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# More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage

Melanie B. Jacobs
*Michigan State University College of Law*, mjacobs@law.msu.edu

# MORE PARENTS, MORE MONEY: REFLECTIONS ON THE FINANCIAL IMPLICATIONS OF MULTIPLE PARENTAGE

MELANIE B. JACOBS*

## I. INTRODUCTION

An increasing number of children have more than two potential legal parents. Legal recognition of these multi-parental frameworks creates new challenges for courts that are accustomed to dealing with the traditional two parent paradigm.[1] For example, in deciding whether legal paternity could be conferred on a child's biological father in a situation in which the child already has a legal father by virtue of his marriage to her biological mother, Justice Scalia, writing for a plurality of the United States Supreme Court in the 1989 landmark case of *Michael H. v. Gerald D.* wrote, "law, like nature itself, makes no provision for dual fatherhood."[2] Subsequently, in 1993, the California Supreme Court in *Johnson v. Calvert* wrote, "[y]et for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible."[3] Fifteen years later, however, there is precedent to concede that law can—and should—provide for multiple parents.

With the advent of reproductive technology, it is possible to have two "natural" mothers, both a gestational mother and genetic mother. Both biology and birth are traditional, legal bases by which to determine maternity and the term "natural" might be used to describe either a birth mother or genetic mother. Nature—with the help of science—permits family formations that differ from our traditional understanding of one mother and one natural father. For instance, under certain circumstances, the law may preclude both of those biological mothers from any legal parental rights and may confer rights, instead, in an intended legal parent—i.e., the parent who contracted with the two biological mothers.[4] It is

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* Associate Professor of Law, Michigan State University College of Law. I presented a draft of this article at the International Society of Family Law Conference in September, 2008 in Vienna, Austria, and I appreciate the helpful comments that I received.

[1] *See* Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007) [hereinafter *Why Just Two*].

[2] Michael H. v. Gerald D., 491 U.S. 110, 118 (1989).

[3] Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993).

[4] *See, e.g.*, In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

equally possible to envision a scenario in which a lesbian couple may wish to use the eggs of one partner for implantation in the womb of the other and give parental rights to a known sperm donor.[5] Thus, with the use of assisted reproductive technologies ("ART"), it is possible for a child to have more than two legal parents, and there are instances in which the adults involved envision parental roles for more than two adults.

Multiple parenthood, while particularly relevant to many couples who use ART, has much greater applicability. For example, the marital presumption has long conferred legal parental status on a child's mother's husband, regardless of whether that man is the child's biological father.[6] I have previously suggested that when the mother's husband or social father is not the same as the biological father, both men should have the ability to establish parental rights and share certain parental duties.[7] At least one jurisdiction—Louisiana—recognizes dual paternity and confers legal parental status on the mother and both fathers.[8] The American Law Institute Principles of Dissolution ("Principles") suggests support for dual paternity in some instances as well as support for recognizing more than two legal parents.[9] Several United States jurisdictions have also recognized ongoing support and/or custodial obligations for stepparents.[10] Determining a framework for assessing financial responsibility for multiple parents is relevant to many families.

Courts, too, have begun to acknowledge that more than two legal parents may be beneficial to a child. In a few cases, courts have awarded legal rights to more than two parents. In January 2007, the Ontario Court of Appeals ruled that a child could have three legal parents. A significant part of the court's reasoning was its desire to protect the child financially, as well as emotionally.[11] A few months later, a Pennsylvania court ruled that it was possible to establish legal support obligations

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[5] There are several cases in which a known sperm donor has been granted some form of parental rights. *See, e.g.*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986) (upholding the paternity adjudication and visitation rights of a known sperm donor although denied custodial rights); LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000) (upholding paternity adjudication but denying custodial rights to known donor). In at least one case, the California Supreme Court has stated that an egg "donor" and her partner and birth mother were both legal mothers of the resulting children. K.M. v. E. G., 117 P.3d 673 (Cal. 2005) (holding that woman who donated her ova to lesbian partner/birth mother is a parent under California law). Thus, it is possible to imagine the combination of these two scenarios and the recognition of three parents.

[6] *See* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 228 (2006); Jana Singer, *Marriage, Biology, and Paternity: The Case For Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 247 (2006).

[7] Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006) [hereinafter *My Two Dads*].

[8] *Id.* at 853-54.

[9] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 (2002).

[10] *See, e.g.*, Nunn v. Nunn, 791 N.E.2d 779, 783 (Ind. Ct. App. 2003) (discussing Indiana statute which permits de facto custodians to establish custodial and/or visitation rights; in this case, a stepfather); Miller v. Miller, 478 A.2d 351 (N.J. 1984) (invoking principles of equitable estoppel to uphold stepfather's duty of child support).

[11] A.A. v. B.B., [2007] 220 O.A.C. 115 (Can.).

for three parents.[12] These two cases are illustrative of the transformation of families from the traditional two-parent paradigm to a multi-parent paradigm.

In this Article, I narrow my focus of multiple parentage to potential financial implications. In the next section, I review the current law of parentage and make the case for multiple parents. I also discuss when and why child support should be allocated among more than two parents. Next, I review three scenarios in which multiple parents are recognized and illustrate how those scenarios can inform future decision-making regarding allocating support among more than two parents. Finally, I briefly address other financial implications of recognizing more than two parents, such as inheritance. The Uniform Probate Code already permits a child to inherit from more than two parents when a biological parent remarries and the stepparent adopts the child.[13] It is equally possible to envision an intestacy scheme that permits intestate inheritance from more than two parents in other circumstances. While I offer some concrete suggestions for parents and lawmakers, the purpose of this Article is to highlight areas that need greater exploration in the coming years.

## II. MULTIPLE HURDLES FOR RECOGNIZING MULTIPLE PARENTS

### *A. Who is a Legal Parent?*

Determining a child's legal mother and father was not historically difficult: the birth mother was the legal mother and her husband, pursuant to the marital presumption, was the child's father.[14] For a child born out of wedlock, only the mother was a legal parent.[15] Improved ART techniques and the corresponding increase of nontraditional families challenge the traditional two-parent paradigm and family law itself, which as recently noted by Professor Susan Appleton, has "enshrined the number two."[16] What once was a simple question—who are your parents?—is complicated in an era of ART that can bring together biological parents, gestational parents, and intentional parents: who among them are the mother and father?

Within the past decade or so, courts have begun to shift from a strict one mother/one father paradigm to a more open two-parent paradigm. Using doctrines such as intentional[17] and functional[18] parenthood, courts have broadened the pool

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[12] Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007).

[13] UNIF. PROBATE CODE § 2-114 (amended 2008).

[14] Singer, *supra* note 6, at 246-47.

[15] *Why Just Two*, *supra* note 1, at 318.

[16] Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2008) [hereinafter *By the Numbers*].

[17] In several cases, courts have looked at the intent of an individual to parent a child and have used intent as a legal alternative to a traditional basis of parentage, such as biology. *See, e.g.*, In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998); discussion of *Buzzanca infra* p. 6 and note 18. *See also* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional*

of potential legal parents. Important to recognize, though, is the continued emphasis on the number two and that courts try to ensure no more and no less than two parents.[19]

For example, in *Buzzanca*, a court was required to determine the legal parentage of a child, Jaycee, born from assisted reproduction: a sperm donor, egg donor, gestational surrogate, and two "intended parents."[20] The intended mother, Luanne, sought to establish that her husband, John, had a duty to support Jaycee although John argued that without a biological connection to Jaycee, he was not the father and had no financial obligation.[21] While the trial court absurdly held that Jaycee had no legal parents,[22] the appellate court determined parentage based on intent and held that the two parties who had contracted for and intended the pregnancy—Luanne and John—were Jaycee's legal parents and had support obligations that flowed therefrom.[23] The decision to determine that Jaycee has two lawful parents—rather than three or four—makes sense in the context of the facts presented.

In other cases, more than two potential parents have sought parental rights and yet only two parents were recognized. Most notably, in *Michael H. v. Gerald D.*, a father who lived with and provided financial support to his biological daughter was denied any parental rights because the child was deemed to have a legal father—her biological mother's husband.[24] In one portion of his opinion, Justice Scalia rejected the suggestion that both men might have rights vis-à-vis the

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*Approach to Parentage*, 53 HASTINGS L.J. 597, 639-40 (2002) (discussing cases in which intentional parenthood is applied); Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005) (arguing in favor of courts applying intentional parentage doctrine to adjudicate the maternity of nonbiological lesbian mothers).

[18] For example, courts have used doctrines such as psychological parent, parent by estoppel, and equitable parenthood to preserve the relationship between a nonbiological mother and her child. *See* Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 354-66 (2002) (reviewing several cases in which courts used a functional parentage analysis to grant some parental rights to a traditionally nonlegal parent) [hereinafter *Micah Has One Mommy*].

[19] *See Why Just Two*, *supra* note 1, at 324-25.

[20] *Buzzanca*, 72 Cal. Rptr. 2d 280.

[21] *Id.* at 282.

[22] As the appellate court wrote:

> [t]he trial court then reached an extraordinary conclusion: Jaycee [the child] had *no* lawful parents. First, the woman who gave birth to Jaycee was not the mother; the court had—astonishingly—already accepted a stipulation that neither she nor her husband were the 'biological' parents. Second, [the wife] was not the mother. According to the trial court, she could not be the mother because she had neither contributed the egg nor given birth. And [the husband] could not be the father, because, not having contributed the sperm, he had no biological relationship with the child.

*Id.* (emphasis in original).

[23] The court flatly disagreed with the trial court's holding that Jaycee had no lawful parents and held that Luanne and John were her parents. The court wrote, "Let us get right to the point: Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate." In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

[24] Michael H. v. Gerald D., 491 U.S. 110 (1989).

child, Victoria; he makes clear that the state is entitled to choose between the two men and that the choice made was to protect the marital father rather than to protect the adulterous biological father.[25] In the California case of *Johnson v. Calvert*, both the gestational surrogate and the genetic, intended mother claimed to be the child's legal mother.[26] While the court recognized that multiple parent arrangements are common in our society, the court specifically declined to recognize the rights of both women, concerned that recognizing parental rights in the surrogate would diminish the parental rights of the intended mother.[27] In short, even as courts acknowledge changes to the traditional family, they are reluctant to move beyond the two parent paradigm.

### *B. Why Just Two?*

Furthermore, although courts have become more willing to recognize parentage predicated on something other than biology or marriage, many courts continue to distinguish between legal parents and "other" parents and give primacy in custodial matters to legal parents.[28] I have argued that this is a compelling reason to confer legal parentage on all appropriate adults—i.e., those that have and intend to have a parental relationship with the child. Without legal parentage, the involved adult may be seen as a mere third party or legal stranger with no parental prerogatives and no parental responsibilities.[29] Recognition of legal parental status not only protects the adult who seeks to maintain a relationship with the child she/he has parented but, more significantly, also protects the child who relies on the emotional and financial support of the adult caregiver.

As courts utilize doctrines other than biology and the marital presumption to grant parental status to persons who historically were not considered legal parents, recognizing more than two parents becomes quite possible. As discussed above, a number of U.S. courts have granted parental status based on "functional parentage," "intentional parentage," "equitable parentage," or "parentage by estoppel." In fact, the American Law Institutes Principles on Dissolution considers several types of parents. A legal parent is defined through customary state definitions, such as by biology or adoption.[30] A parent by estoppel is one who, with the agreement of a legal parent or parents, has lived with the child since birth, or at least two years if

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[25] *Id.* at 130.

[26] Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).

[27] *Id.* at 781 n.8.

[28] *See Why Just Two*, *supra* note 1, at 314-17 (discussing the historic dichotomy between the rights of legal parents and nonparents). *See also* Jacob v. Shultz-Jacob, 923 A.2d 473, 477 (Pa. Super. Ct. 2007) (contrasting the rights of a biological, legal mother with the mother who has rights pursuant to the doctrine of *in loco parentis*, the court notes. "However, standing established by virtue of *in loco parentis* status does not elevate a third party to parity with a natural parent in determining the merits of a custody dispute.").

[29] *Micah Has One Mommy*, *supra* note 18, at 348-49; *Why Just Two*, *supra* note 1, at 314-17.

[30] "A *legal parent* is an individual who is defined as a parent under other state law." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION ' 2.03 (1)(a) (2000) (emphasis in original).

not since birth and has assumed full parenting responsibilities.[31] A de facto parent is also a person who has lived with the child for at least two years and, with the agreement of the legal parent or, as a result of the legal parent's failure to perform care taking functions, has regularly cared for the child.[32] An important distinction between parents by estoppel and de facto parents is that parents by estoppel are treated the same as legal parents, and both legal parents and parents by estoppel have priority over de facto parents in the award of custodial responsibility.[33]

I previously argued that courts should not be bound by the number "two"; rather, courts should allocate full legal parentage to more than two parents if the circumstances warrant such allocation.[34] For example, if a lesbian couple agrees to use a known sperm donor to father a child that the couple wishes to jointly parent with the sperm donor, all three parties should be granted parental status. In fact, in January 2007, the Ontario Court of Appeals issued a decision in which it granted full parental status to three such adults, recognizing the enormous benefit to the child of having three legal parents: two mothers and a father.[35] The five-year-old boy has three functional, active parents: his biological mother and father and the biological mother's lesbian partner. All three adults specifically contemplated a multiple parenting arrangement and jointly sought to have legal parentage established for the nonbiological lesbian partner.[36] Since adoption by the lesbian partner would have terminated the rights of the biological father, adoption was not an option for the family.[37] Although Canada's parentage laws, much like ours,

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[31] The American Law Institutes Principles on Dissolution defines a parent by estoppels as:

> an individual who, though not a legal parent, is (i) liable for child support under Chapter 3; or (ii) lived with the child for at least two years and (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition as a parent is in the child's best interests; or (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition as a parent is in the child's best interests.

*Id.* at ' 2.03(1)(b) (2000) (emphasis in original).

[32] "A *de facto parent* is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions." *Id.* at ' 2.03(1)(c) (2000) (emphasis in the original). A de facto parent "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." *Id.* at ' 2.03 comment (c).

[33] *Id.* at ' 2.03(1)(b).

[34] *Why Just Two*, *supra* note 1.

[35] A.A. v. B.B., [2007] 220 O.A.C. 115 (Can.).

[36] *Id.* at 14.

[37] The court specifically noted that the partner sought a parentage declaration but had not applied for an order of adoption because the statute would then cause the biological father to lose his status as the child parent. *Id.* at 13.

discuss parentage in terms of a two parent paradigm, the court used its equitable, *parens patriae* authority to establish legal parentage for all three adults.[38] The court concluded that "[i]t is contrary to [the child's] best interests that he is deprived of the legal recognition of the parentage of one of his mothers."[39]

Opponents of recognizing more than two parents argue, in part, that there will be "too many cooks in the kitchen": it is hard enough for two parents to agree on the best way in which to raise and support a child, so how will three—or four or more—negotiate the difficulties of custody, visitation, and financial support. By rethinking parentage and its attendant attributes, though, we can not only recognize multiple parentage but also recognize the relative rights of parents. I propose that the primary parents who engage in the bulk of daily responsibility for the child—and often have the most benefit from the close contact—should have greater rights and responsibility regarding the raising of the child than a third—or fourth—parent who contributes less, or no, financial support and less emotional support and has a more tenuous relationship with the child.

I refer to this paradigm as a disaggregation of parental rights and responsibilities.[40] At present, the establishment of legal parentage entails all of the responsibilities of parentage, such as financial and medical support, and all of the benefits, such as the right to custody and visitation.[41] By separating and disaggregating all of these rights and responsibilities, more than two people may hold the designation of "legal parent," yet each will make different contributions. For example, two parents may be the primary parents who assume physical custody of the child and bear the bulk of the support responsibility while a third—or even fourth—parent may have limited visitation and pay a modest support stipend.

### *C. More than Two Parents Means More Support for Children*

The difficulty of establishing support from multiple actors is that it does not neatly fit into our current scheme of support, which is predicated on one custodial parent and one non-custodial parent. However, the flexibility of a case-by-case determination is that courts would be able to recognize the legal status of all

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[38] *Id.* at 12.

[39] *Id.* at 37 ("There is no other way to fill this deficiency except through the exercise of the *parens patriae* jurisdiction.").

[40] *See Why Just Two*, *supra* note 1.

[41] Professor Appleton has criticized this view of parentage. She argues that disaggregation has already occurred. *By the Numbers*, *supra* note 16, at 23. Using the example of parenting plans post divorce, Appleton writes that parenting plans "reveal that the law does not presently conceptualize parenthood as a comprehensive and indivisible monolith, but rather as a mosaic capable of division and subdivision even in the ordinary case. And with so many discrete elements of 'parenting' listed, a plan could easily accommodate two, three, or more parents." *Id.* at 25. I agree that it is possible to accommodate more than two parents in a parenting plan; I think, though, that Appleton's criticism does not adequately take into account courts' prioritizing of biological parenthood over other forms of parenthood and the reluctance of courts to imbue non-traditional parents with all of the legal attributes of parentage, unlike the traditional actors in a divorce case. I am arguing that non-traditional families can have the elements of parentage disaggregated similar to traditional families.

relevant and appropriate parents and determine their support obligation accordingly. In many cases, a child would benefit from the financial and emotional support of more than two parents. In the paternity context, for example, the social father living with the child would continue to support the child, financially and emotionally, but the biological father, if identified, could share the support obligation and also develop a relationship with the child. In cases of ART, three parents could be recognized as having legal parental status and could craft agreements regarding varying degrees of custodial rights and financial obligations.

Most importantly, despite the difficulties of managing multiple parenthood, children will benefit from greater security from maintaining care giving relationships and financial security. For example, the Ontario Court of Appeals in *A.A. v. B.B.* recognized a series of benefits that would be available to the child if a third parent was legally recognized—such as rights to support, inheritance, and even citizenship.[42] The benefits that the *A.A.* court touts as beneficial for conferring parentage on a third parent are the same benefits litigants and scholars tout as important for conferring parentage on a second parent. Children born out of wedlock were long disadvantaged if their paternity was not established because they had no access to support or other benefits from their biological father. In the 1960s and 1970s, the U.S. Supreme Court rendered a number of opinions in which it determined that non-marital children were entitled to many of the benefits of marital children. The Court made several rulings to protect the rights of children born out of wedlock, such as the right to receive child support,[43] sustain an action for wrongful death,[44] and recover under a state's workers' compensation law.[45]

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[42] The Court listed numerous benefits of conferring parentage on a third parent:

> the declaration of parentage is a lifelong immutable declaration of status; it allows the parent to fully participate in the child's life; the declared parent has to consent to any future adoption; the declaration determines lineage; the declaration ensures that the child will inherit on intestacy; the declared parent may obtain an OHIP card, a social insurance number, airline tickets, and passports for the child; the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada . . . ; the declared parent may register the child in school; and the declared parent may assert her rights under various laws such as the [1996] *Health Care Consent Act*.

A. A. v. B. B., [2007] 220 O.A.C. 115, ¶ 14 (Can.).

[43] Gomez v. Perez, 409 U.S. 535, 537-38 (1973) (holding that children born out of wedlock are constitutionally entitled to the same right of support as are children of married parents).

[44] Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding that it violated the Equal Protection Clause not to permit five children born out of wedlock to seek damages as a result of the wrongful death of their mother).

[45] *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 169B70 (1972). Two children born out of wedlock sought to recover under a state's workers' compensation law but were denied because of their illegitimate status. *Id.* at 167. The children lived in an intact household with their unwed mother and father, and their father's four legitimate children from his marriage. *Id.* at 165. Based on the fact that they comprised an intact family, the Court found it violated the Equal Protection Clause to deny the two children born out of wedlock the same right to sue under a workers' compensation law as the four legitimate children. *Id.* at 169-70, 176.

The Court's focus in these cases was the best interests of the child or children and their entitlement to benefits.[46]

In response to these Supreme Court decisions seeking to rectify the differential treatment between children born in and out of wedlock, the Uniform Parentage Act ("UPA") was promulgated. At its core, the purpose of the UPA was to ensure equal treatment of children born out of wedlock and to provide a mechanism whereby two legal parents would be established for each child. Building on that precedent, a number of lesbian partners sought to establish parentage pursuant to the UPA to protect the parental relationship they enjoyed with children they helped raise. While early courts were not receptive to these arguments,[47] more recent decisions support either application of the UPA[48] or other legal doctrines to establish two legal parents for a child born with only one legal parent.[49] Just as it took time for courts to look beyond the traditional paradigm of one mother and one father to recognize two legal mothers, it will take time for courts to fully embrace recognition of multiple parents. But as recognition of parental rights has ensured many benefits to a child born to two same-sex parents, recognition of legal rights in a third—or fourth—parent can similarly ensure benefits to children. Why limit support, access to health insurance, inheritance, and other benefits when more choices are available? Ignoring the issue will not make the cases go away; rather, we should develop a viable framework so that courts can best protect children, their relationships with all parental figures, and provide for the children's financial security.

An important consideration in the multiple parentage discussion is the link between custodial rights and financial responsibility. In the paternity context, support for the child is the most significant factor in establishing parentage,[50] and a biological parent cannot disavow his or her financial responsibility.[51] Financial

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[46] *See* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 663 n.114 (1993).

[47] *See e.g.*, Nancy S. v. Michelle G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991) (holding that neither the UPA nor the doctrine of equitable estoppel could be used to establish legal parentage for a biological mother's partner); Alison D. v. Virginia M., 77 N.Y.2d 651 (1991) (refusing to apply equitable estoppel to find lesbian co-parent a "legal parent" under statute and declining to award her visitation with child).

[48] *See* Elisa B v. Emily B., 37 Cal 4th 108, 113 (Cal. 2005) (holding that a woman who supported her lesbian partner's use of artificial insemination, received the children into her home and held them out as her children is a parent under the UPA); K.M. v. E.G. 37 Cal. 4th 130, 134 (Cal. 2005) (holding that woman who donated her ova to lesbian partner who bore the children is a parent under California's version of the UPA, as her genetic relationship constitutes evidence of the mother and child relationship, just as the partner's giving birth to the children also evidences a mother-child relationship).

[49] *See e.g.*, Rubano v. DiCenzo, 759 A.2d 959, 974 (R.I. 2000) (holding that a former same-sex partner could prove legal parentage by establishing a de facto or psychological parental relationship); V.C. v. M.J.B., 163 N.J. 200 (2000) (holding that lesbian co-parent was a psychological parent to twins and was properly awarded visitation); E.N.O. v. L.M.M., 429 Mass. 824 (1999) (holding that lesbian co-parent was a *de facto* parent pursuant to the Principles and was properly awarded visitation with the child).

[50] *See My Two Dads*, *supra* note 7, at 822-24 (discussing federal child support policy and the importance of establishing paternity to benefit the public fisc).

[51] *See e.g.*, Kristine M. v. David P., 37 Cal. Rptr. 3d 748 (Cal. Ct. App. 2006) (holding a mother's

obligation and custodial rights should be linked. Family law jurisprudence of custody and support is predicated on a traditional, nuclear family in which a mother and father decide to have a child and both bear parenting responsibility. In the event of divorce, both parties maintain custodial rights and continue to be responsible for the financial support of the child. When three people jointly decide to have a child, two will likely be the primary caretakers, and the primary caretakers should bear a greater financial burden to support the child than a parent with limited custodial and/or visitation rights. By allocating responsibility in proportion with custodial rights, courts should be able to fashion a reasonable financial support award.

Naysayers likely will be alarmed at the link between financial responsibility and custodial rights; in the two-parent context, some noncustodial parents bear a significant financial burden while receiving limited custodial rights. This argument is specific to more than two parents. As explained in the discussion of disaggregation of parental rights above, my hypothesis is not that all three parents will assume equal responsibility for the child—nor will they intend to. Limiting the financial obligation of a third party protects that individual from a high support award; conversely, the link and limitations on support and custodial rights protects the primary parents from too much custodial interference from the third party.

In the next section I review three scenarios, which illustrate the possibility of financial support from more than two parents: Louisiana's dual paternity scheme, the case of *Jacob v. Shultz-Jacob*, and the American Law Institute Principles of Dissolution.

## III. THREE EXAMPLES OF MULTIPLE PARENTS SUPPORTING CHILDREN

The backdrop of child support guidelines is a traditional nuclear family, which does not accurately represent many American families. The guidelines do not contemplate more than two parents and continue to rely on the premise that a child has two parents with a corresponding duty to support.[52] The two most common child support models either review the income of two parents—income-sharing model—or focus solely on the income of a non-custodial parent—percentage-of-income model.[53] Both are premised on a two-parent family. In a multiple parent case, the two-parent guidelines cannot strictly apply. The

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waiver of child support violative of public policy because of the legislative preference for two parents who can provide financial support).

[52] *See* Adrienne Jennings Lockie, *Multiple Families, Multiple Goals, Multiple Failures: The Need for "Limited Equalization" as a Theory of Child Support*, 32 HARV. J. L. & GENDER 109, 115 (2009). In her article, Lockie discusses that the two most common models of child support guidelines, income-sharing and percentage-of-income, do not adequately address situations in which parents remarry and/or have additional children. She points out multiple shortcomings of current federal child support policy and suggests reform to better account for these varied family formations. Similarly, current child support guidelines do not account for more than two parents and a different model may need to be created for these situations.

[53] *Id.* at 139-40.

percentage-of-income model seems most inapplicable, as it contemplates only one noncustodial parent. The income-sharing model could be more useful, but assuming that two parents have primary responsibility for the child, it does not seem appropriate to require the third parent to contribute a third of the financial support. Even fractions will not work.

For example, by the time the court decided *Michael H.*, Carole and Gerald were functioning again as an intact family and supporting Victoria. It would have been inapt to apply the traditional child support guidelines to Michael, because Victoria was already being supported by two parents. If the court had granted Michael a custodial and visitation role, it would have been appropriate for him to contribute *something* to her support and care, but not a third of the guidelines support obligation. The cases of *A.A.* and *Shultz-Jacob* show the advantage of a third party paying support, yet not paying a traditional noncustodial parent share. In both cases, the lesbian couple intended to actively parent the children but wanted a third-party sperm donor to be an active father for the children, too. The father in those cases should not owe approximately half or even a third of the children's support, because he did not have a primary parenting role nor was he intended to. Nevertheless, his support likely assists with meeting an appropriate standard of living and may improve upon it. Ultimately, the amount of support a third parent should contribute will vary, depending upon the intent of the parties and relationship that the parent builds with the child.

### *A. Louisiana Dual Paternity*

As discussed above, children born out of wedlock are able to establish a legal relationship with two parents under the UPA—or state variation thereof. For children born in wedlock, it is presumed that the mother's husband is the father of the child, unless that presumption is challenged. All U.S. jurisdictions retain the marital presumption in some form—that the husband of the mother is the child's legal father.[54] Some jurisdictions, however, make this presumption rebuttable while others foreclose the possibility of the biological father establishing paternity if his child is born into an extant marriage.[55] One U.S. jurisdiction, however, explicitly provides for more than two parents, namely dual fatherhood. Louisiana's statutory code specifically includes the marital presumption.[56] However, unlike all other U.S. jurisdictions, Louisiana allows a biological father, mother, or child to institute an action to establish paternity, even if the child's mother is married to another man.[57] In fact, the state further provides that the Department of Public

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[54] *See generally* Appleton, *supra* note 6, at 234-36.

[55] *Id.*

[56] LA. CIV. CODE ANN. art. 185 (2005).

[57] LA. CIV. CODE ANN. art. 198 (2005). The statute provides, in relevant part:

> If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad

Welfare may also bring an action to establish the paternity and support obligation of a child's biological father, even if there is a legal presumption that another man is the child's father, unless it is not in the best interest of the child.[58] As the Louisiana Court of Appeals has explained, "[t]he concept of 'dual paternity' allows a child to seek support from the biological father notwithstanding that the child was conceived or born during the mother's marriage to another man, and is therefore presumed to be the legitimate child of the marriage.[59]

Louisiana courts have had several instances in which to decide how to allocate custodial and financial responsibility among two fathers. No set formula is revealed from the cases; rather a flexible approach emerges from the court decisions. One of the first cases to address the allocation of support was a wrongful death case which enabled a child to sue for the wrongful death of her biological father despite having a presumptive legal father.[60] That court noted, "[w]e are not unmindful of the problems a logical extension of these holdings may create, *such as a child in these circumstances recovering from both fathers for support and maintenance.*"[61] In a subsequent decision regarding whether a woman could, on behalf of her child, sue a biological father for support although she had been married at the time of conception and birth, the court addressed the potential financial responsibility of both the presumptive father and biological father. The court determined, "[c]ertainly, this is a factor to be considered in determining the amount of child support, because both the legal father and the biological father are obliged to support their child."[62]

The Louisiana Supreme Court in *Smith v. Cole*[63] reaffirmed the statutory principle of dual paternity and lent some clarity to the issue of allocating child support among two fathers. The court wrote that the:

> presumption [of legitimacy] will not be extended beyond its useful sphere. The presumption was intended to protect innocent children from the stigma attached to illegitimacy and to prevent case-by-case determinations of paternity. It was not intended to shield biological fathers from their support obligations. The presumed father's acceptance of paternal responsibilities, either by intent or default, does not enure to the benefit of the biological father. It is the fact of biological paternity or maternity which obliges parents to nourish their children. The biological father does not escape his

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> faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.

*Id.*

58 LA. REV. STAT. ANN. § 46:236.1.2(D) (2005).

59 Dep't of Soc. Serv. v. Howard, 898 So.2d 443 (La. Ct. App. 1st Cir. 2004).

60 Warren v. Richard, 296 So.2d 813 (La. 1974) (emphasis added).

61 *Id.* (emphasis added).

62 Shackleford v. Shackleford, 411 So.2d 736 (La. Ct. App. 3d. Cir. 1982).

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

> support obligations merely *because others may share with him the responsibility*. Biological fathers are civilly obligated for the support of their offspring.[64]

In *Smith*, the court held that the biological father was required to pay child support.[65] Addressing the presumptive father's duty, the court noted, "[t]he question of whether the 'legal' father in this case also shares the support obligation is not before the court. We decline for now to hold [that] the legal father will, in all factual contexts, be made to share the support obligations with the biological father and the mother."[66] In *Smith*, the court determined support after the child's mother and husband divorced;[67] if the couple were still intact, it seems likely both the social and biological fathers would have borne a support obligation.

In a footnote, the court further explained:

> [t]he best interest of the child should be considered in determining whether the court in a given case will impose the obligation of support on the person who . . . is conclusively presumed to be the father of the child. While [the statute] may provide the basis for such an imposition on the legal father, the fact that there is a biological father capable of providing support cannot equitably be ignored.[68]

I do not agree that biological fathers should always bear a support obligation by virtue of biological parenthood only; rather, I see a link between visitation and/or *custodial* rights and the obligation to pay support. Regardless, the case certainly demonstrates the possibility of allocating financial responsibility among more than two parents.

Subsequent cases also discuss the ability of the court to impose a support obligation against either or both fathers, depending upon circumstances.[69] This flexibility indeed seems to comport with the best interests of the child, as instructed by the Louisiana Supreme Court.[70] Such flexibility would be helpful in all multiple parent cases as it would allow the court to examine both the intentions and financial circumstances of all the parties. Courts can then make a determination that provides for a reasonable standard of living for the child but fairly allocates the

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[64] *Id.* at 854 (emphasis added). The court's express discussion of shared responsibility presumes that both men would contribute to the support of the child.

[65] *Id.* at 855.

[66] *Id.* at n.8.

[67] *Id.* at 848.

[68] *Id.* at n.8.

[69] Dep't of Soc. Serv. v. Howard, 898 So.2d 443, 444 (La. Ct. App. 1st Cir. 2004) (citing Warren v. Richard, 296 So.2d 813, 817 (La. 1974) ("The concept of 'dual paternity' allows a child to seek support from the biological father notwithstanding that the child was conceived or born during the mother's marriage to another man, and is therefore presumed to be the legitimate child of the marriage."); Dep't of Soc. Serv. v. Washington, 747 So.2d 1245, 1247 (La. App. Ct. 2d. Cir. 1999); Dep't of Soc. Serv. v. Williams, 605 So.2d 7, 9 (La. Ct. App. 2 Cir. 1992).

[70] Smith v. Cole, 553 So.2d 847, 854 (La. 1989).

support responsibility in accord with the parties' available resources and intentions.[71]

### *B. The Case of Jacob v. Shultz-Jacob*

Although several courts have protected a child's relationship with more than two parental figures and essentially embraced multiple parentage, it was not until 2007 that a court affirmatively spoke of three legal parents and their corresponding child support obligations.[72] In 2007, the Pennsylvania Superior Court held that a biological mother, her former same-sex partner, and the children's biological father all had custodial rights of their two children and a corresponding child support obligation.[73] Predicating parental responsibility on legal parentage, the court determined that the mother and biological father were parents with parental prerogatives and obligations by virtue of their biological connection to the children and that the former same-sex partner had parental rights and obligations under the doctrine of *in loco parentis*.[74] All three parties were awarded custodial rights of varying degrees by the trial court.[75] The superior court overruled the trial court's holding that a biological father could not be held responsible for child support and the case was remanded to determine the allocation of support among the three parents.[76]

The two mothers in the case—Jodilynn Jacob and Jennifer Shultz-Jacob—lived together for almost nine years.[77] They had a commitment ceremony in Pennsylvania and later went to Vermont for a civil union.[78] Jodilynn adopted and had custody of two of her nephews.[79] Thereafter, the couple decided to have children and Jennifer asked a friend of hers—Frampton—if he would be the sperm donor.[80] Frampton maintained contact with the children after their birth and even provided some financial support but Jennifer and Jodilynn were their primary caretakers and parents.[81]

Several years into the relationship, it soured and the parties separated.[82] Ultimately, Jennifer was awarded primary custody of one child and Jodilynn was

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[71] This approach also means that not every parent *must* provide financial support and allows the court to carefully consider the circumstances of the case to see if a support obligation should be imposed in the first instance.

[72] *See Why Just Two?*, *supra* note 1, at 327-32 (discussing cases in which courts recognized custodial and/or visitation rights of more than two parents).

[73] *See* Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007).

[74] *Id. at* 480-82.

[75] *Id. at* 476.

[76] *Id. at* 482.

[77] *Id. at* 476.

[78] *Id.*

[79] Jacob v. Shultz-Jacob, 923 A.2d 473, 476 (Pa Super.Ct. 2007).

[80] *Id.*

[81] *Id.* at 476, 481.

[82] *Id.* at 476.

awarded primary custody of the three other children.[83] Jennifer was ordered to pay nearly $1,000 per month in support for the two biological children and was given partial custody.[84] Frampton was awarded one weekend of visitation per month with his two biological children but not ordered to pay any support. Jennifer appealed.[85]

In her appeal, Jennifer requested primary physical custody of all four children and further argued that Frampton, because he was awarded partial custodial rights, should also have to contribute financial support.[86] More specifically, she argued that since Frampton had a prima facie right to custody because he is the children's biological father, then he should also have the obligations that flow therefrom.[87] The appellate court agreed and posed the following question:

> [i]f fundamental fairness prevents Appellant, identified by law as a third party, from avoiding a support obligation arising from her status as a *de facto* parent, and she does not, in any event, attempt such avoidance, does not the same principle operate similarly to estop Appellee Frampton, automatically recognized as the possessor of parental rights based on his biological parenthood, from disclaiming financial responsibility? We find that it does.[88]

The court further stated that Frampton's support obligation is statutorily imposed.[89] The court compared this situation with stepparents who have held a child out as their own and are liable for child support; if stepparents can be liable, then certainly biological parents who have exercised rights consistent with their parental status must be bound.[90] In fact, Frampton had a history of providing child support, moved closer to the children to exercise visitation, asked the children to call him Papa, and supplied funds for household needs.[91] The court remanded the case with a direction that both Frampton and Jennifer share the child support obligation responsibility.[92]

If two parents are in an intact relationship, the third parent should not be required to pay support in an amount usually reserved for a noncustodial parent. The financial needs of the child should not be as great with two parents already providing support. The third parent may contribute to "extras," such as tuition or a college fund, or help with extraordinary health expenses, but most of the day-to-day costs should be borne by the primary parents. Similarly, if the primary parents'

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83 *Id.* at 476.

84 *Id.*

85 Jacob v. Shultz-Jacob, 923 A.2d 473, 476 (Pa Super.Ct. 2007).

86 *Id.*

87 *Id.* at 479.

88 *Id.* at 480 (emphasis in original).

89 *Id.*

90 *Id.*

91 Jacob v. Shultz-Jacob, 923 A.2d 473, 480 (Pa Super.Ct. 2007).

92 *Id.* at 482.

relationship is no longer intact, the court should still allocate financial responsibility so that the primary noncustodial parent still bears a greater burden than a third parent who never lived with the child.

The *Shultz-Jacob* court seems to agree with this approach. It wrote, "[w]e are not convinced that the calculus of support arrangements cannot be reformulated, for instance, applying to the guidelines amount set for Appellant fractional shares to incorporate the contribution of another obligee."[93] Arguably, if neither primary parent has adequate resources to assist the child and meet her or his needs, then it is particularly beneficial to have a third parent available to provide some necessary support. That amount, though, should still not be at a level at which the primary parents would pay. It would not make sense, to impose the full noncustodial support obligation on a third parent who has a small role in the child's life.

### *C. The American Law Institute Approach*

Unlike Louisiana's dual paternity approach and the court's suggestion in *Shultz-Jacob* that a proportional approach be used in determining support obligations for more than two parents, the American Law Institute ("ALI") has seemingly fully disaggregated custodial rights from financial responsibility and contemplates only two parents supporting the child. As I previously mentioned, the ALI recognizes three categories of parents: legal parents, parents by estoppel, and de facto parents. Moreover, the ALI includes language that would specifically permit more than two parents.[94] For example, part of the definition of a parent by estoppel is that such a relationship can be established if a person:

> lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as [a] parent, as part of a prior co-parenting agreement with the child's legal parent (*or, if there are two legal parents, both parents*) to raise a child together each with full parental rights and responsibilities, and when the court finds that recognition . . . as a parent is in the child's best interests."[95]

The Comment notes that parent by estoppel status should be recognized only when it is in the child's best interests.[96] The Comment further cautions that if a child already has two legal parents, the case for recognizing an additional parent is weaker, but also directs that the court must consider the strength of emotional

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[93] *Id.*

[94] "The ALI's approach creates the possibility that a child might have three or more parents all at the same time." David Meyer, *Partners, Care Givers, and Constitutional Substance of Parenthood*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 47, 51 (Robin Fretwell Wilson ed., 2006).

[95] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1)(b)(iii) (emphasis added).

[96] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 comment (b).

bonds to the child.[97] The Principles thus recognize the express possibility of recognizing more than two legal parents.[98]

The *Shultz-Jacob* court linked the award of custodial rights with the obligation to pay support. The Principles do not automatically link rights and responsibilities, and as described by Professor Katharine Baker, show the asymmetry of parenthood.[99] Although the ALI expands the ways in which legal custody and visitation can be awarded to various adults, the Principles are much more focused on a two parent system in determining child support. As Professor Baker explains, a person who is estopped from denying a child support obligation is entitled to custodial rights but someone who is entitled to custodial rights as a parent by estoppel or de facto parent may not be required to pay support.[100] While the custodial Principles embrace the concept of multiple parents, the "[child support chapter] is far less receptive to the idea of multilateral responsibility."[101] Professor Baker writes, "[t]o base the entire child support structure on the binary biological ideal when it is so transparently not reality for millions of children seems a little odd."[102]

Like Professor Baker, I think the ALI's disconnect between custodial rights and financial obligation is "odd." I advocate a relationship between custodial and financial responsibility. Consider the disconnect using the *Shultz-Jacob* case: under the Principles, Frampton would be recognized as a de facto parent but he would have no financial obligation. Primary parents should shoulder greater financial responsibility than any other parent. But relying on a bright line rule that limits financial support to only two parents seems to be the same restrictive view of parentage from which courts are starting to move away. The ALI support principles are based on a restricted two parent paradigm; once the paradigm gives way to recognizing more parents, the support paradigm should similarly yield.

## IV. INHERITANCE AND ADDITIONAL FINANCIAL IMPLICATIONS

Additional financial benefits will be affected if more than two legal parents are recognized for a child. One primary area of change is inheritance. Children have no right to inherit from their parents under the American law of estates and trusts. However, the intestate succession laws of every state—laws that provide for

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97 *Id.*

98 If Canada had adopted these *Principles*—or something similar—it would have been much easier to recognize three parents for D.D. The mother's lesbian partner would have had the agreement of both legal parents to establish parental responsibilities and could have had her parental status recognized that way, rather than through general *parens patriae* principles. Either method, though, recognizes that more than two parents can agree to raise a child and assume full parental rights and responsibilities.

99 Katharine K. Baker, *Asymmetric Parenthood, in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 121 (Robin Fretwell Wilson ed., 2006)

100 *Id.* at 124.

101 *Id.* at 128.

102 *Id.* at 129.

the distribution of a deceased's estate if there is no will—specifically include provisions for children to inherit. The Uniform Probate Code as amended in 2008 includes multiple provisions that recognize numerous ways in which a parent-child relationship can be established.[103] This, in turn, creates the possibility that a child may be able to inherit from more than two parents. For instance, section 2-119(b) provides that when a child is adopted by the spouse of a parent, the child still maintains the right to inherit through the other parent.[104] So, if a child is adopted by her stepfather, she may inherit from her mother, stepfather, and biological father. Similarly, section 2-119(c) permits a child to inherit from or through her genetic parents even if the child is adopted by the relative of a genetic parent and/or the relative's spouse.[105] Thus, an intestate distribution from more than two parents already exists within intestacy law.

Because the Uniform Probate Code already recognizes instances in which a child may inherit from genetic and adoptive parents, it is not a stretch to permit a child to inherit from more than two legal parents. So long as the parent-child relationship exists, a child should be able to inherit from that parent. Moreover, in keeping with provisions of the Code that provide that a child may inherit through the genetic parent despite having adoptive parents, a child with more than two legal parents should also be able to inherit through that parent and potentially inherit from other relatives. Any relative who wishes to foreclose such inheritance has an easy mechanism by which to opt out—a will.

In addition to support and inheritance, many other financial implications are raised if more than two parents are legally recognized, such as the ability to obtain social security survivor benefits from deceased parents and the ability to sue if a parent is injured at work or dies wrongfully. Although it may seem unfair to permit children to gain access to various legal benefits and potential causes of action from more than two parents, courts and states were confronted with the same issue fewer than fifty years ago when children born out of wedlock were not given the same rights as their counterparts born into extant marriages.[106] As noted above, the consensus was that in the best interests of the child, a non-marital child should be able to access all the benefits that marital children receive; it is merely an extension of that philosophy that would enable a child with more than two parents to

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[103] Uniform Probate Code sections 2-115 through 2-121 address multiple ways in which the child parent relationship can be established, and, like the American Law Institute Principles discussed above, includes functioning as a parent as a means by which parentage can be established for intestate succession purposes.

[104] Uniform Probate Code § 2-119(b) provides:

> A parent-child relationship exists between an individual who is adopted by the spouse of either genetic parent and: (1) the genetic parent whose spouse adopted the individual: and (2) the other genetic parent, but only for the purpose of the right of the adoptee or a descendant of the adoptee to inherit from or through the other genetic parent.

UNIF. PROBATE CODE § 2-114 (amended 2008).

[105] UNIF. PROBATE CODE § 2-119(b) (amended 2008).

[106] *See infra* notes 43-45 and accompanying text.

similarly benefit. A few U.S. courts have been asked to determine the rights of children conceived posthumously, specifically whether the children are entitled to federal benefits through the deceased parent. In two leading cases, *Gillett-Netting v. Barnhart* and *Woodward v. Commissioner of Social Security*, the courts used the test of whether the child would be eligible to inherit intestate as a measure by which to determine benefits' eligibility;[107] the children were deemed eligible to receive federal benefits. In response, some states specifically require that the deceased parent make clear his or her intent to support the child, preferably in writing.[108] In *Gillett-Netting* and *Woodward*, the children were biologically related to their deceased father; the Uniform Parentage Act opens the door to recognizing a legal obligation from a decedent to a posthumously conceived child even if there is no biological connection, as long as the deceased put in writing his or her consent to parent the child.[109] The Uniform Probate Code as amended in 2008 similarly provides a means by which a parent-child relationship may be established even if the intended parent, with no genetic connection to the child, dies prior to the conception of the child.[110] Given the emerging recognition of parental obligations to children conceived posthumously—especially if the deceased parent clarifies his or her intent to parent the child—it is quite possible to envision a system that allows children to benefit from and through more than two adults if the adults have specified their intent to parent. This is an area ripe for additional exploration as it will involve a careful balancing between the rights of the child and the conservation of resources.

## V. CONCLUSION

As courts begin to confer legal parentage on more than two adults, it is important to develop a framework for establishing appropriate financial support from the adults to the child. Not all parents should bear the same obligation. The financial obligation should be closely related to the particular nature of the custodial and/or visitation relationship. Such a system will best protect the best interests of the child and the parents.

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[107] *E.g.*, Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004); Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002).

[108] *E.g.*, CAL. PROB. CODE § 249.5 (2005) (providing, in part, that a posthumously conceived child shall be deemed to have been born during the lifetime of the deceased parent provided that there is clear and convincing evidence that the decedent specified in writing, signed by a witness, that a designated person could use the decedent's genetic material for posthumous conception).

[109] The UPA section 707 provides:

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

UPA § 707 (2002).

[110] UNIF. PROBATE CODE § 2-121(e), (h) (amended 2008).