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The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage

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THE PARENTAGE PUZZLE: THE INTERPLAY BETWEEN GENETICS, PROCREATIVE INTENT, AND PARENTAL CONDUCT IN DETERMINING LEGAL PARENTAGE

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INTRODUCTION

A wife has a brief affair but soon ends it without ever telling her husband. When the couple find out they are expecting a baby, they are overjoyed. They both assume the baby is the husband's until standard blood tests taken at the baby's birth exclude the husband as a possible biological father. After counseling they are able to resolve their conflicts and remain together, welcoming the baby into their family. However, they also allow the baby's biological father and his wife to spend time with the baby, including weekly overnight visits. Upon the biological mother's return to work, the biological father's wife assumes childcare responsibilities. When the child is two years old, the biological mother and her husband decide that they no longer want the biological father and his wife involved with their family, and they cut off contact.¹

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1. See *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 608 (Cal. Ct. App. 2004) (discussing the background of a case with factual similarities, involving a child with two "fathers"—the child's biological father and the husband of the child's mother).

How many parents does this child have, and who are they?

A lesbian couple decide to have a child together. One provides the eggs, which are fertilized with sperm from an anonymous sperm donor and then implanted in the uterus of the other. They give birth to twins, whom they raise together for five years. However, they never tell the twins that the mother who did not give birth is actually their genetic mother. When they break up, the birth mother asserts that she is the only legal parent and tries to cut off contact between the twins and the genetic mother.²

Do these children have one mother or two?

A woman gives birth to a baby boy. Within a few months, her older daughter, who lives with her, also gives birth to a baby. Mother and daughter raise the two babies together, and the daughter nurses both babies while her mother is at work.

When her mother dies suddenly, the daughter continues to raise the children together as siblings. She has another baby of her own and the three children grow up believing that they are siblings and that the young woman is their mother. In school records and other official documents, however, she acknowledges that one of the children is her biological brother.

When this young woman gets arrested for peripheral involvement in a drug conspiracy, all three children are temporarily taken from her. As a mother, she is entitled to reunification services with her two biological children, but the third child—her biological brother—is in danger of being separated from the other two children and placed in foster care.³

What is the legal relationship of this young woman and this child?

A collection of factors have combined to make this an extraordinarily complex and confusing time in history for determining legal parentage of children. These factors include the following:

- (1) The mind-boggling number of children in foster and kinship care—creating a pressing need to do a better job of finding “parents” for young and vulnerable children;
- (2) The rapid changes in medical technology whereby egg donors, sperm donors, in vitro fertilization, and surrogacy are becoming commonplace;
- (3) The rise in divorce rates and the accompanying rise in stepparent and “blended” families; and

2. See *K.M. v. E.G.*, 117 P.3d 673, 680 (Cal. 2005) (holding that both lesbian partners were mothers of the twins).

3. See *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 709 (Cal. Ct. App. 2003) (issuing an order granting the woman presumed mother status and de facto parent status of her biological half-brother).

- (4) The increasing numbers of single people and same-sex couples choosing to become parents through assisted reproduction or adoption.

All of these phenomena combine to create a perplexing and fascinating puzzle—the parentage puzzle.

As our courts and legislatures grapple with solving this puzzle, the primary factors they have considered are procreative intent, genetics, the marital presumption,⁴ and parental conduct. In the “traditional” family model, all of these factors lead to the same conclusion: that the husband and wife are the parents of the child. In other words, in such a family, the genetic parents have intentionally conceived their children within the context of their marriage and will be acting in the role of parents with regard to those children. But this model “traditional” family is no longer the norm, or even the majority, and, in an ever-increasing number of cases, legal and social policy issues arise because these factors do not all point to the same people.

Further, as we redefine and broaden what we mean by the term “parent,” more and more situations surface where more than two people fit our expanded definitions. When we look to intent and conduct—instead of only biology or marriage—to create legal parent-child relationships, it quickly becomes clear that there may be more than two people who are candidates for the legal title “parent.”

So far, courts have been reluctant to find more than two parents for any given child due to some combination of distaste for “non-traditional” families and concern about putting children in the middle of increasingly complex custody disputes. While courts have expanded their definitions of “parent” to include more people and encompass adults parenting in less traditional families, including same-sex families and families created with the use of assisted reproductive technologies, they have maintained the rigid idea that a child can have only two legal parents. Thus, even when courts find that three or more adults have standing to seek parentage, the outcome of such cases still tends to protect the child’s relationship with only two of those adults. Frequently, the best interests of the child are neither considered in the process nor served by the outcome.

Contrary to the fears of some courts, finding parentage in more than two

4. See Debi McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: Is It Actually in the Best Interests of Children to Divorce the Current Application of the Best Interests Marital Presumption of Paternity*, 5 WHITTIER J. CHILD & FAM. ADVOC. 345, 348 (2006) (asserting that “marital presumption,” included in some form in most state family codes, presumes that a child conceived during and/or born into an intact marriage is the legal child of both the husband and the wife). Whether this presumption is a conclusive presumption or a rebuttable presumption, and what facts will cause the presumption to be rebutted, varies from state to state. *Id.* at 351

adults need not lead to further fragmentation of physical or legal custody; instead, the courts can and should move to a “best interests” analysis⁵ on behalf of children in which *all relevant adults* can be considered. Presumably, it will only be in the unusual case that, after due consideration, a court ultimately divides physical custody among more than two adults. But without a finding of parentage, the adults who are “non-parents” generally find themselves shut out completely, and children end up losing all contact with and support from adults on whom they had relied and who had functioned as their parents. Further, the courts’ formulaic refusal to consider the option that children can have more than two parents is leading to some vicious, and I submit unnecessary, tugs of war between fit and caring individuals who might otherwise be able to forge productive co-parenting arrangements to the benefit of the child.⁶

This article will explore parentage issues affecting two specific categories of children: (1) children conceived with the use of Assisted Reproductive Technologies (“ART”), including those born to same-sex couples; and (2) children born as a result of extra-marital affairs. I will examine how courts have determined who should be recognized as legal parents and consider whether it is in the best interests of children to recognize more than two legal parents when the children are intentionally conceived and/or successfully parented by more than two people. Finally, I will argue that courts should entertain parentage actions, as well as custody and/or visitation actions, brought by as many adults as have meaningfully contributed to parenting a child. By not mechanistically limiting the number to two, some critical adults will not find themselves completely shut out of the process. In addition, I will argue that courts should use a best interests approach to resolving any disputes among these adults.

I. ESTABLISHING PARENTAGE IN FAMILIES OF CHOICE

A. *Children Conceived Using Assisted Reproductive Technologies*

In the last twenty years, advances in modern medicine have made it possible for many people previously considered infertile to conceive and bear children. In the simplest case, this involves *in vitro* fertilization of a wife’s egg with her husband’s sperm, with the resulting embryo transferred

5. Nolo, Glossary: Best Interests of the child, <http://www.nolo.com/definition.cfm/Term/2AC7A5A3-29CC-44C8-ACCBC7DCB1F09395/alpha/B/> (last visited Apr. 4, 2007) (defining what is involved in a “best interests” analysis, which is the test the courts use when deciding who will take care of a child).

6. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (affirming a lower court decision where a child was found to have no legal relationship with her genetic father because the California statute at issue made it irrelevant for paternity purposes who begot the child; if the child was subsequently born to a married mother, the mother’s husband is responsible for the child).

back into the wife's womb for gestation. In this scenario, the husband and wife intentionally are procreating children conceived of their own genetic material and presumably are going to raise those children, posing few of the special problems involved in determining parentage in the modern era. However, families created with the use of ART are often much more complicated.

The importance of the ART cases is twofold. First, these cases call into question the value we place on genetics in assigning parental rights, in light of the fact that many ART cases involve children who are intentionally conceived on behalf of parents to whom they are not genetically related. Second, these cases highlight the issue of procreative intent as a basis for establishing legal parenthood.⁷ By doing so, ART cases have paved the way for many of the cutting edge developments in family law, and, therefore, they serve as an important starting place for examining issues of genetics, intentionality, and parental responsibility.

Surrogacy is fast becoming one of the most traditional of the "non-traditional" ways of conceiving a child. There are two types of surrogacy: gestational and traditional. Gestational surrogacy involves a surrogate who gestates the child but has no genetic relationship with it; whereas, in "traditional" surrogacy, the surrogate's own egg is used, rendering her both the genetic and the gestational mother.

When a heterosexual married couple conceive a child using the wife's egg fertilized *in vitro* with the husband's sperm, but the baby is carried to term by a "gestational surrogate," there are two possible mothers: the genetic mother and the gestational mother.⁸ Most states that have ruled on this type of surrogacy arrangement have found that the husband and wife are the legal parents of the child, and that the woman who carried the child is not a parent based on one or both of two theories: intentionality and genetics.

The lead cases in this area come from California and Ohio, and they resolve the issues in very different ways. In *Johnson v. Calvert*,⁹ the

7. See William Joseph Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1 n.173 (1990) (defining "procreative intent" to mean the intentional conduct by which people have chosen to conceive children with the intent to parent those children).

8. See UNIF. PARENTAGE ACT § 102 (amended 2002) (abandoning use of the term "surrogate" in favor of the term "gestational mother" in the most recent version of the Act, approved by the American Bar Association in 2002 and now being circulated by the National Conference of Commissioners on Uniform State Laws). As explained in their Comment to Section 102: "For purposes of this Act, a woman giving birth to her own genetic child, a.k.a. 'birth mother,' is distinguished from a 'gestational mother.' The former is both a gestational and genetic mother, while the latter also gives birth to a child, who may or may not be her genetic child. In the Act the term 'gestational mother' is narrowly defined to restrict it to a situation in which a woman gives birth to a child pursuant to a gestational agreement . . ." *Id.*

9. 851 P.2d. 776, 776 (Cal. 1993) (discussing the factual background of the case,

California Supreme Court resolved a dispute between a child's genetic/intended mother and the gestational surrogate by placing dispositive weight on the parties' pre-birth intentions. The court found that:

[A]lthough the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as a means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own is the natural mother under California law.¹⁰

In *Johnson*, the American Civil Liberties Union (“ACLU”) filed an amicus brief suggesting that the appropriate outcome, where both the gestational mother and the genetic mother desired a continued relationship with the child, would be to find that the child had two legal mothers.¹¹ In other words, the ACLU argued that the child had three parents: the father, the genetic mother, and the gestational mother. The court declined to follow this suggestion, finding that:

Even though rising divorce rates have made multiple parent arrangements common in our society, we see no compelling reason to recognize such a situation here. . . . To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish [Mrs. Calvert's] role as mother.¹²

“[F]or any child,” the court concluded, “California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.”¹³

Years after *Johnson* was decided, California passed the Domestic Partners Rights and Responsibilities Act of 2003, which provides that almost all the rights and responsibilities of married couples now apply to registered domestic partners under California law.¹⁴ This presumably

wherein a couple contracted with a woman to bear a child using the couple's genetic material; when the woman attempted to back out, the couple sued to have their rights as parents of the child enforced).

10. *Id.* at 782 (reasoning that the intention of the parties involved determines parenthood as legally understood).

11. *See id.* at 781 n. 8 (rejecting the ACLU's argument because recognizing a third party's parental status would diminish the role of the genetic mother, whom the court deemed to be the parent of the child).

12. *Id.*

13. *Id.* at 781. *But see* *Elisa B. v. Superior Court of El Dorado County*, 117 P.3d. 660, 665-66 (Cal. 2005) (overruling the premise that a California child can have only one natural mother in the context of children born into lesbian partnerships).

14. CAL. FAM. CODE § 297 (2007) (codifying the Domestic Partners Rights and

includes the marital presumptions attaching to children born during a marriage.¹⁵ By so doing, and under case law discussed below, California has acknowledged that a child *can* have two natural mothers (using the term “natural” as a term of art referring to a non-adoptive legal mother¹⁶), in the persons of registered same-sex domestic partners who give birth during their partnership.¹⁷ With California now recognizing, at least in this limited context, that a child can have two natural mothers, question why this same principle could not be applied in the context of a surrogacy case to find that both the gestational and the genetic mothers are legal mothers with a right to shared custody or, at the very least, continued contact through visitation.¹⁸

The potential desirability of such a result is illustrated by *In re Marriage of Moschetta*, a California surrogacy case decided after *Johnson*, in which a surrogate gave birth to a child conceived under a traditional surrogacy arrangement.¹⁹ In this case, the court applied the rules of *Johnson* whereby intent is determinative *if the genetic mother and the gestational mother are two different women, thereby creating a “tie” between two mothers*, and determined that where the surrogate was both the genetic and the gestational mother, she was the natural and legal mother of the child.²⁰

Responsibilities Act of 2003 and providing that domestic partners have the same rights and responsibilities as married couples).

15. See, e.g., CAL. FAM. CODE § 7611(a) (2007) (stating that a man is presumed to be a father if he and the child’s natural mother are or have been married to each other and the child is born during the marriage or within 300 days after its end); CAL. FAM. CODE § 7613(a) (2007) (providing that a man is the natural father of a child if that child is conceived with his consent by assisted reproduction using donor sperm).

16. See *Elisa B.*, 117 P.3d. at 666 (clarifying that what they were objecting to in *Johnson v. Calvert* was not the possibility that the child would have two mothers, but rather the possibility that the child would end up with three parents—two mothers and a father).

17. See CAL. FAM. CODE § 297.5 (2007) (codifying the Domestic Partner Rights and Responsibilities Act of 2003, which provides in Part (a) that: “Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses). Part (d) goes on to expressly provide that: “The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses.” CAL. FAM. CODE § 297.5.

18. See, e.g., *K.M. v. E.G.*, 117 P.3d 673, 682 (Cal. 2005) (finding that a child conceived by a lesbian couple, with one woman providing eggs which were *in vitro* fertilized with donor sperm and implanted in the uterus of the other woman, was the “natural” and legal child of both women).

19. 30 Cal. Rptr. 2d 893, 894 (Cal. Ct. App. 1994) (distinguishing “traditional” surrogacy, where a woman is impregnated with the sperm of a married man with an understanding that the child will legally belong to the married man and his wife, from “gestational” surrogacy, where the sperm of a married man is united with his wife’s egg, and the resulting embryo is implanted in the uterus of another woman).

20. *Id.* at 900-01 (determining that, under *Johnson v. Calvert*, the intention of the “parents” is only an issue if parentage cannot be determined by the terms of the Uniform

Because there was no “tie” that needed breaking, procreative intent was irrelevant. The court also chose to discount the fact that the “intended mother” had raised the child from birth.²¹

This case, above all other ART cases I have found, illustrates the downside of the position that children can have only two legal parents. Marissa Moschetta was intentionally conceived by a married couple who very much wanted her.²² However, the baby was the full biological child, both genetically and gestationally, of the surrogate Elvira Jordan.²³ To find that Elvira Jordan had no legal rights would go against fundamental principles of parentage and adoption, whereby a woman who gives birth to her own genetic child is a full legal mother whose rights cannot be terminated without her consent after the child is born, absent some clear indication of unfitness.²⁴ Yet when the Moschettas divorced, because the child was only allowed two legal parents, the child lost all legal (and actual) connection to Mrs. Moschetta, who had acted as her mother up to that point. Instead, custody was divided between the husband and the surrogate, who had no practical basis for sustaining a workable co-parenting arrangement together.

And in fact, they did not sustain such a relationship. I have spoken to the attorneys involved in the *Moschetta* case to learn the “story behind the story.” After the court’s ruling, Mr. Moschetta took advantage of the class and educational differences between himself and Elvira Jordan, forcing her out of the picture and causing the child to lose contact with both mothers.²⁵ Ultimately, the child was taken to another state to be parented solely by her father.²⁶ Interestingly, the wife and the surrogate ended up as allies in

Parentage Act, which California had codified, and that in this case the Uniform Parentage Act provided an answer without considering intent).

21. *Id.* at 897 (discussing why receiving the child into the home of one of the women does not necessarily make her the child’s presumed mother); see also *In re Baby M.*, 537 A.2d 1227, 1234 (N.J. 1988) (reaching a decision similar to that in *Moschetta*, by determining that the husband/genetic father and the surrogate were the child’s legal parents and awarding custody to the genetic father but providing visitation to the surrogate based on her genetic and gestational relationship with the child).

22. See *id.* at 895 (discussing how, even after separating as a married couple, the child’s parents—as well as the surrogate mother—all fought for custody of the child, leading to the litigation).

23. *Id.* (discussing the “traditional” surrogacy procedure, wherein Elvira Jordan was artificially inseminated with Robert Moschetta’s sperm using her own egg; thus, Jordan was both the gestational and genetic mother of the child).

24. See *id.* at 894 (asserting that, in “traditional” surrogacy, the surrogate is both the genetic mother—her egg is used—and gestational mother because she gave birth to the child).

25. Telephone Interview with Leslee J. Newman, attorney for Cynthia Moschetta (2005).

26. *Id.*

trying to stop this from happening, but to no avail.²⁷

How would young Marissa Moschetta's life have been different had the court ruled that she could have a legal relationship with Mr. Moschetta, Mrs. Moschetta, and the surrogate who was her genetic and gestational mother? It is, of course, impossible to know. But with the women having a cooperative relationship and the husband not, the chances certainly are much improved that Marissa would have ended up with more than one functional parent. And what would have been the harm in such a finding?

Arguably, allowing more than two adults to petition the courts for custody or visitation increases the odds of litigation and adds to the complexity and contentiousness of whatever litigation does occur at the expense of the children. But preventing all parties who have a parental interest in the child from participating in custody litigation creates a substantial risk that children's most important relationships may be left unprotected by the courts. In my assessment, this risk outweighs any arguable benefits flowing from rigid adherence to a rule that only recognizes the possibility of two legal parents in a child's life.²⁸

Ohio has taken a completely different philosophical approach to determining parentage in the surrogacy context—albeit one that will often result in the same outcome. Explicitly rejecting California's intent-based analysis as too confusing and prone to uncertainty but applying a much more rigid and inflexible approach in its stead, Ohio has chosen to rely exclusively on genetics, finding that: "The test to identify the natural parents should be, 'Who are the genetic parents?'"²⁹ According to Ohio law:

[W]hen a child is delivered by a gestational surrogate who has been impregnated through the process of in vitro fertilization, the natural parents of the child shall be identified by a determination as to which individuals have provided the genetic imprint for that child. If the individuals who have been identified as the genetic parents have not relinquished or waived their rights to assume the legal status of natural parents, they shall be considered the natural and legal parents of that child.³⁰

27. *Id.*

28. *See, e.g.*, CAL. FAM. CODE § 3101(a) (2007) (differing from many states that have laws that only allow the natural parents to have custody, and joining a number of states that have case law and/or statutes allowing stepparents to obtain visitation if the court determines that a continued relationship between the stepparent and the child is in the child's best interest); *see also* DivorceSource.com, Stepparent's Right to Request Custody or Visitation, <http://www.divorcesource.com/tables/stepparentscustody.shtml> (last visited Jan. 21, 2007) (listing state statutes on custody and visitation rights of stepparents for all fifty states and the District of Columbia).

29. *Belsito v. Clark*, 67 Ohio Misc. 2d 54, 64 (Ohio Ct. Comm. Pl. 1994).

30. *See id.* at 66.

The Ohio approach may, at first glance, be attractive for its simplicity, but the issue of what constitutes a valid waiver of rights by a genetic parent in the context of ART cases can itself be complex. In *K.M. v. E.G.*, a lesbian couple conceived twins using K.M.'s eggs, which a medical center fertilized *in vitro* with donor sperm and then implanted into E.G.'s womb.³¹ K.M. signed a standardized "egg donor consent" form at the hospital where the procedure was done, by which she waived all parental rights to any children conceived from her eggs.³² However, after the twins were born, the two women brought the children home together and raised the children together for five years.³³

After dissolution of the partnership, E.G., the twins' gestational mother whose name appears on their birth certificates as a result of her having given birth to them, alleged that K.M. was in fact only an egg donor, having waived her parental rights by signing the medical consent form.³⁴ Although she won this argument before the court of appeal,³⁵ the California Supreme Court rejected this logic and held that the usual rules for an egg or sperm donor do not apply where the genetic mother "supplied ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home."³⁶ The court ruled that both women were legal parents.³⁷

As *K.M. v. E.G.* illustrates, a rule based solely on genetics is inadequate to deal with the variety and complexity of real-life situations. A further example of this complexity is found in a Pennsylvania case, where an unmarried heterosexual couple arranged to conceive with the assistance of an egg donor and a gestational surrogate.³⁸ However, the surrogacy contract failed to specify who the legal mother would be and was signed by

31. 117 P.3d 673, 675 (Cal. 2005) (holding that when lesbian partners decide to have a child, where one partner provides her ova and the other partner bears the child, both are the child's parents).

32. *Id.* at 675-76 (explaining the hotly contested dispute about whether K.M. in fact intended to be an egg donor at the time the Medical Center retrieved her eggs, or whether she intended to be a parent but was forced to sign the form because the clinic would not perform the *in vitro* fertilization procedure without her signature).

33. *Id.* at 676-77 (stating that from December 1995 until September 2001 the children lived with both K.M. and E.G., that two school forms listed both K.M. and E.G. as the twins' parents, and that the twins' nanny testified that both children referred to K.M. and E.G. as their mothers).

34. *Id.* at 676 (recounting E.G.'s testimony that she wanted to have a child of her own and that without K.M. signing the consent form she would not have accepted K.M.'s ova).

35. *Id.* at 677.

36. *Id.* at 681 (declining to base the ruling on the intent of the parties at the time of conception, as in *Johnson v. Calvert*, in addition to declining to rely on parental conduct, and instead crafted a hybrid rule for this particular set of factual circumstances, whose broader applicability is yet to be determined).

37. *Id.* at 675.

38. *J.F. v. D.B.*, 66 Pa. D. & C.4th 1, 3 (C.P. Ct. Erie County 2004).

the biological father, the egg donor, the surrogate, and the surrogate's husband, but not by the biological father's partner with whom the biological father intended to raise the child.³⁹ When the surrogate gave birth to triplets, the couple who contracted for the babies initially failed to follow through on their obligations with regard to the care and custody of the premature newborns.⁴⁰ The surrogate and her husband therefore stepped in, ultimately taking the babies home from the hospital and caring for them.⁴¹ The couple that originally arranged for the surrogacy contested the surrogate's parental rights based on her lack of a genetic connection to the triplets.⁴²

The Court of Common Pleas of Pennsylvania found that the surrogate assumed the status of legal mother, despite having no genetic connection to the babies and despite the fact that she clearly had no intent to parent them at the time of their conception, by her conduct in gestating and caring for the babies.⁴³ As stated by the court:

A, B and C did not hatch, they were born. . . . D.B. [the surrogate] . . . like E.D. [the father's partner] is not genetically related to the triplets, but carried them in her womb and then gave birth to them. Her every decision prior to their birth has affected them—health, nutrition, prenatal care, etc. In addition, she has not terminated any parental rights she may have to the triplets. She has instead taken the triplets into her home and cared for them along with her three other children. She is more a mother and a parent by her actions than by genetics.⁴⁴

Here the court gave more weight to parental conduct, including prenatal parental conduct, than to either genetics or intent in establishing parentage.

An even greater level of complexity in determining legal parentage occurs when a couple has used both an egg donor and a sperm donor in their procreative process, and, therefore, they are not in any way genetically related to the child. The most complex of these cases in the United States comes from California.⁴⁵ In *In re Marriage of Buzzanca*,

39. *Id.* at 4-5.

40. *Id.* at 5-6 (acknowledging that J.F. and E.D. did not bring the required court order, which would give them legal custody of the triplets, to the medical center where the children were born).

41. *Id.* at 7 (recounting that the surrogate mother's concerns over the lack of visits from the intended parents, the fact that the triplets were still nameless, and E.D.'s lie about visiting the triplets convinced the surrogate to take the triplets to her home).

42. *Id.* at 9.

43. *Id.* at 24 (considering the surrogate's decisions during pregnancy relating to health, nutrition, and prenatal care, along with the fact that she did not terminate her parental rights to the triplets enough to declare her the legal mother in this case).

44. *Id.* at 23-24.

45. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998) (recounting the Buzzanca's decision to have a genetically unrelated embryo implanted in a surrogate; however after fertilization, implantation, and pregnancy, the Buzzancas

John and Luanne Buzzanca wanted to have a child, but both were infertile.⁴⁶ They obtained eggs from an anonymous egg donor and used the sperm of an anonymous sperm donor for *in vitro* fertilization, creating embryos that were implanted into the womb of a married surrogate.⁴⁷ The resulting child, Jaycee, thus had six adults involved in her procreation: an egg donor, a sperm donor, the Buzzancas as “intended parents,” the surrogate, and the surrogate’s husband.⁴⁸ However, while the surrogate was still pregnant, the Buzzancas filed for divorce.⁴⁹ In the dissolution papers, Luanne Buzzanca indicated that the baby was a child of the marriage; John Buzzanca indicated that there were no children of the marriage, maintaining that he should not be held legally responsible for a child that was not genetically his, was not genetically his wife’s, and was not being gestated by his wife.⁵⁰

The trial court agreed with John Buzzanca, finding that the baby had *no legal parents*, a result compatible with the Ohio “pure genetics” approach whereby John and Luanne Buzzanca would not be parents without a genetic connection to the child, even if incompatible with the child’s best interests or any definition of common sense.⁵¹ The court of appeal that heard the case disagreed, finding that when a married couple, unable to procreate without assistance, conceive a child through medical technology with the intent to parent the child, they must be held to the status of legal parents regardless of genetics.⁵² *Buzzanca* may be the ultimate illustration of why a purely genetic model, such as that adopted by Ohio, will not work in the age of modern reproductive technological advances.

The Tennessee Supreme Court recently grappled with these issues in a case involving an unmarried heterosexual couple.⁵³ The couple, Charles and Cindy, decided to have children together.⁵⁴ Due to Cindy’s age, which rendered her own eggs unsuitable for procreation, they obtained

separated, creating a controversy over who Jaycee’s legal parents were. Neither the surrogate nor Mr. Buzzanca made a claim to parentage of the child, while Mrs. Buzzanca claimed that she and Mr. Buzzanca were the lawful parents).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 282-83 (noting that the child was born on April 26th, after Mr. Buzzanca filed for divorce and Mrs. Buzzanca filed her response).

50. *Id.*

51. *Id.* at 291.

52. *Id.* at 293 (concluding that Mr. and Mrs. Buzzanca are the lawful parents of Jaycee after considering the intent to parent as the ultimate basis of its decision, which correlates to the child’s best interest).

53. *In re C.K.G., C.A.G. & C.L.G.*, 173 S.W.3d 714 (Tenn. 2005).

54. *Id.* at 717 (informing that Cindy already had two adult children and grandchildren from a previous marriage, while Charles was childless).

anonymously donated eggs, fertilized them with Charles' sperm, and then implanted the embryos into Cindy's uterus.⁵⁵ As a result, Cindy became pregnant with triplets.⁵⁶ After she gave birth, the two adults and three children lived together as a family for a period of time.⁵⁷ However, the adults' relationship eventually deteriorated and Cindy filed a parentage action seeking custody and child support.⁵⁸ Charles responded that Cindy was not a legal parent because she lacked any genetic connection with the triplets.⁵⁹

Noting that "recent developments in reproductive technology have caused a tectonic shift in the realities which underlie our legal conceptions of parenthood, . . . engender[ing] a bewildering variety of possibilities which are not easily reconciled with our traditional definitions of 'mother,' 'father,' and 'parent,'"⁶⁰ the Tennessee court reviewed both California's intent-based approach and Ohio's genetics-based approach and declined to purely follow either, instead creating a hybrid approach of their own.⁶¹ The Tennessee court decided Charles and Cindy's case on "particularly narrow grounds," focusing closely on the facts of the case and basing its decision on a combination of: (1) the joint procreative intent of the parties prior to the children's conception and birth; (2) the fact of Cindy gave birth to the three children as her own (as opposed to having birthed them for someone else, as a surrogate); and (3) the lack of another party competing with Cindy for the role of "mother."⁶²

The common thread in the California, Ohio, New Jersey, Pennsylvania, and Tennessee cases is that where the genetic parents were known and intended to raise the child, they were found to be legal parents unless they failed to follow through on their parental obligations (as in the Pennsylvania case). It is only where the genetic parents were unknown

55. *Id.* at 717.

56. *Id.* at 718 (acknowledging that Charles intended for the couple to have one child, but, to increase the chances of success, the fertility center used two eggs, one of which divided resulting in triplets since all three embryos survived).

57. *Id.*

58. *Id.*

59. *Id.* at 718-19.

60. *Id.* at 721.

61. *Id.* at 726-30 (finding that "Tennessee's statutory framework for establishing maternity differs markedly from the California and Ohio statutes under consideration in *Johnson and Belsito*. . . . Consequently, neither California's intent test nor Ohio's genetic test is strictly apposite to our statutory scheme").

62. *Id.* at 730 (limiting their holding to cases where there is no controversy between the gestator and the genetic mother). This issue of whether or not there is anyone else competing for a parental role has been a factor favoring expanding definitions of parentage in a number of cases, especially where more traditional definitions of "parent" would either leave a child parentless or would leave a child with only one parent where two parents are actually available. *Id.*

(being anonymous egg or sperm donors) that intent became a significant and distinct factor. But the cases show courts' growing inclination to factor intent into the parentage analysis where procreation is the result of highly intentional conduct, such as in cases involving assisted reproductive technologies. The courts also are showing a willingness to look at parental conduct both before and after birth as relevant to the core parentage determination. This opens the door to the possibility that where intent is murky, where there is a clear intent to share parentage among more than two adults, or where the genetics, intent, and conduct are distributed among more than two parties, courts may soon begin to recognize three-parent families for children conceived through the use of reproductive technologies.⁶³

B. Children Conceived by Same-Sex Couples

While cases involving same-sex parents clearly overlap with other ART cases (e.g., *K.M. v. E.G.*, discussed above with regard to the relevance of a signed medical waiver, which involved a lesbian couple using *in vitro* fertilization to conceive a child), I have chosen to discuss them separately because the courts have generally treated ART cases involving same-sex couples differently from ART cases involving different-sex couples. This difference in treatment is attributable to some combination of institutional discomfort with same-sex families and concern over the implications of recognizing two mothers or two fathers for the same child.

In most of the cases discussed above, heterosexual couples unable to conceive without medical assistance chose to use reproductive technologies to procreate. And, as noted, in each case only two persons intended to be parents. However, when same-sex couples choose to procreate, the biological realities of conception mean that they need some assistance. It is also more common for them to intentionally involve more than two known adults in this process.

Appellate courts in approximately twenty states have addressed the issue of whether the same-sex partner of a lesbian mother has a right to petition for joint custody and/or visitation, where the partner has lived with the family and stood in the role of a parent for a significant period of time but has not established a legal parent-child relationship with the child. At least thirteen of those states have awarded some degree of parental rights to non-biological lesbian mothers, relying on a variety of theories including psychological parenthood, *de facto* parenthood, *in loco parentis*, and equitable parenthood.⁶⁴

63. See *Elisa B. v. Superior Court of El Dorado County*, 117 P.3d. 660, 665 (Cal. 2005) (acknowledging that the lack of a judicial opinion recognizing a "legislative policy limiting a child to two parents" could potentially lead to a child having more than two parents).

64. Deborah Wald, *California is Behind the Times when it Comes to Granting Custody to Same-Sex Parents*, L.A. DAILY J., Oct. 5, 2004, available at <http://waldlaw.net>

The leading national standard for determining when a non-biological mother should have continued access to a child born to a lesbian couple comes from Wisconsin.⁶⁵ The test established by the Wisconsin Supreme Court follows:

To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.⁶⁶

This standard has been followed in a number of other states. For example, in a lesbian custody dispute where the non-biological mother had not adopted the child, the New Jersey Supreme Court recognized the non-biological mother as a psychological parent.⁶⁷ The court identified a "psychological parent" as:

[O]ne who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological need for an adult. This adult becomes an essential focus of the child's life, for he [*sic*] is not only the source of the fulfillment of the child's physical needs, but also the source of his emotional and psychological needs.⁶⁸

In concluding that courts must protect a child's relationship with a psychological parent, the New Jersey court cited what it termed the "thoughtful and inclusive definition of de facto parenthood" enunciated by Wisconsin.⁶⁹ The New Jersey court reiterated the standard, holding that:

/published_articles.html (identifying Colorado, Connecticut, Maine, Massachusetts, Minnesota, Missouri, New Jersey, Pennsylvania, Rhode Island, Washington, and Wisconsin among the thirteen states which have awarded or considered awarding custody and/or visitation rights in lesbian custody disputes).

65. *Id.* (stating that the New Jersey court has described the elements laid out by the Wisconsin Supreme Court as "the thoughtful and inclusive definition of de facto parenthood.").

66. *Holtzman v. Knott*, 533 N.W.2d 419, 421 (Wis. 1995) (establishing the elements necessary to prove the existence of a parent-like relationship with a child when considering a non-custodial parent's visitation rights).

67. *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (holding that the non-biological parent is recognized as a psychological parent after application of the four Wisconsin factors).

68. *Id.* at 551 (quoting *Carter v. Brodrick*, 644 P.2d 850, 853 n.2 (Alaska 1982)).

69. *Id.* (stating that the definition appeases the concerns of governmental bodies in determining the concept of a psychological parent (citing *Holtzman*, 533 N.W.2d at 421)).

[T]he legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged. We are satisfied that that test provides a good framework for determining psychological parenthood in cases where the third party has lived for a substantial period with the legal parent and her child.⁷⁰

More recently, the Colorado Court of Appeals found that the former domestic partner of a child's legal mother had standing to seek joint custody based on her status as the child's psychological parent, even though she had no legally recognized relationship with either the legal parent or the child.⁷¹ The court found that "proof that a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child establishes a compelling state interest sufficient to permit state interference with parental rights" and concluded that "emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a psychological parent"⁷² The court further noted that even though the legal mother had a constitutionally protected parental right and her ex-partner did not, the State of Colorado had a compelling state interest in protecting the child from the harm that would result from termination of her relationship with her psychological parent.⁷³

Other states have reached similar conclusions. In *T.B. v. L.R.M.*, the Supreme Court of Pennsylvania found that the lesbian former partner of a child's biological mother could seek partial custody and visitation based on her standing *in loco parentis* to the child.⁷⁴ In this case, the biological mother argued that her ex-partner did not have standing to seek visitation because she had not adopted their child.⁷⁵ The court responded that a biological parent's rights "do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so."⁷⁶

70. *Id.* at 551-52.

71. See *In re E.L.M.C.*, 100 P.3d 546, 553 (Colo. Ct. App. 2004) (applying the Colorado General Assembly's psychological parenting approach narrowly due to the use of a strict scrutiny analysis, which is necessary in situations involving the fundamental rights of individuals).

72. *Id.* at 558, 561 (concluding that the significance of possible emotional harm to a child due to a curtailment of contact with a non-biological parent is great and warrants an interference by the court).

73. *Id.* at 561.

74. 786 A.2d 913, 914 (Pa. 2001) (determining that the evidence presented demonstrated that the non-biological parent assumed a parental role which gave them standing in seeking visitation rights).

75. *Id.* at 915.

76. *Id.* at 918 (quoting *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996));

Missouri has also granted visitation rights to the lesbian ex-partner of a biological mother, noting that “[a]n award of custody or visitation to a non-biological parent necessarily affects the biological parent’s rights of control, but a child is a person and not chattel over which a biological parent has an absolute possessory interest.”⁷⁷ The court made numerous findings, including that “[c]ourts must re-examine the theory that a child may have only biological parents and adopt a more flexible ‘functional approach,’ as opposed to the traditional, stricter, ‘formal approach,’ for defining family.”⁷⁸ On this basis, the court adopted the doctrine of “equitable parent,” which it found “analogous to the doctrine of ‘equitable adoption.’”⁷⁹ The court then applied this doctrine to the facts before it and found that the ex-partner had established herself as the equitable parent of the child and was therefore entitled to shared custody and visitation.⁸⁰

In states such as those discussed above, which have taken the step of recognizing a child’s relationship with a functional or de facto parent over the objections of the legal parent, it is interesting to consider what would happen in the case of a lesbian couple with a known sperm donor, who actively fostered a strong, parental bond between their child and the donor for a period of years, arguably bringing him within the bounds of the Wisconsin test. Granted, in most such cases, the donor could not meet the “lived with the child” prong of the tests enunciated by Wisconsin and New Jersey, making his role distinguishable from that of the mother’s partner. However, in a case where the donor actually lived with the family, it seems that it would be appropriate to use these same standards to determine whether the child has two, three, or, if the donor’s partner is also involved as a parent, even four parents. If the donor could meet the Wisconsin test, it would be arguable that he should have the same degree of legal rights—to seek custody and/or visitation—as does the second parent.⁸¹

Concerns about the prospect of recognizing three legal parents for

see also L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002) (holding that the rights and responsibilities that arise out of the relationship between a non-biological parent, who assumes the obligations of raising a child, and a child, are the same as the biological parent).

77. *In re T.L.*, No. 953-2340, 1996 WL 393521, at *3 (Mo. Cir. Ct. May 7, 1996) (determining whether a parent can choose at will when to remove parental rights from a non-biological parent).

78. *Id.* at *2.

79. *Id.* (defining an equitable parent as one who retains custody of a child for an extended period of time, demonstrates a genuine concern for the child’s well-being, and developed a relationship with the child under the direction of the biological parent).

80. *Id.* at *2-3.

81. If the lesbian couple has fostered a long-term parental relationship between the donor and the child where the child has spent substantial time with the donor from birth, the child considers him a father, and the donor has contributed to the child’s support, even though the donor never lived with the child so that the Wisconsin test would not strictly apply, I would argue that the donor should have an enforceable right to visitation.

children being raised by their mother, their mother's partner, and their donor/father, are threefold:

- (1) An argument can be made that recognizing more than two parents is against public policy, undermining the traditional nuclear family;
- (2) As mentioned earlier, many courts are concerned that recognizing parentage in more than two adults will lead to more frequent and complex custody battles, or at least create the opportunity for more adults to initiate custody actions; and
- (3) To recognize more than two parents for a child may undermine the legal rights of fit parents to determine with whom their children will associate, in violation of the United States Constitution.⁸²

Although these are serious concerns, refusing to consider the possibility of finding a parent-child relationship between a child and the person who has raised that child elevates principles over practice, trivializing the reality that the loss of a parental relationship can cause devastating harm to a child.

The importance of allowing the courts to consider establishing parentage in adults who would not traditionally have been considered parents is exemplified by a West Virginia case in which a child was born to his mother and her same-sex partner, using sperm of a known donor who was legally recognized as the child's father.⁸³ The couple, Tina and Christina,

planned the birth of Z.B.S. and enlisted the involvement of Clifford K[.] only for the purpose of impregnating Christina [S]. It was their apparent intention together to raise Z.B.S. . . . as a "family" unit Although he [Clifford] has had contact with Z.B.S. since the child's birth, he has performed limited care-giving functions and his planned as well as actual involvement with the child has been limited.⁸⁴

The two women and the child lived together as a family for

82. See *Troxel v. Granville* 530 U.S. 57, 61 (2000) (invalidating the Washington visitation statute which provided that: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interests of the child . . ."). In that case, the mother had reduced the paternal grandparents' visitation with the child following the father's death, so the paternal grandparents sued. *Id.* at 60-62. The Court found that the superior court's order awarding additional visitation to the grandparents "was an unconstitutional infringement on Granville's fundamental right to make decisions concerning the care, custody, and control of her two daughters." *Id.* at 71.

83. See *In re Clifford K.*, 619 S.E.2d 138, 144 (W. Va. 2005).

84. *Id.* at 158.

approximately two and a half years.⁸⁵ Then, after Christina's untimely death, a custody battle developed between Tina (the partner) and Christina's parents, in which Clifford, the donor/father, lent his support to Tina.⁸⁶ Although Tina clearly was not the child's parent by birth or adoption under West Virginia law, the court nevertheless found Tina to be the child's "psychological parent" and awarded her custody.⁸⁷ In finding in Tina's favor, the West Virginia court noted that:

In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions. . . . For this reason, the limited rights of a psychological parent cannot ordinarily trump those of a biological or adoptive parent to the care, control, and custody of his/her child. Nonetheless we hold that, in exceptional cases and subject to the court's discretion, a psychological parent may intervene in a custody proceeding brought pursuant to [West Virginia statutes] when such intervention is likely to serve the best interests of the child(ren) whose custody is under adjudication.⁸⁸

The court went on to conclude that the best interests of the child in this "very unusual and extraordinary" case required that custody be awarded to Tina, the non-biological "psychological" mother.⁸⁹

By way of contrast, the Vermont case of *Titchenal v. Dexter*, which predates Vermont's Civil Union statute, illustrates a court refusing to extend parentage to the ex-partner of a lesbian mother out of concern for broader policy ramifications.⁹⁰ In this case, a lesbian couple adopted an infant after they failed to conceive via artificial insemination.⁹¹ Based on their understanding of Vermont law at the time, only one legally adopted the child, and the other mother remained a non-legal parent; however, they gave the child a surname comprised of their hyphenated last names, they

85. *Id.* at 144.

86. *Id.* (noting that Clifford K.'s initial petition for custody was on behalf of Tina B. and not for his own purposes).

87. *Id.* (finding that the "caretaking" responsibilities that Tina S. provided to the child were so significant that it formed the basis for her consideration as a psychological parent).

88. *Id.* at 157 (quoting *In re Willis*, 207 S.E.2d 129, (W. Va. 1973)).

89. *Id.* at 157-59.

90. See 693 A.2d 682, 690 (Vt. 1997) (holding that the legislature did not create a system that grants visitation rights to third parties, and, thus, any court that grants visitation rights to third parties would be going above and beyond the scope of the Legislature). This case would be decided differently now, at least under circumstances where the women had entered into a civil union, since children born into a Vermont lesbian civil union are presumed to be the children of both mothers.

91. *Id.* at 683.

held themselves out to the child and the world as equal parents, the child called each woman “Mama,” and for the first three and a half years of the child’s life her non-adoptive mother cared for her approximately sixty-five percent of the time.⁹² Following their separation, they shared custody for another five months before the adoptive mother reduced visitation with the non-adoptive mother and refused financial assistance from her former partner.⁹³ Subsequently, the non-adoptive mother sued for shared custody and/or visitation as a *de facto* parent.⁹⁴ The case wound its way to the Supreme Court of Vermont, which ultimately rejected the non-adoptive parent’s suit, finding no “underlying legal basis for plaintiff’s cause of action that would allow the superior court to apply its equitable powers to adjudicate her claim. . . . Notwithstanding plaintiff’s claims to the contrary, there is no common-law history of Vermont courts interfering with the rights and responsibilities of fit parents absent statutory authority to do so.”⁹⁵

Invoking a common, albeit illogical, “slippery slope” argument, the court asserted that if the non-adoptive mother were allowed visitation through court intervention, it would open the door to “various relatives, foster parents, and even day-care providers” seeking visitation against a fit parent’s wishes, or it would encourage abuse of the court system by third parties seeking court-ordered visitation as a means of harassing the legal parents or forcing continuation of an unwanted relationship.⁹⁶ The Vermont court concluded that if the pool of persons who could seek court-ordered visitation was to be expanded, it was for the legislature to make this choice and not the courts.⁹⁷

The issue of how best to protect the autonomy of fit parents, while also protecting children raised in non-traditional families from “parentectomies” when their sole legal parent decides unilaterally to terminate their relationship with another parent, is complex, and there are no easy answers. However, it is clear that children need the courts to take a more functional approach to defining the parent-child relationship, so as to protect children from losing parents solely because the children were born into families the legislatures may not have previously envisioned.

In some of the same-sex cases that come through my law practice, lesbian couples are choosing to use friends as sperm donors expressly *for the purpose of* making sure their children have a bonded, loving

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 684-85.

96. *Id.* at 688.

97. *Id.* at 689.

relationship with their biological father. Likewise gay male couples are choosing to use friends as surrogates *for the purpose of* making sure their children have a bonded, loving relationship with their biological mother. In some of these cases, the intent of the child-seeking couple is that they be sole legal parents with an amicable relationship with the other biological parent. But in others, it is the intent of all parties that the children have a genuine parent-child relationship with all three adults involved in their conception: the biological mother, the biological father, and the partner of the one who will be primary parent. Clearly, there could be four functional parents under this model, if both the biological mother and the biological father are in committed relationships, and all four intend to be parents. This highly intentional, procreative conduct by more than two adults cannot be taken lightly as we review and redefine the term “parent” to comport more closely with modern realities.

II. ESTABLISHING PARENTAGE FOR CHILDREN BORN AS A RESULT OF EXTRA-MARITAL AFFAIRS

Another series of cases crying out for solutions that acknowledge the possibility of children having more than two parents are those involving children born as a result of extra-marital affairs. They add marital presumptions to the mix of factors a court must weigh. In many of these cases, married mothers give birth to children while living with boyfriends, and the children live with and are encouraged to bond with the boyfriend, who may or may not be the genetic father, for some period of time before their mothers reunite with the mothers’ husbands, who then want to claim the children as their own based on traditional marital presumptions. The public policy issues are complex: do we support the child’s right to a relationship with its functional and/or genetic father at the expense of the marital family, or do we support the married couple who wants to live as a nuclear family at the expense of the child having a relationship with its functional and/or genetic father?

Unlike most of the other areas discussed in this article, the United States Supreme Court has weighed in on these cases. The Supreme Court has indicated, in more than one case, that an unwed father has a constitutional right to maintain a legal relationship with his child *if* the man has taken responsibility for the child and has an actual “substantial” relationship with the child.⁹⁸ In other words, for unwed fathers genetics is not enough. For the man to have a parental claim, he must show genetics plus parental conduct. The Court has also approved the conclusive presumption that a

98. See, e.g., *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972) (identifying parental relationships as being more of an enduring relationship rather than only a biological relationship between a parent and a child).

child born into a marital home is a child of the marriage, whether or not the husband actually is the genetic father.⁹⁹

The Supreme Court wrestled with the issue of what to do when the mother is married, but the child also has a “substantial” relationship with the non-husband genetic father in *Michael H. v. Gerald D.*¹⁰⁰ In a 1989 opinion, the Court decided that it was constitutional for the State of California to determine that the marital presumption precluded a genetic father, who had lived with and parented a child for some period of time, from establishing legal parentage.¹⁰¹ This case was decided by a plurality of the Court, however, with five separate opinions filed by the nine Justices, indicating how unsettled the law is in this area.¹⁰²

California has two interesting court of appeal decisions on this issue, both of which point to complexities involved in resolving these disputes, and both of which were ultimately decided based on the extent of bonding, functional parenting, and the best interests of the child. In *Steven W. v. Matthew S.*, Julie was married to Matthew.¹⁰³ In 1986, she moved out of their marital home and moved in with Steven.¹⁰⁴ She told Steven she was divorcing Matthew, but she secretly maintained an intimate relationship with Matthew on the side.¹⁰⁵ In 1987, she talked with both Steven and Matthew about having a child, neither man knowing she was talking with the other.¹⁰⁶ In May 1987, she became pregnant while on a weekend tryst with Matthew (her husband).¹⁰⁷ However, she continued to live with Steven, and she told both men that they were the father.¹⁰⁸ Steven went

99. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion) (identifying an interest in promoting civility and tranquility in families by asserting a father’s right to establish parental rights over a third party).

100. *Id.* at 124 (finding that the government’s interest in maintaining the marital family outweighs a biological father’s liberty interest in rearing his own child).

101. *Id.* at 125 (suggesting that the biological father failed to meet his burden of proof because history and precedent all indicated that the state’s public interest in protecting the marital family far outweighed the biological father private interest in establishing a relationship with his child).

102. See, e.g., *id.* at 133-34 (Stevens, J., concurring) (holding that the biological interest does not outweigh the state’s interest in maintaining the marital family but also reminding the parties that the biological father may possess reasonable visitation rights because he is an “other person having an interest in the welfare of the child” (quoting CAL. CIV. CODE § 4601 (West 1989))). But see *id.* at 141 (Brennan, J., dissenting) (condemning the plurality for its failure to recognize that the modern-day family structure is malleable, and, therefore, the Court should recognize that the biological father possesses a liberty interest in regards to his child).

103. 39 Cal. Rptr. 2d. 535, 536 (Cal. Ct. App. 1995).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

through the pregnancy and childbirth with Julie, fed, bathed, and cared for baby Michael.¹⁰⁹ Matthew did not see Michael until he was several months old.¹¹⁰ Julie, Steven, and Michael lived together as a family until 1990, when Steven discovered that Julie was still seeing Matthew.¹¹¹ Steven moved out but continued to share custody and support of Michael, and, in December 1990, he filed a court action asserting his legal paternity.¹¹² In her response to the action, Julie admitted that Steven was Michael's father.¹¹³ Matthew defaulted.¹¹⁴ However, Matthew subsequently moved for relief from default and, in April 1992, the judgment was set aside.¹¹⁵ Blood tests at that time showed Matthew (the husband) to be Michael's biological father.¹¹⁶

In this case, both Matthew and Steven qualified as presumed fathers under the Uniform Parentage Act,¹¹⁷ Matthew was married to the child's mother at the time of birth, and Steven received the child into his home and held him out as his natural child. The court of appeal resolved these conflicting presumptions in favor of preserving the extant, functional father-child relationship between Steven and Michael.¹¹⁸ As stated by the court:

[I]n the case of an older child [over two years of age] the familial relationship between the child and the man purporting to be the child's father is considerably more palpable than the biological relationship of actual paternity. A man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved. . . . This social relationship is much more important, to the child at least, than a biological relationship of actual paternity.¹¹⁹

In other words, in a victory for the functional approach to defining parentage, Julie's boyfriend was found to be the legal father in preference over Julie's husband who was the biological father of the child.

109. *Id.* at 536-37.

110. *Id.* at 537.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. See CAL. FAM. CODE §§ 7611(a), 7611(d) (2007) (setting the standards, conditions, and presumptions a court may utilize when determining the natural parentage of a child).

118. *Steven W.*, 39 Cal. Rptr. 2d at 538 (quoting *Susan H. v. Jack S.*, 37 Cal. Rptr. 2d 120, 125 (Cal. Ct. App. 1994)) (finding that social policy favors maintaining an ongoing father-child relationship because it protects a child's emotional stability).

119. *Id.* at 549 (quoting *Susan H. v. Jack S.*, 37 Cal. Rptr. 2d 120, 125 (Cal. Ct. App. 1994) (quoting *Estate of Cornelious*, 35 Cal. 3d 461, 465-466 (1984))).

(Presumably, were Julie and Matthew to separate again, Matthew would be entitled to visitation as a stepfather under California's stepparent visitation statute, if such visitation were shown to be in Michael's best interest.)¹²⁰

In the second case, *Craig L. v. Sandy S.*, Sandy was married to Brian, and Craig was a close family friend.¹²¹ Sandy and Craig had a brief sexual relationship.¹²² In February 2001, Sandy became pregnant and delivered a baby she and Brian named Jeffrey.¹²³ All the involved parties believed that Brian was Jeffrey's father until routine neonatal blood tests performed at the hospital immediately following Jeffrey's birth eliminated Brian as a possible biological father for Jeffrey.¹²⁴ At this point, Sandy admitted the affair to Brian and explained that Craig was the only other possible biological father.¹²⁵ The disclosure led to a brief separation, but the couple and baby were eventually reunited as a family in the marital home.¹²⁶ However, Craig and his wife Kathryn participated in Jeffrey's life in the following ways: Craig signed a support agreement and made support payments to Sandy; when Sandy returned to work, Kathryn took care of Jeffrey three to four days per week in her and Craig's home; and when Jeffrey was a few months old the families initiated one overnight visit per week between Jeffrey, Craig, and Kathryn.¹²⁷ Although Sandy and Brian disputed this fact, Craig asserted that he held Jeffrey out to his family and friends as his natural son.¹²⁸ Then, on March 31, 2003, Sandy sent Craig an e-mail advising him that she and Brian no longer needed the "childcare services" that Craig and Kathryn had been providing.¹²⁹

Craig filed a petition with the court to establish his status as Jeffrey's father based on his having brought Jeffrey into his home and held Jeffrey out as his natural child; Brian responded that because he was Sandy's husband at the time of Jeffrey's conception and birth, he was Jeffrey's presumed father under the marital presumption.¹³⁰ The trial court ruled in

120. See CAL. FAM. CODE §3101(a) (2007) (providing that, after considering all the factors of the stepparent-child relationship, a court may grant reasonable visitation rights to a stepparent so long as it is in the best interests of the child).

121. 22 Cal. Rptr. 3d 606, 608 (Cal. Ct. App. 2004).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* (noting that, almost immediately after he filed his § 7611(d) claim for status as Jeffrey's natural father, Craig motioned for a temporary order that would allow him to visit Jeffrey); see also CAL. FAM. CODE § 7611(d) (2007) (establishing that a court may find a man the natural father of a child if he welcomes the child into his home and he openly holds the child out to the public as his natural child).

favor of Brian, noting:

There is a strong public policy in California to maintain the integrity of the unitary family and the welfare of Jeffrey requires a concern for Jeffrey's perceived legitimacy. The court finds that pursuant to Statute, Decisional Law, and California's strong public policy to maintain the integrity of a child's legitimacy, Craig does not have standing to establish a paternal relationship.¹³¹

The trial court also refused Craig's motion for DNA testing to establish his genetic link to Jeffrey, and Craig appealed.¹³²

On review, the court of appeal found that Craig had standing to pursue his paternity claim based on his factual assertion that he met the definitions of a presumed father under the "holding out" provisions of the Uniform Parentage Act.¹³³ The court also found that Brian had standing to pursue a paternity claim based on the marital presumptions.¹³⁴ Finally, the court found that there is no statutory preference between these two claims.¹³⁵ As stated by the court of appeal, "we have found no case which holds that . . . the state's interest in marriage will always outweigh the interests of a man and a child with whom the man has established a paternal relationship."¹³⁶ The case was remanded to the trial court to determine the nature of Craig's actual relationship with Jeffrey and to weigh that relationship against the interests embodied in Brian's status as Sandy's husband and his relationship with Jeffrey.¹³⁷ "[I]n weighing the conflicting interests . . . the trial court must in the end make a determination which gives the greatest weight to Jeffrey's well being."¹³⁸

131. *Id.* at 609 (stating that the trial court found that Craig did not have standing to assert a natural father claim because California's social policy dictates maintaining the traditional marital home); *see also* CAL. FAM. CODE § 7611(d).

132. *Id.* at 609 (detailing that, because the trial court determined that Craig lacked standing to assert his natural father claim, it also found that it was unnecessary to address both Craig's request for DNA testing and his temporary visitation).

133. *Id.* (analogizing Craig's frequent contact with Jeffrey to the precedent case in which a biological father received his son into his home every weekend and, therefore, the court found he had standing to assert a natural father claim).

134. *Id.* at 610 (explaining that Brian could pursue a natural parent claim under both California Family Code § 7540 and the broader provisions of § 7611(a) because he was married to and living with Sandy); *see also* CAL. FAM. CODE § 7540 (2007) (mandating the conclusive presumption that a child of a wife living with her husband is a child of the marriage so long as the husband is not sterile); CAL. FAM. CODE § 7611(a) (2005) (establishing the rebuttable marital presumption which grants natural father status to the husband of the child's natural mother so long as the child was born during the marriage).

135. *Id.*

136. *Id.* at 614.

137. *Id.*

138. *Id.* at 615 (concluding that, on remand, the trial court must consider several factors, such as the nature of Craig's father-son relationship with Jeffrey and the impact of acknowledging Craig's paternity will have on Jeffrey, before determining whether Brian or

The importance of assigning legal paternity to *someone* becomes particularly clear in cases where men who believed themselves to be the genetic fathers of the children they raised later turn out not to be. There are many such cases around the country, and they are becoming increasingly controversial as some of these men fight to be relieved of support obligations for children who are not genetically theirs. However, many other men who are found not to be genetic fathers of children they have raised want to continue in the paternal role, and most states reviewing these cases have ruled they should be permitted to do so.

For example, in *Atkinson v. Atkinson*, the Court of Appeals of Michigan found that a husband who was proven during divorce proceedings not to be the biological father of his wife's minor child, whom he had parented for over three years, could nevertheless be found to be the child's legal parent over the mother's objection.¹³⁹ In making this finding, the Michigan court relied on a theory of equitable parenthood.¹⁴⁰ As stated by the Michigan court:

[A] husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.¹⁴¹

In a comparable case, Wisconsin reached a similar result while explicitly rejecting the doctrine of "equitable" parenthood.¹⁴² That case involved a child (Selena) born to a married Wisconsin woman as the result of an affair she was having while "on business" in another state.¹⁴³ The mother Norma raised the child with her husband Randy.¹⁴⁴ Randy did not discover that he was not Selena's biological father until he initiated divorce proceedings after Norma was incarcerated for embezzlement.¹⁴⁵ As recited by the

Craig is Jeffrey's natural father). According to counsel for the case, Craig and his wife subsequently abandoned Craig's parentage claim, believing that the litigation was not in anyone's best interest.

139. 408 N.W.2d 516 (1987).

140. *Id.* at 519.

141. *Id.*

142. See, e.g., *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 642 (Wis. 2004) (rejecting the Michigan Supreme Court's equitable parent doctrine because it is not a long-standing legal doctrine and precluding the Wisconsin lower courts from applying the doctrine when deciding child custody cases).

143. *Id.* at 632.

144. *Id.* at 633-34.

145. *Id.* at 634.

Wisconsin Supreme Court:

Randy and Norma lived together as husband and wife when Selena was born. Randy has provided for Selena since her birth, emotionally and financially. He has made a home for her and provided her with the status of a marital child for six years, while [the biological father] has been uninvolved in providing for her daily needs. Accordingly, we conclude that [the biological father] has not demonstrated a constitutionally protected liberty interest in his putative paternity because he has failed to establish a substantial relationship with Selena.¹⁴⁶

The court found that Randy was Selena's legal father based on Wisconsin's marital presumptions but declined to adopt the equitable parent doctrine as many other states have done "because its parameters are too indistinct, permitting its use to create uncertainties in the law."¹⁴⁷

All of the extra-marital cases discussed thus far have turned on the best interests of the children involved. By way of contrast, in *Petition of Ash*, the Iowa Supreme Court found that a man, who lived with and raised the child along with the mother, bathed, fed, and changed her diapers as a baby, and provided ongoing psychological, emotional, and financial support, including paying school tuition and providing health and dental insurance for the child as she matured, was nevertheless a legal stranger to the child with no right to custody or visitation.¹⁴⁸ As stated by that court:

[I]n the legal sense, James is a stranger to the child. He is an interested third party. He is not the child's biological father. He is not her adopted father. He is not her stepfather. He is not her foster parent. He never married the child's mother. . . . He is merely a man who lived with—and cared for—her mother, and who, understandably, became smitten with fatherhood after the child's birth. . . . It is apparent that James loves the child. He treats her like his daughter. He has, since her birth, assumed the responsibilities and—until his visitation was cut off—enjoyed the privileges of fatherhood. Up to the time visitation was interrupted, James and the child unquestionably enjoyed an appropriate, nurturing, father-daughter relationship. . . . Nevertheless, James has no legal basis for asserting parental status.¹⁴⁹

Therefore, James was denied any future contact with the child except at the whim of the mother.¹⁵⁰

146. *Id.* at 638 (comparing Randy's substantial father-daughter relationship to Norma's lover's nonexistent parent-child relationship to find that Norma's lover did not have a constitutionally protected liberty interest in his putative paternity, and, thereby, affirming the lower court's judgment insofar as Randy is the legal father of Selena).

147. *Id.* at 642.

148. 507 N.W.2d 400 (Iowa 1993).

149. *Id.* at 404.

150. *Id.* (refusing to grant the man any legal parent status because there were no statutes

There are many court decisions, such as the ones cited above, that offer examples of the complexities found when children are conceived during extra-marital affairs. When read together, it is clear that the purely genetic approach of states such as Ohio and Iowa cannot adequately protect children who only have two parents, much less protect children in more complicated situations. In other states, where courts take intention and conduct into account along with genetics, children's needs are more likely to be met. This includes children with two functional parents, as well as those children who may have more than two parents through intent and/or parental conduct.

III. MAKING THE CASE FOR THREE-PARENT FAMILIES

I have encountered few published cases from around the country where courts have recognized more than two legal parents. However, select trial courts in California have allowed what we refer to as "third parent adoptions" in circumstances where a lesbian couple conceive a child with a known sperm donor who remains in the picture and acts as a father to the child, on the condition that the child is at least five years of age and the parties can show full bonding of the child with all three parents plus a good co-parenting arrangement among the adults.¹⁵¹ I am personally aware of at least two comparable "third parent" adoptions having been granted in Massachusetts, and there have been several granted in Alaska and Washington.¹⁵² In addition, a trial court in Pennsylvania recently granted *de facto* parent status and the accompanying rights to visitation and shared custody to the lesbian ex-partner of a woman who married after leaving the

nor common law theories that buttressed his paternity claim).

151. See, e.g., *K.M. v. E.G.*, 117 P.3d 673, 680-81 (Cal. 2005) (reversing a California appellate court decision to deny a lesbian woman legal parent status because the lesbian woman supplied the ova that resulted in the birth of twins, and, under the Model Uniform Parentage Act, consanguinity constitutes evidence of a mother-and-child relationship). *But see* *Georgina G. v. Terry M.*, 516 N.W.2d 678, 684 (Wis. 1994) (mandating a "cut-off" provision for the state's adoption statute and preventing a lesbian woman from adopting her partner's biological child because a recognition of third parent could result in the recognition of several other parents if there are multiple marriages). Similarly, other courts have declined to do so on the grounds that they just would be setting children up for uglier, more complex custody litigation in the occasion of a disagreement among the various parents.

152. See, e.g., *In re Susan*, 619 N.E.2d 323, 324 (Mass. 1993) (stating that the female partner of a lesbian woman should be able to adopt the woman's biological child because the plain language of the adoption statute did not restrict same-sex adoption); *In re Tammy*, 619 N.E.2d 315, 320-21 (Mass. 1993) (reasoning that, because the lesbian partner provided financial and emotional support for the child, she should be permitted to adopt the biological daughter of her partner because it was in the best interest of the child for her to legally maintain both mother-daughter relationships). Information on where third parent adoptions have occurred is obtained directly from the attorneys who have handled these adoptions and from meetings of the National Family Law Advisory Council of the National Center for Lesbian Rights.

partnership and whose husband had adopted the child. This provided the child with a legally protected relationship with her biological mother, her biological mother's husband, and her biological mother's ex-partner, with whom the child had a substantial, well established parent-child relationship.¹⁵³

In a case that has received international attention, the Ontario Court of Appeal in Toronto recently ruled that a child born there has three legal parents. In this case, a lesbian couple had a child with a man who provided his sperm on the condition that he could play a meaningful role in the child's life.¹⁵⁴ When the child was born, the biological mother and the biological father were listed on the birth certificate; and the highest court in Ontario unanimously ruled in January 2007 that the biological mother's partner was also the child's legal parent in addition to the biological mother and father, giving the child a legal father and two legal mothers.¹⁵⁵

The possibility that it may be in a child's best interests to preserve parental relationships with more than two adults also arises in cases involving less intentional conduct than what is involved in the ART and same-sex cases. For example, in *McDaniels v. Carson*, the Supreme Court of Washington reviewed a paternity action brought where a child's mother had alternately cohabited with two men, to one of whom she had been married for some of the time, and either of whom could be the child's biological father.¹⁵⁶ The child had a substantial parent-child relationship with each man.¹⁵⁷ In resolving the case, the court allowed a paternity action by the non-husband, but it stated:

[I]n light of [the child's] strong relationship with both appellant and respondent and the genuineness of their affection, we accept the recommendation of the guardian ad litem that . . . it would be in [the child's] best interest to preserve her relationship with each. Regardless of the outcome of the paternity determination, either party will be entitled to petition the trial court for visitation rights.¹⁵⁸

Interestingly, courts examining the legality of "second parent" adoptions, where the partner of a legal parent adopts the child they are raising together

153. See, e.g., *KDP v. TPW*, Court of Common Pleas of Montour County, Pennsylvania, No. 192 of 2004, Opinion of June 25, 2004 (finding that the lesbian ex-partner of a child's biological mother—who had not been given notice or an opportunity to be heard at the proceeding where the mother's new husband adopted the child—had standing to proceed with a custody action for the child with whom she had resided in a parent-child relationship for over four years based on her *in loco parentis* relationship with the child).

154. A.A. v. B.B., [2007] O.A.C. 5.

155. *Id.* at 26.

156. 738 P.2d 254, 263 (Wash. 1987).

157. *Id.*

158. *Id.*

without termination of the legal parent's rights, have used the danger of these adoptions opening the door to families with more than two parents as a basis for denying or restricting the adoptions. The Supreme Court of Wisconsin raised the issue in 1994 when it denied a lesbian co-parent the right to adopt her partner's child despite acknowledging that the adoption would be in the child's best interests.¹⁵⁹ The issue before the court was whether the legal rights of *one* or *both* of the birth parents had to be terminated before an adoption could occur.¹⁶⁰ The petitioner argued that she should be allowed to adopt with the only termination being of the father's rights (an outcome with which the father was in full agreement).¹⁶¹ In rejecting this argument, the court noted that:

If we . . . accept this interpretation, then [a] husband and wife could jointly adopt [a] minor without severing the ties between the remaining birth parent and the minor. The minor would then have three parents. Subsequently, a court could terminate the rights of one of the three parents and a second husband and wife could jointly adopt the minor, giving the minor four parents. . . . This process could go on *ad infinitum*. Obviously, the petitioners' interpretations of [the relevant statutes] . . . could lead to absurd results. This court will not construe a statute so as to work absurd or unreasonable results.¹⁶²

In a dissent to the California Supreme Court decision validating the "second parent" adoption procedure for California, two of the justices of that court raised a similar concern, noting that:

Under the majority's approach, [the relevant statute's] termination of the birth parents rights in *any* type of adoption—not merely those that seek to add a second parent—can be waived by mutual agreement, thus permitting a child to have three or more parents. . . . I cannot fathom why the majority has deliberately chosen a rationale that is unnecessary to the disposition of this case *and* that has been avoided by other jurisdictions, but I do understand and fear the effect of the majority's additional holding: to put at risk fundamental understandings of family and parentage. Tomorrow, the question may be: *How many legal parents may a child have in California?* And the answer, according to the majority opinion, will be: *As many parents as a single family court judge, in the exercise of the broadest discretion in our law, deems to be*

159. See, e.g., *Georgina G. v. Terry M.*, 516 N.W.2d 678, 685 (Wis. 1994) (denying a lesbian the opportunity to adopt her partner's biological child despite the adoption being in the best interests of the child because the child could still associate and maintain a strong loving bond with her mother's partner).

160. *Id.*

161. *Id.*

162. *Id.* at 684.

*in the child's best interest.*¹⁶³

More recently, in the California Supreme Court case of *Elisa B. v. Superior Court*, the court made clear that its earlier statement that a California child could not have two natural mothers was a reaction to the threat in *Johnson v. Calvert* that if the gestational mother were legally recognized the child might end up with more than two parents.¹⁶⁴ As stated by the court:

In *Johnson* . . . we addressed the situation in which three people claimed to be the child's parents: the husband, who undoubtedly was the child's father, and two women, who presented competing claims to being the child's mother. . . . We rejected the suggestion of amicus curiae that both the wife and the surrogate could be the child's mother, stating that a child can have only one mother, but what we considered and rejected in *Johnson* was the argument that a child could have three parents.¹⁶⁵

What is clear from these cases is that fear of children ending up with more than two parents is coloring the decisionmaking processes in courts and legislatures around the country. However, as courts take a long, hard look at new ways of defining the parent-child relationship, it must be recognized that either California's intent-based approach or the functional-family approach adopted by the Wisconsin Supreme Court could result in children having more than two parents.

Where more than two people jointly use assisted reproductive technologies to procreate with the explicit intent that all of them be legal parents, there is no empirical reason why they could not all end up with full legal parental status. In the same way, when more than two adults actively and successfully parent children over a period of years, it may be in the children's best interests to provide legal protection to these multiple parental relationships on which the children rely. Again, this does not necessarily imply that *custody* should be split more than two ways if the adults end their relationships (though such a result is also possible). However, recognition of parentage in more than two adults, as the facts dictate, would allow a more full consideration of best interests by the court than is allowed where some of the child's most significant adults are locked

163. *Sharon S. v. Superior Court*, 73 P.3d 554, 575, 582 (Cal. 2004).

164. *See* 117 P.3d 660, 667, 669-70 (Cal. 2005) (finding that the presumption that a man who receives a child into his home and holds him out as his natural child analogously applies to a lesbian woman who was found to be a natural mother because she cared for her former partner's child and paid for the child's health insurance).

165. *Id.* at 666 (readdressing and rejecting the court's earlier concern in *Johnson v. Calvert* that a recognition of two natural mothers would diminish the recognized mother's role, and finding that a natural parent is any person who receives a child into her home and holds it out to the public as her natural child and, therefore, the former lesbian partner had an obligation to pay child support).

out of court.

CONCLUSION

The danger to children engendered by the present system results from courts' clutching at overly rigid approaches to determining parentage, approaches that do not allow for the full range of human procreative and parental conduct. One basis for this rigidity is an almost obsessive fear of recognizing what is an undeniable reality of our society—that some children have more than two parents. The inflexible position of our state courts—that where there are three people standing in clear parental roles, each with valid claims to parentage based on either genetics plus parental conduct or membership in an intact marital family, there nevertheless can be only two legal parents—is based on an historical perspective that may no longer be valid.

The children in *Michael H.* and *Craig L.* would have been well served by a finding that they had more than two parents. In *Michael H.*, the child formally joined with her genetic father in requesting that his relationship with her be legally recognized. The court could have done this without undermining the public policy of supporting the marital family by acknowledging the factual reality that the child had three parents and granting visitation rights to Michael. In *Craig L.*, the facts strongly suggest that the child had been encouraged to form a bonded parental relationship with four adults, given that Craig's wife was the one who actually stayed home with the child during the days when Craig, Sandy, and Brian were all at work. Thus, that child arguably should be found to have four legal parents, with custody and visitation rights spread between the adults in a manner determined by the court to be in the child's best interests. In this way, even if the court decided the child should live with Sandy and Brian in their home, in deference to the marital presumption, the child would not have lost two of the parents he had been raised to rely on during his infancy.

Legal parentage does not guarantee *custodial* parentage, so assigning legal status to all the functional parents in a child's life would not necessarily require that a child be moved around among multiple homes for custody purposes. Instead, it would allow courts to engage in a best interests analysis that is never reached when some of the parties who have acted as parents are denied any legal recognition. It thereby would ensure that many more children would have continued access to all the people with whom they have formed significant, parental attachments, and the public policies of respecting genetic connections and supporting marital families could still be served. The current insistence on resolving all parentage disputes in favor of a child having only two legally recognized parents is a "lose-lose" proposition in these cases and should be

reexamined.

When courts and/or legislatures seek to define legal parentage outside the context of “traditional” families, many factors come into play. Clearly, there are competing public policy concerns that have to be addressed. However, using the basic factors of genetics, procreative intent, parental conduct, and marital presumptions as guides, it is worth looking at whether limiting children to only two legal parents in every circumstance is in their best interests. Recognition of more than two legal parents should be limited to cases where the specific facts support this result so as to avoid unnecessarily exposing children to the risk of overly complex custody disputes. But where the facts support a finding that there are three (or more) functional parents, all of whom the child has formed a substantial parent-child attachment such that the child could be detrimentally impacted by loss of that adult from their lives, the courts should be open to considering this option.