

Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting

by

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I. Introduction

With the increasing use of assisted reproductive technologies (“ART”), including gamete (sperm, egg, and embryo) donation and the use of gestational carriers and traditional surrogates, particularly coupled with the recognition of same-sex marriages and other societal factors, our world is facing a new frontier of family formation. This new frontier includes the recognition of more than two legal parents for a child. In most ART arrangements, the intended parents, donors, and gestational carriers or surrogates, their respective attorneys, and other involved professionals, are focused on ensuring and securing the legal parentage of just two resulting parents. In other words, in most ART situations, the donors (whether sperm, egg, or embryo) and the carrier-surrogates want to be “off the hook” as to any and all legal parentage responsibilities. Thus, donation agreements and relevant statutes are pivotal to establishing the intent of the donor to be only a donor of genetic material and not a parent. Likewise, gestational carrier or surrogacy agreements are replete with language clarifying that the carrier-surrogate will not be a parent and does not intend in any way to be a parent. And, on the other hand, in most instances the committed “duo” of intended parents want to ensure that they are the only two possible parents “on the hook” as the legal parents and that no one else in the ART arrangement can claim parentage.

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A. Tri-Parenting by Design Versus by Default

In less frequent but evolving ART situations, some “parents” voluntarily plan in advance to seek legal recognition of more than two parents who are involved in the child’s creation and/or the parenting process. In these ART situations, all of the involved parties “by design,” or by choice, decide that the child they plan to create will have more than two parents. Hence the concept of multiple parents or “tri-parenting by design” has developed. On the other hand, there also are cases where there is tri-parenting “by default,” or by chance. These cases may involve ART but the necessary legalities (such as a valid sperm donor release) were not followed. Or they might not involve ART at all but might be the result of extra-marital conjugal relations (such as the wife or husband having a child as the product of an extra-marital affair). These default case outcomes, even where ART was not involved, still are relevant to whether tri-parenting arrangements will be upheld.

B. Variations in Establishing Parentage

With the evolution of ART, along with other societal changes, we now are seeing parentage being established in a variety of ways. These ways include: by birth, adoption, genetics (with DNA testing), orders of parentage (including pre-birth orders), marital presumption, various types of custody arrangements, and by de facto parentage (also referred to as psychological, functional, equitable, or intent-based, among other descriptions). The ART arrangements can include: the use of donor or contributor sperm, egg, or embryo, as well as the use of gestational carriers and genetic (true or traditional) surrogates, and the evolution of reciprocal in vitro fertilization (“IVF”) whereby one mom serves as genetic mom and the other as gestational mom. The societal changes include, but are not limited to: the growing acceptance of cohabitation and non-marital parenting arrangements, marriage equality for same-sex couples, the increased frequency of divorce and remarriage, the increased recognition of polyamory, and the easy inexpensive access to genetic testing (through such sites as Ancestry.com and 23andMe.com).

C. Variations in Parenting Rights and Responsibilities

Given the above, it should come as no surprise that children increasingly are being parented, or at least subject to the parenting influence and/or duties, of more than two parents. This evolving world of multi-parenting is also challenging traditional concepts of a parent's rights and responsibilities with regard to a child. These varying rights and responsibilities include:

- The duties of care, custody and support,
- Inheritance rights (of both child and parent),
- Visitation rights,
- The right to make legal, medical, educational, and other decisions for the child,
- The child's eligibility for social security and other state or federal benefits,
- Ability to claim the child as a dependent,
- Insurance (health, automobile, life) coverage qualifications,
- Tort liability of the parent,
- Ability to bring suit on behalf of the child,
- The right to travel or move with the child,
- The right to discipline or guide in moral and religious beliefs,
- Access to all of the child's educational, medical, and other records,
- Responsibility for the child's medical bills and other debts,
- The right to the child's earnings, and
- Being subject to criminal implications and child protective service consequences for violating laws or standards for abuse, neglect, abandonment, truancy, and the like.

This article examines:

- (1) the current state of the law, both by statute and published case law,¹ in the United States and elsewhere,

¹ This article attempts to capture as many existing known published cases as possible and also includes some limited information regarding unpublished cases. However, given the difficulty of accurately capturing all of the unpublished decisions that might exist, it cannot be considered a fully complete

178 *Journal of the American Academy of Matrimonial Lawyers*

- regarding the legal recognition of three parent arrangements and the theories used;
- (2) the current state of legal authority or ability to place more than two parents on a birth certificate;
 - (3) some of the unpublished case law for multiple parents; and,
 - (4) the arguments favoring and disfavoring “multiple” parent recognition.

This article does not examine the following:

- (1) the many cases that exist where third parties seek to take custody from or supplant the biological or legal parent due to that parent being unfit;²

compilation. Moreover, many of the unpublished cases have been placed under court seal and are not available to the public or must be heavily redacted to protect party identity.

² See, e.g., *In re Marriage of Rudsell*, 684 N.E.2d, 421, 426 (Ill. App. Ct. 1997) (“A third party seeking to obtain or retain custody of a child over the superior right to the natural parent must demonstrate good cause or reason to overcome the presumption that a parent has a superior right to custody *and* further must show that it is in the child’s best interests that the third party be awarded the care, custody and control of the minor.”) (emphasis in original); *Montgomery Cnty. Dept. of Soc. Servs. v. Sanders*, 381 A.2d 1154, 1161 (Md. Ct. Spec. App. 1977) (“When the dispute is between a biological parent and a third party, it is presumed that the child’s best interest is sub-served by custody in the parent. That presumption is overcome and such custody will be denied if (a) the parent is unfit to have custody, or (b) if there are such exceptional circumstances as make such custody detrimental to the best interests of the child.”); *Tubwon v. Weisberg*, 394 N.W.2d 601, 603 (Minn. Ct. App. 1986) (“In determining custody of MKT, the court cited *Wallin v. Wallin*, 290 Minn. 261, 187 N.W.2d 627 (1971), which establishes the standard for awarding custody to third parties over the objection of a biological parent.”); *In re Guardianship of Lavone M.*, 610 N.W.2d 29, 40 (Neb. Ct. App. 2000) (“A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.”); *Bodwell v. Brooks*, 686 A.2d 1179, 1183 (N.H. 1996) (“Once the superior court has acquired jurisdiction over a custody proceeding between unwed natural parents, it may use its *parens patriae* power to decide whether the best interest of the child warrants the intervention of a stepfather as an appropriate party in the custody determination.”); *K.B. v. J.R.*, 26 Misc.3d 465, 887 N.Y.S.2d 516, 521 (2009)

- (2) those cases where a third party is seeking de facto (also called psychological or functional or equitable, among other things) parentage but is not doing so to be recognized as a third parent to the child or where there are not already two parents;³ and,
- (3) the many cases, including unpublished cases, where a third party might be awarded some visitation while the child maintains two primary parents.

Instead, this article seeks to explore existing statutory authority (with or without supporting case law) that permits the recognition of more than three legal parents, as well as those cases in which at least three parents play such a significant role in the child's life that all three have obtained some heightened recognition by the court as parental figures. Note that there still are extremely limited situations where more than two parents legally will be recognized as full equal and legal parents. However, there are numerous anecdotal articles in the media and even in published legal treatises claiming that a case represents one in which

("Intervention by the State in the right and responsibility of a natural parent to custody of her or his child is warranted if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child."); McDonald v. Wrigley, 870 P.2d 777, 779 (Okla. 1994) ("But courts have long held that statutory language similar to that in § 108 and § 112 is sufficient for a divorce court to award custody of a minor child to a third party when the parents are unfit.").

³ For example, in the case of *In re Custody of B.M.H.*, 315 P.3d 470 (Wash. 2013), the biological father of a child was killed and the male petitioner stepped in to help the mother. The male petitioner was with the mom when the child was born and then later married the mother, though they divorced a few years later. During the marriage, the male petitioner was the child's step-father and a joint caretaker. No step-parent adoption had been done. The mother later remarried and the male petitioner filed for non-parental custody of the child. The Washington Supreme Court found that the male petitioner had failed to show adequate cause to grant the non-parental custody request, but did believe that the petitioner's status as a former stepfather entitled him to being a de facto parent of the child. In deciding this, the court noted that he had undertaken a permanent parental role with the child and had the mother's consent. Interestingly in this case, the Court found that the petitioner did not meet "the high burden imposed on those seeking third party custody. However, we find he is entitled to maintain his de facto parentage action." *Id.* at 472.

more than two parents have been recognized. Yet, upon close examination, most of those cases do not actually represent the issue of three (or more) substantially involved parents seeking legal recognition.

There also currently are very limited documented situations where more than two parents are being placed on the birth certificate of the child. However, this concept is expected to evolve rather quickly in the next few years and this article attempts to capture those countries or states that presently permit more than two parents to be placed on the birth certificate.

II. Tri-Parent Recognition by Statute or Published Case Law

A. States and Countries with Statutory Authority for Multiple Parents

As of the date of this article, there appear to be four states, one country, and one province within a country that have enacted statutory language acknowledging multiple parents. They are: California, Maine, Washington (state), and Louisiana (dual paternity), the province of Ontario, Canada, and the country of Brazil (dual paternity). Another state (Vermont) also is in the process of adopting statutory language similar to that adopted by the state of Washington which may have passed and gone into effect by the time this article is published.

1. California

In California, Family Code section 3040(d), which was enacted in 2013, states as follows:

In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child's need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child as provided in Sections 3011 and 30.⁴

Moreover, California Family Code section 7612(c), enacted in 2014, addressing parentage, states:

⁴ CAL. FAM. CODE § 3040(d) (Deering 2017).

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.⁵

Notably, in 2011, prior to the statutory recognition of more than two parent situations, an appellate court in California upheld the lower court's recognition of a tri-parent situation. *In re M.C.*⁶ involved a case where the child's biological mother, her wife, and the biological father were all the child's presumed parents. In that case the child was born during the marriage of the two women but was the result of a premarital relationship between one of the women and a man. The non-biological mother was a presumed parent because she was married to the biological mother at the time of the child's birth. The biological father could be considered a presumed parent because he promptly came forward and demonstrated his commitment to his parental responsibilities to the extent that the biological mother and the circumstances allowed. Although the case was remanded for the lower court to make further findings, the appellate court clearly gave the nod of approval to the concept of three presumed parents prior to the statutory changes.

2. Maine

Section 1853 of the Maine Parentage Act, entitled "Consequences of Establishment of Parentage," enacted in 2015 but which went into effect in 2016, states: "Preservation of parent-child relationship. Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents."⁷ Under the Maine Parentage Act, the law established eight primary mechanisms for establishing parentage: by birth, adoption, acknowledgment, presumption, de facto par-

⁵ CAL. FAM. CODE § 7612(c) (Deering 2017).

⁶ 195 Cal. App. 4th 197, 123 Cal. Rptr. 3d 856 (2011).

⁷ ME. STAT. tit. 19 § 1853(a)(2) (2015).

entage, genetic parentage, assisted reproduction or gestational carrier agreement.⁸

The Act most importantly lays out specific requirements and findings for presumed parents and de facto parents. Under the “Presumed Parentage” part of the Act, a marital presumption is established so that the person married to the person giving birth (except for a surrogate) is a presumed parent.⁹ Moreover, where the parties are not married, a nonmarital presumption of parentage can be established if the person:

- (a) lived with the child from the time the child was born or adopted, and for a period of at least two years thereafter, and,
- (b) assumes personal, financial or custodial responsibilities for the child.¹⁰

Under the Act, a court can recognize a de facto parent if that parent can show 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.”¹¹ Facts sufficient to meet the legal requirements include:

- (a) the parent has lived with the child for a significant amount of time;
- (b) the parent regularly takes care of the child;
- (c) a bonded and dependent relationship is established between the child and the parent;
- (d) another parent of the child has understood, acknowledged, supported, or encouraged the de facto parent in forming and having this close, relationship with the child;
- (e) the parent has taken on complete and permanent responsibilities as a parent of the child and not because paid to do so; and
- (f) it is “in the best interests of the child” to continue having this parent-child relationship¹².

⁸ ME. STAT. tit. 19 § 1851 (2015).

⁹ ME. STAT. tit. 19 § 1881 (1) (2015).

¹⁰ ME. STAT. tit. 19 § 1881(3) (2015).

¹¹ *Id.*

¹² *Id.*

3. *Washington*

The newest version of the Uniform Parentage Act (UPA), approved in July 2017 by the National Conference of Commissioners on Uniform State Laws, expressly includes a provision for a child to have more than two legal parents. Section 613(c), Alternative B, when addressing competing parentage claims, states: “The court may adjudicate a child to have more than two parents under this [Act] if the court finds that failure to recognize more than two parents would be detrimental to the child.”¹³ Washington state has adopted this newer version of the UPA as it was signed into law by the Governor on March 6, 2018 (Senate Bill 6037) and will be effective as of January 1, 2019.¹⁴ Note that the Washington Parentage Act contains similar provisions to Maine’s Parentage Act with regard to establishing de facto parentage.

4. *Louisiana*

In 2005, in response to evolving case law discussed further below, the state legislature revised the Louisiana State Civil Code to better acknowledge the possibility of dual paternity (two fathers in addition to the mother) in Articles 197 and 198. Article 197 lays out the child’s right to the dual paternity cause of action under which a child can institute an action to prove paternity even if the child is presumed to be the child of another man.¹⁵ The action can even be brought after the death of the alleged father but must be brought within a year of the death and shown by clear and convincing evidence as a higher burden of proof.¹⁶

Moreover, Article 198 lays out the biological father’s right to a paternity cause of action, even where the child is the presumed child of another man, under which a man can institute an action at any time unless (a) if the child is presumed to be the child of another man, the action must be instituted within one year from the day of the birth of the child; or (b) if the mother in bad faith deceived the father of the child regarding his paternity, then the action can be instituted within one year from the day the father knew or should have known of his paternity, or within ten years

¹³ Washington SB 6037 (2017).

¹⁴ *Id.*

¹⁵ LA. CIV. CODE 197 (2005).

¹⁶ *Id.*

from the day of the birth of the child, whichever occurs first.¹⁷ In any event, any action cannot be brought any later than one year from the day of the death of the child.¹⁸ Moreover, other Articles in the Civil Code address the presumption of the husband. Among others, the more pertinent ones are set out in Articles 185 and 195. Under Article 185, a marital presumption is established whereby the husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of the termination of the marriage.¹⁹ Moreover, parentage can be established under Article 195 where a man marries the mother and holds himself out as the father. The statute indicates that so long as no other man has been filiated with the child, then if that man marries the mother and “with the concurrence of the mother, acknowledges the child by authentic act,” then he is presumed to be the father of that child.²⁰ There also are provisions for disavowing paternity.²¹

The effect of the Louisiana statutory scheme is that a married man might be the presumed and legal father but not the biological father of a child. Then, either the child or the biological father may later sue to recognize the biological father without displacing the presumed father – thus leading to dual paternity.

The changes to the Louisiana Civil Code were prompted by two prior cases. In the case of *T.D. v. M.M.M.*,²² decided by the Supreme Court of Louisiana, the plaintiff had an affair while married, and during the marriage permitted the lover to visit the child regularly until she divorced, at which point she denied him access to the child. While other factors, such as the timeliness of bringing a cause of action, were considered, the court made it clear that:

several policy factors favor allowing a biological father to avow his child where such action will result in dual paternity. First a biological father is susceptible to suit for child support until his child reaches nineteen years of age. La. Civ. Code. art 209. Second, a child who enjoys legitimacy as to his legal father may seek to filiate to his biolog-

¹⁷ LA. CIV. CODE 198 (2005).

¹⁸ *Id.*

¹⁹ LA. CIV. CODE 185 (2005).

²⁰ LA. CIV. CODE 195 (2005).

²¹ LA. CIV. CODE 187 (2005).

²² 730 So. 2d 873 (La. 1999).

ical father in order to receive wrongful death benefits or inheritance rights.²³

Thus, the court focused on the benefits available to the child via legal recognition of dual paternity.

Another earlier Supreme Court of Louisiana case likewise opines on the benefits of dual paternity. In *Smith v Cole*, the mother of a thirteen-year old brought a filiation action against the biological father. The court noted:

Louisiana law may provide the presumption that the husband of the mother is the legal father of her child while it recognizes a biological father's actual paternity. When the presumptive father does not timely disavow paternity, he becomes the legal father. A filiation action brought on behalf of the child, then, merely establishes the biological fact of paternity. The filiation action does not bastardize the child or otherwise affect the child's legitimacy status. The result here is that the biological father and the mother share the support obligations of the child.²⁴

The court further noted that whether the legal father should share in the support obligations for the child was not before the court.²⁵

5. *Canada*

In the province of Ontario, Canada, the Children's Law Reform Act ("CLRA") Chapter C.12 (1)(4) states:

If, under this Part, a child has more than two parents, a reference in any Act or regulation to the parents of the child that is not intended to exclude a parent shall, unless a contrary intention appears, be read as a reference to all of the child's parents, even if the terminology used assumes that a child would have no more than two parents.²⁶

Prior to the enactment of the statute, the Ontario Court of Appeals recognized three parents in the case of *A.A. v. B.B., et al.*²⁷ In that case A and her partner C had been in a stable same-sex union since 1990, and in 1999 they decided to start a family with the assistance of their male friend B. They thought it was in the child's best interest that B remain involved in the child's life. C, the biological mother, and B, the biological father, were the

²³ *Id.* at 876.

²⁴ 553 So. 2d 847 (La. 1989).

²⁵ *Id.* at 855.

²⁶ Ontario Children's Law Reform Act, R.S.O. 1990, c. 23, s. 1 (1) (2016).

²⁷ 83 O.R. (3d) 561 (Ct. App. Ontario 2007).

child's legal parents but wanted A, the non-biological parent, to be recognized as a mother. A and C did not apply for an adoption order because that would cause B to lose his parental status. Instead, A brought an application for a declaration that she was the child's mother. While the lower level judge felt without authority to grant the application, the appellate court held that its "inherent *parens patriae* jurisdiction" could be applied "to rescue a child in danger or to bridge a legislative gap."²⁸ The court's analysis is worth noting verbatim:

A legislative gap existed in this case. The purpose of the CLRA was to declare that all children have equal status. At the time, equality of status meant recognizing the equality of children born inside and outside of marriage. The legislature had in mind traditional unions between one mother and one father. It did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the Legislature of the day. Present social conditions and attitudes have changed. *Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the CLRA's legislative scheme.*²⁹

The court went on to look at the fact that it was contrary to the child's best interests that he "was deprived of the legal recognition of the parentage of one of his mothers" especially given the child's own statement "I just want both my moms recognized as my moms." The child also noted: "It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everyone else's family."³⁰ The court also recognized the lesbian moms' fear about the death of the biological mother, leaving the child with her biological father but without her other mother or any mother.³¹

6. *Brazil*

On September 21, 2016, the Brazilian Federal Supreme Court decided an extraordinary appeal that recognizing dual paternity (referred to in Brazil as the concomitance of paterni-

²⁸ *Id.* at 572.

²⁹ *Id.* at 563 (emphasis added).

³⁰ *Id.* at 568.

³¹ *Id.*

ties).³² The facts involved a woman raised by her “affective-based” father who, when she was 18, discovered that he was not her biological parent. To guarantee her legal rights as to her biological father and determine her ancestry she brought suit including asking for a DNA test.

Like Louisiana, Brazil has a statutory backdrop recognizing the possibility of dual paternity. Article 48 of the Child and Adolescent Statute³³ in Brazil provides that the origin of paternity is biological. However, Article 1.593 of the 2002 Civil Code in Brazil establishes that paternity might be “affective.” The Brazilian Court actually looked to and cited Louisiana law and statutes in rendering the decision to find that the now adult child could establish dual paternity and that the statutory scheme in Brazil permitted such an outcome.

B. *States and Countries with Published Case Law on Multiple Parents*

More states and countries also are recognizing more than two parents through published case decisions. Tracking the case law is difficult because evidently numerous unpublished cases exist. However, published decisions increasingly are coming into existence. The primary justification for recognition of more than two parents usually is based on the theory of the de facto, also referred to as equitable or psychological, parent. Another approach is to balance the decision based on the totality of the circumstances and best interests of the child, including, among other things, looking at the contact the putative parent has had with the child, their role in the child’s life, the child’s perception of their role, and other factors. Some of these cases do not give full legal parental rights to de facto or psychological parents, but this article includes those cases where the court did grant fairly extensive custodial and/or other extensive parental rights.

The countries recognizing more than two parents by case law include the province of Ontario in Canada as discussed above (followed by statutory enactment) as well as Brazil, also discussed above, whereby the case decision was based on already existing statutes allowing for dual paternity. The states that have

³² (RE) No. 898.060 (Brazil 2016).

³³ Brazil Law 8.069 (1990).

188 *Journal of the American Academy of Matrimonial Lawyers*

recognized three legal parents, or have given a third parent significant legal recognition, by common law include: Delaware, Louisiana, Minnesota, New Jersey, New York, North Dakota, and Pennsylvania.

1. *Cases Using the De Facto, Equitable, or Psychological Parent Analysis*

The states that have utilized the de facto, equitable, or psychological parent method, also sometimes called functional parenthood, to recognize tri-parents, in order of most recent to less recent, include: New Jersey, Delaware, North Dakota, and Pennsylvania.

While not a three-parent case, in *Conover v. Conover*,³⁴ the Maryland Court of Appeals set out a four-prong test (adopted from the often used test of the Wisconsin Supreme Court) for de facto parentage that appears helpful to and used in several tri-parent cases. In *Conover*, a same-sex female couple decided to have a child together, so one of the parties was artificially inseminated by an anonymous sperm donor. After the child was born, the two parties married. They later divorced, and the biological mother wanted to deny parental rights to her former partner. The former partner argued that she had a right to visitation of the child as a de facto parent. Under Maryland law as it stood, de facto parents did not have equal rights as legal parents to contest custody or visitation. The Maryland Court of Appeals reversed precedent and held that de facto parents were different from “third parties” under the law and had standing to contest custody or visitation under the “best interests of the child” standard. The court adopted the four-part test used by the Wisconsin Supreme Court in *In re Custody of H.S.H-K*,³⁵ for finding de facto parent status which is as follows:

³⁴ 141 A.3d 31 (Md. Ct. App. 2016).

³⁵ 533 N.W.2d 419 (Wis. 1995), *cert. denied*, 516 U.S. 975 (1995). *Holtzman v. Knott (In re H.S.H-K)* actually was a two-parent dispute case where a female same-sex couple had a child together using an anonymous sperm donor. Knott carried the child and Holtzman was present throughout the pregnancy and well into the early years of the child’s life. After the relationship between Knott and Holtzman soured, Knott attempted to prevent Holtzman from getting any visitation rights on the basis that Holtzman was never legally the child’s parent and was not the biological parent. Holtzman sought a transfer of custody and visitation rights. The Wisconsin court held that Holtzman must first prove

- (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 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.

The case was remanded for further fact finding on the issue of whether the biological parent interfered with the parental relations and if the non-biological parent had satisfied the four-part test.

a. *New Jersey*

*D.G. v. K.S.*³⁶ was a case decided by the New Jersey Superior Court, in which a biological mother entered into a "tri-parenting" agreement with two men, who were a gay couple. This was a multiple parenting by design case. They used one man's sperm, the woman's egg, and gave the other man's last name to the child. They all agreed to co-parent the child and were active in the child's life. Several years later, the woman wanted to move with the child to California, which the two men protested. The man who was not the biological father of the child sought an order to be named the "psychological parent" of the child because he had been in a parental role to the child for six years.

The court upheld the tri-parenting agreement on the grounds that the non-biological dad was the psychological par-

under the above noted four-part test that she had a parent-like relationship with the child; and then prove there was a significant triggering event by demonstrating that Knott has interfered substantially with the child's relationship with Holtzman, and finally show that Holtzman petitioned the court promptly after Knott's interference.

³⁶ 133 A.3d 703 (N.J. Super. Ct. 2015).

ent, but denied him full legal parentage on the ground that a legal relationship could only stem from “the mother and child relationship and the father and child relationship” or a legal adoption.³⁷ The court also referenced that under the Parentage Act adopted in New Jersey that legal parentage could only be established in three ways: “genetic contribution, gestational primacy or adoption.”³⁸ The court was sympathetic to the non-biological father, but ultimately believed that changing ways to get legal parentage was something best left to the legislature, not the courts. The court awarded all three parties joint legal and residential custody and equal parenting time, and further held that, even though there was precedent in New Jersey for a psychological parent to pay child support, the psychological (and non-biological) parent could not be compelled to pay child support even though he wanted to do so.³⁹ The court noted that “the facts of this case do not support the elements of equitable estoppel since the biological parents are available to pay child support for the child.”⁴⁰ The court then proceeded to assess the child support obligations as between the two biological parents.

Of note is an earlier New Jersey case, *P.B. v T.H.*,⁴¹ in which the child’s maternal aunt had permanent custody of the child (after the child had been removed from the biological mother and put into foster care) and had allowed a neighbor to become a “psychological parent.” The neighbor filed for custody of the child. The court noted that the seminal test for whether a third party had standing to seek custody as a “psychological parent” was set out in an earlier New Jersey case, *V.C. v M.J.B.*⁴² However, that case basically adopted the four-prong test initially set out by the Wisconsin Supreme Court in *In re Custody of H.S.H-K*, which is noted above. Of critical note is that in *P.B.*, the court held:

[T]he *V.C.* test was not meant to apply only to domestic partners, step-parents, or those third parties who lived in a “familial setting” with the parent and child. Rather the test was established to avoid baseless

³⁷ *Id.* at 58.

³⁸ *Id.*

³⁹ *Id.* at 61-62.

⁴⁰ *Id.* at 62.

⁴¹ 851 A.2d 780 (N.J. Super. Ct. 2004).

⁴² 748 A.2d 539, *cert. denied*, 531 U.S. 926 (2000).

claims by unrelated third parties. We noted that the language in *V.C.* led to the conclusion that the test was meant to apply to all third parties seeking standing.⁴³

The court in particular noted that the critical first prong of the test was whether the legal parent fostered the formation of the parental relationship between the third party and the child. Also, once the third party is deemed to be the psychological parent under the third prong test, he or she then stands in parity with the legal parent.⁴⁴ The end result was that the New Jersey appellate court upheld the trial court's ruling that the child remain in the custody of the neighbor, thus expanding the realm of those parties who could be found to be *de facto* or psychological parents.

Prior adoption cases in New Jersey also have yielded more than two parents. In *In re Adoption of Two Children by H.N.R.*,⁴⁵ the court held that the step-parent adoption of two children by the same-sex partner would not terminate the rights of the other biological parent.⁴⁶

b. Delaware – Full Legal Parental Status Given to Both the Biological Parent and the De Facto Parent

In *J.W.S. v. E.M.S.*,⁴⁷ a case that was decided by the Delaware Family Court in Sussex, the first male petitioner, who was the ex-husband of the child's mother, and the second male petitioner, the man with whom the mother had intercourse around the time of conception, both sought custody and a paternity adjudication under the Delaware statute.⁴⁸ An adjudication was proper. The court found that the presumption of the first male petitioner's paternity was based on a material mistake of fact, that is, the mother's failure to tell him for four years that it was equally likely that the second male petitioner was the biological father. The court thus determined that recognition of both male

⁴³ *Id.* at 786-87.

⁴⁴ *Id.* at 786.

⁴⁵ 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995).

⁴⁶ See also *In re Adoption by A.R.*, 378 A.2d 87 (N.J. Super. Ct. 1997); *Matter of Adoption of Child by J.M.G.*, 632 A.2d 550 (N.J. Super Ct. Ch. Div. 1993).

⁴⁷ Nos. CS11-01557, CS13-01083, 2013 WL 6174814 (Del. Fam. Ct. May 29, 2013).

⁴⁸ DEL. CODE ANN. tit. 13, § 8-606(e) (2012).

petitioners as fathers was in the child's best interest, since the child considered both male petitioners to be her fathers, and both had been involved very deeply in her life. DNA testing established that the second male petitioner was the biological father and overcame the presumption of the first male petitioner's paternity.

The court held that "it is appropriate to give legal parental status to three people in this case: mother as the biological mother, [the second male petitioner] as the biological father, and [first male petitioner] as a de facto parent."⁴⁹ Moreover, the court was able to rely on the Delaware statute for recognition of a de facto parent. Under the Delaware statute, de facto parent status is established if the Family Court determines that the de facto parent:

- (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 as that term is defined in § 1101 of this title; 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.⁵⁰

In rendering the decision that all three were equal legal parents, the court referenced a prior decision, *A.L. v D.L.*,⁵¹ in which the court found that a step-father had established de facto status, thus resulting in an order declaring three legal parents. However, the decision is silent as to which parents were to be listed on the child's birth certificate.

c. North Dakota – Psychological Parent Given Expanded Parental-Custodial Rights

In *McAllister v. McAllister*,⁵² the North Dakota Supreme Court addressed a tri-parenting by default case in 2010 where a

⁴⁹ *Id.* at 23.

⁵⁰ 13 DEL. CODE § 8-201 (2012).

⁵¹ No. 12-07390, 2012 WL 6765564 (Del. Fam. Ct. Sept. 19, 2012).

⁵² 779 N.W.2d 652 (N.D. 2010).

stepfather and the biological mother disputed custody of a child that she had conceived with another man who was the biological father. The stepfather had been a caretaker of the child during the marriage but never adopted the child. Although the stepfather and mother were divorcing, up until that point the stepfather had been actively involved in the child's life. The court noted that it had previously described the role of the psychological parent as a "person who provides a child's daily care and who, thereby, develops a close bond and personal relationship with the child becomes the psychological parent to whom the child turns to for love, guidance, and security."⁵³ The court further noted that the establishment of a psychological parent did not end the trial court's inquiry. Rather, when a psychological parent and natural parent both were vying for custody, the natural parent's "paramount right to custody prevails unless the court finds it in the child's best interests to award custody to the psychological parent to prevent serious harm or detriment to the welfare of the child."⁵⁴ Although the court did find the stepfather to be a psychological parent, the court granted decision making responsibility and primary residential responsibility for the child to the mother.⁵⁵ The court also found that the stepfather was the psychological parent and granted him reasonable visitation as well as other expanded rights such as access to school and medical records and to attend educational conferences and to be notified of serious accidents or illnesses and the like.⁵⁶

Of note is that the case involved a dispute between the biological mother and her ex-husband who was the step-father. The biological father was not involved in that dispute. However, the court further noted that its decision was not intended to affect the biological father's parental rights or duties or his support obligations to the child.⁵⁷

⁵³ *Id.* at 658.

⁵⁴ *Id.* (citations omitted).

⁵⁵ *Id.* at 662.

⁵⁶ *Id.* at 661-62.

⁵⁷ *Id.* at 657.

d. *Pennsylvania – Three Parents Liable for Child Support*

In *Jacob v. Shultz-Jacob*,⁵⁸ the Superior Court of Pennsylvania addressed a situation where the legal mother's former same-sex partner filed an action against the legal mother and the "sperm donor" seeking full legal and physical custody of the mother's two biological and two adopted children. The mother counter-sued for child support. While somewhat inexplicably referred to as the "sperm donor," the biological father of the two biological (not adopted) children was held to be an indispensable party. Notably, the biological father was present at the birth of the children, had provided support to the two biological children since their birth and then for at least four years, had been awarded monthly partial custody and contact, and provided other assistance.⁵⁹ All three parents had been awarded some aspect of custody, and the court's order was upheld on appeal.

While the court did not officially declare three equal legal parents, of particular note in this case with regard to the division of child support is the court's break from tradition and disagreement with the trial court that three parties could not be liable for child support. Instead, the appellate court agreed with the non-biological mother's argument that "since all of the three persons involved in these matters have been awarded formal rights of custody, all three are obligated to provide support."⁶⁰ In finding that all three parents would be liable for support, the appellate court noted:

In the trial court's view the interjection of a third person in the traditional support scenario would create an untenable situation, never having been anticipated by Pennsylvania law. We are not convinced that the calculus of support arrangements cannot be reformulated, for instance, applying to the guidelines amount set for [biological dad] fractional shares to incorporate the contribution of another obligee.⁶¹

The court further noted that the three-way support issue is a matter better addressed by the legislature, but then stated that in the absence of legislative mandates, the courts "must construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have *vis a vis* each

⁵⁸ 923 A.2d 473 (Pa. Super. Ct. 2007).

⁵⁹ *Id.* at 481.

⁶⁰ *Id.* at 480.

⁶¹ *Id.* at 482.

other.”⁶² The court then affirmed the trial court’s award of custody and vacated the award of support, remanding it to the trial court for the biological father to be joined as an “indispensable party for a hearing at which the support obligation of each litigant is to be recalculated.”⁶³

2. Cases Using the Totality of the Circumstances Approach

The states that have recognized three parents via case law by using the totality of the circumstances approach include Louisiana, Minnesota, and New York.

a. Louisiana – “Tripartite Custody” in the Child’s Best Interests and a Long-Standing History of “Dual Paternity”

In *McCormic v. Rider*,⁶⁴ the maternal grandmother adopted the child. For approximately three years, the parties lived as a family unit in a duplex, with the biological parents residing on one side of the unit and the child living on the other side with the grandmother. The biological parents then ended their relationship, and the father moved out. The following year, the biological parents filed a custody petition, alleging that the grandmother was in ill health and unable to properly care for the child.

The Supreme Court of Louisiana found that because the grandmother had adopted the child, the parents were actually “nonparents” and the grandmother was the “parent” for the purposes of the Louisiana statutes.⁶⁵ However, it found that it would be detrimental to the child if the grandmother maintained sole custody.⁶⁶ Accordingly, the district court awarded joint custody to all three, with the biological mother designated as the domicil-

⁶² *Id.* (citations omitted).

⁶³ *Id.* But compare *Doran v Doran*, 820 A.2d 1279 (Pa. Super. Ct. 2003), where the presumed father, who had divorced the mother, successfully sought dismissal of his child support obligation based on genetic testing that proved he was not the child’s biological father. The court held that the marital presumption no longer applied because he was no longer married to the child’s mother and the equitable estoppel doctrine did not apply because the man only held the child out as his own based on the mother’s misrepresentations regarding his paternity.

⁶⁴ 27 So. 3d 277 (La. 2010).

⁶⁵ *Id.* at 279, citing LA. CIV. CODE ANN. art. 133.

⁶⁶ *Id.*

itary parent. The appellate court noted that “the ‘tripartite’ custody arrangement fashioned by the district court comports with the best interest of the child.”⁶⁷ Citing prior similar decisions awarding custody to both parents and non-parents, the court also noted that “the joint custodial arrangement will further benefit the child by keeping intact the family unit in which he has lived for virtually his entire life.”⁶⁸

Most interestingly, as previously discussed in the statutory authority part of this article, Louisiana also has a somewhat longstanding judicial doctrine of “dual paternity” in which there is a presumption that the husband of the mother is the legal father of her child while also recognizing a biological father’s actual paternity. The precedent set out in that part of this article ultimately resulted in a Louisiana State Civil Code revision in 2005 recognizing dual paternity in Articles 197 and 198 as previously noted.⁶⁹

b. *Minnesota – Quad-Parenting by Design; Tripartite Arrangement Recognized*

In the case of *LaChapelle v. Mitten (In re L.M.K.O.)*,⁷⁰ the female parent Mitten, her female partner Ohanian, and a sperm donor friend, LaChapelle, along with his gay partner, agreed to have a child together. At the time they agreed in writing that LaChapelle would donate the sperm for the artificial insemination of Mitten, that he would not have parental rights, and that Mitten would not hold him responsible for the child. Mitten got pregnant in April 1992 and, in May 1992, the four signed a new agreement that Mitten and her female partner would have physical and legal custody of the child and that LaChapelle and his partner would be entitled to a “significant relationship” with the child.⁷¹ The two women allowed LaChapelle and his partner to have some custody and visitation until around August 1994 when they terminated visitation. Also, in September 1993, without notice to the men, Mitten and her partner filed a petition for

⁶⁷ *Id.* at 280.

⁶⁸ *Id.*

⁶⁹ See *T.D. v. M.M.M.*, 730 So. 2d 873 (La. 1999); *Smith v. Cole*, 553 So. 2d 847 (La. 1989).

⁷⁰ 607 N.W.2d 151 (Minn. Ct. App. 2000).

⁷¹ *Id.* at 157.

Ohanian to adopt the child, stating that the child was the product of artificial insemination, and obtained a final order of adoption. After his visitation rights ended, LaChapelle filed to vacate the adoption based on fraud and also began paternity proceedings. Then, Mitten and Ohanian broke up in the Spring of 1996. All three parties claimed parental rights to the child.

The Minnesota Court of Appeals found that a tripartite arrangement was appropriate in the situation. The court looked to the best interests of the child doctrine which it viewed as a paramount consideration in making a determination in the case.⁷² The court viewed Mitten as the biological mother, LaChapelle as the biological father, and Ohanian as the child's "emotional parent" that the child looked to for "comfort, solace and security."⁷³ The appellate court ultimately affirmed the trial court's grant of sole physical custody to the biological mother Mitten so long as she moved back to Minnesota (where Ohanian and LaChapelle lived) from Michigan, the grant of joint legal custody to Mitten and Ohanian, and the grant of the right to LaChapelle to be able to participate in important decisions involving the child.⁷⁴ Notably the appellate court also upheld the trial court's order that both Ohanian and LaChapelle also had visitation rights and support obligations.⁷⁵

c. New York – Legal Tri-Custody

Dawn M. v. Michael M.,⁷⁶ is a legal tri-custody case where the plaintiff was the wife of the male defendant, who had a biological child with another woman during the course of the marriage (from the facts, this was a polyamorous relationship). The plaintiff acted as a mother to the child, along with her husband (the defendant) and the biological mother. The plaintiff and the defendant broke up and the plaintiff applied for legal custody on the grounds that she had parented the child for more than eighteen months, along with the defendant and the biological mother, and the child considered both women to be equal "mommies." The New York Superior Court found that the child's best inter-

⁷² *Id.* at 163.

⁷³ *Id.* at 164.

⁷⁴ *Id.* at 168.

⁷⁵ *Id.* at 165-66.

⁷⁶ 55 Misc. 3d 865, 47 N.Y.S.3d 898 (N.Y. Sup. Ct. 2017).

ests would be served by granting the plaintiff's custody application, thereby creating a legal tri-custodial arrangement (note that the biological mother and the defendant already shared joint custody of the child).

C. Three Parents Placed on the Birth Certificate

There is limited information available but there appear to be at least one state (Florida) and two countries (Argentina and Brazil) that have permitted three parents to be placed on the child's birth certificate. In another case out of Nevada in 2017, the Supreme Court of Nevada vacated the district court's order that all three parents' names appear on the child's birth certificate without the designation of mother or father, and sent the case back for further consideration of whether Nevada law allowed more than two legal parents.⁷⁷

The issuance of tri-parenting orders whereby all three (or possibly more) parents are declared to be legal parents raises unique situations with the issuance of birth certificates and vital record departments that do not have the correct forms or systems in place. Presumably all parents simply should be called "parent" as opposed to "mother," "mother number two," and "mother number three," just by way of example. One director of a state department of vital records recently opined at an April 2018 Conference of the Academy of Adoption and Assisted Reproduction Attorneys ("AAAA") that maybe a better solution is the issuance of parentage certificates as opposed to changing the child's birth certificate.⁷⁸ On the other hand, what is so difficult about simply listing three (or more) parents – each as "parent"?

1. Florida

In an evidently unpublished opinion, the Miami-Dade Circuit Court held that a sperm donor could be listed on the birth certificate alongside the child's two mothers. The mothers re-

⁷⁷ See *Hammer v. Rasmussen*, 404 P.3d 393 (Nev. 2017).

⁷⁸ Dr. Lou Saadi, "A National Perspective on Vital Records," AAAA Annual Conference (May 1, 2018).

tained sole parental responsibility while the biological father received visitation rights.⁷⁹

2. *Argentina*

Argentina allowed a same-sex couple and the biological parent of the child to have all three of their names listed on the child's birth certificate.⁸⁰

3. *Brazil*

A judge allowed three names to be on the baby's birth certificate: two married women and a male friend who helped them conceive.⁸¹

D. *Unpublished Tri-Parent Cases in Adoption and ART*

There evidently are quite a number of unpublished opinions – including in states that do not have published case law - that are under seal or not searchable or otherwise easily found. Samples of these cases are decisions that have been issued in Alaska,⁸² New Jersey,⁸³ the District of Columbia (Washington,

⁷⁹ Kelli Kennedy, *Gay Sperm Donor, Lesbian Couple Reach Agreement*, YAHOO.COM (Feb. 8, 2013), <https://www.yahoo.com/news/gay-sperm-donor-lesbian-couple-reach-agreement-230442034.html?ref=gs>.

⁸⁰ Thom Senzee, *Argentina Makes History with Three-Parent Birth Certificate*, ADVOC. (May 3, 2015), <https://www.advocate.com/world/2015/05/03/argentina-makes-history-three-parent-birth-certificate>.

⁸¹ Annalee Newitz, *A Baby in Brazil Now Has Three Legal Parents*, 109 (Sept. 18, 2014), <https://io9.gizmodo.com/a-baby-in-brazil-now-has-three-legal-parents-1636577678>. For further reading see also Susan Goldberg, *Three Parents on the Birth Certificate: A First for B.C.*, TODAY'S PARENT (Feb. 13, 2014), <https://www.todaysparent.com/family/three-parents-on-the-birth-certificate-a-first-for-b-c/>.

⁸² See *In the Matter of the Adoption of A.O.L*, a minor child, Case No. IJU-85-25 P/A (Sup. Ct. Alaska, First Judicial District at Juneau, 1986) (adoption petition was granted but the adoption did “not terminate the parental rights of the natural mother and father of the child.”). See also Jennifer Peltz, *Courts and ‘Tri-Parenting’: A State-by-State Look*, ASSOCIATED PRESS NEWS (June 18, 2017), <https://www.apnews.com/4d1e571553a34cfbb22b72249a791a44>.

⁸³ *In the Matter of the Adoption of an Adult by [Confidential]* (Sup. Ct. N.J., Family Part Middlesex County, Jan. 29, 2009) (adult adoption granted to adoptee while leaving the biological parent rights intact).

200 *Journal of the American Academy of Matrimonial Lawyers*

D.C.) and Virginia.⁸⁴ Evidently other unpublished opinions exist in other states such as Oregon but this author was not able to procure actual copies of the opinions.⁸⁵

III. Arguments in Favor of and Against Recognizing Tri-Parenting

A. *Why Should Courts Routinely Recognize More than Two Parents in Those Cases that Warrant It?*

1. *Best Interests of the Child*

The most common argument for recognizing tri-parenting, which is one advanced by the National Center for Lesbian Rights, is that it is against a child's best interests to not grant parental status to a person who the child has considered a "parent" for their entire life.⁸⁶ In *VC v. MJB* (which was not a tri-custody case but did involve third party visitation), the New Jersey Supreme Court held that

At the heart of the psychological parent cases is recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.⁸⁷

There is significant empirical data that exists to suggest that, regardless of the family structure, children have healthy outcomes when, after their basic needs (food, shelter, clothing, medical care) are met, the family provides, basic physical and

⁸⁴ See *Ex Parte* in the Matter of the Petition of J.B. & W.B. for Adoption of Minor Children, Case No Confidential, (Sup. Ct. Dist. Columbia, Fam. Ct., Apr. 27, 2012) (determining that a relative adoption by a sister and her spouse did not cut off a biological father's rights).

⁸⁵ *Tanya Prashad v Roberto-Luis Copeland, et al.*, Fairfax Cir. Ct. August 18, 2008) (Virginia court was confronted with the issue of, and in fact agreed to, domesticating and registering four agreed upon North Carolina custody orders whereby the true surrogate had secondary legal and physical custody and the same-sex male fathers had primary legal and physical custody).

⁸⁶ See *Bill Clarifies a Judge's Ability to Protect Best Interests of a Child Who Has Relationships with More than Two Parents*, NAT'L CENTER FOR LESBIAN RIGHTS (Feb. 24, 2012), <http://www.nclrights.org/press-room/press-release/bill-clarifies-a-judges-ability-to-protect-best-interests-of-a-child-who-has-relationships-with-more-than-two-parents/>.

⁸⁷ 748 A.2d 539 (N.J. 2000).

psychological safety, love, acceptance, nurture, understanding, structure and guidance, educational opportunities, and encouragement.⁸⁸

2. *Fundamental Human Rights*

Humans have a right to define their identity the way they see fit and the law should recognize identities outside of traditional societal structures. Professor Paula Gerber and researcher Phoebe Irving Lindner observe:

Birth certificates also provide individuals with an identity, both in the practical and abstract sense. Birth certificates afford an individual with legal proof of identity, which is essential for many day-to-day activities. In a report on identity fraud, the United States Department of Health and Human Services observed, “[A] birth certificate issued in the States is the key to opening many doors in our society - from citizenship privileges to Social Security benefits. Such certificates can then be used as ‘breeder’ documents to obtain driver’s licenses, passports, Social Security cards or other documents.⁸⁹

3. *Anti-Discrimination*

Absent legal protections, parents in a tri-parenting arrangement arguably are discriminated against both legally and in society.⁹⁰ For example, when only two parents are legally recognized, then the third parent is not able to access the child’s medical and school records under most state laws.

4. *Equal Footing Among Parents*

Where the parental rights are limited to two parties (or, in some cases, just the biological parent), the non-biological or third-party parent is at a disadvantage legally when it comes to issues like custody, child support, etc.⁹¹ Also note that de facto/psychological parents have to meet certain requirements in order

⁸⁸ Robert A. Simon, *On Talking with Young Children About Their Non-traditional Families*, 40 ABA FAM. ADVOC. 44 (Spring 2018).

⁸⁹ Paula Gerber & Phoebe Irving Lindner, *Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?* 18 N.Y.U. J. LEGIS. & PUB. POL’Y 225, 235 (2015).

⁹⁰ See Emily B. Gelmann, *What About Susan: Three’s Company, Not a Crowd: The Importance of Allowing Third Parent Adoptions When Both Legal Parents’ Consent*, 30 WIS. J. L., GENDER, & SOC’Y 65-6 (2015).

⁹¹ See Pamela Gatos, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 218 (2001).

202 *Journal of the American Academy of Matrimonial Lawyers*

to be recognized under the law, and those requirements take time to be met; a parent who was present at birth may still have no legal rights to the child until up to several years later, once the requirements are met. There's an additional difficulty due to the fact that the de facto parent must seek actual recognition of his or her status from the court and can't just establish de facto parentage simply by living out the requirements.⁹²

5. *Scientific Advances*

As reproductive medicine continues to develop, new scientific methods may lead to situations in which there are three biological parents. The legal system needs to be prepared to address those issues when they arise.⁹³ For example, new reproductive technologies provide for the DNA in one woman's egg to now be replaced by DNA from another woman's egg especially to prevent mitochondrial disease.⁹⁴ For such an egg from two women, now fertilized by sperm of a man, a child can be created with three biological parents. To similar effect are the reciprocal in vitro fertilization arrangements whereby one mother is the genetic mother who contributes her egg which is then fertilized with sperm from an intentional father and carried by the gestational mother – all with the intent of giving the child three reproductive parents.

6. *Changing Societal Norms*

The traditional family structure is changing over time as social norms evolve. Even thirty years ago, “the ‘traditional’ family - husband and wife, living together with their children – [was] a minority family structure Only twenty-seven percent of

⁹² See Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 NEV. L.J. 743, 769-70 (2016).

⁹³ See James Gallagher, *UK Government Backs Three-Person IVF*, BBC-NEWS.COM (June 28, 2013), <http://www.bbc.com/news/health-23079276>; Ian Sample, *Three-Person IVF: UK Government Backs Mitochondrial Transfer*, THEGUARDIAN.COM (June 28, 2013), <https://www.theguardian.com/science/2013/jun/28/uk-government-ivf-dna-three-people>; Brittany Shoot, *3-Parent IVF: Why Isn't It Available in the United States?*, THEGUARDIAN.COM, (Feb. 27, 2015), <https://perma.cc/C589-8JBF>.

⁹⁴ Sharon Kirkey, *Fertility Doctor Offering to Blend Eggs from Two Women to Make ‘Three-Parent’ Babies*, NATIONALPOST.COM (June 19, 2017).

American households in 1988 consisted of conventional nuclear families.”⁹⁵ Numerous demographic changes have occurred that have exploded the myth that the nuclear family is the conventional familial arrangement: “An increasing number of divorces, heterosexual non-marital cohabitation, openness in same-sex couples, and the growing number of women raising children alone all contribute to the emergence of alternative families.”⁹⁶

7. *Honoring Parties’ Intentions*

The courts should honor the choice that families have made to enter into a non-traditional family structure. “Families of consent can include more than two parents, and decisions within these families to allocate parental status to more than two individuals should be honored.”⁹⁷

B. *What Are the Arguments Against Such Recognition?*

1. *Traditional Definition of “Parent,” Marital Presumptions, and Accepted Family Structure*

Some people believe that the traditional definition of “parent” should be limited to two parties, and people of the opposite sex. This is the determination that the Court of Appeals of Arizona came to in *Riepe v. Riepe*.⁹⁸ The case mainly discussed the concept of in loco parentis, but it’s the bickering between the majority and the dissent about “unhing[ing] the ties of gender and the number contained within Arizona’s definition of the term ‘parent’”⁹⁹ that is of interest.

Moreover, the U.S. Supreme Court noted in *Michael H. v. Gerald D.*, that the child’s

basic claim is not that California has erred in preventing her from establishing that Michael, not Gerald, should stand as her legal father. Rather, she claims a due process right to maintain filial relationships with both Michael and Gerald. This assertion merits little discussion, for, whatever the merits of the guardian ad litem’s belief that such an arrangement can be of great psychological benefit to a child, the claim

⁹⁵ Alexa King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN’S L.J. 329, 379 (1995).

⁹⁶ *Id.*

⁹⁷ Gatos, *supra* note 91, at 218.

⁹⁸ 91 P.3d 312 (Ariz. Ct. App. 2004).

⁹⁹ *Id.* at 316.

204 *Journal of the American Academy of Matrimonial Lawyers*

that a State must recognize multiple fatherhood has no support in the history or traditions of this country.¹⁰⁰

In *Michael H.*, the mother and the respondent were married. The mother had an adulterous relationship with the petitioner father resulting in the child at issue. The respondent was listed as the father on the child's birth certificate and held the child out to the world as his daughter. However, blood tests showed that the petitioner was the child's father. For a time, the mother resided with the petitioner, who held the child out as his daughter. The mother subsequently moved and rebuffed the biological father's attempts to visit the child. The petitioner filed a filiation action to establish his paternity and right to visitation. The child filed a cross-complaint asserting that if she had more than one de facto father, then she was entitled to maintain her filial relationship with both. The mother and the respondent reconciled. The respondent intervened, and the superior court granted his motion for summary judgment against the petitioner and the child. The California Court of Appeal affirmed. The California Supreme Court denied discretionary review. The U.S. Supreme Court affirmed thus leaving the child with only one recognized father, not two. Given the age of this case it seems that the U.S. Supreme Court might take a different view some thirty years later.

Note that the Louisiana Supreme Court distinguished the *Michael H.* case in *T.D. v. M.M.M.*,¹⁰¹ discussed previously, by noting that at the time that case was decided, California did not have a statutory scheme that allowed for dual paternity while Louisiana did have such a scheme.¹⁰² In *T.D.*, the dissenting judge strongly disagreed with the majority's application of Louisiana law allowing the biological father to establish paternity and recognizing dual paternity. The dissent argued that doing so simply allowed a biological father to interfere with the father-son relationship and close bond that had been established with the child by the legal father. The dissent faulted the majority's application of the dual paternity law and the majority's permitting the biological father to intervene at such a late juncture, noting:

First and foremost, these laws protect and strengthen the marital family unit by protecting it from intrusion by biological fathers who have

¹⁰⁰ 491 U.S. 110, 130-31 (1988).

¹⁰¹ 730 So. 2d 873.

¹⁰² *Id.* at 876 n. 2.

not previously established parental relationships with their children. Second, these laws also protect children by promoting stable family relationships. Finally, these laws protect the substantial and important relationship that develops between a father and child by virtue of the father's care and nurturance of the child, despite the lack of a biological connection.¹⁰³

Thus, the dissent supported the argument that, regardless of genetics, the husband of the wife who bears the child who accepts the child as his own and actually parents that child should be the only recognized father.

Some commentators argue that recognizing untraditional families will "all but guarantee . . . new and even bizarre family structures."¹⁰⁴ Such fear of new family structures that undermine traditional family structures and values also remains deeply rooted in conservative religious views.¹⁰⁵

2. Reduction of Conflict and Best Interests of the Child

Given the proliferation of custody disputes as between just two parents, another criticism of tri-parent arrangements is that now there is apt to be more conflict between the parents which is not in the best interest of the child. The argument is that now there will be three or more parents and not just two who have to get along and work together. This potential lack of cooperation in multiple parenting is evidenced by some of the cases set out in this article which show that even with multiple parent recognition, such arrangements may inevitably end up in court. Two of the cases in this article show that litigation ensued when one parent wished to move with the child. In the New Jersey case of

¹⁰³ *Id.* at 882.

¹⁰⁴ *Sharon S. v Superior Ct.*, 31 Cal. 4th 417, 451 (2003) (Baxter, J., concurring in part and dissenting in part).

¹⁰⁵ See Dennis Leap, *Courts Say More than Two Parents OK*, TRUMPET (July 11, 2017), <https://www.thetrumpet.com/16039-courts-say-more-than-two-parents-ok>. (calling multi-parent families a "violation of the Fifth, Seventh and Tenth Commandments. It is immorality and it is law-breaking."); Patrick McGreevy & Melanie Mason, *Brown Signs Bill to Allow Children More than Two Legal Parents*, L.A. TIMES (Oct. 4, 2013), <https://perma.cc/7UWD-QJY9> (multiple parents are an "attack" on the traditional family); Deirdre Reilly, *Tri-Parenting Failing Children*, LIFEZETTE (Apr. 19, 2016), <https://www.lifezettes.com/momzette/why-we-shouldnt-try-tri-parenting/> (stating that the traditional family structure is "best").

D.G. v K.S.,¹⁰⁶ the biological mother wanted to move to California and in the Minnesota case of *LaChapelle v. Mitten (In re L.M.K.O.)*,¹⁰⁷ the biological mother in fact moved with the child to Michigan. In the New Jersey case, the court held that the parent could not move, and in the Minnesota case the court held that the parent had to move back with the child.¹⁰⁸

3. *Concerns About Abuse and Over-Extension*

Some fear that allowing multiple parents to share in traditional parental rights will open the door for cults and their ilk to “claim” children for the cult. One arguably conceivable – but unlikely – “unintended consequence” of allowing an unlimited number of parents to be listed on birth certificates is that groups such as spiritual sects or cults might seek to register multiple parents as a way of asserting improper control over the children.¹⁰⁹ “If a child can have three parents,” Aston wrote, “why not four or six or a dozen? What about all the adults in a commune or a religious organization or sect?”¹¹⁰

4. *Lack of Stability for the Child*

Other people argue that allowing a child to have more than two legal parents will lead the child to feel unstable and confused.¹¹¹ This argument flies directly in the face of the counter-argument that the more parents a child has, the greater the stability. Yet the criticism of tri-parenting not being in the child’s best interests persists. “The ones who are going to pay the price [of California’s multi-parent bill] are not the activists, but it’s going to be children, who will see greater conflict and indecision over matters involving their well-being.”¹¹²

¹⁰⁶ 133 A.3d 703 (N.J. Super. Ct. 2015).

¹⁰⁷ 607 N.W.2d 151 (Minn. Ct. App. 2000).

¹⁰⁸ See Reilly, *supra* note 105, for an article that is very critical of the New Jersey tri-parenting arrangement.

¹⁰⁹ Gerber & Lindner, *supra* note 89, at 261.

¹¹⁰ Gudrun Schultz, *Ontario Court Rules Five-Year Old Has Three Legal Parents – Father, Mother, Lesbian Partner*, LIFESITENEWS.COM (Jan. 3, 2007), <https://www.lifesitenews.com/news/ontario-court-rules-five-year-old-has-three-legal-parents-father-mother-les>.

¹¹¹ *Id.*

¹¹² McGreevy & Mason, *supra* note 105.

IV. Conclusion

The recent evolution and growth of assisted reproductive technology is enabling more tri-parent cases to come into existence, primarily by design but also by default. Focusing solely on a child-centric approach, isn't it the case that, so long as they get along and cooperate, the more legal parents for a child the merrier? When a child has three, or even four, legal parents, there is then one more parent from which to inherit or to receive military benefits or social security benefits. It leaves one more parent to care for the child in the event of incapacity or unavailability of the others. It means yet another parent who can contribute to the child's overall welfare including education and extracurricular activities. Provided that all three (or more) parents can put the child's interest first, aren't there greater resources that inure to the child's benefit? And moreover, whether by default or design, isn't this just the inevitable future of some families that the law, whether by statute or common law, will be forced to address and embrace?

