THE LEGAL QUICKSAND 2+ PARENTS: THE NEED FOR A NATIONAL DEFINITION OF A LEGAL PARENT

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I. INTRODUCTION

The national legalization of same-sex marriage by the United States Supreme Court in *Obergefell v. Hodges* ("*Obergefell*") is just the tip of the proverbial iceberg of change in family law.[1] Over the last fifty years, the function and definition of "family" has undergone major cultural shifts caused by no-fault divorce, high divorce rates, increased frequency of childbirth outside of marriage, cohabitation, blended families, reproductive technology, genetic testing, delayed marriage, and the Supreme Court's recognition of the rights and obligations of unmarried fathers in *Stanley v. Illinois* and its progeny.[2] These trends have created new family compositions that did not exist a generation ago.[3] Today, more adults than just the child's biological or adoptive parents have an integral role in a child's life.[4] Historically, only natural or adoptive parents were legally recognized as possessing "the authority to make significant decisions" in the child's life related to "health care, education, permission to marry, and to enlist in the military."[5] Thus, when a non-biological, non-adoptive adult's relationship ended with the child's biological or adoptive parents, then the non-biological, non-adoptive adult had no legal rights to the child.[6] In essence, the non-biological, non-adoptive adult becomes a "legal stranger" with no rights to visitation or continued involvement in the child's life.[7] This may result in uprooting some of the most long-lasting, meaningful relationships the child has ever known. Some states have sought to address this dilemma by recognizing these non-biological, non-adoptive adults as legal parents.[8] This recognition has the

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[1] *See generally* 576 U.S. 644 (2015).

[2] *See, e.g.*, 405 U.S. 645, 658 (1972); Quilloin v. Walcott, 434 U.S. 246, 256 (1978); Caban v. Mohammed, 441 U.S. 380, 381–82 (1979); Lehr v. Robertson, 463 U.S. 248, 267–68 (1983); David D. Meyer, *Section II: Civil Law, Procedure, and Private International Law: Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 133–36 (2006).

[3] *See* Meyer, *supra* note 2, at 133–36.

[4] *See id.* at 126, 132.

[5] *See* PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(f) (AM. L. INST. 2002) (defining decision-making responsibility and explaining that most states define legal custody as the ability to make major life decisions for a child).

[6] *See* Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. FAM. STUD. 309, 313–17 (2007). For example, under the Ohio Parentage Act, the "parent and child relationship" is defined as "the legal relationship that exists between a child and the child's natural or adoptive parents . . . ." OHIO REV. CODE ANN. § 3111.01(A) (LexisNexis 2015).

[7] Jacobs, *supra* note 6, at 317 ("[W]ithout recognition as a legal parent, a person may be seen in the law as a third party or 'legal stranger' who is not entitled to a relationship with a child with whom the individual has fostered a parental relationship.").

[8] *See* Colleen M. Quinn, *Mom, Mommy & Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parentings,* 31 J. AM. ACAD. MATRIMONIAL L. 175, 180–185 (2018); Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 1–2 (2013); June Carbone & Naomi Cahn, *Changing*

potential to result in the simultaneous legal recognition of three or more people as parents. [9]

This Article first provides an overview of the case law of the roughly thirteen states that have expanded the definition of parenthood to allow the allocation of parental rights to more than two parents simultaneously. Next, the Article delves into the legal quicksand created by the simultaneous legal recognition of more than two parents as related to: (1) the children's best interests; (2) biological and adoptive parents' rights; and (3) court resources. In conclusion, this Article explains the need for a national definition of parentage.

II. OVERVIEW OF CASES

The designation of additional parents beyond biological and adoptive parents arises under a variety of monikers, including de facto parent, psychological parent, *in loco parentis*, parents by estoppel, and emotional parent.[10] Each term has their own unique definition that a potential parent must meet in order to be considered as such. First, to be considered a de facto parent:

> The individual must have lived with the child for a significant period of time (not less than two years), and acted in the role of a parent for reasons primarily other than financial compensation. The legal parent or parents must have agreed to the arrangement, or it must have arisen because of a complete failure or inability of any legal parent to perform caretaking functions. In addition, the individual must have functioned as a parent either by (a) having performed the majority share of caretaking functions for the child, or (b) having performed a share of caretaking functions that is equal to or greater than the share assumed by the legal parent with whom the child primarily lives.[11]

Second, a psychological parent is "[a] person who provides a child's daily care and who, thereby, develops a close bond and personal relationship with the child . . . to whom the child turns for love, guidance, and security.[12]

American State and Federal Childcare Laws: Parents, Babies, and More Parents, 92 CHI.-KENT L. REV. 9, 25–35 (2017).

[9] *See* UNIF. PARENTAGE ACT § 613 (ALTERNATIVE B) (NAT'L CONFERENCE OF COMM'RS ON UNIIF. STATE LAWS 2017) (stating that recognition of more than two people as parents is allowed if there are competing parentage claims, and "if the court finds that failure to recognize more than two parents would be detrimental to the child.").

[10] *See* L.P. v. L.F., 338 P.3d 908, 915 (Wyo. 2014).

[11] PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(c) cmt. c (AM. L. INST. 2002)

[12] McAllister v. McAllister, 779 N.W.2d 652, 658 (N.D. 2010) (quoting Hamers v. Guttormson, 610 N.W.2d 758, 760 (N.D 2000)).

A psychological parent is also "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs."[13] Third, the term *in loco parentis* "refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption and embodies the two ideas of assuming the parental status and discharging the parental duties."[14] A parent by estoppel is defined as "an individual who, even though not a legal parent, has acted as a parent under certain specified circumstances which serve to estop the legal parents from denying the individual's status as a parent."[15] This is usually accompanied by some sort of reliance by the person claiming "parent status."[16] Finally, an emotional parent is "a person [the child] looks to for comfort, solace, and security."[17]

The potential for more than two legal parents to be simultaneously recognized typically arises in four types of scenarios: (1) a relationship between a couple and a third-party for the purpose of creating and raising a child; (2) an unmarried, biological mother with multiple sexual partners during the time of conception; (3) a married, biological mother's extramarital affair where the marital presumption applies; and (4) step-parents.[18] As outlined below, at least seven jurisdictions have statutes that recognize three or more parents: Louisiana, California, Delaware, Maine, Vermont, Washington, D.C., and Washington State.[19] Additionally, there are at least six states where the ability for more than two parents to be recognized has been developed through the common law: Illinois, New Jersey, New York, Minnesota, North Dakota, and Pennsylvania.[20] Also of import, but beyond

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[13] PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.18(c) (AM. L. INST. 2002) (quoting GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 97–101 (1973)).

[14] SooHoo v. Johnson (*In re SooHoo*), 731 N.W.2d 815, 822 (Minn. 2007) (citing London Guar. & Accident Co. v. Smith, 64 N.W.2d 781, 784 (Minn. 1954)).

[15] PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(b) cmt. a, illus. 2 (AM. L. INST. 2002)

[16] *Id.*

[17] LaChapelle v. Mitten (*In re L.M.K.O.*), 607 N.W.2d 151, 164 (Minn. Ct. App. 2000).

[18] The marital presumption is a legal presumption that the husband is the father of a child born during a marriage. *See generally* Paula A. Monopoli, *Inheritance Law and the Marital Presumption After Obergefell*, 8 TEX. TECH EST. PLAN COM. PROP. L.J. 437 (2016).

[19] *See, e.g.*, Smith v. Cole, 553 So.2d 847, 854 (La. 1989) (interpreting Louisiana's filiation and child support statutes to allow paternity and child support action against the biological father of a child born during the biological mother's marriage to another man all while not delegitimizing the child); CAL. FAM. CODE § 7612(c) (West Supp. 2018) ("[i]n an appropriate action, a court may find that more than two persons with a claim to parentage . . . are parents if the court finds that recognizing only two parents would be detrimental to the child."); DEL. CODE ANN. tit. 13, § 8-201(c)(1) (West Supp. 2018) (establishing procedures for determining de facto parent status); ME. REV. STAT. ANN. tit. 19-A, § 1853 (West Supp. 2017) ("a court may determine that a child had more than [two] parents"); VT. STAT. ANN. tit. 15C, § 206 (West Supp. 2020) ("a court may determine that a child has more than two parents if the court finds that it is in the best interests of the child to do so."); D.C. CODE ANN. § 16-831.01(1)(A)(iii) (West Supp. 2020) (establishing procedures for determining de facto parent status); *see also infra* Part II.A.

[20] *See infra* Part II.B.; Quinn, *supra* note 8, at 187–88.

the scope of this Article, a handful of states recognize three parent adoptions.[21]

A. States with Statutes Recognizing 2+ Parents

1. Louisiana

In the 1970s, Louisiana adopted a dual system of paternity, thus becoming the first state to recognize three legal parents.[22] Louisiana allows for dual paternity for purposes of child support when a married woman conceives a child with a man who is not her spouse and the marital presumption applies.[23] The marital presumption in Louisiana, as with most states, provides that a child born during a marriage is the offspring of the husband.[24] Under Louisiana law, a child can have two fathers—one father whose status is based on biology and a legal father based on the mother's marital status—and a biological mother.[25] The law allows for the child to receive child support from the biological father and not lose his status as a child of the marriage.[26] But Louisiana courts "have been reluctant to award custodial rights to more than one father at a time [and] have never treated three parents as having equal physical and legal custodial rights with respect to a child."[27] Therefore, the biological father has financial responsibilities, but no attendant rights to visitation and custody.[28]

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[21] *See, e.g.*, *Where Can a Child Have Three Parents?*, BEYOND (STRAIGHT & GAY) MARRIAGE BLOG (July 14, 2012, 12:51 PM), http://beyondstraightandgaymarriage.blogspot.com/2012/07/where-can-child-have-three-parents.html#:~:text=More%20recently%2C%20and%20in%20the,a%20legal%20parent%20throu gh%20adoption (noting that California, Oregon, Washington, Massachusetts, and Alaska allow for third-parent adoptions in some situations); Jennifer Peltz, *Courts and 'Tri-Parenting': A State-by-State Look,* BOSTON (June 18, 2017), https://www.boston.com/news/national-news/2017/06/18/courts-and-tri-parenting-a-state-by-state-look; Haim Abraham, *A Family is What You Make It? Legal Recognition and Regulation of Multiple Parents,* 25 AM. U.J. GENDER SOC. POL'Y & L. 405, 419 (2017) (stating that in open adoptions, there is a greater "potential for multiparenting" and that there is also evidence of cases where there are three adoptive parents).

[22] *See* Naomi Cahn & June Carbone, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399, 401 (2018) (citing Warren v. Richard, 296 So.2d 813, 815 (La. 1974)).

[23] *See* LA. CONST. art. 185; State v. Reed, 52 So.3d 145, 146–47 (La. Ct. App. 2010) (citing Smith v. Cole, 553 So.2d 847 (La. 1989) (highlighting a child support case involving legal father—husband of mother who had a vasectomy—and biological father—husband's brother who had affair with mother).

[24] *Smith*, 553 So.2d at 849–50; s*ee also* Lopes v. Lopes, 518 P.2d 687, 689 (Utah 1974); Earp v. Earp, 464 S.W.2d 70, 73 (Ark. 1971) (citing Jacobs v. Jacobs, 225 S.W. 22, 23 (Ark. 1920)).

[25] *See generally Smith*, 553 So.2d at 847; T.D. v. M.M.M., 730 So.2d 873, 881 (La. 1999) (Kimball, J., dissenting) (describing Article 209 filiation proceedings and ruling in *Smith*).

[26] State *ex rel.* Wilson v. Wilson, 855 So.2d 913, 914–16 (La. Ct. App. 2003) (affirming trial court's calculation of the paternal child support obligation and dividing the payment of the same pro rata between the biological father and presumed father, and holding that the trial court's calculation was performed in "the spirit of the [child support] guidelines"); *Smith*, 553 So.2d at 854 ("[T]his paternity and support action will not alter [the child's] status as the legitimate offspring of her mother's former husband . . . .").

[27] Cahn & Carbone, *supra* note 22, at 401.

[28] *See id.*; *Wilson*, 855 So.2d at 914–16 ("The biological father does not escape his support obligations merely because others may share with him the responsibility.") (quoting *Smith*, 553 So.2d at 854) (emphasis omitted).

2. California

Since 2013, in "rare cases" in California, a child may have more than two parents pursuant to section 7612 of the California Family Code.[29] Section 7612(c) states:

> In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.[30]

California courts have explained, that to qualify as a "presumed parent," the individual must "*treat* the child as though the child was his or her own by developing a parental relationship and taking on 'parental responsibilities—emotional, financial, and otherwise.'"[31] The person's commitment to the child and to parental responsibilities are what ultimately matter in determining presumed parental status.[32] Therefore, caring for a child out of convenience, rather than commitment to the child (for example to receive welfare benefits) will not garner an individual presumed parent status.[33] California courts explained, that a third-parent finding, there is state recognition of a pre-existing relationship between a putative third parent and child.[34] Thus, it should only be granted if there actually was a pre-existing relationship between the putative third parent and the child and should not be granted if there is only a potential that the relationship *could* develop.[35]

An example of the California three-parent statute in application is *C.A. v. C.P.*, where the child was born as a result of an extramarital affair the married mother had with a co-worker.[36] The biological father sued to obtain legal recognition as a parent, and the mother and her husband opposed.[37] The

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[29] S.B. 274, 2013-2014 Leg., Reg. Sess. (Cal. 2013)
[30] CAL. FAM. CODE § 7612(c) (West Supp. 2018).
[31] *In re* Alexander P., 4 Cal. App. 5th 475, 493 (2016) (quoting *In re* Jovanni B., 221 Cal. App. 4th 1482, 1488 (2013)) (emphasis in original).
[32] *Id.* at 494.
[33] *Id.* at 495 (citing *In re* Spencer W., 48 Cal. App. 4th 1647, 1654 (1996)).
[34] *See In re* Donovan L., 224 Cal. App. 4th 1075, 1089–90 (2016).
[35] *Id.* at 1089–90.
[36] 29 Cal. App. 5th 27, 30 (2018).
[37] *Id.* at 31.

court granted the biological father third-parent recognition.[38] The court explained:

> Defendants could have prevented plaintiff from meeting the definition of a presumed father by excluding him from the child's life from the moment of birth. . . . But they did not choose that avenue. They instead allowed plaintiff to form a bond with the child, pay support for her, hold her out as his own, receive her into his home, and introduce her to his close relatives, with whom she bonded during the first three years of her life.[39]

In short, the biological father, "[f]or over three years . . . treated the child as his daughter with the consent of defendants."[40] The Court of Appeals affirmed, reasoning that "[t]he evidence establishes [she] is a child who would benefit greatly from the continued love, devotion and day to day involvement of three parents."[41]

3. Delaware

In Delaware, a person who is not biologically related to a child can become a parent to that child through establishing that he or she meets the "de facto parent" statutory qualifications which requires a court to determine that the person:

> (1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent; (2) Has exercised parental responsibility for the child . . .; and (3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.[42]

Under Delaware law, "parental responsibilities" are defined as "the care, support and control of the child in a manner that provides for the child's necessary physical needs, including adequate food, clothing and shelter, and that also provides for the mental and emotional health and development of such child."[43] However, Delaware does not have a set amount of time that a child and an adult must have a relationship in order for the adult to qualify as a de facto parent.[44] The de facto parenthood statute in Delaware simply states

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[38] *Id.* at 30.
[39] *Id.* at 44 n.3 (emphasis in original).
[40] *Id.* at 44.
[41] *Id.* at 39.
[42] DEL. CODE ANN. tit. 13 § 8-201(C) (West Supp. 2018).
[43] *Id.* § 1101(10).
[44] *See* J.B. v. R.L., 2016 Del. Fam. Ct. LEXIS 6, at *50 (2016) (holding that a claim for de facto parent status for a husband whose wife had a child fathered by another man in an extramarital affair during the

that the third-party "[h]as acted in a parental role for a length of time *sufficient* to have established a bonded and dependent relationship with the child that is parental in nature."[45]

Delaware courts have used the de facto parent statute to recognize more than two parents for one child. For example, in *J.W.S. v. E.M.S.*, the unmarried, biological mother had sexual intercourse with two men during the time of conception.[46] She married one of the men, and for four years did not tell him that he may not be the biological father of the daughter.[47] After she told him, the other man was informed, and they all took a DNA test.[48] The test determined that the other man was the biological father.[49] For the next two years, mother and husband followed an informal visitation schedule with the biological father.[50] When mother and husband were divorcing, husband was given interim custody of daughter and biological father intervened in the court action.[51] The court named the non-biological father a de facto parent based on the length of the relationship between the non-biological father and child.[52] Specifically, the child had been consistently living with her non-biological father since her birth.[53] For six years, the non-biological father had "undertaken a parental role" over the child.[54] Additionally, there was no dispute that the non-biological father bonded with the child, and the child referred to him as "Dad."[55] Therefore, the court held that the case was "a unique situation" where a child was found to have three legal parents: biological mother; adjudicated biological father; and non-biological father who helped raise the child as the de facto parent.[56] The court explained, "one of the factors in establishing de facto parent status is that the person has 'the support and consent of the child's *parent or parents* who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent.'"[57] The court consolidated the two men's actions for custody against the mother into one action because the three individuals all had standing as legal parents of the child and all "will be affected by a decision

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parties' marriage lacked merit, because his seven months with the child as a newborn was not a sufficient length of time to develop a bonded and dependent relationship). For example, the court in *J.B v. R.L.* explained that "[a]ttempting to make a precise finding of how much time is necessary to form a bonded and dependent parent-child relationship is a difficult venture, which has not been addressed at length by Delaware Courts." *Id.*

[45] tit. 13, § 8-201(c)(3) (emphasis added).

[46] No. CS11-01557, 2013 Del. Fam. Ct. LEXIS 27, at *4 (Fam. Ct. Del. Apr. 18, 2013).

[47] *Id.* at *4, *19.

[48] *Id.* at *6.

[49] *Id.*

[50] *Id.* at *9, *20.

[51] *Id.* at *8–9.

[52] *Id.* at *21–23.

[53] *Id.* at *21.

[54] *Id.*

[55] *Id.*

[56] *Id.* at *22–23.

[57] *Id.* (quoting A.L. v. D.L., No. CK12-01390 2012 Del. Fam. Ct. LEXIS 83, at *5 (Fam. Ct. Del. Sept. 19, 2012)).

of the [c]ourt regarding issues related to the custody, placement and visitation" of the child.[58]

4. Maine

> The Maine de facto parentage statute states the following:
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> > The court shall adjudicate a person to be a de facto parent if the court finds by clear and convincing evidence that the person has fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life. Such a finding requires a determination by the court that: (A)The person has resided with the child for a significant period of time; (B) The person has engaged in consistent caretaking of the child; (C) A bonded and dependent relationship has been established between the child and the person, the relationship was fostered or supported by another parent of the child and the person and the other parent have understood, acknowledged or accepted that or behaved as though the person is a parent of the child; (D) The person has accepted full and permanent responsibilities as a parent of the child without expectation of financial compensation; and (E) The continuing relationship between the person and the child is in the best interest of the child.[59]

Under Maine law, the adjudication of a de facto parent does not disestablish the parentage of any other parent, and it does not relieve any other parent from an obligation to pay child support.[60] The Supreme Judicial Court of Maine held that the focus of inquiry to establish whether the alleged de facto parent has standing is the relationship between the alleged de facto parent and the child, and not on the relationship between the alleged de facto parent and the child's legal parent.[61] Finally, Maine's Parentage Act provides that "a court may determine that a child has more than [two] parents."[62] However, as of January 2021, there are no published decisions relying on this statute.

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[58] *Id.* at *23–24.

[59] ME. REV. STAT. ANN. tit. 19-A, § 1891(3) (West 2015).

[60] *Id.* § 1891(4)–(5).

[61] *See* Young v. King, 208 A.3d 762, 766–67 (Me. 2019) (holding that denying standing to a third-party trying to assume de facto parent status on the basis of the biological mother's refusal to let the third-party adopt the child was an error and remanding to the trial court for an evidentiary hearing on the de facto parent test).

[62] tit. 19-A, § 1853.

5. Vermont

Under Vermont law, an individual can be found to be a de facto parent if the person demonstrates by clear and convincing evidence that:

> (A) the person resided with the child as a regular member of the child's household for a significant period of time;
>
> (B) the person engaged in consistent caretaking of the child;
>
> (C) the person undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;
>
> (D) the person held out the child as the person's child;
>
> (E) the person established a bonded and dependent relationship with the child that is parental in nature;
>
> (F) the person and another parent of the child fostered or supported the bonded and dependent relationship . . .; and
>
> (G) continuing the relationship between the person and the child is in the best interests of the child.[63]

Although a Vermont court may determine "that a child has more than two parents if the court finds that it is in the best interests of the child to do so," as of January 2021, there have been no reported cases analyzing this statute.[64] The best interest of the child in parentage actions are determined based on:

> (1) the age of the child;
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> (2) the length of time during which each person assumed the role of parent of the child;
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> (3) the nature of the relationship between the child and each person;
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> (4) the harm to the child if the relationship between the child and each person is not recognized;
>
> (5) the basis for each person's claim to parentage of the child; and
>
> (6) other equitable factors arising from the disruption of the relationship between the child and each person or the

[63] VT. STAT. ANN. tit. 15C, § 501(a)(1) (West 2017).
[64] *Id.* § 206(b).

likelihood of other harm to the child.[65]

6. Washington, D.C.

In Washington, D.C., the District of Columbia Safe and Stable Homes for Children and Youth Act of 2007 ("the Act") establishes a way for a de facto parent to assume roles traditionally held by a biological parent.[66] Specifically, the Act states that:

> (1) "De facto parent" means an individual:
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> (A) Who:
>
> (i) Lived with the child in the same household at the time of the child's birth or adoption by the child's parent;
>
> (ii) Has taken on full and permanent responsibilities as the child's parent; and
>
> (iii) Has held himself or herself out as the child's parent with the agreement of the child's parent or, if there are 2 parents, both parents; or
>
> (B) Who:
>
> (i) Has lived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint or motion for custody;
>
> (ii) Has formed a strong emotional bond with the child with the encouragement and intent of the child's parent that a parent-child relationship form between the child and the third party;
>
> (iii) Has taken on full and permanent responsibilities as the child's parent; and
>
> (iv) Has held himself or herself out as the child's parent with the agreement of the child's parent, or if there are 2 parents, both parents.[67]

In *W.H. v. D.W.*, the biological mother was deceased, and the children lived with their older brother and grandmother.[68] The biological father never married their mother and his involvement in the children's life was sporadic.[69] The District of Columbia Court of Appeals upheld the family court's decision that granted the children's adult brother and grandmother joint legal custody

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[65] *Id.* § 206(a).
[66] W.H. v. D.W., 78 A.3d 327, 331, 339 (D.C. 2013).
[67] D.C. CODE ANN. § 16-831.01(1)(A) (West 2020).
[68] 78 A.3d at 331.
[69] *Id.* at 333.

and granted the biological father supervised visitation.[70] The court found that the older brother lived with the children continually since their birth; during their mother's illness and subsequent death, he "took on the duties and obligations for which a natural or biological parent is responsible"; and he dropped out of the twelfth grade to assume many of these responsibilities.[71] The court also held that, while the grandmother was not a de facto parent, the family court did not err when it awarded her joint legal and physical custody of the children because of her prolonged and significant involvement in the children's lives.[72] As for the biological father, the court found that the Act and the family court's judgment did not terminate his parental rights and that he was still the children's natural, biological father.[73] However, despite not losing his parental rights, the court found that it was in the children's best interests to be placed with their brother and grandmother.[74]

7. Washington State

In Washington, the recognition of a de facto parent has also resulted in a child having more than two legal parents. In *in re Parentage of J.B.R.*, the Washington Court of Appeals found that a former stepfather was a de facto parent of his ex-girlfriend's child, even though the child had two existing legal parents because the stepfather met the four-factor de facto parent test.[75] In Washington, the de facto parentage test is as follows:

> (1) the natural or legal parent consented to and fostered the parent-like relationship, (2) the petitioner and the child lived together in the same household, (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and (4) 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.[76]

Applying this test, the court reasoned, in part, that the biological father's decision not to have any type of relationship with his child for more than a decade; the child did not have an alternative person acting as a father figure; and the mother's consent to the stepfather's relationship with the child aided in the stepfather's ability to establish a parent-child relationship with the child. [77] The court explained that when the petitioner has proven consent to and fostering of a parent-child relationship, then the State is enforcing a

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[70] *Id.* at 342.
[71] *Id.* at 340.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *See generally* 336 P.3d 648 (Wash. Ct. App. 2014).
[76] *Id.* at 208 (quoting *In re* Parentage of L.B., 122 P.3d 161, 165 (2005)).
[77] *Id.* at 213.

de facto parent's autonomous rights rather than encroaching on an insular family.[78]

B. Common Law

1. Illinois

In *in re Custody of C.C.*, the Illinois Court of Appeals expressed the need for legislative action or guidance from the Illinois Supreme Court "with respect to whether one child, born to an unwed mother, may simultaneously have two *additional* parents who share equal court-ordered parental rights and obligations with the biological mother . . . ."[79] In that case, the trial court simultaneously granted legal recognition to a man who signed a voluntary acknowledgment of paternity; a biological father; and the unmarried, biological mother.[80]

2. New Jersey

In New Jersey, in *D.G. v. K.S.*, three friends decided to conceive and jointly raise a child together.[81] They discussed the role each adult would play in the child's life and described it as a "tri-parenting relationship."[82] They intended the child to have two homes—one with the biological father and his same-sex spouse and another home with the biological mother.[83] At first, the three friends were very enthusiastic about the arrangement and the arrangement was publicized in *Marie Claire* and on the *Nate Berkus Show*.[84] Litigation ensued after the biological mother decided to move out of state with the child.[85] The court granted the biological father's same-sex spouse the designation of "psychological parent" but denied his claim for legal parentage because it found that it did not "have the jurisdiction to create a new recognition of legal parentage other than that which already exists—genetic contribution, adoption, or gestational primacy."[86] The court found that the

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[78] *Id.* at 208.

[79] *In re* Custody of C.C., 1 N.E.3d 1238, 1250 (Ill. App. Ct. 2013) (emphasis in original).

[80] *Id.* at 1240. A recent Ohio Court of Appeals case, with facts similar to *In re Custody of C.C.*, reached a different result. *See In re* P.L., No. 108312, 2019 WL 6002234, at ¶¶ 103, 106 (Ohio Ct. App. Nov. 14, 2019). In that case, the Ohio Court of Appeals reasoned that there was no legal mechanism for the biological father to disestablish K.L.—the man who signed a voluntary acknowledgment of paternity form two days after child's birth, and then two years later married the mother and had a child together—as the child's father and insert himself as the child's father. *See id.* at ¶¶ 3, 106–07. The court further reasoned, "[t]he relief that appellant seeks—a rescission of the acknowledgment of paternity . . . and a declaration that appellant is the child's father—is neither contemplated nor authorized [by the applicable statute]." *Id*. at ¶ 107.

[81] 133 A.3d 703, 707 (2015).

[82] *Id*. 707–08.

[83] *See id.* at 708.

[84] *Id*. at 709.

[85] *Id*.

[86] *Id.* at 726.

tri-parenting model used by the parties was not supported by the law.[87] But the court's orders gave the biological father's spouse the rights normally reserved for parents—sharing expenses and time with the child.[88] Specifically, the court ordered the three parties (biological father, biological father's spouse, and biological mother) to share medical expenses, educational expenses, and extracurricular expenses for the child.[89] Additionally, the court awarded joint legal and joint residential custody of the child to the three parties; denied the biological mother's request to remove and relocate the child to a different state; and established a schedule giving the three parties equal parenting time.[90]

3. New York

In New York, there is conflicting case law as to whether three parent recognition is a legally recognized formation.[91] Two cases supporting the legal recognition of more than two people with the rights traditionally reserved for parents are: *Dawn M. v. Michael M.* ("*Dawn M*.") and *David S. v. Samantha G.* ("*David S.*").[92] In *Dawn M.* an infertile heterosexual married couple and single woman were living together when they decided to conceive and raise a child together.[93] The single woman was the child's biological mother, and the married man was the biological father.[94] When the resulting child was less than a year old, the two women and the child moved out of the marital home.[95] In subsequent divorce proceedings for the married couple, the court granted a "tri-custodial arrangement" between the biological parents and the biological father's wife.[96] The court held that such an arrangement was in the child's best interest because the child understood both women to be his mother, and the biological father encouraged that bond.[97] In *David S.*, a woman and a gay married couple decided to conceive and raise a child together in a tri-parent arrangement.[98] The court reasoned that while there

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[87] *Id.* at 727.
[88] *Id.* at 731.
[89] *Id*.
[90] *Id*. at 706, 722.
[91] *Compare* Matter of Tomeka N.H. v. Jesus R., 122 N.Y.S.3d 461 (N.Y. App. Div. 2020), *and* Matter of Wlock v. King, 122 N.Y.S.3d 838 (N.Y. App. Div. 2020) (finding biological mother's ex-girlfriend did not have standing under equitable estoppel theory because under the applicable New York law, a child can have only two parents at a time), *and* Matter of Shanna O. v. James P., 112 N.Y.S.3d 792 (N.Y. App. Div. 2019) ("Domestic Relations Law § 70 clearly limits a child to two parents, and no more than two, at any given time."), *with* Dawn M. v. Michael M., 74 N.Y.S.3d 898, 902 (N.Y. Sup. Ct. 2017) ("Pursuant to Domestic Relations Law § 70, a parent may apply to the court for custody based solely upon what is for the best interest of the child, and what will promote his welfare and happiness."), *and* In Matter of David S. v. Samantha G., 74 N.Y.S.3d 730, 731 (N.Y. Fam. Ct. 2018) (finding that the biological father's husband had standing to seek custody and visitation).
[92] *Dawn M*., 74 N.Y.S.3d at 899; *David S.*, 74 N.Y.S.3d at 731.
[93] 74 N.Y.S.3d at 900.
[94] *Id.*
[95] *Id.*
[96] *Id.* at 903.
[97] *Id.*
[98] 74 N.Y.S.3d 730, 731 (N.Y. Fam. Ct. 2018).

was not any relevant precedent for recognizing legal parentage to more than two people, the biological father's spouse had standing to seek custody and visitation because he showed by clear and convincing evidence that he and the legal parents agreed to conceive and raise a child together.[99]

Conversely, other New York courts have held that tri-parenting does not exist under New York Law. For example, in *Matter of Tomeka N.H.*, the appellate court held that the biological mother's on-again, off-again girlfriend did not have standing to seek joint custody and visitation with the child, which would have resulted in a tri-custodial arrangement with the biological parents and the biological mother's former girlfriend.[100] The court held that because the relevant New York law "simply does not contemplate a court-ordered tri-custodial arrangement," parentage was limited to only two parents.[101]

Similarly, in *T.H. v. J.R.*, the court did not allow the biological mother's ex-girlfriend to be recognized as a third parent.[102] In this case, the court found that there was no pre-conception agreement between the parties to tri-parent and the biological father did not consent to the ex-girlfriend's involvement in parenting the child.[103] The court explained that this made this case different from *David S.* and *Dawn M.* because both of those cases involved pre-conception agreements to tri-parent.[104] The *T.H. v. J.R.* court further distinguished *David S.* and *Dawn M.* cases from the case before it because those cases involved married couples, which meant that a legitimacy presumption attached to the non-biological parent's parenthood claims because the non-biological parent was married to the biological parent.[105]

4. Minnesota

In *LaChapelle v. Mitten* ("*LaChapelle*"), the court granted third-party parenting rights while asserting it was not creating an impermissible legal formation.[106] Denise Mitten was the birth mother who was artificially inseminated with Mark LaChapelle's sperm.[107] Denise was in a same-sex relationship with Valerie Ohanian.[108] Mark was also in a same-sex

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[99] *Id.* at 734–36.

[100] *See generally* 122 N.Y.S.3d 461 (N.Y. App. Div. 2020).

[101] *Id*. at 465; *see also* Matter of Wlock v. King, 122 N.Y.S.3d 838, 840 (N.Y. App. Div. 2020) (finding biological mother's ex-girlfriend did not have standing under equitable estoppel theory because under Domestic Relations Law § 70, a child can have only two parents at a time); Matter of Shanna O. v. James P., 112 N.Y.S.3d 792, 795 (N.Y. App. Div. 2019) ("Domestic Relations Law § 70 clearly limits a child to two parents, and no more than two, at any given time.").

[102] *See* T.H. v. J.R., 84 N.Y.S.3d 676 (N.Y. Fam. Ct. 2018).

[103] *Id.* at 684.

[104] *Id.* at 683 (internal citations omitted).

[105] *Id.* The presumption of legitimacy presumes that a child born during a marriage is the child of the marriage.

[106] 607 N.W.2d 151, 161 (Minn. Ct. App. 2000).

[107] *Id.* at 157.

[108] *Id*.

relationship.[109] The two couples met prior to the child's birth to discuss the possibility of conceiving and raising a child.[110] After Denise's relationship with Valerie ended, Denise wanted to move with the child to Michigan, and Valerie and Mark were opposed.[111] The Court of Appeals upheld the trial court's judgment which granted Denise sole physical custody, on the condition that she move back to Minnesota, and granted Denise and Valerie joint legal custody, with Mark having the right to participate in important decisions affecting the child.[112] The Court of Appeals also held that an impermissible "triumvirate" parenting scheme was not created under the parties' settlement agreement because Mark agreed to drop his demand for legal custody, Denise and Valerie would share joint legal custody, and Mark would have "various rights" to the child which were not rights of a joint legal custodian.[113] The court found that Valerie was the child's "emotional parent," which means a person the child looks to for comfort, solace, and security.[114]

5. North Dakota

In North Dakota, the trial court in *McAllister v. McAllister*, granted decision-making responsibility and primary residential responsibility of the child to his biological mother, Robin.[115] The court granted Mark, the child's stepfather, reasonable visitation and access to the child's information, including school and medical, despite the fact that the child's biological father paid child support and had a parenting time order.[116] The North Dakota Supreme Court affirmed the trial court's finding that Mark was entitled to visitation on the basis that he was the child's psychological parent.[117] In North Dakota, "[a] person who provides a child's daily care and who, thereby, develops a close bond and personal relationship with the child becomes a psychological parent to whom the child turns for love, guidance, and security."[118] The North Dakota Supreme Court reasoned that the decision in this case was not intended to affect the biological father's rights or responsibilities.[119]

6. Pennsylvania

The Superior Court of Pennsylvania in *Jacob v. Schultz-Jacob* ("*Jacob*"), reversed and remanded the trial court's child support order because

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[109] *Id.*
[110] *Id.*
[111] *See id.*
[112] *Id.* at 168.
[113] *Id.* at 161.
[114] *Id.* at 164.
[115] 779 N.W.2d 652, 654, 661–62.
[116] *Id*. at 654–55, 661–62.
[117] *Id.* at 658–59.
[118] *Id.* at 658 (quoting Hammers v. Guttormson*,* 610 N.W.2d 758, 760 (N.D. 2000)).
[119] *Id.* at 657.

the trial court failed to re-formulate the calculus of child support to incorporate two child support obligors instead of the customary one.[120] In *Jacob*, the trial court ordered Jennifer to pay child support to Jodilynn to help support children Jodilynn gave birth to during her civil union with Jennifer.[121] However, on appeal, the Superior Court was persuaded by Jennifer's argument that Carl, the sperm donor, was "essentially a third parent" to the children and "as such was obligated to contribute" to the children's financial support.[122] The Superior Court acknowledged that legislative guidance would be the best solution, but without it, courts must develop fair solutions to care for the children and remanded the case to the trial court to reconsider the child support, this time including the sperm donor into the calculation.[123]

III. LEGAL QUICKSAND OF 2+ PARENTS

Traditionally, children could have a maximum of two legal parents at one time.[124] This section explores some of the problems that may arise when a child has more than two legal parents simultaneously.

A. The Child's Best Interests

The cornerstone of family law jurisprudence is evaluating custody and visitation decisions under the best interest of the child analysis.[125] For example, in Ohio, best interest factors include the wishes of the parents; the child's wishes and concerns as expressed in a child interview; child's interactions and interrelationships with other family members; child's adjustment to home, school, and community; mental and physical health of all persons involved; the parent more likely to honor and facilitate parenting time rights; child support payments; domestic violence; interference with parenting time; and whether a parent has established or plans to establish a residence out of state.[126]

The legal recognition of more than two parents simultaneously who live in separate households is not in a child's best interest because it increases the number of adults entitled to time with the child.[127] It further stretches the

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[120] *See* 923 A.2d 473, 482 (Pa. Super. Ct. 2007).
[121] *Id.* at 476.
[122] *Id*.
[123] *Id.* at 482.
[124] *See* Jacobs, *supra* note 6, at 309.
[125] *See, e.g.*, OHIO REV. CODE ANN. § 3109.04 (F)(1) (LexisNexis 2011). Additionally, Supreme Court jurisprudence has also recognized the historical importance and broad authority of the family unit regarding minor children and decision making. *See, e.g.*, Parham v. J.R., 442 U.S. 584 (1979); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).
[126] § 3109.04 (F)(1)(a)–(f), (i)–(j).
[127] *See* L.P. v. L.F., 338 P.3d 908, 920 (Wyo. 2014) (discussing the practical problems associated with identifying more than two parents).

child's time between multiple households.[128] As a result, there will be potentially three or more houses that the child is shuttled to and from. For example, the New York Family Court in *T.H. v. J.R.*, examined the effect on parenting time:

> In light of the current 50/50 joint parenting agreement between the parents, a three-way shared parenting arrangement would likely be unworkable. A parenting plan that only impacts [the biological mother's] parenting time would substantially reduce [the child's] time with her mother and siblings and is unlikely to be in [the child's] best interest.[129]

There are many scheduling challenges under the current two-parent structure, arising from coordinating the schedules of two parents and a child with such items like school schedules; extracurricular activities; parents' work schedules; parties; holidays, birthdays, vacations, school breaks, and weekends. Adding a third adult or more will only complicate scheduling further. Moreover, it encroaches on a child's time to simply be a child and spend time with other children in social, non-structured activities that are not adult-centered parenting time or visitation.

Additionally, more than two legal adults may be confusing to the child's personal development because the child will have to learn and navigate between three or more household values, beliefs, and rules. Social science research has indicated that children of divorce often feel caught between "two worlds," and with more than two parents, the children will be caught in three or four worlds.[130]

> [A] child's time, loyalty, and emotional energy are finite resources. If too many parents attempt to manage the child's development, the tragedy of the commons occurs—no parent can effectively accomplish his or her task without being undercut by someone else. By the same token, if too many parents are able to veto another parent's decisions the tragedy of the anti-commons occurs—the ability of many to veto prevents any development.[131]

Children should have the time, space, and opportunity to be simply children. Even without third parents, parents already have to compete with

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[128] *See, e.g.*, McAllister v. McAllister, 779 N.W.2d 652, 661 (N.D. 2010) ("The best interests of a [young] child . . . may not be well served by having him stay in three different homes with three different 'parents' each week.").

[129] 84 N.Y.S.3d 676, 685 (N.Y. Fam. Ct. 2018).

[130] Elizabeth A. Pfenson, Note, *Too Many Cooks in the Kitchen? The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California's Recently-Proposed Multiple-Parents Bill*, 88 NOTRE DAME L. REV. 2023, 2060 (2013).

[131] *Id*. (citing Margaret F. Brinig, FAMILY, LAW, AND COMMUNITY 119 (2010)).

the influences children receive from school, peers, and other communities that they are involved in.[132] More than two households result in too many transitions for children shifting from different rules expectations, and personalities between different adult authority figures. More than two parents means a lack of a centralized authority figure for children. Children thrive when their homelife is stable, predictable, and safe because it prevents child abuse and neglect; it helps children become more resilient when they experience adverse challenges in life; and leads to healthy brain development.[133]

B. Biological and Adoptive Parents' Rights

1. Fit Parent Standard

The legal recognition of more than two parents simultaneously infringes on the original two "fit" parents' fundamental right "in the care, custody, and control of their children."[134] A parent is "fit" when he or she adequately cares for his or her child.[135] In *Troxel v. Granville*, the Supreme Court held that Washington State's visitation statute, which permitted any person to seek visitation with a child at any time, was unconstitutional because it did not give due consideration to the custodial parent's fundamental rights.[136] Relying on the Due Process Clause of the Fourteenth Amendment, the Court reasoned the Constitution "provides heightened protection against government interference with certain fundamental rights and liberty interests," including a parent's fundamental right to make decisions concerning the care, custody, and control of their children.[137] The Court recognized that a parent's liberty interest in the care, custody, and control of their children is one of the oldest recognized liberty interests.[138] The United States Supreme Court further reasoned, "[t]here is a presumption that fit parents act in the best interests of their children."[139] The right to parental decision making and other fundamental constitutional rights, like the right to be left alone in one's own home "converge to give parents almost complete authority over childrearing conducted within the home."[140] The Supreme Court held in *Michael H. v. Gerald D.* ("*Michael H.*") that the "integrity [and

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[132] Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 834, 841 (2007).

[133] CTR. FOR DISEASE CONTROL & PREVENTION, ESSENTIALS FOR CHILDHOOD: CREATING SAFE, STABLE, NURTURING RELATIONSHIPS AND ENVIRONMENTS FOR ALL CHILDREN 6 (2019), https://www.cdc.gov/violenceprevention/pdf/essentials-for-childhood-framework508.pdf; *see also* HEATHER SANDSTROM & SANDRA HEURTA, THE NEGATIVE EFFECTS OF INSTABILITY ON CHILD DEVELOPMENT: A RESEARCH SYNTHESIS 5 (2013), https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF.

[134] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[135] *Id.* at 68–69.

[136] *See generally id.*

[137] *Id.* at 65.

[138] *Id*. (quoting Washington v. Glucksberg, 520 U.S. 702, 720 (1997)).

[139] *Id.*

[140] Rosenbury, *supra* note 132, at 862–63.

privacy] of the family unit should not be impugned," further protecting the rights of biological parents.[141]

If a "fit" parent no longer wants to continue a child's relationship with a non-biological, non-adoptive adult, then courts should honor that fit parent's wishes and not force the interaction.[142] But, many of the states that are allowing more than two parents do not require an unfitness determination before going against the fit original parents' wishes.[143] For example, California's law states that the courts can find that a child has more than two parents if the absence of such a finding would be detrimental to the child, and a finding of an unfit parent is not necessary for there to be a detriment to the child.[144]

Similarly, in Washington, a court can determine that a child has more than two parents if the lack of recognition would be detrimental to the child, and that finding "*does not* require a finding of unfitness of any parent or individual seeking an adjudication of parentage."[145] In Vermont, a court can determine that it is in the best interest of the child to have more than two parents.[146] Like in Washington, Vermont courts are not required to find a parent unfit in order to establish more than two person parentage.[147]

2. A Parent's Right to Care, Custody, and Control of Children

The recognition of a third parent is a modification of parental rights because it dilutes or divests the original two parents of their parental rights.[148] When the Supreme Court addressed the issue of the legal recognition of more than two parents in *Michael H.*, the Court applied the marital presumption and recognized only two parents (biological mother and her husband) and held that biological father (Michael) who fathered the child as a result of an adulterous affair with the biological mother did not have any rights to the child.[149] The Court listed the many "substantive rights" that Michael would have if he was declared the father of the child, including rights to be involved in child rearing, decision making for the child's health and educational benefit, the right to direct the child's activities, religious upbringing; and the

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[141] 491 U.S. 110, 199 (1989) (quoting Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1005 (1987)).

[142] *See* Pfenson, *supra* note 130, at 2059; *see also* Collins v. Collins, No. CA2003-06-007, 2004-Ohio-5653 (Ohio Ct. App. Oct. 25, 2004) (applying *Troxel* in a case where the child was born during Martha's marriage to Jerry. During a divorce action in the domestic relations court, genetic testing revealed that Jerry was not the child's biological father. Later testing revealed that Christopher Williams was the child's father. The court of appeals affirmed the ruling of the juvenile court that denied Jerry visitation with the child because the biological parents were deemed fit parents and they were opposed to the visitation).

[143] *See, e.g.*, CAL. FAM. CODE § 7612(c) (West 2013); Uniform Parentage Act, S.B. 6037 § 513(3), 65th Leg., Reg. Sess. (Wash. 2018); VT. STAT. ANN. tit. 15C, §§ 206 (b) (West 2020).

[144] FAM. § 7612(c).

[145] S.B. § 513(3) (emphasis added).

[146] tit. 15C, §§ 206 (b), 501(b).

[147] *Id.* §206(b).

[148] McAllister v. McAllister, 779 N.W.2d 652, 666 (N.D. 2010).

[149] *See generally* 491 U.S. 110 (1989).

responsibility to prepare the child for life including teaching the child good morals and good citizenship.[150]

Under Ohio law, for example, rights, privileges, duties, and obligations flow from the parent and child relationship.[151] Examples include educating the child; caring for the child; liability stemming from the child's driver's license; duty to support; liability for their minor child's willful damage to property or theft offenses; and liability for the assaults their child commits.[152] When more than two people are simultaneously legally recognized as parents, then the newly recognized "parents" may have some or all of the attending rights that come with that designation.[153]

3. A Parent's Right to be Free From Abuse

There is scholarship about how domestic violence perpetrators misuse the court system to manipulate and control their victims.[154] For example, some domestic violence perpetrators seek to continue to remain involved in the victim's life by obtaining custody or visitation rights over the victim's children to whom they have no biological or adoptive connection even after the relationship has ended.[155] Although many states' best interest factors take into account domestic violence, abusive relationships are sometimes difficult for courts to discern and the process of the court proceeding itself can be a continuation of abuse.[156]

Even in the absence of domestic violence, parents who choose to end relationships with non-parents should be trusted to make the best decision for themselves and their children in the absence of an unfit determination.[157] There are various reasons why a parent may want or need to end a relationship that do not meet the legal definition of domestic violence. Emotional abuse, psychological abuse, economic abuse, controlling behaviors, manipulation, and intimidation can be as equally damaging to an individual as physical

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[150] *Id.* at 118–19, 127 (internal citations omitted).

[151] *See* OHIO REV. CODE ANN. § 3111.01(A) (LexisNexis 2018).

[152] Educating the child (*Id.* § 3331.14); caring for the child (*Id.* § 2151.05) a parent is obligated for the child's driver's license (*Id.* § 4507.07); duty to support (*Id.* §§3103.03, 3111.77) parental liability for their minor child's willful damage to property or theft offenses (*Id.* § 3109.09); and parental liability for the assaults their child commits (*Id.* § 3109.10).

[153] *See Michael H.*, 491 U.S., at 118–19. *Compare id. with* Cahn & Carbone, *supra* note 22, at 402 *and* Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217, 232 (2010), *and* James B. Boskey, *The Swamps of Home: A Reconstruction of the Parent-Child Relationship,* 26 U. TOL. L. REV. 805, 816 (1995), *and* Jacobs, *supra* note 6, at 326 (arguing that parents who spend more time with a child should have greater rights in child rearing).

[154] *See, e.g.*, Emmaline Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It*, 24 UCLA WOMEN'S L. J. 41 (2017); Mary Przekop, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of their Victims Through the Courts*, 9 SEATTLE J. FOR SOC. JUST. 1053 (2011).

[155] Pfenson, *supra* note 130, at 2048–49 (discussing trusting fit parents' ability to discern when it is appropriate to continue a child's relationship with a non-biological, non-adoptive adult).

[156] Campbell, *supra* note 154, at 46, 55; *see also* Przekop, *supra* note 154, at 1062–63.

[157] Pfenson, *supra* note 130, at 2059, 2061.

abuse.[158] Not all domestic violence laws protect against those types of destructive, unhealthy behaviors when they are not coupled with physical violence or the threat of physical violence.[159] If a non-parent is designated by law to be a parent, then they will be legally tethered to the parent who is trying to move on from the relationship. A parent being involved in more than one relationship should not justify the law's involvement in the child's life absent a determination that the biological or adoptive parent is unfit.

4. A Parent's Right to Travel

In the United States, citizens have the constitutional right to relocate to another state, which is broadly defined as the right to travel.[160] When more than two people are simultaneously legally recognized as parents, a parent will have yet another "parent" who can legally challenge their ability to relocate with the child. *D.G. v. K.S.* and *LaChapelle* highlight this problem.[161] In *D.G. v. K.S.*, two men and a woman decided to have a child, and then tri-parent the child together.[162] When mother unilaterally decided to relocate with the child out-of-state, the men sued.[163] The court denied the biological mother's request to remove and relocate the child to a different state; and gave all three adults equal parenting time.[164] Similarly, in *LaChapelle* Denise (birth mother) wanted to move with the child from Minnesota to Michigan, and Valerie (Denise's former partner) and Mark (biological father) were opposed.[165] The Court of Appeals upheld the trial court's judgment that granted Denise sole physical custody on the condition that she move back to Minnesota from Michigan.[166] Even in those cases where courts allow a biological parent to move with the child, against the third-parent's wishes, the biological parent potentially could face court orders requiring them to return the child to the home state on a set schedule to visit the other "parents."

In modern society, it is not uncommon for people to couple and re-couple and move to different states multiple times while raising children. As biological or original parents move from state to state, they leave behind other "parents" in their wake. For example, a 2015 study found that out of all adults living with their own children younger than eighteen, 14% had been married

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[158] *See generally* NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/ (last visited Apr. 25, 2021); Melinda Smith, M.A. & Jeanne Segal, Ph.D., *Domestic Violence and Abuse*, HELPGUIDE, https://www.thehotline.org/resources/types-of-abuse/ (last visited Apr. 25, 2021).

[159] *See, e.g.*, OHIO REV. CODE ANN. 3113.31(A) (LexisNexis 2015).

[160] *The Right to Travel*, CORNELL L. SCH., LEGAL INFO. INSTIT., https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/the-right-to-travel (last visited Feb. 10, 2021) (citing Saenz v. Roe, 526 U.S. 489 (1999)).

[161] *See generally* D.G. v. K.S., 133 A.3d 703 (2015); LaChapelle v. Mitten (*In re* L.M.K.O), 607 N.W. 2d 151 (Minn. Ct. App. 2000).

[162] 133 A.3d at 707–08.

[163] *Id.* at 709.

[164] *Id.* at 706.

[165] 607 N.W.2d at 157.

[166] *Id.* at 168.

twice; 2.3% had been married three or more times; and 11% had never been married.[167] Additionally, the study found that "2.4 million children lived in a household that included a parent's unmarried opposite-sex partner who was not also the child's parent."[168] The list of adults who could potentially qualify as a parent under the expanded definition is limitless.

C. Court Resources

The legal recognition of more than two parents simultaneously has the potential to put further strain on the already heavy caseloads of family law courts. When more people are classified as a parent, there will be more confusion and increased potential for conflict and litigation, which will, in turn, stretch the already limited court resources. Specifically, when courts recognize more than two parents, there is a greater chance for disagreements and misunderstandings over child-rearing.[169] For example, in *T.H. v. J.R.*, the New York Family Court observed:

> [A] tri-party joint custody arrangement as requested by Ms. H would require the three parties to make decisions about A. together. Based on the testimony presented, the court concludes that Ms. S., Mr. R. and Ms. H. are extremely unlikely to be able to jointly make even the most basic decisions about A.'s education and care.[170]

More than two-parent recognition has the potential to result in an increased number of litigants filing a dizzying array of motions for change of custody; contempt for the interference of parental time; supervised parenting time; and modification of parenting time. Every parent would be entitled to notice, service, opportunity to be heard, and the opportunity to object or appeal the ruling.[171] Trials could go on for even longer, as each party is entitled to call their own witnesses and to cross-examination other parties' witnesses.

The parent-child relationship affects many other areas of law including adoptions, wills and trusts, wrongful death, worker's compensation, unemployment, social security, insurance, military benefits, immigration, and taxes. For example, according to the Operations Manual for Maine's Social Security Program "an individual who meets the legal requirements to become a de facto parent in Maine also meets the agency's definition of 'parent' in

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[167] Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI.-KENT L. REV. 55, 60 (2017).
[168] *Id.*
[169] *See* Pfenson, *supra* note 130, at 2062.
[170] 84 N.Y.S.3d 676, 684 (N.Y. Fam. Ct. 2018)
[171] *See, e.g.*, N.Y. JUD. LAW § 165 (McKinney 2008).

the [Supplemental Security Income] program."[172] Therefore, a lack of a consistent, national definition of parenthood could lead to increased litigation in related courts.

IV. CONCLUSION: TOWARD A NATIONAL DEFINITION OF PARENTHOOD

A review of the variety of definitions of "parenthood" across the states demonstrate a clear and long overdue need for a national understanding of the terms that describe the people that nurture and support a child. Children are too important to have ill-defined categories for the most influential people in their lives.

Expanding the legal definition of parenthood to include the simultaneous recognition of more than two legal parents is unnecessary because many states already have a viable solution for adults who are not the child's legal parent but have an interest in the child: companionship time. For example, in Ohio, companionship time is defined as follows:

> In a divorce, dissolution of marriage, legal separation, annulment, or child support proceeding that involves a child, the court may grant reasonable companionship or visitation rights to any grandparent, any person related to the child by consanguinity or affinity, or any other person other than a parent, if all of the following apply:
>
> (a) The grandparent, relative, or other person files a motion with the court seeking companionship or visitation rights.
>
> (b) The court determines that the grandparent, relative, or other person has an interest in the welfare of the child.
>
> (c) The court determines that the granting of the companionship or visitation rights is in the best interest of the child.[173]

Companionship time is a better alternative to a legal finding of parentage because it allows an important adult in the child's life to continue to spend time with the child, while not infringing on the unique, hallmarked status of parent that has been established by biology or through a time-honored legal process such as adoption (with notice and opportunity to be heard). Moreover, companionship time hearings give special weight to a fit

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[172] *Program Operations Manual System (POMS)*, SOC. SEC., https://secure.ssa.gov/apps10/poms.nsf/lnx/1600905022 (last visited March 1, 2021).

[173] OHIO REV. CODE ANN. § 3109.051(B)(1) (LexisNexis 2015); *see generally* S.D. v. K.H., 98 N.E.3d 375, 375–79 (Ohio Ct. App. 2018) (explaining that California law allows for a child to have more than two parents, but Ohio law does not and holding that companionship time was a viable option for a biological mother's former girlfriend who was granted parenting rights in California but who could not have the same enforced in Ohio because parenting rights were reserved for parents).

parent's wishes.[174]

Parenthood should have the same meaning in all fifty states because people increasingly move from state-to-state. The lack of a national understanding of the term "parent" is increasingly problematic. The United States Supreme Court should grant certiorari on a case involving the function and definition of parenthood.[175] Thirty-one years ago, when the Supreme Court addressed the issue of the simultaneous legal recognition of more than two legal parents in *Michael H.*, Justice Scalia wrote for the majority and stated: "California law, like nature itself, makes no provision for dual fatherhood."[176] In the intervening years since *Michael H.*, there have been major shifts in the law both on the state and federal level including California and other states recognizing multiple parents and the Supreme Court's ruling in *Obergefell* which legalized same sex marriage in all fifty states.[177] As generationally defining as *Obergefell* was, it was a marriage case and not a parenthood case.[178] Prior to *Obergefell*, each state decided for itself whether it would recognize same sex unions.[179] Just like *Obergefell* held that there would be one definition of marriage in the United States, the Supreme Court should make a ruling that establishes one definition of parenthood in the United States.[180] There should be bright line, predictable rules as to who is a parent and who is not.[181] The Supreme Court should hear a parenthood case and make a national definition of parenthood, as it did for marriage. Many courts that have refrained from simultaneously recognizing more than two parents have done so because they posit that this responsibility lies with the legislature.[182] A Supreme Court case is a better solution because waiting for each state's legislature to modernize its definition of parenthood will result in state nuances, and it will not provide the necessary national uniformity for this foundational societal position.

The legal recognition of more than two people as parents is fraught with potential problems. It dilutes the rights of biological or adoptive parents even though they have done nothing (such as abuse or neglect) to warrant that result. In many cases, these biological or adoptive parents have done nothing

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[174] § 3109.051(D)(15).

[175] Jeffrey A. Parness, S*tate Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions*, 50 CREIGHTON L. REV. 479, 486 (2017) ("It cannot be that federal constitutional childcare rightsholders necessarily must be left to state law definitions . . . since other personal, familial privacy rightsholders, as with the abortion, contraception, sexual conduct, and marriage, have been substantially federalized by United States Supreme Court precedents.").

[176] 491 U.S. 110, 118 (1989).

[177] *See generally* 576 U.S. 644 (2015).

[178] Harris, *supra* note 167, at 66, 74–75, 81; Joanna L. Grossman, *Parentage Without Gender*, 17 CARDOZO J. CONFLICT RESOL. 717, 718 (2016).

[179] *See Obergefell*, 576 U.S. at 644.

[180] *Id.* at 675.

[181] Sinnott v. Peck, 180 A.3d 560, 576 (Vt. 2017) (Dooley, J., dissenting).

[182] *See* L.P. v. L.F., 338 P.3d 908, 919–920 (Wyo. 2014) (declining to adopt de facto parentage or parentage by estoppel and explaining legal pitfalls of the same); *Peck*, 180 A.3d at 574–75.

more than entered and exited a relationship that failed. It is unjust for a non-biological, non-adoptive person to remain legally tethered to a child when that person's relationship with the biological or adoptive parent has ended and when that person did not take a traditional, time-honored step of adopting the child. Adoption or companionship time of a child is a better option than third-parent recognition because those procedures afford procedural safeguards to the original two parents such as consent, notice, and opportunity to be heard.