds: The Color of Child Welfare (2001) [hereinafter Roberts, Shattered Bonds]; Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World (2022) [hereinafter Roberts, Torn Apart].

267. See, e.g., In re Green, 650 A.2d 1072, 1073 (Pa. Super. Ct. 1994) (reporting that, after the child's birth, the biological mother "abandoned the child in the hospital").

FIGURE 10. ALLEGATIONS OF CHILD ABUSE OR NEGLECT IN FUNCTIONAL PARENT CASES



* * *

Overall, in the cases in the data set, functional parent claims arise in a variety of situations. They are common in cases in which couples—both married and unmarried, different-sex and same-sex—break up. But they are also common in cases that arise within the child welfare system. And they arise with surprising frequency in cases in which a legal parent, who may have supported the functional parent's role in the child's life, has died.

D. *Adjudication in Functional Parent Cases*

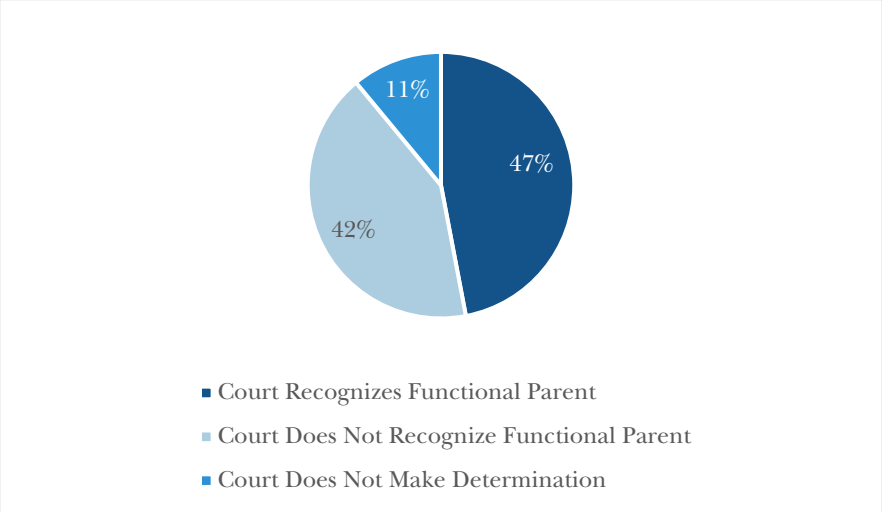
Finally, we attend to the outcomes and particular features of the cases in the data set. Again, the data set includes only electronically available decisions, almost all of which come from state appellate courts.[268] Most importantly, we observe that when courts recognize a functional parent, that person almost always has been the child's primary caregiver. Conversely, when confronted with claims by individuals who have not been the child's primary caregiver, courts in our study overwhelmingly refuse to recognize the individual as a functional parent. A notable exception emerges from estoppel cases, where courts appear more willing to impose obligations on men who at one point believed and acted as though they were the child's biological father and therefore formed a parental relationship.[269]

268. See supra notes 177–179 and accompanying text.

269. As discussed in more detail supra, we exclude most estoppel doctrines from our study. Our study only includes estoppel doctrines that eschew the classic elements of misrep-

As Figure 11 shows, among the cases in the data set, the court found a party to be a functional parent in 47% of cases and refused to recognize the party as a functional parent in 42% of cases.[270] In the remaining 11% of cases, the court did not make a determination.[271]

FIGURE 11. RESULTS OF ADJUDICATION



These rates are relatively consistent with expectations based on models of the litigation process.[272] Still, there is some notable variation in rates of recognition across populations of functional parents represented in the data set. Figure 12 illustrates.

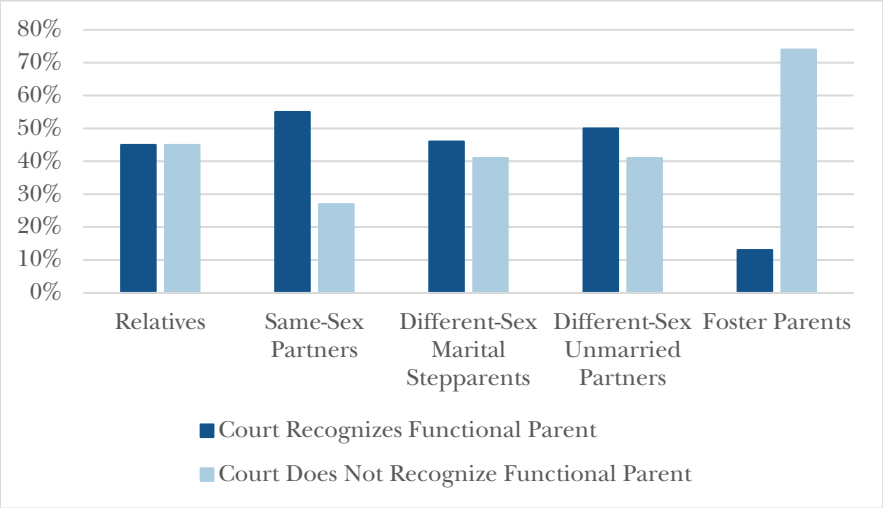
resentation and reliance as between the adults and instead focus on the adult's relationship with and conduct toward the child. See supra notes 87–91 and accompanying text.

270. In 77% of the appellate decisions in which the appellate court found a party to be a functional parent, that decision affirmed the trial court's functional parent determination. In 75% of the appellate decisions in which the appellate court did not find a party to be a functional parent, that decision affirmed the trial court's functional parent determination.

271. In Appendix D, we provide state-by-state data on the jurisdictions that have more than fifteen decisions in the data set.

272. See supra note 175 (discussing Priest and Klein model). Notably, in the twenty-eight trial court decisions in the data set, a court recognized a functional parent in 68% of cases and declined to recognize a functional parent in 21% of cases. The remaining cases did not include a determination.

FIGURE 12. FUNCTIONAL PARENT RECOGNITION BY GROUP



The relatively high rate of recognition for same-sex partners likely reflects the fact that in many of these cases, the person would have been a legal parent but for discriminatory family law rules.[273] It likely also reflects the fact that in most of these cases, there is no other person claiming the position of the second parent.[274]

The relatively low rate of recognition for foster parents may reflect various factors. As an initial matter, only twenty-three cases in the data set involve foster parents.[275] In some jurisdictions, a statute makes clear that foster parents do not have standing to make such claims.[276] But even in the absence of such a statutory command, courts in some of the cases in the data set concluded that foster parents are barred from protection under functional parent doctrines.[277] That is, courts routinely denied foster parents' claims *because* the claimants were foster parents, not because they

273. See, e.g., Conover v. Conover, 146 A.3d 433, 449 (Md. 2016) (recognizing that "when gay or lesbian relationships end, at least one member 'will find itself in a court system ill-prepared to recognize its existence and to formulate rules to resolve its disputes'" (quoting Polikoff, Two Mothers, supra note 85, at 463)).

274. In 63% of these cases, the child was born through assisted reproduction.

275. In the 1970s, advocates invoked the psychological parent concept to support constitutional claims by foster parents, but the Supreme Court declined to resolve the question of whether and when foster parents would have a protected liberty interest in the parent–child relationship. See Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 847 (1977). For contemporary analysis of the case and its implications, see Douglas NeJaime, The Constitution of Parenthood, 72 Stan. L. Rev. 261, 308–13 (2020) [hereinafter NeJaime, Constitution of Parenthood].

276. See, e.g., 15 R.I. Gen. Laws § 15-8.1-105(b) (2022).

277. See, e.g., J.B. v. Commonwealth, No. 2004-CA-001949-ME, 2005 WL 497197, at *1 (Ky. Ct. App. Mar. 4, 2005) ("[F]oster parents do not have standing to seek de facto

lacked a deeply rooted, bonded relationship with the child. For example, in *Lawler v. Riggs*, the foster parents parented the child from birth for approximately two years; the child was never parented by his biological parents.[278] Nonetheless, the court rejected the foster parents' functional parent claim on the ground that they could not qualify as functional parents because they received compensation from the state; that is, the foster parents did not assume parental obligations without expectation of financial compensation—a requirement under many states' functional parent doctrines.[279]

Within particular subsets of fact patterns in the data set, there is also some variation in adjudication rates; once again, the adjudication rates in some types of fact patterns depart from expectations. Here we note data that may bear on specific issues we address later in Part IV. First, we observe the outcomes in cases in the data set involving allegations of domestic violence or child abuse or neglect against the functional parent. In the twenty-three cases in which any allegations of domestic violence were made against the functional parent and no other party, the court recognized the person as a functional parent in five cases (a 22% recognition rate). In the sixteen cases in which any allegations of child abuse or neglect were made against the functional parent and no other party, the court recognized the person as a functional parent in three cases (a 19% rate of recognition).

Next, Figure 13 shows outcomes in relation to a legal parent's role in the child's life.

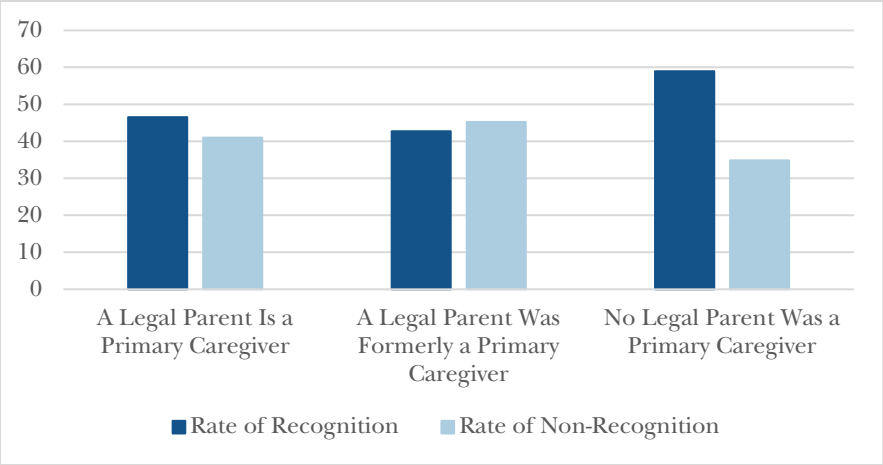
---

custodian status . . . ."); In re G.C., 735 A.2d 1226, 1226 (Pa. 1999) (holding that foster parents generally do not stand in loco parentis); In re Adoption of Crystal D.R., 480 A.2d 1146, 1151–52 (Pa. Super. Ct. 1984) ("We therefore find the conclusion inescapable that the Legislature could not have intended to include foster parents when it provided in 23 P.S. § 2512(a) that an individual 'standing in loco parentis to the child' could file a petition to terminate the parental rights of the child.").

278. No. 2007-CA-000886-ME, 2007 WL 4465548, at *1 (Ky. Ct. App. Dec. 21, 2007) (noting that the birth mother "abandoned" the child shortly after birth and the father signed a disclaimer of paternity one month after the child was born).

279. Id. at *2 ("The circuit court concluded that the Cabinet was Zachary's primary financial supporter . . . . Hence, we do not believe that the Lawlers have established that they provided the primary support for Zachary to be *de facto* custodians as required by KRS 403.270." (citation omitted)); see also supra note 75.

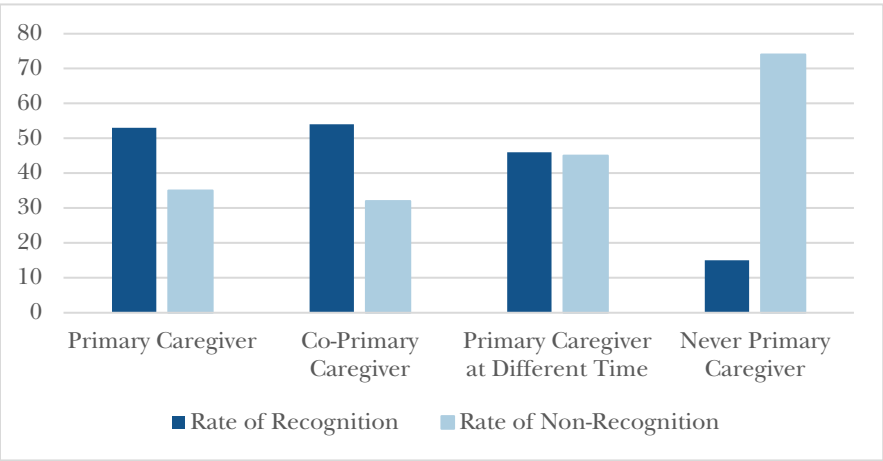
FIGURE 13. FUNCTIONAL PARENT RECOGNITION RELATIVE TO A LEGAL PARENT'S ROLE IN THE CHILD'S LIFE



In the 113 cases in which no legal parent was ever the child's primary caregiver, the court recognized a functional parent in 58% and rejected such recognition in 35%.[280] In contrast, in cases in which a legal parent was currently or had been a primary caregiver, the court recognized a functional parent in 45% and denied such recognition in 43%.

Finally, we examine how outcomes vary based on the role of the functional parent—a feature illustrated by Figure 14.

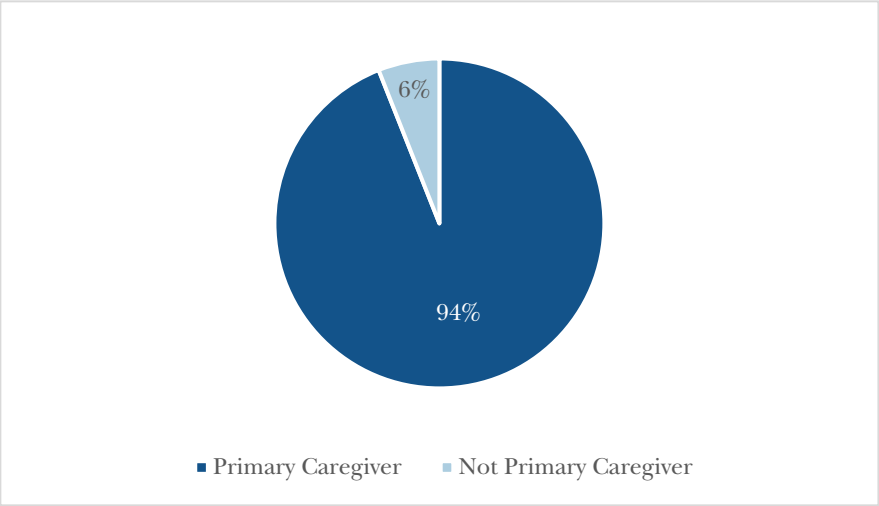
FIGURE 14. FUNCTIONAL PARENT RECOGNITION RELATIVE TO FUNCTIONAL PARENT'S ROLE IN THE CHILD'S LIFE



280. Among the eleven cases based on the "holding out" presumption of parentage in which a legal parent was not a primary caregiver, the court recognized the functional parent in six cases (55%).

Among the 556 cases in which the functional parent appears to have served as a primary caregiver, the court recognized the person as a functional parent in 53% and did not recognize the person as a functional parent in 35%. The remaining cases did not reach a resolution and required further proceedings.[281] As Figure 15 illustrates, among cases in the data set, individuals recognized by a court as a functional parent have, with only a handful of exceptions, served as the child's primary caregiver.

FIGURE 15. PRIMARY CAREGIVER ROLE OF FUNCTIONAL PARENTS IN DECISIONS RECOGNIZING FUNCTIONAL PARENT



More specifically, when partners, grandparents, or other relatives are recognized by courts as functional parents in the cases in the data set, they have almost always served as the child's primary caregiver. Of the 284 cases in which such individuals are recognized as functional parents, the individual seems to have served as a primary caregiver in 94%.

Recall that some functional parent doctrines, such as Kentucky's de facto custodian statute, require that the person served as a primary caregiver for a specific time period.[282] Other doctrines focus on the formation of a parent–child relationship without specifically mandating a primary caregiving role.[283] Some doctrines focus primarily on whether the

281. There are smaller deviations in the rates of recognition across some other subsets of cases. In the 42% of all cases in which the functional parent and a legal parent had been co-primary caregivers, the court recognized the person as a functional parent in 54% and rejected such recognition in 32%. In the 22% of all cases in which the functional parent had been the child's primary caregiver and, at a different time, a legal parent had been the primary caregiver, the court recognized the person as a functional parent in 46% and rejected such recognition in 45%.

282. See supra note 122 and accompanying text.

283. See supra notes 128–129 and accompanying text.

person lived with the child and held the child out as their child.[284] Even though the "holding out" presumption does not require evidence of primary caregiving, of the thirty-six cases in the data set in which a court recognized a person as a parent based on the presumption, that person had been a primary caregiver in 92%. In sum, among the cases in the data set, when individuals are recognized as functional parents, they overwhelmingly have been primary caregivers.

Among the 556 cases in the data set in which the functional parent appears to have served as a primary caregiver, the court did not recognize the person as a functional parent in 35%. Among the 110 cases in which the functional parent was the child's primary caregiver *and no legal parent had ever been a consistent caregiver* for the child, the court denied recognition to the functional parent in nearly a third.

Inversely, courts in the data set overwhelmingly declined to recognize a person as a functional parent when that person had only a limited relationship with the child.[285] Among the thirty-three cases in the data set in which the functional parent lived with the child only sporadically, courts treated the person as a functional parent in only three cases.[286] These cases are a subset of the 104 cases in which the functional parent was never a primary caregiver of the child. Courts largely rejected the claims of these individuals, treating the person as a functional parent in only sixteen cases.[287] (These sixteen cases include the three cases of recognition in which the functional parent lived with the child sporadically.[288])

---

284. See supra notes 130–131 and accompanying text.

285. See, e.g., In re C.T., No. B215178, 2009 WL 3034104, at *1 (Cal. Ct. App. Sept. 24, 2009) (rejecting claim brought by the mother's nonmarital male partner, explaining that he did not live with the child and failed to provide consistent financial support for the child); Vitale v. Goodman, No. A-3959-05T1, 2007 WL 1007987, at *1 (N.J. Super. Ct. App. Div. Apr. 5, 2007) (affirming trial court's rejection of functional parent claim, based on conclusion that "plaintiff failed to prove he had lived with the children in the same household or had performed parental functions to a significant degree"); Butler v. Illes, 747 A.2d 943, 946 (Pa. Super. Ct. 2000) (rejecting functional parent claim asserted by aunt after death of mother where the "record indicates that [aunt] looked after R.W.I. while his biological parents were on vacation and otherwise had occasional contact with him in the presence of one or both parents").

286. See Jason P. v. Danielle S., 215 Cal. Rptr. 3d 542, 547–49 (Ct. App. 2017) (reversing a lower court's decision precluding sperm donor from establishing parenthood when he developed a parent–child relationship and held the child out as his child); M.L.S. v. T.H.-S., 195 A.3d 265, 266 (Pa. Super. Ct. 2018) (holding that "stepfather stood in loco parentis status to child and, thus, had standing to pursue custody of child"); Peterson v. Ransome, No. 81-22927, 1983 WL 265382, at *465–67 (Pa. Ct. Com. Pl. Jan. 5, 1983) (holding that mother was estopped from denying paternity of unmarried man who believed he was child's biological father and had increasingly significant visitation with the child over seven years).

287. In 21 of the 90 cases based on the "holding out" presumption of parentage, the functional parent was not a primary caregiver of the child. The court recognized the person as a functional parent in two cases.

288. Our data set includes three cases in which the court recognized a functional parent, but it was unclear from the opinion whether the functional parent had served as a

In two of these sixteen cases, the functional parent was the child's *biological father*, suggesting that courts might be reluctant to exclude a child's biological father who willingly seeks to claim a parental role in the child's life. In *K.A.S. v. J.L.W.*, the biological father had voluntarily relinquished his parental rights, thus allowing the mother's partner to adopt the child.[289] Both before and after his parental rights were terminated, the biological father had exercised visitation with the child and contributed financial support, but eventually the mother and adoptive father decided "to stop visitation."[290] The court determined that the biological father could qualify as a de facto parent.[291] In *Jason P. v. Danielle S.*, the biological father had provided his sperm to his former girlfriend for her to have a child through assisted reproduction; as a person considered a "sperm donor," he could not establish parentage based on his genetic connection.[292] After the child was born, the man and the child's mother, who had been in an on-and-off romantic relationship, engaged in conduct that the court viewed as co-parenting, even though the child lived primarily with his mother.[293] The court found that the man was a presumed parent based on the "holding out" presumption.[294]

In another twelve of these sixteen cases in which the court recognized a functional parent who had not been a primary caregiver, one or more of the parties at some point believed or acted as though the functional parent was the child's biological father.[295] In each case, the functional parent and

---

primary caregiver. In these three cases, no role was coded. In each case, the functional parent had a significant relationship to the child. See In re Alexander D., No. A152436, 2018 WL 4042668, at *2, *11 (Cal. Ct. App. Aug. 24, 2018) (noting that functional parent "has 'assumed the day-to-day physical and emotional responsibilities' of a father since he began living with Mother and the minor," and child referred to functional parent as "daddy"); A.S. v. C.L., No. CAAP-13-0005068, 2016 WL 6833916, at *1 (Haw. Ct. App. Nov. 18, 2016) (observing that trial court had determined that person acted as a "de facto" parent); Thomas T. v. Luba R., 49 N.Y.S.3d 507, 509 (App. Div. 2017) (observing "a strong father-daughter relationship" and that child "has referred to [functional parent] as 'daddy' since she was 18 months old and continues to view him as the only father figure in her life").

289. See No. 99-09-08TN, 2007 WL 3197752, at *3 (Del. Fam. Ct. Aug. 17, 2007).

290. Id. at *3–4.

291. Id. at *8.

292. See 215 Cal. Rptr. 3d 542, 547–49 (Ct. App. 2017).

293. Id. at 549–54, 561.

294. Id. at 561.

295. See In re Jerry P., 116 Cal. Rptr. 2d 123, 132 (Ct. App. 2002) (observing that the child's presumed father "believed the child was his and told others the mother was pregnant with his child"); Comm'r of Soc. Servs. ex rel. Elizabeth S. v. Julio J., 985 N.E.2d 127, 128 (N.Y. 2013) (observing that "the child . . . knows respondent, with his encouragement, as her father" and drawing its facts from Commissioner of Social Services ex rel. Elizabeth S. v. Julio J., 94 A.D.3d 606, 607 (N.Y. App. Div. 2012)); Shondel J. v. Mark D., 853 N.E.2d 610, 614 (N.Y. 2006) (noting that "Mark represented that he was the father of the child, and she justifiably relied on this representation"); Dep't of Soc. Servs. v. Donald A.C., 117 N.Y.S.3d 229, 229 (App. Div. 2020) (finding that "convincing evidence demonstrates that respondent . . . held himself out as [the child's] father"); Montgomery Cnty. Soc. Servs. ex

the child held themselves out as having a parent–child relationship.[296] Typically, in these cases, the functional parent had a consistent relationship with the child but, for a variety of reasons, did not regularly live with the child.[297]

---

rel. Melissa W. v. Jose Y., 173 A.D.3d 1273, 1273–74 (N.Y. App. Div. 2019) (stating that the mother and petitioner filed petitions "alleging that Jose Y. was the father of the child"); Comm'r of Soc. Servs. v. Dimarcus C., 94 A.D.3d 538, 538 (N.Y. App. Div. 2012) (noting that respondent "held himself out to be the father" and that the "child believes that respondent is his father"); Comm'r of Soc. Servs. ex rel. Edith S. v. Victor C., 91 A.D.3d 417, 418 (N.Y. App. Div. 2012) (stating that the "child calls respondent, 'dad,' [and] that he never dissuaded her from doing so"); Smythe v. Worley, 72 A.D.3d 977, 979 (N.Y. App. Div. 2010) (finding that the child and putative father "had established a parent–child relationship and that the child had developed relationships with members of his family"); Glenda G. v. Mariano M., 62 A.D.3d 536, 536 (N.Y. App. Div. 2009) (observing that the respondent "never attempted to dissuade the child from believing he was the father" and that the child "knew respondent as his father"); Sarah S. v. James T., 299 A.D.2d 785, 785 (N.Y. App. Div. 2002) (noting that "both parties believed that respondent was the child's biological father"); Lisa L. v. Kelvin P., No. XX-09, 2008 WL 5549446, at *5 (N.Y. Fam. Ct. Nov. 14, 2008) (observing that all parties agreed that the child "addresses [the petitioner] as Dad and that he never told him not to do that"); Peterson v. Ransome, No. 81-22927, 1983 WL 265382, at *466 (Pa. Ct. Com. Pl. Jan. 5, 1983) (noting that "the parties behaved, essentially, as though Mr. Peterson had fathered the child").

296. See, e.g., *In re Jerry P.*, 116 Cal. Rptr. 2d at 126 (child calls functional parent "Daddy"); *Shondel J.*, 853 N.E.2d at 614–15 (the functional parent "referred to himself as 'daddy'"); *Donald A.C.*, 179 A.D.3d at 603–04 ("Clear and convincing evidence demonstrates that respondent . . . held himself out as her father. The child calls respondent 'Daddy' . . . ."); *Jose Y.*, 173 A.D.3d at 1276 (noting that functional parent "is the only person [the child] calls 'daddy,' [and] he is responsive to being called daddy'"); *Julio J.*, 94 A.D.3d at 607 (child called functional parent "Daddy"); *Dimarcus C.*, 94 A.D.3d at 538 (noting that functional parent "held himself out to be the father to his friends, family and co-workers"); *Victor C.*, 91 A.D.3d at 418 ("The evidence . . . established that the child calls respondent 'dad,' that he never dissuaded her from doing so . . . ."); *Smythe*, 72 A.D.3d at 979 ("the putative father and the child . . . had established a parent–child relationship"); *Glenda G.*, 62 A.D.3d at 536 (child called the functional parent "dad"); *Sarah S.*, 299 A.D.2d at 785 ("[B]oth he and the child believ[ed] that, and act[ed] as if, he were the child's father."); *Lisa L.*, 2008 WL 5549446, at *2 (man held himself out as child's father for thirteen years); *Peterson*, 1983 WL 265382, at *489 (reporting that the child believed Peterson was his biological father until the mother told him otherwise when he was almost seven).

In some cases, the functional parent did live with the child. See *Donald A.C.*, 179 A.D.3d at 603–04 ("Clear and convincing evidence demonstrates that respondent . . . held himself out as her father. The child calls respondent 'Daddy' . . . .").

297. See, e.g., *In re Jerry P.*, 116 Cal. Rptr. 2d at 125–27 (noting that functional parent lived in a facility that did not allow children and was not able to be licensed as a foster parent, but established a relationship with the child from birth and had continuous visitation while the child was in foster care); *Shondel J.*, 853 N.E.2d at 612 (involving a mother and child who lived in a foreign country but "spent time" with the functional parent when they visited the United States); *Jose Y.*, 173 A.D.3d at 1276 (highlighting that functional parent frequently stayed at the mother's home, during which time "he would help with daily activities, including feeding and dressing the child, putting her to bed at night and caring for her when she was sick"); *Dimarcus C.*, 94 A.D.3d at 538 (describing how functional parent "watched the child at his workplace on a regular basis, and provided the mother with money for the child"); *Victor C.*, 91 A.D.3d at 417 ("The evidence . . . established that the 13-year-old child . . . enjoys visiting with him, and has a familial relationship with his relatives,

All but one of these twelve cases arose under an estoppel doctrine.[298] Ten of these eleven estoppel cases featured men attempting to avoid child support obligations.[299] In some of these child support cases, the child's mother was seeking to establish the man's paternity; in other cases, the government was seeking to collect child support in response to the mother's application for government benefits. The courts in these eleven cases prevented the man from denying or contesting paternity. In this sense, relative to cases in which the functional parent asserts a claim to custody over the objection of a legal parent, courts seem more willing to impose obligations on men who acted as though they were the child's biological father for a significant period of time.

Among the sixteen cases in which the court recognized a functional parent who had not been a primary caregiver, in only two cases did it appear clear to the legal parent and the functional parent from the outset that the functional parent was not the child's biological father. In *M.L.S. v. T.H.-S.*, the functional parent was the child's stepfather, but he did not regularly reside with the mother and child because he was an active-duty member of the military.[300] In finding that the stepfather qualified as a functional parent, the court emphasized that the "[s]tepfather served in the place of the Child's deceased biological father."[301] In *Jean Maby H. v. Joseph H.*, the mother was already pregnant when her relationship with the functional parent began.[302] After that point, the parties began living

---

including his mother and other children."); *Glenda G.*, 62 A.D.3d at 536 (noting that functional parent "saw the child every few months and bought him clothing and he never attempted to dissuade the child from believing he was the father"); *Sarah S.*, 299 A.D.2d at 786 (noting that functional parent "has spent meaningful time with the child over the years, spoken with the child by telephone approximately once per week, voluntarily given some financial support, and enabled the child to develop close relationships with his extended family"); *Lisa L.*, 2008 WL 5549446, at *4–11 (describing functional parent's involvement in child's life over the course of thirteen years); *Peterson*, 1983 WL 265382, at *467 ("As the child grew older, . . . [the] informal visitation scheme reflected more frequent and prolonged contact. Finally, in the summer of 1981, Justin remained with Mr. Peterson at his apartment for a substantial portion of the season."). In two cases, the parent–child relationship was more limited. See *Donald A.C.*, 179 A.D.3d at 603–04 ("Respondent was present at the hospital shortly after the child was born, attended her birthday parties, and bought her gifts and clothing."); *Smythe*, 72 A.D.3d at 979 (noting "evidence indicating that the parent–child relationship was somewhat limited"). In the final case, the functional parent served in the military for the first two years of the child's life and after that had a "sporadic" relationship with the child. See *Julio J.*, 94 A.D.3d at 607 .

298. But see *In re Jerry P.*, 116 Cal. Rptr. 2d at 132 (arising under "holding out" presumption).

299. But see *Peterson*, 1983 WL 265382, at *463 ("The question posed is whether or not the natural mother of a minor child born out of wedlock may be equitably estopped from disputing the paternity of a putative father seeking custodial rights where the parties were never married.").

300. 195 A.3d 265, 268 (Pa. Super. Ct. 2018).

301. Id.

302. 676 N.Y.S.2d 677, 678 (App. Div. 1998).

together and eventually married. Recognizing the stepfather as a functional parent several years after the parties' divorce, the court explained that he was "the only father [the child] has ever known."[303] Indeed, until the present action, the child "always believed that [her stepfather] was her biological father."[304]

* * *

As noted above, due to selection effects, there are limits to the utility of recognition rates among litigated cases. That said, our results reveal important features of judicial application of the doctrines. Ultimately, when courts recognized an individual as a functional parent in the cases in the data set, that individual typically had served as the child's primary caregiver. When an individual seeking recognition as a functional parent had not served as a primary caregiver in the cases in the data set, courts overwhelmingly declined to treat the person as a functional parent.

IV. EVALUATING EMPIRICAL ASSUMPTIONS ABOUT FUNCTIONAL PARENT DOCTRINES

This Part considers what our empirical analysis means for the extant debate in courts, legislatures, and the legal academy about functional parent doctrines. A range of voices across these domains express skepticism of functional parent doctrines. Although objections routinely present themselves as normative arguments, they in fact reflect claims that sound in empirical registers. Commentators, judges, and advocates often assert, without concrete and comprehensive evidence, that functional parent doctrines operate or may operate in a particular way.

Normative arguments resisting functional parent doctrines routinely rest on assumptions about the identities and roles of claimants, the contexts that produce claims, the worthiness of the claims, and the capacity of courts to adjudicate the claims. Commentators often envision a paradigm case—a post-dissolution custody action by the legal parent's former cohabiting partner. In most discussions, the functional parent is imagined to be a sympathetic figure—usually a nonbiological parent in a same-sex couple who has been denied legal recognition because of discriminatory parentage laws.[305] In other discussions, the anticipated claimant is less

303. Id. at 679.

304. Id. at 682.

305. We have written about these cases involving same-sex couples. See Joslin, Protecting Children, supra note 138, at 1179–81; NeJaime, Constitution of Parenthood, supra note 275, at 269; Douglas NeJaime, The Nature of Parenthood, 126 Yale L.J. 2260, 2265–66 (2017) [hereinafter NeJaime, Nature of Parenthood]. Indeed, one of us served as counsel in Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005), and participated as amici in a number of other cases, including In re E.L.M.C., 100 P.3d 546 (Colo. App. 2004); In re Parentage of L.B., 122 P.3d 161 (Wash. 2005); and In re Clifford K., 619 S.E.2d 138 (W. Va. 2005).

sympathetic—often a man who lived with the child's mother, was an occasional and unreliable caregiver, and is seeking to remain in the family's life. Relatives, including grandparents, are sometimes considered; but even when they are, they are not viewed as paradigmatic.[306] Confronted with claims from these various groups, courts are commonly imagined to be at best incompetent—muddling their way through cases involving complex family dynamics—and at worst harmful—unnecessarily intruding in a family's private affairs and placing the child in a worse position as a result.

The discussion that follows draws on our study to assess the empirical assumptions that pervade both the commentary on functional parent doctrines and the jurisprudence in jurisdictions that have rejected a functional parent doctrine.[307] What emerges from our analysis is a starkly different picture of the doctrines and their role in the lives of families and children.

A. *Are the Doctrines Unnecessary?*

Legal scholarship on functional parent doctrines tends to point to nonbiological parents in same-sex couples as the doctrines' primary

---

306. Baker, Equality, supra note 60, at 454 ("Common law doctrines like in loco parentis had sometimes been used by step-parents or other extended family members to assert visitation rights, but those cases were rare." (footnote omitted)). As Sacha Coupet argues, "Kinship caregivers . . . occupy only the fringes of the debate" over "expansions of parenthood." Sacha M. Coupet, Ain't I a Parent?: The Exclusion of Kinship Caregivers From the Debate Over Expansions of Parenthood, 34 N.Y.U. Rev. L. & Soc. Change 595, 656 (2010).

307. The normative argument against functional parenthood also often draws on constitutional claims for support. The constitutional objection asserts that recognition of functional parents infringes on the rights of existing biological or legal parents. Baker, Quacking, supra note 44, at 137 ("In granting rights to a non-legal parent, a court is inevitably diminishing the parental autonomy of an extant legal parent."); Strauss, supra note 44, at 912 (arguing that "de facto parenthood will often infringe upon parents' constitutional right to decide who may associate with their children"); see also Jones v. Barlow, 154 P.3d 808, 816 (Utah 2007) ("[I]n carving out a permanent role in the child's life for a surrogate parent, this court would necessarily subtract from the legal parent's right to direct the upbringing of her child . . . .").

We will return to the constitutional objection in future work. Here, we simply make two descriptive observations. First, despite heavy reliance by critics on constitutional concerns, our data show that constitutional objections to functional parent doctrines are rare and that judicial acceptance of such objections is even rarer. Second, the constitutional objection often rests on a speculative view about the circumstances in which functional parent claims arise as well as assumptions about the role of the biological or legal parents in the life of the child. In contrast to this imagined scene, however, our study shows that functional parent claims arise in circumstances in which the biological or legal parents are not active participants in the child's life. See supra section III.C. In such circumstances, the constitutional rights that scholars assume merit protection may be diminished. Cf. Gupta-Kagan, Children, Kin, and Court, supra note 163, at 108–09 (arguing that parents' constitutional rights are diminished when they have not been acting as a parent and another person has).

In other work, we make more far-reaching arguments against the constitutional objections to functional parent doctrines. NeJaime, Constitution of Parenthood, supra note 275, at 269 ("This Article challenges the common assumption that the Constitution protects only biological parents and makes an affirmative case for constitutional protection of the bonds that develop between nonbiological parents and their children.").

beneficiaries.[308] Historically, these families were excluded from protection under parentage rules.[309] For example, in the past, when a same-sex couple had a child through assisted reproduction or one member of the couple adopted the child, the nonbiological or nonadoptive parent typically was treated as a legal stranger to the child.[310] Under this state of the law, upon dissolution, the biological or adoptive parent could, and sometimes did, seek to exclude the other parent from the child's life.[311] Functional parent doctrines, on this account, are intended largely to accommodate these families who were excluded by discriminatory and heteronormative family law frameworks.[312]

Today, same-sex couples have access to marriage—and thus, presumably, to the marital presumption of parentage.[313] Similarly, after

---

308. See, e.g., Baker, Quacking, supra note 44, at 135 (describing "[t]he typical functional parent doctrine claim in the same-sex parent context"); Strauss, supra note 44, at 931 ("Most of the seminal cases adopting de facto parenthood involve strikingly similar facts: two women in a committed relationship enter a preconception agreement and then raise the child together as equal parents for years."). For representative cases, see Elisa B. v. Superior Ct., 117 P.3d 660, 663 (Cal. 2005); In re E.L.M.C., 100 P.3d 546, 549 (Colo. App. 2004); E.N.O. v. L.M.M., 711 N.E.2d 886, 888 (Mass. 1999); Carvin v. Britain (In re Parentage of L.B.), 122 P.3d 161, 163 (Wash. 2005); In re Clifford K., 619 S.E.2d 138, 143 (W. Va. 2005); In re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995).

309. See Courtney G. Joslin, The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law, 39 Fam. L.Q. 683, 684 (2005) [hereinafter Joslin, Legal Parentage] ("Until recently, however, when same-sex couples have used assisted reproduction to have children, only one of the partners was considered the child's legal parent until an adoption was completed by the nonbirth or nonbiological parent."); NeJaime, New Parenthood, supra note 214, at 1206 (describing cases in the 1990s in which courts "rejected the [parentage] claims of nonbiological lesbian co-parents").

310. See Joslin, Legal Parentage, supra note 309, at 684. Although this result is less common today, it still occurs, even with respect to children born to same-sex married couples. See, e.g., Gatsby v. Gatsby, 495 P.3d 996, 999 (Idaho 2021) (holding that a woman was not the legal parent of a child conceived by and born to her wife during their marriage); In re A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *10 (Tex. App. Apr. 27, 2017) (same).

311. See Nancy S. v. Michele G., 279 Cal. Rptr. 212, 214 (Ct. App. 1991) (action in which biological mother sought a declaration that her former same-sex partner was not a parent of either child conceived through assisted reproduction and born during their relationship).

312. See Baker, Equality, supra note 60, at 454 ("Contemporary functional parent doctrines grew out of these situations [involving same-sex parents]."); Feinberg, supra note 44, at 57 (pointing to "the historical denial of avenues to establishing formal legal parent status for nonbiological parents raising children within same-sex relationships that led many courts and legislatures to adopt equitable parenthood doctrines"); Strauss, supra note 44, at 911 ("Seeking to avoid . . . injustice and the devastating harm it would cause the child, courts used their equitable power to adopt a functional parent test that would treat the nonbiological mother as a legal parent."). Some leading family law casebooks also tend to present functional parent doctrines as most relevant to nonbiological parents in same-sex couples. See, e.g., D. Kelly Weisberg, Modern Family Law: Cases and Materials 458–65, 792–97 (7th ed. 2020).

313. See, e.g., McLaughlin v. Jones, 401 P.3d 492, 494 (Ariz. 2017) ("Because couples in same-sex marriages are constitutionally entitled to the 'constellation of benefits the States have linked to marriage,' . . . we hold that the statutory [marital] presumption applies [to a same-sex spouse].").

Obergefell, marriage-based assisted reproduction statutes must be applied equally to same-sex married couples, and in some states these statutes have been amended to apply without regard to marital status.[314] If nonbiological parents in same-sex couples should not have to rely on functional parent doctrines going forward,[315] then the doctrines may seem unnecessary or obsolete.[316]

As a preliminary matter, it is important to clarify that even for same-sex parent families, functional parent doctrines continue to be critical. First, despite *Obergefell*, some courts have refused to apply gendered parentage provisions equally to same-sex married spouses.[317] Second, as is true for different-sex couples, many same-sex couples are not married.[318] For unmarried LGBTQ parents, marriage-based parentage rules—including marriage-based assisted reproduction rules, which continue to exist in the majority of states[319]—are unavailing. Third, according to leading researchers of LGBTQ families, "[i]n the majority of contemporary LGB-parent families, the children were conceived in the context of different-sex relationships."[320] For these families, the same-sex

---

314. See generally Courtney G. Joslin, (Not) Just Surrogacy, 109 Calif. L. Rev. 401 (2021) (surveying surrogacy statutes); NeJaime, Nature of Parenthood, supra note 305 (surveying assisted reproduction law).

315. See Strauss, supra note 44, at 934 ("First, these non-biological mothers should have been legal mothers under assisted reproduction statutes . . . . Second, many of these non-biological mothers should have qualified as parents under a marital presumption."). As Brian Bix characterizes this position, "[N]ow that same-sex partners and parents can generally protect their interests through marriage or adoption," the "disadvantages" of functional approaches "often outweigh the benefits for the legal treatment of parenthood." Bix, supra note 58, at 1.

316. See, e.g., Baker, Quacking, supra note 44, at 135 ("Functional analyses . . . should be unnecessary."); Strauss, supra note 44, at 977 (arguing that "strong de facto parenthood doctrines that [courts] created [to address nonbiological mothers in same-sex couples] should have little ongoing role in parentage law").

317. See, e.g., In re A.E., No. 09-16-00019-CV, 2017 WL 1535101, at *10 (Tex. App. Apr. 27, 2017) ("The substitution of the word 'spouse' for the words 'husband' and 'wife' [in the assisted reproduction statute] would amount to legislating from the bench, which is something that we decline to do."); cf. Gatsby v. Gatsby, 495 P.3d 996, 999 (Idaho 2021) (holding that a woman was not the legal parent of a child conceived by and born to her wife during their marriage).

318. See, e.g., Shoshana K. Goldberg & Kerith J. Conron, Williams Inst., How Many Same-Sex Couples in the U.S. Are Raising Children 1–2 (2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Same-Sex-Parents-Jul-2018.pdf [https://perma.cc/TH6U-UC2F] (finding that in 2016, about "half (approximately 348,000) [of the 705,000 total same-sex households] were unmarried cohabiting couples" and finding that 12.2% of unmarried same-sex couples were raising children as compared to 21.9% of married same-sex couples).

319. NeJaime, Nature of Parenthood, supra note 305, at 2367–69 app. B (identifying jurisdictions with marriage-based donor-insemination statutes as well as jurisdictions that lack a donor-insemination statute and thus rely simply on the marital presumption).

320. Abbie E. Goldberg, Nanette K. Gartrell & Gary Gates, Williams Inst., Research Report on LGB-Parent Families 1, 7–8 (2014), https://williamsinstitute.law.ucla.edu/wp-

partner typically joined the family after the birth of the child.[321] As a result, the marital presumption and intended parent rules generally do not apply to the new partner—marital or nonmarital. Finally, gay male parents continue to face hurdles to recognition and protection. Among other things, the marital presumption ordinarily only applies to the spouse of the person who gave birth.[322] Thus, for example, the marital presumption would not apply to the male spouse of a biological or adoptive father.[323]

More fundamentally, though, the claim that the doctrines are now obsolete is premised on the assumption that the paradigm claimant in functional parent cases is a former same-sex partner.[324] Our data suggest, however, that this imagined paradigm claimant is not so paradigmatic. Functional parent doctrines remain critically important to same-sex parent families.[325] As a result of past and continuing exclusion from other parentage rules, these families are overrepresented in the data set of functional parent cases as compared to their representation in the general population.[326] But while the doctrines may be of particular importance to this population, disputes between same-sex parents constitute fewer than a fifth of the total cases.

Our data reveal a more varied population of claimants and families. The paradigm family in many states in the data set is not what is often

---

content/uploads/LGB-Parent-Families-Jul-2014.pdf [https://perma.cc/4AAU-SLMM]. It is worth noting that, among individuals in same-sex couples, those raising children are more likely to be women and racial minorities, and same-sex parents experience economic disadvantage relative to different-sex parents. See Gary J. Gates, Williams Inst., Demographics of Married and Unmarried Same-Sex Couples: Analyses of the 2013 American Community Survey 6–7 (2015), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Demo-SS-Couples-US-Mar-2015.pdf [https://perma.cc/R6CG-3BWZ].

321. See Goldberg et al., supra note 320, at 5–7.

322. See, e.g., Conn. Gen. Stat. Ann. § 46b-488(a)(1) (West 2022) ("[A] person is presumed to be a parent of a child if: The person and the person who gave birth to the child are married to each other and the child is born during the marriage, whether the marriage is or could be declared invalid . . . .").

323. There are still circumstances in which only one member of a same-sex couple may adopt a child brought into their family. This may be the case, for example, if the couple adopts internationally, given the lack of countries that allow a same-sex couple to adopt jointly. Adoption Options Overview, Hum. Rts. Campaign, https://www.hrc.org/resources/adoption-options-overview [https://perma.cc/7MPT-TAAB] (last visited Oct. 28, 2022) ("[I]t is very difficult to pursue an international adoption as an openly same-sex couple, or as an openly single LGBTQ+ person.").

324. See, e.g., Baker, Quacking, supra note 44, at 148 (describing In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995), in which a same-sex couple conceived a child through assisted reproduction and co-parented before separating, as a "paradigmatic functional parent case").

325. See supra Part III.

326. As noted above, 17% of the cases in the data set involve same-sex parents, see supra Figure 5, but LGBTQ people constitute only about 5.6% of adults in the United States. Jeffrey M. Jones, LGBT Identification Rises to 5.6% in Latest U.S. Estimate, Gallup (Feb. 24, 2021), https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx [https://perma.cc/7V8K-3YNT].

imagined—a financially secure same-sex couple who had a child through assisted reproduction but is excluded by discriminatory parentage laws. Instead, it is a family devising parental care arrangements in the face of economic insecurity, substance use disorders, health challenges, and instability.[327] These families receive little attention in discussions of functional parent doctrines.

Our findings suggest that functional parent doctrines are neither unnecessary nor obsolete. Among electronically available decisions, relatives constitute by far the largest group of functional parent claimants, and grandparents make up the majority of that relative population. In these cases, the parent–child relationships are not contemplated by other parentage rules, such as the marital presumption (which applies only to people who were spouses at the time of conception or birth[328]) or intended parent statutes (which apply only to children conceived through assisted reproduction[329]).

While it is possible that the share of all functional parent disputes involving relatives may depart somewhat from our findings about their prevalence among electronically available decisions, our study suggests at a minimum that relatives constitute an important yet often overlooked set of functional parent claimants. Moreover, there may even be reason to think that relatives are underrepresented in the data set. As discussed more below, disputes between former partners may be more likely to lead to litigation, including at the appellate level. Relatives as a group may be more reluctant to initiate or continue litigation against family members—often their own children.[330]

In addition, while there may be some variation across the full spectrum of all disputes, our finding that a large share of functional parent cases involve relatives is consistent with important demographic trends.

---

327. See supra Part III.

328. See, e.g., Cal. Fam. Code § 7540(a) (2022) ("Except as provided in Section 7541, the child of spouses who cohabited at the time of conception and birth is conclusively presumed to be a child of the marriage.").

329. See, e.g., Tex. Fam. Code Ann. § 160.701 (West 2021) ("This subchapter applies only to a child conceived by means of assisted reproduction.").

330. See, e.g., Kristina Brant, Nonparental Primary Caregivers: A Case Study From the United States, *in* Social Parenthood in Comparative Perspective (Clare Huntington, Courtney G. Joslin & Christiane von Bary eds., forthcoming 2023) (manuscript at 104, 111) (on file with the *Columbia Law Review*). This book chapter describes a number of such cases. For example, Kristina Brant describes the experience of Stephanie, who was parenting her niece. Id. (manuscript at 111). Stephanie "was certain that a judge would rule in her favor if it came down to a fight." Id. She chose not to pursue litigation, however, because she worried about how that would affect her relationships with her other family members. Even if she won the case, litigating against her own family members, she thought, would ultimately result in her "los[ing] all connection with my remaining niece and nephews, all connection. And they need me too." Id. (quoting interview with Stephanie).

Relatives have taken on caregiving roles at increasing rates.[331] A 2012 study found that "[e]xtended family members and close family friends care for more than 2.7 million children in this country, an increase of almost 18 percent over the past decade."[332]

In recent years, the opioid crisis has contributed to the rise of grandparent-led households and relatives serving as primary caregivers. In regions of the country with high rates of opioid overdose and death,[333] parental substance use disorders and drug-related deaths have become increasingly common reasons for children's placement with caregivers who are not their biological parents.[334] In one community in Appalachian Kentucky, "local school staff in the region estimate that as many as 40 percent of students are being raised by a relative caregiver."[335]

There is reason to believe that the number of cases involving grandparents and relatives will continue to increase. Researchers estimate that, as of September 19, 2022, more than 225,000 children in the United States had lost a primary caregiver during the COVID-19 pandemic.[336] In

---

331. See Cross, supra note 74, at 242 ("[O]ver one-third . . . of children lived with an extended relative at some point during childhood . . . . [T]here has been a statistically significant increase in co-residence over [the 1988 to 2013] analysis period.").

332. Annie E. Casey Found., supra note 213, at 1. While most of these caregiving relationships arise informally, many children are placed in kinship foster care arrangements. See id. at 2; see also Supporting Grandparents Raising Grandchildren Act, Pub. L. No. 115-196, § 2, 132 Stat. 1511, 1511 (2018).

333. Rates of opioid overdose and death are concentrated in predominantly white, low-income communities. See Joseph Friedman, David Kim, Todd Schneberk, Philippe Bourgois, Michael Shin, Aaron Celious & David L. Schriger, Assessment of Racial/Ethnic and Income Disparities in the Prescription of Opioids and Other Controlled Medications in California, 179 JAMA Internal Med. 469, 470 (2019) (reporting findings from a California study); Zirui Song, Mortality Quadrupled Among Opioid-Driven Hospitalizations, Notably Within Lower-Income and Disabled White Populations, 36 Health Affs. 2054, 2059 (2017) (reporting nationwide data).

334. § 2, 132 Stat. at 1511 ("Between 2009 and 2016, the incidence of parental alcohol or other drug use as a contributing factor for children's out-of-home placement rose from 25.4 to 37.4 percent.").

335. Kristina Brant, When Mamaw Becomes Mom: Social Capital and Kinship Family Formation Amid the Rural Opioid Crisis, 8 Russell Sage Found. J. Soc. Scis. 78, 79 (2022).

336. This figure comes from the Global Orphanhood real time calculator from Imperial College London. See COVID-19 Orphanhood: United States of America, Imperial Coll. London, https://imperialcollegelondon.github.io/orphanhood_calculator/#/country/United%20States%20of%20America [https://perma.cc/8EG8-F5JQ] (last visited Oct. 29, 2022); see also Susan D. Hillis, Alexandra Blenkinsop, Andrés Villaveces, Francis B. Annor, Leandris Liburd, Greta M. Massetti, Zewditu Demissie, James A. Mercy, Charles A. Nelson III, Lucie Cluver, Seth Flaxman, Lorraine Sherr, Christl A. Donnelly, Oliver Ratmann & H. Juliette T. Unwin, COVID-19–Associated Orphanhood and Caregiver Death in the United States, 148 Pediatrics 31, 37 (2021) ("From April 1, 2020, to June 30, 2021, COVID-19–associated deaths accounted for the loss of parents and caregivers for >140 000 children.").

Here, too, the burdens have not fallen evenly across the population. The pandemic has highlighted and exacerbated racial health disparities in the United States, with African Americans experiencing dramatically elevated rates of infection and death. See Reis Thebault, Andrew Ba Tran & Vanessa Williams, The Coronavirus Is Infecting and Killing

the wake of these parental deaths, grandparents or other relatives often became primary caregivers.[337]

The other paradigm case that appears in contemporary debates over functional parent doctrines involves former male nonmarital cohabitants.[338] While commentary on functional parent doctrines' application to same-sex partners is generally sympathetic, unmarried different-sex cohabitants provoke less sympathy. In fact, critics fear not only that these men are not truly functioning as parents but also that they are using the doctrines for abusive ends.[339]

Our data show that the number of cases featuring different-sex unmarried partners has grown over time, and this growth has been more pronounced than what we observe in cases featuring different-sex marital stepparents. At the same time, this population represents a relatively small segment of all functional parent cases in our data set—18% of the cases. Even in the most recent years covered by the data set, the average number of cases per year featuring different-sex unmarried partners is far below the average number of cases per year featuring grandparents. In the period from 2014 to 2021, we observe an average of 4.75 cases per year with different-sex unmarried partners. In that same period, we observe an average of 9.5 cases per year with grandparents.

Ultimately, both same-sex couples and unmarried different-sex couples are important constituencies for functional parent doctrines. And their distinctive situations remain relevant to conversations about the doctrines. Still, we are concerned about making normative assessments about functional parent doctrines based primarily on consideration of cases involving subsets of families—same-sex couples and different-sex unmarried couples—that each represent fewer than one fifth of all cases in our data set. Such assessments are at best incomplete and fail to account for the

---

Black Americans at an Alarmingly High Rate, Wash. Post (Apr. 7, 2020), https://www.washingtonpost.com/nation/2020/04/07/coronavirus-is-infecting-killing-black-americans-an-alarmingly-high-rate-post-analysis-shows/ (on file with the *Columbia Law Review*) (reporting that "counties that are majority-black have three times the rate of infections and almost six times the rate of deaths as counties where white residents are in the majority"); see also Cecilia Reyes, Nausheen Husain, Christy Gutowski, Stacy St. Clair & Gregory Pratt, Chicago's Coronavirus Disparity: Black Chicagoans Are Dying at Nearly Six Times the Rate of White Residents, Data Show, Chi. Trib. (Apr. 7, 2020), https://www.chicagotribune.com/coronavirus/ct-coronavirus-chicago-coronavirus-deaths-demographics-lightfoot-20200406-77nlylhiavgjzb2wa4ckivh7mu-story.html (on file with the *Columbia Law Review*) (reporting that, in Chicago, African Americans make up 30% of the population but represent 52% of COVID-19 cases and 68% of COVID-19 deaths).

337. See Paula Span, As Families Grieve, Grandparents Step Up, N.Y. Times (Apr. 12, 2022), https://www.nytimes.com/interactive/2022/04/12/well/family/covid-deaths-parents-grandparents.html (on file with the *Columbia Law Review*).

338. See, e.g., Wilson, Undeserved Trust, supra note 63, at 99–100 ("If state legislatures or courts institute these proposals, many mothers will find themselves unable to excise former lovers from their lives and the lives of their children.").

339. See infra notes 400–401, 409–410 and accompanying text.

majority of cases in which the doctrines are applied. Claims about the doctrines' utility, as well as claims about their potential dangers, ought to consider the full range of families served by functional parent doctrines. Of particular note, over a third of the cases in our data set (36%) involve functional parents who are relatives.[340] These families are rarely the focus of commentary on the doctrines.[341] This oversight skews the understanding of how and when these doctrines operate, as well as the overall assessment of them.

B. *Are Functional Parents Intruding?*

In debates over functional parent doctrines, inside and outside the academy, the paradigm context is post-dissolution custody litigation.[342] Discussions of functional parent doctrines typically assume or imagine that the claim arises as a custody action initiated by the functional parent—typically following the breakdown of a cohabiting relationship between the legal parent and the functional parent.[343] On this view, some earlier arrangement has ended because of the parties' private actions, and one of them is now asking a court to intervene.[344] Consider a 2014 decision of the Vermont Supreme Court, which at the time declined to adopt a functional parent doctrine, "lest every domestic break-up with children in the household become a potential battleground for child visitation and custody by ex-paramours, or even mere cohabitants."[345]

---

340. The emphasis on same-sex and different-sex couples as paradigmatic functional parent cases may also reflect the instinct to derive parenthood from conjugal, coupled relationships. Drawing on her work with kinship caregivers, Coupet argues that the "salient distinction between kinship caregivers and other nontraditional parents is that the latter group of adults is connected to the child via a conjugal or quasi-conjugal tie to one parent, even if only for the purposes of prescribed mating or heterosexual reproduction, while kinship caregivers are not." Coupet, supra note 306, at 598–99. Coupet asserts that the relegation of kinship caregivers to "inferior third-party or nonparent claims fails to reflect both the critical role that their parenting efforts play in the lives of the children they are raising and, more importantly, the relationship that develops between them and those children." Id. at 598.

341. See supra note 306 and accompanying text.

342. See, e.g., Baker, Equality, supra note 60, at 465 (discussing the impact of functional parent doctrines in "custody determinations" and noting that "[i]f the parties are in court fighting over a functional parent's rights, the parties have already demonstrated their inability to cooperate effectively as co-parents"); Gaines, supra note 60, at 126 ("If a non-parent is designated by law to be a parent, then they will be legally tethered to the parent who is trying to move on from the relationship."). Here, it is the litigation context specifically that is of concern. Thus, focusing on litigated cases, as we do, is particularly appropriate and helpful for assessing this critique.

343. See, e.g., Baker, Quacking, supra note 44, at 166 (drawing lessons from "[c]ontested custody disputes" following divorce).

344. As Bix describes, "[O]ne member of a couple is resisting the claim . . . , and the resisting partner will *not* want the claim recognized and will almost certainly *not* want the intrusiveness of the inquiry." Bix, supra note 58, at 3 n.7.

345. Moreau v. Sylvester, 95 A.3d 416, 426 (Vt. 2014). Vermont later adopted both a de facto parent doctrine and a "holding out" presumption of parentage. See supra notes 112–113, 116 and accompanying text.

Post-dissolution custody disputes provoke concern from the perspective of the legal parent, who now must confront unwarranted intervention into the protected realm of the family.[346] As a Florida court explained in denying protection to the relationship between a child and her stepfather, "[W]e simply recognize the limits of governmental intrusion into the most private matters of family relationships."[347] On this view, as two legal scholars put it, "[F]unctional parenthood makes formal parents uneasy about state interference with the parent–child relationship."[348] Rejection of a functional parent doctrine, in the Florida court's view, demonstrates a respect for family privacy and parental autonomy.[349]

These disputes also provoke concern from the perspective of children, who will be subjected to bitter custody battles.[350] And, if the court recognizes the person as a functional parent, children will then continue to endure the acrimonious relationship between the functional and legal parents.[351] As the Utah Supreme Court put it in a 2007 decision refusing to adopt a functional parent doctrine, "[C]arving out a permanent role in the child's life for a surrogate parent . . . would . . . expose the child to inevitable conflict between the surrogate and the natural parents."[352] With legal status assigned to the functional parent, on this vision, children become pawns in the battles of adults who now must continue to serve as co-parents.[353]

Post-dissolution custody disputes also pose a concern for courts, which must reconstruct and assess family arrangements that no longer exist. One

---

346. See Bix, supra note 58, at 1 ("Functional approaches are intrusive . . . . This parallels the way that state benefit rules already authorize the state to intrude on the lives and domestic decision-making of poorer families."). As Susan Appleton, who has written supportively of functional approaches, puts this concern: "[T]he more flexible and individually tailored a parentage determination becomes, as illustrated by contemporary functional tests, the more room the law of parentage leaves for judicial determinations and hence state intervention." Susan Frelich Appleton, Gender and Parentage: Family Law's Equality Project in Our Empirical Age, *in* What Is Parenthood? Contemporary Debates About the Family 237, 250 (Linda C. McClain & Daniel Cere eds., 2013).

347. Meeks v. Garner, 598 So. 2d 261, 262 (Fla. Dist. Ct. App. 1992).

348. Laufer-Ukeles & Blecher-Prigat, supra note 44, at 461.

349. *Garner*, 598 So. 2d at 262.

350. See Wilson, Undeserved Trust, supra note 63, at 100 ("It may be important to encourage continuing relationships with Ex Live-In Partners, but long, expensive custody fights–even where the mother wins–have financial and emotional costs that hurt her and the child."); see also Baker, Quacking, supra note 44, at 165 ("[F]unctional parent claims . . . imperil children's wellbeing . . . .").

351. Baker, Equality, supra note 60, at 465 ("It is much harder to conclude that severing that relationship will be worse than the cost to the child of being placed in the middle of a toxic relationship between two adults who have proved themselves incapable of working it out on their own.").

352. Jones v. Barlow, 154 P.3d 808, 816 (Utah 2007).

353. See Baker, Equality, supra note 60, at 465 ("[C]ourts should weigh the pain of losing a meaningful relationship against the cost to the child of being brought up in an unstable environment with significant parental discord.").

scholar worries that courts in these cases must "address roles that, by the time of hearing, months or years after relationship breakdown, are no longer being performed, or no longer performed in the same way, or are being performed by others."[354]

Post-dissolution custody cases account for 44% of cases in our data set.[355] Cases involving same-sex couples, for example, regularly feature this type of dispute, as do some of the cases involving former different-sex partners.[356]

A wide swath of the cases in our data set, however, do not feature post-dissolution custody disputes.[357] In 13% of the cases, a legal parent of the child has died.[358] Here, the case typically arises because of conflict over the child's custody after the death of a parent.[359] In another important group of cases, accounting for a third of the cases in the data set, the state has intervened in the family through its child welfare apparatus.[360] In these cases, the state is intervening in the family not because of a custody claim initiated by the functional parent, but often based on an allegation that the legal parent has engaged in abuse or neglect.[361]

The concerns described above—interference with the legal parent's rights, the child's well-being, and the court's role—are based on an assumption that a stable, ongoing, co-residential relationship exists between the child and a legal parent—one that the functional parent is threatening.[362] Our analysis shows, however, that in a significant share of functional parent cases in the data set, the person recognized as the child's functional parent is the only person truly parenting the child at the time of the proceeding.[363]

In *McKenzie v. Whitt*, for instance, the parents began leaving the child with the child's maternal grandmother for days at a time when she was a few months old.[364] This continued for about two years, at which point the

---

354. Jenni Millbank, The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family, 22 Int'l J.L. Pol'y & Fam. 149, 151 (2008).

355. See supra section III.C.1.

356. See supra section III.B.

357. It is noteworthy that post-dissolution custody disputes are more common in "holding out" presumption cases than in the data set as a whole, see supra note 251, and yet some critics of other functional parent doctrines have ignored or not taken issue with nonbiological application of the "holding out" presumption.

358. See supra section III.C.2.

359. See supra section III.C.2.

360. See supra section III.C.3.

361. See supra section III.C.3.

362. See Baker, Equality, supra note 60, at 465 ("If the parties are in court fighting over a functional parent's rights, the parties have already demonstrated their inability to cooperate effectively as co-parents.").

363. See supra section III.B.

364. No. 2014-CA-001566-ME, 2015 WL 7422822, at *1 (Ky. Ct. App. Nov. 20, 2015).

father became incarcerated.[365] At that time, in 2010, the child began living with the grandmother full time.[366] When not incarcerated, the father would occasionally visit the child.[367] After 2010, the mother "rarely visited" the child; she "would occasionally call and attended a few school events."[368] The grandmother testified "that for most of [the child's] life she has been solely responsible for seeing to [the child's] medical and educational needs[,] . . . buy[ing] all of [the child's] food and most of her clothing."[369] Ultimately, the grandmother was found to be a functional parent and awarded sole custody of the child.[370]

Many cases in the data set involve an attempt, often by a legal parent who is not and has not been providing primary care for the child, to remove a child from a stable placement with a functional parent. Consider again *State ex rel. Combs v. O'Neal*,[371] described at the outset of this Article. At the time of trial, the child, Brittanae, was thirteen and had lived with her grandmother, Ronetta, for her entire life.[372] Ronetta had been Brittanae's sole caregiver since she was nineteen months old, when her mother died.[373] For most of those thirteen years, the child's father, Adrian, had "been content to occupy the role of a noncustodial parent visiting Brittanae every month or so while Ronetta performed the day-to-day task of raising Brittanae."[374] But eventually Adrian sought custody.[375] In affirming the trial court's award of custody to the grandmother, the court explained that after thirteen years of parenting, "the relationship between Ronetta and Brittanae is now essentially that of natural parent and child."[376]

In cases of this kind, the court is being asked to protect a family arrangement that presently exists, rather than reconstruct an arrangement that has dissolved or create one that never existed. The stable relationship between the functional parent and the child often develops in light of difficult circumstances. In many cases, the legal parents are grappling with a range of challenges that inhibit their ability to provide consistent care for their children. Many are struggling with substance use disorders.[377]

---

365. Id.

366. Id.

367. Id.

368. Id.

369. Id. at *2.

370. Id. at *4.

371. 662 N.W.2d 231, 234 (Neb. Ct. App. 2003).

372. Id. at 233–34.

373. Id. at 233, 236.

374. Id. at 236.

375. Id.

376. Id.; see also id. at 234 ("Ronetta testified that Brittanae calls her 'Mom' and that she and Brittanae have a very close bond.").

377. See, e.g., In re L.M., No. C072731, 2014 WL 5841572, at *1 (Cal. Ct. App. Nov. 12, 2014) ("[The child's] biological mother . . . has an extensive history of mental health and substance abuse issues. She has repeatedly failed in treatment programs, has been in and

Some are facing mental health challenges or physical illnesses.[378] Others are incarcerated.[379]

Consider two examples. In *Wilson v. Sweely*, the parents, who had "a history of drug addiction and incarceration," "dropped the child off at [the maternal aunt and uncle's] home . . . when the child was only three months old."[380] At the time of the custody dispute, the aunt and uncle had "been providing for the minor child, without receiving support from either [parent], for nearly five years."[381] Because the aunt and uncle had been "acting *in loco parentis* to the child and providing '*all*' financial, emotional, educational, and medical needs of the child," the North Carolina appellate court found that they had standing to seek permanent custody.[382]

In *Denton v. Mulligan*, the mother and father were incarcerated when the child, J.G.D., was two, and the maternal aunt petitioned for and was granted emergency custody.[383] While the mother spent time with the child after her release, she was soon incarcerated again, and the aunt continued to care for the child.[384] The father was "residing at a halfway house" and "receiving substance abuse treatment."[385] When J.G.D. was almost four-and-a-half years old, both the mother and father sought custody.[386] The Kentucky courts recognized the aunt as the child's functional parent after finding that she "was the primary caregiver and financial supporter" of the child.[387]

---

out of prison for years, and when not incarcerated, is transient."). As Jeff Atkinson and Barbara Atwood observe, the role of individuals who are not biological or legal parents "has been accentuated by the opioid epidemic. With 2.1 million adults experiencing opioid addiction in this country, many relatives have stepped forward to care for children because of their parents' addictions." Jeff Atkinson & Barbara Atwood, Moving Beyond *Troxel*: The Uniform Nonparent Custody and Visitation Act, 52 Fam. L.Q. 479, 481 (2018). But, as Atkinson and Atwood note, "The legal rights of such relative caregivers remain in limbo in many situations." Id.

378. See, e.g., *In re L.M.*, 2014 WL 5841572, at *1 (noting the biological mother's "extensive history of mental health and substance abuse issues").

379. See, e.g., id.; C.P. v. S.C., No. 1277 WDA 2019, 2020 WL 829471, at *1 (Pa. Super. Ct. Feb. 19, 2020) (describing how paternal grandparents cared for the child after the child's mother and father were incarcerated).

380. No. COA20-682, 2021 WL 2425909, at *1 (N.C. Ct. App. June 15, 2021).

381. Id.

382. Id. at *4–5.

383. No. 2009-CA-002165-ME, 2010 WL 3604157, at *1 (Ky. Ct. App. Sept. 17, 2010).

384. Id.

385. Id.

386. Id.

387. Id. at *3. In another case, *In re A.L.*, the child was raised by her paternal grandmother. No. CA2020-12-090, 2021 WL 2072170, at *1 (Ohio Ct. App. May 24, 2021). The child's mother "was homeless and abusing drugs," and the child's father, who was in the military, was stationed in another state for many years. Id. In light of these circumstances, the mother and father granted custody of the child to the grandmother, with the mother having supervised visitation. Eventually, when the mother and father each sought custody, the Ohio courts awarded legal custody to the grandmother. Id. at *2. Finding such custody to be in the child's best interest, the trial court had noted that "the past two (2) years in

None of this is to suggest that the legal parents, by virtue of the challenges they face, should not be able to maintain relationships with their children. Terminating parental rights or denying contact between the parent and child based on these grounds will be inappropriate and harmful in many cases.[388] The point is simply that in a huge swath of cases in the data set, courts' application of the functional parent doctrine safeguards the child's existing relationship with the person who is consistently parenting them.

C. *Do the Doctrines Unleash Meritless and Abusive Claims?*

Critics fear that the existence of functional parent doctrines will open the floodgates to litigation, including abusive litigation.[389] For example, in rejecting a functional parent doctrine in a 2018 decision, a Virginia court worried that "it would open a Pandora's box of unintended consequences to hold that a legal parent–child relationship is created simply by virtue of such factors as the amount of time a child spends with, or the strength of an emotional bond that exists between, another living in the same household."[390] Imagine, the court explained, if "an ex-wife, ex-husband, ex-boyfriend, ex-girlfriend, former nanny, au pair or indeed virtually anyone not related to their child through biology or legal adoption, can be placed on equal footing as a biological or adoptive parent solely through a significant emotional bond with the child."[391] Scholars echo this concern, worrying that an endless parade of claimants will petition for

---

Paternal Grandmother's home has been the most, and only, stable period of the child's life." Id. at *7.

388. As Roberts powerfully shows, the child welfare system disproportionately harms parents of color and their children. See Roberts, Shattered Bonds, supra note 266, at vii (arguing that "[c]hild welfare authorities are taking custody of Black children at alarming rates, and in doing so, they are dismantling social networks that are critical to Black community welfare"); Roberts, Torn Apart, supra note 266, at 30 (arguing that the "nation's terroristic approach to protecting children blames the most marginalized parents for the impact of race, class, and gender inequalities on their children").

389. See, e.g., Jones v. Barlow, 154 P.3d 808, 816 (Utah 2007) ("A de facto parent rule for standing, which rests upon ambiguous and fact-intensive inquiries into the surrogate parent's relationship with a child and the natural parent's intent in allowing or fostering such a relationship, does not fulfill the traditional gate-keeping function of rules of standing."); Wilson, Undeserved Trust, supra note 63, at 100 ("By granting standing to Ex Live-In Partners, we would encourage the adults involved to resolve problems in court, with all the costs and damaged relationships that result.").

390. Hawkins v. Grese, 809 S.E.2d 441, 448 (Va. Ct. App. 2018).

391. Id.; see also Janice M. v. Margaret K., 948 A.2d 73, 74, 88 (Md. 2008) (asserting that creating a functional parent doctrine could give rise to a "myriad" of disputes, including those "involving step-parents, grandparents, and parties in a relationship with 'a significant other'"), overruled by Conover v. Conover, 146 A.3d 433, 453 (Md. 2016); Stadter v. Siperko, 661 S.E.2d 494, 500 (Va. Ct. App. 2008) (adducing the same slippery slope hypotheticals); Titchenal v. Dexter, 693 A.2d 682, 688 (Vt. 1997) (asserting that "various relatives, foster parents, and even day-care providers could seek visitation through court intervention").

parental rights[392]—including "Ex Live-In Partners,"[393] "aunts, cousins, neighbors, fictive kin and paid caretakers."[394] From this perspective, the mere fact of litigation is harmful to families; legal parents will have to fend off outsiders, and children will have their sense of security threatened by legal proceedings.[395]

Concerns about functional parent doctrines relate not only to additional litigation, but also to unwarranted, frivolous, or vexatious litigation. Again, our data set includes only electronically available decisions, the overwhelming majority of which are from state appellate courts. It is reasonable to expect more meritless claims at the trial court level, with adverse decisions also less likely to be appealed. Nonetheless, there are reasons to believe these concerns that functional parent doctrines will produce significant amounts of meritless and abusive litigation are overstated.

First, many of the claimants in functional parent cases have other routes to petition courts for custody or visitation. In the absence of a functional parent doctrine, a wide swath of claimants would still have grounds on which to litigate. For example, states maintain third-party custody and visitation statutes, as well as more targeted statutes covering grandparents or stepparents.[396] Many functional parents would be entitled to proceed under one or more of these other routes. For example, 42% of the total cases in the data set involve grandparents or stepparents who are alleged to be functional parents—people who may be able to bring a custody or visitation action based on their status. Among the remaining cases involving other types of claimants, some of them would be entitled to bring claims under third-party custody and visitation statutes.[397] Thus, it

---

392. See, e.g., Wilson, Undeserved Trust, supra note 63, at 99 (discussing the ALI's de facto parent proposal and arguing that it could "encompass[] every Tom, Dick, and Harry").

393. See id. at 90.

394. Baker, Equality, supra note 60, at 464. Lawyers also raise these concerns. See, e.g., Trial Transcript at 806, [K.M.] v. [E.G.], No. CIV020777 (Marin Cnty. Super. Ct. Feb. 14, 2002) (arguing against application of the "holding out" presumption by claiming that "[a]ny step parent, partner, informal or otherwise, grandparent, other relative, or friend could assert being a full parent because of the relationship he or she developed with a child while living with the parent"). For discussion of these arguments over the course of decades of litigation, see NeJaime, New Parenthood, supra note 214, at 1224.

395. See, e.g., Wilson, Undeserved Trust, supra note 63, at 100 ("It may be important to encourage continuing relationships with Ex Live-In Partners, but long, expensive custody fights—even where the mother wins—have financial and emotional costs that hurt her and the child.").

396. See 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, 7 (2013).

397. While it is typically more difficult to prevail under these third-party statutes, see supra notes 159–163 and accompanying text, the alleged concern here relates to situations in which a person is using the court system for the purpose of harassing and abusing the legal parent. Critics argue that this concern is triggered by any such litigation, irrespective of the final outcome. See supra note 395 and accompanying text.

is far from clear that functional parent doctrines open the floodgates to *additional* litigation, since a large share of the claimants have other grounds upon which to litigate.[398]

Second, our data provide other reasons to think these concerns are overstated. Again, in 83% of the cases in the data set, the functional parent appears to have been a primary caregiver of the child. Among the cases we analyzed, the typical claimant in a functional parent case is the person serving a primary parental role in the child's life. Claims of this kind are hardly meritless.

More than a third of the cases in the data set involve relatives who are alleged to be functional parents. Some might point to this finding to support concerns about non-meritorious claims, seeing relatives as merely assisting parents. A closer look, however, reveals the prevalence of cases in which these extended family members became parents of the child at issue, often in the absence of a legal parent. Recall that in all but four of the seventy-two cases in which the court recognized a grandparent as a functional parent, the grandparent was serving as the child's primary caregiver at the time of the proceeding, and the legal parents were not.[399]

Some worry not simply about meritless claims but about abusive claims. They suggest that functional parent cases will feature many abusive former nonmarital male partners who would use the doctrine to further harass the child's parent.[400] Consider the statement of prominent New York advocacy organizations: "A discretionary functional approach, requiring a case-by-case analysis, would empower former abusive partners with no biological or adoptive connection to the child to claim parental rights as a way to continue threatening their victims."[401]

---

398. Indeed, it is not uncommon to see cases in our data set that feature claims under both third-party statutes and functional parent doctrines. See, e.g., In re Custody of S.A.-M., 489 P.3d 259, 262–63 (Wash. Ct. App. 2021) (noting that the claimant initially sought third-party custody and later added a claim "under the newly enacted de facto parenting statute"). In fact, courts applying functional parent doctrines have recognized how litigants had other claims available even if they did not prevail on their functional parent claim. See, e.g., In re Antonio R.A., 719 S.E.2d 850, 862 (W. Va. 2011) (denying custody to the grandmother under the psychological parent doctrine but citing the grandparent visitation statute as a basis on which to maintain the relationship).

399. See supra notes 229–230 and accompanying text.

400. See, e.g., Titchenal v. Dexter, 693 A.2d 682, 688 (Vt. 1997) ("[T]hird parties could abuse the process by seeking visitation to continue an unwanted relationship or otherwise harass the legal parents."); Wilson, Undeserved Trust, supra note 63, at 99–100.

401. See, e.g., Brief of Amicus Curiae Sanctuary for Families et al. at 8, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 499 (N.Y. 2016) (No. APL-2015-00236); see also Hearing on H.B. 5178 Before the Gen. Assemb. Judiciary Comm. (Conn. 2020) (statement of Liza Andrews, Dir. of Pub. Pol'y & Commc'ns, Conn. Coal. Against Domestic Violence), https://www.cga.ct.gov/2020/JUDdata/Tmy/2020HB-05178-R000306-Andrews,%20Liza,%20Director%20of%20Public%20Policy%20-%20Communications-Connecticut%20Coalition%20Against%20Domestic%20Violence-TMY.PDF [https://perma.cc/6H65-U8QG] ("For victims who are not married to their abuser or whose abuser is not the biological or legal

It is reasonable to expect that the full spectrum of disputes would include more claims brought for abusive ends. In disputes that never make it to court, individuals, including those with weak claims, may invoke these doctrines primarily as a means to exert control. To the extent abusive claims are more likely to lack merit than non-abusive claims, one might also expect a larger share of trial court cases, relative to appellate cases, to include these types of abusive claims.[402] Again, the data set of 669 decisions includes only twenty-eight trial court decisions.

Nonetheless, our study provides grounds on which to suspect that concerns about abusive claims are overstated. First, again, to the extent the goal of the litigation is to harass the parent, often the party has other grounds upon which to sue.[403] Second, the data do not lend significant support to the assumption that functional parent doctrines will be routinely asserted for abusive ends. Former unmarried different-sex partners represent less than a fifth of all cases in the data set—though, as we observed, the average number of cases per year in the data set grew over time at a greater pace than different-sex marital stepparent cases.[404] Of the 118 cases involving unmarried different-sex partners, twenty-five feature allegations of domestic violence between the adults; of those, eighteen involve allegations against the functional parent.[405] Of course, the presence of domestic violence allegations in these cases is troubling. But it is important to observe the gap between this data and the alarmingly high rate of domestic violence allegations in other kinds of family law cases.[406] Moreover, in most of the cases in the data set that involve allegations of domestic violence, there are allegations leveled against the

---

parent of their child, this bill unfortunately provides the abuser with an opportunity to use presumption or de facto parentage against their victim.").

402. The motivation to exert control over another person, however, may lead individuals to make decisions about whether and how much to litigate that depart from the rational decisionmaking assumptions that structure models of the litigation process. It could be the case, then, that abusive claims are overrepresented in appellate decisions. Again, our data do not allow us to draw conclusions about this.

403. See supra notes 396–398 and accompanying text.

404. See supra section III.A.

405. See supra section III.C.

406. For example, a 2002 study found that "[i]n 76 percent of court-based child custody mediation cases [in California], at least one parent reported at least one indicator of prior interparental violence." Jud. Council of Cal., Admin. Off. of the Cts., Domestic Violence in Court-Based Child Custody Mediation Cases in California 2 (2002), https://www.courts.ca.gov/documents/resupDV99.pdf [https://perma.cc/75BX-3BR2]. For important work on domestic violence in family law proceedings, see Meier, supra note 180, at 848 (collecting and analyzing the 2,189 electronically reported cases decided over the course of a decade in which mothers accused fathers of family violence, which includes both domestic violence and child abuse); Elizabeth S. Scott & Robert E. Emery, Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard, 77 Law & Contemp. Probs. 69, 86–87 (2014) (discussing the prevalence of domestic violence allegations in custody proceedings).

legal parents.[407] In the small number of cases involving allegations of domestic violence against the functional parent, it is not always clear why the person is invoking the doctrine. Ultimately, the data do not provide meaningful support to the position that functional parent doctrines should be rejected outright based on fears of their misuse by perpetrators of domestic violence.[408]

Going further, some critics contend that functional parents, once recognized, will subject children to "physical abuse and neglect."[409] Once again, the concern focuses primarily on the "male expartners" of the child's mother—a subgroup that constitutes 18% of the cases in the data set.[410] Among electronically available cases, very few involve allegations that the functional parent engaged in child abuse or neglect. This is especially striking given the large number of child welfare–involved cases in the data set.[411]

Ultimately, 37% of the cases in the data set involve allegations of domestic violence or child abuse or neglect. In the overwhelming majority of these cases—83%—there are allegations that a *legal parent* has engaged in violence, abuse, or neglect. To be clear, we are identifying cases that feature *allegations* of domestic violence or child abuse or neglect; we are not making claims about the prevalence of substantiated allegations or allegations that result in protection orders or child removal. Still, it is telling that in 62% of all the cases in the data set involving allegations of domestic violence or child abuse or neglect, the allegations are against the legal parent or parents and not the functional parent. Indeed, in many of these cases, the functional parent has served as the child's primary caregiver and offers the child relative safety and security.

Thus, contrary to the speculation of some functional parent skeptics, there are few cases, among electronically available decisions, that feature allegations of domestic violence or child abuse or neglect against the functional parent but not against the legal parent. Only twenty-six cases, which comprise 10% of the cases involving allegations of domestic violence or child abuse or neglect, and 4% of all cases in the data set, fall into this category. This raises questions about reaching normative conclusions about the doctrines overall based on this assumed fact pattern.

---

407. See supra section III.C.1.

408. Some jurisdictions have drafted functional parent doctrines to guard against potential misuse by perpetrators of domestic violence. See, e.g., Conn. Gen. Stat. Ann. § 46b-490(b) (West 2022) ("A parent of the child may use evidence of duress, coercion or threat of harm to contest an allegation that the parent fostered or supported a bonded and dependent relationship [between the alleged de facto parent and the child].").

409. Wilson, Undeserved Trust, supra note 63, at 92.

410. Strauss, supra note 44, at 973 ("Not only did [the drafters of the ALI Principles] lack evidence about the psychological benefits of ongoing visitation, but they also ignored substantial evidence that ongoing visitation with male ex-partners posed a substantial risk of abuse.").

411. See supra section III.C.3.

D. *Are Courts Effective at Deciding?*

For some commentators, problems arise not only from the doctrines themselves but also from judicial application of the doctrines. How, some wonder, can judges be expected "to dive responsibly into inquiries they have never made before—determining whether a particular relationship[] qualifies as parental."[412] As one scholar bluntly states, "It is not at all clear that judges know what they are doing."[413]

A focus on judicial competence leads to two separate concerns, which are somewhat in tension. The first concern invokes the classic legal trope of the slippery slope.[414] Commentators imagine that courts will award parental status to individuals who have not functioned as parents—from relatives to cohabitants, teachers to nannies.[415] On this view, functional parent doctrines give too much discretion to judges who cannot be trusted to apply them accurately.[416]

---

412. Baker, Equality, supra note 60, at 464.

413. Id. But see Carlos A. Ball, Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty, 20 Am. U. J. Gender Soc. Pol'y & L. 623, 626 (2012) (arguing "that concerns regarding uncertainty in the application of equitable parenthood doctrines are greatly overblown").

414. See, e.g., Eugene Volokh, The Mechanisms of the Slippery Slope, 116 Harv. L. Rev. 1026, 1029 (2003) (arguing that "[s]lippery slopes [in the law] . . . are a real cause for concern"). As Courtney Cahill explains, there are two different slippery slope arguments: the rational-grounds slippery slope argument, and the empirically based slippery slope argument. "Rational-grounds slippery slope arguments assume that a distinction cannot be made between *A*, the object under consideration, and *B*, the object of comparison. This kind of argument 'rel[ies] on the idea that there is no non-arbitrary stopping place anywhere along the slope.[']" Courtney Megan Cahill, Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo, 99 Nw. U. L. Rev. 1543, 1551–52 (2005) (quoting Eric Lode, Slippery Slope Arguments and Legal Reasoning, 87 Calif. L. Rev. 1469, 1484 (1999)). "[E]mpirical slippery slope arguments assume that while differences between *A* and *B* exist, *A* should nevertheless be prohibited 'on the grounds that allowing it would increase the likelihood of our allowing each successive case on the slope, until we finally reach some objectionable result.'" Id. (footnote omitted). Both types of slippery slope arguments appear in the functional parent debate.

415. See Baker, Equality, supra note 60, at 464 (arguing that proponents of functional parenthood "seem sure that [judges] know the difference between these kinds of bonds and the bonds a child might form with a paid caretaker, or a grandmother or a sibling"); see also Wilson, Undeserved Trust, supra note 63, at 99 (suggesting that the ALI's treatment of de facto parents encompasses "every Tom, Dick, and Harry with whom a woman cohabits for two years and shares an equal caretaking load").

416. See, e.g., Baker, Quacking, supra note 44, at 168 ("Asking judges to assess the quality of the relationship between the functional parent and the child to see if it is a 'parent–child relationship' asks judges to determine what a family relationship is."). As Martha Minow, an early advocate for functional approaches, put this concern: "[A] functional approach can be . . . unpredictable. Which factors or combination of factors ends up being enough? Isn't this simply a more direct invitation for judges to express their own ideas about what should count as a family?" Minow, supra note 69, at 276.

Again, assessing such claims depends in part on an understanding of what makes a relationship parental in nature. We acknowledge that some of those who oppose functional parent doctrines may be of the view that some individuals treated as parents under the doctrines are merely nonparents. To be sure, there are cases in the data set where there may be a reasonable debate about whether the person was truly functioning as a parent. That said, we still suspect that this critique is primarily premised on an *assumption* that "in most stepparent, cohabitant, or relative caregiver cases,"[417] the person claiming functional parenthood is fulfilling some less central role in the child's life, rather than a considered rejection of the conclusions in particular cases based on their facts.[418]

Again, the data set of electronically available decisions does not represent the universe of litigated cases. And the data set is comprised of almost entirely appellate decisions. Accordingly, we cannot make claims about how courts adjudicate functional parent claims as a general matter. Nor can we make claims about the capacities of trial courts in this domain.

Still, our study sheds light on how courts assess and adjudicate functional parent claims. In the vast majority of electronically available cases (83%), the functional parent seems to have been a primary caregiver of the child. In 53% of those cases, the court recognized the functional parent—slightly higher than the rate of recognition overall among cases in the data set (47%). Among cases in which the functional parent was a primary caregiver, the rate of recognition was highest (61%) in the subset of cases in which no legal parent had been a consistent caregiver to the child. Ultimately, among electronically available cases, when courts recognize a person as a functional parent, including a partner, grandparent, or other relative, that person in all but a handful of cases has been a consistent source of parental care for the child.[419]

Among the cases in the data set, courts routinely deny claims of individuals who played the role of a family member but did not serve as a primary caregiver of the child. Specifically, a small minority of the cases in the study feature a person who has not in fact been a primary caregiver, and courts overwhelmingly reject these claims.[420] Moreover, there is no case in the data set of 669 cases in which a paid caregiver is treated as a functional parent.

If anything, our analysis suggests that courts are rejecting, not accepting, the legitimate claims of functional parents. Consider cases in

---

417. Strauss, supra note 44, at 913.

418. See, e.g., Hearing on H.B. 5178 Before the Gen. Assemb. Judiciary Comm. (Conn. 2020), https://www.cga.ct.gov/2020/JUDdata/Tmy/2020HB-05178-R000306-Pripstein,%20Shirley-TMY.PDF [https://perma.cc/9TMN-T74V] (testimony of Shirly M. Pripstein, Chair, Exec. Comm. of the Fam. L. Section of the Conn. Bar Ass'n) ("A permanent legal relationship should rest on a stronger foundation than one year of acting as a parent.").

419. See supra section III.C.

420. See supra section III.C.

which courts rejected the claims brought by former nonmarital different-sex partners. In some of these cases, the unmarried partner had a strong relationship with the child that could easily be described as parental.[421] For example, in *Kevin Q. v. Lauren W.*, the mother and her first child moved in with the functional parent, Kevin, in 2003.[422] The mother and child moved out of Kevin's house for a period of time, but then returned when she was pregnant with her second child—the child at issue in the case.[423] Kevin was present at the second child's birth and cut the umbilical cord.[424] Despite knowing that he was not the child's biological parent, Kevin declared that he had held the child out as his own from the moment of birth: He was listed on the birth announcement, and, according to Kevin, his parents viewed the child as their grandchild.[425] Kevin asserted that he was primarily responsible for the child financially and for the child's day-to-day care.[426] The mother and the two children continued to reside with Kevin until the youngest child was twenty months old.[427] Although the trial court held that Kevin was a parent based on the "holding out" presumption, this ruling was reversed on appeal—the appellate court held that Kevin could not be a legal parent because another man's parentage had already been established.[428]

This decision—one rejecting the claim of a former nonmarital different-sex partner who had a parental relationship with the child—is not unique.[429] Like in *Kevin W.*, in many cases in which the court rejected the functional parent claim, it did so because there was another person

---

421. To be clear, there are also cases in which the court denied the claim of a person who had only a limited relationship with the child. See, e.g., In re L.H., No. 17-0769, 2018 WL 317057, at *5 (W. Va. Jan. 8, 2018) ("H.A. never lived with petitioner and was one year old at the time of the dispositional hearing. We find no error in the circuit court's ruling that petitioner is not a psychological parent of H.A.").

422. 95 Cal. Rptr. 3d 477, 479–80 (Ct. App.), modified on denial of reh'g (Ct. App. 2009).

423. Id.

424. Id.

425. Id.

426. Id. To be clear, the child's mother disputed some of these facts, including facts related to who performed most of the care for the children. Id. at 480.

427. Id.

428. Id. at 489 ("In sum, Brent signed and filed a valid declaration of paternity that has the force of a judgment under section 7573 and trumps Kevin's presumption under section 7611, subdivision (d).").

429. See, e.g., Van v. Zahorik, 597 N.W.2d 15, 16 (Mich. 1999) (rejecting claim of former nonmarital partner despite "a longstanding relationship" to the children); Thompson v. Davis, No. 1726 EDA 2020, No. 1727 EDA 2020, 2021 WL 2472885, at *7 (Pa. Super. Ct. June 17, 2021) (rejecting claim of former nonmarital partner who assumed "caregiving duties from 2015 through 2019"); E.T.S. v. S.L.H., 54 A.3d 880, 880–81, 884 (Pa. Super. Ct. 2012) (rejecting claim of former nonmarital partner "who lived with and parented the children from May 2009 until at least May 2011").

who was recognized as a parent, not because the person lacked a true and meaningful parental relationship with the child.[430]

At times, courts reject the claims of functional parents to vindicate the rights of the legal or biological parent. Consider two examples. In *Darling v. Blummer*, an unmarried couple ended their relationship when the child was three months old.[431] At the time, they "entered [into] a consent order" granting the father primary physical custody; this was later expanded to include sole legal custody as well.[432] The "[m]other exercised her visitation rights periodically but did not do so consistently."[433] During this time, the father worked long hours.[434] The child's grandmother "took on the role of primary caregiver"; she dropped the child off and picked him up from daycare, coordinated his extracurricular activities, and played with him after school.[435] After the father died when the child was seven, the grandmother sought custody.[436] The appellate court, however, rejected her functional parent claim and awarded sole physical and legal custody to the mother.[437]

Similarly, in *Santiago v. Berry*, the court rejected the claim asserted by the child's maternal grandmother. The child's mother was incarcerated for "a significant period of [the child's] life . . . and she was not significantly involved in [the child's] care and support."[438] Over the course of many years, the child's maternal grandmother "provided significant financial support and caretaking for the child," and, during this time, the father was sometimes absent.[439] Nonetheless, the court rejected the grandmother's functional parent claim because it was unable to find "clear and convincing proof that her role was primary to the substantial exclusion of the natural parent."[440]

---

430. See, e.g., Santiago v. Berry, No. 2020-CA-0157-MR, 2021 WL 943755, at *3 (Ky. Ct. App. Mar. 12, 2021) (dismissing a custody petition when a court failed to "find clear and convincing proof that [the petitioner's] role was primary to the substantial exclusion of the natural parent").

431. Darling v. Blummer, No. 1527, 2018 WL 3602962, at *1 (Md. Ct. Spec. App. July 27, 2018).

432. Id.

433. Id.

434. Id.

435. Id.

436. Id.

437. See id. at *4–5 ("[A]s a third party, Grandmother's rights are subordinate to Mother's, Child's biological parent.").

438. Santiago v. Berry, No. 2020-CA-0157-MR, 2021 WL 943755, at *1 (Ky. Ct. App. Mar. 21, 2021).

439. Id. at *3.

440. Id.; see also McMaster v. McMaster, No. COA19-234, 2020 WL 774018, at *1 (N.C. Ct. App. Feb. 18, 2020) (rejecting functional parent claim by child's maternal great-great-uncle and his wife, despite the fact that for approximately the first eight years of the child's life, the "child primarily resided with and was cared for by" the functional parents).

The data suggest that this case is not unusual; courts appear to err on the side of nonrecognition of individuals who have served as primary caregivers. Indeed, as noted above, among the 110 cases in which the functional parent was the child's primary caregiver *and no legal parent had ever been a consistent caregiver* for the child, the court denied recognition to the functional parent in nearly a third.[441]

The focus on judicial competence raises a second, and distinctive, concern. Some scholars worry that courts will apply functional parent doctrines in ways that systematically privilege heteronormative, unitary, "conventional" families.[442] On this view, "judicial interference will be morally conservative and weigh against nonconformist lifestyles."[443] The doctrines, then, will reify, rather than disturb, conventional norms that have long governed family law.[444] Through this lens, one might see functional parent doctrines as not accommodating but rather "undermining pluralism."[445]

This Article is not able to make claims about judicial decisionmaking generally. The data set does not include all litigated cases, and it is almost entirely composed of appellate decisions. Nonetheless, this study lends little support to the concern that functional parent doctrines will be applied to privilege "conventional" family forms. Instead, among the cases in the data set, courts apply the doctrines to a wide array of family arrangements in which children are being raised—many of which are rarely the focus of commentary on functional parent doctrines. Families that scholars would characterize as "conventional"—same-sex and different-sex committed couples living together and jointly raising a child—constitute a sizable portion of cases in which the court recognizes a functional parent. But another group of families that scholars positing

---

441. See supra notes 281–285 and accompanying text.

442. See, e.g., Baker, Equality, supra note 60, at 460 ("In determining whether a parent–child relationship exists, courts routinely import nuclear, binary, sexual and heteronormative understandings of what parenting is."); Bix, supra note 58, at 1 ("What do (unconventional) families need to *be like*, to warrant the special protections the constitution grants to families? The answer tends to be: conventional families . . . .").

443. See Laufer-Ukeles & Blecher-Prigat, supra note 44, at 461 (identifying concerns stemming from judicial intervention in the sphere of familial privacy).

444. See, e.g., Baker, Quacking, supra note 44, at 138–39 ("Because [the functional] approach determines what a parent is by looking at what a parent does, it inevitably relies on what parents have traditionally done. This [focuses judges] on stereotyped roles, binary romantic relationships and genetic contribution because these variables have been at the core of . . . what families did."); see also Jessica A. Clarke, Adverse Possession of Identity: Radical Theory, Conventional Practice, 84 Or. L. Rev. 563, 614 (2005) (arguing that because functional parent doctrines operate in reference to "previous . . . performances of . . . parenting, . . . a court is most likely to recognize a functional parent if that person closely approximates the cultural archetype of the 'normal' parent").

445. See, e.g., Clare Huntington, Staging the Family, 88 N.Y.U. L. Rev. 589, 633 (2013) ("Requiring functional families to act like traditional families places performance at the center of the analysis, entrenching traditional social fronts and undermining pluralism.").

this concern often would not describe as "conventional"—including those featuring relatives, as well as cases involving legal parents who are struggling with a range of challenges, including incarceration and substance use disorders—also constitutes a sizable portion of cases in which the court recognizes a functional parent. Our data show that, in practice, functional parent doctrines benefit children in a range of families typically overlooked in the scholarly conversation—families struggling economically and dealing with especially challenging life circumstances.

* * *

In sum, objections to functional parent doctrines rest on assumptions about who functional parents are, what roles they play, the context in which their claims are asserted, and the worthiness of their claims. Our study suggests that many of the empirical assumptions and claims that motivate normative arguments against functional parent doctrines lack significant support.

Ultimately, our findings indicate that functional parent doctrines are neither unnecessary nor obsolete. A majority of the cases in the data set involve parent–child relationships that are not contemplated by other parentage rules. Our study also shows that, while functional parent claims commonly arise in post-dissolution custody disputes, a majority of the cases in the data set do not feature this fact pattern and thus do not raise some of the concerns that post-dissolution conflicts present. Our data also suggest that fears of floodgates and slippery slopes are overstated. The overwhelming majority of cases in the data set involve individuals who have served as primary caregivers for the child.[446] In the small minority of the cases that feature an individual who has not in fact served a central parental role in the child's life, courts overwhelmingly reject these claims.[447] Our findings also indicate that courts do not appear to be applying functional parent doctrines in ways that systematically exclude arrangements that depart from the heteronormative, unitary family. Among the cases in our study, functional parent doctrines serve a broad range of children in a broad range of families living in a variety of circumstances.

V. THE CHILD-CENTERED AND FAMILY-PRESERVING FUNCTIONS OF FUNCTIONAL PARENT DOCTRINES

This Part considers how our study not only sheds light on critiques of functional parent doctrines but also lends support to the doctrines on child-centered and family-preserving grounds. In the overwhelming

446. See supra section III.A.

447. See supra section III.D.

majority of cases in the data set, the functional parent has been the child's primary caregiver. By recognizing this relationship, judicial application of the doctrines can preserve and stabilize a child's home and family. Further, in situations in which the legal parents are unable to care for the child, placement with the functional parent can enable a court to protect the child and, simultaneously, to preserve the legal parent's relationship with their child.

A. *Protecting Children's Relationships With Primary Caregivers*

The legal recognition and protection of functional parent–child relationships is generally child welfare enhancing.[448] Children's relationships with their primary caregivers are critical to their development—a common sense belief that has been confirmed by decades of research.[449]

Secure, stable parental relationships contribute to children's healthy cognitive development and emotional growth.[450] When children lack these secure relationships, they are at greater risk for a range of negative health consequences.[451] As many studies over the course of many years consistently demonstrate, children benefit when strong attachment relationships are secured and preserved.[452]

Research also demonstrates that children are harmed when these attachment relationships are disrupted.[453] Across a diverse range of families, children suffer significant and long-lasting developmental consequences when their relationships with their psychological parents are severed.[454]

---

448. See Anne L. Alstott, Anne C. Dailey & Douglas NeJaime, Psychological Parenthood, 106 Minn. L. Rev. 2363, 2372 (2022) ("[T]he psychological parent principle is a developmental principle oriented toward children's welfare . . . .").

449. See id. at 2373–74 (emphasizing findings that "(1) the child's bond with a psychological parent is essential for healthy development; (2) disruptions in that relationship can inflict serious developmental harm; (3) the psychological parent–child bond buffers childhood trauma; and (4) the quality of the parent–child relationship can be improved with treatment").

450. See id. at 2373.

451. Nat'l Rsch. Council & Inst. of Med., From Neurons to Neighborhoods: The Science of Early Childhood Development 265 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000) ("[A]ttachments buffer young children against the development of serious behavior problems, in part by strengthening the human connections and providing the structure and monitoring that curb violent or aggressive tendencies.").

452. See Alstott et al., supra note 448, at 2373–79.

453. See Comm. on Early Childhood, Adoption & Dependent Care, Am. Acad. of Pediatrics, Adoption & Dependent Care, Developmental Issues for Young Children in Foster Care, 106 Pediatrics 1145, 1145 (2000) (describing children's "need for continuity with their primary attachment figures" as "paramount").

454. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 499 (N.Y. 2016) ("A growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure—such as a de facto parent—regardless of that figure's biological or adoptive ties to the children." (citations omitted)); see also K. S. Kendler, M. C. Neale, C. A. Prescott, R. C. Kessler, A. C. Heath, L. A. Corey & L. J. Eaves, Childhood Parental Loss and

Secure parental attachments can form between children and people who are not their biological or legal parents.[455] And disruption of these parental relationships can harm children.[456]

Our study shows how courts apply functional parent doctrines in ways that protect children's primary attachment relationships and thereby promote children's welfare. At least among the cases in the data set, the relationships protected under these doctrines are often deeply rooted and critically important to children and their well-being.

Again, some critics of functional parent doctrines present the doctrines as undermining, rather than promoting, the interests of children.[457] On this view, the "child is the subject of a bitter, expensive, protracted litigation for nothing."[458] And if the person is recognized as a functional parent, the conflict between the legal and functional parents will persist, thus making the child's life less safe and stable.[459]

Yet, the cases in our study reveal a more complex and often starkly different picture. These cases present compelling, vivid illustrations of the important role functional parents play in the lives of children. Among the

---

Alcoholism in Women: A Causal Analysis Using a Twin-Family Design, 26 Psych. Med. 79, 89 (1996) (showing that parental loss through separation "had a consistent and robust association with future alcoholism"); Takeshi Otowa, Timothy P. York, Charles O. Gardner, Kenneth S. Kendler & John M. Hettema, The Impact of Childhood Parental Loss on Risk for Mood, Anxiety and Substance Use Disorders in a Population-Based Sample of Male Twins, 220 Psychiatry Rsch. 404, 407–08 (2014) (finding that parental separation, even more than parental death, "has strong[] and wide[] effects on offspring psychopathology").

455. Cf. Snyder v. Scheerer, 436 S.E.2d 299, 301, 307–08 (W. Va. 1993) (observing that "[t]he mission of these mothers," that is, the child's biological mother and the child's aunt who served as her primary caretaker for a number of years, "is the same" (quoting In re James M., 408 S.E.2d 400, 409–10 (W. Va. 1991))).

456. See Comm. on Applying Neurobiological & Socio-Behavioral Scis. From Prenatal Through Early Childhood Dev.: A Health Equity Approach, Nat'l Acad. of Scis. Eng'g & Med., Vibrant and Healthy Kids: Aligning Science, Practice, and Policy to Advance Health Equity 256 (Jennifer E. DeVoe, Amy Geller & Yamrot Negussie eds., 2019) ("A meta-analysis of 19 studies confirmed that children raised by same-sex parents have patterns of adjustment that are just as healthy as those of their counterparts raised by heterosexual parents." (citation omitted)); A. Brewaeys, I. Ponjaert, E. V. Van Hall & S. Golombok, Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families, 12 Hum. Reprod. 1349, 1356 (1997) ("Both women in the lesbian mother family were actively engaged in child care and a strong mutual attachment had developed between social mother and child."); Yvon Gauthier, Gilles Fortin & Gloria Jéliu, Clinical Application of Attachment Theory in Permanency Planning for Children in Foster Care: The Importance of Continuity of Care, 25 Infant Mental Health J. 379, 394 (2004) (explaining that children suffer greatly when separated from non-biological parent figures).

457. Baker, Quacking, supra note 44, at 168 ("[B]y the time the litigation was resolved, any benefit gained by honoring the functional relationship was outweighed by the costs of exposing the child to so much vitriol.").

458. Baker, Equality, supra note 60, at 466.

459. See, e.g., Laufer-Ukeles & Blecher-Prigat, supra note 44, at 427 ("[F]unctional relations . . . create a potential multiplicity of claims that can upset the stable, private lives of children through state and court intervention.").

cases in the data set, courts routinely apply functional parent doctrines in ways that recognize and protect a child's relationship with the person who has been parenting them. While we do not have data on the full universe of functional parent disputes, the number of children being parented by people other than their legal parents, and thus potentially captured by these doctrines, is substantial.

The abrupt termination of a child's relationship with their functional parent can be harmful to children. Cases in our study reflect this well-established finding. Consider *Kilborn v. Carey*.[460] At the time of the decision, the child was six.[461] The child's biological father essentially cut off contact with her and the mother when the child was one month old.[462] About a month later, the mother and child moved in with the functional parent, Kilborn.[463] The mother and Kilborn married later that year and thereafter had two biological children together. The parties raised all three children as "full siblings."[464] Throughout the child's life, Kilborn fully participated as her parent, the child called him "daddy," and the child was considered Kilborn's child by his extended family.[465] When Kilborn and the mother divorced, the mother sought to preclude him from having contact with the child.[466] This, the court-appointed therapist opined, was contrary to the child's well-being: "Based on her work with the child, it was the therapist's opinion that having to watch her younger siblings go off with Kilborn for their visits without her would be extremely difficult for her, and that 'there is no doubt that [the child] would be harmed' if Kilborn were removed from her life."[467] The court went on to explain that "[t]he actual harm that the child suffered was demonstrated by audio recordings entered into evidence in which the child, reacting to Kilborn's arrival to pick up her siblings for a visit, is heard crying, 'Daddy, you've got to care about me too' and 'I want to come too.'"[468] Finding that "the child would be substantially and negatively affected if Kilborn were removed from her life," the Maine courts found it "difficult to envisage a more clear case establishing de facto parenthood."[469]

From this perspective, preserving the functional parent's relationship with the child can be crucial to the child's development. As one court explained, in many cases, terminating the functional parent–child relationship "would contribute to instability rather than provide

460. 140 A.3d 461, 464 (Me. 2016).
461. Id. at 462.
462. Id.
463. Id.
464. Id. at 463.
465. Id. at 462–63.
466. Id. at 463.
467. Id. at 464.
468. Id.
469. Id. at 466–67.

stability."[470] Recall that in 83% of cases in the data set, the functional parent seems to have been a primary caregiver of the child. By recognizing a functional parent, courts can protect the child's relationship with the person who is providing them with the consistent parental care they need.

To be clear, in the absence of functional parent doctrines, some—but not all—functional parents may be able to maintain some level of contact with the child based on third-party doctrines or on statutes that apply specifically to grandparents or stepparents.[471] For a variety of reasons, these other avenues for protection often are inadequate alternatives. As an initial matter, some of these doctrines allow only for an award of visitation.[472] Accordingly, if the child has been living with the functional parent, application of these statutes may not allow the court to protect the child's home.[473]

This result may be especially problematic for children exposed to maltreatment. Again, about a third of the cases in the data set are child welfare-involved cases.[474] In most cases in the data set that involve allegations of child abuse or neglect, the allegations are against the legal parent or parents.[475] Of course, some of these allegations may be unfounded,[476] or the alleged maltreatment may arise primarily out of poverty.[477] Nonetheless, in the cases in the data set, the functional parent typically had been functioning as a parent for a significant period of time, and often this person had been providing the child with a degree of

---

470. Honaker v. Burnside, 388 S.E.2d 322, 326 (W. Va. 1989).

471. See Barbara A. Atwood, Third-Party Custody, Parental Liberty, and Children's Interests, 43 Fam. Advoc. 48, 49 (2021) ("Almost all states have some form of grandparent visitation statute, and about a third have stepparent visitation laws . . . .").

472. See, e.g., Neb. Rev. Stat. § 43-1802(1) (2022) (providing that "[a] grandparent may seek visitation with his or her minor grandchild if: (a) The child's parent or parents are deceased").

473. This may also be a basis on which to find that the four functional parent doctrines that supply standing to seek only visitation are also inadequate.

474. See supra section III.C.

475. See supra section III.C.

476. Most child welfare investigations are based on allegations of neglect. See, e.g., HHS, Child.'s Bureau, How the Child Welfare System Works 5 (2020), https://www.childwelfare.gov/pubpdfs/cpswork.pdf [https://perma.cc/3PVS-2QER] ("Nearly three-quarters of all child maltreatment cases are related to some form of neglect . . . ."). Scholars argue that, in these neglect cases, child welfare "workers make largely discretionary judgments about bad mothering and their underlying assumptions are, for the most part, unexamined and unchallenged. Conversations with workers reveal a deep bias about bad mothering based on race, class, and poverty." Jane C. Murphy, Legal Images of Motherhood: Conflicting Definitions From Welfare "Reform," Family, and Criminal Law, 83 Cornell L. Rev. 688, 707 (1998) (footnotes omitted).

477. Wendy Jennings, Separating Families Without Due Process: Hidden Child Removals Closer to Home, 22 CUNY L. Rev. 1, 6 (2019) ("In truth, the majority of families investigated by child protective services are scrutinized because of poverty-related neglect instead of abuse." (footnote omitted)).

security.[478] Continued custody for the functional parent, and hence continuity in the child's home placement, may be especially critical in these cases. To be clear, there may be other state laws or policies that authorize the court in a child welfare proceeding to place the child with the functional parent.[479] Even in states where such laws and policies exist, however, they typically treat the functional parent differently than a parent.[480] For example, often there is no preference in favor of placement with the functional parent.[481]

Similarly, even under other types of third-party statutes that provide for the possibility of custody, rather than merely visitation, these third-

---

478. See, e.g., Turnmire v. Eldreth, No. COA17-960, 2019 WL 438303, at *1 (N.C. Ct. App. Feb. 5, 2019) (case in which the child's mother had "becom[e] addicted to pain medications" and the child's great-aunt "cared for [the child's] daily needs" "[s]ince her birth"). We do not mean to suggest that the functional parent is always a paragon caretaker. In some of these cases, all of the parties—including the functional parent—face a range of challenges. This was true, for example, in In re T.B., No. 20-0369, 2020 WL 6482958 (W. Va. Nov. 4, 2020). In that case, the functional parent was the child's paternal grandfather. After an abuse and neglect petition was filed against the child's parent based on allegations of drug use, a petition was also filed against the grandfather based on, among other things, concerns about an altercation near the home involving a gun, and another incident in which a man came to the home to purchase a controlled substance. Id. at *2. Nonetheless, the grandfather was the person in the case who had been the consistent caretaker for the child. Id. at *1 (noting that the grandfather had cared for the child "on and off for a couple of years," and that the child "s[aw] his mom when she [came] to [petitioner's home] and he [did] go to her house sometimes").

479. See, e.g., N.Y. Fam. Ct. Act § 1017(2) (McKinney 2022) (allowing the court in a child welfare proceeding to place the child with "a relative . . . or other suitable person").

480. In addition, even when the law allows for a foster placement with the functional parent, that may not offer the functional parent an adequate alternative. Some functional parents may not be eligible to be licensed as a foster parent, perhaps because of their living arrangements or because of a past criminal conviction or involvement with the child welfare system. See Gupta-Kagan, Children, Kin, and Court, supra note 163, at 63–65. Indeed, facts presented in *Haaland v. Brackeen*, the case in which the Supreme Court is considering the constitutionality of the Indian Child Welfare Act, illustrate. In one of the consolidated cases, a grandmother who had been the child's "life-long caregiver" was informed by social workers that "her criminal record disqualified her for foster placement"—though social workers did not tell her that such record could be cleared. Brief for Robyn Bradshaw, Grandmother and Adoptive Parent of P.S. ("Child P.") as Amicus Curiae in Support of Tribal and Federal Defendants at 7–8, Haaland v. Brackeen, Nos. 21-376, 21-377, 21-378, 21-380 (U.S. filed Aug. 19, 2022), 2022 WL 3648316. Kinship placements facilitated by child welfare authorities also may have significant downsides. They may, for example, require the opening of a neglect case in ways that run counter to the interests of the family and child. At the same time, foster placement may be more attractive in some situations because of the subsidies that would be given to the foster parent to care for the child.

481. See, e.g., N.Y. Fam. Ct. Act § 1017(1)(a) (providing that a "non-respondent parent" is entitled to notice, a right to intervene, and a right to enforce visitation rights but providing no similar rights to relatives or "other suitable person[s]"); see also Josh Gupta-Kagan, Creating a Strong Legal Preference for Kinship Care (manuscript at 3) (on file with the *Columbia Law Review*) (discussing how the law "does not generally impose a strong preference for kinship care"). Indeed, even in states where the child welfare laws accord a preference in favor of a kinship caregiver, there may still be obstacles. See id. (manuscript at 3–4).

party and status-based doctrines are materially different than functional parent doctrines. First, in many states, these statutes limit who has standing, allowing only some individuals in only some circumstances to petition for third-party custody.[482] As Josh Gupta-Kagan documents in his study of third-party custody law, "Some states have chosen to permit only certain relatives to seek custody of children."[483] In addition, as Barbara Atwood explains,

> Statutes in more than half of states today condition grandparent or other third-party standing on a preliminary showing that a parent has died or that the parents have divorced or separated, and about a third of the states include an alternative criterion that the child was born to unmarried parents.[484]

Accordingly, while stepparents and grandparents may have grounds to petition for custody, functional parents in a significant number of cases in the data set would lack standing under these statutes. As a result, in the absence of functional parent doctrines, these individuals may have no legal basis on which to maintain contact with the children they are raising.[485]

Second, as compared to functional parent doctrines, states maintain substantive standards that place higher burdens on claimants invoking third-party custody statutes. For example, some states require that the claimant show that the child would be harmed if custody were denied.[486] Substantive and evidentiary burdens are often heavily weighted against the functional parent in a third-party custody case.[487]

Beyond these doctrinal differences, there are also important substantive and expressive differences between the statuses they yield. As Sacha Coupet observes in her work on kinship caregivers, "The attribution of parental status matters to kinship caregivers for the practical and expressive value that the 'p' word carries . . . ."[488] Parental status may be necessary, for example, to access certain government benefits for the

---

482. See Restatement of Child. & the L. § 1.80 cmt. I (Am. L. Inst., Tentative Draft No. 2, 2019) (noting that "most third-party-visitation statutes limit standing to certain categories of third parties such as grandparents and siblings" and that "[s]ome states allow [third party petitions] . . . only when a parent is deceased or when the parents are separated or divorced or were never married").

483. See Gupta-Kagan, Children, Kin, and Court, supra note 163, at 75.

484. Atwood, Marriage as Gatekeeper, supra note 162, at 974; see also Gupta-Kagan, Children, Kin, and Court, supra note 163, at 83 (discussing states that limit standing for third-party custody to cases of divorce or parental death).

485. See, e.g., Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991) (holding that a former same-sex co-parent lacked standing to seek visitation), overruled by Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016).

486. See supra notes 160–162 and accompanying text.

487. See Restatement of Child. & the L. § 1.80 cmt. g (Am. L. Inst., Tentative Draft No. 2, 2019).

488. See Coupet, supra note 306, at 611.

child.[489] In addition, third-party custody and visitation statutes treat the claimant as a *nonparent*[490] and so have dignitary dimensions that may matter to the functional parent and the child.[491]

In contrast to third-party custody and visitation statutes, which are often limited in scope and breadth, functional parent doctrines generally give courts authority to provide more robust protection to children's relationships with the people who are parenting them.[492] Doing so when the person has been functioning as a parent for a significant period of time can promote stability for the child.[493]

This is not to suggest that application of a functional parent doctrine is always or necessarily the most appropriate path. Even if functional parent doctrines should play a role, there may be reasons why certain functional parents would pursue protections under other doctrines, including third-party custody statutes or statuses afforded by the child welfare system, such as kinship foster placement or subsidized guardianship.[494] These alternative routes may be more attractive options in cases in which the functional parent is concerned about the impact of a functional parent determination on the legal parent.[495] These concerns may be particularly common in cases involving relatives. Within the child welfare system, the

---

489. See Joslin, Protecting Children, supra note 138, at 1209–17. Still, not all functional parent doctrines would yield the necessary status. See supra Figure 2 and accompanying text.

490. See supra notes 157–159 and accompanying text.

491. See Susan Frelich Appleton, Parents by the Numbers, 37 Hofstra L. Rev. 11, 58 (2008) (explaining that "the label and the status ['parent'] signifies have considerable expressive value"); NeJaime, Nature of Parenthood, supra note 305, at 2322–23 (discussing the expressive harms stemming from the lack of parental recognition).

492. See Joslin, Protecting Children, supra note 138, at 1199–200 (describing judicial "doctrines [used] to protect children's relationships with their functional parents").

493. This is not to suggest that states do not privilege legal or biological parents even when granting legal recognition to functional parents under functional parent doctrines. In some cases, courts recognize the functional parent–child relationship but nonetheless shift custody to the legal parent based on the view that such parent's rights are superior. For example, the child in *In re L.H.*, from birth until age six, had lived "in the home and care of Standing Grandparents who served in the role of parents." No. 17-0102, 2017 WL 5157367, at *8 (W. Va. Nov. 7, 2017). The court recognized the Standing Grandparents as "psychological parents." Id. at *10. The appellate court nonetheless shifted physical custody from the Standing Grandmother to the father, based on the father's superior rights as a biological parent. Id. at *11. (The "Standing Grandfather" died while the case was pending. Id. at *1 n.4.) The court did so despite its recognition that the shift in custody would "effect a major change in the life of [the child]." Id. at *10; see also, e.g., Andra F. v. Anthony H., No. 15-0445, 2016 WL 700585, at *5 (W. Va. Feb. 16, 2016) (involving grandparents who parented alongside child's father for some time but that by the time of trial had been providing "daily care of the children . . . and bearing all of the financial obligations of the children *without assistance from the parents*" for almost two years).

494. See Cynthia Godsoe, Permanency Puzzle, 2013 Mich. St. L. Rev. 1113–14 [hereinafter Godsoe, Permanency Puzzle] (criticizing the focus on adoption as the permanency solution and discussing the potential of subsidized guardianship as a permanency option).

495. See supra note 330 and accompanying text.

functional parent may want to preserve the possibility of reunification with the legal parent or maintain access to foster care subsidies. Some functional parents may seek custody and decisionmaking authority but want to avoid designation as a "parent" to maintain a good relationship with the child's legal parent.

Just as third-party custody and status-based statutes do not offer sufficient alternatives to functional parent doctrines, neither does adoption furnish a reasonable substitute, as some contend.[496] On this view, functional parent recognition appears as an illegitimate end-run around the procedural and substantive requirements of adoption.[497] Requiring adoption by functional parents, however, does not adequately protect the interests of children in having their parental relationships legally secured. In almost all states, a child is not eligible to be adopted unless an existing legal parent's rights have been terminated.[498] Some functional parents, especially relatives, may not want to have the rights of the legal parents terminated to free the child for adoption. Among other things, they may, quite reasonably, want to avoid making allegations of unfitness or abuse or neglect against the legal parent—who may be their own child.[499] Functional parent doctrines, in contrast, often readily facilitate multi-parent arrangements—allowing the functional parent to assume parental rights and responsibilities without disestablishing the parental status of an

---

496. See, e.g., Michael J. Higdon, Constitutional Parenthood, 103 Iowa L. Rev. 1483, 1539 (2018) ("[A] psychological parent who desires a legal relationship with a parentless child can turn to adoption—an option that most 'parents' in that situation would likely assume was required in order to become a legal parent."); Wilson, Undeserved Trust, supra note 63, at 99 (arguing against the ALI principles on the ground that it "was unnecessary to stretch the tent of parenthood this far [because] . . . live-in partners who want to protect their interests in an existing adult–child bond . . . can adopt the child"); Letter from Mark S. Randall, Member Fam. L. Section, Conn. Bar Ass'n, to Jud. Comm., Conn. Gen. Assemb. (2020) (on file with *Columbia Law Review*) ("[C]ohabitation with a legal parent of a child for a relatively brief period of time, while simultaneously holding the child out as that person's child is unnecessary in light of . . . Connecticut's law of adoption.").

497. See, e.g., Uniform Parentage Act (2000) With Prefatory Note and Comments (and With Unofficial Annotations by John J. Sampson, Reporter), 35 Fam. L.Q. 83, 108 n.17 (2001) (explaining that the drafting committee had removed the "holding out" presumption from the Act on the view that "[it] could be a subterfuge to avoid the rigors of adoption").

498. But see Cal. Fam. Code § 8617(b) (2022) (permitting third-parent adoption). For stepparent or co-parent adoption, this may require relinquishment of only the non-custodial parent's rights. For all other adoptions, the rights of both legal parents would need to be terminated.

499. See, e.g., Coupet, supra note 306, at 600 (giving example of grandparents who "hold out hope that their daughter . . . will eventually become a responsible mother to her child" and "are thus reluctant to initiate any effort to terminate their daughter's parental rights"); Cynthia Godsoe, Subsidized Guardianship: A New Permanency Option, 23 Child.'s Legal Rts. J. 11, 14 (2003) [hereinafter Godsoe, Subsidized Guardianship] (explaining that "kin caregivers . . . may feel that agreeing to adopt a child condones the severance of parental rights, and as a result they want to avoid dividing the family in this way").

existing parent.[500] Moreover, adoption is a costly, intrusive, and lengthy process that many functional parents may simply not be reasonably able to pursue.[501] Functional parent doctrines, in contrast, allow a court to recognize a person as a parent without adoption fees, invasive home studies, and lengthy waiting periods.

Similarly, guardianship does not offer a sufficient substitute for functional parent doctrines. Guardianship may avoid some of the shortcomings of adoption but has its own problems for some functional parents. In contrast to adoption, it lacks the permanency that may benefit many functional parent–child relationships.[502] It also lacks the security that many seek. In most circumstances, a legal parent can petition to terminate a guardianship.[503] And termination may be ordered under a best-interests-of-the-child standard.[504] In addition, the guardian may possess less authority than a parent—for example, the guardian may need court

---

500. See Joslin & NeJaime, Multi-Parent Families, supra note 54, at 2588 (explaining that, in functional parent cases from West Virginia, courts "routinely applied the psychological parent doctrine, even when a child has two legal parents, to recognize a child's primary parental relationship").

501. See Coupet, supra note 306, at 609 ("[T]he adoption process usually involves adversarial legal proceedings that pit kinship caregivers against another relative, often their own adult child, in order to gain some measure of security in their relationship with the children they are raising. These proceedings are usually lengthy and emotionally difficult for everyone involved."); NeJaime, Nature of Parenthood, supra note 305, at 2317 (explaining the costs of having to adopt one's child).

502. See Coupet, supra note 306, at 651 (explaining that guardianship was "typically conceived as temporary in nature"). Not only may guardianships be terminated more easily than a legal parent–child relationship, see infra note 503, but they may also be subjected to ongoing supervision even as they continue. See, e.g., Okla. Stat. tit. 30, § 2-109 (2022) (requiring guardianship placement to be reviewed within one year and allowing "periodic reviews by the court thereafter").

503. See Godsoe, Subsidized Guardianship, supra note 499, at 13; see also Ariz. Rev. Stat. Ann. § 8-873 (2022) ("[A] parent of the child . . . may file a petition for the revocation of an order granting permanent guardianship if there is a significant change of circumstances . . . ."); Ind. Code Ann. § 29-3-8-9 (West 2022) ("[T]he court may modify or terminate the guardianship only if the parent: (1) complies with the terms and conditions [set forth in the creation of the guardianship]; and (2) proves the parent's current fitness to assume all parental obligations by a preponderance of the evidence."); Mass. Gen. Laws Ann. ch. 190B, § 5-212 (West 2022) ("Any person interested in the welfare of a ward . . . may petition for removal of a guardian on the ground that removal would be in the best interest of the ward . . . .").

504. See, e.g., Del. Code tit. 13, § 2359(c)(1)(a)–(b) (2022) ("An order of permanent guardianship may be rescinded only upon a finding . . . [t]hat there has been a substantial change in material circumstances[] and . . . [t]hat rescission is in the best interests of the child."); N.C. Gen. Stat. § 7B-600(b) (2022) ("The court may terminate the guardianship only if (i) the court finds that the relationship between the guardian and the juvenile is no longer in the juvenile's best interest . . . ."). While courts have the authority to change a custody or visitation order with regard to a functional parent even after it has been made, that change in the placement or allocation generally does not terminate the legally protected relationship between the child and the functional parent.

permission to travel out of state with the child.[505] Guardianship also lacks the expressive dimensions of a parental designation, making a functional parent in some circumstances feel like a "glorified babysitter."[506]

Ultimately, even as third-party custody statutes, status-based doctrines, guardianship, and adoption retain important roles in the family law system—and provide grounds on which most of the functional parents in the cases in the data set could litigate—they do not represent a replacement for functional parent doctrines.

B. *Preserving Family Relationships*

Some scholars see functional parent doctrines as yet another vehicle for state intervention in vulnerable families.[507] On this view, by inviting courts and judges to peer into the intimate lives of families, the doctrines systematically threaten, rather than support, already marginalized families.[508] This view, however, pays insufficient attention to the many ways in which the doctrines can function to respect and preserve families and to protect them against further state intervention and control.

Our study demonstrates the vital role that judicial application of functional parent doctrines plays in preserving families. It also illustrates how courts apply these doctrines in ways that help ward against further, more destructive state intervention. The cases in the data set show that recognition of a person as a functional parent can protect and preserve the child's existing home. In the absence of the doctrines, the result for some of these children would be removal from a stable and secure household.[509]

---

505. See Godsoe, Subsidized Guardianship, supra note 499, at 12 ("Courts can limit a guardian's power, such as requiring that a guardian seek court permission before making certain decisions regarding a child . . . ."); Cal. Prob. Code § 2352 (2022) (prohibiting the guardian from moving the child from the state without the court's permission); see also J. Shia's Family, GLAD, https://www.glad.org/j-shias-family/ [https://perma.cc/F54K-AQT6] (last visited Oct. 4, 2022) (providing a firsthand account of a guardian who has been child's primary parent all of child's life).

506. J. Shia's Family, supra note 505 (internal quotation marks omitted).

507. See, e.g., Baker, Equality, supra note 60, at 463 ("[A] rule that justifies state interference whenever there is a change in the status quo is a rule that destroys any notion of family autonomy or non-interference in non-elite communities.").

508. See, e.g., id. at 415 (arguing that functional family doctrines involve "invasive, ineffective and often damaging judicial interference in family relationships").

509. The most common scenarios that appear in our data set seem to be different in kind from what Gupta-Kagan has identified as "hidden foster care." See generally Josh Gupta-Kagan, America's Hidden Foster Care System, 72 Stan. L. Rev. 841 (2020). This term refers to child welfare–involved cases in which "the agency threatens to remove children and take parents to court, a process that could lead to an indefinite placement of children in foster care, and even termination of parental rights, unless the parents agree to change their children's physical custody to the identified kinship caregiver." Id. at 843. While scholars exploring this issue acknowledge that such placement with kin can be best for the child in some cases, they worry about the lack of safeguards and protections that apply when

In many cases in our study, courts protect parent–child relationships in the context of custody disputes between a legal parent and a functional parent, both of whom have been actively involved in the child's life.[510] This is the situation that critics typically assume is the focus of functional parent doctrines. But, crucially, our study shows how courts also protect parent–child relationships through functional parent doctrines in cases in which the functional parent was parenting *in the absence of* consistent caregiving by a legal parent.[511] Recall that in 17% of cases in our data set, a legal parent was never the child's primary caregiver.[512] Courts recognized the functional parent in this set of cases at a higher rate than the rate of recognition in the data set as a whole.[513] For most children in these cases, a functional parent doctrine allows a court to protect the only parent–child relationship they have known.[514]

---

the transfer of custody process is informal rather than formal—in other words, outside of the parameters of a judicial proceeding. Id. ("Given the weighty stakes involved and the state power exercised, more procedural protections should be required."). We share the concerns raised by Gupta-Kagan and others about the lack of safeguards and oversight in the hidden foster care process. Yet the child welfare–involved cases that implicate functional parent doctrines tend to present a different set of circumstances, given that our study is focused on whether courts protect an established relationship between a functional parent and a child after such relationship has formed. Of course, some cases in our data set could have involved hidden foster care before the official proceeding in which a functional parent claim is raised. Nonetheless, in the child welfare–involved cases in our data set, the child often began living with the functional parent prior to any involvement by child welfare authorities. See, e.g., In re T.B., No. 20-0369, 2020 WL 6482958, at *1 (W. Va. Nov. 4, 2020) (involving grandfather who had been caring for the child "on and off for a couple of years" prior to child welfare investigation). In addition, because all of the cases in our data set feature court involvement, at least some of the concerns that hidden foster care raises regarding the lack of due process and other safeguards are either not present or diminished to a significant degree.

510. See supra sections III.B and III.D. One scholar who has recognized and written about this issue is Nancy Polikoff. See Nancy D. Polikoff, Neglected Lesbian Mothers, 52 Fam. L.Q. 87, 111 (2018) [hereinafter Polikoff, Neglected Lesbian Mothers] (describing a "tragic case" in which "a former [same-sex] partner who had raised her nonbiological child . . . lost that child forever when the biological mother . . . lost all her parental rights"); see also Courtney G. Joslin & Catherine Sakimura, Fractured Families: LGBTQ People and the Family Regulation System, 13 Calif. L. Rev. Online 78 (2022).

511. See, e.g., N.J. Div. of Youth & Fam. Servs. v. A.S., No. A-1666-10T2, 2014 WL 2197805, at *1 (N.J. Super. Ct. App. Div. May 28, 2014) (involving a child who "is now nine years old and has spent most of her life living with [her aunt and uncle]"); N.J. Div. of Youth & Fam. Servs. v. V.W., No. A-5196-08T4, 2010 WL 4075325, at *5 (N.J. Super. Ct. App. Div. July 12, 2010) (involving a child who had lived "for most of her life" with her great-grandmother).

512. See supra section III.B.

513. See supra section III.D.

514. One scholar argues that these cases can be appropriately handled by doctrines on parental abandonment. See Strauss, supra note 44, at 945–51 ("Many de facto parent cases involve something akin to abandonment . . . . Because de facto parenthood applies to the same cases as . . . abandonment, it enables courts to bypass the well-traversed limits on adoption on an ad hoc basis."). As a threshold matter, showing abandonment is no easy task; this approach would place a heavy, and in some cases insurmountable, burden on the

Moreover, failure to recognize the functional parent in these cases would not only disrupt or sever a primary attachment relationship but may also require the child to be removed from their home. For example, in *New Jersey Division of Youth and Family Services v. A.S.*, the child, Jennie, was placed with her maternal aunt two days after she was born, and for the next five years lived with her aunt and uncle.[515] Jennie's mother and father visited with her but were not a consistent and reliable presence in her life.[516] Eventually, Jennie's father opposed the aunt and uncle's continued custody.[517] The New Jersey court found the aunt and uncle to be Jennie's psychological parents and affirmed an award of custody to them.[518] Citing to expert testimony, the court explained that the aunt and uncle were "the individuals [Jennie] relied upon to meet her physical and emotional needs and provide her with an overall sense of well-being" and "were attached to Jennie and committed to raising her."[519] Indeed, the expert had opined that "[i]f Jennie were placed with [her father], [he] would have to be tolerant of her grieving the loss of her psychological parents."[520]

A large share of the cases in the data set—about a third of all cases—arise in the context of child welfare proceedings.[521] In this context, the recognition, or lack thereof, of a functional parent may be the difference between a child being able to remain in the household in which they have been living or being placed into state custody.[522]

---

functional parent seeking to preserve the existing parent–child relationship. The cases in our data set illustrate the difficulty that would inhere in determining whether abandonment has in fact been demonstrated, given that many of the cases feature shifting family arrangements in which a legal parent may come in and out of the child's life. Moreover, even in those cases in which it is clear that one parent has abandoned the child, the other parent may not have. See, e.g., Kilborn v. Carey, 140 A.3d 461, 462 (Me. 2016) (noting that shortly after the child's birth, the father "ended his relationship with [the mother] and removed himself from his daughter's life"). In such cases, the abandonment by one parent does not strip the other non-abandoning parent of their right to oppose an adoption.

More importantly, while abandonment doctrine limits the rights of the existing legal parent to oppose an adoption, the doctrine does *not* give rise to legal recognition of the relationship between the child and the functional parent. In this sense, it is not accurate to claim that in "abandonment cases, the [de facto parent] doctrine overlaps other formal rules." Strauss, supra note 44, at 977. Instead, even where the abandonment doctrine applies, the functional parent would still need to complete an adoption or guardianship to obtain legal recognition. This then bleeds into arguments that functional parent claims should be appropriately routed through adoption or other formal legal mechanisms. For our response to those claims, see supra notes 496–502 and accompanying text.

515. No. A-1666-10T2, 2014 WL 2197805, at *1 (N.J. Super. App. Div. May 28, 2014).

516. Id. at *3–4.

517. Id. at *1.

518. Id. at *11.

519. Id. at *4.

520. Id. at *5.

521. See supra section III.C.

522. See, e.g., Joslin & Sakimura, supra note 510, at 13–14 (discussing how placement in state custody can result if a functional parent's relationship is not legally recognized).

Consider the foundational case of *In re Nicholas H.*[523] The case arose in the context of a dependency proceeding.[524] The child, Nicholas, had been removed by the state from his mother's physical custody due to concerns about his safety.[525] Thomas, the mother's former nonmarital partner, was seeking a determination that he was a functional parent so that he could be reunified with Nicholas.[526] Thomas had functioned as a parent to Nicholas since his birth.[527] As the court explained, if Thomas' request was denied, the result would be that Nicholas would "be rendered fatherless and homeless."[528] He would likely have been placed in the foster care system, possibly with strangers.

As *In re Nicholas H.* illustrates, functional parent doctrines can be vital to families struggling for stability and security. Rather than necessarily resulting in an increase of state control over poor families,[529] functional parent doctrines may allow courts to protect existing parent–child relationships while avoiding the most extreme form of state intervention—removal from the child's current household.

Moreover, in some of the child welfare cases in which the legal parent is unable to care for the child, application of a functional parent doctrine can protect the child's relationship with their legal parents. That is, for some families, recognition of the functional parent wards off further state intervention, potentially avoiding petitions to terminate the legal parent's rights.

Consider two examples. In *Lambert v. Lambert*, the court affirmed the award of custody to the children's grandfather, who had been "acting as a parent."[530] The children's mother, who "failed to engage with the children during her supervised visits," appeared "intoxicat[ed] at the court

---

Even when the child has not been living with the functional parent, the doctrines can limit additional state intervention in vulnerable families. For example, in *Jobst v. Jobst*, the child's grandmother assumed custody *after* the mother's arrest for driving under the influence and child endangerment. 817 S.E.2d 515, 518 (S.C. App. 2018). As the court reported, in the absence of the grandmother's role, the child would have been placed in a foster home, given the parents' failure to comply with drug testing and treatment requirements. Ultimately, the court dismissed child welfare authorities from the case and awarded permanent custody to the grandmother, who had "a loving, bonded parental-type relationship" with the child. Id. at 521.

523. Alameda Cnty. Soc. Servs. Agency v. Kimberly H. (In re Nicholas H.), 46 P.3d 932, 934 (Cal.), modified on denial of reh'g (Cal. 2002).

524. Id.

525. Id.

526. Id.

527. Id.

528. Id.; see also Palmer v. Dep't for Child. & Fams., No. 2019-156, 2019 WL 6048911, at *1 (Vt. Nov. 14, 2019) (involving a pro se petition filed by a grandmother after the parental rights of both parents of the four children had been terminated).

529. See Baker, Equality, supra note 60, at 416, 461, 474 (suggesting that functional doctrines place poor families of color at greater risk of inappropriate state intrusion).

530. 475 S.W.3d 646, 651 (Ky. Ct. App. 2015).

hearing" and continued to have positive drug screens.[531] The children's father "failed to participate in the case in any capacity and provide[d] the children with no caregiving or financial support."[532] Both parents, the court observed, "engaged in conduct that could render [their] parental rights terminated."[533] Yet continued custody with the children's grandfather prevented further state proceedings and preserved the parents' legal status.[534]

In *In re L.M.*, discussed in this Article's opening paragraphs, the child was the subject of a state-initiated abuse and neglect proceeding.[535] The child's biological mother, D.M., had "an extensive history of mental health and substance abuse issues" and had "been in and out of prison for years, and when not incarcerated, [was] transient."[536] D.M. had four other children.[537] Her parental rights as to three of the other children had been terminated.[538] With regard to the fourth child, she was not provided reunification services after the child was removed from her custody and the child was eventually placed with the father.[539] L.M., the child at issue in the case, was born while the mother was incarcerated.[540] The functional parent, M.W., was asked by the mother to "take and raise" the child. At the time of the proceeding, there had been multiple years in which the mother "had no contact with M.W. or the minor."[541] M.W., during this time, "was raising L.M. M.W. paid for all the minor's expenses. She enrolled him in school and took him to medical appointments[.]"[542] Indeed, "demonstrating the extent to which M.W. held the minor out as her own, the six-year-old minor did not know M.W. was not his biological mother until these proceedings were instituted."[543]

As the court explained, given the facts of the case, "[d]enying M.W.'s petition for presumed parent status, . . . [would] tear from the minor the only parent he has ever known."[544] Moreover, if M.W.'s petition was denied, the result would likely be that the child would be placed in the custody of

---

531. Id. at 652.

532. Id.

533. Id. at 652; see also H.K. v. Comm., No. 2010-CA-000911-ME, 2011 WL 1085624, at *1 (Ky. Ct. App. Mar. 25, 2011) (allowing grandfather who had been "acting as a parent" to retain custody while noting that the legal parents had "stipulated that Child was a neglected child").

534. Id. at *2.

535. In re L.M., No. C072731, 2014 WL 5841572, at *1 (Cal. Ct. App. Nov. 12, 2014).

536. Id.

537. Id.

538. Id.

539. Id.

540. Id.

541. Id.

542. Id. at *2.

543. Id. at *4.

544. Id. at *6.

the state, as the evidence also demonstrated that the mother was unable to care for the child.[545]

From this perspective, functional parent doctrines can offer courts and state officials the ability to preserve the parental status of the child's legal parents, even when the legal parents have been deemed to be unable to care for the child.[546] Under many of the functional parent doctrines in our study, the child can formally have three (or more) individuals who possess some parental rights, even though one or more of those individuals may not be a consistent presence in the child's life.[547] The child can remain with the functional parent and maintain contact with the legal parents. In this sense, functional parent doctrines may mitigate and lessen, rather than exacerbate and increase, the punitive effects of state intervention.

Again, none of this is to suggest that recognition under a functional parent doctrine is always or necessarily desirable. Functional parent status may have costs for the legal parent, the functional parent, and the child. Recognition of the functional parent may make formal reunification with the legal parent less likely than it would have been had the functional parent simply served as a foster parent. In other words, reunification may no longer be a goal when the state steps aside *and* the functional parent's legal status is elevated above that of a foster parent. For their part, the functional parent may resist proceedings that might be seen to sanction the state's attack on the legal parent's rights.[548] Designation as a parent may also foreclose the functional parent's access to the state subsidy that

---

545. Id. at *8 ("The allegations . . . establish that a child in D.M.'s care is at substantial risk of serious physical harm or illness . . . [and that] D.M. abused or neglected the minor's half siblings and there is a substantial risk that she would also abuse or neglect L.M. if he were in her care . . . .").

546. See, e.g., Polikoff, Neglected Lesbian Mothers, supra note 510, at 111 (discussing the importance of nonbiological parental recognition in child welfare cases involving same-sex couples); see also Feldpausch v. Adams, No. 2004-CA-002136, 2006 WL 1451548, at *1 (Ky. Ct. App. May 26, 2006) (noting that at one point the district court determined that "the parents could remain with the children, [but only if] the children . . . live with [the functional parent] because the parents were unable to properly provide for them").

547. For an analysis of multi-parent cases, including those arising in the child welfare context, in one jurisdiction, see Joslin & NeJaime, Multi-Parent Families, supra note 54, at 2578–79 (describing families where multiple people have parental rights); Joslin & NeJaime, The Next Normal, supra note 60 (same).

548. See, e.g., Teresa Wiltz, Will the New Foster Care Law Give Grandparents a Hand?, Pew Trs. (June 5, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/06/05/will-the-new-foster-care-law-give-grandparents-a-hand [https://perma.cc/CW2L-8CS4] (explaining concern about "diverting children into informal foster care situations where their caregivers won't be eligible for foster care payments"). In some states, subsidized guardianship may offer a more permanent solution that includes financial support, but eligibility criteria for "kin" will exclude many functional parents from this option. See Godsoe, Permanency Puzzle, supra note 494, at 1119 (observing that "[m]any states . . . have kept their definitions of relative narrow," for example, by including only "certain blood or legal relatives").

would be given to foster parents and would contribute to the care of the child.[549] Ultimately, in child welfare cases, the role of functional parent doctrines may need to be assessed in light of a range of financial, legal, and personal considerations. Notwithstanding these caveats, overall, in the cases in the data set, functional parent doctrines appear to serve both child-protective and family-preserving roles.

CONCLUSION

This Article provides a more comprehensive and detailed examination of the operation and application of functional parent doctrines than currently exists. It presents a starkly different account than what is common in contemporary legal debates. Our study reveals that widespread empirical assumptions about when and how the doctrines operate in fact are not significantly supported by the data from electronically available judicial decisions. By raising questions about these assumptions, this Article's account also challenges the normative conclusions that these assumptions tend to justify.

Ultimately, analysis of electronically available judicial decisions yields a picture of functional parent doctrines that is, in significant ways, child centered. Courts in the study regularly applied the doctrines in ways that preserved children's stable placements with the individuals who were providing them with consistent parental care. This observation lends significant support to normative arguments for functional parent doctrines.

Our study provides important findings with which to assess, not simply whether functional parent doctrines should exist, but how they should be designed. This Article supplies insights with which to consider whether existing doctrines set forth the appropriate substantive standard or evidentiary burden for a functional parent to gain recognition. It presents findings with which to contemplate with more precision the types of individuals or relationships that functional parent doctrines should cover or exclude. It provides material with which to assess whether functional parents should have full parental status or instead receive only some parental rights and obligations, and whether jurisdictions should have multiple functional parent doctrines that have different criteria and that yield different rights. These are important questions we turn to in subsequent work—newly equipped with the insights elaborated in this Article.

549. Cf. Godsoe, Subsidized Guardianship, supra note 499, at 14 (explaining why a kinship caregiver may resist formalizing the parent–child relationship if that is seen to condone the state's attack on the legal parent's rights).

APPENDIX A: FUNCTIONAL PARENT DOCTRINES BY JURISDICTION

Jurisdiction	Functional Parent Doctrine	Source of Authority
Alaska	psychological parent	common law/ equitable[550]
Arkansas	in loco parentis	common law/ equitable[551]
California	"holding out" presumption	statutory[552]
Colorado	"holding out" presumption	statutory[553]
	psychological parent	common law/ equitable[554]
Connecticut	de facto parent	statutory[555]
	"holding out" presumption	statutory[556]
Delaware	de facto parent	statutory[557]
District of Columbia	de facto parent	statutory[558]
Georgia	equitable caregiver	statutory[559]
Hawaii	de facto custodian	statutory[560]
Indiana	de facto custodian	statutory[561]
Kansas	parentage presumption based on "notoriously" recognizing parentage	statutory[562]

550. E.g., Kinnard v. Kinnard, 43 P.3d 150, 154 (Alaska 2002).
551. E.g., Robinson v. Robinson-Ford, 208 S.W.3d 140, 140 (Ark. 2005).
552. Cal. Fam. Code § 7611(d) (2022).
553. Colo. Rev. Stat. § 19-4-105(1)(d) (2022).
554. E.g., In re E.L.M.C., 100 P.3d 546, 559–62 (Colo. App. 2004).
555. Conn. Gen. Stat. Ann. § 46b-490 (West 2022).
556. Id. § 46b-488(3).
557. Del. Code tit. 13, § 8-201(c) (2022).
558. D.C. Code § 16-831.01 (2022).
559. Ga. Code Ann. § 19-7-3.1 (2022).
560. Haw. Rev. Stat. Ann. § 571-46(a)(2) (West 2022).
561. Ind. Code Ann. § 31-17-2-8.5 (West 2022).
562. Kan. Stat. Ann. § 23-2208(a)(4) (West 2022).

Jurisdiction	Functional Parent Doctrine	Source of Authority
Kentucky	de facto custodian	statutory[563]
	acting as a parent	statutory[564]
	waiver of legal parent's superior rights	common law/ equitable[565]
Maine	de facto parent	statutory[566]
	"holding out" presumption	statutory[567]
Maryland	de facto parent	common law/ equitable[568]
Massachusetts	de facto parent	common law/ equitable[569]
	"holding out" presumption	statutory[570]
Michigan	equitable parent	common law/ equitable[571]
Minnesota	in loco parentis	statutory[572]
Montana	legal parent ceded parental authority and allowed parent–child relationship	statutory[573]

563. Ky. Rev. Stat. Ann. § 403.270(1)(a) (West 2022).

564. Id. § 403.822(1).

565. E.g., L.W. v. M.P., No. 2008-CA-000760-ME, 2009 WL 485054, at *2 (Ky. Ct. App. Feb. 27, 2009).

566. Me. Rev. Stat. Ann. tit. 19-a, § 1891 (West 2022). Maine also has an equitable functional parent doctrine. See Stitham v. Henderson, 768 A.2d 598, 603 (Me. 2001). It is unclear whether, in the wake of the enactment of the statutory de facto parent provision, the equitable doctrine continues to supply an independent basis for a functional parent claim.

567. Me. Rev. Stat. Ann. tit. 19-a, § 1881(3).

568. E.g., Conover v. Conover, 146 A.3d 433, 437 (Md. 2016).

569. E.g., Youmans v. Ramos, 711 N.E.2d 165, 167 n.3 (Mass. 1999).

570. Mass. Gen. Laws Ann. ch. 209C, § 6(a)(4) (West 2022).

571. E.g., Van v. Zahorik, 597 N.W.2d 15, 20–22 (Mich. 1999). The doctrine was announced by an intermediate appellate court in Atkinson v. Atkinson, 408 N.W.2d 516, 604 (Mich. Ct. App. 1987), which we exclude because it involves a "child of the marriage" and thus a man who should be presumed to be a parent by virtue of the marital presumption.

572. Minn. Stat. § 257C.08 (2022). The Minnesota Supreme Court has read this provision, which extends visitation rights to "unmarried persons" based in part on a showing that "[the petitioner] and child had established emotional ties creating a parent and child relationship," "as mandating that the petitioner stand in loco parentis with the child." SooHoo v. Johnson, 731 N.W.2d 815, 822, 825 (Minn. 2007).

573. Mont. Code Ann. § 40-4-228 (West 2022).

Jurisdiction	Functional Parent Doctrine	Source of Authority
Nebraska	in loco parentis	common law/ equitable[574]
New Hampshire	"holding out" presumption	statutory[575]
	psychological parent	common law/ equitable[576]
New Jersey	psychological parent	common law/ equitable[577]
New Mexico	"holding out" presumption	statutory[578]
New York	de facto parent	common law/ equitable[579]
	equitable estoppel	common law/ equitable[580]
North Carolina	legal parent ceded parental authority and allowed parent–child relationship	common law/ equitable[581]
North Dakota	psychological parent	common law/ equitable[582]
Ohio	parenting agreement	common law/ equitable[583]

574. E.g., Hickenbottom v. Hickenbottom, 477 N.W.2d 8, 16–17 (Neb. 1991).

575. N.H. Rev. Stat. Ann. § 168-B:2(V)(d) (2022).

576. E.g., Bodwell v. Brooks, 686 A.2d 1179, 1184 (N.H. 1996).

577. E.g., V.C. v. M.J.B., 748 A.2d 539, 549–50 (N.J. 2000).

578. N.M. Stat. Ann. § 40-11A-204(A)(5) (2009).

579. E.g., Dawn M. v. Michael M., 47 N.Y.S.3d 898, 903 (Sup. Ct. 2017). The New York high court's earlier rejection of de facto parenthood in Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991), was overruled in Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016).

580. E.g., Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677, 682 (App. Div. 1998).

581. E.g., Boseman v. Jarrell, 704 S.E.2d 494, 550–51 (N.C. 2010); see also Best v. Gallup, 715 S.E.2d 597, 599 (N.C. Ct. App. 2011).

582. E.g., In re D.R.J., 317 N.W.2d 391, 394 (N.D. 1982). In 2019, North Dakota enacted the Uniform Nonparent Custody and Visitation Act, which includes de facto parent provisions, N.D. Cent. Code § 14-09.4-03 (2022). There were no electronically reported decisions applying the new law during the period covered by our data set.

583. E.g., In re Bonfield, 780 N.E.2d 241, 249 (Ohio 2002).

Jurisdiction	Functional Parent Doctrine	Source of Authority
Oklahoma	parenting agreement	common law/ equitable[584]
Pennsylvania	in loco parentis	common law/ equitable[585]
	paternity by estoppel	statutory[586]
Rhode Island	de facto parent	statutory[587]
	"holding out" presumption	statutory[588]
South Carolina	psychological parent	common law/ equitable[589]
Vermont	de facto parent	statutory[590]
	"holding out" presumption	statutory[591]
Washington	de facto parent	statutory[592]
	"holding out" presumption	statutory[593]

584. E.g., Eldredge v. Taylor, 339 P.3d 888, 895 (Okla. 2014). Recently, the Oklahoma Supreme Court has required a showing of an "intent to parent jointly," as well as a showing that the functional parent "acted in a parental role for a length of time sufficient to have established a meaningful emotional relationship with the child, and resided with the child for a significant period while holding out the child as his or her own child." Schnedler v. Lee, 445 P.3d 238, 244 (Okla. 2019).

585. E.g., T.B. v. L.R.M., 786 A.2d 913, 914 (Pa. 2001). While the doctrine was judge-made, the legislature eventually incorporated the status into the state's custody statute. 23 Pa. Stat. and Cons. Stat. Ann. § 5324 (2022) (providing that a person standing in loco parentis to a child "may file an action . . . for any form of physical or legal custody").

586. 23 Pa. Stat. and Cons. Stat. Ann. § 5102(2). This statute codified the equitable doctrine.

587. 15 R.I Gen. Laws § 15-8.1-502 (2022). Prior to that statutory enactment, Rhode Island recognized a common law functional parent doctrine. See Rubano v. DiCenzo, 759 A.2d 959, 967 (R.I. 2000).

588. 15 R.I Gen. Laws § 15-8.1-401(a)(4).

589. E.g., Marquez v. Caudill, 656 S.E.2d 737, 744 (S.C. 2008). The state also has a de facto custodian statute. S.C. Code Ann. § 63-15-60 (2022). No relevant electronically available decisions applying this statute were issued during the period we studied.

590. Vt. Stat. Ann. tit. 15C, § 201(6) (2022).

591. Id. § 401(a)(4).

592. Wash. Rev. Code Ann. 26.26A.440(4) (West 2022). Prior to that statutory enactment, Washington recognized a common law functional parent doctrine. See Carvin v. Britain (In re Parentage of L.B.), 122 P.3d 161, 177, 176 (Wash. 2005).

593. Wash. Rev. Code Ann. § 26.26A.115(1)(b).

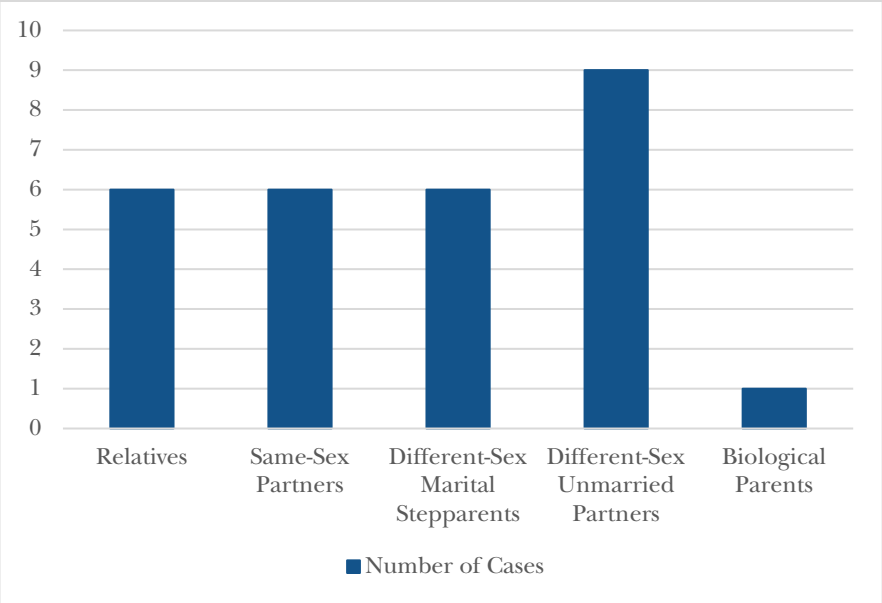
Jurisdiction	Functional Parent Doctrine	Source of Authority
West Virginia	psychological parent	common law/ equitable[594]
	parenting agreement or custody relinquishment	common law/ equitable[595]
Wisconsin	de facto parent	common law/ equitable[596]

594. E.g., In re Clifford K., 619 S.E.2d 138, 143 (W. Va. 2005).
595. E.g., Overfield v. Collins, 483 S.E.2d 27, 36 (W. Va. 1996).
596. E.g., In re Custody of H.S.H.-K., 533 N.W.2d 419, 435 (Wis. 1995).

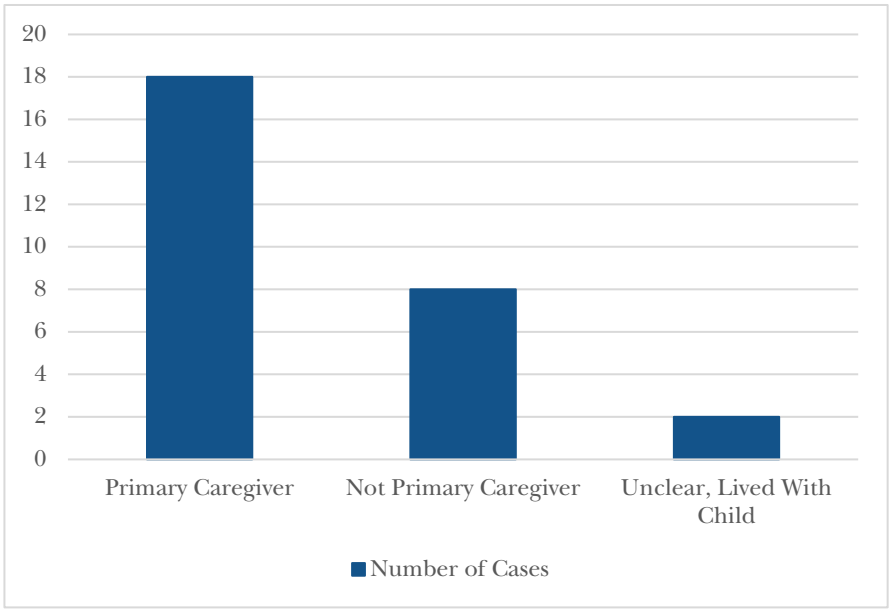
APPENDIX B: TRIAL COURT DECISIONS IN DATA SET

The data set contains twenty-eight trial court decisions, representing four states—Delaware (fourteen cases), New Jersey (two cases), New York (six cases), and Pennsylvania (six cases). The following charts provide information about the identity of the functional parents, the role of the functional parents, and the role of the legal parents in these twenty-eight trial court decisions.

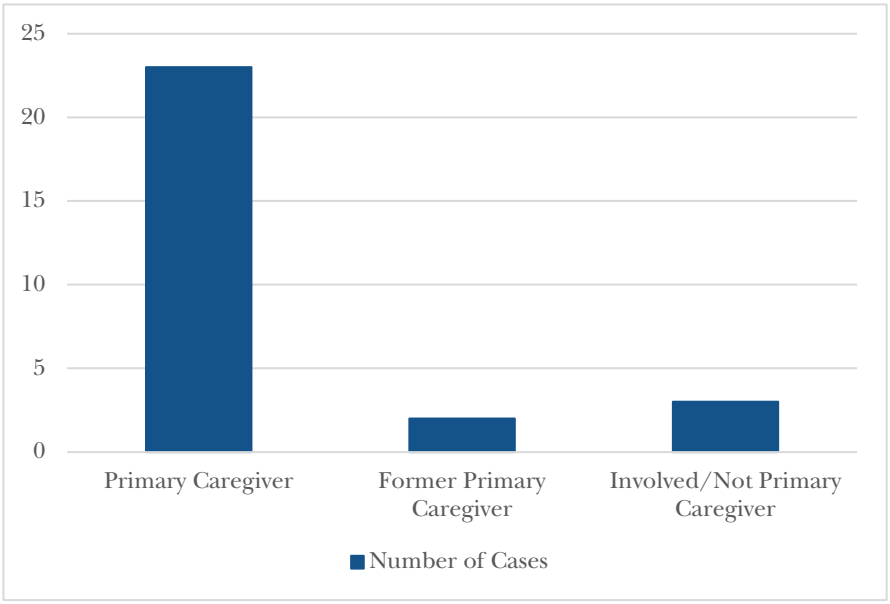
APPENDIX B, FIGURE 1. FUNCTIONAL PARENTS BY GROUP IN TRIAL COURT DECISIONS



APPENDIX B, FIGURE 2. ROLE OF FUNCTIONAL PARENT IN CHILD'S LIFE IN TRIAL COURT DECISIONS



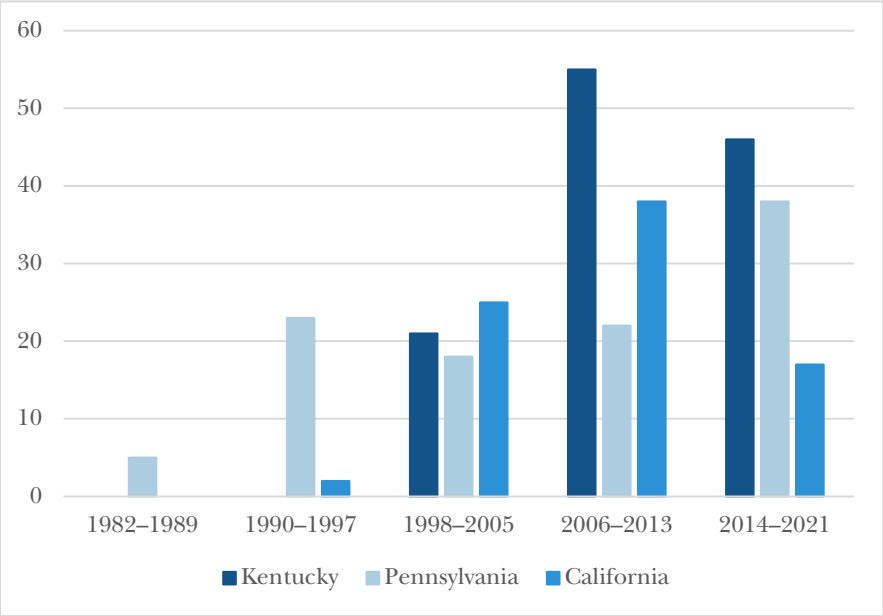
APPENDIX B, FIGURE 3. ROLE OF LEGAL PARENT IN CHILD'S LIFE IN TRIAL COURT DECISIONS



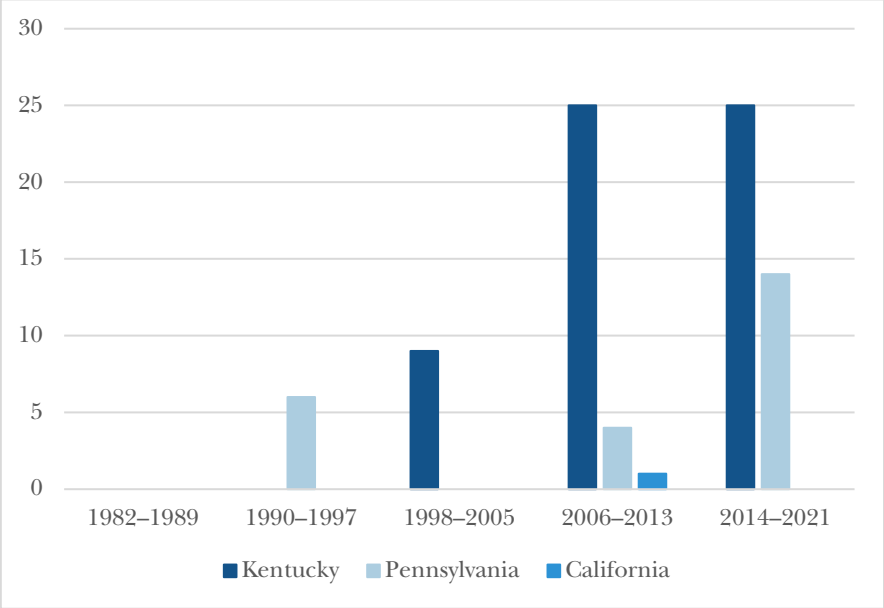
APPENDIX C: DECISIONS OVER TIME IN THE THREE JURISDICTIONS WITH THE MOST DECISIONS IN THE DATA SET

Together, Kentucky, Pennsylvania, and California comprise 47% of the decisions in the data set. The charts in this Appendix provide data about decisions over time—both generally and broken down by groups of functional parents—in these three jurisdictions.

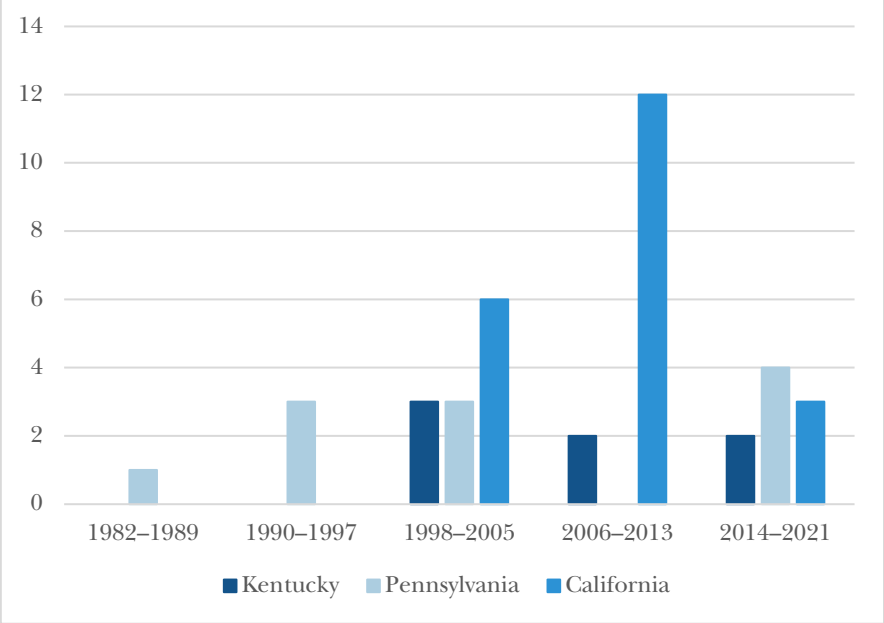
APPENDIX C, FIGURE 1. DECISIONS OVER TIME IN KENTUCKY, PENNSYLVANIA, AND CALIFORNIA



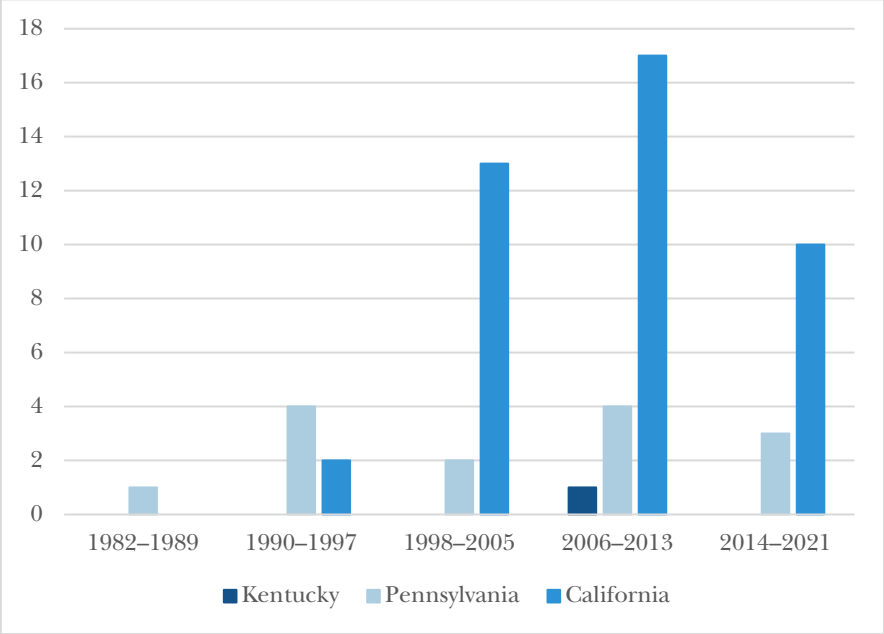
APPENDIX C, FIGURE 2. NUMBER OF GRANDPARENT DECISIONS OVER TIME IN KENTUCKY, PENNSYLVANIA, AND CALIFORNIA



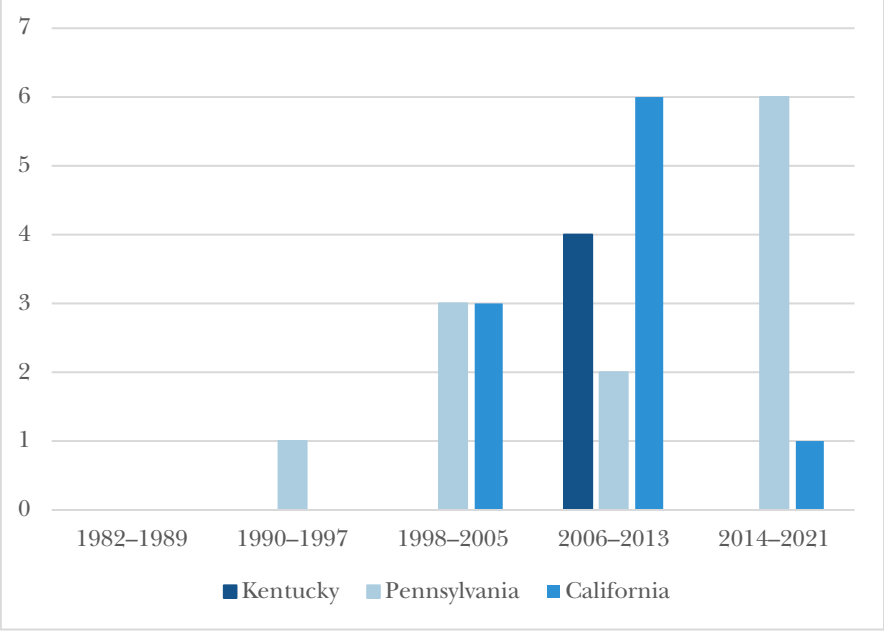
APPENDIX C, FIGURE 3. NUMBER OF MARRIED DIFFERENT-SEX COUPLE DECISIONS OVER TIME IN KENTUCKY, PENNSYLVANIA, AND CALIFORNIA



APPENDIX C, FIGURE 4. NUMBER OF UNMARRIED DIFFERENT-SEX COUPLE DECISIONS OVER TIME IN KENTUCKY, PENNSYLVANIA, AND CALIFORNIA



APPENDIX C, FIGURE 5. NUMBER OF SAME-SEX COUPLE DECISIONS OVER TIME IN KENTUCKY, PENNSYLVANIA, AND CALIFORNIA



APPENDIX D: OUTCOMES IN FUNCTIONAL PARENT CASES BY JURISDICTION

The following table lists the rates of recognition and non-recognition in jurisdictions with more than fifteen decisions in the data set. In some cases, the decision does not contain a determination on the person's functional parent status. This could be true if, for example, the court remands the case to the lower court for a determination of the person's status.

Jurisdiction	**Number of Cases**	**Court Recognizes Party as Functional Parent**	**Court Does Not Recognize Party as Functional Parent**
Kentucky	122	43%	56%
Pennsylvania	108	52%	41%
California	82	39%	49%
New Jersey	28	46%	39%
West Virginia	28	57%	29%
New York	26	69%	23%
North Carolina	26	50%	31%
Washington	26	46%	31%
Nebraska	25	48%	44%
Indiana	17	53%	29%
Ohio	16	44%	50%