2022

The Boundaries of Multi-Parentage

Jessica Feinberg
jessica.feinberg@maine.edu

THE BOUNDARIES OF MULTI-PARENTAGE

*Jessica Feinberg**

ABSTRACT

Multi-parentage has arrived. In recent years, a growing number of courts and legislatures have recognized that a child may have more than two legal parents. A number of significant societal, medical, and legal developments have contributed to the trend toward multi-parentage recognition. The traditional family structure of a married different-sex couple and their biological children currently represents only a minority of U.S. families. Stepparents, non-marital partners of legal parents, and extended family members often play a significant role in children's lives, and it has become increasingly common for same-sex couples to welcome children into their families. In addition, advancements in assisted reproductive technology have made it possible for a greater number of parties to play a role in a child's conception. At the same time, the law has expanded both the categories of individuals who are eligible to establish parentage and the mechanisms through which parentage can be established. While the trend in favor of multi-parentage recognition is clear, the boundaries of multi-parentage remain largely unsettled. It is imperative that in drafting their multi-parentage laws, states carefully consider how to address a number of important questions. These questions include, for example, whether each of the child's existing legal parents must consent to the establishment of multi-parentage, what (if any) cap should be set on the number of individuals who can establish legal parentage, and how to avoid imposing a hetero- and bionormative family structure on LGBTQ+ families. After providing a detailed analysis of the complex issues involved in each of these questions, the Article sets forth a number of proposals regarding how states should address these critical questions within their multi-parentage laws.

TABLE OF CONTENTS

https://doi.org/10.25172/smulr.75.2.10.

* Professor, University of Maine School of Law. I am grateful to Meghan Boone, Kaitlin Caurso, Jeff Dodge, Heidi Gorovitz Robertson, Daniel Pi, Susan Hazeldean, Leigh Saufley, Deirdre Smith, Lisa Tucker, and the participants in the Feminist Legal Theory Collaborative Research Network Program at the Law and Society Conference for providing insightful feedback on the issues addressed in the Article. Finally, thank you to my family, LBF, ABF, and RBF, for all of your love and support.

I. INTRODUCTION

FOR most of U.S. history, the law identified a maximum of two parents for each child. In recent years, however, legislatures and courts have become increasingly willing to recognize the possibility that a child may have more than two parents (multi-parentage). A number of jurisdictions have adopted statutes providing for the identification of more than two legal parents under certain circumstances, and judicial decisions in additional jurisdictions have reached the same result.[1] There is currently a clear trend toward legal recognition of multi-parentage, and this trend shows no signs of slowing down.[2]

A variety of factors have contributed to the move away from strict adherence to the "rule of two."[3] In recognizing a maximum of two parents for each child, the law has long sought to "naturalize a normative family in which only enduringly monogamous heterosexual couples reproduce."[4] Today, however, the "traditional" nuclear family consisting of a married different-sex couple and their genetic children represents only a minority of family structures in the United States, and a significant number of children have more than two individuals in their lives who serve in a parental role.[5] For example, the rate of births outside of marriage and the rate of divorce each remain around 40% or higher.[6] As a result, stepparents, non-marital partners of legal parents, and extended family members often play significant roles in children's lives and may form relationships with children that are parental in nature.[7] Moreover, it has become increasingly common for same-sex couples to have children, and some same-sex couples have chosen to create family structures in which the couple and a third party whose gametes were used to conceive the child (and perhaps the gamete provider's spouse or partner) raise the child together as co-parents.[8]

---

1. *See infra* Section III.B.

2. *See infra* Section III.B.

3. Elizabeth Marquardt, Opinion, *When 3 Really Is a Crowd*, N.Y. TIMES (July 16, 2007), https://www.nytimes.com/2007/07/16/opinion/16marquardt.html [https://perma.cc/GX3G-GP9V] (coining the term "the rule of two").

4. Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 21 (2008).

5. PEW RSCH. CTR., PARENTING IN AMERICA 2–3, 8 (2015), https://www.pewresearch.org/social-trends/2015/12/17/1-the-american-family-today [https://perma.cc/4MP3-WHWD].

6. Joyce A. Martin, Brady E. Hamilton, Michelle J.K. Osterman & Anne K. Driscoll, *Births: Final Data for 2019*, 70 NAT'L VITAL STAT. REPS. 1, 6 (2021), https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-02-508.pdf [https://perma.cc/8CWZ-5J43] (describing the rate of births outside of marriage); John Harrington & Cheyenne Buckingham, *Broken Hearts: A Rundown of the Divorce Capital of Every State*, USA TODAY (Feb. 2, 2018, 7:00 AM), https://www.usatoday.com/story/money/economy/2018/02/02/broken-hearts-rundown-divorce-capital-every-state/1078283001 [https://perma.cc/E582-MGWN] (describing the divorce rate).

7. Tiffany L. Palmer, *How Many Parents?*, 40 FAM. ADVOC. 36, 36 (2018).

8. Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 EMORY L.J. 2047, 2058–59 (2015); Palmer, *supra* note 7, at 36.

Important medical advancements have also contributed to the decline of the rule of two. The use of assisted reproductive technology (ART) has become increasingly common among both same-sex couples who wish to conceive children and different-sex couples who are confronting fertility issues.[9] Advancements in ART mean that five or more people may be directly involved in the conception of a child: the providers of the gametes used to conceive the child, the person who gestates the child, and the intended parents.[10] Moreover, it is likely that advances in medical technology will soon result in the ability to conceive children using the gametes of three individuals, leading to the reality of a child having more than two genetic parents.[11]

Along with these societal and medical developments have come important legal developments. The law has both expanded the categories of individuals who can utilize the traditional mechanisms available for parentage establishment (marriage, adoption, and biology) and added important additional parentage establishment mechanisms. Members of same-sex couples, for example, now can use traditional marriage-based avenues—such as the marital presumption of parentage, spousal consent to assisted reproduction laws, and stepparent adoption procedures—to obtain legal parentage.[12] In addition, states across the country have supplemented their traditional parentage establishment mechanisms with a variety of intent- and function-based mechanisms, meaning that there are more bases on which an individual may establish legal parentage than ever before.[13] Taken together, these societal, medical, and legal developments have led to a situation in which it is increasingly common for more than two people to seek recognition as a child's legal parent.[14]

Rather than joining the well-developed debate regarding the baseline question of whether the law should recognize the possibility of a child having more than two legal parents,[15] this Article instead seeks to address what boundaries the law should adopt in setting forth a logical, fair, and effective legal framework governing multi-parentage determinations. Le-

9. Marvel, *supra* note 8, at 2058–59; Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2285–86 (2017).

10. *See* Marvel, *supra* note 8, at 2058–59.

11. Judith Daar, *Multi-Party Parenting in Genetics and Law: A View from Succession*, 49 FAM. L.Q. 71, 71 (2015).

12. *See infra* Part II.

13. *See infra* Part II.

14. Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 NEV. L.J. 743, 744–45 (2016).

15. *See generally* Appleton, *supra* note 4; Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649 (2008); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007); Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting*, 31 J. AM. ACAD. MATRIM. LAWS. 175 (2018).

gal recognition of multi-parentage is a relatively new concept.[16] The jurisdictions that have recognized multi-parentage through statute or court decision have employed varying approaches, and the boundaries of multi-parentage recognition remain very much unsettled. Of particular importance are questions relating to (1) whether the consent of all the existing legal parents should be required for the law to recognize additional legal parents and, if so, whether the definition of consent should encompass both express and implied consent; (2) what (if any) cap states should set on the number of individuals who can obtain legal parentage; and (3) how to structure multi-parentage laws in a way that avoids imposing a hetero- and bio-normative family structure on LGBTQ+ families.[17] Each of these questions raises complex legal and policy-related issues.

The first question, regarding the consent of a child's existing legal parents to the establishment of multi-parentage, raises complicated legal issues. The analysis necessarily involves weighing the fundamental constitutional rights of the existing legal parents to direct the care, custody, and control of their child against the state's interest in protecting the well-being of children who have formed a parent-like relationship with a third party. With regard to the second question, whether states should set a firm cap on the number of parents the law can recognize, there are strong policy considerations on each side. On the one hand, having too many individuals recognized as a child's legal parents could lead to chaos and conflict that is detrimental to the child. On the other hand, having the state choose one number as the absolute maximum number of legal parents a child could possibly have is arguably arbitrary and unwise given the wide variety of family forms in existence today and the unique attributes of every family. Resolving the third question, how to protect LGBTQ+ families from imposition of a hetero- and bio-normative family structure, will be a complex undertaking that will require states to carefully construct each component of their laws in a way that minimizes the potential for anti-LGBTQ bias to play a determinative role in multi-parentage decisions. Overall, in structuring their multi-parentage laws, it is essential that states give each of these questions thorough consideration—the manner in which states choose to address these questions will have profound and lasting effects on children, parents, and families.

This Article proceeds in the following manner. Part II describes each of the modern bases through which individuals can establish legal parentage. Part III begins by identifying the common factual scenarios in which multi-parentage issues may arise. It then sets forth a detailed description of the current state of the law governing multi-parentage in the United States. Part IV identifies three of the most important unsettled questions regarding how states should structure the boundaries of multi-parentage

16. Appleton, *supra* note 4, at 12–13 (explaining that the issue of "whether particular children can or should have more than two parents, surfaced with seeming suddenness" in 2007).

17. As per Professor Katharine K. Baker, the term bionormative in this context refers to "a parental regime based on biology." Baker, *supra* note 15, at 653.

recognition. After engaging in a thorough analysis of the legal and policy-related issues underlying each question, the Article sets forth a number of detailed proposals regarding how states should address each of these critical questions.

II. MODERN BASES FOR PARENTAGE ESTABLISHMENT

A. The Act of Giving Birth

The law has long provided legal parentage based upon the act of giving birth,[18] and that remains largely true today. At present, the only scenario in which legal parentage does not attach to the act of giving birth is when state law recognizes a surrogacy agreement as establishing the intended parents as the child's sole legal parents prior to or upon the child's birth.[19] In the absence of an enforceable surrogacy agreement, the law widely continues to provide legal parentage based upon the act of giving birth.[20] This longstanding practice not only reflects a recognition of the critically important, substantial caregiving work and nurturing undertaken by individuals who gestate and give birth to children, but it also bestows parentage to an individual who, in addition to gestating the child, is the child's genetic and intended parent in the vast majority of instances.[21]

B. The Marital Presumption

The longstanding marital presumption of parentage is the most common way of establishing legal parentage in someone other than the person who gave birth.[22] "As far back as the early 1700s, the common law of England set forth a presumption that a woman's husband was the legal father of any child born to or conceived by the woman during the marriage."[23] In the early years of the United States, the marital presumption was virtually irrefutable.[24] Rebutting the presumption required the initiation of legal proceedings in which the husband or wife had to prove that "the husband did not have access to his wife"[25] during the time of conception, and neither the wife nor the husband was permitted to testify to this fact.[26]

---

18. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 Am. J. Compar. L. 125, 127 (2006).
19. *See* NeJaime, *supra* note 9, at 2264, 2300, 2334.
20. *See id.* at 2280.
21. Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 Yale J.L. & Feminism 99, 115 (2018).
22. Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. Rev. 1647, 1659 (2015).
23. Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 Minn. L. Rev. 243, 248 (2019) (citing Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. Va. L. Rev. 547, 562 (2000)).
24. *Id.* at 248–49.
25. Glennon, *supra* note 23, at 562–63.
26. Feinberg, *supra* note 23, at 248–49.

While the marital presumption remains in some form in every state, the rules governing the presumption have changed over the years.[27] The spouses are no longer prohibited from testifying in rebuttal actions.[28] In addition, in approximately two-thirds of states, not only do the person who gave birth, their spouse, and child support enforcement agencies have standing to challenge the marital presumption, but an individual outside of the marriage who claims to be the child's biological father also may seek to rebut the presumption.[29] Rebuttal usually requires, at a minimum, DNA testing results indicating that the spouse of the person who gave birth does not share a genetic connection with the child.[30] In many states, however, courts can refuse to admit DNA evidence or otherwise deny rebuttal if the court determines that rebuttal would be contrary to the child's best interests or that the party seeking to rebut the marital presumption should be estopped from doing so on equitable grounds.[31]

Importantly, pursuant to the Supreme Court's 2015 decision in *Obergefell v. Hodges*, which mandated that states provide marriage rights to same-sex couples on the same terms accorded to different-sex couples, it seems clear that state marital presumption laws must extend to same-sex spouses of individuals who give birth.[32] The Supreme Court's decision two years later in *Pavan v. Smith*, which held that if a state provides the different-sex spouses of individuals who give birth with the right to be listed on the child's birth certificate it must do the same for same-sex spouses, further supports the mandatory application of state marital presumption laws to same-sex spouses of individuals who give birth.[33] The vast majority of courts that have addressed the issue have reached the conclusion that state marital presumptions, even if written in gendered terms, apply equally to same-sex spouses.[34] In addition, a number of states have amended their marital presumption laws so that gender-neutral terms are used to describe the spouse of the individual who gave birth.[35]

C. Voluntary Acknowledgements of Parentage

Today, voluntary acknowledgements of parentage (VAPs), which are usually executed at the hospital at the time of the child's birth,[36] are the most common way of establishing a second legal parent for a child born

27. *Id.* at 252.
28. *Id.* at 249.
29. *Id.* at 252.
30. *Id.* For an argument regarding the need to change the bases for rebuttal given the application of the marital presumption to same-sex couples, *see generally id.*
31. *Id.* at 252–53.
32. *See* Obergefell v. Hodges, 576 U.S. 644, 652, 681 (2015).
33. Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017) (per curiam).
34. Feinberg, *supra* note 23, at 255–56 n.57.
35. NeJaime, *supra* note 9, at 2339.
36. Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 Wm. & Mary Bill Rts. J. 909, 920 (2006).

to an unmarried individual.[37] Federal guidelines mandate that all birthing hospitals and birth records offices provide "a simple civil process for voluntarily acknowledging paternity" of children who are "born out-of-wedlock."[38] To establish a party's parentage through a VAP, the individual who gave birth and the person whose parentage the parties are seeking to establish must sign a document acknowledging that person's parentage.[39] Importantly, while many states' VAP forms or accompanying instructions state that in signing the VAP the parties are attesting under penalty of perjury that, to the best of their knowledge, the party seeking to establish parentage is the child's biological father,[40] states cannot require a person to submit to genetic testing before signing a VAP.[41] As a result, a biological tie between the individual seeking to establish parentage and the child does not need to be proven in order for legal parentage to be established through the VAP. An unrescinded VAP must be "considered a legal finding of paternity,"[42] and states must give "full faith and credit" to VAPs validly executed in other states.[43] Although federal law only requires states to provide VAPs to establish the paternity of children born "out-of-wedlock,"[44] approximately half of states allow a married individual who gives birth to execute a VAP with someone other than their spouse if the spouse is willing to execute a document declaring that they are not the child's biological father and waiving their presumed legal parentage.[45]

37. Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 469 (2012).

38. 45 C.F.R. § 302.70(a)(5)(iii) (2017). Federal law mandates only voluntary paternity establishment procedures, and thus this Article uses the term paternity, as opposed to parentage, in describing the federal rules. 45 C.F.R. § 303.5(g)(1)(i)–(ii) (2017). Otherwise, however, because a number of states have extended these procedures to parentage establishment for women and non-binary individuals, *see infra* notes 49–50 and accompanying text, this Article uses the term voluntary acknowledgement of parentage.

39. 45 C.F.R. § 303.5(g)(4) (2017).

40. Baker, *supra* note 22, at 1686.

41. Harris, *supra* note 37, at 476 (citing 45 C.F.R. § 302.70(a)(5)(vii) (2009)).

42. 42 U.S.C. § 666(a)(5)(D)(ii).

43. *Id.* § 666(a)(5)(C)(iv).

44. 42 U.S.C. § 666(a)(5)(D)(ii).

45. *See, e.g.*, *Self-Help Center: Family Law*, ALASKA CT. SYS., http://www.courts.alaska.gov/shc/family/glossary.htm#aff-pat [https://perma.cc/N565-CJJ7]; *Acknowledgement of Paternity*, ARIZ. DEP'T ECON. SEC., http://www.azdhs.gov/documents/licensing/vital-records/register-acknowledgement-paternity.pdf [https://perma.cc/KL27-9J2Y]; *Acknowledgement of Paternity*, ARK. OFF. CHILD SUPPORT ENF'T, http://www.dfa.arkansas.gov/offices/childSupport/Documents/aopPage1English.pdf [https://perma.cc/A8KK-6BRH]; *Voluntary Acknowledgement of Paternity*, STATE OF COLO., https://www.colorado.gov/pacific/sites/default/files/CHED_VR_Form_Acknowledgement-of-Paternity_English0916.pdf [https://perma.cc/2PBK-6SH4]; *Form No. VS27-A, Acknowledgement of Paternity (AOP)*, ME. CTR. FOR DISEASE CONTROL & PREVENTION, https://www.maine.gov/dhhs/mecdc/public-health-systems/data-research/vital-records/documents/pdf-files/VS27-A.pdf [https://perma.cc/H66L-XPAU]; *Minnesota Voluntary Recognition of Parentage*, MINN. DEP'T HUM. SERVS., https://edocs.dhs.state.mn.us/lfserver/Public/DHS-3159-ENG [https://perma.cc/5Y5R-DTAT]; *Paternity Issues*, CLARK CNTY. NEV., https://www.clarkcountynv.gov/government/departments/district_attorney/divisions/family_support_division/paternity_issues1.php [https://perma.cc/S3RH-6Y5D]; N.H. REV. STAT. ANN. § 5-C:24 (2015); *North Dakota Acknowledgment of Paternity*, N.D. DEP'T HEALTH, https://childsupport.dhs.nd.gov/sites/default/files/PDFs/acknowledgment-of-paternity.pdf [https://perma.cc/8VRA-RPPV]; OKLA. HUM. SERVS., *Paternity Establishment*

While either signatory may rescind the VAP within sixty days of its execution, after that point it can be challenged only on the grounds of duress, material mistake of fact, or fraud.[46] Although the most frequent challenges to VAPs are based upon claims "that the [person who gave birth] committed fraud by misleading the man about his biological paternity or that there is a material mistake of fact because the man is not the biological father," proof that the man is not the child's biological father will not necessarily result in the disestablishment of his parentage.[47] Some courts require evidence of fraud or mistake in addition to the genetic testing results or deny the challenge, despite the genetic testing results, where disestablishing the paternity of the man who executed the VAP would be inequitable under the circumstances or contrary to the best interests of the child.[48]

While the federal guidelines set out voluntary acknowledgement procedures that extend only to establishing parentage for men, approximately ten states have expanded voluntary acknowledgement procedures to women and non-binary individuals as of 2021.[49] Many of these states have adopted an approach similar to that adopted by the 2017 Uniform Parentage Act (UPA), which extends VAP availability to women and non-binary individuals who qualify under the Act as intended or presumed parents as long as there is no other individual who is already recognized under the Act as the child's second legal parent.[50] The Act maintains the sixty-day rescission period and limited grounds for challenges following the rescission period.[51]

Process, https://oklahoma.gov/okdhs/library/policy/current/oac-340/chapter-25/subchapter-5/parts-21/establishment-of-parentage.html [https://perma.cc/X63P-J6XS]; R.I. GEN. LAW § 15-8-3 (2020); *Voluntary Declaration of Paternity: What You Should Know*, UTAH DEP'T HEALTH, http://www.paternitymatters.utah.gov/pdf/XNOT.pdf [https://perma.cc/FXZ9-AJVN]; *Acknowledgement of Parentage*, WASH. ST. DEP'T HEALTH, https://www.doh.wa.gov/Portals/1/Documents/pubs/422-159-AcknowledgmentOfParentage.pdf [https://perma.cc/7ST9-42V4]; *Paternity Establishment on the Birth Certificate*, WYO. DEP'T HEALTH, https://health.wyo.gov/admin/vitalstatistics/paternityestablishment [https://perma.cc/2F6G-ZEL6]. At the other end of the spectrum, a number of state VAP forms specify that VAP procedures are unavailable when a child is born to a married mother. Feinberg, *supra* note 21, at 128–29.

46. 42 U.S.C. § 666(a)(5)(D)(ii), (iii).

47. Harris, *supra* note 37, at 479–81.

48. *Id.* at 480–82.

49. COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW § 5:22 (2021).

50. UNIF. PARENTAGE ACT §§ 301, 302(b)(1) (UNIF. L. COMM'N 2017); *see, e.g.*, VT. STAT. ANN. tit. 15C, § 301(a)(3)–(4) (2021) (including "a person who is an intended parent to the child" and "a presumed parent" among the list of persons who may sign an acknowledgement of parentage). Under the UPA approach, if there is a presumed parent, the gestating parent can execute a VAP with someone else if the presumed parent executes a denial of parentage. UNIF. PARENTAGE ACT § 302(b)(1).

51. UNIF. PARENTAGE ACT §§ 308(a)(1), 309(a). The 2017 Uniform Parentage Act requires that challenges to VAPs after the rescission period occur within two years from the execution of the VAP. *Id.* § 309(a). State laws currently differ with regard to the categories of individuals who have standing to challenge VAPs. Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws*, 70 MERCER L. REV. 325, 351–53 (2019).

D. GENETICS

Actual or presumed genetic ties to the child have long played a role in parentage determinations.[52] In situations where a child has only one existing legal parent, the person who gave birth, an individual claiming to be the child's biological father, or a child support agency can initiate legal proceedings to establish the alleged biological father's parentage on the basis of DNA evidence.[53] Federal law requires that state procedures "create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child."[54]

In situations in which a second individual (in addition to the person who gave birth) is already recognized as a legal parent, an individual claiming parentage on the basis of genetic ties to the child may be able to bring an action to establish their parentage and rebut the parentage of the existing second legal parent. For example, as discussed above, in two-thirds of states biological fathers have standing to seek to rebut the marital presumption of parentage that attaches to the spouse of the individual who gave birth.[55] In addition, while the standing requirements for VAP challenges differ by state, a biological father may have standing to challenge a VAP that identifies someone else as the child's second legal parent.[56] However, genetic ties are not always determinative in these contexts. Courts may reject these challenges on the grounds that establishing the genetic father as the child's legal parent would be contrary to the best interests of the child or inequitable.[57] Many jurisdictions also have time limitations on actions to challenge an individual's legal parentage.[58]

Moreover, in recent years some jurisdictions have expanded to women the types of genetics-based parentage establishment avenues traditionally available only to men.[59] This has arisen primarily in the context of gestational surrogacy arrangements in situations where the surrogacy agreement is not enforceable under the laws of the jurisdiction, but the court allows the intended mother to establish parentage through proof that she is the child's genetic mother.[60] In addition, a few courts have recognized similar claims in the context of same-sex couples who engaged in reciprocal in vitro fertilization (IVF), an assisted reproductive procedure

52. Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 340–46 (2016).

53. Glennon, *supra* note 23 at 566, 569.

54. 42 U.S.C. § 666(a)(5)(G).

55. *See supra* text accompanying note 29.

56. Parness, *supra* note 51, at 351–53.

57. *See supra* notes 31, 48 and accompanying text.

58. Feinberg, *supra* note 23, at 270 (discussing time limitations on marital presumption challenges); UNIF. PARENTAGE ACT §§ 309(a), 610(b)(1) (UNIF. L. COMM'N 2017) (adopting a two-year time limitation on VAP challenges).

59. Jessica Feinberg, *After Marriage Equality: Dual Fatherhood for Married Male Same-Sex Couples*, 54 U.C. DAVIS L. REV. 1507, 1535–36 (2021).

60. *Id.* at 1535–37.

wherein an embryo is created using ova from one member of the same-sex couple and sperm from a third party and then transferred to the other member of the couple for gestation.[61] The courts in these cases recognized both members of the couple as the child's legal parents—one on the basis of giving birth and the other on the basis of genetic ties.[62] Notably, the trend in expanding genetics-based parentage grounds to women is likely to continue as many states have adopted provisions in their parentage codes indicating that, to the extent reasonable, the standards governing paternity determinations should apply to maternity determinations.[63]

E. Consent to Assisted Reproduction

Under existing statutory or common law rules throughout the United States, a husband who consents to his wife's use of assisted reproduction with the intent to be the resulting child's parent is deemed a legal parent regardless of whether the child is conceived using the husband's sperm or donor sperm.[64] In some jurisdictions, the laws require that the consent be in writing or that the procedure be performed under the supervision of a physician.[65] Notably, parentage established through consent to assisted reproduction laws generally is conclusive and irrefutable.[66] In terms of same-sex couples, courts that have addressed the issue generally have ruled that, under *Obergefell* and *Pavan*, spousal consent to ART laws extend to same-sex spouses.[67] In addition, a growing number of states are adopting spousal consent to ART statutes that contain gender-neutral terms in reference to the class of individuals who may use this avenue to establish their legal parentage.[68]

A number of jurisdictions now have consent to ART laws that extend to non-marital partners. As of 2021, approximately sixteen jurisdictions have adopted consent to ART laws that extend to an individual who consents to a non-marital partner's use of ART to conceive with the intent to be the resulting child's parent.[69] In thirteen of these jurisdictions, the law

61. Joslin, Minter & Sakimura, *supra* note 49, § 3:11; *Reciprocal IVF*, Univ. S. Cal. Fertility, https://uscfertility.org/same-sex-family-building/reciprocal-ivf [https://perma.cc/JFH2-ALLY].

62. *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 682 (Cal. 2005) (holding that where a same-sex couple had engaged in recipricol IVF, each member of the couple had an equal claim to legal parentage).

63. NeJaime, *supra* note 9, at 2294–95.

64. Joslin, Minter & Sakimura, *supra* note 49, § 3:3.

65. *Id.*

66. *Id.* § 3:4.

67. *Id.*; *see, e.g.*, Appel v. Celia, No. CL-2017-0011789 at *2–3 (Va. Cir. Ct. Feb. 8, 2018) (extending a Virginia statute that "confers upon the husband of a gestational [parent] who conceives a child through assisted conception the right of parentage" to same-sex spouses of gestational parents because "the reasoning in *Obergefell* and *Pavan* make clear that [limiting the statute's application to different-sex couples] does not comply with constitutional requirements").

68. NeJaime, *supra* note 9, app. A (listing twelve gender-neutral donor insemination statutes).

69. Joslin, Minter & Sakimura, *supra* note 49, § 3:3.

encompasses non-marital same-sex partners.[70] Similar to the spousal consent to ART laws discussed above, a conclusive presumption of parentage generally attaches under these laws to the individual who consents to a non-marital partner's use of ART.[71]

F. Surrogacy

Surrogacy typically involves an agreement between the surrogate and intended parents providing that the surrogate agrees to become pregnant through the use of assisted reproduction and to relinquish parental rights to any resulting child to the intended parents.[72] Only a few jurisdictions statutorily recognize "traditional" or "genetic" surrogacy agreements in which the surrogate's ova and sperm from an intended parent donor are used to conceive the child[73] (meaning the surrogate shares both genetic and gestational ties to the child).[74] The other category of surrogacy, gestational surrogacy, is estimated to represent approximately 95% of all surrogacy arrangements today.[75] In gestational surrogacy, the surrogate is not genetically connected to the child—ova and sperm from the intended parent(s) or gamete donor(s) are used to create the embryo that will be implanted in the surrogate.[76]

Gestational surrogacy is a complex area of the law and legal regulation varies dramatically by jurisdiction. Slightly under half of states have statutes that explicitly address gestational surrogacy,[77] some states have only case law addressing gestational surrogacy,[78] and still other states have no statutory or case law governing gestational surrogacy.[79] A few of the states with statutes addressing surrogacy consider all surrogacy contracts void and unenforceable.[80] The rest of the jurisdictions with statutes addressing gestational surrogacy, approximately eighteen jurisdictions, rec-

70. *Id.*

71. *Id.* (citing N.M. Stat. Ann. § 40-11A-703 (West 2021)) ("A person who provides eggs, sperm or embryos for or consents to assisted reproduction . . . with the intent to be the parent of a child is a parent of the resulting child.").

72. Jenna Casolo, Campbell Curry-Ledbetter, Meagan Edmonds, Gabrielle Field, Kathleen O'Neill & Marisa Poncia, *Twentieth Annual Review of Gender and the Law: Annual Review Article: Assisted Reproductive Technologies*, 20 Geo. J. Gender & L. 313, 329 (2019); Joslin, Minter & Sakimura, *supra* note 49, § 4.1.

73. Joslin, Minter & Sakimura, *supra* note 49, § 4:2.

74. *Id.*, § 4.1.

75. Diane S. Hinson & Maureen McBrien, *Surrogacy Across America*, 34 Fam. Advoc. 32, 33 (2011).

76. Robert John Kane & Lawrence E. Singer, The Law of Medical Practice in Illinois § 35:9 (3d ed. 2019).

77. *See* NeJaime, *supra* note 9, app. E.

78. Joslin, Minter & Sakimura, *supra* note 49, § 4.3.

79. *Id.* § 4.5.

80. *See, e.g.*, Ind. Code Ann. § 31-20-1-1 (West 2021) (stating that "it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to . . . become pregnant . . . [or w]aive parental rights or duties to a child"); Mich. Comp. Laws Ann. § 722.855 (West 2021) ("A surrogate parentage contract is void and unenforceable as contrary to public policy."); N.D. Cent. Code § 14-18-05 (2021) ("Any agreement in which a woman agrees to become a surrogate or to relinquish that woman's rights and duties as a parent of a child conceived through assisted conception is void.").

ognize surrogacy agreements under specified conditions.[81] In states that recognize the enforceability of at least some gestational surrogacy agreements, the approaches to the categories of individuals who may enter into enforceable surrogacy agreements as intended parents range from permissive jurisdictions that place no marriage- or genetics-related restrictions on intended parents to restrictive jurisdictions in which eligibility is limited to very narrow categories of intended parents.[82]

In a number of the jurisdictions that recognize gestational surrogacy agreements, courts can grant pre-birth parentage orders that identify the intended parents as the child's legal parents before the child is born.[83] In a few of the jurisdictions that recognize gestational surrogacy agreements, the intended parents must wait until the child is born to obtain an order establishing their legal parentage.[84] On the other end of the spectrum, a few states' gestational surrogacy statutes establish legal parentage for intended parents who enter into a valid surrogacy agreement without any requirement of judicial involvement.[85]

G. Adoption

All states allow for the establishment of legal parentage through judicial adoption proceedings.[86] Most adoptions fall into one of three categories: (1) "[t]he adoption of children from the public foster care system by foster caregivers, kin, or adoptive parents chosen by the agency for the child"; (2) "[t]he domestic adoption of infants who reside in the United States and are adopted through private adoption agencies or independently"; or (3) "[i]ntercountry adoption of infants and children from other countries by U.S. citizens."[87] In terms of the categories of individuals eligible to adopt children, the laws of all jurisdictions permit married couples to jointly adopt children.[88] After *Obergefell*, these laws must be applied equally to married same-sex couples.[89] In addition, single individuals are eligible to adopt in all jurisdictions, and a number of jurisdictions

81. Joslin, Minter & Sakimura, *supra* note 49, § 4:2.

82. *The United States Surrogacy Law Map*, Creative Fam. Connections (2016), https://www.creativefamilyconnections.com/us-surrogacy-law-map [https://perma.cc/A556-TEHR] (describing the laws governing surrogacy agreements in every state).

83. *Id.* There are approximately eleven states in which "[s]urrogacy is permitted for all parents, pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate." *Id.*; N.Y. Fam. Ct. Act § 581-203(d) (McKinney 2021) (coming into effect on February 15, 2021, after the Creative Family Map was last updated).

84. Joslin, Minter & Sakimura, *supra* note 49, § 4:8.

85. *See, e.g.*, 750 Ill. Comp. Stat. Ann. 47/15(b) (West 2021); Me. Rev. Stat. Ann. tit. 19-A, § 1933(1) (2021); Unif. Parentage Act § 809(c) (Unif. L. Comm'n 2017).

86. Child Welfare Info. Gateway, U.S. Dep't Health & Hum. Servs., Court Jurisdiction and Venue for Adoption Petitions 1 (2017), https://www.childwelfare.gov/pubpdfs/jurisdiction.pdf [https://perma.cc/A24N-3DX7].

87. Child Welfare Info. Gateway, U.S. Dep't Health & Hum. Servs., The Basics of Adoption Practice 2 (2006), https://www.childwelfare.gov/pubPDFs/f_basicsbulletin.pdf [https://perma.cc/TYP2-VHX4].

88. Joslin, Minter & Sakimura, *supra* note 49, § 5:11.

89. *Id.*

also allow unmarried couples to jointly adopt children.[90] A few states exclude certain categories of individuals, such as unmarried couples or individuals who are cohabitating with a non-marital partner, from adoption eligibility.[91] For most types of adoptions, the parental status of any existing legal parents has to be terminated before the adoptive parent(s) can obtain legal parentage.[92] There are, however, a couple of common exceptions to this general rule.

Step- and second-parent adoption procedures allow an existing legal parent to maintain their status as the child's legal parent when their spouse or non-marital partner adopts the child.[93] Stepparent adoption procedures, in which the spouse of an existing legal parent adopts the child, are available in every jurisdiction.[94] Following *Obergefell*, both different- and same-sex spouses of a child's legal parent can utilize stepparent adoptions to establish parentage.[95] Second-parent adoption, which is recognized in a minority of jurisdictions, allows the non-marital partner of a child's existing legal parent to adopt the child.[96] As of 2021, approximately sixteen jurisdictions have statutes or appellate case law providing for second-parent adoptions; a number of additional jurisdictions have allowed second-parent adoptions in at least some counties.[97] It is important to note that for both step- and second-parent adoptions, if the child already has an existing second legal parent the adoption generally cannot occur unless that person's parental rights are terminated (either voluntarily or involuntarily).[98]

H. Parental Functioning

Over the past fifty years or so, parental functioning has emerged as a basis for the establishment of legal parentage. Common function-based mechanisms for establishing parental rights include holding out provisions and equitable parenthood doctrines. Holding out provisions, which were rooted originally in the gendered language of the 1973 Uniform Parentage Act, generally create a presumption of parentage for a man who receives a child into his home and holds the child out as his own.[99] Many

90. Nat'l Ctr. for Lesbian Rts., Legal Recognition of LGBT Families 4 (2019), https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [https://perma.cc/A9VB-XY24].

91. *E.g.*, Joslin, Minter & Sakimura, *supra* note 49, § 5:11.

92. 2 Ann M. Haralambie, Handling Child Custody, Abuse and Adoption Cases § 14:1 (2020).

93. Nat'l Ctr. for Lesbian Rts., Adoption by LGBT Parents 1 (2020), https://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf [https://perma.cc/YYR5-JKDG].

94. Joslin, Minter & Sakimura, *supra* note 49, § 5:2.

95. *Id.*

96. *Id.*

97. Nat'l Ctr. for Lesbian Rts., *supra* note 93, at 1–2.

98. Feinberg, *supra* note 21, at 110, 112.

99. Joslin, Minter & Sakimura, *supra* note 49, § 5:22 (citing Unif. Parentage Act § 4(a)(4) (Unif. L. Comm'n 1973)).

states have adopted holding out provisions.[100] In some states, the holding out provision contains a durational requirement mandating that the holding out occurred for a minimum amount of time following the child's birth.[101] Common factors that courts consider in determining whether someone has held the child out as their own include, *inter alia*, the person's words and actions acknowledging the child as their own, the person's demonstrated commitment to the child through physical, emotional, and financial support, and whether the person and child share a bond that is parental in nature.[102] Courts in at least six states have held that such provisions, even when written in gendered terms, extend to women who have received the child into their home and held the child out as their own for the requisite period of time.[103] Notably, the 2017 Uniform Parentage Act, which as of 2021 has been enacted in several states,[104] sets forth a holding out presumption that is written in gender-neutral terms.[105]

Equitable parenthood doctrines—which are commonly referred to as de facto, psychological, or functional parenthood doctrines—developed as a method of providing rights relating to child custody and visitation to individuals who had functioned in a parental role to a child but had not attained formal legal parent status.[106] The development of these doctrines was particularly important for non-biological parents in same-sex relationships who were raising children together with the child's biological parent.[107] For most of the nation's history, non-biological parents in this situation were excluded from formal mechanisms of establishing legal parentage, which required biological ties, adoption, or marriage.[108] Prior to the establishment of equitable parenthood doctrines, if the relationship between the non-biological parent and the biological parent ended and the biological parent denied the non-biological parent access to the child, the non-biological parent often was treated as a legal stranger in custody and visitation actions.[109] This resulted in the severance of relationships between children and individuals who, in many cases, had functioned as the child's parent from the child's birth.[110]

---

100. *Id.*

101. *Id.*

102. *See* Chatterjee v. King, 280 P.3d 283, 286 (N.M. 2012); Elisa B. v. Superior Ct., 117 P.3d 660, 667–70 (Cal. 2005); E.C. v. J.V., 136 Cal. Rptr. 3d 339, 348 (Cal. Ct. App. 2012); 160 AM. JUR. 3d *Proof of Facts* § 5 (2017).

103. JOSLIN, MINTER & SAKIMURA, *supra* note 49, § 5:22.

104. *Parentage Act Legislative Bill Tracking*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=C4f37d2d-4d20-4be0-8256-22dd73af068f [https://perma.cc/F6BK-STPN].

105. UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. L. COMM'N 2017).

106. Jessica Feinberg, *Whither the Functional Parent?: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 56 (2017).

107. *Id.* at 55.

108. *Id.*

109. *Id.* at 55–56.

110. *Id.* at 56.

Equitable parenthood doctrines seek to promote children's well-being by protecting the relationship between a child and an individual who the child views as a parent.[111] The most widely adopted test for determining whether an individual qualifies for relief under a state's equitable parenthood doctrine requires the petitioner to prove that: (1) the legal parent consented to, supported, or fostered the formation of a parent-like relationship between the petitioner and child; (2) the petitioner lived in a household with the child; (3) the petitioner "assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation"; and (4) the petitioner served in the role of a parent for long enough "to have established with the child a bonded, dependent relationship parental in nature."[112]

Today, a majority of states have adopted equitable parenthood doctrines through statute or case law.[113] In most of the jurisdictions that have adopted an equitable parenthood doctrine, an individual who qualifies as an equitable parent is entitled to certain rights relating to child custody or visitation, but is not recognized as a legal parent.[114] More specifically, qualifying individuals are given standing to seek custody or visitation, but they "must meet higher burdens (the language of which differ[s] by jurisdiction) than legal parent[s] in order to obtain such rights."[115] In a few jurisdictions, individuals who qualify under these doctrines are treated as equal to legal parents for purposes of custody or visitation determinations, but they do not acquire the status of legal parent.[116]

Importantly, however, in recent years a handful of jurisdictions have passed laws providing that satisfaction of the state's equitable parenthood doctrine is a basis for establishing full legal parentage. As of 2021, five states—Connecticut, Maine, Vermont, Washington, and Delaware—have enacted legislation allowing for the establishment of legal parentage through equitable parentage doctrines.[117] The standards for proving equi-

111. *Id.* at 56–57, 64–66.

112. *Id.* at 69 n.83 (quoting Holtzman v. Knott (*In re* H.S.H-K), 533 N.W.2d 419, 421 (Wis. 1995)); *see also* UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM'N 2017) (identifying as the elements of the de facto parentage doctrine "that: (1) the individual resided with the child as a regular member of the child's household for a significant period; (2) the individual engaged in consistent caretaking of the child; (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation; (4) the individual held out the child as the individual's child; (5) the individual established a bonded and dependent relationship with the child which is parental in nature; (6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and (7) continuing the relationship between the individual and the child is in the best interest of the child").

113. *De Facto Parenting Statutes*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/de_facto_parenting_statutes [https://perma.cc/ZP8R-4KXD].

114. *Id.*

115. Feinberg, *supra* note 106, at 68 (footnote omitted).

116. *Id.* at 67–68.

117. H.B. 6321 § 38(a), 2021 Gen. Assemb., Reg. Sess. (Conn. 2021); ME. STAT. tit. 19-A, § 1891(4)(B) (2021); VT. STAT. ANN. tit. 15C, § 501(a)(1) (West 2021); WASH. REV. CODE ANN. § 26.26A.440(4) (West 2021); DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(4)

table parenthood in these jurisdictions are similar to the common standard described above, though some of these jurisdictions have added a requirement that the petitioner held the child out as their own or made explicit that the court must find that continuing the relationship between the petitioner and child is in the child's best interests.[118] The core distinction between these five jurisdictions and the other jurisdictions that recognize equitable parenthood doctrines is that in these jurisdictions an individual who meets the elements of the equitable parenthood doctrine attains the status of legal parent.

III. MULTI-PARENTAGE IN THE UNITED STATES

The expansion of the methods through which parentage can be established, combined with advancements in reproductive technology and the diversity in U.S. family structures, have made it increasingly difficult for society and the legal system to deny the possibility of multi-parentage recognition. This Part first describes a number of the more common scenarios in which multi-parentage issues may arise. It then provides a detailed overview of the current state of legal recognition of multi-parentage in the United States.

A. Situations in Which Multi-Parentage Issues May Arise

1. Assisted Reproduction

Due to advancements in ART, a number of individuals may be involved in a child's conception or birth. This may include, for example, the providers of the gametes used to conceive the child, the person who gestates the child, and the intended parents. Same-sex couples who utilize ART are particularly likely to require the involvement of third parties. This is because cisgender same-sex couples who desire to have a child who is genetically related to one member of the couple necessarily require gametes from a third party.[119] Cisgender male same-sex couples also require the assistance of a surrogate.[120] Different-sex couples who are facing fertility issues also may require gametes from a third party or

(West 2021). It is unclear whether Washington, D.C. also falls within this category of states. This is because "[t]he statute declares [only] that a de facto parent 'shall be deemed a parent for purposes' of a number of provisions that relate to child custody and child support; it is therefore unclear what the status means in other contexts." Joslin, Minter & Sakimura, *supra* note 49, § 5:22 n.68 (quoting D.C. Code § 16-831.03(b) (2021)).

118. *See* Me. Stat. tit. 19-A, § 1891(3)(E) (2021) (including as an element that "[t]he continuing relationship between the person and the child is in the best interest of the child"); Vt. Stat. Ann. tit. 15C, § 501(a)(1)(D), (G) (West 2021) (including as elements that the petitioner held the child out as their own and that continuing the relationship is in the best interests of the child); Wash. Rev. Code Ann. § 26.26A.440(4)(d), (g) (West 2021) (same); Unif. Parentage Act § 609 (Unif. L. Comm'n 2017) (same). Connecticut also has added a minimum time length to the element requiring that the petitioner resided with the child, stating that the petitioner must have resided with the child for at least one year "unless the court finds good cause to accept a shorter period." H.B. 6321 § 38(a)(1), 2021 Gen. Assemb., Reg. Sess. (Conn. 2021).

119. Feinberg, *supra* note 21, at 123–24.

120. *Id.* at 134.

the assistance of a surrogate.[121]

The judicial system may become involved if, for example, the parties involved in the child's conception and birth agreed to a multi-parentage arrangement and together request that more than two individuals be recognized as the child's legal parents.[122] More common, however, is for courts to become involved when the relationship among some or all of the parties deteriorates and multiple parties claim legal parentage.[123] For instance, the members of a same-sex couple and the third party who provided gametes or gestated the child may disagree as to whether the parties intended for the third party to be a parent, a donor or surrogate with no claim to legal parentage, or something in-between.[124] Each party may assert an independent basis for establishing legal parentage. Moreover, if the parties did not comply with the relevant requirements governing the creation of enforceable gamete donation or surrogacy agreements, or if the jurisdiction does not recognize the validity of such agreements, then multi-parentage issues may arise regardless of the parties' intent or agreement.[125]

When multi-parentage issues arise in jurisdictions with laws that do not recognize multi-parentage, the court must first determine which of the parties have a valid basis for asserting legal parentage.[126] Then, if more than two individuals have bases for parentage establishment, the court must determine which two should be deemed the child's legal parents. If

121. *See, e.g.*, Maria Cramer, *Couple Forced to Adopt Their Own Children After a Surrogate Pregnancy*, N.Y. TIMES (Jan. 31, 2021), https://www.nytimes.com/2021/01/31/us/michigan-surrogacy-law.html [https://perma.cc/4YUC-2CCK].

122. A.A. v. B.B. (2007), 83 O.R. 3d 561, 563–65 (Can. Ont. C.A.) (ruling on a parentage action brought by the members of a same-sex couples and the sperm provider, who mutually sought recognition as the child's three legal parents).

123. *See infra* Section IV.C.

124. *See infra*, notes 348–350 and accompanying text.

125. *See, e.g.*, *In re* Paternity & Maternity of Infant T., 991 N.E.2d 596, 597, 600–01 (Ind. Ct. App. 2013) (holding that because Indiana does not allow the person who gives birth to disestablish maternity unless another individual establishes genetic maternity, the surrogate's parentage could not be disestablished even though the intended parents, the surrogate, and the surrogate's husband all remained in agreement that the surrogate should not be recognized as the child's legal parent); Cramer, *supra* note 121 (describing a case in Michigan, which does not recognize surrogacy agreements, where the court denied the intended parents' request to be declared the legal parents of a child born via gestational surrogacy and held that despite the fact that all parties remained in agreement that the intended parents should be recognized as the child's legal parents, the intended parents (who were also the child's biological parents) would have to pursue adoption in order to establish their parentage and disestablish the parentage of the surrogate and her husband); Chandrika Narayan, *Kansas Court Says Sperm Donor Must Pay Child Support*, CNN (Jan. 24, 2014, 2:33 AM), https://www.cnn.com/2014/01/23/justice/kansas-sperm-donation/index.html [https://perma.cc/WA3C-HL5V] (describing a Kansas case in which the state was allowed to establish the sperm donor's paternity for purposes of obtaining child support, despite the parties' agreement that he was a donor with no parental rights, due to lack of the required physician involvement under state's donor non-paternity law).

126. *See* D.G. v. K.S., 133 A.3d 703, 710, 726 (N.J. Super. Ct. Ch. Div. 2015) (holding, in a case involving a tri-parenting relationship between a male same-sex couple and their female friend who had given birth to the child, that only the individual who gave birth and the member of the same-sex couple who shared genetic ties with the child had grounds to establish legal parentage).

the dispute involves a challenge to the marital presumption or a VAP, the court will apply the relevant standards governing such challenges discussed above.[127] In situations involving other competing claims for parentage, the court usually bases its determination on considerations of policy, logic, and the best interests of the child.[128]

2. Biological Fathers and Individuals with Competing Claims of Legal Parentage

Outside of the assisted reproduction context, multi-parentage issues also may arise when a biological father and another individual each seek recognition as the child's second legal parent. For example, a biological father may seek to establish parentage, on genetics-based grounds, of a child born to an individual who was married to someone else at the time of the child's conception or birth. In response, the spouse may claim legal parentage based on the marital presumption. In jurisdictions that do not recognize multi-parentage, either the spouse or the biological father, but not both, will be recognized as the child's parent.[129] This has been true even where both parties have formed a relationship with the child.[130] In terms of the determination of which party will be recognized as the child's legal parent, as discussed above, approximately two-thirds of jurisdictions give the biological father standing to rebut the presumed parentage that attaches to the spouse pursuant to the marital presumption.[131] In many states, however, courts can refuse to admit DNA evidence or otherwise deny rebuttal if the court determines that rebuttal would be "contrary to the child's best interests or that the party seeking to rebut the marital presumption should be estopped from doing so on equitable grounds."[132] As a general matter, "[c]ourts are quite reluctant to undercut the marital presumption when the [person who gave birth] and [their spouse] have co-parented the child, the [spouse] has provided financial and emotional support to the child, and the child has bonded with the [spouse]."[133]

Multi-parentage issues can also arise when a biological father seeks to establish parentage on genetics-based grounds, and a current or former

127. *See supra* text accompanying notes 28–31, 46–48.

128. *See, e.g.*, Doherty v. Leon, 472 P.3d 531, 536 (Ariz. Ct. App. 2020) (describing various states' approaches in resolving competing parentage claims based upon considerations of policy, logic, and the child's best interests); UNIF. PARENTAGE ACT § 613 (UNIF. L. COMM'N 2017) (setting forth a number of factors for courts to consider in adjudicating competing claims for parentage, many of which relate to the best interests of the child); UNIF. PARENTAGE ACT § 4(b) (UNIF. L. COMM'N 1973) ("If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.").

129. *See* Michael H. v. Gerald D., 491 U.S. 110, 130–31 (1989) (plurality opinion); N.A.H. v. S.L.S., 9 P.3d 354, 356 (Colo. 2000).

130. *See, e.g.*, *Michael H.*, 491 U.S. at 130–31; *N.A.H.*, 9 P.3d at 356.

131. *See supra* text accompanying note 29.

132. Feinberg, *supra* note 23, at 252–53 (footnote omitted).

133. Rhonda Wasserman, *DOMA and the Happy Family: A Lesson in Irony*, 41 CAL. W. INT'L L.J. 275, 284 (2010).

non-marital partner of the person who gave birth asserts a competing claim for parentage. For example, as discussed above, a biological father may have standing to challenge a VAP that identifies another individual as the child's second legal parent.[134] However, there are limited grounds for challenging VAPs, and courts may deny such challenges, despite DNA evidence, where they determine that disestablishing the parentage of the individual identified in the VAP would be contrary to the child's best interests or equitable principles.[135] Competing claims may also arise between a biological father and an individual who has another basis for asserting parentage, such as a holding out provision.[136] As noted above, when these types of competing claims for parentage arise in jurisdictions that do not recognize multi-parentage, the court generally will make the determination of which party to recognize as the child's second legal parent based on considerations of policy, logic, and the child's best interests.[137]

3. Remarriage or Re-Partnering by the Existing Legal Parents

Multi-parentage issues also arise when a child has two existing legal parents, and one or both of them enter into a marriage or serious relationship with a third party—a common occurrence in the United States.[138] For example, it is estimated that approximately one-third of children will live in a household with a stepparent at some point in their childhood.[139] Children often form important relationships that are parental in nature with the spouse or partner of an existing legal parent.[140] These relationships may begin when the child is very young and continue for years, and the child may view the individual in question as a parent regardless of that person's formal legal status.[141]

Individuals who, at some point after the child is born, enter into a relationship with one of the child's existing legal parents and wish to establish legal parentage, generally must pursue adoption.[142] As discussed above,

134. *See supra* text accompanying note 56.

135. *See supra* text accompanying notes 57–58.

136. *See, e.g.*, J.W.S. v. E.M.S., No. CS11-01557, 2013 WL 6174814, at *4–5 (Del. Fam. Ct. May 29, 2013).

137. *See supra* note 128 and accompanying text.

138. *See supra* text accompanying note 5.

139. DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & LINDA C. MCCLAIN, CONTEMPORARY FAMILY LAW 703 (5th ed. 2019). In the five states that provide equitable parenthood doctrines as a mechanism for parentage establishment, a spouse or partner of a child's legal parent who meets the elements of the doctrine could potentially establish legal parentage on that basis. *See supra* notes 117–118 and accompanying text.

140. BRIAN H. BIX, THE BOGEYMAN OF THREE (OR MORE) PARENTS 4 (Legal Stud. Rsch. Paper Series Rsch. Paper No. 08-22 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1196562 [https://perma.cc/Z8MV-T9UJ] ("In a world where divorce is relatively common and accepted, and remarriage of one or both parents far from rare, children frequently grow up with three or four parental figures.").

141. *See* June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 17–18 (2017).

142. Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 367–68 (2020).

however, in jurisdictions that do not recognize multi-parentage, the spouse or partner of a child's legal parent cannot adopt the child unless the other legal parent first agrees to terminate their parental rights or has their rights terminated involuntarily, which usually requires clear and convincing evidence that the person is unfit and has engaged in serious abuse, neglect, or abandonment of the child.[143] There generally is no option for a legal parent to agree to the other legal parent's spouse or partner adopting the child while still keeping their own legal parentage intact.[144]

4. Other Involved "Non-Parents"

Multi-parentage issues also may arise when a child has two legal parents, and someone who is neither the spouse nor partner of one the legal parents acts in a parental role to the child. Family members or friends of a child's legal parents may take on a parental role in the child's life, which may involve co-parenting with one or both of the child's existing legal parents.[145] While "kinship caregiving" occurs in all types of communities, it is particularly common in many minority communities for "relatives and close friends [to] play a critical role in caring for children."[146] Today, one in twelve children live in a household that is maintained by a grandparent or other relative,[147] and Black and Asian children are twice as likely as White children to be living in this type of household.[148]

Adoption is often the only option through which a kinship caregiver can establish parentage, and its availability in this context is extremely limited.[149] In states that do not recognize multi-parentage, kinship caregivers cannot adopt a child who has two existing legal parents.[150] In addition, even if one of the existing legal parents agrees to terminate their parental rights or has their rights terminated involuntarily, there often is no mechanism akin to step- or second-parent adoption available to establish kinship caregivers as a child's second legal parent alongside the re-

143. Phillip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 766 (1992); Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U.L. REV. 321, 357–58 (2008).

144. NeJaime, *supra* note 142, at 367–68.

145. Sacha M. Coupet, *"Ain't I a Parent?": The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 604, 606 (2010).

146. Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family*, 2012 U. ILL. L. REV. 319, 343 (2012); *see also* Coupet, *supra* note 145, at 595 ("Kinship caregivers—a group disproportionately populated by persons of color, particularly black grandmothers—have historically assumed parental roles, often together with a legal parent.").

147. Coupet, *supra* note 145, at 603.

148. PEW RSCH. CTR., AT GRANDMOTHER'S HOUSE WE STAY: ONE-IN-TEN CHILDREN ARE LIVING WITH A GRANDPARENT 8 (2013), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2013/09/grandparents_report_final_2013.pdf [https://perma.cc/K36U-MBB6].

149. Coupet, *supra* note 145, 609.

150. *See id.* at 653–54.

maining legal parent.[151] As a result, individuals in this category generally cannot establish parentage unless the parental status of both of the child's legal parents is terminated.[152]

5. Multi-Party Romantic Relationships

Multi-parentage issues may also arise within romantic relationships involving more than two people. In some cases, more than two parties may share a romantic relationship together and conceive the child with the intention to raise the child as a family unit.[153] Multi-parentage issues also may arise in other forms of multi-partner relationships, including polygamous and polyamorous relationships in which multiple partners are involved, but not all of the partners share a romantic relationship with each other.[154] With the practice of consensual non-monogamy becoming more common (current estimates are that one in five people have engaged in it at some point),[155] this is an area in which multi-parentage issues likely will increase in the coming years.[156]

As a general matter, like in the other contexts, in jurisdictions that do not recognize multi-parentage, the law will recognize, at most, two of the individuals involved as the child's legal parents. The most likely result in these situations is that initial legal parentage will attach to the person who gave birth and, where relevant, their spouse or the individual with whom they executed a VAP.[157] If more than one party has recognized grounds for establishment as the child's second legal parent, courts must apply the relevant standards discussed above governing rebuttal of the marital presumption, VAP challenges, or competing claims involving other grounds for parentage establishment.[158]

6. Adoption and Foster Care

While a detailed discussion of the adoption and foster care systems is beyond the scope of this Article, it is important to recognize this as another area in which multi-parentage issues arise. With regard to adoption,

151. *See, e.g.*, *In re* Garrett, 841 N.Y.S.2d 731, 733 (N.Y. Surr. Ct. 2007).

152. Coupet, *supra* note 145, at 653. In the five states that provide equitable parenthood doctrines as a mechanism for parentage establishment, a kinship caregiver who meets the elements of the doctrine potentially could establish legal parentage on that basis. *See supra* notes 117–18 and accompanying text.

153. *See, e.g.*, Dawn M. v. Michael M., 47 N.Y.S.3d 898, 900 (N.Y. Sup. Ct. 2017).

154. Marvel, *supra* note 8, at 2085–86.

155. Jessica Stillman, *5 Lessons on Jealousy and Romance that Couples can Learn from Their Friends in Non-Monogamous Relationships*, BUS. INSIDER (Feb. 20, 2020, 9:12 AM), https://www.businessinsider.in/slideshows/miscellaneous/5-lessons-on-jealousy-and-romance-that-couples-can-learn-from-their-friends-in-non-monogamous-relationships/slidelist/74032288.cms#slideid=74032300 [https://perma.cc/LYQ9-UBLC].

156. *See* Marvel, *supra* note 8, at 2088 ("Complicated kinships are more likely to be the future for both Canada and the United States, emerging both from polygamous and polyamorous communities, as well as the use of reproductive technologies outside a two-parent model of kinship.").

157. *See supra* text accompanying notes 18, 22, 36–37.

158. *See supra* notes 26–31, 46–48, 128 and accompanying text.

outside of the context of step- and second-parent adoptions, a child cannot be adopted unless the parental status of all of the child's existing legal parents is first terminated (either voluntarily or involuntarily).[159] This exclusivity of legal parentage in the adoption context has remained in place even as open adoption practices allowing for a child's biological parents to remain, to varying extents, involved in the child's life have become increasingly common.[160] Similarly, for children in foster care, if the rights of the child's biological parents are not terminated, then the biological parents are the only parties with the status of legal parent.[161] The foster parents, regardless of how long they have been serving in a parental role, will not be recognized as legal parents unless and until the rights of the existing legal parents are terminated, allowing the foster parents to pursue adoption.[162]

B. Legal Recognition of Multi-Parentage

While the "rule of two" remains in place in many jurisdictions, in recent years statutes and judicial decisions recognizing that a child can have more than two legal parents in certain circumstances have increased significantly. As the discussion below demonstrates, there is a clear trend toward states recognizing multi-parentage. This trend shows no signs of slowing down, and legal recognition of multi-parentage likely will become even more widespread in the coming years.[163]

1. Statutory Recognition

a. Louisiana

While Louisiana was the first state to recognize that a child may have more than two legal parents,[164] recognition is limited to very narrow circumstances. Beginning in the 1970s, Louisiana courts began to recognize the possibility of dual paternity in situations where the husband of the person who gave birth was presumed to be the child's father pursuant to the marital presumption, but another man was established as the child's biological father.[165] The Louisiana Supreme Court first determined that the biological father could be recognized as a legal parent for purposes of a wrongful death action without the presumed father losing his parental status.[166] The Louisiana courts subsequently extended this ruling such that a biological father could be recognized as the child's legal parent for child support purposes without the presumed father losing his parental

159. Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 Ala. L. Rev. 715, 719 n.11 (2015).
160. *Id.* at 718, 730–37.
161. *Id.* at 735–37.
162. *Id.*
163. *See* Quinn, *supra* note 15, at 180.
164. Rachel L. Kovach, *Sorry Daddy—Your Time Is Up: Rebutting the Presumption of Paternity in Louisiana*, 56 Loy. L. Rev. 651, 659 (2010).
165. Carbone & Cahn, *supra* note 141, at 20–21.
166. Warren v. Richard, 296 So. 2d 813, 817 (La. 1974).

status.[167]

Revisions to the state's filiation laws in 2005 resulted in the statutory recognition of dual paternity.[168] The concept of dual paternity is reflected in, for example, statutory provisions that (1) allow the state to seek to establish the paternity of the biological father for the purpose of obtaining child support despite the child already having a presumed father, and (2) allow the child to establish the biological father's paternity without displacing the presumed father's legal parentage.[169] While the biological father may be recognized as a legal parent for purposes of child support, the Louisiana courts "have been reluctant to award custodial rights to more than one father at a time, [and] have never treated three parents as having equal physical and legal custodial rights with respect to a child."[170] The courts in these cases generally have not considered the biological father to be on equal footing with the presumed father.[171] Overall, Louisiana's recognition of multi-parentage is extremely limited—it applies only to situations involving married different-sex couples wherein the husband is not the child's biological father, and it seems to be aimed primarily at identifying the biological father as a third parent solely for child support purposes.[172]

b. Delaware

In Delaware, statutory recognition of multi-parentage occurs solely through the state's de facto parentage law.[173] The de facto parentage statute was enacted in 2009.[174] As noted above, Delaware is one of the states in which an individual can establish legal parentage through satisfaction

167. Smith v. Cole, 553 So. 2d 847, 848 (La. 1989).

168. Kovach, *supra* note 164, at 658–59.

169. LA. STAT. ANN. § 46:236.1.2(D)(1) (2021) ("The department, except when it is not in the best interest of the child, may . . . take direct civil action, including actions to establish filiation against an alleged biological parent notwithstanding the existence of a legal presumption that another person is the parent of the child solely for the purpose of fulfilling its responsibility under this Section."); LA. CHILD. CODE ANN. art. 197, 2005 cmt. b (2021) (establishing the right of the child to establish paternity of the biological father despite the existence of the presumed father, and noting that "Louisiana currently is the only state which recognizes that a child may establish his filiation to more than one father").

170. Naomi Cahn & June Carbone, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399, 401 (2018).

171. Carbone & Cahn, *supra* note 141, at 21 (citing Geen v. Geen, 666 So. 2d 1192, 1197 (La. App. 1995)) (describing the one Louisiana dual paternity case the authors could find in which both fathers received custodial rights, which involved a biological father who had later married the child's mother and wherein the husband received physical custody, but the biological father was awarded shared legal custody and visitation akin to what the mother was awarded); Jacqueline V. Gaines, *The Legal Quicksand 2+ Parents: The Need for a National Definition of a Legal Parent*, 46 U. DAYTON L. REV. 105, 109 (2021) ("Therefore, the biological father has financial responsibilities, but no attendant rights to visitation and custody.").

172. Carbone & Cahn, *supra* note 141, at 20–21.

173. *See* DEL. CODE ANN. tit. 13, § 8-201(c) (West 2021).

174. An Act to Amend Title 13 of the Delaware Code Relating to Parents, ch. 97, § 1, 2009 Delaware Laws (West).

of the de facto parentage doctrine.[175] Delaware's de facto parentage standard requires as an element that the petitioner "had the support and consent of the child's parent *or parents* who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent."[176] A number of Delaware courts have interpreted the language referring to the consent of the child's existing legal "parents" as indicating that multi-parentage can occur through satisfaction of the de facto parentage doctrine.[177]

c. California

California was the first state to pass a law providing for broad recognition of multi-parentage. California's multi-parentage law, enacted in 2013, states that "a court may find that more than two persons with a claim to parentage . . . are parents if the court finds that recognizing only two parents would be detrimental to the child."[178] The law then provides guidance regarding what courts should consider in determining whether recognizing only two parents would be detrimental to the child. Specifically, it states that in determining potential detriment, "the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time."[179] In addition to providing for multi-parentage in the context of competing parentage claims, California law also explicitly provides for the possibility of multi-parentage in the adoption context. The relevant provision states that in adoption proceedings, the existing legal parent or parents can maintain their legal parentage if the prospective adoptive parent(s) and the existing legal parent(s) all sign a waiver prior to the adoption being finalized.[180]

Importantly, the California bill establishing these multi-parentage provisions includes an introductory statement explaining that "[m]ost children have two parents, but in rare cases, children have more than two people who are that child's parent in every way" and further providing that "[i]t is the intent of the Legislature that this bill will only apply in the rare case where a child truly has more than two parents."[181] The courts,

175. *Id.* § 8-201(c).
176. *Id.* (emphasis added).
177. *See, e.g.*, J.W.S. Jr. v. E.M.S., No. 11-08009, 2013 WL 6174814, at *5 (Del. Fam. Ct. May 29, 2013); A.L. v. D.L., No. 12-07390, 2012 WL 6765564, at *2–3 (Del. Fam. Ct. Sept. 19, 2012); *see also In re* K.L.W., 492 P.3d 392, 398 (Colo. App. 2021) (interpreting Delaware's de facto parentage law to provide for multi-parentage). *But see* Bancroft v. Jameson (*In re* Bancroft), 19 A.3d 730, 750 (Del. Fam. Ct. July 15, 2010) (holding, in a decision that other Delaware courts have not followed, that the Delaware de facto parentage law is unconstitutional).
178. CAL. FAM. CODE § 7612(c) (West 2021).
179. *Id.*
180. *Id.* § 8617(b).
181. S.B. 274, 2013 Leg., Reg. Sess. (Cal. 2013).

in making multiple parentage determinations in contested cases, have taken seriously the legislature's expressed desire that multi-parentage should only be recognized in the rare cases where a child has more than two individuals who are, in every way, that child's parents. In interpreting the requirement that courts not recognize multi-parentage unless failing to do so would be detrimental to the child, courts have required the party seeking recognition to demonstrate that a relationship that is parental in nature continues to exist between the party and the child at the time of the parentage determination proceedings.[182] This was demonstrated in a series of cases involving biological fathers who satisfied the state's holding out standard for establishing parentage and sought to establish parentage of a child who already had a mother and presumed father.[183] The courts in these cases reached different conclusions about whether to recognize the biological father as a third legal parent depending on whether he shared a relationship with the child that was parental in nature at the time of the proceedings.[184]

It is important to note that in states that recognize multi-parentage, including California, each person seeking recognition as the child's legal parent must have a recognized basis for establishing parentage.[185] While California recognizes most of the grounds for establishing parentage described in Part II,[186] it is not one of the states through which legal parentage can be established pursuant to an equitable parenthood doctrine. California's de facto parenthood doctrine provides limited rights relating to standing, custody, and visitation, but not legal parentage.[187] As a result, an individual cannot become the child's third (or subsequent) parent through the de facto parentage doctrine—they would need to satisfy one of the other bases described in Part II for establishing legal parentage.[188] Finally, California's law governing custody disputes specifies that in cases involving children who have more than two legal parents, courts do not have to award shared legal or physical custody among all of the parents if

182. *Compare In re* Donovan L., 198 Cal. Rptr. 3d 550, 564 (Cal. Ct. App. 2016) (refusing to recognize biological father with a claim for parentage pursuant to the holding out presumption as the child's third legal parent because he lacked an existing parental relationship with the child and thus was "not [the] child's parent in every way."), *and In re* L.L., 220 Cal. Rptr. 3d 904, 915–16 (Cal. Ct. App. 2017) (same), *with* C.A. v. C.P., 240 Cal. Rptr. 3d 38, 40, 46 (Cal. Ct. App. 2018) (recognizing the biological father, who had satisfied the requirements of the holding out provision, as the third parent of a child born to a different-sex married couple where "the [lower] court found plaintiff has 'an existing and significant bond' with the child").

183. *See supra* note 182.

184. *See supra* note 182.

185. *In re* M.Z., 209 Cal. Rptr. 3d 397, 406 (Cal. Ct. App. 2016) ("Thus, the language of the statute, the legislative history, and the foregoing authorities lead us to the conclusion a court considering a request for status as a third parent . . . should initially determine whether or not a person seeking status as a third parent can establish a claim to parentage under the Uniform Parentage Act.").

186. CAL. FAM. CODE § 7611 (West 2021).

187. *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 113.

188. *See* discussion *supra* Part II.

doing so would be contrary to the child's best interests.[189]

d. Maine

Maine's statute recognizing multi-parentage provides less guidance to courts regarding multi-parentage determinations. Enacted in 2015, Maine's statute states that, "Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than [two] parents."[190] Unlike California, the Maine statute does not explicitly require the court to find that failing to recognize more than two parents would be detrimental to the child in order for multi-parentage to be established.[191] Maine recognizes, in some form, each of the bases for establishing parentage described in Part II.[192] This includes the establishment of parentage through satisfaction of the state's equitable parenthood doctrine.[193]

e. Vermont

In 2018, Vermont enacted a law providing that "a court may determine that a child has more than two parents if the court finds that it is in the best interests of the child to do so."[194] While Vermont, unlike Maine, explicitly requires that the court determine multi-parentage is in the child's best interest, it does not go as far as California in requiring that multi-parentage only be recognized where failing to do so would be detrimental to the child.[195] Like Maine, Vermont recognizes, in some form, each of the bases for establishing parentage described in Part II, including the establishment of parentage through the state's equitable parenthood doctrine.[196]

f. Washington and Connecticut

In 2018 and 2021, respectively, Washington[197] and Connecticut[198] enacted the most recent version of the Uniform Parentage Act,[199] which includes an optional provision providing for the recognition of multi-par-

189. CAL. FAM. CODE § 3040(d) (West 2021).
190. ME. REV. STAT. ANN. tit. 19-A, § 1853(2) (2021).
191. *See id.*
192. *See* tit. 19-A, § 1851; discussion *supra* Sections II.A–H.
193. *See* tit. 19-A, § 1891(3); *supra* text accompanying note 112.
194. VT. STAT. ANN. tit. 15C, § 206(b) (West 2021).
195. *Compare id.*, *with* ME. REV. STAT. ANN. tit. 19-A, § 1853(2) (2021) ("[A] court may determine that a child has more than 2 parents."), *and* CAL. FAM. CODE § 7612(c) (West 2021) ("[A] court may find that more than two persons with a claim to parentage . . . are parents if the court finds that recognizing only two parents would be detrimental to the child.").
196. *See* VT. STAT. ANN. tit. 15C, § 201 (West 2021); discussion *supra* Sections II.A–H.
197. WASH. REV. CODE ANN. § 26.26A (West 2021).
198. H.B. 6321, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021).
199. UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017).

entage.[200] The Washington and Connecticut legislatures opted to include the language of that optional provision.[201] Like California's approach, this approach specifies that the court can recognize more than two legal parents only if failing to do so would be detrimental to the child.[202] It also provides similar guidance to courts for determining detriment to the child, instructing the court to consider "all relevant factors, including the harm if the child is removed from a stable placement with [a person] who has fulfilled the child's physical needs and psychological needs for care and affection and has assumed the role for a substantial period."[203] Washington and Connecticut recognize, in some form, each of the bases for establishing parentage described in Part II,[204] including through the satisfaction of the state's equitable parenthood doctrine.[205]

g. Nevada

In 2021, Nevada enacted a law providing that courts can recognize multi-parentage through adoption proceedings.[206] The law makes clear that the written consent of all of the existing legal parents is required in order for the adoption to occur.[207]

2. Judicial Recognition

Tracking judicial recognition of multi-parentage is a difficult task because many opinions in this context are unpublished.[208] There have been, however, a number of instances in which courts in jurisdictions that do not statutorily recognize multi-parentage nonetheless determined that a child has more than two legal parents. It is important, however, to distinguish true multi-parentage decisions from decisions in which the court distributes custody or visitation between multiple parties in jurisdictions that provide rights relating to custody or visitation to equitable parents or other third parties, but do not recognize such parties as legal parents.[209]

200. *Id.* § 613(c) Alternative B ("The court may adjudicate a child to have more than two parents under this [act] if the court finds that failure to recognize more than two parents would be detrimental to the child.").

201. WASH. REV. CODE ANN. § 26.26A.460(3) (West 2021); H.B. 6321 § 23(c), 2021 Gen. Assemb., Reg. Sess. (Conn. 2021).

202. WASH. REV. CODE ANN. § 26.26A.460(3) (West 2021); H.B. 6321 § 23(c), 2021 Gen. Assemb., Reg. Sess. (Conn. 2021); *see* CAL. FAM. CODE § 7612(c) (West 2021).

203. WASH. REV. CODE ANN. § 26.26A.460(3) (West 2021).

204. WASH. REV. CODE ANN. § 26.26A.100, 26.26A.440(1)–(2) (West 2021); H.B. 6321 § 23(c), 2021 Gen. Assemb., Reg. Sess. (Conn. 2021); *see* discussion *supra* Sections II.A–H.

205. WASH. REV. CODE ANN. § 26.26A.440(1)–(2) (West 2021); H.B. 6321 § 38, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021).

206. NEV. REV. STAT. ANN. § 127.030(7) (West 2021).

207. *Id.* § 124.040(1)(a).

208. *See* Quinn, *supra* note 15, at 187 ("Tracking the case law is difficult because evidently numerous unpublished cases exist.").

209. *See, e.g.*, Jacob v. Shultz-Jacob, 923 A.2d 473, 477, 482 (Pa. Super. Ct. 2007) (distributing custody and visitation between three parties, but noting that "standing established by virtue of *in loco parentis* status does not elevate a third party to parity with a natural parent in determining the merits of custody dispute"); LaChapelle v. Mitten (*In re* Custody of L.M.K.O.), 607 N.W.2d 151, 159, 168 (Minn. Ct. App. 2000) (distributing cus-

While these cases are often referred to as multi-parentage cases, they are not cases in which more than two people are recognized as full legal parents;[210] as a result, those cases are not included in the discussion below. Also not included are multi-parentage decisions rendered in a jurisdiction that subsequently enacted a statute providing that multi-parentage can occur through the mechanism recognized in the case (i.e., an equitable parenthood doctrine, adoption, etc.).

a. Assisted Reproduction

In an unpublished decision, a lower court in Florida held, at the request of the parties, that the sperm provider and a female same-sex couple to whom the sperm was provided could all be listed as parents on the child's birth certificate.[211] Pursuant to the agreement that was reached by the parties and approved by the court, the same-sex couple was granted sole parental responsibility (Florida's term for legal custody),[212] and the sperm provider was granted visitation rights.[213]

b. Adoption

In a 1985 case that is often referred to as one of the first second-parent adoption cases, but is actually a third-parent adoption case, a superior court in Alaska allowed the same-sex partner of a child's mother to adopt the child without terminating the parentage of either of the child's existing legal parents.[214] The petitioner had been involved in caring for the child since birth, and both of the existing legal parents consented to the adoption.[215] Attorneys report that there have been subsequent decisions in Alaska granting third-parent adoptions, including one instance in which a terminally ill mother sought to establish a male same-sex couple as her child's legal parents while also maintaining her own legal parentage.[216]

In Oregon, a court granted a third-parent adoption to the stepfather of children who already had two existing legal parents: their mother (who

tody and visitation rights between mother, her former partner, and the biological father, but referring to the mother's former partner as a non-parent).

210. *See* Quinn, *supra* note 15, at 179–80.

211. *Id.* at 198.

212. STEVEN SCOTT STEPHENS, 23 FLA. PRAC., *Florida Family Law* § 9.20, Westlaw (database updated June 2021).

213. Kelly Kennedy & Associated Press, *Gay Sperm Donor, Lesbian Couple Reach Agreement*, HARTFORD COURANT (Feb. 8, 2013, 6:04 PM), https://www.courant.com/sdut-gay-sperm-donor-lesbian-couple-reach-agreement-2013feb08-story.html [https://perma.cc/8KBK-9C3H].

214. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 243 (2009).

215. Debra E. Guston & William S. Singer, *The State of Gay and Lesbian Adoption in New Jersey*, 239-APR N.J. L. 35, 38 (2006) (citing *In re* Adoption of A.O.L., No. IJU-85-25-P/A (Alaska Super. Ct. 1985)).

216. Jennifer Peltz, *Courts and 'Tri-Parenting': A State-by-State Look*, BOSTON.COM (June 18, 2017), https://www.boston.com/news/national-news/2017/06/18/courts-and-tri-parenting-a-state-by-state-look [https://perma.cc/A88U-ZRYK].

was married to the stepfather) and their biological father (who had maintained a close relationship with the children).[217] The adoption was seemingly granted at the request of all of the parties.[218] Oregon attorneys have reported other instances of courts allowing third-parent adoptions, including one case in which three adults in an intimate relationship undertook having a child together[219] and another case in which a child's biological parents consented to an adoption by the biological mother's former partner, who had helped raised the children.[220] Attorneys also have reported third-parent adoptions occurring in other jurisdictions that do not have statutes explicitly recognizing multi-parentage via adoption, such as Massachusetts[221] and Washington, D.C.[222]

IV. THE BOUNDARIES OF MULTI-PARENTAGE

A. The Consent of the Existing Legal Parents

1. The Question

In the context of two-party parentage, a number of the mechanisms through which an individual can establish themselves as the child's second legal parent require the consent of the existing legal parent.[223] This includes, for example, parentage establishment through consent to assisted reproduction,[224] VAPs, step- and second-parent adoption, equitable parenthood doctrines, and (arguably) holding out provisions.[225] An important and unsettled question relates to whether the consent of just one, or instead all, of the existing legal parents will be required if states recognize a mechanism in this category as one through which multi-parentage can be established. If the consent of all of the existing legal parents is required, an additional question arises regarding whether the definition of consent will encompass both express and implied consent. Thus far, few legislatures or courts have addressed the consent issue directly. When courts or legislatures have addressed the issue, it has oc-

217. Ian Lovett, *Measure Opens Door to Three Parents, or Four*, N.Y. Times (July 13, 2012), https://www.nytimes.com/2012/07/14/us/a-california-bill-would-legalize-third-and-fourth-parent-adoptions.html [https://perma.cc/A5QT-JFNP].

218. *Id.* (stating that one of the children described the result as one that was happy for everyone involved).

219. Jodi A. Argentino, *Families By Design*, The LGBTQ+ Bar (2015), https://lgbtbar.org/annual/wp-content/uploads/sites/7/2015/05/Families-by-DesignLAVLAW.pdf [https://perma.cc/3KVS-78Y3] (citing *In re* Adoption of A.L. and E.L., Case No. 9207-65717 (Or. Cir. Ct. 1992)).

220. Peltz, *supra* note 216.

221. Guston & Singer, *supra* note 215, at 38.

222. Quinn, *supra* note 15, at 199–200 n.84.

223. *See supra* Part II.

224. While the language of some jurisdictions' consent to ART statutes only explicitly requires the consent of the person seeking to establish parentage over the child conceived by their spouse or partner, it is generally understood that the consent of the other party—the party undertaking ART to conceive—is also required. *See* Joslin, Minter & Sakimura *supra* note 49, § 3:4.

225. *See supra* Part II. *See also infra* note 372 (discussing whether consent of the existing legal parent is required for parentage establishment through holding out provisions).

curred primarily in the contexts of the recognition of multi-parentage through adoption and the recognition of multi-parentage or multi-party parental rights through equitable parenthood doctrines.

In the context of multi-parentage establishment through adoption, so far the statutory and judicial developments (albeit limited) seem to point in the direction of requiring the express consent of all existing legal parents. For example, the language of Nevada's statute is clear in requiring the written consent of all existing legal parents to establish multi-parentage through adoption.[226] California's multi-parentage adoption provision specifies that the existing legal parent or parents can maintain their legal parentage after the adoption only "if both the existing parent or parents and the prospective adoptive parent or parents sign a waiver at any time prior to the finalization of the adoption."[227] This language seems to indicate that creating a multi-parent family through adoption would require the express consent of all existing legal parents and all prospective adoptive parents, and this is how commentators have interpreted the provision.[228] In addition, the cases discussed above granting third-parent adoptions in jurisdictions that lack explicit statutory recognition of multi-parentage generally appear to involve situations in which all of the existing legal parents expressly consented to the adoption.[229]

The question of whether all existing legal parents' consent is required for an additional party to establish parental rights or full legal parentage has received greater scrutiny in the context of equitable parenthood doctrines. As discussed above, a common element of equitable parenthood doctrines is that the child's existing legal parent consented to, supported, or fostered the formation of the petitioner's relationship with the child.[230] It is generally understood that a primary purpose of including this element in equitable parenthood doctrines is to recognize a fit legal parent's fundamental constitutional right to make decisions regarding the care, custody, and control of their child and to head off arguments that equitable parenthood doctrines violate this fundamental right.[231] Specifically, if a legal parent has chosen to exercise their fundamental parental rights by consenting to, supporting, or fostering the formation of a parental relationship between another party and the child, the legal parent cannot subsequently argue that providing that individual with parental rights violates their constitutional rights.[232] However, in the vast majority of states

226. *See supra* note 207 and accompanying text.

227. CAL. FAM. CODE § 8617(b) (Deering 2021).

228. *See* JOSLIN, MINTER & SAKIMURA, *supra* note 49, § 5:12 ("California now explicitly permits third parent adoptions where all parties agree, the adoption is in the best interests of the child, and all other requirements of adoption are met.").

229. *See supra* Section III.B.2.

230. *See supra* note 113 and accompanying text.

231. *See, e.g.*, Conover v. Conover, 146 A.3d 433, 447 (Md. 2016); *In re* Parentage of L.B., 122 P.3d 161, 179 (Wash. 2005); *In re* H.S.H-K, 533 N.W.2d 419, 436 (Wis. 1995); ABRAMS, CAHN, ROSS & MCCLAIN, *supra* note 139, at 935; Feinberg, *supra* note 106, at 70; Marvel, *supra* note 8, at 2061–62.

232. V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000).

with equitable parenthood doctrines, the language of the consent element leaves open the questions of whose consent is required in situations where a child has more than one existing legal parent and what form any required consent must take.

In each of the five states where multi-parentage can be established through an equitable parenthood doctrine, the language of the consent element does not expressly address whose consent would be required in situations where there are already two or more existing legal parents. However, on its face, the language of the de facto parentage statutes in four of these states—Maine, Vermont, Washington, and Connecticut—seems to point in the direction of requiring the consent of only one of the existing legal parents.[233] Specifically, the language of the consent element of these states' de facto parentage doctrines requires only that the relationship between the petitioner and the child was fostered or supported by "another parent" of the child.[234] Moreover, in these jurisdictions, the statutory de facto parentage provisions and the statutory provisions providing that a child may have more than two legal parents were adopted at the same time, through the same bill.[235] This means that the legislatures in these jurisdictions were contemplating the possibility of multi-parentage when they adopted the language of the de facto parentage statute requiring the consent of "another parent."[236] The language of Delaware's de facto parentage standard is more ambiguous, requiring "the support and consent of the child's parent or parents," and, unlike the other states in this category, when Delaware adopted its de facto parentage standard, it did not also adopt a separate statutory provision explicitly providing that a child can have more than two legal parents.[237]

---

233. ME. REV. STAT. ANN. tit. 19-A, § 1891(3)(C) (2016) (requiring that "the relationship was fostered or supported by another parent of the child and the person and the other parent have understood, acknowledged or accepted that or behaved as though the person is a parent of the child"); VT. STAT. ANN. tit. 15C, § 501(a)(1)(F) (West 2018) (requiring that "the person and another parent of the child fostered or supported the bonded and dependent relationship"); WASH. REV. CODE ANN. § 26.26A.440(4)(f) (West 2019) (requiring that "[a]nother parent of the child fostered or supported the bonded and dependent relationship"); H.B. 6321 § 38(6), 2021 Gen. Assemb., Reg. Sess. (Conn. 2021) (effective January 1, 2022) (same); UNIF. PARENTAGE ACT § 609(d) (UNIF. L. COMM'N 2017) (same).

234. *See supra* note 233. A Washington appellate court has interpreted the "another parent" language of the consent element of the state's de facto parentage statute as requiring the consent of only one of the existing legal parents. *In re* Parentage of L.J.M., 476 P.3d 636, 645 (Wash. Ct. App. 2020); *see also* Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 IDAHO L. REV. 421, 442–43 (2020) (interpreting the "another parent" language from the UPA's de facto parentage standard to mean that the consent of all existing legal parents is not required). The Maine Supreme Judicial Court, however, reached a different conclusion. Martin v. MacMahan, 264 A.3d 1224, 1234 (Me. 2021) (interpreting the phrase "another parent" within the consent element of the state's de facto parentage doctrine to require the consent of any "legal parent who appears and objects to the de facto parentage petition").

235. S.B. 6037, 65th Leg., Reg. Sess. (Wash. 2018) H.B. 562, 2017–2018 Leg., Reg. Sess (Vt. 2018); An Act to Update Maine's Family Law, ch. 296, § 1, 2015 Me. Laws 706; *see also* UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017).

236. *See infra* note 306.

237. DEL. CODE ANN. tit. 13, § 8-201(c)(1) (West 2021).

Most jurisdictions with equitable parenthood doctrines that provide only limited rights relating to custody and visitation, as opposed to full legal parentage, also do not have clear language in the standard specifying whose consent would be required in situations where there are already two or more existing legal parents. Generally, the language of the consent element in these jurisdictions refers simply to the consent or support of "the legal parent" and does not explicitly address whether the consent of *all* existing legal parents is required.[238] One potential explanation for this is that the legislatures or courts in these jurisdictions were not contemplating application of the doctrine in situations where a child already had two fit legal parents.[239] Washington, D.C. represents an exception to the general lack of clarity regarding the consent element, specifically requiring as an element of its de facto parentage standard "the agreement of the child's parent or, if there are [two] parents, both parents."[240]

A handful of state appellate courts have directly addressed questions relating to whether the state's equitable parenthood doctrine should be interpreted to require that all of the existing legal parents consented to the formation of the relationship between the petitioner and child and, if so, what form the consent must take. It is important to note, however, that several of these decisions occurred in states where the laws in existence at the time (some of which are still in existence) neither recognized equitable parents as full legal parents nor provided that a child could have more than two legal parents. For example, in *K.A.F. v. D.L.M.*, a 2014 New Jersey appellate court decision, the former partner of one of the child's legal parents, who claimed that she had served in a parental role to the child for over six years, sought to establish herself as a psychological parent.[241] Individuals who qualify as psychological parents under New Jersey law are entitled to standing to seek custody of the child, and the requirements for establishing psychological parentage include that "the legal parent must consent to and foster the relationship between the third party and the child."[242] Both legal parents opposed the petition, arguing that the petitioner could not establish herself as a psychological parent since only one of the legal parents had consented to the formation of the parent–child relationship.[243] The lower court granted summary judgment, holding that because there was no genuine issue of material fact regarding the contention that one of the legal parents had not consented to the relationship, the petitioner's claim failed as a matter of

238. *See supra* note 112 and accompanying text.

239. *See supra* Section II.H (describing the history of equitable parenthood doctrines).

240. D.C. CODE § 16-831.01(1)(A)(iii) (2021); *see also* PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. L. INST. 2021) (setting forth as an element of parentage by estoppel that there was "a prior co-parenting agreement with the child's legal parent [or, if there are two legal parents, both parents]").

241. K.A.F. v. D.L.M., 96 A.3d 975, 977 (N.J. Super. Ct. App. Div. 2014).

242. *Id.* at 980–81.

243. *See id.* at 978–79.

law.[244] The appellate court overturned the lower court's decision and held that only one legal parent's consent was necessary.[245]

While the court acknowledged the fundamental constitutional right of fit parents to make decisions about the care, custody, and control of their children, it explained that the right was not absolute and could be overcome by "'exceptional circumstances' affecting the welfare of the child."[246] The court further explained that psychological parenthood cases fell within the broader category of exceptional circumstances cases, stating that "the transcendent importance of preventing harm to a child weighs more heavily in the balance [than] the fundamental custody rights of a non-forsaking parent."[247] Regarding the policy implications involved, the court reasoned that to deny recognition of an individual as a child's psychological parent on the sole basis that one of the legal parents had not consented to the relationship would "ignore the 'psychological harm' a child might suffer because he is deprived of the care of a psychological parent."[248] The court also stated that a consent requirement that rendered the court "powerless to avert harm to a child through the severance of the child's parental bond with a third party" would be contrary to the court's well-established policies of protecting children from harm.[249] The court did specify, however, that it was not wholly discounting the importance of one legal parent's lack of consent.[250] It explained that courts could still consider it as a factor in determining whether the other elements of the psychological parenthood doctrine were satisfied or whether awarding custody or visitation to the petitioner would further the child's best interests.[251] But notably, the longer the third party had served in a parental role, the less lack of consent from one of the legal parents would factor into the analysis.[252]

In another 2014 decision, the Court of Appeals of Washington (Division 3) reached a different conclusion regarding the interpretation of the consent element of the equitable parenthood doctrine in place at the time.[253] In *In re Parentage of J.B.R.*, the mother's former partner, who the eleven-year-old child viewed as her father and had been raised to know as her father since the age of two, sought to establish de facto parentage.[254] Although the case was decided before Washington statutorily recognized de facto parentage or identified it as a mechanism for establishing full legal parentage, under the state's common law approach a de

244. *See id.* at 977–78.
245. *See id.* at 983.
246. *Id.* at 980.
247. *Id.* at 980, 982.
248. *Id.* at 981.
249. *Id.* at 982.
250. *See id.* at 983.
251. *See id.*
252. *See id.*
253. *In re* Parentage of J.B.R., 336 P.3d 648, 649–50 (Wash. Ct. App. 2014).
254. *See id.* at 649.

facto parent stood "in legal parity with an otherwise legal parent."[255] The first element of the doctrine required that "the natural or legal parent consented to and fostered the parent-like relationship."[256] In denying the mother's argument that a third party could not become the de facto parent of a child who already had two fit legal parents, the court held that de facto parentage could be established "if the . . . petitioner establishes the relevant four factors, which include establishing that *both* legal parents consented to the [petitioner] being a parent to the child."[257] The court explained that a standard that allows an individual who "undertook an unequivocal and permanent parental role with the consent of all existing parents" to establish de facto parentage strikes the correct balance with regard to the rights of the existing legal parents, the child, and other parties.[258]

In applying the element requiring both existing legal parents' consent, however, the court made clear that the consent to the formation of the petitioner's relationship with the child does not have to be express.[259] While the mother's consent was clear and uncontested, the court also held that the biological father had impliedly consented to and fostered the relationship between the petitioner and the child by choosing to "voluntarily absent[ ] himself" from his child's life for over a decade, during which time he neither saw nor supported the child.[260] The biological father's decision to neither support nor seek a relationship with his daughter over the years evidenced his consent to the petitioner filling the parental role left vacant and fostered the formation of the relationship between the petitioner and child.[261]

Following *In re Parentage of J.B.R.*, however, Washington enacted a statute that recognized multi-parentage, established de facto parentage as a mechanism through which full legal parentage could be obtained, and identified the elements of de facto parentage.[262] The elements set forth by the statute include that "[*a*]*nother parent* of the child fostered or supported the bonded and dependent relationship" between the child and the petitioner.[263] In 2020, the Washington Court of Appeals (Division 2) reversed and remanded a lower court decision dismissing a stepfather's petition to establish de facto parentage.[264] One of the issues on appeal was the proper interpretation of the consent element of the state's de facto parentage doctrine.[265] The court held that only one parent's consent was necessary to satisfy this element, explaining that under the express

255. *Id.* at 651.
256. *Id.*
257. *Id.* at 649–50. (emphasis in original).
258. *Id.* at 653.
259. *See id.*
260. *Id.* at 654.
261. *See id.* at 653–54.
262. WASH. REV. CODE ANN. § 26.26A.440 (West 2019).
263. *Id.* § 26.26A.440(4) (emphasis added).
264. *In re* Parentage of L.J.M., 476 P.3d 636, 645 (Wash. Ct. App. 2020).
265. *See id.* at 644–55.

language of the statute, "[t]he only requirement is that one parent—'[a]nother parent'—support the petitioner's relationship with the child."[266] The court, however, did not engage in a constitutional or policy-based analysis of the issue, relying solely on the statutory language in reaching its conclusion.[267] In a footnote, the court addressed the earlier decision in *In re Parentage of J.B.R.*, explaining that the court in that case was applying the prior common law standard governing de facto parentage, which required the consent of all existing legal parents.[268] The court went on to explain that the current statute governing de facto parentage, which superseded *J.B.R.*, departs from the prior common law approach as it "clearly refers to [the consent of] '[a]nother parent,' not both parents."[269]

In 2021, Maryland's highest court addressed the consent question in a lengthy opinion that included a strongly worded dissent.[270] In *E.N. v. T.R.*, the father's girlfriend, with whom the father's two children had lived for three years, sought to establish de facto parentage.[271] Under Maryland's de facto parentage doctrine, qualifying individuals are not full legal parents, but they do have "standing to contest custody or visitation and [unlike other third parties] need not show parental unfitness or exceptional circumstances before a trial court can apply a best interests of the child analysis."[272] The first element of the de facto parentage doctrine is "that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child."[273] The children's biological mother argued that due to the constitutional protections afforded to legal parents, a third party could not become the child's de facto parent without the consent of both of the existing legal parents.[274] Overturning the decision of the intermediate appellate court, the Court of Appeals of Maryland held that a party seeking to establish de facto parentage must prove that both existing legal parents consented to the formation of their relationship with the child.[275] If both parents did not consent, the petitioner is left to seek custody or visitation under the standards governing third-party claims.[276]

The court justified its decision on both constitutional and policy-based grounds. In terms of the constitutional justifications, the court explained

266. *Id.* at 644.
267. *See id.*
268. *See id.* at n.4.
269. *Id.*
270. *See* E.N. v. T.R., 255 A.3d 1 (Md. 2021).
271. *See id.* at 3–4.
272. *Id.* at 15.
273. *Id.* at 1.
274. *See id.* at 9.
275. *See id.* at 3.
276. *See id.* at 22 ("In cases not involving *de facto* parents, i.e., cases involving third parties seeking custody or visitation, this Court has repeatedly concluded that to award custody or visitation to the third party, the third party must show that the parents are unfit or that exceptional circumstances exist, before a trial court can apply the best interests of the child standard.").

that parents have a fundamental right to direct the care, custody, and control of their children, and that there is a well-established presumption that parents act in a way that promotes the best interests of their children.[277] In the court's view, a rule that does not require the consent of both of the existing legal parents "undermines and, essentially, negates" the non-consenting parent's fundamental rights.[278] In terms of policy-related considerations, the court stated that a rule requiring only one party's consent could result in situations that were unworkable for everyone involved.[279] Specifically, it could lead to the non-consenting parent having to co-parent with someone whom they did not realize was forming a parental relationship with their child or even possibly someone whom they had never met, resulting in "further conflict foreordained" for everyone involved.[280] The court further explained that it would rarely be in children's best interests to subject them to custody and visitation orders among three or more parents who have demonstrated little or no ability to co-parent together.[281]

After determining that the consent of all existing legal parents was necessary to satisfy the de facto parentage doctrine, the court turned to the question of the type of consent required.[282] The court held that the consent could be express or implied and could occur through either action or inaction, as long as the consent "is knowing and voluntary and would be understood by a reasonable person as indicating consent to the formation of a parent-like relationship between a third party and a child."[283] With regard to proving that a legal parent had consented through their inaction, the court explained that "implied consent by inaction would consist of the legal parent having sufficient information concerning the fostering of a parent-like relationship between a third party and the parent's child and the parent knowingly and voluntarily not objecting."[284]

In applying the standard to the facts of the case, the court determined that the biological mother had neither expressly nor impliedly consented to the formation of the parental relationship between the children and the father's girlfriend.[285] At the time of the trial, the children had lived in a household with the girlfriend for three years.[286] During the first two years, the children's father also lived in the household, but after he went to prison the children continued to live with the girlfriend for another year before she sought to establish de facto parentage.[287] Although there was only one documented occasion on which the mother had seen the

277. *See id.*
278. *Id.*
279. *See id.* at 29.
280. *Id.*
281. *See id.*
282. *See id.* at 25.
283. *Id.*
284. *Id.*
285. *See id.* at 27.
286. *See id.* at 3–4.
287. *See id.*

children during this three-year period, the court determined that the implied consent standard was not satisfied because the mother's lack of objection to the formation of the relationship between the children and girlfriend (i.e., her inaction) was not "knowing and voluntary."[288] The court reasoned that while the mother knew the father had a girlfriend, for most of the period in which the children resided with the girlfriend the mother did not know who the girlfriend was or where she resided.[289] The mother had not met the girlfriend until two years after the children began living with her and did not know the importance of the girlfriend in the children's lives.[290] The court also noted that the mother had not abandoned her children by leaving them in the care of a third party for a substantial period, but rather had simply given permission for the children to live with their other legal parent—a common occurrence between legal parents who do not reside together.[291] According to the court, taken together with the fact that the mother had attempted to locate the children and have them returned to her on a few occasions, the evidence supported the conclusion that the mother had neither knowingly consented to the formation of the relationship between the girlfriend and the children nor abandoned her children.[292]

The dissenting opinion expressed strong disagreement with both the constitutional and policy-based justifications set forth in the majority opinion. In terms of the constitutional justifications, the dissent acknowledged the fundamental right of fit parents to direct the care, custody, and control of their children, but pointed out that that this right is not absolute.[293] The dissent argued that the paramount concern in all custody cases is the well-being and interests of the child, and that it is well established that a child's interests may outweigh the rights of a parent.[294] According to the dissent, a standard that allows for the severance of the relationship between the child and someone whom they view as a parent simply because one of the legal parents did not consent to the relationship's formation fails to sufficiently provide for children's interests and "inevitably will result in judicial determinations that harm children."[295] The dissent further noted that the harm to children resulting from such a rule was clearly demonstrated in this case—although the girlfriend had satisfied all of the other elements of the de facto parentage standard and the children viewed her as their mother and desired to live with her, the non-consenting parent was able to unilaterally sever the relationship.[296]

The dissent also disagreed with the idea that requiring only one parent's consent to the formation of the de facto parent relationship "ne-

288. *Id.* at 26–27.
289. *See id.*
290. *See id.*
291. *See id.* at 27.
292. *See id.*
293. *See id.* at 31.
294. *See id.*
295. *Id.* at 40.
296. *See id.* at 40–42.

gates" the non-consenting parent's fundamental rights.[297] The court pointed out that identifying an individual as a child's de facto parent does not somehow make the non-consenting parent "less of a parent."[298] It also does not necessarily mean that the non-consenting parent will have to share custody with the de facto parent—the court will not issue a joint custody order, even among legal parents, if such an arrangement would be contrary to the best interests of the child.[299] Moreover, even if the non-consenting party must share custody or visitation with the de facto parent, the non-consenting parent nonetheless maintains their legal parentage and all of the rights and obligations flowing therefrom.[300]

In terms of the policy-related justifications set forth by the majority, the dissent expressed disagreement with the view that a rule requiring only one party's consent would necessarily result in unworkable, conflict-ridden parenting arrangements that harm children.[301] The dissent explained that in all custody disputes the court is tasked with creating an order that promotes the best interests of the child, and family courts are well-versed in creating custody arrangements that account for potential conflicts between the parents.[302] Regardless of how many parties are involved, a court that is concerned with potential conflict can tailor its order accordingly.[303] Moreover, the dissent noted that while some situations involving de facto parents may require orders that grant sole physical or legal custody to one of the parties due to the inability of the parties to co-parent, that will not always be the case—"adults who did not previously know each other well (or even at all), but who both have the best interests of a child at heart, may well find a way to co-parent effectively."[304] In fact, individuals who do not carry the baggage of a failed romantic relationship may, in some instances, actually be better able to co-parent without conflict.[305]

The dissent also addressed the majority's concerns regarding fairness to the non-consenting parent, acknowledging the pain and frustration a parent may feel if parental rights are given to a third party who formed a relationship with the child without that parent's consent.[306] However, in the dissent's view, "the nonconsenting parent's understandable anguish is not a sufficient reason to empower that parent unilaterally to sever the parental-type psychological bond that the would-be de facto parent has formed with the child through no fault of the adult or child."[307] The dissent further noted that parents understand that their relationship with the

297. *Id.* at 32.
298. *Id.*
299. *See id.*
300. *See id.*
301. *See id.* at 33–34.
302. *See id.* at 34.
303. *See id.*
304. *Id.*
305. *See id.*
306. *See id.*
307. *Id.*

other parent may end and that the other parent may subsequently enter into a relationship with someone else who comes to play a parental role in the child's life—it is an inherent risk that a person assumes in becoming "one-half of a union that produces a child."[308] Overall, in the dissent's view, none of the policy-related reasons for requiring both parents' consent were strong enough to outweigh the policy interests in granting courts the ability to protect children from the psychological harm that they would suffer from the loss of a relationship with someone they view as a parent.[309]

Most recently, and just a few months after the Maryland decision, Maine's highest court directly addressed the issue.[310] Maine is a state that recognizes multi-parentage and provides full legal parentage to individuals who satisfy the state's de facto parentage doctrine.[311] In *Martin v. MacMahan*, a couple (the biological mother's lifelong friend and the friend's husband) sought to establish de facto parentage of two children.[312] The couple had supported the mother throughout her pregnancy and provided care and necessities for the children from the time of their birth.[313] The children's biological father had moved to Kansas when the children were four months old and did not provide any support or care for the children, despite the mother's continued requests.[314] When the children were two years old, they began to live primarily with the couple, who provided for all aspects of their care.[315]

Over a year after the couple had begun providing full-time care for the children, the father returned to Maine.[316] After the mother refused to allow him to see the children, he initiated a divorce action and returned to Kansas.[317] When he returned to Maine a few months later to visit the children, it was the first time he had seen them in three years.[318] The court approved a custody agreement between the mother and father providing that they would share parental rights and the mother would have primary physical custody.[319] The children continued to reside primarily with the couple.[320] After the couple sought a protective order against the mother on behalf of the children, the father granted the couple temporary legal authority over the children and subsequently moved for a modification of the custody order seeking primary physical custody and sole legal custody.[321] The judge declined to modify the order beyond provid-

308. *Id.*
309. *See id.* at 33–34.
310. Martin v. MacMahan, 264 A.3d 1224 (Me. 2021).
311. *See* ME. STAT. tit. 19-A, §§ 1853, 1891 (2021).
312. *See Martin*, 264 A.3d at 1226–27.
313. *See id.* at 1227.
314. *See id.*
315. *See id.*
316. *See id.*
317. *See id.* at 1228.
318. *See id.*
319. *See id.*
320. *See id.*
321. *See id.*

ing that the children could visit the father in Kansas.[322] The father failed to return the children to Maine in compliance with the court's visitation order, which resulted in the couple traveling to Kansas to retrieve the children.[323] Upon returning to Maine, the couple filed a petition seeking de facto parentage, parental rights and responsibilities, and child support.[324] Throughout the years that the couple had been the children's primary caretakers, they had received a total of $100 from the father and $75 from the mother.[325]

The lower court determined that the couple had satisfied the de facto parentage doctrine.[326] On appeal, the father argued, *inter alia*, that the lower court's decision infringed on his fundamental constitutional rights as a parent because it granted the couple de facto parentage without finding that he had fostered and supported the relationship between the couple and the children.[327] The Supreme Judicial Court of Maine set out to determine whether, in order for the state's de facto parentage statute to pass constitutional scrutiny, the court must interpret the requirement that "another parent" fostered or supported the petitioner's relationship with the child to require that *each* legal parent fostered or supported the relationship.[328] The court answered in the affirmative, holding that to establish de facto parentage the petitioner must prove each element of the standard as to any existing parent who appears and objects to the petition.[329] The court stated that because establishing someone as a child's de facto parent is an intrusion into the rights of the existing legal parents that is "no less permanent than the termination of parental rights," the statute must undergo a strict scrutiny analysis.[330] The court then concluded that to allow for the establishment of de facto parentage without proof that each existing parent fostered or supported the relationship "would potentially allow the unilateral actions of one legal parent to cause an unconstitutional dilution of another legal parent's rights."[331]

Importantly, however, the court went on to state that under its interpretation of the consent element, the petitioner did not have to prove that each existing parent had expressly consented to the relationship.[332] The court explained that "[i]f such consent were required, there could be no litigation of any de facto parentage claim because a legal parent's objection would necessarily defeat the claim."[333] Instead, a petitioner can meet the consent element by "demonstrating that the child's legal parent

322. *See id.*
323. *See id.* at 1228–29.
324. *See id.*
325. *See id.*
326. *See id.* at 1226.
327. *See id.* at 1231.
328. *Id.* at 1232.
329. *See id.* at 1234.
330. *Id.* at 1233.
331. *Id.* at 1234.
332. *See id.* at 1235.
333. *Id.*

or parents have *implicitly*, through acts or omissions if not through words, fostered, supported, and accepted the person's parental role."[334] Applying the standard to the facts of the case, the court determined that the petitioners had satisfied the consent element.[335] In support of its determination, the court noted the lower court's findings that the father either knew or should have known from early on that the children were living with the couple.[336] The father understood and accepted, "at least implicitly[,]" that the couple was serving a parental role in the lives of the children.[337] The court further explained that the father had abdicated his responsibilities for the children, and that this created a gap in the children's lives with regard to care and nurture that the couple filled.[338] Concluding that the petitioners had satisfied each element of the standard, the court upheld the lower court's determination that the couple had established de facto parentage.[339]

2. Thoughts on Resolving the Question

The analysis of whether the consent of all existing legal parents should be required for multi-parentage establishment through mechanisms that in the two-party parentage context require the existing legal parent's consent, as well as the form of any required consent, differs significantly depending on the mechanism through which multi-parentage is sought. The result is that there is a relatively strong argument that a standard that does not require the express consent of all existing legal parents for multi-parentage establishment through equitable parenthood doctrines and similar mechanisms that require an established parent–child relationship is sound, both constitutionally and as a matter of policy. For the other parentage establishment mechanisms that require the consent of a legal parent, however, it is much clearer that constitutional considerations mandate, and policy-based considerations support, requiring the express consent of all existing legal parents. These parentage establishment mechanisms include adoption and, if states allow for the recognition of multi-parentage through such mechanisms, VAPs[340] and consent to ART

334. *Id.* at 1236 (emphasis added).
335. *See id.*
336. *Id.*
337. *Id.*
338. *See id.* The court also noted that the father had taken certain actions to foster the relationship between the couple and the children that went beyond omissions, such as granting the couple temporary legal authority and thanking them for raising the children. *Id.*
339. *See id.* at 1237.
340. It is unclear whether U.S. jurisdictions will recognize VAPs as a method through which multi-parentage can occur. The 2017 Uniform Parentage Act, for example, states that a VAP is void if the child already has a presumed, acknowledged, or adjudicated parent (besides the individual who gave birth), which seems to remove the possibility of establishing an individual as a child's third parent through a VAP. UNIF. PARENTAGE ACT § 302 (UNIF. L. COMM'N 2017). The requirement in many states' VAP forms that the parties attest that the individual seeking to establish parentage is the child's biological father and the inability of married individuals to utilize a VAP to establish the parentage of someone other than their spouse (either at all or unless the spouse is willing to give up their parental

provisions.[341]

a. Equitable Parenthood and Similar Doctrines that Require an Established Parent–Child Relationship

The issue of whether the express consent of all existing legal parents should be required for multi-parentage establishment through equitable parenthood doctrines presents an extremely difficult question with strong arguments on each side. However, due to the paramount importance of children's best interests, it is neither necessary nor desirable for parentage establishment through equitable parenthood doctrines to require the express consent of each of the existing legal parents. A better approach is to either (1) require the consent of only one of the existing legal parents, or (2) require the consent of each existing legal parent, but adopt a broad definition of consent that includes implied consent. It is likely that more courts and state legislatures will adopt the latter approach, which raises fewer constitutional issues and represents a compromise between requiring the consent of only one of the existing parents and requiring the express consent of each existing parent. However, both options arguably are permissible, both constitutionally and as a matter of policy.

While legal parents have a fundamental right to make decisions regarding the care, custody, and control of their children, it is well-established that this right is not absolute and must be weighed against competing state interests.[342] For example, in most states, certain categories of third parties can be granted custody of a child over the wishes of a child's legal parent if extraordinary or exceptional circumstances exist such that denying the third party custody would harm the child.[343] In determining harm to the child, the type of bond and relationship formed between the child and the third party is usually a primary consideration.[344]

Similarly, while the Supreme Court in *Troxel v. Granville* struck down as unconstitutional as applied a visitation statute that allowed the court to grant any party visitation rights at any time if it determined doing so was in the child's best interests, the Court stated only that the wishes of the legal parent must be given "special weight" in visitation determina-

rights) also seem to weigh against the likelihood of recognition of multi-parentage through VAPs. *See supra* Section II.C.

341. It is unclear if in the unpublished Florida decision referenced above, in which a court allowed a same-sex couple and the sperm provider to be listed on the birth certificate, the court relied on a consent to ART provision for establishing any of the parties' parentage. *See supra* note 211 and accompanying text. It is possible that the birth mother was recognized as a legal parent due to having given birth, her spouse based on the marital presumption, and the provider based on genetic ties.

342. *See* E.N. v. T.R., 255 A.3d 1, 31 (Md. 2021); *see also* David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, *in* RECONCEIVING THE FAMILY 47, 64 (Robin Fretwell Wilson ed., 2006) (arguing that the Supreme Court has not applied the usual strict scrutiny standard in the context of substantive due process protections of parents' rights, instead applying "a more open-ended balancing of public and private interests").

343. *See* ABRAMS, CAHN, ROSS & MCCLAIN, *supra* note 139, at 790–91.

344. *See id.*; *see also* Ross v. Hoffman, 372 A.2d 582, 593 (Md. 1977).

tions.[345] Today, every state has some form of a third-party visitation law granting certain categories of third parties the right to seek visitation in specified circumstances.[346] Many of these laws allow courts to grant a third party visitation if it would further the child's best interests.[347] Other third-party visitation laws allow courts to grant visitation if denying the visitation would be detrimental to the child.[348] The type of relationship the third party shares with the child is usually a key factor in determining whether the relevant standard is satisfied.[349] These non-parent custody and visitation standards, implemented by states across the country, demonstrate the understanding that the state's interest in protecting children from the harm that will occur through disrupting their relationship with important individuals in their lives can outweigh a parent's fundamental right to direct the care, custody, and control of the child.[350]

Although establishing a party as an additional legal parent through an equitable parenthood doctrine as opposed to providing the party with rights relating only to custody or visitation is arguably a greater intrusion on the rights of the existing legal parents, it is important to note that it does not alter the existing parents' legal status. Contrary to the assertion of the Supreme Judicial Court of Maine in *Martin v. MacMahan*,[351] establishing a third party as a legal parent through an equitable parenthood doctrine is not akin to the termination of the parental rights of the existing parents.[352] On the contrary, as the dissenting opinion in *E.N. v. T.R.* noted, when multi-parentage is established through an equitable parenthood doctrine, the existing parents remain legal parents with the myriad essential rights and responsibilities that attach to that status.[353]

There is a strong argument that when an individual is able to meet all of the elements necessary to satisfy an equitable parenthood doctrine, it demonstrates exactly the type of circumstances that are extraordinary enough to outweigh the legal parent's fundamental right to make decisions regarding the care, custody, and control of their child.[354] Satisfaction of an equitable parenthood doctrine generally requires showing not only that the petitioner has, with a legal parent's support, resided with the child for a significant period and taken on the responsibilities of parenthood, but also that the individual has formed a bonded, dependent

345. Troxel v. Granville, 530 U.S. 57, 69–72 (2000); *see also* Meyer, *supra* note 342, at 64–65.

346. ABRAMS, CAHN, ROSS & MCCLAIN, *supra* note 139, at 926.

347. 4 A. KIMBERLEY DAYTON, JULIE ANN GARBER, ROBERT A. MEAD & MOLLY M. WOOD, ADVISING THE ELDERLY CLIENT § 37:29 (2021); 69 AM. JUR. 3D *Proof of Facts* 281, § 4 (2021).

348. DAYTON, GARBER, MEAD & WOOD, *supra* note 347, § 37:30; *see* 69 AM. JUR. 3D, *supra* note 347, § 4.

349. 69 AM. JUR. 3D, *supra* note 347, § 9.5; 51 CAUSES OF ACTION 2D 573, § 10 (2021).

350. Meyer, *supra* note 342, at 64–66.

351. *See supra* note 330 and accompanying text.

352. *See* E.N. v. T.R., 255 A.3d 1, 45 (Md. 2021) (Biran, J., dissenting).

353. *Id.*

354. *See id.*

relationship with the child that is parental in nature.[355] A wide body of social science research demonstrates that disrupting the relationship between a child and someone who they view as a parent can result in serious short- and long-term harm to the child.[356] Even if an individual who is not recognized as a legal parent is granted standing to seek custody or visitation (as opposed to being treated as a legal stranger), they generally will be at a significant disadvantage in seeking custody and visitation rights.[357] In addition, the failure to recognize an individual as the child's legal parent means the child will be deprived of important rights relating to, *inter alia*, support, inheritance, healthcare, and social security.[358] The serious potential harm to the child resulting from denying legal recognition to an individual with whom they share a bonded, dependent relationship that is parental in nature elucidates the extraordinary nature of these circumstances.

Importantly, there are steps that states concerned with protecting their multi-parentage laws from constitutional challenges could take that involve a lesser risk of harm to the child's well-being than requiring the express consent of all legal parents for multi-parentage establishment through equitable parenthood doctrines. States could, for example, adopt the general approach to multi-parentage determinations taken by California, Washington, Connecticut, and the 2017 UPA. This approach requires a showing of detriment to the child before courts will recognize more than two individuals as a child's legal parents (regardless of whether the multi-parentage claim arises via an equitable parenthood doctrine or via some other basis for establishing parentage).[359] Alternatively, states that adopt a best interests—as opposed to detriment—standard for multi-parentage claims could specify that the objection of an existing parent who did not expressly consent to the formation of the relationship must be given special weight in the best interests analysis.[360]

There are also persuasive policy considerations that support a standard that does not require the express consent of each of the existing legal parents in establishing multi-parentage through satisfaction of equitable parenthood or similar doctrines. While, at least in the context of two fit and involved legal parents, it may seem unjust to allow the spouse or partner of one of the legal parents to establish parentage without the other legal parent's express consent, this concern must be weighed against the potential harm to the child in failing to recognize the relation-

355. *See supra* note 112 and accompanying text.

356. Feinberg, *supra* note 106, at 64–66.

357. *See* Feinberg, *supra* note 21, at 114. In most states, even individuals who qualify as equitable parents face higher burdens in obtaining custody or visitation against a legal parent's wishes. Feinberg, *supra* note 106, at 68 n.80.

358. Feinberg, *supra* note 21, at 113.

359. *See supra* notes 178, 199, 202.

360. *See* K.A.F. v. D.L.M., 96 A.3d 975, 982–83 (N.J. Super. Ct. App. Div. 2014) (holding that although both parents' consent was not required for another party to become the child's de facto parent, the lack of consent of one of the parents could be considered by the trial court in analyzing the best interests of the child).

ship. At the end of the day, the fact that the child has formed a bonded, dependent parental relationship with the individual in question remains true regardless of whether just one, or both, of the existing legal parents expressly consented to the relationship.[361] Allowing the fact that one of the parents did not expressly consent to, in effect, sever the relationship between the child and a parental figure, even though all of the other elements required to establish equitable parenthood are satisfied, would result in the exact type of harm to the child that equitable parenthood doctrines were created to avoid.[362]

Moreover, the potential for co-parenting conflicts between the nonconsenting parent and the petitioner does not justify requiring both legal parents' express consent to the formation of the relationship. As an initial matter, in most states that have adopted multi-parentage laws, a court cannot recognize more than two legal parents unless it determines either that not recognizing the multi-parentage claim would be detrimental to the child or that recognizing the multi-parentage claim would further the child's best interests.[363] The result under either standard is that in situations where the court determines that recognizing multi-parentage would not be beneficial to the child due to the level of conflict among the parties, the petitioner would not be recognized as the child's legal parent despite having satisfied the elements of the equitable parenthood doctrine.

In addition, the potential for conflict between the parties if the petitioner is able to establish parentage pursuant to an equitable parenthood doctrine is not unique to situations where one of the legal parents has not expressly consented to the formation of the relationship between the petitioner and child. As countless custody cases involving former spouses or partners demonstrate, conflict frequently arises between parents who, at some prior point, expressly consented to and fostered each other's relationship with the child. Furthermore, equitable parenthood doctrines usually (though not always)[364] are pursued when a legal parent who fostered and expressly consented to the relationship between the petitioner and child subsequently denies the petitioner access to the child following the demise of the parties' romantic relationship.[365] It is hard to see how the potential for conflict is lower in situations where both legal parents had expressly consented to the relationship between the petitioner and the child and then subsequently seek to deny the petitioner access to the child. In fact, as the dissent pointed out in *E.N. v. T.R.*, individuals who did not previously share an intimate or personal relationship may in some

361. E.N. v. T.R., 255 A.3d 1, 44–45 (Md. 2021) (Biran, J., dissenting).

362. *Id.* at 44; *see also supra* notes 111, 355–358 and accompanying text.

363. *See supra* notes 178, 195, 199, 202 and accompanying text.

364. *See E.N.*, 255 A.3d at 7.

365. *See supra* notes 107–113 and accompanying text. *But see E.N.*, 255 A.3d at 7 (addressing a situation in which the partner of the child's father, who was incarcerated, sought to establish parentage although she still shared an intact relationship with the father).

instances co-parent more effectively than individuals who did.[366] Importantly, courts are well versed in creating custody orders aimed at protecting children in situations where some level of conflict exists between the parents. Regardless of whether a custody dispute involves two parents or multiple parents, courts can, and should, create custody orders that take into account the level of conflict among the parents. This may involve, for example, adopting an order that does not grant all of the parties shared physical or legal custody.[367]

As noted above, however, even if it is arguably permissible to adopt a rule requiring the consent of only one of the existing legal parents, it is nonetheless important to address the reality that, as prior cases make clear, a significant number of states likely will require the consent of all existing legal parents for constitutional (state or federal) or policy-related reasons.[368] To minimize the potential of harm to the child, it is essential that states that require the consent of all existing legal parents for multi-parentage establishment through equitable parenthood doctrines adopt a broad definition of consent. More specifically, these states should adopt a definition of consent that includes both express and implied consent. With regard to implied consent, the definition should make clear that consent can occur through a parent's acts, omissions, or absences that "create a vacuum in terms of care and nurture [of the child] that is filled by the de facto parent relationship."[369] The definition should further specify that parents who voluntarily have been largely uninvolved in their children's lives for a substantial period have, through their actions, implicitly consented to the formation of a parent-like relationship between the child and another party.

States should not adopt the approach to implied consent set forth by the majority in *E.N. v. T.R.*, which requires that for implied consent to occur through inaction, the parent must have "knowingly" failed to object to the formation of the relationship between the petitioner and child.[370] Such an approach is problematic: it allows the fact that the child has an uninvolved parent who has not made the effort to obtain basic knowledge about their child's life, including who they are living with and who is providing care for them, to prevent legal recognition of the parent–child relationship between the petitioner and child. In contrast, an approach that equates substantial parental noninvolvement with implied consent will at least ensure that the fact that a parent has chosen to be uninvolved in their child's life for a substantial period of time does not prevent legal recognition of the relationship between the child and an individual who has filled the parental gap in the child's life resulting from the existing

366. *E.N.*, 255 A.3d at 45 (Biran, J., dissenting).
367. *See* Cahn & Carbone, *supra* note 170, at 405.
368. *See supra* Section IV.A.1.
369. Martin v. MacMahan, 264 A.3d 1224, 1236 (Me. 2021); *see also In re* Parentage of J.B.R., 336 P.3d 648, 654 (Wash. Ct. App. 2014) (finding implied consent when the legal parent had been absent from the child's life for over ten years).
370. *See supra* note 284 and accompanying text.

parent's lack of involvement.[371] Failure to adopt this broader definition of consent would lead to unjust results and a greater likelihood of harm to the child in question.

Finally, in terms of other function-based parentage establishment mechanisms that (arguably) require the express consent of an existing legal parent, such as holding out provisions, the question of whether the consent of all existing legal parents should be required in the multi-parentage context depends on how such provisions are interpreted.[372] If a holding out provision is interpreted to require the existence of a relationship that is parental in nature between the petitioner and child, there is a strong argument that a standard that either requires the consent of only one legal parent or requires the consent of all existing legal parents but adopts a broad definition of consent is permissible for reasons similar to those discussed in the context of multi-parentage establishment through equitable parenthood doctrines. If, however, a state's holding out provision can be satisfied without proving the existence of a relationship that is parental in nature, the express consent of all existing legal parents should be required for the reasons set forth in the subsection below addressing multi-parentage claims through mechanisms that do not require an established parent–child relationship.[373]

b. Adoption and Other Parentage Establishment Mechanisms that Do Not Require an Established Parent–Child Relationship

A number of legislatures and courts expressly have recognized adoption procedures in which the existing legal parent(s) retain their status as legal parent(s) as a mechanism through which multi-parentage can occur. In the two-party parentage context, the express consent of the existing legal parent is required in order for that parent's spouse or partner to adopt the child through step- or second-parent adoption procedures. When multi-parentage recognition is sought through adoption, the express consent of all existing legal parents should be required. Indeed, all of the statutory and judicial developments discussed above recognizing multi-parentage through adoption appear to involve situations in which

371. *See supra* note 284 and accompanying text.

372. Although the language of most states' holding out provisions does not explicitly require an existing parent's consent, in the vast majority of circumstances the holding out could not occur without the consent of at least one existing legal parent, and thus the requirement of consent arguably can be inferred. *See* R.M. v. T.A., 182 Cal. Rptr. 3d 836, 850 (Cal. Ct. App. 2015) (stating that the holding out provision did not violate the existing legal parent's fundamental rights because "by its very nature the presumption will arise only if the single parent allows the circumstances to evolve to a point where the person is holding out the child as his or her own and receiving the child into his or her home for purposes of parental caretaking"); Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183, 190–91 (2020) ("Residency or hold out parentage, as a form of parentage . . . can be grounded on the actual, apparent, or presumed consents by existing legal parents.").

373. *See supra* Section IV.A.2.

all of the parties were in agreement regarding the adoption.[374] There are both constitutional and policy-related concerns that support requiring the express consent of all existing legal parents in the adoption context.

In terms of constitutional concerns, the critical distinction between adoption and equitable parenthood doctrines is that an individual does not need to have formed a bonded, dependent relationship with the child that is parental in nature in order to establish parentage through adoption.[375] As a result, unlike equitable parenthood doctrines, adoption does not require the existence of the type of extraordinary circumstances that outweigh the fundamental rights of existing legal parents to make decisions regarding the care, custody, and control of their children. Regarding policy-related considerations, there is a far weaker argument that failure to recognize multi-parentage necessarily will harm the child when the mechanism through which the petitioner is seeking to establish parentage does not require the existence of a relationship that is parental in nature between the petitioner and child. As a result, in this context, the child's interests in recognizing the petitioner as a legal parent do not outweigh the concerns regarding fairness to the non-consenting parent and the likelihood of increased conflict among the child's parents if the adoption is granted against the wishes of one of the existing legal parents.[376] For the reasons discussed in the subsection above, in situations where one of the existing legal parents will not consent to the adoption, but extraordinary circumstances involving an established parent–child relationship between the petitioner and child are present, an equitable parenthood doctrine is a more appropriate mechanism for establishing parentage.

If states choose to recognize multi-parentage through the other parentage establishment mechanisms that require the existing legal parent's express consent in the two-party parentage context but do not require an established parent–child relationship, similar constitutional and policy-based reasons support requiring the express consent of all parties. These mechanisms include, for example, consent to ART provisions, VAPs, and any other forms of parentage agreements that the jurisdiction may recognize. The arguments against requiring the express consent of all parties are even weaker in this context than in the adoption context. This is because these methods of parentage establishment generally are undertaken prior to or at the time of the child's conception or birth, when none of the parties (aside from the person gestating the child) could yet have formed a close relationship with the child.

It is important to recognize that there are some significant downsides to requiring the express consent of all existing legal parents for multi-

374. *See supra* notes 227–58 and accompanying text.

375. 2 HARALAMBIE, *supra* note 92, § 14:04.

376. *See* Gupta-Kagan, *supra* note 159, at 759 ("[L]egislation should require consent of all parents as a condition of granting a non-exclusive adoption. Present disagreements between potential parents regarding their respective legal statuses suggests too high of a risk of future conflicts—the precise concern regarding multiple parenthood that any non-exclusive adoption statute should attempt to avoid.").

parentage to occur through adoption. Such an approach allows for the possibility that a legal parent could, out of bitterness, resentment, or some other reason unrelated to the child's well-being, single-handedly prevent the spouse or partner of the other legal parent from establishing parentage, even when the individual has formed a parent-like relationship with the child. Not all states that recognize multi-parentage will allow for parentage establishment to occur through an equitable parenthood doctrine, meaning adoption may be the only option for an individual who has formed a parental relationship with the child to establish parentage. Moreover, even if all states do eventually recognize multi-parentage through equitable parenthood doctrines, there are still downsides to requiring individuals who have formed a parental bond with the child to pursue this mechanism as opposed to adoption. For example, equitable parenthood doctrines generally require an individual to serve in a parental role for a significant amount of time, leaving both the child and the person serving in a parental role without essential rights and protections in the interim.[377] In addition, unlike adoption procedures, equitable parenthood claims usually are not pursued unless and until the relationship the petitioner shared with one of the child's legal parents has broken down.[378] The result is that there will be a substantial period of time in which the child and petitioner lack essential rights and protections that would have attached to their relationship much earlier if adoption had been an option.

These issues, however, can be ameliorated to a significant extent through solutions that do not involve infringing on the non-consenting parent's fundamental constitutional rights. For example, not only should states that have not yet done so enact equitable parenthood doctrines for parentage establishment, states also should make clear that these mechanisms are available even when the relationship shared between the petitioner and the legal parent(s) is intact. Other steps that states could take to protect the relationship between a child and someone they view as a parent include adopting standards granting standing to seek custody and visitation to individuals who have formed a parent-like relationship with the child.

B. The Number of Parents

1. The Question

When the subject of multi-parentage is broached, usually one of the first questions that arises is whether there will be any limit set on how many individuals can establish themselves as a child's legal parents. There are strong arguments both for and against establishing a firm limit on the number of individuals who can establish legal parentage. On the one hand, many commentators, including advocates in favor of multi-parent-

377. *See supra* Section II.H.
378. *See generally* Feinberg, *supra* note 106.

age recognition, have expressed concern that allowing too many individuals to attain legal parentage will be harmful to children.[379] One aspect of this concern focuses on the harm to children that can come from having "too many cooks in the kitchen."[380] The greater the number of individuals who are tasked with the wide variety of decisions, small and big, that parents must make about raising their children, the higher the likelihood that disagreements will arise among the child's parents.[381] This can lead to a situation in which "no parent can effectively accomplish his or her task without being undercut by someone else."[382] It also could result in greater state intervention in children's lives and more frequent litigation regarding custody, visitation, and child support—occurrences that are widely considered to be harmful to children's well-being.[383] Moreover, regardless of whether the disputes end up in court, children often suffer when their parents' relationship is marked by frequent disagreements and contentiousness regarding co-parenting decisions.[384]

Another aspect of the concerns about a child having too many legal parents is that the more parents a child has, the more likely it is that the child will need to split their time among multiple households. This can lead to the child experiencing feelings of instability, insecurity, and lack of belonging.[385] It also may make it harder for the child to form strong bonds with each of their parents.[386] A related fear is that "fractured family units resulting from break-ups would be all the more painful for children if they have three or four parents who they may feel are owed their allegiance—a child might feel caught not just between two worlds, but between three or four."[387] Finally, some commentators have argued that setting a cap is necessary to ensure that the law is not facilitating parentage establishment among individuals in cults or cult-like settings.[388]

On the other hand, capping how many legal parents a child can have at a certain number may not be the best way to address these concerns. Identifying one number as the absolute maximum number of legal par-

379. *See, e.g.*, Cahn & Carbone, *supra* note 141, at 39–40; Jacobs, *supra* note 15, at 326; Alexa E. King, *Solomon Revisited: Assigned Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 390 (1995); Mallory Ullrich, *Tri-Parenting on the Rise: Paving the Way for Tri-Parenting Families to Receive Legal Recognition Through Preconception Agreements*, 71 RUTGERS U. L. REV. 909, 924 (2019).

380. Jacobs, *supra* note 15, at 326; Elizabeth A. Pfenson, *Too Many Cooks in the Kitchen: The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California's Recently-Proposed Multiple-Parents Bill*, 88 NOTRE DAME L. REV. 2023, 2023 (2013); Ullrich, *supra* note 379, at 924.

381. Appleton, *supra* note 4, at 41; Jacobs, *supra* note 15, at 326; Ullrich, *supra* note 379, at 924.

382. Pfenson, *supra* note 380, at 2060.

383. Baker, *supra* note 15, at 675; Ullrich, *supra* note 379, at 925.

384. ABRAMS, CAHN, ROSS & MCCLAIN, *supra* note 139, at 774–75.

385. King, *supra* note 379, at 391; Ullrich, *supra* note 379, at 924–25.

386. Pamela Gatos, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 216 (2001).

387. Pfenson, *supra* note 380, at 2060; *see also* King, *supra* note 379, at 391.

388. *See* Paula Gerber & Phoebe Irving Lindner, *Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 261 (2015).

ents a child possibly could have is arguably arbitrary and unwise given the wide variety of family forms in existence today and the unique attributes of every family.[389] For example, four or more parents who share a collaborative and cooperative co-parenting relationship may provide a healthier environment for a child than two parents who have a hostile and contentious relationship. Thus, some commentators argue that the better approach is to make determinations regarding how many legal parents a child can have based on that specific child's interests, the relationship among the potential parents, and the overall circumstances of the family in question.[390]

2. Thoughts on Resolving the Question

Thus far, none of the statutes providing for multi-parentage include a cap on the number of legal parents, and this is the better approach.[391] The number of legal parents a child should have depends on the unique characteristics of the family in question. For some families, the number of parents should be capped at two. For others, capping the number at three will make the most sense. For yet others, the appropriate number will be four or more. It is unnecessary for states to choose one number as the absolute maximum. There are better, less arbitrary ways of ensuring that the law does not recognize a multi-parentage familial structure that would be contrary to the well-being of the particular child in question. In fact, there are already several important aspects of existing laws governing multi-parentage that have the effect of limiting the number of legal parents a child can have without setting forth an arbitrary numerical cap.

In the states that recognize multi-parentage, a party seeking to establish parentage of a child who already has two parents must qualify as a legal parent pursuant to one of the parentage establishment mechanisms recognized in the two-party parentage context.[392] Not only that, but the mechanism also must be one through which multi-parentage can be established in the jurisdiction.[393] A jurisdiction may only recognize certain mechanisms as available for multi-parentage establishment, and the mechanisms that are available may have strict requirements that few people would be able to satisfy.[394] Thus, even a person who has a basis for

389. *See* Appleton, *supra* note 4, at 68 ("A one-size-fits-all rule . . . strikes me as too blunt to constitute a child-centered rule about how many legal parents a particular child may have. . . . I favor a more pluralistic and nuanced approach that respects diversity among families and is sufficiently capacious to honor a given child's experience.").

390. *Id.*; Gatos, *supra* note 386, at 216 ("By focusing on the role of the parties in a family of consent, and the relationships between the parents, the law does not have to determine a maximum number of parents a child may have.").

391. *See supra* Section III.B.

392. *See supra* Section III.B.

393. *See supra* Section III.B.

394. K.A.F. v. D.L.M., 96 A.3d 975, 982 (N.J. Super. Ct. App. Div. 2014) (responding to the fear that a child could have too many legal parents pursuant to the psychological parentage doctrine by noting the significant difficulty of satisfying the doctrine).

parentage establishment that would be recognized in the two-party parentage context may not have a basis for establishing parentage that is recognized in the multi-parentage context.[395]

In addition, establishing multi-parentage requires judicial approval, and even when an individual can prove that they have a basis for establishing parentage that the jurisdiction recognizes as one through which multi-parentage can occur, there is often an additional substantive determination that a court must make before recognizing multi-parentage.[396] This additional step makes multi-parentage establishment even more difficult. For example, under the approaches of California, Washington, Connecticut, and the 2017 UPA, a court cannot recognize multi-parentage unless "the court finds that recognizing only two parents would be detrimental to the child."[397] Vermont has adopted a best interests—as opposed to detriment—standard for the additional substantive determination.[398] These types of safeguards reduce significantly the risk that a harmful number of people will be able to establish themselves as a child's legal parents.

Finally, even if in a later custody or visitation dispute between the parents it turns out that there are, in fact, "too many cooks in the kitchen," the court would have the discretion to structure an order governing custody and visitation in a manner that protected the child from harm. While in some jurisdictions there are presumptions in favor of awarding joint legal and physical custody among the child's legal parents, all jurisdictions recognize that the best interests of the child is the paramount concern in custody determinations and that joint custody should not be ordered where it would be contrary to the child's best interests.[399] Furthermore, while fit legal parents generally have a right to visitation, a court may deny a parent visitation if it determines that such visitation would be detrimental to the child.[400] As a number of scholars persuasively have advocated, states should make clear that these well-established principles carry over to the multi-parentage context, and that courts do not have to provide each parent with custody or visitation rights where it would be contrary to the child's best interests.[401] California law provides a helpful

395. For example, Delaware provides for multi-parentage only through satisfaction of its de facto parentage doctrine, and Louisiana recognizes multi-parentage only when a child is born to a different-sex married couple and the husband is not the child's biological father. *See supra* Section III.B.1. In addition, the 2017 UPA provides that a VAP is void if the child already has a second presumed, acknowledged, or adjudicated parent, which presumably excludes VAPs as a method through which multi-parentage can be established. *See* UNIF. PARENTAGE ACT § 302(b) (UNIF. L. COMM'N 2017).

396. *See supra* Section III.B.

397. *See supra* notes 178, 199–205 and accompanying text.

398. *See supra* note 196 and accompanying text.

399. *See generally* Vitauts M. Gulbis, Annotation, *Propriety of Awarding Joint Custody of Children*, 17 A.L.R. 4th 1013 (1982).

400. ABRAMS, CAHN, ROSS & MCCLAIN, *supra* note 139, at 911.

401. *See, e.g.*, Jacobs, *supra* note 15, at 326, 333, 338; 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, 381–82 (2007).

template for states to follow in this context, instructing that "[i]n cases where a child has more than two parents . . . [t]he court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child."[402] Overall, a cap on the number of legal parents is not necessary—there are a number of steps states can take to protect children from the risk of harm related to having too many legal parents while still respecting the rich diversity in family structures that exists today.

C. Respecting LGBTQ+ Families

1. The Question

The final question that this Article will address regarding the boundaries of multi-parentage is how to structure multi-parentage laws in a way that minimizes the risk of courts using such laws to impose a hetero- and bio-normative family structure on LGBTQ+ families. A number of scholars have expressed concerns about the potential for hetero- and bio-normative biases to influence judges' decisions in the multi-parentage context.[403] Indeed, at least one multi-parentage advocate has explicitly identified the potential of "filling the gap of the missing 'gender'" in families headed by same-sex parents as a reason for why states should recognize multi-parentage.[404]

One common scenario in which this issue may be particularly likely to arise involves LGBTQ+ couples who utilize known gamete providers to conceive their children. LGBTQ+ couples may choose to obtain gametes from a known—as opposed to anonymous—provider for various reasons. These reasons may include, "concern for the future medical and emotional needs of the child," a higher comfort level conceiving with the gametes of someone the couple knows, or cost-related considerations.[405] In many cases, while the couple intends for the known gamete provider to have some level of contact with the child, they do not intend for the provider to play a parental role (i.e., they do not intend to create a multi-parentage family structure).[406] Over the years, there have been a number of cases in which a known sperm provider seeks to establish parentage against the wishes of a same-sex couple, and the parties dispute whether the sperm provider should be considered a donor with no parental rights

402. Cal. Fam. Code § 3040(e) (West 2021).

403. Appleton, *supra* note 4, at 54–55; Fiona Kelly, *Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law*, 21 Can. J. Fam. L. 133, 140, 172 (2004); NeJaime, *supra* note 19, at 2362.

404. Yehezkel Margalit, *Artificial Insemination from Donor (AID)—From Status to Contract and Back Again?*, 21 B.U. J. Sci. & Tech. L. 69, 100–01 (2015).

405. Deborah L. Forman, *Exploring the Boundaries of Families Created with Known Sperm Providers: Who's In and Who's Out?*, 19 U. Pa. J.L. & Soc. Change 41, 64 (2016); *see also* Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 357 (N.Y. App. Div. 1994).

406. *See Thomas S.*, 618 N.Y.S.2d at 358; Leckie v. Voorhries, 875 P.2d 521, 522 (Or. Ct. App. 1994); Cahn & Carbone, *supra* note 170, at 406; Forman, *supra* note 405, at 47.

and responsibilities or, instead, a legal parent.[407]

Historically, the results of such cases were mixed and difficult to predict.[408] In many states, donor non-paternity laws state that a man who provides sperm to a licensed physician for use in the insemination of a woman other than his wife—a process that typically includes the man signing a consent form agreeing to relinquish parental rights[409]—is not the legal parent of any resulting children unless the parties have agreed otherwise.[410] However, these laws are not always determinative in situations involving same-sex couples and known sperm providers. As an initial matter, it is not clear in all states that donor non-paternity laws extend to known donors.[411] Moreover, even if a state's donor non-paternity law extends to known donors, it may not apply if the parties failed to comply with the law's formal requirements.[412] For example, a common requirement of donor non-paternity laws is that the conception involved the assistance of a physician[413] or medical technology,[414] which excludes situations involving at-home inseminations or conceptions that occur via sexual intercourse.[415] In addition, the language of some donor non-paternity laws refers only to conceptions that occur via insemination, leaving it unclear whether the law applies to conceptions that occur via other forms of assisted reproduction.[416] In a few jurisdictions, the language of the donor non-paternity law refers only to conceptions by married women.[417] Donor non-paternity laws also may not prevent a sperm provider from establishing parentage where he has played a role in the child's life after birth, making the parties' intent less clear,[418] or where he asserts a claim

407. *See, e.g.*, Doherty v. Leon, 472 P.3d 531, 533–34 (Ariz. Ct. App. 2020); N.A.H. v. J.S., No. 1537 WDA 2017, 2018 WL 1354356, at *1–3 (Pa. Super. Ct. Mar. 16, 2018); *In re* Christopher YY. v. Jessica ZZ., 69 N.Y.S.3d 887, 889 (N.Y. App. Div. 2018); *In re* Joseph O. v. Danielle B., 71 N.Y.S.3d 549, 551 (N.Y. App. Div. 2018); McNair v. Shannon, No. CV136017755, 2014 WL 1345353, at *1 (Conn. Super. Ct. Mar. 12, 2014); Janssen v. Alicea, 30 So. 3d 680, 681 (Fla. Dist. Ct. App. 2010); Browne v. D'Alleva, No. FA064004782S, 2007 WL 4636692, at *1 (Conn. Super. Ct. Dec. 7, 2007); K.C.C. v. C.D.A., No. SU-16E-0019 (Mass. Probate & Fam. Ct. Sept. 16, 2016) (on file with author); C.O. v. W.S., 639 N.E.2d 523, 524 (Ohio Ct. Com. Pl. 1994); *Thomas S.*, 618 N.Y.S.2d at 357; Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 533 (Cal. Ct. App. 1986).

408. Forman, *supra* note 405, at 43.

409. Deborah L. Forman, *Embryo Disposition, Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 396 (2013).

410. Feinberg, *supra* note 21, at 121.

411. JOSLIN, MINTER & SAKIMURA, *supra* note 49, § 3:15 ("A number of courts have considered whether gamete donor statutes are applicable in cases in which the donor was known to the recipient. Courts have reached conflicting conclusions with respect to this question.").

412. *Id.* § 3:14.

413. *Id.* § 3:13.

414. Bruce v. Boardwine, 770 S.E.2d 774, 777 (Va. Ct. App. 2015).

415. *See* Forman, *supra* note 405, at 53.

416. *See* Patton v. Vanterpool, 806 S.E.2d 493, 494 (Ga. 2017); JOSLIN, MINTER & SAKIMURA, *supra* note 49, § 3:21.

417. JOSLIN, MINTER & SAKIMURA, *supra* note 49, § 3:13.

418. C.O. v. W.S., 639 N.E.2d 523, 525 (Ohio Ct. Com. Pl. 1994); Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 362 (N.Y. App. Div. 1994); JOSLIN, MINTER & SAKIMURA, *supra* note 49, § 3:16.

for parentage that is not based solely on genetics, such as having satisfied a holding out provision.[419]

Due to the varying characteristics of states' donor non-paternity laws, in some of the earlier cases involving a same-sex couple who had conceived a child via non-sexual means with sperm from a known provider, the court recognized the sperm provider as the child's second legal parent.[420] These cases, however, generally occurred at a time when non-biological parents in same-sex relationships lacked significant access to mechanisms that would establish them as the child's parent at the time of birth—such as the marital presumption, consent to ART provisions, and VAPs.[421] As a result, in these cases the child did not already have two legal parents when the sperm provider sought parentage.[422]

In recent years, however, the state of the law governing same-sex parents has changed dramatically. While there is still progress to be made, particularly in the context of unmarried same-sex couples, today same-sex couples have more avenues available for establishing both members as their child's legal parents than ever before.[423] This is especially true of married same-sex couples, who can establish parentage at the time of the child's birth through a variety of mechanisms including, *inter alia*, the marital presumption and spousal consent to ART provisions.[424] Along with broader legal rights and protections for LGBTQ+ individuals and families has come significantly greater societal respect for the integrity of such families.[425] These developments have changed the analysis in cases involving parentage disputes between same-sex couples and known gamete providers.

In recent years, a number of courts have addressed the claims of known sperm providers in situations in which the child was conceived via non-sexual means and born to a member of a married same-sex couple. The trend thus far in such cases has been for the court to recognize the spouse

419. Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 796 (Cal. Ct. App. 2014) (allowing the donor to establish parentage through the state's holding out provision); JOSLIN, MINTER & SAKIMURA, *supra* note 49, §§ 3:16, 3:18.

420. *See, e.g.*, Browne v. D'Alleva, No. FA064004782S, 2007 WL 4636692, at *13 (Conn. Super. Ct. 2007); *Thomas S.*, 618 N.Y.S.2d at 362; *C.O.*, 639 N.E.2d at 525; Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 537–38 (Cal. Ct. App. 1986).

421. *See Browne*, 2007 WL 4636692, at *13; *Thomas S.*, 618 N.Y.S.2d at 362; *C.O.*, 639 N.E.2d at 525; *Jhordan C.*, 224 Cal. Rptr. at 537–38.

422. *See Browne*, 2007 WL 4636692, at *13; *Thomas S.*, 618 N.Y.S.2d at 362; *C.O.*, 639 N.E.2d at 525; *Jhordan C.*, 224 Cal. Rptr. at 537–38; *see also* Forman, *supra* note 405, at 59 (noting that these cases revealed "the particular vulnerability of single women and lesbian couples who choose this method of family building"). In one recent case involving a same-sex couple and a known sperm provider, the sperm provider was able to establish legal parentage, but the same-sex couple either did not assert, or waived, any claim that the member of the same-sex couple who did not give birth was the child's second legal parent. N.A.H. v. J.S., No. 1537 WDA 2017, 2018 WL 1354356, at *6–7 (Pa. Super. Ct. Mar. 16, 2018).

423. *See supra* Part II.

424. *See id.*

425. *LGBT Rights*, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx [https://perma.cc/NK49-RWV6].

of the individual who gave birth as the child's second legal parent and to deny the known sperm provider's claim of parentage.[426] The courts in these cases have set forth various reasons for their decisions. These reasons include: (1) that a petitioner's genetic ties to a child, standing alone, was not a basis for rebutting the marital presumption when the child was conceived through assisted reproduction and born to a married same-sex couple;[427] (2) that while both the marital presumption and the genetic testing presumption applied in the case, the marital presumption controlled because it was based on weightier considerations of policy and logic in situations where the married same-sex couple intended to raise the child;[428] (3) that the petitioner's claim was barred by equitable estoppel because he had "led [the same-sex couple] to reasonably believe that he would not assert—and had no interest in acquiring—any parental rights;"[429] (4) that allowing the petitioner's claim to proceed would be contrary to the best interests of a child who considered the same-sex couple to be her parents;[430] and (5) that the petitioner had not satisfied the jurisdiction's standing requirement for putative fathers who seek to rebut the marital presumption because he had not formed a substantial relationship with the child.[431] In each of the cases, the court noted that because it would disrupt the relationship the child shared with someone they viewed as a parent as well as the child's core understanding of their family, granting the sperm provider legal parentage would result in significant harm to the child.[432]

While these cases recognizing the integrity of families headed by LGBTQ+ parents have represented welcome developments for such families, there is a fear that multi-parentage will undo the progress that has occurred. More specifically, there is a fear that if a court has the power to recognize more than two legal parents, it will be more likely to recognize a known sperm provider as a legal parent even if he would have been unsuccessful in displacing the spouse or partner of the person who gave birth as the child's second legal parent in the two-party parentage context. While the desire to provide the child with a parent who both shares genetic ties with the child and fills in the "missing gender" may no longer

426. *See, e.g.*, Doherty v. Leon, 472 P.3d 531, 536–37 (Ariz. Ct. App. 2020); *In re* Christopher YY. v. Jessica ZZ., 69 N.Y.S.3d 887, 898–99 (N.Y. App. Div. 2018); *In re* Joseph O. v. Danielle B., 71 N.Y.S.3d 549, 553–54 (N.Y. App. Div. 2018); K.C.C. v. C.D.A., No. SU-16E-0019 (Mass. Probate & Fam. Ct. Sept. 16, 2016) (on file with author).

427. *Christopher YY.*, 69 N.Y.S.3d at 898–99.

428. *Doherty*, 472 P.3d at 535–37.

429. *Christopher YY.*, 69 N.Y.S.3d at 898; *see also Joseph O.*, 71 N.Y.S.3d at 553–54 (holding that the petitioner's claim was barred by equitable estoppel because "it [was] undisputed that all of the parties intended that the petitioner would not be a parent to the child, even if they did contemplate some amount of contact after birth"); *Doherty*, 472 P.3d at 538–39 (holding that the petitioner's claim was barred by equitable estoppel due to his agreement with the same-sex couple that he would have no parental rights).

430. *Christopher YY.*, 69 N.Y.S.3d at 898–99; *Joseph O.*, 71 N.Y.S.3d at 553–54.

431. *K.C.C.*, No. SU-16E-0019, at *7.

432. *Doherty*, 472 P.3d at 536–37; *Christopher YY.*, 69 N.Y.S.3d at 893, 898; *Joseph O.*, 71 N.Y.S.3d at 553–54; *K.C.C.*, No. SU-16E-0019, at *7.

be enough to elevate the sperm provider's claim for parentage over the claim of the spouse or partner of the person who gave birth, it could be enough to identify the sperm provider as a third legal parent.

There are various ways in which hetero- and bio-normative biases could factor into the multi-parentage analysis. For example, a court may be less strict in its analysis of whether the petitioner has satisfied one of the grounds for establishing parentage recognized in the jurisdiction, including erring on the side of allowing the petitioner to assert genetics-based grounds when there is a dispute regarding the application of a donor non-paternity law. Discrimination against LGBTQ+ couples also may arise in the final part of the multi-parentage analysis, when the court determines whether recognizing multi-parentage under the circumstances would promote the child's best interests or not recognizing multi-parentage would be detrimental to the child. A court could potentially rely on the fact of the missing gender among the child's existing legal parents or the sperm provider's biological ties to the child to determine that the best interests or detriment standard is satisfied.

If a jurisdiction's recognition of multi-parentage leads to known sperm providers being able to establish parentage in situations in which their claims otherwise would be denied, it would lead to harm and instability for LGBTQ+ couples who conceived their children with the intent to be the child's sole legal parents. As one court explained, allowing sperm providers to obtain parentage in these circumstances "exposes children born into same-gender marriages to instability for no justifiable reason other than to provide a father-figure for children who already have two parents."[433] As the court correctly observed, "This would be indefensible . . . . [I]t would undermine the 'compelling public policy of protecting children conceived via [assisted reproduction].'"[434] While protecting families headed by LGBTQ+ parents from potential judicial bias is a complex undertaking, there are a number of steps states could take to minimize the effects of such bias.

2. Thoughts on Resolving the Question

It is important to note that while the concerns above are warranted and must be addressed, in some situations the recognition of multi-parentage actually may benefit LGBTQ+ couples by allowing both members to obtain parentage in situations where only one of the members otherwise would have been able to do so.[435] For example, courts may be less likely to identify the same-sex spouse or partner of the individual who gave birth as the child's second parent over the person whose sperm was used to conceive the child when the conception occurred through sexual

433. *Christopher YY.*, 69 N.Y.S.3d at 898–99.

434. *Id.* at 899.

435. Cahn & Carbone, *supra* note 170, at 404.

means.[436] The New York case *Q.M. v. B.C.* is illustrative.[437] There, during a period of separation, one member of a married same-sex couple conceived a child through sexual intercourse with a third party.[438] The alleged biological father sought to establish paternity, and the individual who gave birth and her spouse sought to have the spouse recognized as the child's legal parent.[439] When confronted with competing claims of parentage from the alleged biological father (on genetics-based grounds) and the spouse (based on the marital presumption), the court determined that the spouse was not the child's legal parent and, thus, that the alleged biological father could proceed with his claim to establish legal parentage based on genetic ties to the child.[440]

The court distinguished this case, in which conception occurred via sexual intercourse, from cases in which both members of a married same-sex couple consented to one member conceiving a child through assisted reproduction using anonymous donor sperm.[441] While in the latter situation the consent to assisted reproduction statute would provide parentage to the spouse, in the case at hand, because the conception occurred via sexual intercourse, the spouse was seeking to establish parentage pursuant to the marital presumption.[442] The court explained that it was not required to recognize the same-sex spouse of an individual who conceives a child via sexual intercourse with a third party as the child's legal parent pursuant to the marital presumption because the state's Marriage Equality Act "does not require the court to ignore the obvious biological differences between husbands and wives . . . [and] neither spouse in a same-sex female couple can father a child."[443] If multi-parentage had been an option, however, the court may have been more likely to also recognize the spouse as a legal parent.[444] Importantly, the steps proposed below, which are aimed at helping to protect LGBTQ+ parents from having multi-parentage imposed on them in inappropriate circumstances, would be unlikely to dissuade courts from recognizing multi-parentage in appropriate circumstances where it would benefit LGBTQ+ parents.

An initial step that states should take is to avoid adopting a legal framework governing multi-parentage that reinforces hetero- and bionormativity. The approach taken in Canada's Uniform Child Status Act is

436. *Compare* Q.M. v. B.C., 995 N.Y.S.2d 470, 476 (N.Y. Fam. Ct. 2014) (holding that the biological father could establish paternity of a child conceived through sexual intercourse and born during a same-sex marriage), *with* McNair v. Shannon, No. CV 136017755, 2014 WL 1345353, at *3 (Conn. Super. Ct. Mar. 12, 2014) (denying the putative father standing to establish paternity of a child conceived through sexual intercourse and born during a same-sex marriage where the putative father had not formed a relationship with the child and the child was being raised in a stable family unit).

437. *See Q.M.*, 995 N.Y.S.2d at 470.

438. *See id.* at 472.

439. *See id.* at 471.

440. *See id.* at 476.

441. *See id.* at 474.

442. *See id.*

443. *Id.*

444. Cahn & Carbone, *supra* note 170, at 404.

an example of the type of multi-parentage framework that states should avoid. The Act provides for the recognition of multi-parentage only when there is a preconception agreement executed by the individual who will gestate the child, their spouse or common law partner, "and another person(s) who intend(s) to provide their human reproductive material."[445] In the vast majority of cases, the type of agreement recognized by the Act will involve a female same-sex couple (one of whom will gestate the child) and a male sperm provider.[446] The province of British Columbia has adopted a similar approach, limiting multi-parentage recognition to preconception agreements between (1) intended parents and the "birth mother," or (2) the birth mother, the birth mother's spouse or partner, and "a donor."[447] As one scholar noted, the practical effect of this type of approach is that "the only kind of . . . family capable of being created is one in which a child being raised by same-sex parents will acquire a third legal parent who is both the child's other biological progenitor as well as an individual of the opposite sex."[448]

The type of approach reflected in Canada's Uniform Child Status Act and British Columbia's multi-parentage provision sends the message that the only purpose of multi-parentage is to allow children to have a legally recognized relationship with individuals with whom they share biological ties; individuals who, in most cases, will "fill in the gap of the missing gender."[449] States should seek to avoid sending this message by structuring their multi-parentage laws in a way that does not privilege hetero- and bio-normativity. More specifically, states' multi-parentage laws should recognize that individuals seeking to establish legal parentage of a child who already has two legal parents can utilize mechanisms that do not require the existence of genetic ties. These mechanisms may include, for example, adoption, equitable parenthood doctrines, holding out provisions, VAPs, and consent to ART provisions.

Another important step for states to take in this context is to make clear both that donor non-paternity laws extend to known donors and that an individual who is a donor cannot establish parentage on genetics-based grounds. The law should specify that a donor can establish parentage only if, without consideration of their genetic ties to the child, they are able to satisfy one of the other grounds for parentage establishment. This will help to ensure that a donor is not deemed a legal parent against a LGBTQ+ couple's wishes simply because the couple chose a known donor or allowed the donor to have some degree of contact with the child.

445. *See* UNIF. CHILD STATUS ACT § 9 cmt. (UNIF. LAW CONF. OF CAN. 2010).

446. *Id.* § 9 cmt.

447. Family Law Act, S.B.C. 2011, c 25, § 30(1)(b) (Can.).

448. Fiona Kelly, *Multiple-Parent Families Under British Columbia's New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting?*, 47 U.B.C. L. REV. 565, 568 (2014).

449. *See supra* note 404 and accompanying text.

Finally, states' multi-parentage provisions should identify the types of considerations that the court should and should not weigh in the final step of the multi-parentage analysis. This part of the analysis, depending on the state, requires the court to determine either that the failure to recognize multi-parentage would be detrimental to the child or that recognition of multi-parentage would promote the child's best interests. There are a number of important steps that states could take in this regard. As an initial matter, states could follow the approach of California courts in requiring that, in order to satisfy the detriment or best interests analysis, an individual who is seeking to establish parentage of a child who already has two existing legal parents in a contested case must prove that they share a relationship with the child that is parental in nature.[450] This is another step that would help ensure that a LGBTQ+ couple who simply allows their child to have some contact with a known donor does not risk having a third parent imposed on their family.

The law also should provide that considerations relating to the genders of the existing legal parents and the individual seeking to establish parentage are improper in the detriment or best interests analysis. Explicitly excluding gender-based considerations would not be outside the norm for standards governing best interests determinations. In the custody realm, most states already specify that in considering the custody arrangement that would promote the child's best interests, the court may not give preference to a parent based upon their gender.[451] States should also specify, as California courts have, that the existence of biological ties between the petitioner and child is not, in and of itself, sufficient to support a finding that denying the multi-parentage claim would be detrimental to the child.[452] As one court explained, "the fact that [a child's parents] are both mothers does not warrant a finding that the child has an interest in knowing the identity of, or having a legal or familial relationship with, the man who donated sperm that enabled the mother's conception."[453] While LGBTQ+ families unfortunately may still sometimes encounter judicial bias, the proposed steps will help to minimize the risk that such bias will be determinative of the result in multi-parentage cases.

V. CONCLUSION

Legal recognition of multi-parentage is increasing at an impressive pace in the United States. As a result, the time has come to carefully consider how to structure the laws that will establish the boundaries of multi-parentage recognition. Important questions remain regarding, *inter*

450. *See supra* note 182 and accompanying text; *see also* M.M. v. D.V., 281 Cal. Rptr. 3d 361, 370 (Cal. Ct. App. 2021) ("Accordingly, 'an appropriate action' for application of [the multi-parentage provision] is one in which there is an *existing* parent–child relationship between the child and the putative third parent, such that 'recognizing only two parents would be detrimental to the child.'").

451. Feinberg, *supra* note 52, at 357.

452. *M.M.*, 281 Cal. Rptr. 3d at 372–73.

453. *In re* Christopher YY. v. Jessica ZZ., 69 N.Y.S.3d 887, 898 (N.Y. App. Div. 2018).

alia, whether to require the consent of all of the child's existing legal parents for multi-parentage establishment and the form any required consent must take, the wisdom of setting a cap on the number of individuals who can attain legal parentage, and how to ensure that multi-parentage does not result in a hetero- and bio-normative family structure being imposed on LGBTQ+ families. Each of these questions raises complex issues that merit significant attention. The manner through which states choose to address these questions will have profound and lasting effects on children, parents, and families throughout the United States.