

**DOMESTIC VIOLENCE AND FUNCTIONAL PARENT
DOCTRINES**

Courtney G. Joslin^{*}
Douglas NeJaime^{**}

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^{*} Martin Luther King Jr. Professor of Law, UC Davis School of Law.

^{**} Anne Urowsky Professor of Law, Yale Law School. For helpful comments, we thank Meghan Boone, June Carbone, Leigh Goodmark, Clare Huntington, Joan Meier, Elizabeth Scott, Gregg Strauss, Jane Stoeber, and participants at the Centering Family Violence Roundtable at the University of Virginia. We are grateful to an excellent team of research assistants led by Alex Johnson and Sonia Qin for their work on the large empirical project, and we thank Molly Teague for her assistance with this paper.

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Today, approximately two-thirds of the states have a functional parent doctrine. Under these doctrines, a court can extend parental rights based on the conduct of forming a parental relationship with a child, regardless of whether the person is the child's biological or adoptive parent. In recent years, these functional parent doctrines have garnered significant attention. Some critics fear that perpetrators of domestic violence will misuse functional parent doctrines to abuse, harass, and coerce their victims. These critics often imagine a paradigmatic case — one involving a former nonmarital different-sex partner who has a limited relationship with the child and uses the doctrine in a post-dissolution custody action as a way to continue to harass and control his former partner, the child's mother.

Drawing upon relevant findings from our empirical study of all electronically available decisions issued in the last forty years applying functional parent doctrines, this Article sheds light on these fears by reporting what we know about allegations of domestic violence in cases decided under these doctrines. Ultimately, our findings reveal that the paradigmatic case that critics envision is quite rare. Former nonmarital different-sex partners constitute only a small share of the functional parent claimants. Instead, the population of claimants is characterized by diversity. Indeed, our study includes more than twice as many relatives — a group routinely overlooked in conversations about functional parent doctrines — than different-sex nonmarital partners. Even as allegations of domestic violence are more common in cases involving intimate partners, they are hardly a common feature. Moreover, even the small share of cases that would seem to be of most concern — those involving allegations of domestic violence against only the functional parent — rarely present the straightforward facts that structure objections to functional parent doctrines.

Rather than finding that functional parent doctrines are routinely used in ways that disrupt children's lives, we find that the doctrines often function to provide stability and security for children. Our account raises questions about opposing functional parent doctrines altogether based on fears that male ex-partners will use the doctrines for abusive ends. Instead, given the important benefits of functional parent doctrines for children, we conclude that concerns about domestic violence, which are indisputably serious and must be taken into consideration, should be addressed within functional parent doctrines, as some states recently have done.

INTRODUCTION

Today, approximately two-thirds of U.S. states have a functional parent doctrine. Under these doctrines, a court can extend parental rights

based on the conduct of forming a parental relationship with a child. In recent years, functional parent doctrines have garnered significant attention. As we show in Part I, some scholars, judges, and advocates express skepticism about these doctrines based on fears that perpetrators of domestic violence will misuse functional parent doctrines to abuse, harass, and coerce their victims. These critics often imagine a paradigmatic case — one involving a former nonmarital different-sex partner who has a limited relationship with the child and uses the doctrine in a post-dissolution custody action as a way to continue to harass his former partner, the child's mother.

This Article sheds light on these fears by drawing upon relevant findings from our empirical study of all electronically available functional parent decisions from the past forty years.¹ What we see is that the paradigmatic case that critics envision is actually quite rare. As we explain in Part II, the vast majority of cases in our data set — more than eighty percent — do not involve the category of people — former nonmarital different-sex partners — at issue in the imagined paradigmatic case. Instead, our study reveals that the population of functional parent claimants is much more varied than critics often assume. Indeed, a group routinely overlooked in conversations about functional parent doctrines, relatives, constitute the largest single category of functional parent claimants.

The variety of families represented in our data set may partially explain why, as we show in Part II, allegations of domestic violence against the functional parent are relatively rare overall. Even within the subset of cases involving former nonmarital different-sex partners, in which allegations of domestic violence arise more often, they are hardly a common feature.

In Part III, we provide a more granular look at the small subset of cases — twenty-three cases out of the 669 cases in our data set — that feature domestic violence allegations against *only* the functional parent. These cases — the ones that would seem to be of the greatest concern to critics — are more complex and varied than imagined. In many cases, the parties' lives will continue to be entangled, regardless of the outcome of the functional parent claim. In many cases, the relationship between the functional parent and the child is hardly the kind of casual one that critics imagine. Instead, even in cases involving domestic violence allegations, functional parent doctrines may have a critical role to play in securing a child's relationship with the person who is parenting them. In short, our study reveals that the imagined case of an abusive former nonmarital male partner using functional parent doctrines to abuse, harass, and coerce the child's mother is rare.

¹ A more comprehensive discussion of our study and our findings is presented in Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319 (2023).

Focus on this imagined case obscures consideration of the ways in which functional parent doctrines redound to children's benefit. The vast majority of cases in the data set, approximately 83%, feature functional parent claimants who appear to have served as the child's primary caregiver. Indeed, in many cases, the functional parent is serving as the child's primary caregiver and no legal parent is. In almost half of the cases in the data set, no legal parent was functioning as a primary caregiver at the time of the proceeding. Accordingly, in a large number of cases, recognition of the functional parent does not "fundamentally alter the existing dynamic between the biological or legal parent and the child."² This is so because a decision to recognize the functional parent often results in "preserv[ing] the child's existing living arrangement with the person who is serving as their primary caregiver."³ As we explain in Part II.A. and in more detail elsewhere, our study reveals that in many of the cases in our data set, the families are facing a range of challenges — poverty, housing insecurity, incarceration, intervention by the child welfare system, death of one or both legal or biological parents, as well as situations in which the biological or legal parents are struggling with substance use disorders.⁴ Rather than finding that functional parent doctrines are routinely used in ways that disrupt children's lives, we find that the doctrines often function to provide stability and security for children.

Our account raises questions about opposing functional parent doctrines altogether based on fears that male ex-partners will use the doctrines for abusive ends. Instead, given the important benefits of functional parent doctrines for children, we conclude that concerns about domestic violence — which are indisputably serious and must be taken into consideration⁵ — should be addressed *within* functional parent doctrines. As we show in Part IV, recent state parentage laws, drafted in consultation with domestic violence advocates, provide models for doing so.

I. DOMESTIC VIOLENCE OBJECTIONS TO FUNCTIONAL PARENT DOCTRINES

In recent years, a range of voices, including scholars, advocates, and judges, have raised concerns about functional parent doctrines. We cover

² Joslin & NeJaime, *supra* note 1, at 327.

³ *Id.* at 328.

⁴ Courtney G. Joslin & Douglas NeJaime, *How Functional Parent Doctrines Function: Findings from an Empirical Study*, 35 J. AM. ACAD. MATRIM. LAW. 589 (2023).

⁵ Unfortunately, there is reason to fear that in making custody determinations, trial courts might dismiss mothers' claims of intimate partner violence and award custody to an abuser. See Joan S. Meier, *Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law*, 110 GEO. L.J. 835, 838 (2022) (reporting findings from an empirical study "confirm[ing] that family courts reject mothers' allegations of abuse by fathers at high rates and frequently remove mothers' custody").

these concerns at length in a more comprehensive discussion of our study and our findings.⁶ Here, we focus on the fear that the doctrines will be used by ex-partners for abusive ends. Professor Robin Fretwell Wilson, for example, writes: “No one doubts that some children will be made better off by preserving a connection with a de facto parent. But . . . whatever the magnitude of the gain for some children, it comes at a cost.”⁷ These costs, Wilson continues, include the possibility that the doctrines “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.”⁸

Not only scholars, but also judges express this concern. An Ohio magistrate judge argued against extending legal parentage to functional parents by asserting that some former intimate partners will use functional parent doctrines as a means of “manipulat[ing] and control[ing] their victims.”⁹ If a functional parent is recognized as a legal parent, that person “will be legally tethered to the parent who is trying to move on from the relationship.”¹⁰ Similarly, before adopting a de facto parent doctrine, the Vermont Supreme Court resisted the doctrine, suggesting that “third parties could abuse the process by seeking visitation to continue an unwanted relationship or otherwise harass the legal parents.”¹¹

Perhaps most importantly, organizations working on behalf of domestic violence survivors have objected on this ground. For example, in a case asking the New York high court to adopt a functional parent doctrine, a group of advocacy organizations asserted: “A discretionary functional approach, requiring a case-by-case analysis, would empower former abusive

⁶ Joslin & NeJaime, *supra* note 1.

⁷ 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 PRINCIPALS OF THE LAW OF FAMILY DISSOLUTION 92 (Robin Fretwell Wilson ed., 2006).

⁸ *Id.* at 100. *See also id.* at 101 (“The ALI proposal would stretch the ‘parenthood’ tent so wide that it will necessarily encompass some men with less-than-admirable motives or impulses.”). Wilson seems to be open to supporting some functional parent doctrines, particularly ones that require proof that the functional parent has “fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.” *Id.* at 118 (quoting *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004)).

⁹ Jacqueline V. Gaines, *The Legal Quicksand 2+ Parents: The Need for a National Definition of a Legal Parent*, 46 U. DAYTON L. REV. 105, 125 (2021).

¹⁰ *Id.* at 126. As a result, Gaines argues that a functional parent should not be recognized as a legal parent “absent a determination that the biological or adoptive parent is unfit.” *Id.* While Gaines opposes doctrines that allow for a determination of legal parentage in the absence of a showing that the legal parent is unfit, she does support more limited doctrines that would allow functional parents to seek what she calls “companionship time.” *Id.* at 128.

¹¹ *See, e.g., Titchenal v. Dexter*, 693 A.2d 682, 688 (Vt. 1997).

partners with no biological or adoptive connection to the child to claim parental rights as a way to continue threatening their victims.”¹²

The fear that the doctrines might be used to perpetrate domestic violence against legal parents is of critical importance. As judges and lawmakers consider whether and how to protect functional parents going forward, however, it is necessary to have an accurate understanding of how domestic violence features in functional parent cases as well as how these doctrines protect children from violence and other harms. The next Part discusses relevant findings from our study of functional parent decisions.

II. WHAT WE KNOW ABOUT FUNCTIONAL PARENTS AND DOMESTIC VIOLENCE

We describe our large-scale empirical study of functional parent doctrines at greater length in *How Parenthood Functions*,¹³ and the data is publicly available.¹⁴ Here, we offer a brief description. We collected and coded all electronically available functional parent decisions issued between 1980 and late 2021. Our data set included 669 state court decisions across thirty-two jurisdictions. We coded each case along multiple dimensions, including the presence of domestic violence allegations and the identity of the person alleged to have committed the domestic violence.

Like all data sets, ours has limitations. It includes only litigated cases and covers only electronically available decisions. Additionally, almost all decisions are from state appellate courts. Domestic violence may be more prevalent in disputes that do not reach litigation or that do not reach appellate courts. Or, since litigated cases may involve greater conflict, perhaps appellate decisions feature allegations with a greater degree of frequency.

¹² Brief for Sanctuary for Families et al. as Amici Curiae Supporting Petitioner at 8, *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 25 (2016) (No. APL-2015-00236). See also Laura W. Gal et al., Letter to the Editor, *State Measure Goes Disturbingly Too Far in its Provisions for de facto Parents*, BOS. GLOBE, Dec. 13, 2021, at A9 (objecting to de facto parent provision on the ground that “[d]omestic violence survivors would face harassing litigation from their former abusers”); *AAC Adoption and Implementation of the Connecticut Parentage Act: Testimony Regarding H.B. 5178 Before the Judiciary Comm.* (Conn. 2020) (testimony of Liza Andrews, Dir. of Pub. Policy and Commc’ns, Conn. Coal. Against Domestic Violence) (“For victims who are not married to their abuser or whose abuser is not the biological or legal parent of their child, this bill unfortunately provides the abuser with an opportunity to use . . . de facto parentage against their victim.”).

¹³ Joslin & NeJaime, *supra* note 1.

¹⁴ To view our data set of functional parent decisions issued between 1980 and 2021, see Courtney G. Joslin & Douglas NeJaime, *Functional Parent Doctrines*, YALE L. SCH. DOCUMENT COLLECTION CTR. (Jan. 4, 2023), <https://documents.law.yale.edu/functional-parent-doctrines>.

Given the relatively low rates of domestic violence allegations in our data set, we suspect that domestic violence is more common among the total population of families featuring functional parents than in electronically available decisions.¹⁵ Even with these concerns about selection effects, which we discuss at greater length elsewhere,¹⁶ our data contribute to a clearer understanding of the role domestic violence allegations play in functional parent cases.

A. The Diverse Population of Functional Parents

Concerns about domestic violence typically revolve around a particular type of claimant — “unmarried cohabitants.”¹⁷ That is, skeptics of the doctrines generally focus on unmarried men who cohabited with women with children. Critics fear these men will use the doctrines to abuse mothers despite, in critics’ view, having a limited relationship with the child.

Contrary to the intuition of some skeptics, cases involving the imagined paradigmatic claimant — former unmarried different-sex partners — constitute a relatively small slice of the cases in our data set. Cases involving all intimate couples — married and unmarried, different-sex and same-sex — constitute about half of all cases. But as Figure 1 shows, fewer than a fifth of cases involve former different-sex unmarried partners.¹⁸ In comparison, there are twice as many cases involving relatives claiming functional parent status as cases involving different-sex nonmarital partners.

¹⁵ Compare our findings with estimates of rates of domestic violence in contested custody cases. *See, e.g.*, Janet R. Johnson, Soyoung Lee, Nancy W. Olesen & Marjorie G. Walters, *Allegations and Substantiations of Abuse in Custody-Disputing Families*, 43 FAM. CT. REV. 283, 288–89 (2005) (reporting in a study of families in high-conflict custody disputes that allegations of domestic violence were made against the father in 55% of cases and were substantiated against the father in 41% of cases).

¹⁶ *See* Joslin & NeJaime, *supra* note 1, at 347–50.

¹⁷ *See* Wilson, *supra* note 7, at 98. While Wilson uses the term “Ex Live-In Partner” to capture both “a stepparent” and an “ex live-in lover of a child’s parent,” she distinguishes between the two, asserting that “whether a mother and her partner choose to marry matters greatly to the level of investment that he makes in her child.” *Id.* at 106 n.122.

¹⁸ Joslin & NeJaime, *supra* note 1, at 357.

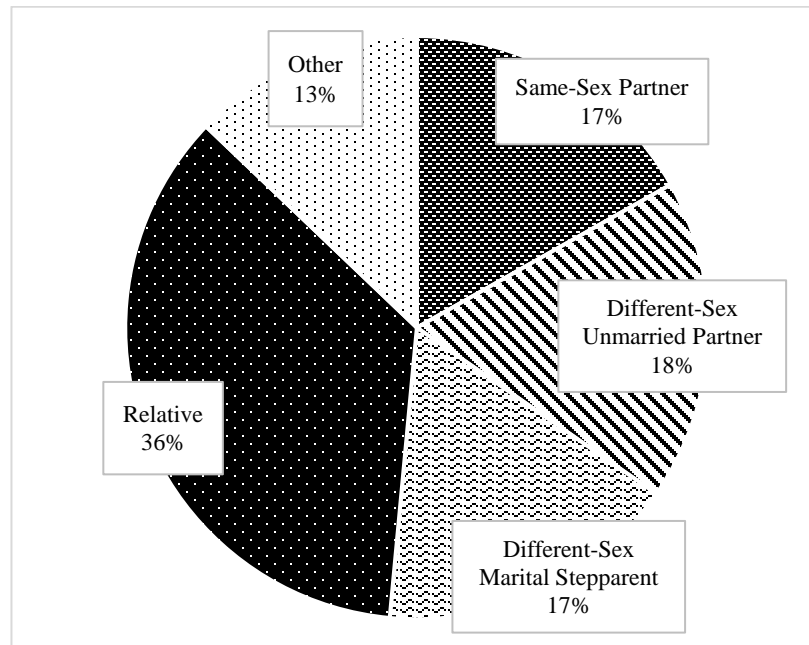


Figure 1: The Identities of Functional Parents

Rather than being dominated by former nonmarital male partners, overall, the data set is characterized by diversity. A wide range of families appear in the cases. More than 80% of cases in the data set do not involve the paradigmatic parties envisioned by skeptics. Moreover, while critics imagine a particular kind of case — a post-dissolution custody dispute — the cases in the data set reveal a much more varied array of contexts. One-third of cases arise in the context of child welfare proceedings. In over 10% of cases, the child’s legal parent has died. Our study reveals that “functional parent doctrines serve many families not envisioned in contemporary debates — families facing poverty, families subject to state intervention through the child welfare system, families in which the biological or legal parents are struggling with substance use disorders, housing insecurity, or incarceration, and families in which the biological or legal parent has died.”¹⁹ In many families, the functional parent is providing a degree of stability for the children.

These findings caution against drawing conclusions about the wisdom of functional parent doctrines based on concerns about a group of claimants — different-sex unmarried partners — who represent a relatively small share of the total cases.

Critics who raise concerns about domestic violence also fear that claimants will invoke the doctrines based on merely casual relationships with the children. Yet, in the vast majority of cases in our data set — representing 83% of the cases — the functional parent appears to have served

¹⁹ Joslin & NeJaime, *supra* note 1.

as a primary caregiver to the child.²⁰ In approximately half of the cases in our data set, a legal parent was not acting as a primary caregiver at the time of the proceeding.²¹

Confronted with claims by primary caregivers across a wide range of families, courts in our data set apply the doctrines in ways that protect children's relationships with the people who are parenting them.²² Among the decisions in which a court recognized a person as a functional parent, that person served as a primary caregiver in 94%.²³ In contrast, among the much smaller share of cases in which the functional parent had not served as a primary caregiver, courts overwhelmingly rejected the claims.²⁴ Ultimately, our study shows how functional parent doctrines make children's lives more stable by protecting their relationships with their primary caregivers and preserving their home placements.

B. Domestic Violence Allegations in Functional Parent Cases

Within the entire data set, a relatively small number of cases — fewer than 12% — feature domestic violence allegations.²⁵ Given that these cases represent such a small share of the total data set, we caution against opposing the doctrines altogether based on concerns related to these cases. Nonetheless, we report our findings on these cases. Even among these cases, our findings reveal that they are more varied and complex than imagined.

Within this class of cases, domestic violence allegations are more commonly asserted against the legal parent than against the functional parent. Of the seventy-nine cases involving domestic violence allegations, fifty involve allegations against the legal parent, while forty-one involve allegations against the functional parent. In cases involving allegations against only one or the other, thirty-two cases involve allegations against the legal parent but not against the functional parent, while twenty-three involve allegations against the functional parent but not against the legal parent. Figure 2 illustrates this data by percentage of total cases in the data set.

²⁰ Joslin & NeJaime, *supra* note 1, at 363.

²¹ *Id.* at 366–67.

²² *Id.* at 406–22.

²³ *Id.* at 378.

²⁴ *Id.* at 379.

²⁵ To be clear, we are identifying cases that feature domestic violence *allegations*; we are not making claims about the prevalence of substantiated allegations or allegations that result in orders of protection. Moreover, we are counting only cases where the decision refers to domestic violence allegations; of course, there may be cases in our data set in which domestic violence allegations have been made but are not reported in the decision.

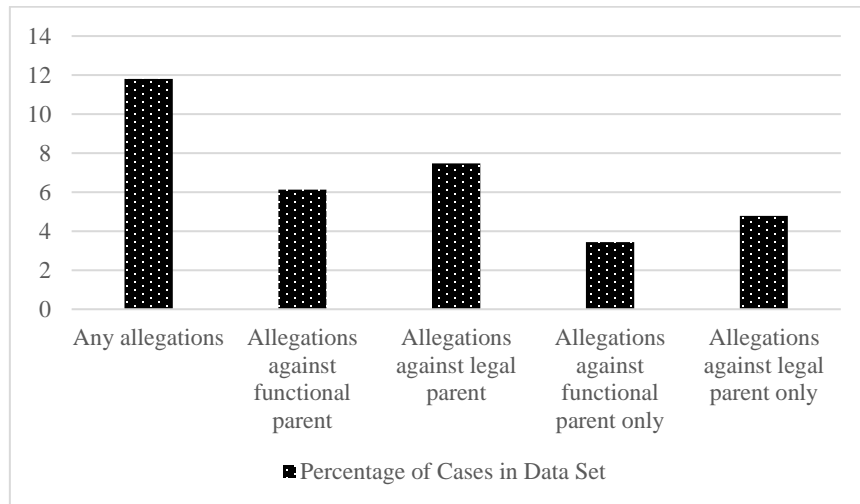


Figure 2: Allegations of Domestic Violence in Functional Parent Cases

As noted above, about half of the cases in the data set feature former intimate partners, either marital or nonmarital, same-sex or different-sex. Across this group of cases involving former intimate partners, domestic violence allegations are relatively rare: 14% involve allegations of domestic violence against some party, 11% involve domestic violence allegations against the functional parent, and 6% involve allegations against *only* the functional parent.

Drilling down into the cases that are of particular concern to critics — those involving former nonmarital partners in different-sex couples — here, too, domestic violence allegations are not a common feature. Among the 118 cases with unmarried different-sex partners, twenty-five feature domestic violence allegations. Of these, eighteen feature allegations against the functional parent — constituting roughly 15% of cases involving former different-sex nonmarital partners.²⁶ In fourteen of these eighteen cases — approximately 12% of cases involving former different-sex nonmarital partners — the functional parent was the only party alleged to have engaged in domestic violence. This constitutes 2% of all functional parent cases in the data set. Figure 3 illustrates these findings.

²⁶ Joslin & NeJaime, *supra* note 1, at 370.

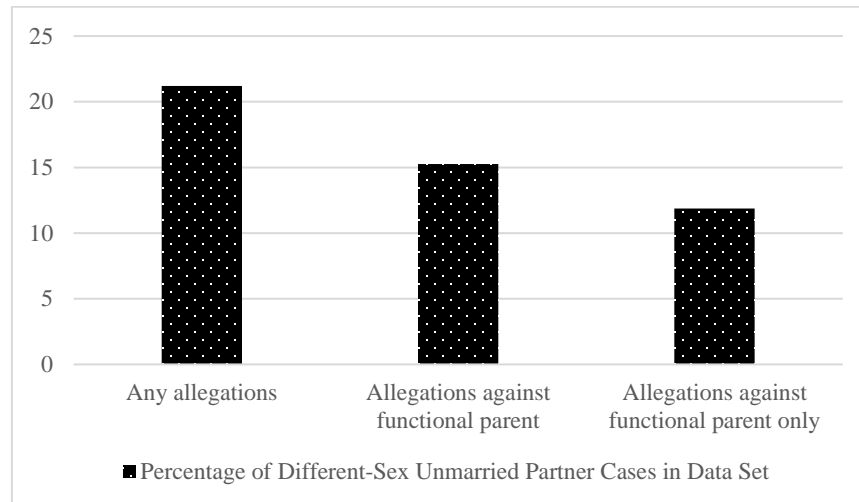


Figure 3: Allegations of Domestic Violence in Different-Sex Unmarried Partner Cases

In the relatively small number of cases involving allegations of domestic violence against the functional parent, it is often not clear why the person is invoking the doctrine. Accordingly, we cannot draw conclusions about how often the functional parent accused of domestic violence is asserting a functional parent claim *as a means* of harassing or coercing the legal parent.

III. WHAT THE CASES TELL US

In this Part, we focus on the twenty-three cases across the data set in which allegations of domestic violence were leveled against the functional parent and no other party. We are not claiming that these cases are representative of functional parent disputes with domestic violence allegations.²⁷ Given the limitations of our data set and given that we are drilling down on a very small number of cases, we are pointing to these cases as simply illustrative. They shed important light on how domestic violence and functional parenthood intersect on the ground, and in doing so, have the capacity to reorient debate over the concerns we identified in Part I.

The twenty-three cases we survey rarely present the straightforward facts that structure objections to functional parent doctrines. Skeptics generally imagine cases involving post-dissolution custody disputes between an involved, fit legal parent and a former nonmarital different-sex partner. Our cases, however, reveal complex and varied family circumstances — circumstances that complicate the role that both domestic violence allegations and functional parent doctrines are playing.

Our survey suggests that the paradigmatic scene skeptics envision is often not the one that exists in fact. Most but not all of these twenty-three

²⁷ Nor do we mean to suggest that cases involving mutual allegations of domestic violence present less serious concerns.

cases feature former nonmarital male partners: fourteen feature different-sex nonmarital partners, five feature different-sex marital partners, three feature same-sex nonmarital partners, and one case features a maternal grandfather.²⁸ In approximately a third of the cases, the child was not in the custody of any legal parent at the time of the action or during the pendency of the action.²⁹ In some of the cases, the child was in the custody of the functional parent.³⁰

Over half of the cases emerged in the context of child welfare involvement,³¹ not a post-dissolution custody dispute.³² In these cases, the state would be involved even in the absence of the functional parent claim. Thus, contrary to the suggestion of some functional parent skeptics, often

²⁸ As noted, three of the twenty-three cases involve same-sex nonmarital partners. Two cases involve children adopted by one of the women, with conflict over whether the couple intended to co-parent and did in fact co-parent. *Toney v. Edgerton*, 768 S.E.2d 201 (N.C. Ct. App. 2014); *Truman v. Lillard*, 404 S.W.3d 863 (Ky. Ct. App. 2012). The third case involves a child conceived with donor sperm. *Cherone v. Hicks*, 2021 WL 118886 (Pa. Super. Ct., Jan. 13, 2021). The court did not recognize the non-adoptive or non-biological parent as a functional parent in any of the cases.

²⁹ See, e.g., *In re Andrew F.*, No. F040719, 2003 WL 116674, at *5 (Cal. Ct. App. Jan. 14, 2003); *In re Casey A.*, No. D041044, 2003 WL 21235317, at *1 (Cal. Ct. App. May 29, 2003); *In re Jonathan G.*, No. B193093, 2007 WL 1153124, at *1 (Cal. Ct. App. Apr. 19, 2007); *In re T.F.*, No. A117987, 2008 WL 1736059, at *5 (Cal. Ct. App. Apr. 16, 2008); *In re H.S.*, 114 Cal. Rptr. 3d 898, 899 (Ct. App. 2010); *In re Dayton J.*, No. D062820, 2013 WL 2325165, at *1–2 (Cal. Ct. App. May 29, 2013); *In re S.R.*, No. C076781, 2015 WL 1084486, at *2 (Cal. Ct. App. Mar. 10, 2015); *In re Paternity of A.C.*, No. 13A04–1009–DR–608, 2011 WL 2888528, at *2 (Ind. Ct. App. July 20, 2011). In another case, it is unclear whether the child at issue is living with a legal parent, and it appears she may have been in state custody. *In re Lauren K.*, No. A113231, 2006 WL 3602913, at *2 (Cal. Ct. App. Dec. 12, 2006). In at least one additional case, the child had been temporarily removed from the custody of the legal parent but was thereafter returned to the parent under the supervision of the state. *In re S.Z.*, No. H042911, 2016 WL 1536320, at *1–2 (Cal. Ct. App. Apr. 14, 2016).

³⁰ See, e.g., *Andrew F.*, 2003 WL 116674, at *5; *Dayton J.*, 2013 WL 2325165, at *1–2; *A.C.*, 2011 WL 2888528, at *2.

³¹ Many scholars and advocates reject the term “child welfare.” See Dorothy E. Roberts, *Keynote: How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455 (2021). We use the phrase here simply because it is used in the cases.

³² See *Andrew F.*, 2003 WL 116674, at *1; *Casey A.*, 2003 WL 21235317; *Lauren K.*, 2006 WL 3602913, at *2; *Jonathan G.*, 2007 WL 1153124, at *1; *T.F.*, 2008 WL 1736059, at *1; *H.S.*, 114 Cal. Rptr. 3d at 900; *Dayton J.*, 2013 WL 2325165, at *1; *In re Giovanni B.*, No. B260681, 2015 WL 6863689, at *1–3 (Cal. Ct. App. Nov. 9, 2015), as modified on denial of reh’g (Dec. 7, 2015); *S.R.*, 2015 WL 1084486, at *1; *In re S.Z.*, 2016 WL 1536320, at *1–2; N.J. Div. of Youth & Fam. Servs. v. P.N., No. A-1737-11T3, 2014 WL 1884330, at *1–2 (N.J. Super. Ct. App. Div. May 13, 2014); *A.C.*, 2011 WL 2888528, at *1.

it is not the functional parent claim itself that prompts state intervention in the family. In most of these child welfare cases, the state intervention was triggered by allegations regarding the mother's affirmative conduct with respect to the child.³³ Still, in a few cases, it is unclear whether the mother was alleged to have engaged in affirmative acts of abuse or neglect, or whether the alleged domestic violence directed at the mother appears to have contributed to the child welfare intervention.³⁴ In at least one case, the mother was faulted for "failure to protect" a child from the functional parent's domestic violence.³⁵

On top of these structural features, there are also distinctive fact patterns that complicate the assumed relationship between domestic violence and functional parent doctrines. While critics worry that the functional parent claim is being asserted to exert control over the legal parent, the functional parent may have other grounds on which to seek to stay in the legal parent's life. There may be statutory grounds on which the person can pursue continued contact with the child. For example, they may be able to petition under a stepparent, grandparent, or third-party custody or visitation statute.³⁶ The person may have other children in common with the legal parent.³⁷ For example, in *In re Andrew F.*, the functional parent was the biological father of five other children with the mother.³⁸ In such a case, the parties will continue to interact with each other even if the functional parent claim is denied.

The relationship between the functional parent and the child is often stronger than imagined. This, too, casts doubt on the concern that the functional parent claim is often being asserted in bad faith. In many cases, the relationship between the child and the functional parent is significant and

³³ See *Andrew F.*, 2003 WL 116674; *Casey A.*, 2003 WL 21235317, at *1; *Lauren K.*, 2006 WL 3602913, at *1; *T.F.*, 2008 WL 1736059, at *1; *H.S.*, 114 Cal. Rptr. 3d 898; *S.Z.*, 2016 WL 1536320, at *1; *A.C.*, 2011 WL 2888528, at *1.

³⁴ See *S.R.*, 2015 WL 1084486, at *1; *In re P.A.*, 130 Cal. Rptr. 3d 556, 560 (Ct. App. 2011); *Jovanni B.*, 2015 WL 6863689.

³⁵ See *Jovanni B.*, 2015 WL 6863689, at *1.

³⁶ See, e.g., *A.C.*, 2011 WL 2888528; *H.S.*, 114 Cal. Rptr. 3d 898.

³⁷ *Andrew F.*, 2003 WL 116674; *Dayton J.*, 2013 WL 2325165; *Bancroft v. Jameson*, 19 A.3d 730 (Del. Fam. Ct. 2010); *A.C.*, 2011 WL 2888528; *Jonathan G.*, 2007 WL 1153124, at *1; *S.R.*, 2015 WL 1084486.

³⁸ *Andrew F.*, 2003 WL 116674.

bonded.³⁹ In some cases, the legal parent and the functional parent had been in a long-term relationship and lived with the child as a family unit.⁴⁰

In twelve of the twenty-three cases, the functional parent appears to have served as a primary caregiver to the child. The cases include functional parents who developed parent-child relationships that persisted for several years.⁴¹ The children in these cases frequently called the functional parent “Dad” or “Mom.”⁴² In some cases, the functional parent acted as a parent from the moment of the child’s birth.⁴³ The functional parent may have believed or acted as though he were the child’s biological father.⁴⁴ Often, the child’s biological father has not been involved in the child’s life.⁴⁵

In eighteen of the twenty-three cases in which only the functional parent is alleged to have committed domestic violence, the court determined that the person alleged to have committed domestic violence *was not a functional parent* under the law and therefore had no standing to seek parental rights under these doctrines.⁴⁶

³⁹ See, e.g., *Pitts v. Moore*, 90 A.3d 1169 (Me. 2014) (vacating trial court decision, which found that because the functional parent claimed the child as his son and had a bond of attachment, the disruption of their relationship would adversely impact the child); *Andrew F.*, 2003 WL 116674 (focusing on the quality of the parent-child relationship); *In re T.F.*, No. A117987, 2008 WL 1736059, at *2 (Cal. Ct. App. Apr. 16, 2008) (observing that social worker found the functional parent had been acting as the child’s father for an eight-year period, since she was nine months old).

⁴⁰ See, e.g., *Pitts*, 90 A.3d at 1172-73; *Andrew F.*, 2003 WL 116674; *T.F.*, 2008 WL 1736059, at *2; *Kevin Q. v. Lauren W.*, 95 Cal. Rptr. 3d 477 (Ct. App. 2009), as modified on denial of reh’g (July 16, 2009); *Y.L.R. v. M.K.*, 86 N.E.3d 513 tbl. (Mass. App. Ct. 2017).

⁴¹ See, e.g., *T.F.*, 2008 WL 1736059, at *2; *Washburn v. Washburn*, No. 204047, 1999 WL 33441180 (Mich. Ct. App. June 15, 1999).

⁴² See, e.g., *Truman v. Lillard*, 404 S.W.3d 863, 866-67 (Ky. Ct. App. 2012); *A.C.*, 2011 WL 2888528, at *1; *Jason P. v. Danielle S.*, 215 Cal. Rptr. 3d 542, 552 (Ct. App. 2017); *S.R.*, 2015 WL 1084486, at *2; *In re P.A.*, 130 Cal. Rptr. 3d 556, 560 (Ct. App. 2011); *T.F.*, 2008 WL 1736059, at *2; *In re Lauren K.*, No. A113231, 2006 WL 3602913, at *2 (Cal. Ct. App. Dec. 12, 2006); *Matter of J.D.W.*, 471 P.3d 228, 232 (Wash. Ct. App. 2020).

⁴³ See *Pitts*, 90 A.3d at 1172; *Lauren K.*, 2006 WL 3602913, at *2; *Kevin Q.*, 95 Cal. Rptr. 3d at 479; *In re Casey A.*, No. D041044, 2003 WL 21235317, at *1 (Cal. Ct. App. May 29, 2003).

⁴⁴ See *Pitts*, 90 A.3d at 1172; *Kevin Q.*, 95 Cal. Rptr. 3d at 479-80; *Casey A.*, 2003 WL 21235317, at *1; *T.F.*, 2008 WL 1736059, at *2-3; *P.A.*, 130 Cal. Rptr. 3d at 560; *Washburn*, 1999 WL 33441180, at *1; *In re Giovanni B.*, No. B260681, 2015 WL 6863689 (Cal. Ct. App. Nov. 9, 2015), as modified on denial of reh’g (Dec. 7, 2015); *S.R.*, 2015 WL 1084486, at *1.

⁴⁵ See, e.g., *Pitts*, 90 A.3d at 1173; *T.F.*, 2008 WL 1736059, at *2.

⁴⁶ As discussed in more detail in Part IV, the court explicitly treated domestic violence as relevant to the functional parent determination in only a few cases. *Lauren K.*, 2006 WL 3602913, at *6; *In re Dayton J.*, No. D062820, 2013 WL

The five cases in which the court recognized the person alleged to have committed domestic violence as a functional parent look quite different than the paradigmatic scene envisioned by skeptics.⁴⁷ All five involve complex fact patterns. Three feature child welfare involvement.⁴⁸ In one of these three cases, the court remanded the matter to allow the trial court to determine whether the presumption for the functional parent should be rebutted.⁴⁹ Hence, on remand, the court could find that he was not a parent.

The five cases feature deep and often long-established family ties. In three cases, the mother married the functional parent after the child's birth.⁵⁰ In one such case, the functional parent began living with the mother when the child, born in 1997, was nine months old. The parties married twice thereafter, once in 2000, and then again in 2004 following a divorce of the parties' first marriage.⁵¹ They lived together as a family for eight years, and the child referred to the functional parent as her "dad."⁵² In another such case, the mother married the functional parent a month after the child's birth; parentage did not become an issue until the couple divorced when the child was nine and genetic tests revealed that the functional parent was not the biological father.⁵³ In the third case, the mother married the functional parent when the child was an infant; parentage questions did not arise until child welfare authorities intervened when the child was six.⁵⁴

Even in the two cases where the mother and the functional parent had not married, significant family ties existed. In one case, the couple had five biological children in common, and the sixth child viewed the functional parent as his father.⁵⁵ In the other case, the functional parent was the genetic father of the child.⁵⁶ He was the former intimate partner of the mother and had agreed to allow her to use his sperm for purposes of

2325165, at *5 (Cal. Ct. App. May 29, 2013); *Y.L.R. v. M.K.*, 86 N.E.3d 513 tbl., at *2 (Mass. App. Ct. 2017).

⁴⁷ These cases all involve different-sex unmarried partners.

⁴⁸ *In re Andrew F.*, No. F040719, 2003 WL 116674 (Cal. Ct. App. Jan. 14, 2003); *T.F.*, 2008 WL 1736059, at *2; *P.A.*, 130 Cal. Rptr. 3d at 559.

⁴⁹ *P.A.*, 130 Cal. Rptr. 3d at 565.

⁵⁰ *T.F.*, 2008 WL 1736059, at *1; *P.A.*, 130 Cal. Rptr. 3d at 559; *Washburn v. Washburn*, No. 204047, 1999 WL 33441180, at *1 (Mich. Ct. App., June 15, 1999).

⁵¹ *T.F.*, 2008 WL 1736059, at *1–3.

⁵² *Id.* at *3.

⁵³ *Washburn*, 1999 WL 33441180, at *1.

⁵⁴ *P.A.*, 130 Cal. Rptr. 3d at 559–60.

⁵⁵ *In re Andrew F.*, No. F040719, 2003 WL 116674 (Cal. Ct. App. Jan. 14, 2003).

⁵⁶ *Jason P. v. Danielle S.*, 215 Cal. Rptr. 3d 542, 551 (Ct. App. 2017).

assisted reproduction, before developing a parent-child relationship after the child's birth.⁵⁷

Ultimately, even the small subset of cases from our data set that involve allegations of domestic violence against only the functional parent do not reflect the scene that critics ordinarily envision. The circumstances are more complex and varied, and the relationships between the functional parents and the children tend to be long-standing and bonded.

IV. PROTECTING FUNCTIONAL PARENT-CHILD RELATIONSHIPS AND ADDRESSING DOMESTIC VIOLENCE

As we explain in more detail elsewhere, our study of electronically available functional parent decisions documents the vital role that the doctrines play in the lives of children in a wide range of families.⁵⁸ Accordingly, our general view is that concerns about unintended consequences should be addressed in *the design* of the doctrines, rather than as a basis to oppose them altogether.

With respect to the serious concerns about domestic violence, this could be done by expressly allowing an individual to use evidence of domestic violence as a basis for opposing the recognition of the functional parent. The doctrine could also require courts to find that recognition of the functional parent is in the child's best interest.⁵⁹ This would improve existing doctrine in most jurisdictions. Among the twenty-three cases in which only the functional parent is alleged to have committed domestic violence, the court rejected the functional parent's claim in eighteen. Yet, courts in these cases generally did not expressly rely on the existence of the domestic violence allegations. Even when courts relied on evidence of past violence, they did not do so under a provision that expressly made such violence or abuse relevant.⁶⁰

⁵⁷ *Id.*

⁵⁸ Joslin & NeJaime, *supra* note 1, at Part V.

⁵⁹ Scholars have shown, however, that even when judges are instructed to consider domestic violence in best-interests-of-the-child determinations, they routinely minimize the issue. See Janet R. Johnston & Nancy Ver Steegh, *Historical Trends in Family Court Response to Intimate Partner Violence: Perspectives of Critics and Proponents of Current Practices*, 51 FAM. CT. REV. 63, 64-66, 68, 71 (2013); Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 360 (2008); Leigh S. Goodmark, *From Property to Personhood: What the Legal System Should Do for Children in Family Violence Cases*, 102 W. VA. L. REV. 237, 257 n.142 (1999).

⁶⁰ Two of these cases arose in California, where the court was tasked with determining "based on policy and logic" which presumption of parentage should prevail when two men claimed to be a child's father. *In re Dayton J.*, No. D062820, 2013 WL 2325165, at *5 (Cal. Ct. App. May 29, 2013); *In re Lauren K.*, No. A113231, 2006 WL 3602913, at *6 (Cal. Ct. App. Dec. 12, 2006). In a third case, which arose in Massachusetts, the court was authorized to consider

States that recently enacted functional parent statutes provide a model for explicitly addressing domestic violence in the doctrines themselves. De facto parent statutes in Connecticut, Rhode Island, and Vermont provide that a legal parent “may use evidence of duress, coercion or threat of harm to contest” one of the required elements, specifically that “the [legal] parent fostered or supported a bonded and dependent relationship [between the alleged de facto parent and the child].”⁶¹ This provision does not mean that domestic violence evidence standing alone defeats a parentage claim. Such an approach would unduly treat de facto parents differently than, and as inferior to, other parents. Instead, evidence of domestic violence can be used to show that the person *cannot satisfy the requirements of de facto parentage*, and therefore, that the person is not a parent.

The de facto parent provisions in these three states *also require* the court to find that “continuing the relationship between the individual and the child is in the best interest of the child.”⁶² A similar requirement exists in a few other states.⁶³ Here, too, evidence of domestic violence can show that the person *cannot satisfy the requirements of de facto parentage*, and therefore is not a parent.

This model emerged in part through coalition and compromise. In Connecticut, for example, one of us worked directly with domestic violence advocates to draft additional protections to be included in the Connecticut Parentage Act. These additional protections were paired with the functional parent provisions in the Act.⁶⁴ Domestic violence advocates

whether treating the claimant as a de facto parent would serve the child’s best interests. The appellate court affirmed the trial court’s ruling that the child’s “best interests would not be served by continued contact with [the alleged de facto parent],” under circumstances in which the child’s mother “has a permanent restraining order prohibiting [the alleged de facto parent] from contacting her or the children.” *Y.L.R. v. M.K.*, 86 N.E.3d 513 tbl., at *3 (Mass. App. Ct. 2017).

⁶¹ See, e.g., CONN. GEN. STAT. ANN. § 46b-490(b) (West 2022); 15 R.I. GEN. LAWS ANN. § 15-8.1-501(a)(1) (West) (same); VT. STAT. ANN. tit. 15C, § 501(a)(2) (West) (same). Pending legislation in Massachusetts includes similar language.

⁶² CONN. GEN. STAT. ANN. § 46b-490(a)(7); 15 R.I. GEN. LAWS ANN. § 15-8.1-501(a)(1)(vii); VT. STAT. ANN. tit. 15C, § 501(a)(1)(G).

⁶³ See, e.g., ME. REV. STAT. tit. 19-A, § 1891(3)(E); WASH. REV. CODE ANN. § 26.26A.440(4)(g).

⁶⁴ See, e.g., CONN. GEN. STAT. ANN. § 46b-489(e) (West 2022); CONN. GEN. STAT. ANN. § 46b-490(b) (West 2022). The statute takes a relatively expansive approach to how a parent can show “duress, coercion or threat of harm” — including a “sworn affidavit from a domestic violence counselor or sexual assault counselor” or through “other credible evidence of abuse against the parent of the child or the child, including, but not limited to, the parent’s or child’s sworn affidavit.” CONN. GEN. STAT. ANN. § 46b-490(b)(2). This responds to concerns about requirements of substantial evidence that domestic violence advocates have raised in other contexts. See, e.g., Debra Pogrud Stark, Jessica M. Choplin & Sarah Elizabeth Wellard, *Properly Accounting for Domestic Violence in Child*

recognized the critical reforms needed in the state's parentage law, and parentage reformers recognized the importance of providing additional protections to allay concerns about domestic violence.⁶⁵

CONCLUSION

Too often, courts fail to appreciate the reality of domestic violence.⁶⁶ This failure harms not only parents but also children. Children are also harmed when courts fail to protect their relationships with their parents. Functional parent doctrines allow courts to safeguard a child's relationship with the person who is parenting them. Like all legal doctrines, functional parent doctrines may be used for improper purposes. Abusive former partners may invoke the doctrines as a means to harass and coerce the child's legal parent. Data from our nationwide empirical study suggests that this misuse of the doctrines is relatively rare. Our close reading of relevant cases adds complexity and variation in ways that complicate the perceived relationship between domestic violence allegations and functional parent doctrines. In our view, functional parent doctrines can and should be designed to address serious concerns with domestic violence while also protecting functional parent-child relationships.

Custody Cases: An Evidence-Based Analysis and Reform Proposal, 26 MICH. J. GENDER & L. 1, 33-34 (2019) (“[A] requirement for substantiation of an abuse claim is contrary to the dynamics of domestic violence. Survivors of domestic violence, specifically women, often do not report domestic violence to law enforcement or healthcare professionals before separating from their partner, as they correctly fear that the report could be used against them.” (footnotes omitted)).

⁶⁵ See *AAC Adoption and Implementation of the Connecticut Parentage Act: Testimony Regarding H.B. 6321 Before the Judiciary Comm.* (Conn. 2021) (testimony of Liza Andrews, Dir. of Pub. Policy and Commc'ns, Conn. Coal. Against Domestic Violence) (“We appreciate and support the intent of this bill which seeks to . . . create meaningful protections and access to legal parentage for all children, including those with unmarried, same-sex, or non-biological parents . . . We want to acknowledge and thank the proponents of the bill for their willingness to hear our concerns and build in some protections against misuse.”).

⁶⁶ See generally Meier, *supra* note 5.