Chicago-Kent Law Review

Volume 92
Issue 1 *Changing American State and Federal Childcare Laws*

Article 3

7-26-2017

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Recommended Citation
June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 Chi.-Kent L. Rev. 9 (2017).
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol92/iss1/3

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PARENTS, BABIES, AND MORE PARENTS

JUNE CARBONE & NAOMI CAHN*

The possibility of three parents has arrived. A growing chorus of law review articles favors such recognition[1], and several states authorize such a result either explicitly or through doctrines such as de facto parentage or third party visitation statutes.[2] The Supreme Court's decision in *Obergefell v. Hodges*,[3] which granted same-sex couples the same access to marriage as other couples, is likely to accelerate these developments. While *Obergefell* does not resolve questions about what the ability to marry means for establishing parental relationships, it opens the door to further recognition of parentage on the basis of factors other than biology. And without the limitation of biology, the courts are increasingly likely to find that more than two adults have assumed parental roles. The unresolved legal issue on the horizon, for same-sex and different-sex partners becomes: what does it mean as a practical matter in custody and child support disputes to say that a child has three legal parents?

The number of jurisdictions recognizing three parents is increasing, albeit without full resolution of the implications. The American Law Insti-

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1. *See, e.g.*, Laura N. Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171 (2008); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J. L. & FAM. STUD. 231 (2007); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 312 (2007) [hereinafter Jacobs, *Why Just Two?*]. Professor Brian Bix has rebuked conservative commentators who respond to the possibility of multiple parenthood with "bogeyman" arguments such as "[o]nce" we cross the border into legalized multiple parenthood, we have virtually arrived at the abolition of marriage and the family." Brian Bix, *The Bogeyman of Three (or More) Parents*, U. OF MINN. L. SCH. LEGAL STUD. RES. PAPER SERIES NO. 08-22, at 3 (alteration in original); *see also* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 267 (2009).

2. State and courts' recognition is discussed *infra*, Part II. California became the first state to adopt legislation explicitly recognizing three parents in 2013. CAL. FAM. CODE § 7612(c) (West 2016) *amended by* S.B. 1171, 2016 Cal. Legis. Serv. Ch. 86 (West). Maine, which recognizes de facto parentage provisions, now explicitly permits multiple parents. *See* ME. REV. STAT. ANN. tit. 19-A, § 1891 (2016) (de facto parents), and ME. REV. STAT. ANN. tit. 19-A, § 1853 (2015) (effective July 1, 2016) ("Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents.").

3. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

tute's (ALI) *Principles of the Law of Family Dissolution* (*Principles*) explicitly address the different functional roles an adult can assume in a child's life, thereby permitting the establishment of multiple parents.[4] The Uniform Law Commission is engaged in drafting a model act that would allow custody rights for "non-parents."[5] Neither measure, however, fully reconciles expanded recognition with existing approaches to custody rights or support obligations for those adults deemed "parents."[6] Do all parents, whatever their numbers, acquire equal parental standing, with equal liability for child support and equal standing to seek custody and visitation? And if they do, how should the courts apply such principles? Should they seek to equalize child support obligations and custody and visitation rights in accordance with the parents' ability to provide for the child or should they take other approaches? Opponents of the recognition of three or more parents have argued that such arrangements are unworkable,[7] while proponents tend to defer to the best interest standard, leaving individual judges to work out appropriate solutions.[8]

At the core of these disagreements is the issue of equality—can and should the principle of equal parental status survive the recognition of more than two adults as legal parents?[9] We believe that it should not necessarily do so, and that the failure to address the possibility that a person may be a

4. AM. LAW. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b), (Ira M. Ellman et al. eds., 2002) [hereinafter ALI PRINCIPLES].

5. UNIF. LAW COMM'N , NON-PARENTAL CHILD CUSTODY AND VISITATION ACT (Interim Draft Apr. 19, 2016), http://www.uniformlaws.org/Committee.aspx?title=Non-Parental%20Child%20Custody%20and%20Visitation%20Act.

6. Some scholars have begun to raise the issue. *See* Susan F. Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2009) [hereinafter Appleton, *Numbers*]; Katharine Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649 (2008) [hereinafter Baker, *Bionormativity*]; Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER, 217, 219 (2010) [hereinafter Jacobs, *More Parents, More Money*]; Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465, 469 (2016) [hereinafter Jacobs, *Parental Parity*]; Dowd, *supra* note 1, at 250–61.

7. ELIZABETH MARQUARDT, INST. FOR AM. VALUES, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS 10–15 (2006) (a survey of relevant developments in the United States and abroad, led by principal investigator Elizabeth Marquardt).

8. Professor Katharine Baker observes, "[a]s more people claim a right to rear a child, the less coherent and unified that child's sense of belonging is likely to be. The more people who have rights with regard to a child, the more likely the child will be the subject of litigation battles— the consequences of which are notoriously bad for children." Baker, *Bionormativity*, *supra* note 6, at 707–08 (alteration in original); *see also* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed,* 70 VA. L. REV. 879, 945 (1984) ("The key disadvantages of broadening access to parenthood are that it may increase the number of adults making claim to a child and enhance the indeterminacy that already exists in child custody law.").

9. *See, e.g.*, Jacobs, *Why Just Two?*, *supra* note 1, at 335 (arguing that "[m]ultiple parenthood does not necessarily mean 'full' parental rights for more than two parents.").

legal parent without rights or responsibilities equal to those of other parents in the child's life poses a major obstacle to full recognition of the realities of the parenting arrangements in many families.

The idea of equal parental standing is a central tenet of modern family law, but the concept is relatively new and far from uniformly applied. Family law once recognized the importance of conferring parental decision-making power in the hands of a single adult.[10] In the early nineteenth century, the father was deemed head of household, and if he died, another man acquired the right to allocate resources and make decisions for the child.[11] By the end of the nineteenth century, that presumption changed to one that assumed that children's interests lay with maternal custody, at least for children "of tender years."[12] In the middle of the twentieth century, courts insisted on naming one, and only one, parent as a custodian, fearing that the conferral of custodial rights on more than one parent at a time would invite mischief and conflict.[13] With increased divorce rates and greater recognition of gender equality, many couples wanted joint custody, and an aggressive fathers' rights movement has fought to enshrine shared parenting as important to children's interests.[14] Today, almost all jurisdictions have adopted a presumption that children's interests lie with the continuing involvement of both parents in the child's life following a break-up,[15] and some jurisdictions go so far as to presume that the parents should enjoy as close as possible to equal time with the child.[16]

10. *See* June Carbone & Naomi Cahn, *Nonmarriage*, __ MD. L. REV. __ (forthcoming 2016).

11. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 3 (Columbia Univ. Press 1994).

12. *Id.* at 61.

13. *See, e.g.*, DeForest v. DeForest, 228 N.W.2d 919, 925 (N.D. 1975) (discussing the need for stability); Lapp v. Lapp, 293 N.W.2d 121, 130 (N.D. 1980) (associating shared custody with lax discipline).

14. Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities* 102 VA. L. REV. 79, 80 (2016); *see* Carbone & Cahn, *Nonmarriage*, *supra* note 10.

15. Dinner, *supra* note 14, at 121.

16. *See, e.g.*, Kelly A. Behre, *Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 WM. & MARY J. WOMEN & L. 525 (2015). Behre explains that Arizona Senate Bill 1127, which passed in August 2012 and went into effect January 2013, encourages joint parenting by changing the best interest criteria to include maximum time with both parents. *Id.* at 595 n.355. Similarly, Arkansas Senate Bill 901 redefined the joint custody presumption following divorce to include equal parenting time and creating a law that enables a judge to modify joint custody to sole custody if "a parent demonstrates a pattern of willfully creating conflict in an attempt to disrupt a current or pending joint-custody arrangement." S.B. 901, 2013 Leg., 89th Sess. (Ark. 2013); *see also* ARK. CODE ANN. § 9-13-101(b)(1)(A)(i)–(ii) (2013).

Those who favor limiting parental status to two adults maintain that recognition of more than that would be unworkable.[17] What they fail to acknowledge is that the difficulties come not from recognition of more than two parents *per se*, but from insistence on equal status for the larger number of adults. In this article, we argue that equal status does not automatically follow from parental recognition. In fact, where three or more adults share parenting, they rarely have—or can or should—assume equal roles in the child's life.[18] Instead, such families are more likely to involve one primary parent and other parents with varying degrees of involvement. This is true whether the multiple adults consist of a marital couple and a sperm donor or surrogate, a stepparent and two biological parents, or any number of other relationships.[19]

We accordingly argue that, where three parents are recognized, custodial decisions should be determined, as they are for any child, in accordance with the best interest of the child. We maintain further that, in determining the child's interests, the courts should apply a primary caretaker presumption; that is, a presumption that the child's interests lie with the strength of the child's relationship to the primary parent and that the other parents' custodial rights should be structured to avoid interference with the strength of that bond. In addition, we argue that the parents' financial obligations should take into account the child's needs, the parents' ability to contribute, and the allocation of responsibility during the parties' relationship. These custody and support presumptions, like other such presumptions, should be rebuttable.[20] This leaves open the possibility of treating all three parents on equal terms where the three agree or where the three have been involved on an equal basis since the child's birth and an allocation of rights and responsibilities is workable.

17. *See* Gabrielle Emanuel, *Three (Parents) Can be a Crowd, But for Some It's a Family*, 3 (Mar. 30, 2014, 6:08 PM), http://www.npr.org/2014/03/30/296851662/three-parents-can-be-a-crowd-but-for-some-its-a-family (Brad Wilcox notes that "the concern here is that three parents will have more difficulty giving their children the kind of consistency and stability that they need to thrive.").

18. *See* Baker, *Bionormativity*, *supra* note 6, at 655 (suggesting that a system of multiple parents is likely to involve "different degrees of parenthood, greater and lesser parenthood.").

19. The principal exception occurs when two parents live together and share custody and a third adult seeks parental recognition. In these cases, the two parents who live together with the child constitute a single decision-making unit and courts need not necessarily allocate responsibilities between the co-resident parents, who may enjoy equal status with each status with each other, legally and practically. When the courts are dealing with three or more adults who do not reside together, however, the allocation of parental rights and responsibilities becomes more complex. For discussion of these various scenarios, see Section IV, *infra*.

20. We discuss the circumstances in which rebuttal of this presumption is appropriate in Section IV, *infra*.

This article makes two basic points. First, the three-parent family is here. Once states accept that parenthood does not depend on either biology or marriage, then three parents are inevitable unless the states go out of their way to rule that adults who otherwise meet their definitions of parenthood will not be recognized.[21] Second, as three-parent family recognition increases, there are difficult questions about how to manage the status of each parent. This difficulty arises because two major trends in family law—the recognition of a multiplicity of family forms and the insistence on parental equality—are on a collision course.

In this article, we first address how the various frameworks for legal parenthood are consistent with recognition of more than two parents, how existing law is moving toward such recognition, and how marriage equality is likely to increase the pressure to acknowledge a variety of alternative family arrangements. Second, we review the existing cases and statutes that have fostered recognition of more than two parents, and document the failure to develop understandings about what such recognition entails when it comes to raising a child. Third, we discuss the problems that would arise if the courts were to try to recognize multiple adults as parents and accord them equal standing in accordance with existing law. Finally, we argue that in those cases with more than two adults who function as parents, the solutions lie in a more flexible approach that permits recognition of a primary caretaker principle.

I. THE FOUNDATIONS OF LEGAL PARENTHOOD AND THE POTENTIAL FOR THREE PARENT RECOGNITION

Historically, marriage served to channel procreation and childrearing into stable, two-parent families. Today's much more varied arrangements often involve multiple adults playing a variety of parental roles. The foundations for the recognition of legal parenthood, applied in light of today's realities, will inexorably result in the recognition of multiple legal parents. Yet, while an increasing number of states recognize this inevitability, they have yet to fully explore the consequences of such developments. This section first examines the bases for legal parenthood, and then explains how these foundations apply to today's families.

21. This does not necessarily mean, however, that even states that otherwise recognize three parents necessarily do so in every case in which three or more adults might qualify in a "parent" category. *See, e.g.*, *In re* Donovan L., Jr., 198 Cal. Rptr. 3d 550, 560, 565 (Ct. App. 2016) (concluding that the juvenile court erred in recognizing three parents, given its determination that the mother's husband—who had lived with mother and child—had been conclusively presumed to be the child's father and the biological father—who claimed recognition as a third parent— lacked an existing parent-child relationship).

A. Determining Legal Parents

Legal parents are those adults upon whom the law confers recognition, imposes financial obligations, and grants standing to seek visitation and custody.[22] The foundation for legal parenthood, though it varies considerably from state to state, proceeds from three factors:

1. Biology:[23] States typically treat the woman who gives birth as a legal parent on the basis of her genetic and gestational connection to the child,[24] and provide various ways for the biological father to receive recognition if he chooses to do so.[25]

2. Function: The American Law Institute's *Principles of the Law of Family Dissolution* and an increasing number of states provide recognition to adults who have assumed parental roles without a biological tie to the child, in some cases on the basis of function alone and in other cases on the basis of a combination of intent, assumption of a parental role, and/or the consent of the initial legal parent.[26] We deliberately term this category "function" and do not include a separate category based on "intent."[27]

22. That is, we use the term "legal" in this section to identify those parents who may be obliged to pay support and who have standing to seek custody. A person can be a biological parent without necessary having recognition as a legal parent. *See generally* LESLIE J. HARRIS ET AL., FAMILY LAW ch. 13 (4th ed. 2010).

23. We use biology here to include both gestational and genetic connections. Some commentators separate them. *See* Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 NEV. L.J. 743, 744–45 (2016) (recognizing "at least" five bases for parenthood: gestation, genetic connection, function, intent and formality).

24. *See, e.g.*, Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645 (2014) (observing that mothers who give birth combine biological and functional bases for parenthood).

25. *Id.* at 664 (observing that courts are more likely to rely exclusively on biology to impose financial obligations on fathers than to grant custodial rights).

26. *See supra* notes 3–5; *infra* Part I.B.

27. LGBT couples began to use the concept of "intent" as a basis for the determination of parenthood after the *Buzzanca* case in California. *See* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 621–22 (2002) (examining reading of *Buzzanca* that places intent on a par with gestation or genetics). More recently, Doug NeJaime describes the combination of intent and function as a basis for recognition of dual parentage in California. Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1211 (2016). We agree that where intent and function occur together, they justify recognition of parenthood, but we have also argued elsewhere that where they conflict, as in *K.M. v. E.G*, the California courts prefer function. The appellate court in *R.M. v. T.A.* explained that although the mother "may have initially intended to raise Child as a single parent, . . . during the first two years of Child's life Mother's relationship with RM developed such that RM, with Mother's full support, *undertook a parental role and established a parent-child relationship with Child*." 182 Cal. Rptr. 3d 836, 853 (Cal. Ct. App. 2015) (emphasis added). In such a case, the courts base parentage on the assumption of a parental function even where that conflicts with the parties' understandings at the time the relationship began. Instead, we believe that intent is important in two different ways: first, as in the *Buzzanca* case, it is important where it encourages reliance and gives rise to parenthood based on estoppel concepts. Second, the consent of an initial parent to a second parent's acquisition of parental

3. Formalities: Parental status may be established or transferred from one adult to another through formal legal actions such as adoption, paternity judgments, or marriage.

In the past,[28] marriage served legally and practically to channel childrearing into two parent families in ways that combined formality, biology, and function.[29] While the law recognized the woman who gave birth as a legal mother on the basis of both biology (i.e., genetics and gestation) and function (the assumption of responsibility for the child over the course of the pregnancy),,[30] fathers gained legal status as parents primarily through marriage. A man who did not marry the mother of his child forfeited the right to a say in the child's life.[31] Moreover, the marital presumption, while a presumption of biology, also limited the evidence that could rebut the presumption, effectively providing a fig leaf that covered up the sometimes messy facts of reproduction, ratifying the husband as a parent without too close an examination of biology.[32] And while women could legally be single parents, their rights to financial and social support typically depended on marriage, creating powerful incentives to enter into two parent families

rights may be important practically and constitutionally. *See* E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child,* 48 ARIZ. L. REV. 97, 99 (2006); June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3 (2006). We do not see intent as a basis for the grant of parental rights, however, by itself; that is, we do not see the intent to be a parent as overriding biology, function, and formalities where it does not give rise to estoppel. The mere fact that a mother's boyfriend intends to be a father, for example, does not ordinarily give him a right to parental status, unless he has assumed a parental function or in some cases relied on the mother's promises. His unilateral intent, without anything more is not enough. *See also* Lewis, *supra* note 23, at 744–55 (distinguishing between intent and function).

28. That is, the relatively recent past. Centuries ago, higher mortality rates meant practically that marriages ended through death at about the same rates as modern marriages end through divorce. Stepparents (and perhaps even "evil stepmothers") were commonplace.

29. Carl E. Schneider, *The Channeling Function in Family Law,* 20 HOFSTRA L. REV. 495, 523 (1992). *See also* Susan F. Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 YALE L.J. & FEMINISM 1, 44 (2016); Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law,* 28 Cardozo L. Rev. 2133, 2133–35 (2007).

30. And as the genetic mother in the era before IVF.

31. The states varied greatly in the degree to which they recognized unmarried fathers or imposed obligations upon them. *See* Baker, *Bionormativity*, *supra* note 6, at 659 n.48 ("not until1973 [did] the U.S. Supreme Court struck down a Texas law imposing a support liability on parents of legitimate children but not on parents of illegitimate children); Serena Mayeri, *Foundling Fathers: (Non-)marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2302 (2016) (exploring the history of non-marital fathers).

32. Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 573, 564 (2000); June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 665 (2016).

and stay there.[33] The result encouraged the unity of biology, function and formalities and enshrined two parent families as "natural" and normative.[34]

B. Legal Parenthood and Today's Families

The advent of assisted reproduction, women's economic independence, readily available paternity testing, and increased family variety have challenged the marital-based two-parent family norm. With less stable families, multiple adults may come in and out of a child's life.[35] With reliable DNA testing, the facts of reproduction are readily ascertainable for anyone who wishes to know them. And with assisted reproduction, the biological connections between parents and children have become more varied: the woman who gives birth may not necessarily be the genetic mother of a child, and three-parent in vitro fertilization—with three adults contributing genetic material in the creation of children—already exists.[36] Considering biology, function and formalities therefore supports recognition of three or more parents in complex ways, and today's families frequently involve more than two adults in caring for a child.[37] Three developments in particular compel such recognition:

1. Lesbian, Gay, Bisexual and Transgender (LGBT) Families: For same-sex couples who wish to produce a child they intend to raise together, reproduction necessarily involves more than two adults. Many lesbian couples would like to use a known donor in conceiving a child and include the donor in the child's life in various ways. Gay men often recruit egg donors and gestational carriers in creating a child, and in some cases wish to use egg donors or carriers who may have a close relationship to one or both of the men.[38] These evolving family relationships involve more than two

33. Indeed, many mothers abandoned children in the hopes that others would be able to provide better care for them. *See* Baker, *Bionormativity*, *supra* note 6, at 656–57.

34. Susan Appleton argues that "the allure of a bi-parentage rule lies in its ability to naturalize a normative family in which only enduringly monogamous heterosexual couples reproduce. This position embodies a strong version of what Baker calls 'bionormativity.'" Appleton, *Numbers*, *supra* note 6, at 21.

35. When parenthood becomes less binary and exclusive, it becomes less private and less biological as well. Baker, *Bionormativity*, *supra* note 6, at 655.

36. See Carbone & Cahn, *Marriage and the Marital Presumption Post-*Obergefell, *supra* note 32 at 665, for a review of recent developments; see Jennifer Couzin-Frankel, *Unanswered Questions Surround Baby Born to Three Parents*, SCI. MAG., Sept. 29, 2016, http://www.sciencemag.org/news/2016/09/unanswered-questions-surround-baby-born-three-parents.

37. *See id.*

38. *See, e.g.*, June Carbone & Jody L. Madeira, *The Role of Agency: Compensated Surrogacy and the Institutionalization of Assisted Reproduction Practices,* 90 WASH. L. REV. (ONLINE) 7, 19–25 (2015), http://www.repository.law.indiana.edu/facpub/1952 (describing case involving sister who acted as gestational carrier for child conceived using her brother's partner's sperm and an egg donor); Jerry

adults on a variety of terms. For example, while all lesbian couple require a sperm donor to give birth, some "sperm donors" provide sperm pursuant to an understanding that they play a parental role while others do so in circumstances where they expect to have no further involvement in the child's life.[39] Yet, none of these understandings are necessarily enforceable and, as a practical matter, the donor's role may change over the course of the child's life. In addition, even where a same-sex couple agrees at the conception of a child that they will both play parental roles, they may separate, and repartner over the course of a child's minority, introducing new adults playing parental roles in the child's life.[40] LGBT advocates have been in the forefront of efforts to gain recognition of more than two parents in part because they have consciously fought to create alternate models that better fit their circumstances.[41] At the same time, many lesbian couples have been eager to limit recognition of sperm donors as full legal parents with equal rights who could intrude on the arrangements that the women work out for themselves.[42]

2. Stepparent Families: Higher divorce rates have led to higher rates of remarriage,[43] introducing stepparents into the children's lives. Stepparents may play a variety of roles: they may become functional parents to the exclusion of one or both of the biological parents, supplement the role of the biological parents to varying degrees, or play a significantly lesser role,

Mahoney, *8 Surprising Facts About Egg Donors*, MOMMY MAN BLOG (June 20, 2012), https://jerrymahoney.com/2012/06/20/8-surprising-facts-about-egg-donors/.

39. Indeed, even where two same-sex parents have used adoption to receive formal recognition, they have not always severed the parental status of the sperm or egg donor as part of the adoption process. *See* Carbone, *From Partners to Parents Revisited*, *supra* note 27, at 13 n.60, 14 n.67. *See also* June Carbone and Naomi Cahn, Jane the Virgin *and Other Stories of Unintentional Parenthood*, ___ U.C. IRVINE L. REV. ___ (forthcoming 2017).

40. A particularly complicated case led California to recognize the possibility of more than two legal parents. *See In re* M.C., 123 Cal. Rptr. 3d 856, 862 (Cal. 2011), *superseded by statute*, S.B. 274, 2013 Cal. Leg. Sess. § 1 (Cal. 2013). Of course, the disputes that arise from separation of two initial legal parents and the inclusion of new partners in the child's life resemble (and are often identical to) those involving stepparents. *See, e.g.,* Margaret M. Mahoney, *Stepparents As Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 84 (2006) (observing that "[u]nder the traditional model of parenthood and family, this important family status [legal parenthood] is limited to the categories of biological and adoptive parents and excludes stepparents who marry the custodial parents of minor children.").

41. "The label 'parent' mattered [in Jacob-Shultz and the Canadian case], because the law makes such titles important. The courts honored and respected the particular families—in which no one voiced opposition to parental status for any of the three adults in each case—and also legitimated the lived experiences of the children in question." Appleton, *Numbers*, *supra* note 6, at 68 (internal quotations added).

42. See, e.g, Deborah L. Forman, *Exploring the Boundaries of Families Created with Known Sperm Providers: Who's in and Who's Out?*, 19 U. PA. J.L. & SOC. CHANGE 41, 93-94 (2016),

43. ANDREW CHERLIN, THE MARRIAGE GO-ROUND 3–12 (2009) (observing that American marriages are less stable than European cohabitations).

particularly in circumstances where both biological parents continue to play active roles in the child's life.[44] The law, however, has historically treated stepparents in all or nothing terms; those who adopt receive full parental recognition to the exclusion of at least one of the biological parents, while those who do not may not receive any parental status at all once the relationship ends.[45] Stepparents have sought and increasingly won increased recognition,[46] but questions remain about whether such recognition necessarily must come through the replacement of a biological parent and the circumstances, if any, in which their parental status equals that of an initial parent.[47] Moreover, stepparents are less well-organized than LGBT advocates and have less uniform interests; after all, many adults are a full legal parent in one family and a stepparent in a second family.[48] And many stepparents—unlike same-sex couples who intentionally set out to create three-parent families—do not necessarily have a single model in mind when they create blended families. Spouses with older children at the time of their marriage, for example, may not want or expect stepparents to assume a role equivalent to that of the legal parent, while spouses with younger children or spouses without a second biological parent active in the child's life may encourage their new spouses to assume such a role. Many stepparents find, moreover, that their role changes over time, often in ways that they did not necessarily anticipate at the time of the marriage.[49]

44. *See, e.g.*, David Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" after Divorce* in DIVORCE REFORM AT THE CROSSROADS 102, 104–08, 118–19 (Stephen D. Sugarman & Herman Hill Kay eds., 1990) (describing varied stepparent role).

45. *See* Margaret M. Mahoney, *Stepparents As Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 84 (2006) (observing that "[u]nder the traditional model of parenthood and family, this important family status [legal parenthood] is limited to the categories of biological and adoptive parents and excludes stepparents who marry the custodial parents of minor children."); Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the Ali Found A Better Definition*?, 36 FAM. L.Q. 227, 227 (2002) (observing that "[o]verall there is a lack of legal recognition of the stepparent/stepchild relationship . . . If the marriage terminates through divorce or death, they most often have no rights of custody or visitation, no matter how longstanding their stepparent role."). More recently, however, the states have expanded the ability of to seek visitation as third parties, but the courts have noted that the extension of such rights still requires deference to the legal parents in accordance with *Troxel* and therefore requires a heightened showing before the courts can award even visitation rights. Mahoney, *supra* at 103–04.

46. *See, e.g.*, Jeffrey A. Parness, *Third Party Stepparent Childcare*, 67 MERCER L. REV. 383, 391 (2016).

47. *See* Mahoney, *supra* note 45, at 84.

48. See, e.g., *In re* Marriage of Engelkens, 354 Ill. App. 3d 790, 791, 821 N.E.2d 799, 801 (2004)(involving custody and visitation issues with respect to both a child born within the marriage, who turned out not to be the biological child of the husband, and the husband's child from a previous relationship).

49. See, e.g., Kimberly Michele Leyerle, *A Shift from Incidental to Instrumental: A Promise of Stability When Stepparents Have Been A Primary Source of Parenting Support*, 14 WHITTIER J. CHILD & FAM. ADVOC. 90 (2015) (asking "what legal rights do residential stepparents obtain when they shift from merely incidental figures to instrumental, primary caregivers, and provide substantial economic

3. Unmarried Families: Increasing reproduction outside of marriage involves higher rates of multi-partner fertility and more complex family structures. While biological mothers and fathers have become much more likely to sign voluntary acknowledgments of paternity at birth and establish formal legal parenthood on the basis of biology,[50] these relationships are much more likely than married ones to end during the children's minority. When the relationships end, unmarried fathers' are less likely than married ones to seek parenting orders,[51] and less likely to receive custodial orders if they do end up in court.[52] Given the greater relationship instability, unmarried parents are more likely to cohabit with multiple adults, who assume a variety of parenting roles that range from fully committed to transitory, and they often go on to bear additional children with new partners.[53] As a practical matter, therefore, these families often include more than two adults playing parental roles, and the parental roles fall on a broad continuum of adult involvement. Moreover, the poorer the community and the greater the variety in family arrangements, the less likely parents are to share parenting on an equal basis or to formalize the parenting arrangements that exist.[54] The interests of these families, however, may be even more poorly represented in the legal system than those of stepparents, and fathers and moth-

and emotional support?"); *id.* at 94 (noting distinctions between stepparents who have been "longtime caregivers" versus others).

50. *See* Leslie J. Harris, *Reforming Paternity Law to Eliminate Gender, Status, And Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1300, 1308–13 (2013) (observing that most unmarried parents sign voluntary acknowledgements of paternity).

51. *See* PATRICIA BROWN & STEVEN T. COOK, CHILDREN'S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN, 2, 9–12, 18–19 (Inst. for Research on Poverty, Univ. of Wisconsin-Madison 2012); *see also* Stacy Brustin & Lisa V. Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 802, 815 (2015)("Unlike divorce and custody proceedings, which typically permit or require parents to address issues of custody and child support together, proceedings in child support courts or administrative tribunals generally do not permit parents to address issues of custody or visitation").

52. *See* PATRICIA BROWN & STEVEN T. COOK, *supra* note 51, at 2, 9–12, 18–19; *see also* Brustin & Martin, *supra* note 51, at 815 (noting the inability to raise custodial claims in some proceedings).

53. *See, e.g.*, Karen Benjamin Guzzo, *New Partners, More Kids: Multiple-Partner Fertility in the United States,* 654 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 66, tbl.2 (2014). *See also* Baker, *Bionormativity*, *supra* note 6 at 655 ("Because contemporary adult relationships are less likely to be permanently binary and exclusive, so is parenthood.").

54. Sociologists report, for example, that "certain conditions—such as extreme economic marginality, frequent conflict, involvement in crime, incarceration, or even infidelity—can be dealt with in a nonmarital union but would virtually mandate a divorce if they were married." Laura Tach & Kathryn Edin, *The Compositional and Institutional Sources of Union Dissolution for Married and Unmarried Parents in the United States*, 50 DEMOGRAPHY 1789, 1815 (2013) (citations omitted). They also find that more than one-third of unmarried fathers have been incarcerated, compared with less than 10% of married fathers. *Id.* at 1799.

ers may not necessarily agree on either what they would like to see the law do or even on the terms of their on-going relationships.[55]

All of these groups involve more than two adults in parental roles, and recognition of a greater number of parents would be appropriate in many of these cases without agreement on what the nature of that recognition should be. The question therefore is how greater recognition to additional parents can be reconciled with the principles that govern family law generally.

II. Finding Three Parents

As this section shows, a growing number of states permit recognition of three parents through case law or legislation. While these jurisdictions allow more than two people to assume the title "parent," few have systematically worked through what this recognition means, and the states that have addressed the issue do not necessarily agree with each other on what multiple recognition means. In this section, we review the existing states of multiple parenthood and identify cases in which courts have attempted to work through the complexities of not only assigning parentage, but determining what parental status means in custody and other determinations.

A. Dual Paternity

Louisiana became the first state to recognize three parents when it adopted a system of dual paternity.[56] The Supreme Court of the United States had declared Louisiana law to be unconstitutional when it limited inheritance rights to legitimate children.[57] The Louisiana Supreme Court responded by concluding that children could inherit from their nonmarital biological fathers without losing their status as the legal children of their mothers' husbands, and thus they could inherit from both men.[58] In later cases, the Louisiana courts extended the concept to find biological fathers liable for support, even where another man retained his status as the child's

55. *Compare* Kathryn Edin & Maria Kefelas, Promises I Can Keep: Why Poor Women Put Motherhood Before Marriage (2005) (showing the mothers' viewpoints) *with* Kathryn Edin & Timothy J. Nelson, Doing the Best I Can: Fatherhood in the Inner City (2013) (showing the men's perspectives).

56. *E.g.*, Warren v. Richard, 296 So. 2d 813, 815 (La. 1974).

57. Levy v. Louisiana, 391 U.S. 68, 70–71 (1968) (concluding that "under the Equal Protection Clause of the Fourteenth Amendment a State may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right.")

58. *Warren*, 296 So. 2d at 817. Under the Uniform Probate Code, a child can inherit through a parent whose rights have been terminated, in some circumstances; notwithstanding the three lines of inheritance, the UPC does not otherwise address the possibility of three parents. UPC Section 2-119(b).

presumed father because of marriage to the mother.[59] The Louisiana courts did not, however, divide custody, explaining that "a biological father who cannot meet the best-interest-of-the-child standard retains his obligation of support but cannot claim the privilege of parental rights."[60]

The Louisiana courts, in administering these provisions, have never treated three parents as having equal physical and legal custodial rights with respect a child. Instead, the one case we could find where two men shared custodial rights in a child involved circumstances where the biological father had married the mother and lived with her.[61] In that case, although the appellate court found no basis to transfer domiciliary custody from the husband to the biological mother and father, it affirmed the part of the trial court order that had extended to the biological father the same rights the mother enjoyed to joint legal custody and visitation.[62]

Louisiana has since amended its paternity statutes in order to limit the ability of a putative father to destabilize a two-parent family.[63] Consequent-

59. *See* Poche v. Poche (*In re* Interest of Poche), 368 So. 2d 175, 176–77 (La. Ct. App. 1979) ("It sufficed to simply determine that the child was in fact the biological child of the alleged father. The fact that the law considered the child to be the legitimate child of another will not alter the result and 'cannot deprive her of a right which illegitimate children generally may have . . . '") (quoting *Warren*, 296 So. 2d at 817)). In Smith v. Cole, 553 So. 2d 847, 848 (La. 1989), the divorced mother obtained "permanent custody" of the two children of the marriage. The court explained that the husband could not be found. She later brought a filiation action against the biological father of a third child. The court explained that the husband was the presumed father, but this recognition did not preclude recognizing the biological father's "actual paternity." *Id.* at 854. It noted that:

> Louisiana law may provide the presumption that the husband of the mother is the legal father of her child while it recognizes a biological father's actual paternity. When the presumptive father does not timely disavow paternity, he becomes the legal father. A filiation action brought on behalf of the child, then, merely establishes the biological fact of paternity. The filiation action does not bastardize the child or otherwise affect the child's legitimacy status.

Id. at 855.

The court found that the biological mother and father were both responsibility for supporting the child, but explicitly "decline[d] for now to hold the legal father will, in all factual contexts, be made to share the support obligations with the biological father and the mother." *Id.*

60. T.D. v. M.M.M., 730 So. 2d 873, 876 (La. 1999). In *Geen v. Geen*, a divorce action, custody had been awarded to the husband. 666 So. 2d 1192, 1193 (La. App. 1995), *writ denied*, 669 So. 2d 1224 (La. 1996). The mother later married the biological father, who sought to establish paternity, and both of them moved to modify the custody award. The court of appeal reversed the trial court grant of a change of custody, finding that while the biological father was entitled to establish paternity, he had not established a basis for transferring custody from the ex-husband, who had an established relationship with the child. The court nonetheless affirmed the original custody decree, extending joint legal custody to all three parents, but retained residential custody with the ex-husband. *Id.* at 1197. It found that "The relationship between the parties, and among each of the parties and the child, is as good as it can be under the circumstances." *Id.*

61. *Geen*, 666 So. 2d at 1194.

62. The *Geen* court explicitly stated, "We will, therefore, so amend the judgment to reflect that the parties were awarded joint legal custody." *Id.*

63. "If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the

ly, the biological father has only one year in which to establish paternity in cases in which the child already has a legal father.[64] Louisiana thus promoted the stability of two-parent families, and it did so not by extending recognition to multiple parents as it had in the past, but by making it more difficult to do so.[65]

The dilemma Louisiana faced arose from the conflict between the marital presumption and the facts of biological paternity.[66] Every state has wrestled with this issue to some degree, reaching different results.[67] As a practical matter, these cases often involve two men who have played or wish to play parental roles.[68] While most states have responded by choosing to recognize only one of the men as a legal parent, California dealt with the issue by expanding the category of parents who qualified as "presumed parents" and thus were entitled to standing to seek custody and visitation.[69] This allowed California courts discretion to choose among the potential parents on the basis of the circumstances of individual cases without forcing a choice rigidly based on either biology or marriage.[70] The practical consequence resembles dual paternity in Louisiana, with the courts typically choosing to protect the child's established relationships, but not neces-

father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs." LA. CIV. CODE ANN. art. 198 (2006). *See id.* art. 197, on the child's right to sue. *See generally* Katherine Shaw Spaht, *Who's Your Momma, Who Are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307 (2007).

64. Katherine Spaht observed that the purpose of the relatively short time period was "to protect the child from the upheaval of such litigation and its consequences in circumstances where the child may actually live in an existing intact family with his mother and presumed father or may have become attached over many years to the man presumed to be his father." *Id.* at 324 (citing art. 198 cmt. e (2006).

65. Spaht notes further that the statute limited the circumstances in which the mother could initiate an action disavowing the paternity of her husband and that if she succeeded: "A judgment rendered in favor of the mother terminates existing child custody and visitation orders. However, the former husband in extraordinary circumstances may be granted reasonable visitation if the court finds it is in the best interest of the child." *Id.* at 316 (citing LA. REV. STAT. ANN. § 9:403(C)(1)). In these cases, the child would have two, not three, legal parents, but the former husband would have the ability to seek visitation as a third party.

66. Indeed, Spaht observes that Louisiana adopted dual paternity principally as a way to insure continuing recognition of the husband's parentage. *Id.* at 321 (noting that "after *Michael H. v. Gerald D.*, . . . the Law Institute Council concluded that denying the biological father of a child the right to establish his filiation when another man was presumed to be the father was not unconstitutional" suggesting that Louisiana lawmakers thought it was unconstitutional beforehand.).

67. *See* June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L. Q. 219, 220 (2011).

68. *See, e.g.*, Michael H., v. Gerald D., 491 U.S. 110 (1989).

69. Carbone, *From Partners to Parents Revisited*, *supra* note 27 at 14, 23 (observing, however, that in some of the cases that involved same-sex parents the California courts looked the other way while two lesbians established parental relationships without terminating the parental status of the sperm donor).

70. *See, e.g.*, *In re* Jesusa V. 85 P.3d 2, 14 (Cal. 2004).

sarily recognizing more than two parents with custodial rights at any one time.[71] These cases laid the foundation for California's eventual statutory recognition of the possibility of three legal parents.[72] In contrast, the ALI, to which we will turn next, dealt with the same issues by incorporating the marital presumption into its adoption of parenthood by estoppel and de facto parenthood provisions.[73]

B. Parents by Estoppel and De Facto Parentage

The ALI, in its *Principles*, sought to provide greater recognition of adults who assumed functional roles as parents without either a biological or formal tie to the child.[74] In doing so, the Principles acknowledged the possibility that more than two adults would meet the standards they articulated. Since then, several states have used recognition of functional parents, either by statute explicitly addressing de facto parenthood or through interpretation of individual state parentage provisions, to grant standing to more than two adults who seek standing to assert parental rights. This section first describes the ALI *Principles*, then reviews state legislation recognizing de facto parentage, and finally summarizes various state cases expanding recognition of functional parents in ways that lay the foundation for more than two parents.

1. The ALI *Principles*

In the 2002 *Principles*, the ALI created two different categories of adults who could receive recognition as parents based on function.[75] Application of these categories, as the ALI recognized, creates a foundation for the recognition of more than two parents.[76]

The first involves "parents by estoppel," which includes those adults who, though not otherwise legal parents, have assumed a parental role "as part of a prior co-parenting agreement with the child's legal parent (or, if

71. Carbone, *From Partners to Parents Revisited*, *supra* note 27 at 3 (explaining that under California doctrine, "the courts can pick and choose who makes a good father.")

72. *See infra* notes 122–130, *discussing* CAL. FAM. CODE § 7612(c) (West 2016).

73. Indeed, the ALI *Principles* overlap with some of the circumstances that could arise where a married man raises his wife's child either with the mistaken belief that the child is his biological offspring or holding the child as his own even though he knows that he is not biologically related to the child. *See* ALI PRINCIPLES, *supra* note 4, § 2.03(1)(b). In some states, the courts treat husbands as de facto parents rather than simply relying on the marital presumption. *See* Althouse, *supra* note 1, at 176. This is true in part because many states have made the marital presumption easier to rebut. *See* Carbone & Cahn, *Marriage, Parentage, and Child Support, supra* note 67.

74. ALI PRINCIPLES, *supra* note 4, § 2.03.

75. *Id.*

76. *Id.*

there are two legal parents, both parents)".[77] The term "estoppel" arises because the legal parent or parents who invited the assumption of a parental role are then estopped from denying recognition of the other adult's parental status.[78] The *Principles* determine the assumption of a functional role by requiring that the parent by estoppel be either obligated to pay child support, have lived with the child for at least two years with a reasonable, good-faith belief that he was the child's biological father, or held himself out and accepted full and permanent responsibilities as a parent.[79] Recognition as a parent under this section is subject to a determination that such recognition is in the child's interests, and it allows the parent by estoppel to seek custody on the same terms as other legal parents.[80] While the Principles do not preclude recognition of more than two parents, the comments observe that "the case for recognition of an additional parent is weaker if a child already has two (or more) parents, although this factor is not dispositive, particularly if one of the child's legal parents has formed no significant parental relationship with the child."[81]

The *Principles*, both in their definition of parenthood and their allocation of custodial time, give more weight to functional relationships than to biological or formal ties. They accordingly make it unlikely that courts would grant comparable custodial awards to more than two adults, unless all three have assumed shared responsibility for the child before the dissolution of the relationships.[82]

The second category recognizes "de facto" parents and defines a de facto parent as someone who:

> (1) lived with the child for a significant period of time not less than two years; (2) with the agreement of the legal parent; (3) primarily to form a parent-child relationship and not primarily for financial compensation, or as a result of a legal parent's complete failure to perform caretaking functions; and (4) regularly performed a majority of the caretaking functions for the child or regularly performed a share of caretaking functions

77. *Id.*

78. For a more general discussion of parenthood by estoppel, see HARRIS ET AL., FAMILY LAW, *supra* note 22, at 956.

79. ALI PRINCIPLES, *supra* note 4, § 2.03.

80. *Id.*

81. *Id.*

82. The ALI *Principles* specify that:

> [T]he court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action.

Id. § 2.08(1).

at least as great as that of the parent with whom the child primarily lived.[83]

These categories create a hierarchy of custodial rights.[84] While a parent by estoppel occupies a status comparable to that of a legal parent, de facto parents do not. A de facto parent, for example, cannot receive primary custodial responsibility if a fit legal parent is able and willing to take such responsibility.[85] A de facto parent, in turn, is favored over non-parents.[86] In addition, while the de facto parent category also allows for recognition of more than two parents, the *Principles* recommend that the courts "should limit or deny an allocation otherwise to be made if, in light of the number of other individuals to be allocated responsibility, the allocation would be impractical."[87] And the *Principles* indicate that significant decision-making for the child should not be shared by more than two parents.[88] The *Principles* thus extend the boundaries of those who can be recognized as performing parent-like responsibilities, without any effort to treat them as equally important to the child.

2. De facto Parentage

Following adoption of the ALI *Principles*, a number of states have decided to recognize de facto parents, either by adopting the ALI *Principles* or by using the concept in accordance with individual state terms. Every state that has recognized this type of functional basis for parenthood has opened the door to the possibility of three parents, though not all of the states have decided whether they will permit such recognition or how to allocate responsibility once multiple parents exist.[89]

83. *Id.* § 2.03(1)(c).

84. *See* Appleton, *Numbers*, *supra* note 6, at 29–30 (describing the principles as creating a parental hierarchy).

85. ALI PRINCIPLES, *supra* note 4, § 2.18(1)(a). The *Principles* provide that courts:

> (a) should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility unless
>
> (i) the legal parent or parent by estoppel has not been performing a reasonable share of parenting functions or
>
> (ii) the available alternatives would cause harm to the child.

Id. In addition, de facto parents on not liable for support solely because of their status as de facto parents. *Id.*

86. *Id.* § 2.18(2).

87. *Id.* § 2.18(1)(b).

88. Althouse, *supra* note 1, at 189.

89. Such functional recognition includes not only de facto parenthood provisions, but third party visitation statute that allow stepparents or other to seek custodial rights. Some families, who wish to create three parent families, have used some provisions of these provisions as a foundation for contractual agreements allocating parental rights. The validity of such provisions have yet to be tested in court.

a. De facto *Parentage Statutes*: Some jurisdictions, including the District of Columbia and Delaware, have enacted statutes recognizing that an adult might become a de facto parent with the permission of the child's parent or parents.[90]

Delaware has used the concept of de facto parents to sort out the allocation of parental rights where a woman, who conceived a child with one man, marries or lives with another man who assumes responsibility for the child. In *Jw. S. Jr. v. Em. S.*, for example, the court recognized the biological father as a legal father on the basis of paternity tests and the mother's former husband as a de facto parent. [91] The husband, who had raised the child since birth, had full legal custody and primary physical custody on the basis of a temporary emergency order.[92] The biological father had been enjoying visitation one day a week, and he became involved in litigation only when the de facto father and mother went to court.[93] The de facto father did not object to inclusion of the biological father in the child's life.[94] The court concluded that the child viewed both men as her fathers and that all three—the two men and the mother—would have standing as legal parents to seek custody.[95] On the other hand, in a subsequent case, a different Delaware court refused to award de facto parent status to a husband, who allegedly abused the children, on the ground that the seven months he had lived with the children was not long enough to establish a parental relationship.[96]

b. *"Common law"* De facto *Parenthood Recognition*: Other states have recognized more than two parents without express statutory authorization. These states have simply found, on the basis of the individual circumstances of the cases before them, that more than adults have met the

See, e.g, MARTHA ERTMAN, *Introduction* to LOVE'S PROMISES, at xv (Michael Bronski ed. 2015) (describing her three-parent family of choice).

90. D.C. CODE § 16-831.01(1)(A)(iii) (2016); DEL. CODE ANN. tit. 13, § 8-201(c)(1) (2016) (if the de facto parent "[h]as had the support and consent of the child's parent or parents"). *See also* Nancy Polikoff, *More Thoughts on the Delaware De Facto Parenting Law—A Child Can Have Three Parents,* BEYOND (STRAIGHT AND GAY) MARRIAGE (Aug. 15, 2009, 2:36 PM) http://beyondstraightandgaymarriage.blogspot.co/2009/08/more-thoughts-on-delaware-de-facto.html. DC deems a de facto parent a "parent" for purposes of establishing custody and child support, and defines a "third party" as someone other than a parent or de facto parent. D.C. CODE §§ 16-831.01(5), 831.03 (definition of "third party"). For further discussion, *see* COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW §§ 7:5, 7:7 (Westlaw, Thomson Reuters, 2016) (state use of terms such as "psychological" and "de facto" parent to recognize functional parenthood).

91. Nos. CS11–01557, CS13–01083, 2013 WL 6174814, at *6 (Del. Fam. Ct. May 29, 2013).

92. *Id.* at *2.

93. *Id.*

94. *Id.*

95. *Id.* at *6.

96. J.B. v. R.L., 2016 WL 2591327, at *13 (Del. Fam. Ct. Mar. 10, 2016).

statutory or case-based definitions of parenthood. The courts in these jurisdictions have then struggled with how to allocate parental rights, and when they have addressed the issue, they have generally established a hierarchical relationship between the adults.

Pennsylvania was one of the first to use functional parentage provisions to recognize three parents. *Jacob v. Shultz-Jacob*[97] involved a custody dispute between two same-sex partners—who had entered a civil union in Vermont—and the biological father—who was actively involved in caring for the children. The same-sex partner who did not have a biological relationship with the child sought custodial rights on the basis of *in loco parentis.*[98] The Pennsylvania court explained that the "rights and liabilities arising out of that relation [*in loco parentis*] are, as the words imply, exactly the same as between parent and child."[99] *In loco parentis* status provides third parties, defined as "persons other than biological parents," standing to seek custody or visitation over the objections of a biological parent.[100] Despite this, the court emphasized that the parental status based on *in loco parentis* is not equal to parental status based on biology.[101] Instead, the court observed that:

> [W]here the custody dispute is between a biological parent and a third party . . . the parents have a prima facie right to custody which will be forfeited only if convincing reasons appear that the child's best interest[s] will be served by an award to the third party. Thus, even before the proceedings start, the evidentiary scale is tipped, and tipped hard, to the [biological] parents' side.[102]

In *Jacob v. Shultz-Jacob*, the court then awarded the former partner primary custody of one of the four children at issue, awarded the other partner primary custody of three children, and provided the sperm donor with partial custody, one weekend a month, of his two biological children.[103] The court of appeals upheld the award, noting that the award to the biological father was not at issue in the appeal.[104] It reversed and remanded on the issue of support, however, because the trial court had concluded that it had no authority to require support from more than two parents.[105] The

97. Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Sup. Ct. 2007).

98. *Id.* at 477.

99. *Id.* (quoting Commonwealth v. Cameron, 179 A.2d 270, 272 (Pa. Sup. Ct.1962)).

100. *Id.*; *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, 502–09 (1990).

101. *Jacob*, 923 A.2d at 477.

102. *Id.* (quoting Charles v. Stehlik, 744 A.2d 1255, 1258 (Pa. 2000)).

103. *Id.* at 476.

104. *Id.* at 476, n.2.

105. *Id.* at 482.

appellate court stated that it was "not convinced that the calculus of support arrangements cannot be reformulated" to account for the proportional contributions of both obligees, and held that equitable estoppel principles prevented an adult who claimed parental status for custody purposes from denying responsibility for financial support.[106]

As a practical matter, the decision recognized all three adults as parents, and divided custody rights and financial obligations among the three. In doing so, however, it made no pretense of treating all three parents equally. Instead, in accordance with the children's interests, it identified a primary parent for each child, and adjusted the awards in accordance with that determination.[107]

In subsequent cases, the Pennsylvania courts have applied the same principles to stepparents. *A.M. v. T.V.*,[108] for example, involved a dispute between the biological father, who had custody, and the biological mother. Because the mother had increased her involvement with the child, she opposed the custodial claims of a stepparent who had been married to the father and taken care of the child during the marriage. The appellate court reversed the trial court's dismissal of the stepmother's action. It explained that the stepparent gained *in loco parentis* standing based on her assumption of a parental role with the acquiescence of the biological parent; once established, the *in loco parentis* relationship could not be disrupted through a change in circumstances, such as the divorce of the stepparent and the legal parent. As in *Jacob*, however, the result was recognition that all three adults had standing to seek custodial rights, not that they assumed equal standing with each other or that the courts should strive to equalize their involvement.

The courts have used similar doctrines to recognize three parents in other states. In North Dakota, for example, a stepfather petitioned for custodial rights in a case in which the child's biological father had visitation rights and the mother had primary custody.[109] The North Dakota Supreme Court upheld the trial court's finding that the stepparent had assumed a role as a "psychological parent," and that this finding of a psychological parent relationship was "an exceptional circumstance" that justified a grant of

106. *Id.* at 480–82. In this sense, the court distinguished the basis for the obligations of the former partner, who was estopped from denying responsibility for support because of her assertion of custody rights from the obligation of the biological father, who the court treated as responsible for support irrespective of his assertion of custody claims.

107. The child separated from the other three had been charged with "indecent assault" against one of the other children, and was subject to a court order to stay away from the victim. *Id.* at 478.

108. 2015 WL 7571451 (Pa. Super. Ct. Feb. 12, 2015).

109. McAllister v. McAllister, 779 N.W.2d 652, 660–61 (N.D. 2010).

visitation, even if it intrudes on the parent's constitutional rights.[110] In contrast, a greater intrusion, such as an award of primary custody to the stepparent, would require a showing of "serious harm or detriment."[111] The court emphasized that decision-making authority should remain with the biological parent.[112] In addition, it expressed concern that the best interests of a young child "may not be well served by having him stay in three different homes with three different 'parents' each week," and instructed the trial court to consider the child's stability in determining parenting schedules.[113]

In New Jersey, the courts have recognized the standing of a "psychological parent" to seek custodial rights. A court may find that "exceptional circumstances" justify such rights if a third party has acted as a parent to the child in the home, with the legal parent's consent, they have developed a parent-child bond, and not recognizing the relationship would result in the child experiencing serious psychological harm.[114] In *K.A.F.*, the birth mother's same-sex partner adopted the child shortly after the child's birth, and continued to be involved in the child's life after the dissolution of her relationship with the birth mother.[115] The birth mother entered into a new partnership. When that relationship dissolved, the partner sought time with the children. The adoptive mother objected that she had never consented to the birth mother's spouse's assumption of a parental role, and therefore that the new stepmother did not have standing to seek visitation as a psychological parent.[116] The New Jersey appellate court concluded that the consent of both legal parents was not necessary to standing as a psychological parent and remanded the case to the trial court.[117]

Washington courts have reached similar results, finding that a stepparent may qualify as a third parent pursuant to the de facto parenthood doctrine.[118] On the other hand, Wyoming rejected recognition of the de facto parenthood doctrine entirely because of the difficulties of dealing with such

110. *Id.* at 658, 660.

111. *Id.* at 660–61.

112. *Id.* at 661–62.

113. *Id.* at 661 (internal quotations added).

114. *K.A.F. v. D.L.M.*, 96 A.3d 975, 981-82 (N.J. App. Div. 2014).

115. *Id.* at 977.

116. *Id.* at 978–79.

117. *Id.* at 982–83.

118. *In re* Parentage of J.B.R Child, 336 P.3d 648, 654 (Wash. Ct. App. 2014). The Washington Supreme Court upheld the lower court's finding that a stepparent could petition for de facto parentage even when the child already has two legal parents. *See also* Killingbeck v. Killingbeck, 711 N.W.2d 759, 773–74 (Mich. Ct. App. 2005) (finding that both a divorced husband and the biological father could receive parenting time with a child).

issues.[119] The Wyoming Supreme Court pointed to the "practical problems" involved in determining what rights de facto parents would receive, the effect of such rights on the rights of other legal parents, and the lack of any objective criteria for the determinations.[120] It also noted in particular the possibility that more than two adults might receive recognition as parents.[121]

C. Legislation Recognizing Three Parents

California enacted legislation explicitly authorizing recognition of three parents in 2013[122] and Maine did so in 2015.[123] Because there are no cases yet under the Maine statute, this section focuses solely on California. The California statute provides that:

> [A] court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time.[124]

The California statute reflects a longstanding state preference for recognition of parents on the basis of the assumption of parental responsibilities, rather than biology or formalities on their own.[125] The case that gave rise to the statute involved circumstances in which a woman conceived a child in heterosexual relationship while she was in a domestic partnership with another woman, giving birth after she broke up with the father and married her female partner.[126] By the time of the dependency proceeding, the mother had been arrested for the attempted murder of her female partner, the second woman was unable to care for the child, and the biological father had moved to another state. California law would ordinari-

119. LP v. LF, 338 P.3d 908, 919–20 (Wyo. 2014).

120. *Id.* at 919.

121. *Id.* at 919–20.

122. CAL. FAM. CODE § 7612(c) (West 2016) *amended by* S.B. 1171, 2016 Cal. Legis. Serv. Ch. 86 (West).

123. ME. REV. STAT. ANN. tit. 19-A, § 1853 (2015); *see* JOSLIN ET AL., *supra* note 90, at § 7:14 ("Number of parents").

124. FAM. § 7612(c).

125. S.B. 274, 2013 Cal. Leg. Sess. (Cal. 2013); *see* Carbone, *From Partners to Parents Revisited*, *supra* note 27, at 8, 60; *see also* NeJaime, *supra* note 27, 1222–30 (discussing California's historic recognition of same-sex partners).

126. *In re* M.C., 123 Cal. Rptr. 3d 856, 862 (2011), *superseded by statute*, S.B. 274, 2013 Cal. Leg. Sess. § 1 (Cal. 2013).

ly recognize the two female spouses as legal parents, since they had cared for the child together immediately after the birth, but under the circumstances, without recognition of the biological father as a third parent, the child would have been without any parent capable of providing care. Given the testimony that the biological father had provided some support and that the biological mother had prevented him from establishing a relationship with the child, the appellate court recognized the three adults as "presumed parents," and awarded custody to the father based on the weightier considerations of logic and circumstances.[127] The statute effectively ratified the result, allowing formal recognition of three parents where necessary to prevent detriment to the child.[128]

In subsequent cases, the statute has been used primarily to expand the number of people who may be liable for support while basing parentage for custody purposes on the child's existing ties.[129] In addressing custody and visitation, the California statute provides that:

> [I]n cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child's need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child . . . [130]

Thus, in *Martinez v. Vaziri,*[131] the appellate court found that where the biological father had abandoned the child during the pregnancy and was incarcerated during much of the child's life, and where the father's half-brother had acted as the father after the child's birth, the trial court had impermissibly refused to acknowledge the potential detriment to the child from the failure to recognize the uncle as a parent. In effect, recognizing the uncle would give the child two functioning parents.

In contrast, the *In re Donovan L., Jr.* appellate opinion concluded that the juvenile court erred in recognizing three parents; in that case, the lower court had determined that the mother's husband, who had lived with the mother and child, had been conclusively presumed to be the child's father,

127. *Id.* at 877. The appellate court found that more than two adults met the criteria to be presumed parents and thus had a standing to seek custodial rights, but that upon remand, the trial court should apply "the weightier considerations of policy and logic" to determine which of the presumed parents to recognize as legal parents. The court thus concluded that while more than two adults had presumed parent status and thus standing to participate in the action, the trial court still had to choose among them in the award of custody; it could not recognize all three as legal parents.

128. California Senate Bill 274 § 1.

129. See analysis of the reported decisions at notes 133–142, *infra*.

130. Lewis, *supra* note 23, at 762 (quoting S.B. 274) (alteration in original).

131. 200 Cal. Rptr. 3d 884, 894 (Cal. Ct. App. 2016).

and the biological father, who claimed recognition as a third parent, lacked an existing parent-child relationship.[132] The appellate court ruled that in these circumstances the biological father was not a legal parent despite his established biological relationship to the child. The result in both cases effectively created a legal two-parent family, granting legal status to the parties who had been in the child's life since birth. In *Martinez*, this required recognizing the uncle as a third parent because the biological father's paternity had already been established in an earlier proceeding.[133] In *Donovan*, it meant refusing to recognize the biological father.[134] In neither case, however, did more than two adults have custodial rights in the child, nor did the child have an established relationship with three different adults. Moreover, in each family, only one parent had primary custody of the child.[135]

More complicated circumstances arose in *S.M. v. E.C.*[136] In that case, a partner in a lesbian relationship arranged with a co-worker that he would father a child to be raised by the two women.[137] The father and the mother, however, had an affair and alleged that the child had been conceived before the two women used the father's sperm to inseminate the mother.[138] The two women separated six months after the child's birth, and the partner sought custodial rights in the dissolution of their domestic partnership.[139] The father and mother, who planned to marry, moved in together and the father held out the child as his own.[140] The appellate court concluded that the trial court had correctly ruled that the domestic partner should be recognized as a parent, but it remanded for a determination of whether the biological father should also be recognized as a parent.[141] It did not deal with the potentially messy issues of balancing custodial rights between the almost-married couple and the former domestic partner.

The result in *S.M. v. E.C.* is not necessarily that different from the approach taken by the Louisiana courts. Both states clearly recognize intimate

132. 198 Cal. Rptr. 3d 550, 557 (Cal. Ct. App. 2016).
133. 200 Cal. Rptr. 3d at 887.
134. 198 Cal. Rpt. 3d 550 at 566.
135. *Id.* at 554; *Martinez*, 200 Cal. Rpt. 3d at 888.
136. S.M. v. E.C., No. F065817, 2014 Cal. App. Unpub. LEXIS 4574 (Cal. Ct. App. June 27, 2014).
137. *Id.* at *3.
138. *Id.* at *2.
139. *Id.* at *3.
140. *Id.* at *3–4.
141. *Id.* at *18.

partners[142] as parents and do not allow acknowledgement of a biological parent to interfere with the custodial claims of a legal parent who has an established relationship with a child. Moreover, in both states, where the biological father marries the mother, he will have, at a minimum, stepparent status while the relationship lasts. The unresolved legal question is whether, if the marriage to the mother later dissolves, the biological father will be able to assert a parental claim to custody in the subsequent divorce and, if so, whether the courts will be willing to grant custodial rights to all three parents. Without three-parent recognition, stepparents in some states can receive visitation as third parties.[143] And if, by the time of a later divorce, the non-biological parent no longer has a relationship with the child, it would be easy to make a case for stepparent visitation in accordance with a best interest analysis.[144] In Louisiana, however, even with recognition as a parent, the biological father would not have equal standing with the husband to assert custodial rights.[145] California courts have yet to address the question of how to determine such disputes under the new statute.[146]

In contrast, states that continue to recognize only two parents must choose between the husband and the biological father. In cases like this,

142. Louisiana's recognition of functional parents is limited to spouses and no case has arisen since the Supreme Court's decision in *Obergefell* raising the question of three parent recognition involving same sex-couples. *See* Spaht, *supra* note 63, 138–39. California law recognizes partners on multiple grounds, but also prefers those with a functional relationship as a parent. *See* Carbone, *From Partners to Parents Revisited*, *supra* note 27 at 8.

143. *See, e.g.*, Gary A. Debele, *Family Law Issues for Same-Sex Couples in the Aftermath of Minnesota's Same-Sex Marriage Law: A Family Law Attorney's Perspective*, 41 WM. MITCHELL L. REV. 157, 173 (2015) (explaining that "[i]n order to obtain third-party custody rights, the non-legal parent must meet the heavy burden of showing, by clear and convincing evidence, parental unfitness, harm to the child, abandonment, or some extraordinary need of the child that could not be met by the legal parent.").

144. *See, e.g.*, McAllister v. McAllister, 779 N.W.2d 652, 652 (N.D. 2010) (finding that "evidence was sufficient to support finding that stepfather had established his role as child's psychological parent such that he was entitled to third-party visitation rights and parental rights and responsibilities."). *See also* Mahoney, *supra* note 45, at 85 (noting that third party visitation statutes vary widely in the standards they apply).

145. *See* T.D. v. M.M.M., 730 So. 2d 873, 876 (La. 1999) and discussion at note 60, *supra*, and accompanying text.

146. The California courts have, however, addressed custody matters in cases in which three adults have presumed parent status. The *In re Jesusa V.* court, for example, recognized three parents: Jesusa's mother, the mother's husband Paul, to whom she was married (but separated) at the time of Jesusa's conception and birth, and Heriberto, Jesusa's biological father, who lived with Jesusa and her mother after the child's birth. 85 P.3d 2, 11, 14 (Cal. 2004). The court concluded that all three were presumed parents on the basis of various presumptions of California law, and that the court could choose which father to recognize on the basis of the weightier circumstances of policy and law. Understandably, the court chose Paul, since Heriberto had been arrested for assaulting Jesusa's mother and faced a deportation order upon his release from jail. In this case, much like the Louisiana cases, the courts expanded the category of adults who had standing to seek custody, but it then chose among the adults; it did not give all of them custodial rights at the same time. *See* Carbone, *From Partners to Parents Revisited*, *supra* note 27, at 11.

Utah, for example, has refused to recognize the biological father as a legal parent at all, even where he is living with the mother and raising the child in an intact marital family.[147]

D. Summary

While only a few states explicitly recognize three parents through statutory language, a growing number embrace the de facto parent doctrine, *in loco parentis*, and similar doctrines that lay the foundation for such recognition.[148] And almost every marital presumption and stepparent case that pits a biological parent against a spouse who has assumed a parental function raises similar issues. To date, the three-parent cases are outliers. They often involve precedent-setting cases, with courts crafting custom-tailored remedies to fit particular facts, articulating carefully nuanced justifications for their conclusions, and balancing the needs of the child with deference toward the arrangements the parties have worked out for themselves.

These cases—although using doctrines such as *in loco parentis* and "psychological parent" to recognize more than two parents who have assumed parenting roles—have not accorded three parents equal rights. Nor have they made custody determinations in these cases in accordance with the same policies that apply to two parents in more typical custody disputes.[149] Such policies would assume that it is in the child's interest to have continuing contact with both parents, and to favor an award to the parent likely to facilitate the other parent's continued involvement. Instead, the courts have limited their inquiry to the issue of whether the third adult has standing to seek any continuing involvement with the child, and the decisions have generally sought to award visitation in circumstances where it does not undermine the child's relationship with the other adults. In addition, other jurisdictions have refused to extend such doctrines precisely in order to avoid the dilution of parental rights that might otherwise occur.

147. *See* Carbone & Cahn, *Marriage, Parentage, and Child Support*, *supra* note 67, at 224–25 (discussing Pearson v. Pearson, 182 P.3d 353 (2008)).

148. Moreover, an increasing number of states also allow third parties standing to seek visitation, without necessarily conferring a parental label on those who qualify under the statutes. These statues often apply, however, to adults who have played quasi-parent roles. *See, e.g.*, UNIF. LAW COMM'N, *Preface* to NON-PARENTAL CHILD CUSTODY AND VISITATION ACT, *supra* note 5, at 13.

149. Indeed, "no state legislature or court has authorized more than three individuals to serve as legal parents with full and equal legal rights and obligations." Yehezkel Margalit et. al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J. L. & GENDER 107, 132 (2014).

In contrast, the courts that have rejected recognition of these more informal parental statuses express concern less about the particular cases before them than about the implications for future cases, such as the appropriate hierarchy of rights and the potentially tense relationship between multiple parents.[150]

These concerns about workability apply equally to recognition of multiple parents. The next section will explain how the custom-crafted results in the three-parent cases to date are at odds with the trends in more conventional custody cases, and how the tension between the two poses a challenge for expanding the recognition of three parents.

III. PARENTAL EQUALITY AND THE PROBLEMS FOR THREE-PARENT RECOGNITION

Unlike the individually crafted three-parent cases, custody litigation has generally moved toward more formulaic and predictable results. Indeed, the ALI begins its explanation of the *Principles* with a discussion of the tension between "predictability v. individualized decision-making,"[151] and acknowledges that expanded recognition of three parents increases judicial discretion and requires more individualized decision-making.[152] Today, the predominant presumption in custody decision-making is the identification of children's interests with shared parenting and the equal standing of fathers and mothers to seek a role in their children's lives.[153]

150. In 2014, the Vermont Supreme Court rejected judicial adoption of de facto parentage in a divided opinion. The majority observed:

> [The] ramifications could be far-reaching. Does recognition of a common law or equitable claim for parental contact by unrelated domestic partners include a corresponding right to claim child support from an unrelated but putative de facto parent? Can an unrelated but putative de facto parent then interfere with the biological parent's decision to move away with his or her children? Will every relief-from-abuse proceeding present an avenue for defendant partners to counterattack with de facto parentage complaints?

Moreau v. Sylvester, 95 A.3d 416, 424 n.12 (Vt. 2014).

151. *Introductory Materials* to *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & SOC. POL'Y 1, 1 (2001) [hereinafter *Introductory Materials*].

152. Indeed, the ALI *Principles* specifically provide that the courts may refuse to recognize parents by estoppel or de facto parents if it would not serve the child's interests. *See* discussion *supra* note 73. California's three parent statute similarly conditions recognition as a third parent on a showing that a child would otherwise suffer a detriment from the failure to do so. *See* discussion *supra* note 118 et. seq. In contrast, where a child would otherwise have only one legal parent, an alleged biological father often has standing to establish paternity as a matter of right. *See, e.g.*, Spaht, *supra* note 63.

153. We have argued elsewhere that as a practical matter, married fathers are substantially more likely than unmarried fathers to have shared custody orders, but the law in most states does not distinguish between married and unmarried legal parents with respect to either standing to seek custody or the presumptions that apply. *See* Carbone & Cahn, *Nonmarriage*, *supra* note 10.

These presumptions are at odds with decisions in three-parent cases, and the practical realities of family life.[154]

A. The Shift Toward Shared Parenting

Before the latter part of the eighteenth century, children's interests were presumed to lie with designation of a single parent with unequivocal authority.[155] At first, that presumption favored fathers.[156] In that era, if a husband died, an uncle or other male relative with control of the family inheritance might be designated as the children's custodian even where an otherwise fit mother had cared for the children from birth.[157]

By the end of the nineteenth century, that had changed to a best interest test,[158] and eventually, a presumption in favor of maternal custody for children of tender years that lasted well into the middle of the twentieth century.[159] With increasing divorce rates in the later part of the twentieth century changing the roles of women, an explicitly gender-based presumption came to be viewed as outmoded.[160] Some parents proposed joint custody awards to the courts on their own.[161] Initially, the courts resisted.[162]

154. *See, e.g.*, Baker, *Bionormativity, supra* note 6, at 708–09. Baker observes that:

> To the extent we are willing to accept greater and lesser degrees of parenthood, we need to question trends elsewhere in family law that treat all parents as equal. Arguments for joint custody, arguments against the labels of "custody" and "visitation" (precisely because they suggest a hierarchy), and much of the rhetoric from fathers' rights groups reject a notion of hierarchical parenthood. It is important to recognize, therefore, that a movement to recognize more parents-which is almost certainly a movement to recognize different classes of parents-exists in some tension with movements to equalize parental status.

Id.

155. J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 214 (2014) (observing that "in virtually all cases, common law courts awarded sole custodial rights to the father.").

156. *See id.*

157. *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS; THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 5 (Columbia Univ. Press 1994).

158. *See* Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1052–59 (1979) (describing how the common law's strict paternal entitlement began to give way to discretionary judicial consideration of child welfare in early nineteenth century cases).

159. *Id.*; *see also* DiFonzo, *supra* note 155, at 214 (discussing the maternal presumption); MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991) (describing the maternal presumption as an easy to administer, predictable standard).

160. DiFonzo, *supra* note 155, at 215.

161. See JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 182 (2000).

162. See J. Herbie DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody,* 43 HOFSTRA L. REV. 1003, 1009 (2015) (observing that "Joint custody arrangements were nearly incomprehensible to most courts, which felt 'it [was] hardly possible for a child to grow up and live a normal, happy life under such circumstances.") (quoting Logan v. Logan, 176 S.W.2d 601, 603 (Tenn. Ct. App. 1943)).

Early cases objected that joint custody "divided the control of the child, which is to be avoided, whenever possible, as an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child."[163] Over time, however, the courts sought to advance continued involvement of both parents in the child's life and, with the dismantling of gendered presumptions, the courts lacked a ready basis to choose between two otherwise fit parents.[164] The result has become a strong preference for shared custody.

Today, all states authorize joint custody awards.[165] Some even have express preferences or presumptions for joint custody.[166] Arkansas not only favors joint custody, but also defines it as "the approximate and reasonable *equal division* of time with the child by both parents individually as agreed to by the parents or as ordered by the court."[167] Other states do not necessarily have presumptions in favor of either joint custody or equal division, but most states, as a matter of policy, identify children's interests with frequent and continuing contact with both parties.[168] In addition, many states favor the award of custody to the parent who is most likely to promote the continuing involvement of the other parent.[169]

The result of these provisions is a strong preference for shared custody awards. A family law report concluded in 2014 that "[t]he most significant trend in contemporary child custody law is toward greater active involvement by both parents in postseparation childrearing."[170] Though the courts continue to express concern about parents who cannot cooperate sufficiently to manage joint custody, studies show that from the earliest days of joint

163. McCann v. McCann, 173 A. 7, 9 (Md. 1934).

164. DiFonzo, *supra* note 162, at 215*; see* Dinner, *supra* note 14, at 115–16.

165. As of 2012, forty-seven states and the District of Columbia have statutes authorizing joint legal and/or physical custody. Dorothy R. Fait et al., *The Merits and Problems with Presumptions for Joint Custody*, 45 MD. BAR J. 12, 14 (Feb. 2012). The three that lack express legislation authorize joint custody awards through case law; DiFonzo, *supra* note 162 at 217.

166. DiFonzo, *supra* note 162, at 217.

167. S.B. 901, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (amending ARK. CODE ANN. § 9-13-101(a))(emphasis added). The new legislation also provided that "custody shall be awarded in such a way so as to assure the frequent and continuing contact of the child with both parents" consistent with the child's best interest, including the provision favoring an award of joint custody. *Id.*

168. DiFonzo, *supra* note 162, at 216 (observing that "[a]s a matter of public policy, the phrase 'frequent and continuing contact with both parents' appears in most state statutes with nearly mechanical regularity.").

169. *Id.* at 225 (stating that "[t]o promote active participation by both parents after separation, many states have amended their best interest factors to include "friendly parent" provisions . . . The rationale is straightforward: children are thought to do better when both parents continue to raise them; thus, if one parent will not allow the other to play that critical role and the other will, the ""friendly parent" should have an advantage in the custody battle.").

170. Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting,* 52 FAM. CT. REV. 152, 156 (2014).

custody, the courts often impose such solutions when the parties cannot voluntarily reach agreement.[171]Indeed, a recent Maryland case upheld a joint legal and physical custody agreement even after concluding that the parents could not stand each other or manage a cooperative relationship.[172] The appellate court ruled that, despite long-standing Maryland precedent emphasizing that "*[r]arely, if ever, should joint legal custody be awarded in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other*."[173] The trial court had structured the award to advance the children's interest in a continuing relationship with both parents.[174]

These cases reflect a long-term shift in custody decision-making. Parenthood has historically been "an exclusive, all-or-nothing status."[175] Not only did this mean that a child could have only one mother and one father, but once an adult received recognition as a legal parent, the courts enforced their right to equal decision-making authority with respect to the child's life.[176] As a practical matter, this has come to mean: 1) a right to develop a relationship with the child, even if that parent had not consistently assumed responsibility for the child;[177] and 2) the corresponding threat that courts will deny custody to a parent who refuses to support the involvement of the other parent, even if the two adults do not respect each other and have little ability to cooperate.[178] In accordance with such precepts, the Wyoming Supreme Court upheld a trial court's transfer of custody of eight- and nine-year-old children from the mother to the father because of the mother's "reluctance to foster a positive relationship between Father and the children by openly disparaging Father to the children."[179]

171. ELEANOR MACCOBY & ROBERT MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 149–53 (Harvard Univ. Press 1992).

172. Santo v. Santo, No. 0061, 2015 WL 5921468, at *1 (Md. Ct. Spec. App. Oct. 9, 2015), *aff'd*, 141 A.3d 74 (Md. 2016).

173. *Id.* at *4 (quoting another opinion).

174. *Id.* (emphasis in original).

175. *Introductory Materials*, *supra* note 151, at 5 (2001).

176. Troxel v. Granville, 530 U.S. 57, 60 (2000); MACCOBY & MNOOKIN, *supra* note 171, at 106–08 (observing that even in the early days of joint custody, joint legal custody was available for the asking).

177. Courtney v. M. Roggy, 302 S.W.3d 141, 149 (Mo. Ct. App. 2009).

178. *In re* Miller, 20 A.3d 854, 862 (N.H. 2011) (observing that "[a]cross the country, the great weight of authority holds that conduct by one parent that tends to alienate the child's affections from the other is so inimical to the child's welfare s to be grounds for a denial of custody to, or a change of custody from, the parent guilty of such conduct.") (quoting Renaud v. Renaud, 721 A.2d 463, 465–66 (1998)).

179. JR v. TLW, 371 P.3d 570, 577 (Wyo. 2016). The court did so despite the fact that the mother had been the children's primary caretaker since birth, the children's guardian ad litem had recommend-

If the courts were to simply extend these custody principles to three parents on the same basis that they apply them to two, this would mean adoption of the following presumption: it is in the interests of the children to have a continuing relationship with all three parents, and that all three parents have an obligation to support the involvement of the other two in the child's life. Some courts have rejected the possibility of three parents because of the uncertainties involved in determining the presumptions that would apply to custody and child support while states otherwise willing to accept three parents have done so without necessarily applying the same presumptions applicable to two parents.[180]

B. Parental Equality and Multiple Parenthood

This treatment of parenthood has led many to counsel caution in the extension of recognition to more than two parents.[181] The skeptics raise three objections.

The first is that the greater the number of adults holding parental status, the greater the potential for conflict.[182] The issue is not just that more disputes might end up in court, but, as Professor Katharine Baker explained, "[t]he more parents there are with competing claims to a child, the higher the likelihood that the state will become involved in the day-to-day business of parenting."[183] Courts today address conflicts over where children will live, the schools in which they will enroll, and the church they will attend.[184] Adding to the number of adults potentially makes these conflicts more likely and more difficult to manage. The courts long recognized that a major advantage of a single legal custodian was that a court could defer to that person for all of these decisions, even if the result effectively

ed that the mother retain custody, and the mother and father lived in different states. *See also* Goetz v. Sisson, No. 15–0385, 2016 WL 1681155, at *5 (Iowa Ct. App. Apr. 27, 2016) (appellate court reversed a failure to transfer custody, explaining that "[i]f visitation rights of the noncustodial parent are jeopardized by the conduct of the custodial parent, such acts could provide an adequate ground for a change of custody.") (quoting *In re* Marriage of Quirk-Edwards, 509 N.W.2d 476, 480 (Iowa 1993).

180. *See, e.g.*, LP v. LF, 338 P.3d 908, 919–20 (Wyo. 2014) (rejecting de facto parentage in part because of uncertainty about what would happen if three parents received recognition). *Cf. supra* notes 78–89, 121, 123_ (discussing the California statute and the ALI Principles, which subject recognition of three parents to a best interest determination made without necessarily applying the same criteria used to determine the child's best interest in cases involving two parents, and the Uniform Law commission's draft re third party visitation).

181. *See infra* notes 182–98

182. *See, e.g.*, Appleton, *Numbers*, *supra* note 6, at 41 ("As the parental community expands, moreover the responsibilities for such disputes increase").

183. Baker, *Bionormativity*, *supra* note 6, at 675.

184. *See, e.g.*, DOUGLAS ABRAMS ET AL., CONTEMPORARY FAMILY LAW ch. 13 (4th ed. 2015).

excluded the other parent from a major say in the child's life.[185] Recognizing two parties with comparable authority in the child's life increased the need for judicial intervention to manage disputes.[186] Critics like Baker argue that increasing the number of parents beyond two magnifies the effect.[187]

The second concern is that managing more than two parents effectively makes formal equality among them challenging, if not impossible. The concern is not just that the third adult will occupy a lesser position, but that recognition of the third parent will alter the relationship between the first two. Baker acknowledged almost a decade ago that "[t]o the extent we are willing to accept greater and lesser degrees of parenthood, we need to question trends elsewhere in family law that treat all parents as equal," and thus reject a notion of hierarchical parenthood. Baker then states it is important to recognize that "a movement to recognize more parents—which is almost certainly a movement to recognize different classes of parents—exists in some tension with movements to equalize parental status."[188]

None of the cases discussed above that recognize more than two parents assign equal rights concerning decision-making authority, nor do they grant equal amounts of custodial time following dissolution of the parental relationship. In some cases, the recognition of the third adult results in a sole custody award to that adult; this was the motive for the California case that provided initial recognition of three parents.[189] In the cases that come closest to an equal allocation of time, two of the parents may be living together in an intact relationship.[190] Where three or more parents live apart, however, and all want some relationship to the child, the courts have to manage the complex relationships that arise. As a practical matter, these cases do not accord equal rights: instead, as Baker suggests, they adopt a hierarchy of relationships, sometimes based on the law, and sometimes based on the strength of the child's bond with the various adults.[191] In that

185. Appleton, *Numbers*, *supra* note 6, at 43–44.

186. *Id.*

187. Baker, *Bionormativity*, *supra* note 6, at 675.

188. Baker, *Bionormativity*, *supra* note 6, at 708–09.

189. *See In re M.C.*, 123 Cal. Rptr. 3d 856, 887 (Cal. Ct. App. 2011) *superseded by statute*, S.B. 274, 2013 Cal. Leg. Sess. § 1 (Cal. 2013).

190. *See, e.g.*, S.M. v. E.C., No. F065817, 2014 Cal. App. Unpub. LEXIS 4574, at *31–32 (Ct. App. June 27, 2014) (recognizing same-sex couple as parents, but remanding for consideration of whether biological father, who had an affair with the biological mother and who later planned to marry her, should also receive recognition as a parent).

191. *See, e.g.*, Geen v. Geen, 666 So. 2d 1192, 1193–94 (La. App. 1995), *writ denied*, 669 So. 2d 1224 (La. 1996) (granting joint legal custody to all three parents, but recognizing only the husband as "domiciliary parent," which typically would involve greater deference to his judgment in the event of a dispute); Jacob v. Shultz-Jacob, 923 A.2d 473, 476 (Pa. Super. Ct. 2007) (designating primary parent).

hierarchy, one parent becomes a primary parent while the others receive visitation.[192] *Jacob v. Shultz-Jacob* provides a model: the court awarded primary custody to a single parent, and then provided for the other two to receive time, but not equal decision-making capacity.[193]

The third ground for hesitation is that the courts, in exercising the discretion necessary to make these arrangements work, will decide on the basis of stereotypically gendered (or other biased) presumptions. Opponents of alternative families tend to emphasize the need for a single father and a single mother.[194] Yet, as Susan Appleton speculates, courts will be particularly eager to recognize a third parent where that parent adds a parent of the opposite sex.[195] In other cases, the addition of a third parent might serve to penalize the mother who had intimate relations with more than one partner, or who seeks to end an abusive or otherwise unsatisfactory relationship.[196]

We agree that these concerns underlie judicial decision-making about custody matters. Nevertheless, it is not clear that recognition of three parents is necessarily worse than cases limiting recognition to two parents. Consider a recent New York case in which a woman, married to another woman, conceived a child while she was separated from her spouse.[197] The two spouses later reconciled and raised the child together. The biological father wanted recognition as a father.[198] The New York intermediate-level court, addressing the issue of whether the marital presumption applied, decided that it did not, in large part because the effect would be to deprive the child of a father.[199] Given a choice of which two parents to recognize, the court chose the biological mother and father.[200] Although not part of the

192. *Geen*, 660 So. 2d at 1193–94.

193. *Jacob*, 923 A.2d at 476.

194. *See, e.g.*, Elizabeth Marquardt, Op-Ed, *When 3 Really Is a Crowd*, N.Y. TIMES, July 16, 2007, at A13 ("[N]o court should break open the rule of two when assigning legal parenthood.").

195. She observes that "I see as no coincidence the court's recognition of parental status for the sperm donor in *Jacob v. Shultz-Jacob* because, without such recognition, the children would have two mothers but no father" and speculates whether the courts would have been as eager to do so if the third parent had been another woman. *See also* Appleton, *Numbers*, *supra* note 6, at 53–54. This echoes the paradigmatic claim by Nancy Polikoff when it came to recognition of two same-sex parents concerning the need for a parent of each gender: "The law operates to require that a child have one parent of each sex." Polikoff, *supra* note 100, at 468.

196. Indeed, some scholars have opposed recognition of de facto parents for similar reasons. *See, e.g.*, Robin Fretwell Wilson, *Limiting the Prerogatives of Legal Parents: Judicial Skepticism of the American Law Institute's Treatment of De Facto Parents*, 25 J. AM. ACAD. MATRIM. LAW 477, 484 (2013) (arguing that "the ALI's thinned-out test for parenthood overrides the judgments of mothers.").

197. Q.M. v. B.C., 995 N.Y.S.2d 470, 472 (N.Y. Fam. Ct. 2014).

198. *Id.* at 471.

199. *Id.* at 474.

200. *Id.*

opinion, the law that would ordinarily apply in such circumstances would then presume that the child's interest were best served by the continuing involvement of both parents, even if the mother and father had little to no relationship with each other, and could not effectively communicate or work cooperatively with each other.[201] Recognition of three parents destabilizes this two equal parent dynamic on three grounds. It requires the court to consider the best interest of the child without applying a cookie cutter presumption that the child's interests necessarily lie with maximizing the involvement of all three parents, given the practical difficulties of doing so.[202] It effectively rules out the pretense that all three parents stand on equal terms to each other or the child. And it makes it harder for courts to do what the New York judge did, and recognize the biological father to the exclusion of the same-sex spouse.[203] We believe that all three results are advantages, not disadvantages, of three-parent recognition, and that such results, which mirror the results in the cases recognizing three parents to date, provide guidance for what the emerging law of parentage should do. We take up these principles in the next section.

IV. THE EMERGING LAW OF MULTIPLE PARENTAGE

In looking toward a future that assumes the existence of multiple parenthood, successful doctrinal development depends on dealing with the issues of how to allocate rights and responsibilities. Doing so requires reconciling the law that governs recognition of third parents with that governing more conventional two parent relationships. Central to those issues is the idea of parental equality. When, if ever, is equality appropriate for any parents?

A. The Prerequisites for Parental Equality

As we noted above, the idea of parental equality is new. Historically, women were viewed as subordinate to men,[204] and the law either recog-

201. *See, e.g.*, Santo v. Santo, 141 A.3d 74, 76 (Md. 2016) (upholding joint custody award even where parents had little ability to communicate or cooperate with each other).

202. Moreover, in some cases, this leads to rejection of a third parent, eliminating the need to balance the respective roles of the three. *See, e.g.*, *In re* Donovan L., Jr., 198 Cal. Rptr. 3d 550, 557, 565 (Cal. Ct. App. 2016) (concluding that the juvenile court erred in recognizing three parents, given its determination that the mother's husband, who had lived with mother and child, had been conclusively presumed to be the child's father and the biological father, who claimed recognition as a third parent, lacked an existing parent-child relationship).

203. It may also make it harder to exclude the biological father in jurisdictions that would otherwise uphold application of the marital presumption in the case of two same-sex parents.

204. William Kristol, *Women's Liberation: The Relevance of Tocqueville*, *in* INTERPRETING TOCQUEVILLE'S DEMOCRACY IN AMERICA 480, 491 (Ken Masugi ed., 1991) (observing that women,

nized the father as head of household within intact marriages, or divorced mothers as primary caretakers and legal custodians for young children following divorce.[205] Hierarchy, not equality, determined these relationships. Today, in contrast, equality is an important quality in committed relationships. As we have argued elsewhere, marriage—and the divisions at divorce—has been remade as a relationship among equals.[206] That is, the law presumes that married couples engage in equivalent exchanges and share equally in the assumption of rights and responsibilities with respect to their children.[207] Couples who do not want an equal relationship or do not see their current partners as capable of such an exchange, or worthy of the commitment involved in making it work, do not marry.[208] This shift in the nature of marriage both reflects and reinforces the application of sharing principles at divorce; couples understand that marriage involves a commitment to inclusion of the other spouse in their children's lives, even if the marriage does not endure.[209]

Custody awards reflect these changes—as fathers have become much more likely to receive shared custody awards at divorce—while unmarried mothers remain dramatically more likely to have sole custody awards even when the father remains in contact with the children.[210] While custody law does not necessarily distinguish among parents on the basis of marriage, practical considerations make equal parental status more realistic at divorce than in other circumstances.[211] This is true because married couples have made a commitment to each other, have typically cared for the child in a joint household, have established relationships with each other and the child at the time of the dissolution of their relationship, and have (or should have) an expectation that they need to continue to include the other parent in the child's life following dissolution.

The reported cases in which three or more parents are involved in a child's life rarely involve an explicit agreement to assume equal responsi-

who were unlikely to come to these conclusions on their own, must be taught, "to grasp the following three points: the necessity of marriage, the importance of good morals, and the necessity of inequality within marriage.")

205. *See generally* Carbone & Cahn, *Nonmarriage*, *supra* note 10.

206. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS III (Oxford Univ. Press 2014).

207. *Id.*; *see also* Carbone & Cahn, *Nonmarriage*, *supra* note 10.

208. *Id.*

209. *Id.*

210. *See* June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1224–25; *see also* BROWN & COOK, *supra* note 51, at 28–29.

211. *See* Carbone & Cahn, *The Triple System of Family Law*, *supra* note 210, at 1226; *see also* BROWN & COOK, *supra* note 51, at 29.

bility for the child.[212] That is, where there is the possibility of three or more parents, they are unlikely: 1) to have made a commitment to each other to include all of the adults in the child's life on a permanent basis; 2) to have lived together in a single residence; 3) to have bonds to the child that are equally strong or equally important to the child's well-being; and 4) to be able to cooperate as a threesome in reaching agreement on the child's needs. Indeed, it well may be that the more adults involved, the greater likelihood of disagreement.[213] It is worth considering where, if ever, equality may be possible among more than two parents. We think it may be possible in two types of cases.

The first involves a lesbian couple and a sperm donor—or a gay male couple and a gestational carrier (or possibly an egg donor)—who agree to assume shared responsibility of the child at birth, and do so for a period of at least two years after the child's birth. We can imagine couples reaching such agreements, and we imagine determined parents working out such arrangements.

On the other hand, many same-sex couples do not want a third party to have equal status, precisely because of the fear that the third party will intrude on the primary couple's decision-making authority if they later disagree.[214] Martha Ertman, for example, has developed a model co-parenting agreement to deal explicitly with such circumstances; the first article of that agreement provides that one parent will have "primary physical and legal" custody.[215] Moreover, even same-sex couples who want to involve a third party in rearing a child on equal terms do not typically do so on a truly equal basis because of the difficulties of coordinating such activities in separate households.[216] Nonetheless, we could imagine three or more adults not only agreeing to, but also following up on such an agreement, and we would leave room open to such a possibility if the parties explicitly agree.

The second example involves polygamy. Again, we can imagine circumstances where three or more parents agree to create a family that in-

212. *But see* LaChappelle v. Mitten, 607 N.W.2d 151, 157 (Minn. Ct. App. 2000) (involving an agreement that the biological mother and her same-sex partner have physical and legal custody of the child while the sperm donor and his partner "would be entitled to a significant relationship.") (internal quotations omitted).

213. *See generally* Baker, *Bionmarativity*, *supra* note 6.

214. For the classic example, see generally Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (N.Y. 1993).

215. ERTMAN, *supra* note 89, at 199. *See also LaChappelle*, 607 N.W.2d at 157.

216. For a discussion of the different expectations concerning the involvement of known donors, *see* John Bowe, *Gay Donor or Gay Dad*, N.Y. TIMES (Nov. 11, 2006), http://www.nytimes.com/2006/11/19/magazine/19fathering.html?_r=0&pagewanted=allhttp://www.nytimes.com/2006/11/19/magazine/19fathering.html?_r=0&pagewanted=all.

cludes formal agreement to a relationship among more than two adults and the assumption, in fact, of such shared responsibilities, but we similarly expect these circumstances to be rare. First, polygamy remains against the law in most states,[217] raising a variety of public policy concerns with recognition.[218] Second, one can dispute whether classically polygamous relationships in fact involve equal assumption of responsibility for childrearing.[219] Where a man, for example, has children with multiple women, the mothers typically take primary responsibility for their own children, while the father and the other mothers play secondary roles. This is particularly true if the various family units do not live in the same household. Nonetheless, we can imagine circumstances where multiple adults do in fact form a single family, with genuinely shared responsibility for the children.

These principles, however, may not be appropriate in circumstances where more than two adults share responsibility for children on a serial basis. That is, we can imagine cases in which a father and mother share responsibility for a child while the two live together, and then split. After the split, the mother may enter into a new relationship with a man who takes over the father's role on terms identical to those the initial father assumed when he lived with the mother. The child in this case would, at various times, have established a parental bond with each of the three adults. But these bonds would not be equally strong with each adult *at the same time*.[220] In these classic stepparent cases, one of the three adults, typically the parent who has had primary custody since birth, has the strongest continuing tie with the child and has assumed responsibility for managing the involvement of the other two parents. Instead, we would expect to see equal parental standing in these cases only where recognition is limited to two parents: either the biological father and mother—if the biological fa-

217. HARRIS, ET AL., *supra* note 22, at 228–33.

218. *Id.* at 228–32.

219. Given the fact that there is typically one father and many mothers, it is hard to imagine what an equal division of responsibility in such circumstances would mean. Studies of polygamous families indicate that, while they vary greatly, a common practice is for each wife to maintain a separate house-hold with her own children, while the husband rotates among the households without investing as much in the day to day management of any of them. See Irwin Altman, Polygamous Family Life: The Case of Contemporary Mormon Fundamentalists, 1996 UTAH L. REV. 367, 389–90 (1996) (observing that a "home is important to a plural wife because she is responsible for managing it, for raising and teaching her children in it, and for maintaining the home for herself, her husband, and her children.").

220. See, e.g., Tach & Edin, supra note 54, at 1794 (observing that when mothers enter into new relationships, it may undermine the prior relationship with the biological father); see also Katharine K. Baker, Bargaining or Biology? The History and Future of Paternity Law and Parental Status, 14 CORNELL J. L. & PUB. POL'Y 1, 37 (2004) (noting that women in poor communities are more likely to form new relationships where the father does not cooperate).

ther has continued to play a substantial role in the child's life—or the mother and her new partner—if the stepparent has replaced the other biological parent in the child's life with the encouragement of the child's custodial parent.

Historically, adoption has served as a bright-line rule distinguishing between stepparents who: (1) assume a full parental role equal to that of the biological parent; and (2) those who play a secondary role.[221] The ALI *Principles*, while according parental recognition both to stepparents who adopt and to those who do not, recommend use of adoption to clarify the different types of roles.[222] We agree that stepparent adoption offers a way to establish two (and only two) equal parents, and that, in the cases that recognize two biological parents plus a stepparent as three parents entitled to at least some legal recognition, the courts will have to distinguish among the differing responsibilities of each of the various parental roles on a case-by-case basis.

We expect the norm in such cases extending recognition to three adults to be hierarchical, rather than equal, relationships.[223] Accordingly, we suggest the following approach for when the courts recognize more than two adults as having standing to seek custody and visitation:

1. There should be a presumption that the child's best interest lies in the strength of the relationship with a primary parent, and that other parents should receive physical custodial awards only to the extent that they do not undermine the relationship with the primary parent.

221. *See* Mahoney, *supra* note 45, at 85–86.

222. The ALI provides that parents by estoppel should be recognized as parents equal to other legal parents. The *Principles* nonetheless recommend that:

> Adoption is the clearer, and thus preferred, legal avenue for recognition of such parent-child relationships, but adoption is sometimes not legally available or possible, especially if the one of the adults is still married to another . . . [N]either the unavailability of adoption nor the failure to adopt when adoption would have been available forecloses parent-by-estoppel status. However, the failure to adopt when adoption was available may be relevant to whether an agreement was intended.

ALI PRINCIPLES, *supra* note 4, § 2.03(1)(b) cmt. a, illus. 8(iii).

With respect to de facto parentage, the *Principles* similarly provide that:

As is the case with an individual seeking to be a parent by estoppel under Paragraph (1)(b)(iii) or Paragraph (1)(b)(iv), the best course of action for an individual who expects legal recognition as a de facto parent would be formal adoption, if available under applicable state law. Failure to adopt the child when it would have been possible is some evidence, although not dispositive, that the legal parent did not agree to the formation of the de facto parent relationship.

ALI PRINCIPLES, *supra* note 4, § 2.03 cmt. c.

223. We use the term "hierarchical" here in the same sense as Baker. *See* Baker, *Bionormativity, supra* note 6, at 708–09.

2. There should be a presumption that the child's best interest lies with the allocation of decision-making authority over the child's life in a single adult, unless the court adopts a parenting plan that allocates decision-making responsibility for particular issues (e.g., music lessons) to an alternative parent or parents, and justifies the reason for the decision in writing.

These presumptions can be rebutted only where three or more adults have agreed to assumption of equal rights and responsibilities for a child at the child's birth, and have in fact assumed comparable responsibility for the child for at least two years after the child's birth.[224] In accordance with the approach taken by the ALI, this allows courts discretion not to recognize a third adult as a fully equal parent where the result would be too complicated to administer and would not advance the child's interests.[225]

Outside of those relationships where two parents explicitly agree to, and implement, a joint assumption of rights and responsibilities, most parents—whether there are one, two or three—neither spend equal amounts of time with their children, nor assume equal responsibility for their well-being. For the last decade, scholars have pointed out that recognition of multiple parents is closely related to the move away from formal, exclusive, binary parental relationships, and toward acceptance of varied functional parenting roles.[226]

We believe that consideration of three or more parents should lead to greater differentiation between those families where the parents (most typically two) have a genuinely shared assumption of responsibility for the child and the many other families where a primary parent takes on the principal caretaking functions with assistance from others. Marriage, as we have argued elsewhere, has come to mean an agreement, not only to share caretaking for the children who result, but also to assume a responsibility to

224. The ALI requires that for recognition as a parent equal to other legal parents that the third adult has:

> (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests . . . .

ALI PRINCIPLES, *supra* note 4, § 2.03(b)(iii)–(iv).

225. It would leave open, of course, the possibility of recognizing a third adult, such as stepparent, through de facto parentage provisions that do not treat the third adult as a parent with equal standing to the first two or through third party visitation statutes.

226. *See, e.g.*, Jacobs, *Parental Parity*, *supra* note 6, at 470; *Jacobs*, *Why Just Two?*, *supra* note 1, at 312. *See generally* Baker, *Bionormativity*, *supra* note 6; Appleton, *Numbers*, *supra* note 1.

support the other parent's continuing involvement with the child.[227] Parents may assume different roles while the marriage lasts, but at divorce, the expectation of equal parental status has justified a presumption in favor of shared parenting.[228] While we do not believe this is justified in every case, given that one parent typically takes on more caretaking responsibilities than the other, at least there is an explicit "opting into" a relationship that presumes equality. In contrast, couples that have a child together and do not marry often do not, precisely because they do not see the second parent as contributing in equal or reliable ways. These parents often go on to form additional relationships with other partners, who may or may not play substantial roles in the lives of their children. As the law recognizes multiple parenting roles, it should move away from a rigid insistence on parental equality to greater differentiation between equal and unequal parental relationships.

B. Custodial Principles

1. Equal Parental Rights and Responsibilities

We started with the presumption that recognition of three equal parents will be rare. In applying the principles, we begin by imaging the circumstances in which three parents might equally share custody after dissolution. One case is easy: we have no objection to an order of shared custody among three parents if all three agree to such an order. In such a case, we could imagine three parents with shared legal and physical custody and support obligations, in accordance with a parenting plan to which the parties agreed. The second case where we believe equally shared custody and financial obligations would be appropriate is where there are two households (not three) and the three parents have the ability to cooperate. Imagine a case not so different from the *Geen* case. In that case, the mother conceived a child with one man, was married to and cared for the child with a second man (her "husband"), divorced the husband, and then later married the biological father.[229] Assume that the mother and the husband have shared custody at the time of the divorce, and that the biological father asserts paternity only after he and the mother marry. In this case, as a practical matter, the biological father will be living with the mother and the child, and he will share in whatever custodial rights the mother has. We see

227. *See generally* CARBONE & CAHN, MARRIAGE MARKETS, *supra* note 206.

228. *See gnerally* Carbone & Cahn, *Nonmarriage*, *supra* note 10 (exploring these concepts).

229. 666 So. 2d 1192, 1193 (La. App. 1995), *writ denied*, 669 So. 2d 1224 (La. 1996) (discussed *supra* notes 57 et seq.

no problem in recognizing both the husband and the biological father as parents, and having the three parents assume shared custody and financial obligations in accordance with the original divorce decree. Such an arrangement, however, should not be seen as necessarily creating a presumption that the three would share custody equally upon a second divorce, creating three households. Were such an additional divorce to occur, the court would have to make a new determination about whether the three parents were able to cooperate in a way that made truly shared parenting among the three possible.

2. Unequal Parental Standing

In most other cases, equal parental standing is unwarranted. Although there are numerous potential situations in which multiple parents might be accorded recognition, their respective rights should depend on the various relationships among the parents, as well as between the parents and the child. Rather than trying to prescribe outcomes in each context, we focus on the facts underlying the Supreme Court decision in *Michael H.*[230] As we have argued elsewhere, we would reach quite different decisions based on the timing of the litigation.[231]

In that case, the mother, Carole, was married to Gerald.[232] She had an affair with Michael that produced a child, Victoria.[233] After Victoria's birth, the three spent three months together in the Bahamas. Michael visited Carole and Victoria whenever he was in Southern California, and Victoria called Michael "Daddy."[234] Shortly before Victoria turned three, however, Carole cut off all contact with Michael, and she and Gerald eventually moved to New York and had two additional children.[235] The Supreme Court, in a plurality opinion, upheld the constitutionality of the marital presumption.[236] By permitting—but not requiring—use of the marital presumption, the Court has left parentage determinations to states' discretion.

Consider now what would happen if, at the time Michael originally filed the action, Gerald had filed for divorce. That is, shortly after Carole

230. Michael H. v. Gerald D., 491 U.S. 110, 113 (1989).

231. Although the decision was appropriate at the time the Supreme Court decided the case, five years after it was initiated, that was not necessarily the appropriate outcome at the time of the initial trial court decision. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1044–45 (2003).

232. *Michael H.*, 491 U.S. at 113.

233. *Id.*

234. *Id.* at 136, 144 (Brennan, J., dissenting).

235. *Id.* at 115.

236. *Id.* at 131–32.

cut off Michael's contact with Victoria when she was three, Gerald filed for divorce. Assuming that all three had an established relationship with Victoria, and all three sought custody,[237] the guiding principles would recognize all three as parents, but a custody award would recognize only one primary parent. Managing the involvement of adults in three separate households would be difficult. Carole would have been the one constant in Victoria's life, and only Carole had any kind of relationship with both men. Accordingly, it would make sense to make Carole the primary custodian (assuming that she was otherwise a fit parent), and award the two men some time with the child and some financial obligation for her.[238]

Contrast this outcome with litigation occurring at the time of the Supreme Court's decision in the case.[239] By then, five years had passed, Michael had no contact with Victoria in the interim, Carole and Gerald had moved to New York, and remained married and had additional children.[240] At this point, recognizing Michael as a parent with a right to custody would be disruptive. Carole and Gerald had a unitary household, in which they enjoyed equal parental status with respect to each other, in a different state, and both opposed Michael's involvement. Michael had no ongoing relationship with Victoria.[241] Treating Michael as a legal parent would, absent additional facts not present in the case, not be in Victoria's interests. At most, therefore, we would treat Michael as a third party, who could seek visitation only upon a substantial showing that it served Victoria's interests.[242]

The most difficult circumstances involve the facts at the time Michael filed the initial case. At that point, Gerald would have parental status on the basis of the marital presumption and his assumption of parental responsibilities during the marriage. Michael would also have parental standing on the bases of biological paternity and his assumption of a relationship with Victoria that included at least some provision of support, several months of co-

237. The case provides little information about Gerald's relationship with Victoria at that point, but Gerald's name was on the birth certificate, he and Carole stayed married, and they went on to have additional children, so we assume that he played a paternal role.

238. This result would be similar to the trial court order in *LaChappelle v. Mitten*, which awarded the birth mother primary custody, and the biological father and the birth mother's partner visitation. 607 N.W.2d 151 (Minn. Ct. App. 2000).

239. *Michael H.*, 491 U.S. at 113.

240. *Id.* at 115.

241. *Id.* at 116 (lower courts denied Michael's petition, supported by Victoria, for visitation).

242. Justice Stevens wrote an opinion concurring in the judgment in Michael H. that endorsed such a result, but in fact, California law at the time did not recognize third party standing to seek visitation. Many more states have third party visitation provisions today, but most still place a substantial burden on the third party who wished visitation over the objection of the legal parent or parents. See Debele, *supra* note 143, at 173.

residence, and an emotional bond with the child.[243] Both men, and Carole, appear to have had a parental bond with Victoria. In these circumstances, we would, subject to an in-depth consideration of Victoria's best interest, recognize all three as parents and, assuming Carole and Gerald remained together, award primary physical and legal custody to them with visitation to Michael. The award of primary custody to Carole and Gerald jointly would not necessarily create a presumption about allocation of custodial rights should they later divorce; that would depend on the respective roles of the three adults, and their ability to cooperate at the later time. Moreover, in these circumstances, where Carole and Gerald did not both consent to Michael's role, Michael's visitation should be subject to a determination that would not undermine Victoria's relationship with Carole and with the family Carole and Gerald have created together. In this sense, while we would recognize Michael as Victoria's father, we would treat him legally as a third party whose ability to receive visitation is dependent on a best interest analysis that starts with a presumption that Victoria's interests lie in the strength of her relationship with her primary custodians rather than with all parents equally.

In all of the scenarios in which the courts recognize three parents who live in separate households, the primary parent's wishes should receive deference in the determination of parenting schedules. Such schedules should allot enough time with the primary parent to insure an adequate relationship, even if the net result is that the relationships with the other parents is not as strong because of the lack of more consistent or sufficient parenting time. In the event of conflict among the parents, it further requires deference to the primary parent, even where that parent's decisions may not be sufficiently respectful of the interests of the other parents. As a practical matter, therefore, we see the possibility that the recognition of three parents may be fundamentally at odds with the principles that apply to two, presumptively equal adults who have parented together in the context of an intact relationship, and who can realistically share responsibility for a child after dissolution of their family circumstances.

243. Some states would still use the marital presumption to block recognition of Michael if he waited until Victoria turned three to establish paternity. Other states, however, would allow Michael to establish paternity. *See* Carbone & Cahn, *Marriage, Parentage, and Child Support, supra* note 67, at 223-24. For purposes of this discussion, however, we assume that the state would be willing to recognize all three.

C. Child Support

Recognition of multiple parents has been recommended as a way to expand the number of parties who could be held liable for child support.[244] Yet, it seems unfair to hold a parent liable for support where that parent has had a limited role in the child's life, particularly where there is an agreement with the other parents that the limited parent would not be responsible for support.[245] At the same time, the ALI's de facto parentage provisions, which provide custodial rights to functional parents who have no support obligation, have also been questioned for according privileges without financial responsibilities.[246]

We believe that for multiple parent recognition to work, there should be a reconfiguration of the relationship among custodial rights, financial obligations, and the ability to pay. Where three or more parents have never assumed equal responsibility for the child, their financial obligations should also not be presumed equal or calculated in the same manner as classic two-parent obligations that assume an equal assumption of responsibility for the child. Instead, the financial obligations should reflect a combination of custodial time and ability to pay. Fully developing what "unequal" parenthood means is a project that will unfold in the courts—and in families.

V. CONCLUSION

Ultimately, recognition of three parents can provide stability and continuity for a child's relationship with relevant adults.[247] As courts decide actual disputes among potential parents, they are implementing the three-parent doctrine in a manner that accords primary parenting rights to one adult rather than granting shared decision-making rights to multiple adults. As they understand, one parent typically has consistently provided care and stability for the child, and it is that parent who should be given more rights. Yet, a presumption of unequal roles, like other custody presumptions,

244. Jacobs, *More Parents, More Money*, *supra* note 6, at 220.

245. *E.g.*, *Sperm Donor May be Responsible for Child Support, Medical Expenses*, KFOR-TV (Dec. 3, 2015, 11:49 AM), http://kfor.com/2015/12/03/sperm-donor-may-be-responsible-for-child-support-medical-expenses/.

246. *See, e.g.*, KATHARINE K. BAKER, *Asymmetric Parenthood*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 121–128 (Robin F. Wilson ed. 2006).

247. *See* Nancy D. Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW & CONTEMP. PROBS. 195, 220 (2014) (arguing for the need to move beyond biology in recognizing parents: "The importance of stability and continuity is precisely the principle that demands that the law recognize the reality of the child's perspective on his or her family").

should be rebuttable, leaving open the possibility of treating all three parents on equal terms where the three agree, or where the three have been involved on an equal basis since the child's birth and an allocation of rights and responsibilities is workable.

The multiple parent model is a good idea only so long as it is applied to recognize the realities of multiple types of families and the need to accord differing—and unequal—rights to those deemed to be "parents."