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A Modern King Solomon's Dilemma: Why State Legislatures Should Give Courts the Discretion To Find that a Child Has More than Two Legal Parents

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A Modern King Solomon’s Dilemma: Why State Legislatures Should Give Courts the Discretion To Find that a Child Has More than Two Legal Parents

ANN E. KINSEY*

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* © 2014 Ann E. Kinsey. J.D. Candidate, University of San Diego School of Law, 2014; B.A., Psychology, University of Pennsylvania, 2008. I thank my faculty adviser Professor Robert Fellmeth for his guidance, as well as the *San Diego Law Review* staff for their diligent editorial work. Above all, I thank my family for their unwavering support and encouragement. I dedicate this Comment to the foster children I worked with at The Children’s Aid Society in the Bronx, New York from 2008–2011.

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I. INTRODUCTION

Three nights a week Bill Delaney’s daughters spend the night with their fathers, a gay couple, and for the remainder of the week, the girls stay with their mothers, a lesbian couple.¹ The children have four parents, and even though Mr. Delaney is the girls’ biological father, he is not one of their legal parents.² This is because California law, before the passage of Senate Bill 274, provided that a child could have only two legal parents.³ As a result, the law did not protect Mr. Delaney’s relationship with his children and did not protect the rights of the children to their father. Mr. Delaney stated that having the law recognize him as a legal parent would give his entire family a greater sense of security: ““This would be the final piece, so we don’t have to worry if something happens to the legal

1. Ian Lovett, *Measure Opens Door to 3 Parents, or More*, N.Y. TIMES, July 14, 2012, at A9.

2. *Id.* at A13. Mr. Delaney’s situation is not atypical. For example, same-sex couples sometimes choose to use a friend as a sperm donor or surrogate and intend the child to have a parent-child relationship with all three adults. *See infra* text accompanying notes 30–32.

3. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 129–32 (1989) (plurality opinion) (holding that the California law, which precluded the child’s biological father from rebutting the marital presumption, was constitutional such that the child had only two legal parents); *In re M.C.*, 123 Cal. Rptr. 3d 856, 861, 877 (Ct. App. 2011) (holding that the juvenile court erred when it failed to resolve the competing presumptions of three presumed parents—the biological mother, the mother’s partner, and the biological father—such that the child had only two legal parents). *But see* CAL. FAM. CODE § 7612(c) (West 2014) (allowing California courts to find that a child has more than two legal parents if not making such a finding “would be detrimental to the child”).

parents or if I am out with the kids and something happens’ ‘Legally, they could just take my kids and I couldn’t do anything about it.’⁴

Mr. Delaney’s situation illustrates the difficulties that nontraditional families face. Children, who are being parented by more than two adults, are not legally protected in their relationships with more than two parents. As a result, children can be deprived of their relationships with people who have been functioning as their parents, people who they love and call “mom” and “dad.” Moreover, the children have no recourse in the event their legal parents wish to end their own relationships with the adults. Likewise, the adults have no right to maintain their relationships with the children. These adults may wish to contribute to the children’s college funds and may want to teach them something the legal parents are unable to.⁵

Currently, most states’ laws provide that children can have only two legal parents.⁶ This limitation is a bright-line rule that prevents a court

4. Lovett, *supra* note 1, at A13. As Professor Nancy Polikoff of American University Washington College of Law stated,

“This is about looking at the reality of children’s lives, which are heterogeneous, as opposed to maintaining a fiction of homogeneity. . . .” “Families are different from one another. If the law will not acknowledge that, then it’s not responding to the needs of children who do not fit into the one-size-fits-all box.”

Id. at A9, A13.

5. Interview with Robert C. Fellmeth, Professor & Exec. Dir., Univ. of San Diego Sch. of Law Children’s Advocacy Inst., in San Diego, Cal. (Feb. 8, 2013). Professor Fellmeth is of the belief that the more parents who are willing to contribute to the child’s college fund, the better.

6. See Lovett, *supra* note 1, at A9 (“[M]ost other states . . . recognize[] no more than two legal parents.”). *But see, e.g.*, CAL. FAM. CODE § 7612(c) (giving courts the discretion to find that a child has more than two legal parents); DEL. CODE ANN. tit. 13, § 8-201 (2009) (providing for de facto parent status); D.C. CODE § 16-831.01 (2012) (providing for de facto parent status); LA. CIV. CODE ANN. art. 191, 197, 198 (2005) (allowing the mother, biological father, or child to rebut the marital presumption, thereby specifically providing for dual fatherhood); *Jacob v. Shultz-Jacob*, 923 A.2d 473, 475–76, 481–82 (Pa. Super. Ct. 2007) (affirming the trial court’s custody order, which granted shared custody to three adults).

Because most states limit parentage to two people, courts are forced to choose a maximum of two parents for a child. This creates a King Solomon’s Dilemma, requiring the court to choose who the child’s two legal parents are, even though more than two people qualify for legal parent status by functioning as parents to the child. *See 1 Kings* 3:16–28. In the Bible, King Solomon had to determine who a child’s mother was because of two women’s competing claims. *Id.* at 3:22–23. King Solomon ordered the child to be cut in half and for each woman to receive half of the child. *Id.* at 3:24–25. After this order, the child’s mother pleaded with King Solomon to give the child to the other woman so he would not be killed; the other woman told the king to divide the

from finding that a child has more than two legal parents, even if the court thinks such a finding would be best for the child. There is a danger in having a bright-line rule apply to situations where it should not.⁷ Under the Constitution, parents have the right to parent their children as they see fit.⁸ In the absence of exceptional circumstances, the state cannot interfere, and neither can third parties, including grandparents.⁹ However, “this simple rule is under increasing pressure, in an age of complex families, in which multiple adults have parent-like relationships with children.”¹⁰

Because “[t]he family is the fundamental unit of society,”¹¹ as the number of nontraditional families grows, the law must evolve to provide them with

child. *Id.* at 3:26. In response, King Solomon ordered the child to be given to the woman who wanted to spare the child because she was the child’s mother. *Id.* at 3:27. Like King Solomon, courts in states with a two-parent limit are forced to determine which two parents’ claims are superior. King Solomon devised a way to determine which woman was the child’s mother. Here, courts are forced to decide who a child’s legal parents are when all three people have been acting as parents to the child, which is arguably an even more difficult situation.

7. Interview with Robert C. Fellmeth, *supra* note 5.

8. *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110, 139 (1989) (Brennan, J., dissenting) (“Throughout our decisionmaking in this important area runs the theme that certain interests and practices—freedom from physical restraint, marriage, childbearing, childrearing, and others—form the core of our definition of ‘liberty.’”); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) (“[A]lthough the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 17 (2011) (“One of the primary rules in this society—so basic we never think much about it—is that the state, government, collective, or whatever one calls it, leaves child-rearing essentially alone. There are no legal rules about how to raise children. . . . Early in the twentieth century, this was elevated to a constitutional right. Fit parents were entitled under the Constitution to make decisions about the ‘care, custody, and control’ of their children.”).

9. GROSSMAN & FRIEDMAN, *supra* note 8, at 17; *see also* *Troxel v. Granville*, 530 U.S. 57, 60, 71–75 (2000) (holding that a Washington statute, which provided that anyone could petition the court for visitation rights at any time, violated the mother’s substantive due process rights as applied to permit the paternal grandparents to have visitation following the death of the children’s father). For a discussion of the legal parentage argument made on behalf of kinship caregivers, *see generally* Sacha M. Coupet, “*Aint I A Parent?*”: *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595 (2010).

10. GROSSMAN & FRIEDMAN, *supra* note 8, at 17–18.

11. *Id.* at 1.

protection.¹² Courts have continued to “redefine and broaden” the term *parent*, and as a result, there are an increasing number of family structures in which more than two people fit the definition.¹³ Even though courts have responded by expanding the definition of *parent* to include more than two people, “they have maintained the rigid idea that a child can have only two legal parents.”¹⁴ Despite expanding the definition of *parent* and granting rights to third parties, courts are doing so without granting parental status.¹⁵ “[W]ithout recognition as a legal parent, a person may be seen in

12. See Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities To Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 311, 325–26 (2007) (“Legal parents enjoy considerable protection from state and third-party interference.”); cf. GROSSMAN & FRIEDMAN, *supra* note 8, at 1–2 (“The ways in which law and the legal system impact the family—regulate it, affect it, mold it, challenge it, or perhaps even ignore it—are, naturally, as variable as the forms of families themselves. . . . Family law follows family life. That is, what happens to families in this society, determines what happens to the law of the family. Law is not autonomous; it does not evolve according to some mysterious inner program; it grows and decays and shifts and fidgets in line with what is happening in the larger society.”).

13. Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL’Y & L. 379, 381 (2007) (“When we look to intent and conduct—instead of only biology or marriage—to create legal parent-child relationships, it quickly becomes clear that there may be more than two people who are candidates for the legal title ‘parent.’”).

14. *Id.* (“Thus, even when courts find that three or more adults have standing to seek parentage, the outcome of such cases still tends to protect the child’s relationship with only two of those adults. Frequently the best interests of the child are neither considered in the process nor served by the outcome.”); see also *In re M.C.*, 123 Cal. Rptr. 3d 856, 861, 877 (Ct. App. 2011) (holding that the juvenile court erred when it failed to resolve the competing presumptions such that the child had only two legal parents); Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217, 221 (2010) (advocating that all adults who intend to have a parental relationship with a child be given legal parent status); Jacobs, *supra* note 12, at 324 (“[C]ourts apply the various doctrines to ensure that a child has two, and only two, legal parents.” (citing *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282–83, 291 (Ct. App. 1998))).

15. See Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend To Disaggregate Family Status from Family Rights*, 71 OHIO ST. L.J. 127, 129 (2010). Professor Baker discusses this phenomenon in the context of same-sex marriage. *Id.* In *Strauss v. Horton*, the California Supreme Court held that although same-sex couples have a fundamental right “to establish an officially recognized family relationship,” they do not have a fundamental right “to the designation of marriage.” 207 P.3d 48, 76 (Cal. 2009). By so holding, Ms. Baker states that the court “disaggregated family rights from family status, finding a constitutional right to the former even while accepting the voters’ ability to restrict

the law as a third party or ‘legal stranger’ who is not entitled to a relationship with a child with whom the individual has fostered a parental relationship.”¹⁶

Legal parents are able to enjoy all of the benefits of parentage and are responsible for all of its duties.¹⁷ If a court does not deem a person who has been acting as a parent to a child to be one of the child’s legal parents, that person has no rights with respect to the child.¹⁸ As a result, both the child and adult may be deprived of a relationship, and the child may be deprived of any financial support the adult could have provided. Thus, the current state of the law leaves both adults and children vulnerable. To protect these families, state legislatures should give courts the discretion to find that a child has more than two legal parents if such a finding is in the child’s best interest.

This Comment reviews the current state of parental rights and proposes statutory clarifications that would provide courts with the power to find that a child has more than two legal parents.

access to the latter”—through Proposition 8. Baker, *supra*, at 128 (citing *Strauss*, 207 P.3d at 76).

16. Jacobs, *supra* note 12, at 317 (citing Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?*, 32 RUTGERS L.J. 783, 787 (2001)); *accord* Jacobs, *supra* note 14 (arguing that a third parent should be granted legal parent status because the status protects the adult’s relationship with a child the adult has parented and protects the child, who relies on the adult’s emotional and financial support).

17. See *Michael H. v. Gerald D.*, 491 U.S. 110, 118–19 (1989) (plurality opinion) (“[T]he sum of parental rights with respect to the rearing of a child, includ[e] the child’s care; the right to the child’s services and earnings; the right to direct the child’s activities; the right to make decisions regarding the control, education, and health of the child; and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship.” (quoting 4 CALIFORNIA FAMILY LAW § 60.02(1)(b) (C. Markey ed., 1987) (internal quotation marks omitted) (citing CAL. CIV. CODE § 4601 (West 1983); CAL. CIV. CODE § 4600 (West 1983))). Professor Jacobs writes that more than two people often share parental duties. See Jacobs, *supra* note 12, at 312–13. Therefore, in the event that “three (or more) individuals financially and emotionally support the child and fully agree that all three should be active participants in the child’s life—why not recognize the legal parent-child relationship for all three parents?” *Id.* at 313.

18. For example, a nonbiological parent may have no right to visit the child following the termination of that parent’s relationship with one of the child’s biological parents. See Wald, *supra* note 13, at 382. Similarly, the child may have no right to maintain a relationship with the nonbiological parent. *Id.* The two-parent rule is not limited to nonbiological parents. See, e.g., *Michael H.*, 491 U.S. at 129–32 (holding that a California law, which precluded the child’s biological father from rebutting the marital presumption, did not violate the biological father’s procedural or substantive due process rights and that the child did not have a due process right to maintain filial relationships with both her biological and presumed father).

Part II provides background information on the decline of the traditional family. The Part reviews how the law of parentage has progressed over time and provides an overview of the laws of several states and Canada that provide rights to, and impose duties on, a third parent. Part III discusses California Senate Bill 1476, which, had Governor Jerry Brown signed it into law in 2012, would have given California courts the discretion to find that a child has more than two legal parents if such a finding was in the child's best interest. The Part concludes with a discussion of California Senate Bill 274, which Governor Brown signed into law in 2013, and allows California courts to find that a child has more than two legal parents if not making the finding would be detrimental to the child. Part IV discusses one court's recognition of the fundamental right of children to maintain familial bonds. Part V outlines the criticism of Senate Bill 1476 and the expansion of legal parentage in general. Part VI responds to these criticisms and provides support for expanding the two-parent limit. Part VII details my proposed reforms to the current state of parentage law. The Part delves into the advantages of allowing courts to recognize more than two legal parents and discusses why it is necessary for the legislatures to give courts this discretion. Part VIII concludes.

II. PARENTAGE LAW BACKGROUND

A. *The Modern Family*

The "traditional" family, in which a child's parents are husband and wife, has been steadily declining for years.¹⁹ Divorce rates have been on the rise, resulting in an increase in the number of stepparent families.²⁰

19. See GROSSMAN & FRIEDMAN, *supra* note 8, at 3 ("Perhaps the single most important trend [in family law] was the decline of the traditional family, the family as it was understood in the nineteenth century, the family of the Bible and conventional morality. The traditional family, in the twentieth century, came under greater and greater pressure; and in some ways, it came apart at the seams."); Jacobs, *supra* note 12, at 310 (discussing the decline of the traditional family and the rise in the number of new family forms); Wald, *supra* note 13, at 381 ("[T]his model 'traditional' family is no longer the norm, or even the majority . . .").

20. See *Johnson v. Calvert*, 851 P.2d 776, 781 n.8 (Cal. 1993) ("[R]ising divorce rates have made multiple parent arrangements common in our society . . ."); see also GROSSMAN & FRIEDMAN, *supra* note 8, at 13–14 (discussing the transition from the old fault-based system of divorce to the new no-fault "revolution" across states). The number of people currently divorced or separated increased from 5% in 1960 to 14% in 2008. *The Decline of Marriage and Rise of New Families*, PEW RES. CENTER (Nov. 18, 2010),

From 1960–2008, the percentage of married American adults declined while the number of unmarried mothers increased substantially from 1940 to the 1990s.²¹ In 1985, 22% of all children were born to unmarried mothers.²² This number increased to 32% in 1997, and by the end of 2008, the number of unmarried mothers had risen to 40.6%.²³ Meanwhile, single people and couples have increasingly turned to surrogacy and assisted reproductive technology (ART) to have children.²⁴ ART consists of fertility treatments involving both eggs and sperm, such as in vitro fertilization.²⁵

<http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/2/>; see also Wald, *supra* note 13, at 380 (“A collection of factors have combined to make this an extraordinarily complex and confusing time in history for determining legal parentage of children. . . . [This includes] [t]he rise in divorce rates and the accompanying rise in stepparent and ‘blended’ families . . .”). For a discussion of second-parent adoption, specifically step-partner adoption and inheritance rights, see Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351 (2005).

21. *The Decline of Marriage and Rise of New Families*, *supra* note 20 (“In 1960, 72% of American adults were married. By 2008, that share had fallen to 52%.”); see also Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 651 (2008) (“Increased reliance on private ordering, decreased demand for marriage as an institution to take care of women’s economic dependency and relaxed norms with regard to sexual activity have simply made marriage less primary than it used to be.” (footnotes omitted)); Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940–99*, NAT’L VITAL STAT. REP., Oct. 18, 2000, at 2, available at http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf (reporting that the number of nonmarital births “rose thirteenfold between 1940 and 1994, from 89,500 in 1940 to 1.17 million in 1990”).

22. GROSSMAN & FRIEDMAN, *supra* note 8, at 20 (citing Brady E. Hamilton et al., *Births: Preliminary Data for 2008*, NAT’L VITAL STAT. REP., Apr. 6, 2010, at 6, tbl.1, available at http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_16.pdf).

23. *Id.* (citing Hamilton et al., *supra* note 22).

24. See *id.* (discussing the advent of surrogacy and in vitro fertilization and the family variations that can result).

There were egg mothers who were not womb mothers, and womb mothers who were not egg mothers—women who carried somebody else’s (genetic) child inside their belly. A child could have an egg mother, a womb mother, a sperm donor father, as well as a mother and father who intended to raise him or her. There were gay couples who adopted a child or made use of a surrogate mother; and lesbian couples who had babies through artificial insemination. There were even children whose biological parents had died before the children were even *conceived*.

Id.; see also Wald, *supra* note 13, at 380–81 (“A collection of factors have combined to make this an extraordinarily complex and confusing time in history for determining legal parentage of children. . . . [This includes] [t]he rapid changes in medical technology whereby egg donors, sperm donors, in vitro fertilization, and surrogacy are becoming commonplace . . .”). For an in-depth discussion of the law as it relates to families created through the use of donors, see Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367 (2012).

25. See CTRS. FOR DISEASE CONTROL & PREVENTION, 2009 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 3 (2011), available at http://www.cdc.gov/art/ART_2009/PDF/ART_2009_Full.pdf (“Of the approximately 62 million women of reproductive age

Since 1978, the year that the first “test-tube baby” was born, there have been an estimated 5 million children born as a result of ART.²⁶ In fact, people in the United States have been using ART since 1981 to help women become pregnant.²⁷ From the 443 fertility clinics that reported data, “[t]he 147,260 ART cycles performed at these reporting clinics in 2010 resulted in . . . 61,564 infants.”²⁸

With the increased use of ART, it has become more common for children to have more than two parents.²⁹ This avenue to multiple parenthood has accelerated because of the needs of infertile and same-sex couples. Same-sex couples sometimes choose to use a friend as a sperm donor or surrogate and intend the child to have a parent-child relationship with all three adults.³⁰ When the three adults decide not to parent the child as a

in 2002, about 1.2 million, or 2%, had had an infertility-related medical appointment within the previous year and an additional 10% had received infertility services at some time in their lives.”).

26. See EUROPEAN SOC’Y OF HUMAN REPROD. & EMBRYOLOGY, FOCUS ON REPRODUCTION 8 (2012), available at <http://www.eshre.eu/ESHRE/English/Publications/Focus-on-Reproduction/September-2012/page.aspx/1712>. In 2011, the cumulative total births as a result of ART was 4.6 million, and in 2012, that number rose to 5 million. *Id.*; Jeanna Bryner, *5 Million Babies Born from IVF, Other Reproductive Technologies*, LIVESCIENCE (July 3, 2010, 10:52 AM), <http://www.livescience.com/21355-5-million-babies-born-ivf-technologies.html>.

27. See CTNS. FOR DISEASE CONTROL & PREVENTION, *supra* note 25, at 1 (“[A]bout 12% of women of childbearing age in the United States have used an infertility service.”).

28. *2010 Assisted Reproductive Technology Fertility Clinic Success Rates Report*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/art/ART2010/index.htm> (last updated Jan. 30, 2013). This statistic does not include “banking cycles and cycles in which a new treatment procedure was being evaluated.” *Id.* In 2009, 441 fertility clinics reported data indicating there were 146,244 ART cycles resulting in 60,190 infants. *2009 Assisted Reproductive Technology Report*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/art/ART2009/> (last updated Mar. 7, 2012).

29. Those potential parents include “genetic sperm or egg donors, gestational birth mothers, and a variety of functional parents such as stepparents, foster parents, and other caregivers.” Jacobs, *supra* note 12, at 309, 325.

30. See Wald, *supra* note 13, at 398–99. For example, in the opening example, the family consists of a gay couple and a lesbian couple, who decided to parent their children together. Despite their decision to do this, the law at the time of the story did not afford legal protection to all of their parent-child relationships. Although the children consider all four adults their parents, at the time, the children under California law could have only two legal parents. As a result, the children had no legally protected relationship with their father, Mr. Delaney, even though he is one of their biological parents. Lovett, *supra* note 1, at A9. *But see* Kevin Gray, *Florida Judge Approves Birth Certificate Listing Three Parents*, U.S. NEWS (Feb. 7, 2013), http://usnews.nbcnews.com/_news/2013/02/07/16889720-florida-judge-approves-birth-certificate-listing-three-parents?lite; Ellie Hall, *Lesbian Couple and Hairdresser Sperm Donor To All Be Listed on Baby’s*

unit, the child would still benefit from having the third adult in a parental role.³¹ Such a role means the child would have a right to continued contact with the adult and allows for another adult role model for the child and additional economic investors in the child's higher education.³²

The rule of two legal parents per child does not affect only same-sex families. News articles frequently discuss cases in which states' parentage laws are ineffective.³³ Consider a New York case in which a man and his live-in girlfriend decided to have a child together and due to difficulties conceiving, used an anonymous sperm donor.³⁴ With the help of in vitro fertilization, the couple had a baby boy—Lincoln Amory Aurelian Sporn Leutner—in July 2012.³⁵ In mid-December 2012, Ms. Leutner moved out of the apartment she shared with Dr. Sporn and committed suicide on

Birth Certificate, BUZZFEED (Feb. 8, 2013), <http://www.buzzfeed.com/ellievhall/lesbian-couple-and-hairdresser-sperm-donor-allowed-to-all-be>. In Florida, a lesbian couple, Ms. Italiano and Ms. Filippazzo, had difficulty conceiving through the use of fertility clinics. Hall, *supra*. They asked their gay friend, Mr. Gerina, to provide his sperm for artificial insemination. *Id.* He did, and once Ms. Italiano became pregnant, Mr. Gerina refused to sign a contract in which he would relinquish all of his parental rights. *Id.* Mr. Gerina stated he had made the donation under the impression he would be considered one of the child's parents because the women were looking for a father for the child. *Id.* The couple had a different idea of Mr. Gerina's role, which resulted in a two-year paternity battle. *Id.* The three settled the matter in January 2013. *Id.* A Florida judge approved the settlement and the adoption of the child, including the child's new birth certificate, which will list all three parents. *Id.* The couple will have sole parental rights, even though Florida recognizes Mr. Gerina as the child's father and grants him biweekly visitation rights. *Id.* Mr. Gerina will not, however, have to make child support payments. *Id.* In an interview with *Reuters*, Ms. Filippazzo said,

We're trying to do the right thing for Emma We want Emma to have it all, and we believe by doing it this way, including him in a birthday or Thanksgiving, it'll be a nice addition for her. We believe the best interest for Emma is for him to have a role in her life, but not as a parent The role is this is mommy's good friend who helped your moms have you because they wanted you so badly.

Gray, *supra* (internal quotation marks omitted).

31. Interview with Robert C. Fellmeth, *supra* note 5.

32. *Id.*

33. See, e.g., Ginia Bellafante, *When the Law Says a Parent Isn't a Parent*, N.Y. TIMES, Feb. 2, 2013, at MB5. Ms. Bellafante discusses the evolution of the "Modern Family" and how the law has lagged behind:

Gay rights are moving forward; single women now account for 41 percent of all births. Americans build caring families with lovers, friends and neighbors; from one-night stands and anonymous providers of genetic material. And yet, even in a place as progressive as New York, the legal system has been slow to synchronize to these altered realities.

Id.; see also Lovett, *supra* note 1, at A9, A13 (referring to the growing legal debate about how alternative family arrangements should be legally recognized).

34. See Bellafante, *supra* note 33, at MB5.

35. *Id.*

New Year's Day.³⁶ Since that time, Lincoln has been in the custody of child protective services and is in foster care in New York City.³⁷ Because the couple was not married and because Dr. Sporn is not Lincoln's biological father, he is not one of Lincoln's legal parents according to New York law.³⁸ As a result, Lincoln has the status of destitute, a term used for children who have no known parents.³⁹ Despite the role Dr. Sporn has played in Lincoln's life thus far, including changing and washing him and soothing him back to sleep, he is now engaged in a custody battle with Ms. Leutner's sister.⁴⁰ Dr. Sporn is effectively a legal stranger to Lincoln, a child he and Lincoln's mother intended to create and raise together and who shares his name.⁴¹ Regardless of one's opinion on who should have custody of Lincoln, it is evident that the rule of two creates harsh results.

To illustrate how quickly parentage is expanding and how necessary it is for the law to catch up, consider the United Kingdom's recent decision to become the first country to allow scientists to experiment with a type of in vitro fertilization that uses DNA from three people.⁴² The intended purpose of the treatment is to keep a woman with mitochondrial disease from passing the disease onto her child.⁴³ Those in support of this technique emphasize the life-saving possibilities; those opposed fear it will "open[] the door to the creation of 'designer babies.'"⁴⁴ Whichever view one holds, this technique will eventually allow for the creation of children with three genetic parents.

36. *Id.*

37. *Id.*

38. *Id.* ("But from the perspective of the law, a parent in Dr. Sporn's situation is effectively not a parent at all. He was not married to Lincoln's mother. He has no blood relationship to the child. And he did not take steps to legally adopt him after his birth.")

39. *Id.*; see also *Paternity Establishment*, N.Y. ST. DIVISION OF CHILD SUPPORT ENFORCEMENT, https://www.childsupport.ny.gov/paternity_establishment.html (last visited June 8, 2014) ("Paternity establishment is the process of determining the legal father of a child. Every child has a biological father, but if the parents are not married, the child has *no legal father*, and the biological father has no rights or responsibilities to the child.")

40. Bellafante, *supra* note 33, at MB5. The court acknowledged that both homes would be suitable for the child. *Id.*

41. See Jacobs, *supra* note 12, at 317.

42. See Laura Smith-Spark, *UK Takes Step Toward 'Three-Parent Babies,'* CNN Health (June 28, 2013, 6:31 PM), <http://www.cnn.com/2013/06/28/health/uk-health-dna-ivf/index.html>.

43. *Id.*

44. *Id.*

B. The Marital Presumption and Presumed Parent Status

Despite the decline in the number of traditional families, courts are “constrained by the two-parent paradigm doctrine to ‘fit’ . . . [new family structures] into old molds.”⁴⁵ Historically, courts applied the marital presumption that the mother’s husband was the father of the child, and in the event that the mother was unmarried, the child had only one legal parent.⁴⁶ Because genetic testing was not available to determine biological parenthood, the system relied on marriage.⁴⁷ With the rise of genetic testing and the decline of marriage, courts have increasingly turned to biology to determine parenthood.⁴⁸

45. Jacobs, *supra* note 12, at 310, 312 (“[W]hen appropriate, we need to recognize that more than two individuals can assume the many roles and obligations that traditional parentage has entailed, and children can benefit from the legal recognition of all of those individuals as parents.”); cf. GROSSMAN & FRIEDMAN, *supra* note 8, at 16 (“The typical family is the nuclear family: a mother and father, and kids. And even this sort of nuclear family made up less than half of all ‘families’ by 2000.”).

46. See GROSSMAN & FRIEDMAN, *supra* note 8, at 6 (“Marriage lost its monopoly over legitimate sexual behavior. By the end of the [twentieth] century, there was no such thing, legally speaking, as a bastard; children born out of wedlock had more or less the same rights as children of married parents. This development was linked to another one, which would have startled the good citizens of Victorian America: cohabitation was not only legal, it was common as dirt. Sexual freedom had gained both social and legal acceptance. Moreover, in some places, gay couples could be recognized as a kind of family.”); Baker, *supra* note 15, at 131 (“Traditionally, marital status determined parental status and the existence of parental rights was contingent on the state of one’s marriage.”); Jacobs, *supra* note 12, at 309–10 (“Determining a child’s legal mother and father was not historically difficult: the birth mother was the legal mother and her husband, pursuant to the marital presumption, was the child’s father. For a child born out of wedlock, only the mother was a legal parent.” (citing Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 816 (2006); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 127 (2006))).

47. See *Michael H. v. Gerald D.*, 491 U.S. 110, 140 (1989) (Brennan, J., dissenting) (“In the plurality’s constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.”). Professor Baker discusses how the marital presumption determined legal parent status, how the “importance of marriage” has declined, and how “[w]ithout the law of marriage, we do not know who parents are.” Baker, *supra* note 21, at 651.

48. See Baker, *supra* note 21, at 651–53. Professor Baker argues that what makes it attractive for courts to focus on biology is not

so much the importance of the genetic connection between parent and child, but is instead the way in which a bionormative regime constructs parenthood as *private* (meaning that the state has no legitimate interest in regulating, but also no requirement to finance, parenthood), *exclusive* (meaning one’s parental status may not be usurped by anyone else), and *binary* (meaning there are at least two and only two parents).

Presumed parent status is the strongest parental status under the law.⁴⁹ There are two avenues to achieving presumed parent status: being married to the mother before the child's birth or following the child's birth, holding out the child as your own, living with the child, and functioning as the child's parent.⁵⁰ When a person establishes parental status, a fundamental liberty interest to parent accrues to that person, and the state can take it away only by clear and convincing evidence.⁵¹

In California, a woman is presumed to be a child's natural mother if she gave birth to the child.⁵² A man is presumed to be a child's natural father if he was married to the child's mother and living with her at the time of the child's birth.⁵³ Under California's Uniform Parentage Act, a

Id. at 653. In Lincoln's case, he has only one legal parent because sperm donors are not legal parents under New York law. See Bellafante, *supra* note 33, at MB5. As a result, once Lincoln's mother died, he had no legal parents under the law, even though Dr. Sporn had been acting as a father to him. *Id.*

49. The term *presumed* derives from the Federal Uniform Parentage Act. Lecture by Robert C. Fellmeth, Professor & Exec. Dir., Univ. of San Diego Sch. of Law Children's Advocacy Inst., Child Rights & Remedies, in San Diego, Cal. (Nov. 7, 2012). After presumed parent status, the following parental statuses apply in order of strongest to weakest: alleged parent status, "mere" biological parent status, and de facto parent status. *Id.*

50. In *Adoption of Kelsey S.*, 823 P.2d 1216, 1217 (Cal. 1992), the California Supreme Court held that equal protection and due process require that a father of a child born out of wedlock, who attempts to obtain custody of the child and rear the child himself, be allowed to withhold his consent to the child's adoption by third parties. Therefore, the father's parental rights cannot be terminated absent a showing of his unfitness. See *id.* Note that presumed parent status can apply to men and women. See *Elisa B. v. Superior Court*, 117 P.3d 660, 664–65, 670 (Cal. 2005) (holding that the genetic mother's former lesbian partner was the children's presumed parent by virtue of having "actively participated" in the artificial insemination process and having cared for the children for more than a year after their birth such that she was obligated to pay child support).

51. In *Stanley v. Illinois*, 405 U.S. 645, 646–47, 649 (1972), the United States Supreme Court held that the fundamental liberty interest to parent is not based on marriage alone. Under the Equal Protection Clause of the Fourteenth Amendment, parents are constitutionally entitled to a hearing on their fitness before their children can be removed from their custody. *Id.* at 649; see also *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (holding that due process requires a state to prove termination of parental rights according to the clear and convincing evidence standard, rather than the preponderance of the evidence standard); *supra* note 8 and accompanying text.

52. CAL. FAM. CODE § 7610(a) (West 2014).

53. *Id.* § 7540. Section 7540 of the California Family Code establishes the marital presumption: "[T]he child of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." *Id.* Pursuant to section 7541, however, the child's mother can challenge the presumed father's paternity by blood test. *Id.* § 7541(c).

man can establish he is a child's presumed father by signing a voluntary declaration of paternity or receiving the child into his home and openly holding out the child as his own.⁵⁴ If a parent has not established parental status, the legal parent, or parents, can bar the child from having contact with the parent who is not legally recognized.⁵⁵

Although reliance on biology is helpful, it alone may not be enough for a man attempting to invoke his parental rights.⁵⁶ In *Lehr v. Robertson*, the United States Supreme Court first made the "clear distinction between a mere biological relationship and an actual relationship of parental responsibility."⁵⁷ Although a "mere biological relationship" between a father and child may not be sufficient for a father who is attempting to invoke his parental rights, it usually is enough to impose child support obligations on him.⁵⁸

For a biological father who wants to be considered one of a child's legal parents, he will have to show he has performed as a parent to the child.⁵⁹ This will then allow him and the child to raise an estoppel

54. *Id.* §§ 7574, 7611(d).

55. Interview with Robert C. Fellmeth, *supra* note 5; *see also* Wald, *supra* note 13, at 382 (describing "vicious . . . and unnecessary . . . tugs of war" between legal parents and parents who are not legally recognized).

56. *See, e.g., Michael H.*, 491 U.S. at 129–32 (holding that a California law, which precluded the child's biological father from rebutting the marital presumption, did not violate the biological father's procedural or substantive due process rights). Justice Brennan, in his dissenting opinion, criticized the Court's focus on whether there has been historical protection of a biological father's "relationship with a child whose mother is married to another man," rather than focusing on "whether parenthood is an interest that historically has received our attention and protection." *Id.* at 139 (Brennan, J., dissenting). He goes on to say that the Court's precedents have held that a biological relationship between father and child alone does not guarantee the father a constitutional right to a relationship with the child, but if the father has a biological relationship to the child and has established a "substantial parent-child relationship" with the child, he is guaranteed constitutional protection of the relationship. *Id.* at 142–43 (citing *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quillion v. Walcott*, 434 U.S. 246 (1978); *Stanley*, 405 U.S. at 645).

57. 463 U.S. at 259–60. In *Lehr*, the Court held that biology creates opportunity and the biological father has to seize the opportunity. *Id.* at 262. If he does not and the other parent has an established custodial relationship with the child, the Equal Protection Clause does not prevent a state from according the parents different legal rights. *Id.* at 267–68.

58. *See, e.g., Jacob v. Shultz-Jacob*, 923 A.2d 473, 475–76 (Pa. Super. Ct. 2007) (holding that equitable estoppel required the sperm donor to make child support payments because he was involved in the children's lives). *But see* Gray, *supra* note 30; Hall, *supra* note 30 (discussing a case in which a lesbian couple's gay friend provided his sperm for artificial insemination and resulted in a Florida court granting him biweekly visitation rights without requiring him to make child support payments).

59. In *Adoption of Kelsey S.*, the California Supreme Court held that the father of a child born out of wedlock can withhold his consent to the child's adoption by third parties if he attempts to obtain custody of the child and rear the child himself. 823 P.2d

argument—the father has functioned as a father, the child knows him as a father, and the state should be estopped from declaring that no parent-child relationship exists.⁶⁰ However, even a biological relationship between a father and child and the father's performance as a parent may be insufficient to afford legal protection to the relationship.⁶¹ As the Court decided in *Michael H. v. Gerald D.*, states are able to place priorities on certain institutions, such as marriage, through the use of the marital presumption.⁶²

In *Michael H.*, the child had three caregivers: her mother, her mother's husband—her presumed father—and her biological father.⁶³ The child had lived with both her presumed father and biological father and was seeking to “maintain[] her filial relationship” with her biological father.⁶⁴ In holding that the California statute precluding the biological father from rebutting the marital presumption was constitutional, the Court wrote, “California

1216, 1217 (Cal. 1992). Therefore, the father's parental rights cannot be terminated absent a showing of his unfitness. *Id.*

60. See *Michael H.*, 491 U.S. at 143 (Brennan, J., dissenting) (“Michael H. is almost certainly Victoria D.'s natural father, has lived with her as her father, has contributed to her support, and has from the beginning sought to strengthen and maintain his relationship with her.”); Interview with Robert C. Fellmeth, *supra* note 5.

61. See, e.g., *Michael H.*, 491 U.S. at 129–32 (plurality opinion).

62. As a result, the marital presumption trumped the relationship the child and biological father had formed. *Id.* at 129–30. Because the law restricts children to two parents, the child's presumed parent—her mother's husband—is her one and only legal father. *Id.* But see *id.* at 145 (Brennan, J., dissenting) (“The plurality's exclusive rather than inclusive definition of the ‘unitary family’ is out of step with other decisions as well. This pinched conception of ‘the family,’ crucial as it is in rejecting Michael's and Victoria's claims of a liberty interest, is jarring in light of our many cases preventing the States from denying important interests or statuses to those whose situations do not fit the government's narrow view of the family.”).

63. The child's parents, Carole and Gerald, married in 1976. *Id.* at 113 (plurality opinion). In 1978, Carole began an affair with Michael. *Id.* In 1980, Carole conceived a child, Victoria. *Id.* Carole informed Michael that she thought he could be Victoria's father. *Id.* at 114. Blood tests confirmed there was a 98.07% probability that Michael was Victoria's father. *Id.* Following that discovery, Carole and Victoria lived with Gerald and then later with Michael. *Id.* Both Gerald and Michael held out Victoria to the world as his daughter. *Id.* at 113–14; see also Wald, *supra* note 13, at 400 (noting that the plurality included five opinions, indicating how unsettled this area of law is).

64. *Michael H.*, 491 U.S. at 114–16, 130. The Court denied Victoria's request, writing, “Here, to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa.” *Id.* at 130. The Court rejected the idea that Victoria had a substantive due process right to maintain a relationship with her biological father. *Id.* Despite Michael's biological connection to Victoria and their parent-child relationship, they received no legal protection of their relationship. *Id.*

law, like nature itself, makes no provision for dual fatherhood.”⁶⁵ The Court rejected the child’s claim that she had a due process right to maintain a filial relationship with both her presumed father and biological father: “[T]he claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country.”⁶⁶

As Professor Robert C. Fellmeth, Executive Director of the University of San Diego School of Law’s Children’s Advocacy Institute, points out, this is a self-fulfilling prophecy.⁶⁷ Multiple fatherhood *is* actually in the history and traditions of this country; the law, however, does not reflect that.⁶⁸ Because of the rise in divorce rates, there are many instances of multiple parents—biological parents and stepparents—functioning as parents to a child. A child should not be punished by being deprived of a relationship with, and financial support from, the child’s biological father by virtue of the child’s mother having had an extramarital affair.

Despite the decline in marriage and the rise in nonmarital births, all states still have the marital presumption in some form.⁶⁹ States vary in terms of whether they allow family members to rebut the marital presumption—present evidence that the mother’s husband is not the child’s biological father.⁷⁰ Louisiana is the only state that allows a biological father, mother, or child to rebut the marital presumption.⁷¹ By allowing

65. *Id.* at 118.

66. *Id.* at 131. *But see id.* at 137 (Brennan, J., dissenting) (“What the deeply rooted traditions of the country are is arguable.” (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 549 (1977) (White, J., dissenting) (internal quotation marks omitted))); *Webster v. Ryan*, 729 N.Y.S.2d 315, 333 (Fam. Ct. 2001) (discussing *Michael H.* and highlighting the fact that the Supreme Court took eighteen pages to dismiss the biological father’s constitutional claims and devoted only three paragraphs to the child’s claims).

67. Interview with Robert C. Fellmeth, *supra* note 5.

68. *See Michael H.*, 491 U.S. at 139–40. Justice Brennan criticized the plurality for tailoring the question so narrowly: “[W]hether the specific variety of parenthood under consideration—a natural father’s relationship with a child whose mother is married to another man—has enjoyed [historical] protection.” *Id.* at 139. He wrote that the Court has recognized certain interests that had not previously been protected and had the Court looked to tradition with the level of specificity it did in *Michael H.*, it would have reached a different result. *Id.* (citing *Vitek v. Jones*, 445 U.S. 480 (1980) (arbitrary transfers from prison to psychiatric institutions); *Ingraham v. Wright*, 430 U.S. 651 (1977) (use of corporal punishment in schools); *Stanley v. Illinois*, 405 U.S. 645 (1972) (rights of fathers to raise illegitimate children); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (unmarried couples’ use of contraceptives); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (married couples’ use of contraceptives)); Interview with Robert C. Fellmeth, *supra* note 5.

69. *See Jacobs*, *supra* note 14, at 227.

70. *See id.* (citing Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 234–36 (2006)).

71. *See id.* (citing LA. CIV. CODE ANN. art. 198 (2007)). Louisiana Civil Code article 198 states,

people to rebut the marital presumption, Louisiana “explicitly provides for more than two parents, namely dual fatherhood.”⁷² The reasoning behind the concept of dual paternity in Louisiana is that a child should be able to receive financial support from the child’s biological father and presumed father.⁷³

The marital presumption is no longer a sufficient way to determine who a child’s legal parents are. As can be the case with an extramarital affair, as exemplified by *Michael H.*,⁷⁴ and especially in the case of a family that used ART, there can be more than two people who qualify as a child’s presumed parents.

C. *The Uniform Parentage Act*

Although there have been some federal statutes in the area, family law is essentially the states’ domain.⁷⁵ One of the few initiatives to reach across state lines is the Uniform Parentage Act (UPA), a federal statute passed

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 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 (2014).

72. Jacobs, *supra* note 14, at 227. Professor Jacobs discusses how the Department of Public Welfare can also rebut the marital presumption by bringing “an action to establish the paternity and support obligation of a child’s biological father,” as long as the action is in the child’s best interest. *Id.* at 227–28 (citing LA. REV. STAT. ANN. § 46.236.1.2(D) (2005)).

73. *See id.* at 228 (quoting *Dep’t of Soc. Serv. v. Howard*, 898 So. 2d 443, 444 (La. Ct. App. 2004)).

74. 491 U.S. 110 (1989).

75. *See* GROSSMAN & FRIEDMAN, *supra* note 8, at 21 (“There is, in the United States, as Mary Ann Glendon notes, no cabinet minister ‘charged with responsibility for family affairs,’ nor an ‘explicit national family policy,’ as there is in some other countries.” (citing MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 135 (1987))).

by Congress in 1973.⁷⁶ To date, twenty-one states have enacted statutes similar to the Federal UPA.⁷⁷

At the state level, California has led in the area of family law.⁷⁸ In 1993, the California Supreme Court in *Johnson v. Calvert* discussed legal issues that had developed due to the advent of ART.⁷⁹ The *Johnson* court discussed the UPA, which was enacted to have legitimate and illegitimate children treated equally under the law.⁸⁰ Instead of focusing on the marital status of a child's parents to determine the rights of the parents and child, the UPA focuses on the existence of a parent-child relationship.⁸¹ The California UPA defines *parent and child relationship* as “the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations.”⁸² This legal relationship is afforded to every parent and child regardless of whether the child's parents are married.⁸³ Thus, the empirical grounding of the UPA is not consistent with a bright-line, two-parent absolute.⁸⁴

76. *Id.* at 296. The UPA was first proposed in response to state bills calling for the prohibition of donors in the area of ART. *Id.* The UPA, which was revised in 2002, provides that an anonymous sperm donor is not the legal father of the child; rather, the mother's husband is the child's legal father. *Id.* (citing UNIF. PARENTAGE ACT § 5 (amended 2002), 9B U.L.A. 407 (1973)).

77. Some version of the UPA has been enacted in twenty-one states. ANN HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES § 3:5 (2012). Twelve states have adopted some or all of the 1973 provisions of the UPA, including California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, Ohio, and Rhode Island. *See* CAL. FAM. CODE §§ 7600–7730 (West 2014).

78. *See* Steven K. Berenson, *The Elkins Legislation: Will California Change Family Law Again?*, 15 CHAP. L. REV. 443, 443 (2012).

79. 851 P.2d 776 (Cal. 1993). The court addressed this question: “When, pursuant to a surrogacy agreement, a zygote formed of the gametes of a husband and wife is implanted in the uterus of another woman, who carries the resulting fetus to term and gives birth to a child not genetically related to her, who is the child's ‘natural mother’ under California law?” *Id.* at 777–78 (footnotes omitted).

80. *Id.* at 778–79 (explaining that the UPA was adopted following United States Supreme Court decisions in which the Court mandated legitimate and illegitimate children be treated equally). Those decisions include *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glonn v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968). *Johnson*, 851 P.2d at 779. In her article, Professor Jacobs discusses the UPA, which she says provided “a mechanism” such that courts would find two legal parents for each child, regardless of the marital status of the child's parents. Jacobs, *supra* note 14, at 225.

81. *See* CAL. FAM. CODE § 7602 (West 2014); *Johnson*, 851 P.2d at 779.

82. CAL. FAM. CODE § 7601.

83. In California, the specific code section states, “The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.” *Id.* § 7602.

84. Interview with Robert C. Fellmeth, *supra* note 5.

In *Johnson*, the surrogate mother, Anna, gave birth to a child created through in vitro fertilization by the genetic mother, Crispina, and her husband, Mark Calvert.⁸⁵ Anna argued that she was the child's legal mother by virtue of having given birth to the child pursuant to California Civil Code section 7003,⁸⁶ which stated that the parent and child relationship "may be established by proof of having given birth to the child."⁸⁷ Crispina's claim that she was the child's legal mother was based on her genetic connection to the child.⁸⁸

In declining to find that the child had two mothers, the court wrote, "[F]or any child California law recognizes only one natural mother."⁸⁹ The court reasoned that because the Calverts were the "genetic and intending parents" of the child, it would diminish Crispina's role as mother to recognize parental rights in Anna, a person with whom the Calverts had little contact following the child's birth.⁹⁰ Discussing a situation in which the genetic mother and the woman who gave birth to the child are not the same person, the court focused on intent: "[S]he who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."⁹¹

85. First names of parties used to avoid confusion. *Johnson*, 851 P.2d at 778. For additional background, see Dan Chu, Nancy Matsumoto & Lorenzo Benet, *A Judge Ends a Wrenching Surrogacy Dispute, Ruling that Three Parents for One Baby Is One Mom Too Many*, PEOPLE WEEKLY, Nov. 5, 1990, at 143.

86. *Johnson*, 851 P.2d at 779.

87. CAL. FAM. CODE § 7610. California Civil Code section 7003 was repealed and replaced by California Family Code section 7610. No changes in substance were made to the law. *Id.*

88. *Johnson*, 851 P.2d at 779–80.

89. *Id.* at 781. The court continued by writing that this is the case "despite advances in reproductive technology rendering a different outcome biologically possible." *Id.*

90. *Id.* at 781 & n.8 ("[W]hile gestation may demonstrate maternal status, it is not the sine qua non of motherhood.").

91. *Id.* at 782. The court rejected the argument made by amicus curiae, the American Civil Liberties Union, that the court should find that the child has two mothers. *Id.* at 781 n.8. The court wrote, "Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here." *Id.* The court went on to write that finding that the child had three parents was not necessary because the child's two genetic parents intended to create the child. *Id.* at 782. This raises the question of how many parents a child has when more than two people intend to create the child.

1. The Importance of Conduct and Intent

Under the UPA, a child's legal father can be either the child's biological or social father.⁹² In the case of an egg or sperm donor, the UPA provides that a donor is not a legal parent: "[A] donor is not a parent of a child conceived by means of assisted reproduction."⁹³ The UPA further provides that a surrogate is not a legal parent: "[T]he prospective gestational mother and the donors relinquish all rights and duties as parents of a child conceived through assisted reproduction."⁹⁴

As the UPA recognizes, marriage and biology are not the only factors courts look to when deciding who a child's legal parents are.⁹⁵ The Act acknowledges, as case law has, that biology is too broad, and marriage is too narrow.⁹⁶ This is the problem with having a bright-line rule limiting parenthood to two people.⁹⁷ Instead, courts should focus on criteria that are based on reality, such as conduct and intent, and their application of those criteria should be on a case-by-case basis.⁹⁸ As courts increasingly look to conduct and intent, rather than only marriage and biology, they will continue to see that "there may be more than two people who are candidates for the legal title 'parent.'"⁹⁹ However, the legal title *parent* has been limited to two people per child, even when a court finds that more than two people have standing to establish legal parentage.¹⁰⁰

In 2005, the California Supreme Court looked to conduct and intent when it held in *Elisa B. v. Superior Court* that a former lesbian partner of a woman with children was the children's presumed mother under the

92. See Jacobs, *supra* note 12, at 318 ("[T]he Uniform Parentage Act (UPA) was promulgated to equalize the rights of nonmarital and marital children and provide that nonmarital children have two legal parents to provide emotional and financial support.").

93. *Id.* at 322 n.73 (quoting UNIF. PARENTAGE ACT § 702 (amended 2002), 9B U.L.A. 355 (2000)) (internal quotation marks omitted).

94. *Id.* at 322 n.74 (quoting UNIF. PARENTAGE ACT § 801 (amended 2002), 9B U.L.A. 362 (2000)).

95. See *id.* at 322–24 (discussing how under the UPA, egg and sperm donors and surrogates are not legal parents, which helps intending parents ensure they are the child's legal parents).

96. Interview with Robert C. Fellmeth, *supra* note 5.

97. *Id.*

98. *Id.*

99. Wald, *supra* note 13, at 381 (discussing courts' reluctance to find that a child has more than two legal parents and that when determining who a child's legal parents are, the child's best interest is not considered in the decision and not achieved in reality).

100. See, e.g., *In re M.C.*, 123 Cal. Rptr. 3d 856, 861, 877 (Ct. App. 2011); see also Wald, *supra* note 13, at 381 ("[E]ven when courts find that three or more adults have standing to seek parentage, the outcome of such cases still tends to protect the child's relationship with only two of those adults.").

UPA and was therefore required to pay child support.¹⁰¹ The former partner “actively assisted” the mother “in becoming pregnant with the expressed intention of enjoying the rights and accepting the responsibilities of parenting the resulting children. She accepted those obligations and enjoyed those rights for years.”¹⁰² Because the former partner lived with the children and held out the children to the world as her own, the court concluded she was a presumed mother and was therefore obligated to support the children financially.¹⁰³

101. 117 P.3d 660, 662 (Cal. 2005). The court noted that no one had filed a competing claim to the former partner being the children's second parent. *Id.* at 670. This suggests that had someone filed a competing claim, the court may not have found the former partner to be the children's second legal parent. This point also highlights the fact that courts prefer to find that a child has two parents, rather than one. By attempting to ensure every child has two parents, this necessarily raises the possibility that more than two people have claims of legal parentage. This then leads to the question of why courts limit the number of legal parents to two. If marriage and biology are no longer the exclusive factors courts look to when determining parentage and as courts continue to look to conduct and intent, there will continue to be more than two people with valid claims of legal parentage.

This case also highlights the fact that courts have not restricted the limit of two to couples of the opposite sex. Here, the children's two legal parents were women. Had the children been conceived naturally instead of through the use of ART, there would have been two biological parents, two or three intending parents, and two or three people acting as parents to the children. If all three intended to create and raise the children, it leads to the question of why legal parentage should be limited to two people. *Id.* at 670–71.

102. *Elisa B.*, 117 P.3d at 669. The women, Elisa and Emily, were both artificially inseminated. *Id.* at 663. They used the sperm of the same sperm donor. *Id.* During their pregnancies, they attended each other's medical appointments and childbirth classes. *Id.* Elisa gave birth to a boy, and Emily gave birth to twins. *Id.* They breastfed all of the children and joined their last names to create the children's last names. *Id.* When the couple separated, Elisa raised her son on her own, and Emily began raising the twins alone. *See id.* Emily brought this action seeking child support from Elisa. *See id.* at 662. The court quoted the legislature regarding the purpose of establishing paternity: “Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights.” *Id.* at 669 (quoting CAL. FAM. CODE § 7570(a) (West 1993)) (internal quotation marks omitted). The court went on to note that the legislature, in recognizing the importance of determining paternity, “implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public.” *Id.*

103. *Id.* at 670. Had the court not held the former partner responsible for paying child support, the children would have been entitled to financial support from only one legal parent—their biological mother. The couple used a sperm donor, and under the law, sperm donors are not legal parents. To ensure the children were not disadvantaged by the fact that they were created through the use of ART, the court held that the former

2. *The American Law Institute*

Like the UPA, which has evolved as family forms have changed, the American Law Institute suggests that three types of parents exist: “legal parents, parents by estoppel, and de facto parents.”¹⁰⁴ A person is a legal parent through either biology or adoption, as determined by state law.¹⁰⁵ A parent by estoppel is someone who, with the legal parent’s agreement, has lived with the child for at least two years and has “assumed full parenting responsibilities.”¹⁰⁶ Courts treat those who qualify as parents by estoppel the same as they treat legal parents.¹⁰⁷ A de facto parent is someone who, with the legal parent’s consent or due to the legal parent’s failure to meet the child’s needs, has cared for the child on a regular basis.¹⁰⁸

Unlike a presumed father, who may claim he is the child’s biological father, a de facto father is not the child’s biological father but functions as a parent to the child, such as a foster father.¹⁰⁹ A de facto parent is short of a presumed parent in terms of the rights each has, but as far as the child is concerned, a de facto parent is “mom” or “dad.”¹¹⁰ The rights of de facto parents are constantly in flux and evolving statutorily and

partner was obligated to make child support payments. *Id.* at 669. In the event more than two people seek to be declared a child’s legal parents, there is no risk that the child is going to be deprived of financial support from one of the parents. In fact, it is the exact opposite. These people are going to court asking to be declared the child’s legal parents. If the court gives legal parent status to more than two people for any given child, those people will have parental rights with respect to the child, including custody and visitation rights, and will also be required to contribute to the child’s financial support. *Id.* at 669–70.

104. See Jacobs, *supra* note 12, at 323 (citing AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (2002)). The American Law Institute’s Principles of the Law of Family Dissolution are “a comprehensive set of rules and principles on property rights in family breakups that it urges states to import into law.” GROSSMAN & FRIEDMAN, *supra* note 8, at 138 (citing AM. LAW INST., *supra*).

105. See Jacobs, *supra* note 12, at 323 (citing AM. LAW INST., *supra* note 104, § 2.03(1)(a)).

106. See *id.* (citing AM. LAW INST., *supra* note 104, § 2.03(1)(b)).

107. See *id.* at 334 (citing AM. LAW INST., *supra* note 104, § 2.03(1)(b)).

108. See *id.* at 323 (citing AM. LAW INST., *supra* note 104, § 2.03(1)(c)); see also *Webster v. Ryan*, 729 N.Y.S.2d 315, 316 (Fam. Ct. 2001) (holding that the child had a constitutional right to maintain a relationship with his de facto parent). Professor Fellmeth calls *Webster* “the ultimate pro-child opinion.” Interview with Robert C. Fellmeth, *supra* note 5.

109. Interview with Robert C. Fellmeth, *supra* note 5.

110. *Id.*

judicially.¹¹¹ Giving rights to de facto parents recognizes the estoppel and child reliance elements involved in these situations.¹¹² Because the American Law Institute recognizes parents by estoppel and de facto parents, it addresses the possibility of courts finding that a child has more than two legal parents.¹¹³

D. Rights and Responsibilities of Third Parties

Some states, such as Pennsylvania, recognize that a child can have more than two people who have the rights and responsibilities of parents, including custody of the child and child support obligations.¹¹⁴ However, few states explicitly recognize three legal parents.¹¹⁵

In *Jacob v. Shultz-Jacob*, a Pennsylvania Superior Court affirmed the trial court's custody order, which granted a mother's former lesbian partner primary physical custody of one of the children with partial physical

111. *Id.* De facto parents have the right to appear before the court to discuss the child, object during hearings, and present evidence. Lecture by Robert C. Fellmeth, *supra* note 49.

112. Interview with Robert C. Fellmeth, *supra* note 5.

113. See Jacobs, *supra* note 12, at 323, 334 (citing AM. LAW INST., *supra* note 104, § 2.03(1)(b)); David D. Meyer, *Partners, Care Givers, and Constitutional Substance of Parenthood*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 47, 47, 51 (Robin Fretwell Wilson ed., 2006).

114. See *Jacob v. Shultz-Jacob*, 923 A.2d 473, 475–76 (Pa. Super. Ct. 2007) (requiring the sperm donor to make child support payments based on equitable estoppel because he was involved in the children's lives); Jacobs, *supra* note 12, at 327 (“[T]here are a number of cases in which courts have protected a child's relationship with more than two parental figures. The cases are sparse, however, and generally reinforce a two parent paradigm coupled with rights for a third party and do not afford full parental recognition to all three parties.”); Gray, *supra* note 30; Hall, *supra* note 30 (discussing a Florida case in which the court granted the sperm donor biweekly visitation rights without requiring him to make child support payments); see also CAL. FAM. CODE § 7612(c) (West 2014) (allowing courts to find that a child has more than two legal parents); Jacobs, *supra* note 14, at 227–28 (discussing Louisiana's civil code, which specifically provides for dual fatherhood).

115. See Jacobs, *supra* note 12, at 327 (discussing cases in which courts granted parental rights to more than two parents but stopped short of finding that the child had three legal parents); Bellafante, *supra* note 33, at MB5 (describing the child's placement in foster care because the mother's boyfriend is not biologically related to the child and was not married to the child's mother, despite the fact that he had acted as a parent to the child).

custody to the biological mother.¹¹⁶ The order also granted primary physical custody of the other three children to the mother with partial physical custody to the former partner and partial physical custody to the sperm donor of two of the children.¹¹⁷ The court held that the sperm donor was an indispensable party in the child support action and remanded the case for the trial court to recalculate the child support obligations of both the sperm donor and former partner.¹¹⁸

The court essentially found that two of the children had three legal parents: the mother, former partner, and sperm donor all had at least partial physical custody of the children, and both the former partner and sperm donor were required to pay child support.¹¹⁹ The sperm donor was present for one of the children's births, had provided financial support to the children since their births, contributed more than \$13,000 to them in the four years preceding the case, and encouraged the children to call him "Papa."¹²⁰ In holding two people obligated to contribute to the children's support, the court wrote, "We are not convinced that the calculus of support arrangements cannot be reformulated"¹²¹

Other states, such as Maine, have not gone as far but have given de facto parent status to nonbiological parents.¹²² In *C.E.W. v. D.E.W.*, the Supreme Judicial Court of Maine affirmed the superior court's ruling, which found that the mother's former lesbian partner was the child's de facto parent and was therefore "entitled to be considered for an award of

116. 923 A.2d at 476, 482. The lesbian couple lived together for nine years before entering into a civil union. *Id.* at 476. One of the women asked her longtime friend to be their sperm donor. *Id.* Since the children's birth, the sperm donor has been involved in their lives. *Id.*

117. *Id.*

118. *Id.* at 482 ("[R]ather than remaining detached from the children, he became, voluntarily, indeed, enthusiastically, an integral part of their lives.").

119. *Id.* at 476, 482. The biological father was awarded one weekend a month with his two children. *Id.* at 476. As for child support, the trial court had decided not to hold the biological father responsible because it would result in three parents being liable for the children's financial support. *Id.* at 482. The appellate court did not agree with this reasoning and cited *L.S.K. v. H.A.N.*, 813 A.2d 872, 878 (Pa. Super. Ct. 2002), in support of its view:

We recognize this is a matter which is better addressed by the legislature rather than the courts. However, in the absence of legislative mandates, the courts must construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have *vis a vis* each other.

Jacob, 923 A.2d at 476, 482.

120. *Id.* at 481.

121. *Id.* at 482.

122. See *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004). Delaware and the District of Columbia also provide for de facto parent status and do so by statute. See DEL. CODE ANN. tit. 13, § 8-201 (2009); D.C. CODE § 16-831.01 (2009).

parental rights and responsibilities.”¹²³ The former partner was not related to the child but had parented the child with the mother since birth, and the mother had conceded that her former partner was the child’s de facto parent.¹²⁴ In reviewing the case, the court applied the “best interest of the child” standard and cautioned that de facto parent status “must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.”¹²⁵

E. Recognition of Three—or More—Legal Parents

Canada has directly recognized that a child can have three legal parents.¹²⁶ In *A.A. v. B.B.*, the Court of Appeal for Ontario issued a declaration that the biological mother’s lesbian partner was a legal parent, in addition to the child’s two biological parents.¹²⁷ The biological mother and her partner decided to have a child and did so with the help of their friend, the biological father.¹²⁸ All three agreed that the women would be the child’s

123. 845 A.2d at 1146–47.

124. *Id.* at 1147. The women agreed that one of them would become pregnant by artificial insemination. *Id.* They changed their last names so they would have the same last name as the child. *Id.* They also signed an agreement in which they expressed their desire to share equally their parental rights and responsibilities. *Id.* Upon their separation, they signed a second agreement outlining their decision to share the parental rights and responsibilities for the child equally. *Id.* The woman who has no biological connection to the child filed a complaint seeking a declaration of her parental rights and responsibilities and to equitably estop the biological mother from denying her status as one of the child’s parents. *Id.* at 1147–48.

125. *Id.* at 1149, 1152 (“D.E.W. concedes that C.E.W. is the child’s de facto parent, has accepted C.E.W.’s parental role in two written agreements, and has not challenged on appeal the court’s conclusion that C.E.W. is the child’s de facto parent.”); see also GROSSMAN & FRIEDMAN, *supra* note 8, at 5–6 (discussing the advent of the child “best interests” rule at the end of the nineteenth century).

126. *A.A. v. B.B.* (2007), 220 O.C.A. 115, para. 1 (Can. Ont. C.A.).

127. *Id.* para. 41. The court addressed some of the points made by the child’s lawyer and intervenors, specifically regarding the rights that come with a legally recognized parent-child relationship. *Id.* para. 14. First, the status of legal parent is lifelong and immutable and ensures the parent can fully participate in the child’s life. *Id.* Second, in the event of the parent’s death, the child will be able to inherit on intestacy. *Id.* Third, the parent can obtain a health insurance card, a social insurance number, and a passport for the child, as well as enroll the child in school. *Id.* In the event the biological parent dies, the partner could not make decisions for the child. *Id.* para. 15.

128. *Id.* para. 1.

primary caregivers, but the women believed it would be in their son's best interest to have his biological father involved in his life.¹²⁹

Two years after the child's birth, the biological mother's partner sought a declaration that, like the biological mother and father, she was the child's parent, specifically, his mother.¹³⁰ The partner did not pursue an adoption order because doing so would result in the biological father losing his status as one of the child's legal parents.¹³¹ In finding a gap in the legislation, as the legislature had not contemplated same-sex unions and the advances in ART at the time of the Act's passing, the court applied its *parens patriae* jurisdiction and declared that the partner was a mother of the child because it would be contrary to the child's best interest if he was "deprived of the legal recognition of the parentage of one of his mothers."¹³²

III. CALIFORNIA SENATE BILL 1476 AND CALIFORNIA SENATE BILL 274

A. California Senate Bill 1476

Courts are reluctant to expand rights in the absence of a statute.¹³³ This is the case for courts considering the recognition of more than two legal parents.¹³⁴

129. *Id.*

130. *Id.* para. 2. The application judge did not think he had the authority to make the declaration that the biological mother's partner sought. *Id.* para. 3. As a result, he dismissed the application. *Id.* If he had thought he had the authority to make the declaration, he would have:

The child is a bright, healthy, happy individual who is obviously thriving in a loving family that meets his every need. The applicant has been a daily and consistent presence in his life. She is fully committed to a parental role. She has the support of the two biological parents who themselves recognize her equal status with them.

Id. para. 2 (internal quotation marks omitted).

131. *Id.* para. 13. The court commented that this would not be in the child's best interests: "It is contrary to D.D.'s best interests that he is deprived of the legal recognition of the parentage of one of his mothers." *Id.* para. 37.

132. *Id.* paras. 34–35, 37. *Parens patriae* is a Latin term meaning "parent of his or her country." BLACK'S LAW DICTIONARY 1221 (9th ed. 2009). The term's definition is "[t]he state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves." *Id.*

133. See Linda D. Elrod, *Client-Directed Lawyers for Children: It Is the "Right" Thing To Do*, 27 PACE L. REV. 869, 888 (2007).

134. See, e.g., *In re M.C.*, 123 Cal. Rptr. 3d 856, 861, 877 (Ct. App. 2011). Although the court acknowledged that the statutory framework, the UPA, is out of date, the court was hesitant to uphold the juvenile court's finding in the absence of statutory authorization from the legislature or precedent from the state supreme court. *Id.* at 869–70.

In February 2010, a Los Angeles dependency court commissioner found that the child M.C. had three presumed parents: “a biological presumed mother, a statutorily presumed mother and a constitutionally presumed father under *Adoption of Kelsey S.*”¹³⁵ The California Court of Appeal, when discussing the juvenile court’s finding, wrote, “Increasingly, as aptly illustrated here, the complicated pattern of human relations and changing familial patterns gives rise to more than one legitimate claimant to the status of presumed parent, and the juvenile court must resolve the competing claims.”¹³⁶

In reversing the juvenile court’s finding, the Court of Appeal noted that the facts of the case made it an inappropriate instance in which to find that the child had three presumed parents and that even if it was appropriate, “[s]uch important policy determinations, which will profoundly impact families, children and society, are best left to the Legislature.”¹³⁷ The court, however, acknowledged the issues M.C. and amicus curiae had raised, particularly “the inadequacies of the antiquated UPA to accommodate rapidly changing familial structures, and the need to recognize and accommodate novel parenting relationships.”¹³⁸ The court, impliedly critical of the statutory two-parent limit, noted that “these issues are critical, and California’s existing statutory framework is ill-equipped to resolve them.”¹³⁹

Although the juvenile court’s finding was correct, the Court of Appeal held that the trial court erred by failing to resolve the “competing

135. *Id.* at 866–67 (citing *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992)).

136. *Id.* at 869 (“[A]lthough more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity, ‘there can be only one presumed father.’” (quoting *In re Jesusa V.*, 85 P.3d 2, 11 (Cal. 2004) (internal quotation marks omitted))).

137. *Id.* at 870, 878. The court acknowledged that the California Supreme Court “has yet to decide ‘whether there exists an overriding legislative policy limiting a child to two parents.’” *Id.* at 870 (quoting *Elisa B. v. Superior Court*, 117 P.3d 660, 666 n.4 (Cal. 2005)). However, the court noted that the court “has rejected the concept of dual paternity or maternity where such recognition would result in three parents.” *Id.*; see also *Johnson v. Calvert*, 851 P.2d 776, 781–82 (Cal. 1993) (holding that the genetic mother of the child was the child’s legal mother because she intended to procreate and raise the child, despite the presumed parent status afforded to the surrogate mother by virtue of her having given birth to the child).

138. *In re M.C.*, 123 Cal. Rptr. 3d at 869.

139. *Id.* at 869–70.

presumptions” such that only two of them had legal parent status.¹⁴⁰ The court remanded the case to the juvenile court to resolve the presumptions according to the prescribed standard: “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”¹⁴¹

On February 24, 2012, in response to the decision in *In re M.C.*, Senator Mark Leno of San Francisco introduced Senate Bill 1476 (SB 1476), which proposed giving courts the discretion to find that a child has more than two legal parents after determining such a finding would be in the child’s best interest.¹⁴² Courts would be able to recognize as a child’s third legal parent only a person who qualifies as a presumed parent.¹⁴³ The bill was narrow because only a few people can acquire presumed parent status for a particular child.

Among other factors for determining a child’s best interest under SB 1476, courts would consider “the nature, duration, and quality of the presumed or claimed parents’ relationships with the child and the benefit or detriment to the child in continuing those relationships.”¹⁴⁴ A court would allocate custody and visitation among parents according to the child’s best interest, including the child’s stability.¹⁴⁵ In terms of child support, the court would divide the child support obligations among the

140. *Id.* at 877 (“While we empathize with the desire to leave all options open, particularly in a case such as this in which, at least at the time the parentage determination was made, no available choice was optimal, that conclusion was improper.”).

141. *Id.* at 877, 878 (quoting CAL. FAM. CODE § 7612(b) (West 2011)) (internal quotation marks omitted).

142. See *Introduced Bill Text, S.B. 1476 Before the S. Judiciary Comm.*, 2011–12 Sess. (Cal. 2012), available at http://leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_bill_20120224_introduced.html. When considering a child’s best interest, California courts analyze these factors:

- (a) The health, safety, and welfare of the child.
- (b) Any history of abuse by one parent or any other person seeking custody
- (c) The nature and amount of contact with both parents
- (d) The habitual or continual illegal use of controlled substances, the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances by either parent.

CAL. FAM. CODE § 3011 (West 2014); see also *id.* § 3020 (declaring that a court, when making a best interest determination in the custody and visitation settings, must be primarily concerned with a child’s “health, safety, and welfare”).

143. See *Introduced Bill Text, S.B. 1476, supra* note 142. Under the California UPA, a man is presumed to be a child’s natural father if he is the husband of the child’s mother, is not impotent or sterile, and was cohabitating with her (§ 7540); if he signs a voluntary declaration of paternity stating he is the ‘biological father of the child’ (§ 7574 subd. (b)(6)); and if ‘[h]e receives the child into his home and openly holds out the child as his natural child’ (§ 7611, subd. (d)).

Elisa B. v. Superior Court, 117 P.3d 660, 664, 670 (Cal. 2005) (citing CAL. FAM. CODE §§ 7540 (West 1994), 7574(b)(6) (West 2000), 7611(d) (West 1994)).

144. *Introduced Bill Text, S.B. 1476, supra* note 142.

145. See *id.*

parents according to the statewide uniform guidelines.¹⁴⁶ Each parent would pay child support according to income and amount of time spent with the child.¹⁴⁷

The Senate and the Assembly passed the bill before Governor Brown vetoed it on September 30, 2012.¹⁴⁸ In his veto message, Governor Brown wrote, "I am sympathetic to the author's interest in protecting children. But I am troubled by the fact that some family law specialists believe the bill's ambiguities may have unintended consequences. I would like to take more time to consider all of the implications of this change."¹⁴⁹ The media and some interests groups had thrust SB 1476 into the culture war.¹⁵⁰ This was likely due, in part, to the fact that the author of the bill, Senator Leno, is gay.¹⁵¹ Even though the proposed law would have affected

146. See *id.* The statewide uniform guidelines begin with California Family Code section 4050. See CAL. DEP'T OF CHILD SUPPORT SERVS., CHILD SUPPORT HANDBOOK 11 (2012), available at http://www.childsup.ca.gov/portals/0/resources/docs/pub160_english.pdf.

147. This is already the current practice. See CAL. DEP'T OF CHILD SUPPORT SERVS., *supra* note 146. According to California Family Code section 4053, "[t]he guideline takes into account each parent's actual income and level of responsibility for the children." CAL. FAM. CODE § 4053(c) (West 2014); see also CAL. FAM. CODE § 7570(b) ("A simple system allowing for establishment of voluntary paternity will result in a significant increase in the ease of establishing paternity, a significant increase in paternity establishment, an increase in the number of children who have greater access to child support and other benefits, and a significant decrease in the time and money required to establish paternity due to the removal of the need for a lengthy and expensive court process to determine and establish paternity and is in the public interest."); *Introduced Bill Text, S.B. 1476, supra* note 142; Jacobs, *supra* note 14, at 223 ("[T]he primary parents who engage in the bulk of daily responsibility for the child—and often have the most benefit from the close contact—should have greater rights and responsibility regarding the raising of the child than a third—or fourth—parent who contributes less, or no, financial support and less emotional support and has a more tenuous relationship with the child.").

148. See *Bill History, SB-1476 Family Law: Parentage*, CAL. LEGIS. INFO., http://leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_bill_20120930_history.html (last visited June 8, 2014).

149. See *Governor's Veto Message, Bill Status, SB-1476 Family Law: Parentage*, CAL. LEGIS. INFO. (Sept. 30, 2012), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_vt_20120930.html.

150. Interview with Robert C. Fellmeth, *supra* note 5. Radio personality Rush Limbaugh commented on SB 1476: "This guy's bill says, okay, we'll find a way if all three involved here can come to an agreement, then the child will have three parents. . . . I don't know that the bill legalizes polygamy. I think this is more like assignment of rights." *Bill To Allow for More than Two Parents*, RUSH LIMBAUGH SHOW (July 2, 2012), http://www.rushlimbaugh.com/daily/2012/07/02/bill_to_allow_for_more_than_two_parents.

151. See *Biography*, SENATOR MARK LENO, <http://sd11.senate.ca.gov/biography> (last visited June 8, 2014); Michael Gryboski, *Calif. Governor Vetoes Bill Stating Child Can Have More than Two Parents*, CHRISTIAN POST (Oct. 1, 2012), <http://www.Christian>

same-sex couples, the proposal is not strictly a gay rights issue; it is a children's rights issue.¹⁵²

B. California Senate Bill 274

On October 4, 2013, Governor Brown signed California Senate Bill 274 (SB 274) into law.¹⁵³ SB 1476 and SB 274, though “substantially similar,”¹⁵⁴ contain different language: SB 1476 would have allowed courts to find that a child has more than two legal parents if such a finding was in the child's best interest; SB 274, now California Family Code section 7612(c), allows courts to find that a child has more than two legal parents if finding that a child has fewer parents “would be detrimental to the child.”¹⁵⁵

post.com/news/calif-governor-vetoes-bill-stating-child-can-have-more-than-two-parents-82519/ (“We fully expect a bill of this type to return, as there are several homosexual legislators and special interest groups with clear intent to deconstruct traditions of marriage and parenting . . .” (quoting Ron Prentice, CEO of the California Family Council) (internal quotation marks omitted)).

152. Interview with Robert C. Fellmeth, *supra* note 5. The Children's Advocacy Institute at the University of San Diego School of Law co-sponsored SB 1476. Press Release, Nat'l Ctr. for Lesbian Rights, CA Governor Brown Vetoes Bill that Would Protect Children with More than Two Parents (Sept. 30, 2012), *available at* <http://www.nclrights.org/press-room/press-release/ca-governor-brown-vetoes-bill-that-would-protect-children-with-more-than-two-parents/>. The Children's Advocacy Institute's lobbyist in Sacramento, Ed Howard, commented on Governor Brown's veto of SB 1476: “Until this law gets changed, judges in California will be forced to issue rulings they know will hurt children by bluntly ordering an end to their real relationships with their real parents. This is wrong and it should not endure.” *Id.* (internal quotation marks omitted).

153. See Patrick McGreevy, *Brown Signs Bill Allowing Children More than Two Legal Parents*, L.A. TIMES (Oct. 4, 2013, 6:36 PM), <http://www.latimes.com/local/political/la-me-pc-cal-governor-signs-bill-allowing-children-more-than-two-legal-parents-20131004,0,7519412.story>.

154. *Bill Analysis, S.B. 274 Before the S. Judiciary Comm.*, 2013–14 Sess. (Cal. 2013), *available at* <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml>.

155. See CAL. FAM. CODE § 7612(c) (West 2014) (directing the courts, when making detriment determinations, to “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”). Compare *Bill Analysis, S.B. 274, supra* note 154 (focusing on whether finding that a child has only two legal parents would be “detrimental” to the child, a standard derived from CAL. FAM. CODE section 3041 (West 2013) (custody award to nonparent)), with *Introduced Bill Text, S.B. 1476, supra* note 142 (focusing on the child's best interest).

Another interesting difference between SB 1476 and SB 274 is SB 274's amendment to California Family Code section 8617, which now provides that birth parents and adoptive parents can waive the termination of the birth parents' parental rights, which normally would occur upon the child's adoption. See CAL. FAM. CODE § 8617(b) (West 2014). Also of note is the fact that SB 274 and Assembly Bill 1403 were presented as a package in that one would be enacted only so long as the other one was also enacted. See S.B. 274, 2013–14 Sess. (Cal. 2013). Governor Brown signed Assembly Bill 1403

SB 1476 was narrow in that a parent had to qualify as a presumed parent before the court would go to the next step of determining whether recognition of that third parent was in the child's best interest. SB 274 was also narrow because the court will first have to determine whether the parent is a presumed parent.¹⁵⁶ The second step, however, will require the court to look at the problem from a different angle. Instead of being able to find that a child has more than two legal parents because that result would be in the child's best interest, the court is able to make such a finding only if not making it would be detrimental to the child. One could argue these are different standards, but a court's application of these two standards would likely lead to the same results. Senator Leno acknowledges as much: "[I]t appears as though applying a 'detriment' standard would be functionally similar to the analysis a court would have undertaken for SB 1476."¹⁵⁷

Governor Brown's representatives have not commented on the reasons for his change in position.¹⁵⁸ The different language of SB 274 may have had something to do with it. SB 274's language may have made it easier for the legislators to believe the law would apply to a smaller subset of the population than SB 1476—children who have more than two presumed parents and would experience detriment if all of their presumed parents were not afforded legal parent status. The additional support for the bill likely also played a role.¹⁵⁹

the day before he signed SB 274. See *Bill History, AB-1403 Family Law*, CAL. LEGIS. INFO., http://leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_bill_20120930_history.html (last visited June 8, 2014). Among AB 1403's amendments is the new definition of *natural parent* in Family Code section 7601: "[A] nonadoptive parent established under this part, whether biologically related to the child or not." *Today's Law as Amended, AB-1403 Family Law*, CAL. LEGIS. INFO., <http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml> (last visited June 8, 2014).

156. See S.B. 274 (section 1(c) of the legislature's findings states that "[t]his bill does not change any of the requirements for establishing a claim to parentage under the Uniform Parentage Act").

157. *Bill Analysis, S.B. 274*, *supra* note 154 (noting that there was confusion over whether SB 1476 required courts to apply "a standard 'best interests' analysis or the heightened, 'as required to serve the best interests' analysis").

158. McGreevy, *supra* note 153.

159. SB 274 had the support of the following groups: the Children's Advocacy Institute, National Center for Lesbian Rights, Association of Family Conciliation Courts, California Alliance, Equality California, Legal Services for Children, Our Family Coalition, Public Counsel, American Academy of Matrimonial Lawyers, and Wald and Thorndal P.C. See *Bill Analysis, S.B. 274 Before the S. Rules Comm.*, 2013–14 Sess. (Cal. 2013), available at <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml>.

Another possible reason for Governor Brown's changed position is the United States Supreme Court's actions on June 26, 2013. On that date, the Court struck down the Defense of Marriage Act on equal protection grounds in *United States v. Windsor* and did not rule on a Proposition 8 challenge on standing grounds in *Hollingsworth v. Perry*, thereby allowing gay marriage to resume in California.¹⁶⁰ Gay marriages in California resumed on June 28, 2013, after the Ninth Circuit Court of Appeals lifted the stay on the lower court's ruling, which had overturned Proposition 8.¹⁶¹

Even though the Court's ruling in *Hollingsworth* affects only California, the arguments in support of expanding legal parentage to more than two people apply to all states. Thirteen states and the District of Columbia recognize gay marriage.¹⁶² The gay and lesbian couples in these states will continue to have families, and given the legal recognition of their marriages, it will be difficult for the states to argue that these families' parent-child relationships should not be legally recognized based on the idea that children should have only two legal parents. The reality for these families is that more than two people are required to bring a child into existence. Thus, when a couple chooses to procreate with someone who will be active in the child's life, the child should be able to have the state recognize that person as a legal parent.

160. Pete Williams & Erin McClam, *Supreme Court Strikes Down Defense of Marriage Act, Paves Way for Gay Marriage To Resume in California*, NBC POLITICS (June 26, 2013, 3:05 PM), http://nbcpolitics.nbcnews.com/_news/2013/06/26/19151971-supreme-court-strikes-down-defense-of-marriage-act-paves-way-for-gay-marriage-to-resume-in-california?lite ("Gov. Jerry Brown said counties could begin issuing marriage licenses to gay couples as soon as one formality was taken care of: A federal appeals court had to lift a stay issued by a lower judge."); *see also* *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (holding that DOMA's definition of *marriage* was unconstitutional); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (finding that proponents of Proposition 8 did not have standing).

161. Geoffrey A. Fowler & Vauhini Vara, *Gay Marriages Resume in California*, WALL ST. J. (June 28, 2013, 9:10 PM), <http://online.wsj.com/news/articles/SB10001424127887323419604578574121442828926> (noting that one of the children of the "first couple to marry" attended the ceremony). California Attorney General Kamala Harris presided over the San Francisco couple's wedding, and that same day, Los Angeles Mayor Antonio Villaraigosa presided over a gay marriage in Los Angeles. *Id.*

162. *See* Miranda Leitsinger, *Federal Judge: Michigan Gay Marriage Ban Will Go to Trial*, U.S. NEWS (Oct. 16, 2013), http://usnews.nbcnews.com/_news/2013/10/16/20993216-federal-judge-michigan-gay-marriage-ban-will-go-to-trial.

IV. THE FUNDAMENTAL RIGHT OF CHILDREN TO MAINTAIN FAMILIAL BONDS

“Administrative hassles are usually not seen as a compelling state interest that justifies depriving a fundamental right.”¹⁶³ The United States Supreme Court has recognized a fundamental liberty interest to parent.¹⁶⁴ Although the Court has not yet recognized a comparable right of children to maintain their familial bonds, some courts are pressing the issue.¹⁶⁵ One court at the forefront of this fledgling position held that “a child has an independent, constitutionally guaranteed right to maintain contact with a person with whom the child has developed a parent-like relationship.”¹⁶⁶

A family court judge in Albany County, New York declared in *Webster v. Ryan* that a child’s interest in maintaining contact with a person the child has developed a parent-like relationship with is a fundamental liberty interest deriving from both the United States Constitution and New York State Constitution.¹⁶⁷ Because New York State does not provide for that

163. Lecture by Junichi P. Semitsu, Professor-in-Residence, Univ. of San Diego Sch. of Law, Constitutional Law II, in San Diego, Cal. (Jan. 14, 2013) (discussing the levels of constitutional scrutiny); *see also* *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (“[O]ur prior decisions make clear that, although efficacious administration of governmental programs is not without some importance, ‘the Constitution recognizes higher values than speed and efficiency.’” (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972))).

164. *See supra* note 8 and accompanying text.

165. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 110, 114, 131 (1989). Despite the child’s desire to maintain a filial relationship with both her genetic and presumed father—her mother’s husband—the Court rejected the concept of “multiple fatherhood.” *Id. But see Webster v. Ryan*, 729 N.Y.S.2d 315, 316 (Fam. Ct. 2001) (holding that the child had a constitutional right to maintain a relationship with his de facto parent).

166. *Webster*, 729 N.Y.S.2d at 316 (footnote omitted). The child, Alex Ryan, Jr., was born in 1995 with a positive toxicology screen for cocaine. *Id.* at 317. Shortly after his birth, Alex was removed from his mother’s care and placed in the foster mother’s home. *Id.* In 1999, Alex’s mother’s and father’s parental rights were terminated. *Id.* Alex’s father had filed four custody petitions, all of which the family court judge had dismissed without a hearing. *Id.* The appellate court held that the Department of Social Services had not provided a reasonable reunification plan to the father and that the family court judge had thwarted the father’s efforts to reunify with his child. *Id.* at 317–18. During Alex’s transition from his foster mother’s home to his father’s home, the foster mother filed petitions for visitation and custody rights. *Id.* at 318. For a detailed discussion on the recognition of new fundamental rights, *see id.* at 317–31.

167. *Id.* at 316–17. Judge Duggan wrote that the child’s right is a “fundamental liberty encompassed within the freedom of association right of the First Amendment of the United States Constitution and Article I § 8 and § 9 of the Constitution of the State of New York.” *Id.*

right by statute, the court held that the child was denied the equal protection of the laws guaranteed by the United States Constitution and New York State Constitution.¹⁶⁸ The child in *Webster*, Alex Ryan, Jr., lived with his foster mother from his birth in 1995 until April 2000, when he returned to his father's care.¹⁶⁹ The court concluded that "a child has a fundamental right to maintain contact, over the objection of a parent, with a person with whom the child has developed a parent-like relationship."¹⁷⁰

Despite the Supreme Court not yet recognizing a right of children to maintain their familial bonds, these additional parents—even though they are currently raising the children—are being deprived of the right to parent their children with all of the rights that legal parent status affords. These parents qualify as presumed parents, are parenting the children, and are considered parents by the children; yet, they are denied the protection of the law. Likewise, the children are denied the protections that legal recognition of their parents affords them. If a court determines it would be best for the child to find that the child has three legal parents, the court should have the discretion to make such a finding.

V. CRITICISM OF EXPANDING LEGAL PARENTAGE

A. Criticism of SB 1476

Although many academics and some practitioners in the area of family law and child welfare law see the recognition of more than two legal parents as a positive change,¹⁷¹ some critics see logistical problems with changing the law.¹⁷² For example, opposition to SB 1476 came from the Association of Certified Family Law Specialists (ACFLS) and the Association of

168. *Id.*

169. *Id.* at 318.

170. *Id.* The court held that the right has constitutional protection but noted that the right has to be balanced with "the unquestionable fundamental right of the parent to raise his son without undue state interference." *Id.* The court went on to note that it has been "firmly established that children are persons within the meaning of the Constitution and accordingly possess constitutional rights." *Id.* at 330.

171. *See, e.g.,* Wald, *supra* note 13, at 381 (arguing that courts should not limit the number of legal parents to two and when making such a determination, should engage in a best interest analysis); Interview with Robert C. Fellmeth, *supra* note 5 (advocating for the recognition of more than two legal parents based on the belief that the more parents who are willing to contribute to the child's college fund, the better); *see also supra* notes 16–17.

172. *See, e.g.,* Elizabeth Marquardt, Op-Ed., *When 3 Really Is a Crowd*, N.Y. TIMES, July 16, 2007, at A13. Ms. Marquardt is the Vice President for Family Studies at the Institute for American Values. *Id.* Others object to the proposal on moral grounds. *See supra* note 151.

Family and Conciliation Courts (AFCC).¹⁷³ Both organizations expressed concern that “unintended consequences” of the bill would “be overly burdensome on the courts.”¹⁷⁴ ACFLS expressed concern regarding the effect “expanding legal parenthood” would have on other areas of law.¹⁷⁵ AFCC expressed concern regarding the effect such a change would have on child support: “[T]he current statewide guideline is not set up to handle child support between more than two parents. The courts have no money and there is no one to pay for totally overhauling the existing formula, software, etc. to make such a law effective.”¹⁷⁶

B. General Criticism of Expanding Legal Parentage

Critics have raised several concerns regarding the expansion of legal parentage.¹⁷⁷ Courts have also been hesitant to expand legal parentage.¹⁷⁸ One reason courts are hesitant to expand legal parentage is the “concern about putting children in the middle of increasingly complex custody disputes.”¹⁷⁹ Critics would agree with this sentiment. In response to the courts’ decisions to expand legal parentage in *A.A. v. B.B.* and *Jacob v. Shultz-Jacob*, one critic wrote an op-ed piece in the *New York Times* in which she expressed four concerns regarding the recognition of more than two legal parents.¹⁸⁰ Her first concern was that because a family with three parents will often include two of the parents living together and the third living separately, “the child will get shuffled between homes.”¹⁸¹ As is the case with children of divorce, the children in three-parent situations will “grow up traveling between two worlds, having to make

173. See *Bill Analysis, S.B. 1476 Before the S. Judiciary Comm.*, 2011–12 Sess. (Cal. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-15_00/sb_1476_cfa_20120507_170523_sen_comm.html. ACFLS monitors family law legislation. *ACFLS Purpose*, ACFLS, <http://www.acfls.org/?page=purpose> (last visited June 8, 2014). AFCC is “the premier interdisciplinary and international association of professionals dedicated to the resolution of family conflict.” *About AFCC*, AFCC, <http://www.afccnet.org/About/About> (last visited June 8, 2014).

174. *Bill Analysis, S.B. 1476*, *supra* note 173.

175. *See id.*

176. *Id.*

177. *See infra* notes 179–85.

178. *See* Elrod, *supra* note 133, at 888 (discussing how courts are generally hesitant to expand rights when not explicitly given the authority to do so by statute).

179. Wald, *supra* note 13, at 381. Ms. Wald argues that the other reason is the “distaste for ‘non-traditional’ families.” *Id.*

180. *See* Marquardt, *supra* note 172, at A13.

181. *Id.*

sense on their own of the different values, beliefs and ways of living they find in each home. They have to grow up too soon.”¹⁸²

The critic’s second concern was that if three parents choose to live together while raising a child, the United States should be prepared for these families to push for “the rights and protections of marriage.”¹⁸³ Third, these families may become involved in custody battles in which all three parents are living in different homes, thus leading to the possibility that the child will have to travel between all three homes.¹⁸⁴ Lastly, in some situations, there may be up to five people involved in bringing the child into the world, and if legal recognition is given to three legal parents, there is no barrier preventing all five people from seeking legal parent status.¹⁸⁵ The critic argues that “in the best interests of children, no court should break open the rule of two when assigning legal parenthood.”¹⁸⁶

VI. RESPONSE TO CRITICISM AND SUPPORT FOR EXPANDING THE TWO-PARENT LIMIT

A. *Response to Criticism of SB 1476*

In his veto message for SB 1476, Governor Brown cited the concern about “unintended consequences” that ACFLS and AFCC had raised.¹⁸⁷ With respect to the ACFLS concern that recognizing more than two legal parents would affect other areas of law,¹⁸⁸ this will likely be the case. Parentage affects many areas of law; however, just because it may affect these areas does not mean it should not be done. The number of cases in which three legal parents would be appropriate is small by virtue of the presumed parent requirement. Additionally, by giving courts the discretion to find more than two legal parents, the legislature is not mandating courts to make this finding. Therefore, judicial discretion, as with SB 274, will limit the number of these cases because “a court may find more than two parents” but is not required to do so.¹⁸⁹

182. *Id.*

183. *Id.*; see also GROSSMAN & FRIEDMAN, *supra* note 8, at 12–13, 16 (discussing the benefits of marriage, including financial ones, such as tax advantages, and other benefits, including the right to visit the sick spouse in the hospital and bury the dead spouse).

184. See Marquardt, *supra* note 172, at A13.

185. See *id.*

186. *Id.*

187. See Governor’s Veto Message, *Bill Status, SB-1476 Family Law: Parentage*, CAL. LEGIS. INFO. (Sept. 30, 2012), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_vt_20120930.html; see also *Bill Analysis, S.B. 1476*, *supra* note 173.

188. *Bill Analysis, S.B. 1476*, *supra* note 173.

189. *Bill Analysis, S.B. 274*, *supra* note 154.

The Supreme Court has recognized a fundamental right to parent.¹⁹⁰ Yet, people who are functioning as parents, consider themselves parents, and are considered parents by their children are not legally protected in this right because of the two-parent limit. Because the right to parent is a fundamental liberty interest, any limitation on the right would be subject to strict scrutiny.¹⁹¹ If strict scrutiny review is applied to the two-parent limit, it would fail on an administrative convenience argument because “[a]dministrative hassles are usually not seen as a compelling state interest that justifies depriving a fundamental right.”¹⁹² Although this proposal would affect other areas of law, families to which this law would apply need legal protection of their parent-child relationships.

Moreover, an elimination of the two-parent limit would likely result in increased revenue for states. With more legal parents, there will likely be more parents obligated to pay child support.¹⁹³ With respect to the AFCC concern regarding California’s child support system, the California Senate Appropriations Committee determined with regard to SB 274 that the child support system would not have to be reprogrammed to take into account a third parent because the court is responsible for making the initial child support order.¹⁹⁴ Because the Department of Child Support Services would

190. See *supra* note 8 and accompanying text.

191. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Court wrote, “The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.” *Id.* The Due Process Clause of the Fourteenth Amendment guarantees this right: “The Clause also includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’” *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)). But see *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989) (plurality opinion) (rejecting the child’s argument that her equal protection claim deserves strict scrutiny review because the state discriminated against her based upon her illegitimate status).

192. *Supra* note 163.

193. See, e.g., *Jacob v. Shultz-Jacob*, 923 A.2d 473, 475–76 (Pa. Super. Ct. 2007) (affirming the trial court’s order, which required two adults to make child support payments); *Bill Analysis, S.B. 1476, supra* note 173. According to the United States Census Bureau, the average monthly child support payment in 2010 was \$430. This equates to \$5160 annually. *Monthly Child Support Payments Average \$430 Per Month in 2010*, U.S. CENSUS BUREAU (June 19, 2012), <http://www.census.gov/newsroom/releases/archives/children/cb12-109.html>.

194. See *Bill Analysis, S.B. 274 Before the S. Appropriations Comm.*, 2013–14 Sess. (Cal. 2013), available at <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml>. With respect to court costs, the Judicial Council estimated that with the passing of SB 274, “there would likely be minimal impact to the courts’ workload” because the court has to

become involved only if there were changed circumstances justifying an alteration of the support order and because the department would use the court's initial order as a guide, the recognition of more than two legal parents would not require a "system change."¹⁹⁵

Additionally, collecting child support from more than one parent would better ensure the child's needs are being met and reduce the odds that the child is receiving public assistance.¹⁹⁶ By accommodating more parents in the child support scheme, states could save money and also increase the likelihood that children are receiving child support.¹⁹⁷ Not only would the child have the right to receive financial support from all three parents, the child would also have "access to health insurance, benefits, and inheritance rights."¹⁹⁸ Moreover, the child would have the right to maintain a relationship with the additional parent.

The most common child support models—the income-sharing and percentage-of-income models—are premised on a family consisting of two parents.¹⁹⁹ The income-sharing model reviews the income of both parents, and the percentage-of-income model focuses only on the income of the noncustodial parent.²⁰⁰ A parent's child support obligation should depend on the amount of involvement and thus amount of responsibility the parent has in the child's life.²⁰¹ Therefore, courts should fashion child support payments according to the parents' relative amounts of custodial time.²⁰² Because two parents will be primarily responsible for the child and thus receive the benefit of more contact with the child, they should also be primarily responsible for the child's financial support.²⁰³ Although a third

make a best interest determination in each case and the Senate Appropriations Committee estimated a financial cost of "less than \$25,000 annually." *Id.*

195. *See id.*

196. *See Introduced Bill Text, S.B. 1476, supra* note 142.

197. The problem with child support is states cannot find fathers. Interview with Robert C. Fellmeth, *supra* note 5. Here, fathers and mothers are coming forward. *Id.*

198. *Introduced Bill Text, S.B. 1476, supra* note 142.

199. *See Jacobs, supra* note 14, at 226 (citing Adrienne Jennings Lockie, *Multiple Families, Multiple Goals, Multiple Failures: The Need for "Limited Equalization" as a Theory of Child Support*, 32 HARV. J.L. & GENDER 109, 115, 139–40 (2009)).

200. *See id.* California has an income-sharing model. *See* CAL. FAM. CODE § 4053(c) (West 2014); CAL. DEP'T OF CHILD SUPPORT SERVS., *supra* note 146, at 11 ("Child support guidelines are based on various factors, including monthly net income of both parents and the amount of time the child spends with each parent. . . . In some specific cases, the court may decide not to use the income guidelines to determine the amount of child support.").

201. *See supra* note 147 and accompanying text.

202. *See Jacobs, supra* note 14, at 223, 225–26 ("Financial obligations and custodial rights should be linked.").

203. *See id.* at 223 (advocating for a disaggregation of parental rights and responsibilities so more than two people can hold the title of legal parent, thereby allowing these people to make different contributions to a child's life).

or fourth parent will not have to contribute a third or a quarter of the child's financial support, what the additional parent does provide, which will be in proportion to the parent's amount of custodial time, will give the child at least some financial support.²⁰⁴

B. Response to General Criticism of Expanding Legal Parentage

With respect to the concern about involving children in complex custody disputes, these disputes will continue to occur as the number of nontraditional families grows, despite the courts' practice of limiting legal parentage to two adults.²⁰⁵ Courts should not be forced to abide by the principle that a child can have only two legal parents based on the idea that such a principle spares children from messy custody disputes. It is better to have the child involved in a custody dispute that will resolve what is best for the child, rather than limiting the number of protected relationships the child can have.²⁰⁶ The most appropriate resolution for the child may be for the court to find that the child has more than two legal parents.

Regarding the concern that recognizing more than two legal parents will result in the shuffling of children between homes, this point is unrelated to parental status.²⁰⁷ Recognizing more than two legal parents is a best

204. See *id.* at 227 ("Ultimately, the amount of support a third parent should contribute will vary, depending upon the intent of the parties and relationship that the parent builds with the child.").

205. See Wald, *supra* note 13 ("So far, courts have been reluctant to find more than two parents for any given child due to some combination of distaste for 'non-traditional' families and concern about putting children in the middle of increasingly complex custody disputes."); see also *Bill Analysis, S.B. 274 Before the Assemb. Floor*, 2013–14 Sess. (Cal. 2013), available at <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml> ("While cases involving more than two parents are, almost by definition, complicated and will require courts to balance many competing interests, courts must already do so today.").

206. In response to the President of ACFLS Diane Wasznicky's concern about the complex custody disputes that will result if courts are given the discretion to recognize that a child has more than two legal parents, Beth Allen, an attorney who handled third-parent adoptions, said, "So often, we are struggling with parents who don't want the responsibilities and obligations of parenting So when you have another parent willing to step up and take on those responsibilities, aren't we so lucky?" Lovett, *supra* note 1, at A13 (internal quotation marks omitted). When making a custody order, the court should consider the child's position. To ensure the child's voice stands out during the dispute between the parents, the court should appoint an attorney for the child. See Elrod, *supra* note 133, at 870. For a discussion on the mandatory appointment of client-directed attorneys for children involved in family court proceedings, see Elrod, *supra* note 133.

207. See Marquardt, *supra* note 172, at A13.

interest determination, which courts already have to make. States should not categorically preclude their courts from finding that a child has more than two legal parents. A family with multiple homes gives children more options in terms of where they want to live. It is not necessarily a negative thing.

Moreover, families that want all three parents involved in the child's life may want the child to have the experience of living in each parent's home, even if all three parents are not afforded legal protection. Although this will necessarily involve the child having more than one home, these families will continue the practice despite the law not affording legal protection to all of their members. Not recognizing a child's third parent as a legal parent will not deter these families from forming and living the way that suits them. Failing to provide the third parent legal status makes the entire family vulnerable. These families need to be afforded legal protection.

With respect to the argument that recognition of three legal parents may result in a child traveling between three homes,²⁰⁸ this is a possibility, but the parties would need to come to an agreement regarding custody and visitation. If they could not, the court would make an order dividing custody and visitation among the parents according to the child's best interest, including the child's stability.²⁰⁹ In California, the legislators addressed the continuity and stability criticism of SB 1476 when drafting SB 274 by specifically including that language in section 3040 of the Family Code: "[T]he 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."²¹⁰ Moreover, the legislators recognized that granting more than two parents legal parent status does not mean all three parents have to be treated equally, writing, "The court may order that not all parents share legal or physical custody of the child."²¹¹ The court has the discretion to craft an appropriate

208. *See id.*

209. *See Introduced Bill Text, S.B. 1476, supra* note 142. During discussions about custody and visitation, the court should appoint an attorney to represent the child to make sure the child's voice is heard. *See Elrod, supra* note 133, at 870. Although nontraditional families will continue to advocate in family court for legal recognition of all of their members and seek resolution of disputes regarding issues related to their children, traditional families will continue to resort to court for similar matters, such as custody, visitation, and child support. Because children involved in family court proceedings have a substantial interest in where they live, with whom they live, and with whom they can and cannot visit, an attorney should be appointed to represent them. *Id.*

210. CAL. FAM. CODE § 3040(d) (West 2014).

211. *Id.*; *see also Bill Analysis, S.B. 274, supra* note 154 ("In most . . . cases, only one or two parents should have custody, and the other parents would have visitation.").

custody and visitation order, and finding that a child has three legal parents does not mean the court has committed to giving the third parent the same custody and visitation rights as the other two.

The argument that affording three parents legal protection will ultimately result in these parents seeking “the rights and protections of marriage” is baseless.²¹² In granting rights to, and imposing obligations on, a third parent, the focus is on the child and the child’s legal relationship to all three parents, not on the parents’ relationships to each other. Although one could argue it would be best for the children if these families were afforded the protections of marriage—a marriage of all three parents—this is not a reasonable proposition. Typically, these families consist of a couple and a friend of the couple who agrees to assist the couple in procreating, and all agree it would be best for the child to have three parents involved.²¹³ These are not polygamous arrangements.

Another concern is that giving courts the discretion to find more than two legal parents may result in courts going too far, such as by finding a fifth legal parent.²¹⁴ There may be cases in which such a finding is appropriate, but it is unlikely. Under the traditional best interest standard, the court has to determine first, who qualifies as a presumed parent, and second, whether the best interest of the child requires the court to find that the child has more than two legal parents.²¹⁵ Because any additional parents the court considers would need to qualify as presumed parents, this number will be relatively small. There is only so much time in the day for a child to develop a parent-child relationship with more than two people, and there are only a few ways in which a person can achieve presumed parent status.²¹⁶ Both the presumed parent requirement and best interest standard limit the number of situations in which the court *could* find that

212. See Marquardt, *supra* note 172, at A13.

213. See, e.g., *Jacob v. Shultz-Jacob*, 923 A.2d 473, 475–76, 482 (Pa. Super. Ct. 2007) (discussing a family consisting of a biological mother, the mother’s former lesbian partner, and a sperm donor); *A.A. v. B.B.* (2007), 220 O.C.A. 115, para. 1 (Can. Ont. C.A.) (discussing a family consisting of a lesbian couple and their friend, the biological father); Gray, *supra* note 30; Hall, *supra* note 30 (same); Lovett, *supra* note 1, at A9 (discussing a family consisting of four parents: a gay couple and a lesbian couple). The two-parent limit also affects heterosexual couples who choose to conceive with the help of ART. See, e.g., *Bellafante*, *supra* note 33, at MB5 (discussing a family that had consisted of a biological mother and her boyfriend, who had conceived with the help of a sperm donor).

214. See Marquardt, *supra* note 172, at A13.

215. See *Introduced Bill Text, S.B. 1476*, *supra* note 142.

216. See *supra* note 143.

a child has more than two legal parents, and finding that a child has more than two presumed parents does not mean the court *would* find that the child has more than two legal parents.

Lastly, recognition of more than two legal parents may have the effect of keeping some children out of foster care because the court would have more placement options for the child.²¹⁷ The more potential resources a child has, the less likely it is the child will end up under the supervision of the state, as the odds increase that there will be at least one appropriate parental resource for the child. This would save the state money because the state would not have to compensate the child's foster family for expenses incurred as a result of caring for the child.

VII. PROPOSED REFORMS

Despite the fact that few states explicitly recognize more than two legal parents, courts are increasingly providing rights to, and imposing obligations on, third parties, many of whom are acting as third parents to children.²¹⁸ Although this movement toward some recognition of third parties is progress, it is not enough to protect families that do not fit the traditional mold. These families will continue to go to court seeking legal recognition of all of their members, and courts will continue to be constrained by the two-parent limit. State legislatures must give courts the discretion to find that a child has more than two legal parents if such a finding is in the child's best interest.

A. Giving Courts Discretion

As proposed by California SB 1476 and SB 274, courts should have the discretion to find that a child has more than two legal parents.²¹⁹ Such a decision should be made only in light of the court finding that a child has more than two presumed parents.²²⁰ Instead of requiring courts to reconcile competing presumptions of parentage such that a child has only two legal parents, state legislatures should give courts the authority to find that a child has more than two legal parents if such a finding is in the child's best interest.²²¹

217. See, e.g., *In re M.C.*, 123 Cal. Rptr. 3d 856, 877 (Ct. App. 2011) (discussing the competing presumptions of three presumed parents in the context of a child placed in foster care); Bellafante, *supra* note 33, at MB5 (describing the child's placement in foster care because he is not biologically related to his intending father).

218. See *supra* notes 114–15 and accompanying text.

219. See *Bill Analysis, S.B. 274, supra* note 159; *Introduced Bill Text, S.B. 1476, supra* note 142.

220. See S.B. 274, 2013–14 Sess. (Cal. 2013); S.B. 1476, 2011–12 Sess. (Cal. 2012).

221. See S.B. 1476.

Under California law, the guide courts are given to resolve competing presumptions is “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”²²² This is a very subjective standard and forces courts to choose which parents have legal parent status.²²³ Because this decision has to be made in light of the overall “best interest of the child” standard, a court may feel that the presumptions need not be reconciled at all. A court may find that resolving the presumptions is not in the child’s best interest and that the most appropriate decision would be to afford all three parents legal parent status. Because of this, courts should not be precluded from making such a finding. To make courts feel comfortable finding that a child has more than two legal parents, state legislatures should amend their parentage laws to remove the bright-line rule of two.

As the California Court of Appeal stated in *In re M.C.*, a change like this needs to come from the legislature.²²⁴ Courts are hesitant to recognize rights in the absence of a statute.²²⁵ Therefore, before courts will feel comfortable recognizing more than two legal parents or affirming decisions that do so in light of current precedents, state legislatures must enact statutes that provide courts with this discretion.

As families increasingly become nontraditional with the help of new technology, state legislatures need to update their parentage laws to afford legal protection to family formations that had not been contemplated at the time the laws were enacted.²²⁶ As courts have acknowledged, states’ parentage laws are out of date in that they no longer reflect the current needs of families.²²⁷ Although the courts and legislatures have taken some steps to keep up with the proliferation of nontraditional family forms, they have

222. CAL. FAM. CODE § 7612(b) (West 2014). California Family Code section 7612(b) remains unchanged after the passage of SB 274. *See id.* The legislators remedied the situation by adding a new subsection that allows courts to find that a child has more than two legal parents if recognizing less than that number would be detrimental to the child. *See id.* § 7612(c).

223. *See Introduced Bill Text, S.B. 1476, supra* note 142.

224. 123 Cal. Rptr. 3d 856, 870 (Ct. App. 2011).

225. *See Elrod, supra* note 133, at 888.

226. *See supra* note 134. In *Jacob v. Shultz-Jacob*, the Superior Court of Pennsylvania acknowledged that the matter was better left to the legislature but fashioned a remedy anyway. 923 A.2d 473, 482 (Pa. Super. Ct. 2007); *see supra* note 119.

227. *See, e.g., In re M.C.*, 123 Cal. Rptr. 3d at 869–70 (“We agree these issues are critical, and California’s existing statutory framework is ill-equipped to resolved them.”); *Jacob*, 923 A.2d at 482 (acknowledging that the legislature had not yet spoken on the matter but stating it was the court’s duty to construct an appropriate remedy).

not gone far enough.²²⁸ State legislatures must untie courts' hands to enable them to do their job—determining the best interest of children.²²⁹

I. Competing Presumptions

Because there are various ways of achieving presumed parent status, including by marriage, biology, conduct, and intent, there are situations in which more than two people qualify as presumed parents. Part of the reason for the multiple ways in which a person can achieve presumed parent status is that courts wish to find that a child has two parents rather than only one.²³⁰ As a result, when a third person qualifies as a presumed

228. See *supra* notes 114–15 and accompanying text.

229. For example, the United States Supreme Court in *Michael H. v. Gerald D.* chose not to recognize dual fatherhood when it upheld a California statute that precluded the genetic father from rebutting the marital presumption. 491 U.S. 110, 118 (1989) (plurality opinion). Despite the child's desire to maintain a filial relationship with both her genetic and presumed father—her mother's husband—the Court rejected the concept of “multiple fatherhood.” *Id.* at 110, 114, 131.

Michael H. is a great example of the law leading to harsh results. The child was unable to have her relationship with her biological father legally recognized. If both the father and child seek to have their relationship acknowledged by the law, courts should at least be able to consider it. With the current rule-of-two approach, they are unable to do so. This all leads to the question of why states preclude courts from finding that a child has more than two legal parents. If the thinking is that doing so provides protection to the institution of marriage, that thinking is off base and out of date. If the standard really is “best interest of the child,” the child and the preservation of the child's existing relationships should be at the forefront of the best interest determination. With the law as it currently stands, courts are sometimes precluded from making the best possible orders for children. In *Michael H.*, a case in which the child was old enough to express her feelings, the law should have allowed the court at least to consider the possibility that the child had more than two legal parents. It would have been appropriate for the court to afford legal parent status to the child's biological father, which would have resulted in the child having three legal parents. *Id.* at 130–31; see also Jacobs, *supra* note 14, at 225 (“Why limit support, access to health insurance, inheritance, and other benefits when more choices are available? Ignoring the issue will not make the cases go away; rather, we should develop a viable framework so that courts can best protect children, their relationships with all parental figures, and provide for the children's financial security.”).

230. See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 667, 670 (Cal. 2005) (discussing *In re Nicholas H.*, 46 P.3d 932, 936–37 (Cal. 2002), in which the court held that it was inappropriate to rebut the presumed parent presumption because there were no competing claims to paternity and rebutting the presumption would result in the child being fatherless); *People v. Sorensen*, 437 P.2d 495, 499–500 (Cal. 1968) (upholding the conviction of the mother's sterile husband for willful failure to provide for his minor child because he had consented to the artificial insemination of his wife with semen from a donor). In *Sorensen*, the court wrote, “A child conceived through heterologous artificial insemination does not have a ‘natural father,’ as that term[] is commonly used. . . . Since there is no ‘natural father,’ we can only look for a lawful father.” *Id.* at 498 (footnote omitted).

parent, the court is required to resolve the presumptions such that the child has only two legal parents.²³¹

Instead of limiting the number of protected relationships a child has and instead of providing half-protections, such as awarding the presumed parent visitation or requiring the presumed parent to pay child support, states should provide these relationships the full protection of the law by giving courts the discretion to find that a child has more than two legal parents. To allow courts to make such findings, state legislatures need to amend the statutes that require courts to resolve competing parentage presumptions. Courts should not be limited by the absolute rule of two when making best interest determinations.

2. *Effect on Custody, Visitation, and Child Support*

States should give courts the discretion to allocate custody and visitation among the parents according to the child's best interest.²³² Because courts will have to consider the practicality of any custody or visitation order and the effect such an order would have on the child's stability, it is unlikely the arrangement would be overly burdensome on the child. Additionally, discussions regarding custody and visitation should include the child's opinion. Courts, when determining custody and visitation arrangements, should do so in light of the parents' involvement in the child's daily life: the parents who have the most "daily responsibility for the child . . . should have greater rights and responsibility regarding the raising of the child than a third—or fourth—parent who contributes less, or no, financial support and less emotional support and has a more tenuous relationship with the child."²³³

With respect to child support, courts should divide parents' obligations based on the statewide uniform guidelines.²³⁴ This means that the child support each parent pays would depend on the parent's income and the

231. See, e.g., *In re M.C.*, 123 Cal. Rptr. 3d at 861, 877.

232. See *Introduced Bill Text, S.B. 1476*, *supra* note 142.

233. Jacobs, *supra* note 14, at 223.

234. See *Introduced Bill Text, S.B. 1476*, *supra* note 142; CAL. DEP'T OF CHILD SUPPORT SERVS., *supra* note 146, at 11. As California has recognized, allowing courts to find that a child has more than two legal parents does not require a reformulation of the child support formula. See *Bill Analysis, S.B. 274*, *supra* note 194. Because the court is responsible for calculating the initial child support award, the court will just have to factor another parent's income into the calculation. See *id.*

amount of time the parent spends with the child.²³⁵ If courts divide the financial responsibilities in accordance with custodial rights, it should not be difficult for them to devise an appropriate support order.²³⁶ Although managing multiple parenthood will be difficult, children in nontraditional families will benefit from the additional security that recognition of multiple parenthood affords, specifically the right to receive financial support from and maintain relationships with those who have acted as parents to them.²³⁷

Moreover, as the California *Child Support Handbook* states, courts in some cases “may decide not to use the income guidelines to determine the amount of child support.”²³⁸ This suggests that courts have some leeway in terms of the child support orders they make. Because of this, a court, in the case of a family with more than two presumed parents, could find that the child has three presumed parents, not resolve the competing presumptions, and divide the child support obligations according to the parents’ income and amount of custodial time. As one academic who has written extensively in this area of law put it, “Why limit support, access to health insurance, inheritance, and other benefits . . . ? [W]e should develop a viable framework so that courts can best protect children, their relationships with all parental figures, and provide for the children’s financial security.”²³⁹ The bright-line rule of two legal parents no longer reflects current family formations and restricts courts’ ability to make orders consistent with the child’s best interest. For these reasons, state legislatures should amend their parentage laws to give courts the discretion to find that a child has more than two legal parents.

VIII. CONCLUSION

Many states’ parentage schemes are outdated. Although the law has evolved somewhat to provide protection to nontraditional families, it has not gone far enough. These families will continue to go to court seeking legal protection of their relationships, and courts will continue to be constrained by the two-parent limit.

235. See CAL. DEP’T OF CHILD SUPPORT SERVS., *supra* note 146, at 11.

236. *Id.*; see also Jacobs, *supra* note 14, at 226 (“When three people jointly decide to have a child, two will likely be the primary caretakers, and the primary caretakers should bear a greater financial burden to support the child than a parent with limited custodial and/or visitation rights. By allocating responsibility in proportion with custodial rights, courts should be able to fashion a reasonable financial support award. . . . Limiting the financial obligation of a third party protects that individual from a high support award; conversely, the link and limitations on support and custodial rights protects the primary parents from too much custodial interference from the third party.”).

237. See Jacobs, *supra* note 14, at 224.

238. CAL. DEP’T OF CHILD SUPPORT SERVS., *supra* note 146, at 11.

239. Jacobs, *supra* note 14, at 225.

State legislatures must amend their parentage laws to give courts the discretion to find that a child has more than two legal parents. Courts would be able to make such a finding only if it was in the child's best interest. It is time for states to stop paying lip service to protecting a child's best interest and start heeding the overwhelming evidence that demands these changes.

