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Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents

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> Yet for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible. *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993).

I. INTRODUCTION

As the *Johnson* court notes, assisted reproductive technologies (ART) make it quite possible to have more than two mothers: the genetic mother, the gestational mother, and the intended mother. Similarly, it is possible to have two fathers: the sperm donor and the intended father. Thus, when heterosexual and homosexual couples use ART to have children there are more than two potential parents. Determining which individuals should have legal status has become rather complicated.

Many families today no longer comport with the traditional nuclear family model of one mother and one father. As the law responds to these societal changes by expanding the legal definition of parent beyond biology and adoption, recognition of multiple parents looms on the horizon.[1] Children born through ART have more than two potential parents, such as genetic sperm or egg donors, gestational birth mothers, and a variety of functional parents such as stepparents, foster parents, and other caregivers.

Determining a child's legal mother and father was not historically difficult: the birth mother was the legal mother and her husband, pursuant to

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[*] Associate Professor of Law, MSU College of Law. My appreciation to Professor Leslie Harris for organizing the "Delivering Nurturance" conference in March 2006 and suggesting this symposium issue. I am grateful for the stimulating comments and questions I received from Leslie Harris, Nancy Dowd, June Carbone, and Marsha Garrison at that conference.

[1] *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 945 (1984) ("The key disadvantages of broadening access to parenthood are that it may increase the number of adults making claim to a child and enhance the indeterminacy that already exists in child custody law."); *see also* Leslie Joan Harris, *Reconsidering Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 482. In advocating for the adoption of a functional parent test, Professor Harris notes that a potential consequence of her "proposal is the possibility that a child might have more than two legal parents . . . ." Harris, *supra*, at 482.

the marital presumption, was the child's father.[2] For a child born out of wedlock, only the mother was a legal parent.[3] Improved assisted reproductive technology techniques and the continued increase of nontraditional families challenge the traditional two-parent paradigm which has been a bulwark of family law. A simple "who's your mommy?" or "who's your daddy?" is not always a simple question nor one with a singular answer. The traditional one mother/one father nuclear family paradigm has been steadily decreasing.[4] As different types of family formations emerge, however, judges are constrained by the two-parent paradigm doctrine to "fit" these new families into old molds.

For example, in the past decade or so, doctrines such as intentional and functional parenthood have been applied by courts to legalize the co-parentage of a child by a nonbiological gay or lesbian partner[5] as well as to determine parentage when heterosexual couples use ART.[6] A nonbiological or nonmarital parent who is granted parental recognition thus enters the two-parent paradigm. In so doing, courts still assure the continuity of the binary system. Significantly, however, oftentimes courts will not grant full parental status to a nonbiological or nonmarital parent and will grant only partial visitation rights.[7]

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[2] David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 127 (2006).

[3] Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 816 (2006).

[4] *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 361 (3d ed. 2006) ("The traditional nuclear family is on the decline. Currently, less than one in four families fits this family type.") (citing BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, FAMILY AND LIVING ARRANGEMENTS: 2003, at 2 (2004), *available at* http://www.census.gov/prod/2004pubs/p20–553.pdf).

[5] *See* Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 *passim* (2005) (arguing that intentional parentage should be used to adjudicate maternity for nonlegal lesbian mothers); 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) [hereinafter *Adjudicating Maternity*] (reviewing several cases in which courts preserved the relationship between the nonbiological mother and her child using a functional analysis); Richard F. Storrow, *Parenthood By Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 639–40 (2002) (discussing cases in which intentional parenthood is applied and noting that the doctrine is most often applied to married couples who have used assisted reproduction but arguing for a broader application of intentional parenthood).

[6] *E.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (in determining whether the genetic egg donor mother or the gestational surrogate mother was the child's legal mother, the court relied on the genetic mother's intention to have and raise the child in holding the genetic mother is the legal mother).

[7] Jacobs, *Adjudicating Maternity*, *supra* note 5, at 349–50 (discussing problems nonbiological lesbian co-parents face in having their legal status recognized and their treatment as a third party legal stranger); *see also* Doe v. Doe, 710 A.2d 1297, 1317

One reason for the disparity of rights is the emphasis on parental rights and the legal and constitutional importance of legal parentage.[8] Legal parents enjoy considerable protection from state and third-party interference.[9] While legal parents bear the obligations of parentage, such as food, shelter, clothing, medical care, and the like, legal parents also enjoy all of the benefits of parentage, such as custody and influencing the child's educational, moral, and religious development.[10]

The Supreme Court has consistently affirmed the rights of parents to control the care and custody of their children without interference from third parties, including the state.[11] When the traditional two-parent family was the norm, it was simpler to determine the third-party outsider: the grandparent, stepparent, foster parent, and so forth. As the traditional one mother/one father model declines and other family models increase, the line between a traditional parent and third party has become blurred. Determining who is a legal parent and who is merely a third party without parental rights, or only partially recognized rights, is increasingly litigated.[12] Oftentimes a nonlegal lesbian parent or stepparent will seek to protect her relationship with a child she has helped to raise.[13] There, the party's goal is to have parental recognition, versus unprotected third-party status. Alternatively, some parents wish to ensure that someone who might otherwise have parental rights, like a sperm or egg donor,

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(Conn. 1998) (finding that woman who used surrogate to bear child was not the child's legal mother and remanding case to determine whether woman should be granted custody).

[8] Jacobs, *Adjudicating Maternity*, *supra* note 5, at 348–49 (discussing parental autonomy and the tension between legal parents and nonlegal parents who are treated as third-party legal strangers in custody disputes).

[9] *Id.*; *see infra* Part II discussing Parental Autonomy.

[10] Jacobs, *Adjudicating Maternity*, *supra* note 5, at 347.

[11] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 73 (2000) (holding that, as applied to a situation where paternal grandparents sought more visitation with children than to which the mother agreed, a Washington statute that permitted any person to petition for visitation rights with a child at any time unconstitutionally infringed on a mother's fundamental right to raise her children); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

[12] *See* Jacobs, *Adjudicating Maternity*, *supra* note 5, at 354–69 (reviewing cases in which a nonbiological lesbian co-parent sought to establish and preserve her legal relationship with her child).

[13] *E.g.*, Holtzman v. Knott, 533 N.W.2d 419, 435–36 (Wis. 1995) (holding that a lesbian co-parent was a psychological parent and could maintain an action for visitation with her nonbiological child); Nunn v. Nunn, 791 N.E.2d 779, 783 (Ind. Ct. App. 2003) (discussing Indiana statute which permits de facto custodians (in this case, a stepfather) to establish custodial and/or visitation rights).

remains a third party without any parental standing.[14] Thus, maintaining the two-parent paradigm may result both in the inclusion of some nontraditional parents and the exclusion of persons who would historically have been deemed a parent.

In recent decades, scholars have undertaken an examination of parenthood from the outside in: we have endeavored to include nontraditional parents within the traditional strictures of parenthood to provide protection both for parent and child. Some courts have positively responded to these arguments and used equitable parental doctrines to preserve relationships for nonlegal parents and children.[15] I have previously advocated for the expansion of parenthood beyond biology and adoption and maintain that position here.[16] My premise, however, is that parenthood should be re-examined from the inside out: that we should rethink and perhaps reshape the roles and responsibilities of parenthood. We need to (when appropriate) disaggregate the many aspects of parenthood to permit all of the relevant adults to participate in a child's life, while still maintaining continuity and stability for the child. And, when appropriate, we need to recognize that more than two individuals can assume the many roles and obligations that traditional parentage has entailed, and children can benefit from the legal recognition of all of those individuals as parents.

The word "parent" evokes a series of images of an adult assisting a child with a myriad of tasks: making dinner; helping with homework; driving to school, the doctor, piano lessons, sports practice; and many more daily, routine tasks. Yet, not all parents engage in those tasks. Some parents are a source of financial support for their children but have little or minimal contact with the children and provide no emotional support. Other parents are primary caretakers who do not work outside the home and do not provide traditional financial support. Finally, some persons are adjudicated a parent and yet have no contact with their child at all. From a legal standpoint, recognition as "parent" entitles the individual to pursue *all* the benefits of parentage and may require the individual to assume *all* of the duties. Oftentimes, though, more

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[14] For example, the Uniform Parentage Act provides that "[a] donor is not a parent of a child conceived by means of assisted reproduction." UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (2000).

[15] *See, e.g.*, Kristine H. v. Lisa R., 117 P.3d 690, 692 (Cal. 2005) (holding that a woman was estopped from attacking the validity of a parentage stipulation jointly signed and filed by her and her lesbian partner, and that permitting an attack on the judgment's validity would contravene public policy that favors a child having two parents).

[16] *See* Jacobs, *Adjudicating Maternity*, *supra* note 5, *passim* (encouraging courts to apply the UPA to adjudicate maternity for nonbiological lesbian co-parents); Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, *supra* note 5, *passim* (advocating that courts use the doctrines of intentional and functional parenthood to adjudicate parentage for nontraditional parents); Jacobs, *My Two Dads*, *supra* note 3, *passim* (advocating for recognition of both biological and social fathers).

than two individuals share the duties of parentage. What if three (or more) individuals financially and emotionally support the child and fully agree that all three should be active participants in the child's life—why not recognize the legal parent-child relationship for all three parents? In addition, what place is there for a biological parent who has no intended or functional parenting role? Whether biology provides an automatic entitlement to parental status or whether biological parenthood can be excluded altogether as a legal basis of parentage is a source of current debate.

I suggest that disaggregating and redefining parentage may allow for recognition of all the relevant adults in a child's life, yet not grant equal parental rights to all individuals, unless specifically agreed upon. A scheme of relative rights, depending upon the adult's relationship with and contributions to the child should enable multiple parentage to work.[17] As Professor Alison Young has argued in an article in which she challenges the paradigm of the nuclear family, "[a] more inclusive notion of family does not mean simply adding to the number of 'parents' which law and society recognize. The challenge is to approach the task with a greater degree of imagination, so that different types of degrees of contribution and potential contribution may be fostered."[18]

Courts have started to move beyond traditional parentage recognition, by legalizing parental relationships for nonbiological lesbian and gay parents as well as establishing parentage for heterosexual couples who use ART and either have no genetic connection to their child or one party has no genetic connection. Because of the greater acceptance of nonbiological and nonadoptive parents, the time is ripe to consider multiple parents; in this Article, I specifically examine multiple parentage for families formed through use of ART. Families formed with ART encompass several types of scenarios in which to apply multiple parenthood, and I hope that the exploration of these varied scenarios can in future writings be applied to other contexts, such as adoptive families and stepfamilies.[19]

In this Article, I will briefly address three issues that affect the implementation of multiple parenthood. First, I discuss the issue of parental autonomy and illustrate the difficulty that persons without legal recognition of their parenthood encounter in seeking visitation or custody with a child they have created or functionally parented. Second, I examine the current ways in which parentage is established. As courts move beyond strictly defining a

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[17] Jacobs, *My Two Dads*, *supra* note 3, at 852–56; *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09 (2000) [hereinafter ALI PRINCIPLES] (discussed *infra* at Part IV.B).

[18] Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & LAW 505, 516 (1998).

[19] In a previous article, I advocated for the recognition of multiple fathers when a child has both a social father and biological father. Jacobs, *My Two Dads*, *supra* note 3, *passim*. I wrote that I hoped to begin a larger dialogue about multiple parentage, and this Article is the next step in that larger process.

parent by biology or adoption and recognize functional and intentional parenthood, more than two people may have legitimate claims of parenthood yet current law adheres to a two-parent paradigm. Coupled with the parental autonomy principles noted earlier, nonparents are essentially legal strangers to children they may have helped to raise or create. Continued reliance on the two-parent paradigm unnecessarily eliminates many caring individuals from children's lives. Finally, I discuss some of the practical realities and implications of multiple parenthood, specifically some of the concerns of "managing" multiple parenthood. In highlighting these three issues, I hope to encourage further dialogue and research that helps us better understand children's needs and interests.

II. PARENTAL PREFERENCE: THE RIGHTS OF LEGAL PARENTS VERSUS THIRD PARTIES

Legal parentage entitles a parent to all the rights, responsibilities, privileges, and benefits of parentage. Lack of parental status often renders other adults as legal strangers without standing or recourse to establish or maintain a relationship with a child.[20] The dichotomy between the rights of parents and nonparents is well established in American jurisprudence. Parents are presumed to act in the best interests of their children and are protected from most governmental interference regarding the care, custody, and control of their children.[21] The Supreme Court has recognized the concepts of parental autonomy and privacy for nearly a century. Beginning in *Meyer v. Nebraska*, the Court has firmly stated that liberty includes "the right of the individual . . . to establish a home and bring up children . . . ."[22] In subsequent cases, the Court reaffirmed both a "private realm of family life which the state cannot enter"[23] and parental autonomy as a fundamental right under the Constitution.[24]

In 2000, the Supreme Court had occasion to revisit the issue of parental autonomy. In *Troxel v. Granville*, the Court held unconstitutional as applied a Washington statute that permitted any person to petition for visitation with a child at any time.[25] Tommie Granville and Brad Troxel lived together and had two children out of wedlock.[26] When their relationship ended, Brad moved in with his parents and continued to visit with his daughters on weekends at his

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[20] *See* Jacobs, *Adjudicating Maternity*, *supra* note 5, at 348–49.

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

[22] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[23] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[24] *See, e.g.*, Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499 (1977) ("A host of cases, tracing their lineage to Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923) . . . and Pierce v. Society of Sisters, 268 U.S. 510. 534–35 (1925) . . . have consistently acknowledged a 'private realm of family life which the state cannot enter.'" (extensive internal citations omitted).

[25] *Troxel*, 530 U.S. at 65–67.

[26] *Id.* at 60.

parent's home.[27] Two years after his separation from Tommie, Brad committed suicide.[28] His parents, Jenifer and Gary Troxel, continued to see his daughters but after some time, Tommie sought to limit their visitation to one weekend per month.[29] The Troxels, unhappy with limited visitation, filed suit pursuant to the above-mentioned statute[30] and the trial court granted their request. The Washington Supreme Court overturned the trial court decision.[31]

On appeal, Justice O'Connor quickly affirmed the principle of parental autonomy: "[t]he liberty interest at issue in this case—the interests of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[32] The Court found that the Washington visitation statute was "breathtakingly broad."[33] As interpreted by the plurality, the statute gave courts the power to "disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests."[34] Finding that the trial judge had indeed disregarded Tommie's wishes and instead substituted his judgment regarding the children's best interests,[35] the Court held that the statute was unconstitutional as applied.[36]

The Court did not, however, foreclose the possibility of third parties bringing visitation actions in appropriate circumstances.

> Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 60–61.

[30] *Id.* at 61. The statute provided that "'[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been a change of circumstances.'" *Id.* (quoting WASH. REV. CODE ANN. § 26.10.160(3) (West 1994)).

[31] *In re Smith*, 969 P.2d 21, 29 (Wash. 1998).

[32] *See Troxel*, 530 U.S. at 65.

[33] *Id.* at 67 (citing WASH. REV. CODE ANN. § 26.10.160(3)).

[34] *Id.* (emphasis in original).

[35] *Id.* at 72. Reviewing the trial court's opinion, Justice O'Connor quoted the trial judge's personal views in ordering the grandparent visitation. In ordering a week of summer visitation, the judge wrote, "I look back on some personal experiences . . . . We always spent as kids a week with one set of grandparents and another set of grandparents, and it happened to work out in our family that it turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out." *Id.*

[36] *Id.* at 75 ("We therefore hold that the application of § 26.10.160(3) to Granville and her family violated her due process right to make decisions concerning the care, custody, and control of her daughters.").

> visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation. We do not, and need not, define today the precise scope of the parental due process right in the visitation context.[37]

Unfortunately, however, the Court provided little guidance for state courts and legislatures regarding the future rights of nonparents. By refraining from holding that the Washington visitation statute was per se unconstitutional, the Court did not preclude all nonparent visitation claims when there is not a showing of harm. The Court did not clarify, however, under what circumstances a nonparent's claim should be granted.[38]

Moreover, the plurality focused on the rights of parents but did not discuss the rights of children to maintain relationships with persons who have been active care givers. In his dissent, Justice Stevens addressed the issue passed on by the plurality and noted that there is no basis in the Court's previous jurisprudence to suggest that the only way in which to interfere with a parent's liberty interest is upon a showing of harm.[39] Rather, Stevens observed that children likely have a liberty interest in preserving intimate relationships, just as adults do[40] but further noted that a child's liberty interest in maintaining a relationship is not necessarily on par with the parent's contrary interest.[41] Regardless, Stevens concluded that

> [w]e should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent. The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily.[42]

It is this tension between parents' rights, children's rights, and third

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[37] *Id.* at 73.

[38] Sally F. Goldfarb, *Visitation for Nonparents After* Troxel v. Granville*: Where Should States Draw the Line?*, 32 RUTGERS L.J. 784, 786 (2001):

> Before the *Troxel* decision, the overwhelming majority of states—unlike Washington—had adopted various criteria to limit the availability of visitation for nonparents. *Troxel* makes clear that all states must do so, but its fragmented, fact-specific holding falls far short of providing a blueprint of what those criteria must be. As a result, the states are left largely to their own devices to determine where to draw the line on which nonparents are entitled to visitation and which are not.

[39] *Troxel*, 530 U.S. at 85–86 (Stevens, J. dissenting).

[40] *Id.* at 88–89.

[41] *Id.* at 89.

[42] *Id.* at 90.

parties' rights—and the superiority of parents' rights—that makes the current regime particularly troublesome for children and third parties.

Addressing this tension and the ambiguity of the plurality opinion, Professor Sally Goldfarb notes the importance of determining the role the nonparent played in the child's life as a guide to when the nonparent's visitation claim should be recognized.[43] In clarifying the potential pool of nonparents who may have legitimate claims for visitation, Goldfarb advocates that courts draw the line "at the point where a given adult has acted in a capacity of a parent to the child."[44] In advocating that *Troxel* should not foreclose legal recognition of lesbian and gay parents, Professor Nancy Polikoff encourages courts "to see the difference between petitioners who have functioned as parents . . . and petitioners who have not, such as the *Troxel* grandparents. Further, courts should accord parental status, rather than third-party status, to legally unrecognized lesbian and gay parents."[45] Her statement addresses the core of the difficulty presented by strict adherence to parental autonomy and transcends the lesbian and gay context: without recognition as a legal parent, a person may be seen in the law as a third party or "legal stranger"[46] who is not entitled to a relationship with a child with whom the individual has fostered a parental relationship.

Strict adherence to parental autonomy coupled with strict adherence to the two-parent paradigm renders many parental figures without legal recognition of their status. Broadening the category of individuals who qualify for parental recognition expands the pool of individuals who benefit from the parental preference.[47] In this way, custody and visitation disputes can be reconciled within a more traditional framework, akin to the divorce context,[48] and the issue of standing to bring the custody and/or visitation claim becomes moot. As *Troxel* leaves ambiguous the status of nonparents, it becomes even more important to confer legal parental recognition on *all* individuals who have parented a child or who have a potential legal claim upon which to establish parentage. In the next section, I discuss how legal parentage is determined.

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[43] Goldfarb, *supra* note 38, at 791.

[44] *Id.*

[45] Nancy D. Polikoff, *The Impact of* Troxel v. Granville *on Lesbian and Gay Parents*, 32 RUTGERS L.J. 825, 851 (2001).

[46] Goldfarb, *supra* note 38, at 787 (noting the traditional view that a nonparent is a legal stranger to the child).

[47] Because the doctrine of parental autonomy and preference is restricted to legal parents, a broader definition of who qualifies as a legal parent would similarly broaden those persons protected by the parental autonomy doctrine.

[48] *See* Young, *supra* note 18, at 534. In discussing the trend of awarding joint custody to divorced parents, Professor Young notes that "it provided a legal framework that recognizes and legitimizes non-exclusive parenting. Joint custody provides one model in which parenting is shared across units or households." *Id.*

III. DETERMINING WHO IS A LEGAL PARENT

The traditional one mother/one father, two-parent paradigm is well entrenched in American family law jurisprudence. Typically, legal parentage has been established by biology or adoption.[49] Until the advent of reproductive technologies, motherhood was most simple to determine: the birth mother was the biological, hence legal, mother.[50] Parentage for children born into a marital relationship has been simple to determine: the child's legal parents are the wife and husband. Pursuant to the marital presumption of paternity, the woman's husband was presumed the child's legal father, even if he was not, in fact, the child's biological father.[51] A child born to an unmarried woman had only one legal parent, the mother.[52] Paternity laws provide for a similar two-parent paradigm for children born out of wedlock; according to its Prefatory Note, the Uniform Parentage Act (UPA) was promulgated to equalize the rights of nonmarital and marital children and provide that nonmarital children have two legal parents to provide emotional and financial support.[53] Under the UPA, a man who is either the biological or social father of the child can be established as the child's legal father.[54]

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[49] Biology as the basis for legal parentage is discussed more fully in the main text.

Parentage may also be established through adoption: historically, a child has been "reborn," so to speak, into her new family and the adoptive parents are the legal parents and the biological parents no longer have any parental rights and are excluded from a further relationship with the child. *See* Bartlett, *supra* note 1, at 893–94.

Adoption may be the result of a voluntary process, as when a biological mother places a child for adoption at or soon after birth. Adoption may also result from an involuntary removal of a child from her parents who have their parental rights terminated because of abuse or neglect. *Id.* at 894–95. The traditional model of adoption excluded biological parents completely following the adoption; some courts have now considered "open adoption" as a means by which to preserve some contact between the child and biological parent(s). *See* Young, *supra* note 18, at 537–38.

[50] For example, UNIF. PARENTAGE ACT § 201 (a)(1), 9B U.L.A. 309 (2000), which provides that the mother-child relationship may be established by the woman's having given birth to the child, excepting certain situations in which the birth mother is a party to a surrogacy agreement as provided for in UPA Article 8.

[51] Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 331 (2005).

[52] *Id.* at 333 ("[U]nmarried biological fathers were not recognized under the law.").

[53] *See* UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. 296 (Supp. 2006).

[54] *See* UNIF. PARENTAGE ACT § 201 (b)(1), 9B U.L.A. 309 (2000) which provides multiple bases on which to establish legal fatherhood, such as adjudication of fatherhood pursuant to judicial proceedings and reliance on presumptions of paternity such as residing with the child and holding oneself out as the father, despite a lack of biological connection. Unif. Parentage Act § 204 (a)(5), 9B U.L.A. 14 (Supp. 2002).

The traditional, two-parent nuclear family, while still the most prevalent family norm in the United States, has been on the decline for several decades. Along with the decline of the traditional nuclear family has come a significant increase in the use of assisted reproduction, by both heterosexual and homosexual couples, to create families. A recent Washington Post article notes that donated sperm is used in 80,000 to 100,000 inseminations each year; that in 2003, at least 15,000 in vitro fertilization procedures were performed with donated eggs; and that more than 1,000 babies are born each year through surrogacy.[55] Furthermore, the number of lesbian and gay households with children is increasing.[56] Some states permit the gay or lesbian partner of a legal parent to adopt the child, thereby imbuing both parents with legal rights but many other states do not, often leaving one partner without any legal parental status.[57] These societal changes within both the heterosexual and homosexual communities complicate parentage determinations. Traditional parentage law does not differentiate between a genetic mother and a birth mother nor does it provide for two mothers or two fathers.[58]

In fact, strict application of traditional parentage principles may exclude from legal recognition persons who would ordinarily be presumed a member of a nuclear family. In *Doe v. Doe*, a man contracted with a surrogate because the woman he intended to marry had had a tubal ligation, an attempted reversal of which was unsuccessful.[59] Both parties wanted a child, and the man advertised for a surrogate in a local newspaper; the surrogate was impregnated at her home, with the man's sperm while both he and the woman were present.[60] The

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[55] Liza Mundy, *It's All in the Genes, Except When It Isn't*, WASHINGTON POST,, Dec. 17, 2006, at B1.

[56] A report prepared by the Human Rights Campaign, analyzing data from the 2000 census, reveals 601,209 same-sex unmarried partner households in the United States, which is a 314% increase from the 1990 census. Furthermore, researchers believe the 2000 census still reflects an undercount of gay and lesbian families. DAVID M SMITH & GARY J. GATES, HUMAN RIGHTS CAMPAIGN, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS, A PRELIMINARY ANALYSIS OF 2000 UNITED STATES CENSUS DATA, A HUMAN RIGHTS CAMPAIGN REPORT 1–2 (2001), *available at* http://www.hrc.org/content/content-groups/familynet/documents/census.pdf

[57] *E.g.*, Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) (holding that Massachusetts' adoption statute permits a lesbian couple to jointly adopt the child of the biological mother without terminating the biological mother's parental rights); *In re* Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993) (holding that a woman could adopt the biological children of her lesbian partner by broadly construing the stepparent provisions to the adoption statute).

[58] *E.g.*, Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) ("California law, like nature itself, makes no provision for dual fatherhood.").

[59] 710 A.2d 1297, 1302 (Conn. 1998).

[60] *Id.* As the court noted, "Both parties desired to have children, although the defendant [man] was determined to have a child with or without the plaintiff's [woman] cooperation." *Id.*

man and woman were married four months into the surrogate's pregnancy.[61] The surrogate went to doctors' visits under the wife's name and was even checked into the hospital under the wife's name, and the wife was listed as the child's mother on the birth certificate.[62] The surrogate "turned the child over to the [wife] and the [husband], 'who nurtured and raised the child with no further participation by the surrogate mother.'"[63] Almost eight years after the child's birth, the wife filed for divorce and the court was asked to consider the issue of whether the wife is the child's legal parent and entitled to custody.[64]

Despite the surrogate's termination of parental rights, the court refused to recognize the wife as the child's legal mother; instead, the wife was granted custody pursuant to a third-party statute.[65] Even after *Troxel*, this decision would likely have come out the same way, as the mother had had primary physical custody of the child for the six years the case was litigated.[66] Relegating the wife to third-party status, however, made her claim more difficult; and had the litigation not lasted so long, her rights as a third party may have been subordinated to the husband's, given his legal parental status.[67] The *Doe* court's refusal to recognize the wife as the child's mother demonstrates a rigid adherence to traditional defining parentage by biology and adoption and a possible unwariness of opening the door to multiple parentage. The reality is that the child in *Doe* had three potential legal parents: a biological surrogate mother, a biological and caregiver father, and a caregiver mother. Since the surrogate had terminated her parental rights, this result seems particularly absurd, as there was room within the traditional two-parent

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[61] *Id.*

[62] *Id.*

> [T]hroughout the prenatal period the defendant accompanied [the surrogate] to doctors' appointments, where she used the plaintiff's name, social security number and other statistical data regarding the plaintiff. Also, on occasion the plaintiff would accompany the defendant and the surrogate to the doctors' appointments, and on occasion would stuff a pillow in her clothing to simulate the appearance of being pregnant. *Id.*

[63] *Id.* at 1303. Furthermore, the court noted at the outset of the opinion that the surrogate mother's parental rights were terminated. *Id.* at 1300.

[64] *Id.* at 1301–02.

[65] *Id.* at 1317. After reviewing the applicable statutes and case law, the court concluded that "the plaintiff is not a parent of the child within the well established definition of that term in our marital dissolution law; . . . she is, however, a third party who comes well within the ambit of [the applicable statute] for consideration as a third party claimant to custody of the child." *Id.*

[66] *Id.* at 1301.

[67] *Id.* at 1323. Under Connecticut law, in custody fights between a parent and a nonparent, "there shall be a presumption that it is in the best interest of the child to be in the custody of the parent, which presumption may be rebutted by showing that it would be detrimental to the child to permit the parent to have custody." CONN. GEN. STAT. ANN. § 46b–56b (West 2003).

paradigm to recognize the wife as a legal mother. The court, however, specifically rejected doctrines of equitable parenthood.[68]

The law is slowly responding to societal changes and the increased use of ART. Other courts have been amenable to using equitable parental doctrines. Some courts have used doctrines of functional parenthood[69] or intentional parenthood[70] to recognize the parental status of a nonbiological or nonadoptive parent. Some states have begun to apply the UPA to recognize the legal parental status of a lesbian partner.[71] The revised UPA and the ALI Principles both contemplate a wider array of parents than biological and adoptive parents. In different ways, each recognizes changing medical technology and social mores that permit family formation beyond the traditional one-mother/one-father paradigm.

Significantly, the UPA is drafted so as to provide two legal parents for a child, even if those parents are not biological parents. The UPA itself was revised in 2000, with additional revisions in 2002, and attempts to resolve some of the existing murkiness in parentage law, especially concerning the use

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[68] *Id.* at 1317–18. In rejecting equitable parenthood, the court wrote:

> [W]e are not persuaded that it would be wise to employ the equitable parent doctrine . . . . It is true that the doctrine has considerable emotional appeal, because it permits a court, in a particularly compelling case, to conclude that, despite the lack of biological or adoptive ties to the child, the deserving adult nonetheless may be determined to be the child's parent. This appeal may be enhanced in a given case because the best interests of the child, if determined irrespective of the otherwise invalid claim of parentage, may point in that direction. That doctrine, however, would lack the procedural and substantive safeguards provided to natural parents and the child by the adoption statutes. In addition, the equitable parent doctrine, which necessarily requires an ad hoc, case-by-case determination of parentage after the facts of the case have been determined, would eliminate the significant degree of certainty regarding who is and who is not a child's parent that our jurisprudence supplies.

Id. at n.46.

[69] *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.).

[70] *E.g., In re* Marriage of Buzzanca, 72 Cal. Rptr 2d 280, 291 (Cal. Ct. App. 1998) (holding that a married couple that had contracted with a sperm donor, egg donor, and gestational surrogate, were the child's legal parents because they caused the child's birth with the intent to parent).

[71] See Elisa B v. Emily B., 117 P.3d 660, 662 (Cal. 2005) (holding that a woman who supported her lesbian partner's use of artificial insemination and received the children into her home and held them out as her children is a parent under the Uniform Parentage Act); K.M. v. E.G. 117 P.3d 673, 675 (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).

of assisted reproductive technologies.[72] Essentially, the UPA broadens the ways in which parentage may be established, but eliminates biological parents from the family in numerous instances. For example, the UPA recognizes that a couple with fertility problems may use a sperm or egg donor for a pregnancy, yet the UPA specifies that the sperm and/or egg donors are not legal parents.[73] The UPA also includes provisions governing the validity of gestational surrogacy agreements and, if the agreement is approved, excludes the surrogate from a parenting role.[74] These changes are helpful to couples who use ART as they can ensure their legal parenthood, although the ramifications of entirely removing biological parents from the family unit has generated considerable debate.[75]

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[72] Articles 7 and 8 specifically apply to ART. The comments to Article 7 explains, in part:

> [d]uring the last thirty years, medical science has developed a wide array of assisted reproductive technology . . . which have enabled childless individuals and couples to become parents. [Because t]housands of children are born in the United States each year as the result of ART[,] . . . [i]t is necessary for the new Act to clarify definitively the parentage of a child born under these circumstances.

UNIF. PARENTAGE ACT Article 7 comment, 9B U.L.A. Supp. 49 (Supp. 2002).

Article 8 specifically addresses the issue of gestational agreements, permitting the use of gestational agreements and providing a framework for enforcing the agreements. UNIF. PARENTAGE ACT Article 8, 9B U.L.A. 360 (2000); *see infra* note 71.

[73] As the law expands the traditional notion of parenthood to encompass nontraditional parents and brings them within the two-parent paradigm and gives them protections as a parent, rather than third-party status, the law has also begun to exclude otherwise "traditional biological" parents, such as sperm and egg donors. The UPA provides that "[a] donor is not a parent of a child conceived by means of assisted reproduction." UNIF. PARENTAGE ACT ' 702, 9B U.L.A. 355 (2000). The Comment further explains:

> If a child is conceived as the result of assisted reproduction, this section clarifies that a donor (whether of sperm or egg) is not the parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation . . . .
>
> UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355 (Supp. 2006).

[74] UPA section 801 authorizes gestational agreements for married or unmarried couples. The provision provides, in part:

> (a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that: . . .
>
> (2) the prospective gestational mother . . . and the donors relinquish all rights and duties as parents of a child conceived through assisted reproduction; and
>
> (3) the intended parents become the parents of the child.

[75] *See infra* Part IV.C.

The American Law Institute has also responded to shifts in family form by suggesting multiple categories of parents: legal parents, parents by estoppel, and de facto parents.[76] A legal parent is defined through customary state definitions, such as by biology or adoption.[77] A parent by estoppel is one who, with the agreement of a legal parent or parents, has lived with the child since birth, or for at least two years if not since birth, and has assumed full parenting responsibilities.[78] 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 failing to perform caretaking functions, has regularly cared for the child.[79] With its inclusion of parent by estoppel and de facto parent designations, the ALI specifically contemplates legal parenthood for two gay or lesbian parents as well as opens the door to multiple parents.[80]

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[76] ALI PRINCIPLES § 2.03(1) (2002).

[77] "A legal parent is an individual who is defined as a parent under other state law." *Id.* § 2.03(1)(a).

[78] *See Id.* § 2.03(1)(b). Section 2.03(1)(b) of the ALI PRINCIPLES states:

> A *parent by estoppel* is an individual who, though not a legal parent, is (i) obligated to pay child support under Chapter 3; or (ii) lived with the child for at least two years and (A) over that period had a reasonable good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and (B) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or (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 of the individual as a parent is in the child's best interests.

[79] *Id.* § 2.03(1)(c). Section 2.03(1)(c) of the ALI PRINCIPLES states:

> 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, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

[80] *Id.* § 2.03, illus. *iii.* Illustration iii of § 2.03 of the ALI PRINCIPLES states, in part:

Interestingly, despite greater acceptance of ART, nontraditional families, and broadening definitions of parenthood, courts continue to cling to the traditional two-parent paradigm. For example, although ART may involve multiple adults who would ordinarily have a claim to legal parentage, courts apply the various doctrines to ensure that a child has two, and only two, legal parents.[81] In *Johnson v. Calvert*, the California Supreme Court had to determine maternity of a child who was born using a surrogate.[82] Mark and Crispina Calvert contracted with Anna Johnson to act as a gestational surrogate; Crispina had had a hysterectomy but produced eggs, and an embryo created from Mark's sperm and Crispina's egg was implanted in Anna.[83] Anna ultimately sought to keep the baby and the court had to decide which woman was the child's legal mother. The court specifically noted that California law recognizes only one mother and determined that Crispina, because of her intent to procreate and raise the child as her own, was the child's legal—and only—mother.[84] In reaching its decision, the court wrote:

> We decline to accept the contention of amicus curiae the American Civil Liberties Union (ACLU) that we should find the child has two mothers. Even though rising divorce rates have made multiple parent arrangements common in our society, *we see no compelling reason to recognize such a situation here*. The Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a stable, intact, and nurturing home. To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's role as mother.[85]

The opinion emphasizes the binary, "all or nothing" approach to parentage. In deciding on one mother and two parents, there was no place for

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> This Paragraph contemplates the situation of two cohabiting adults who undertake to raise a child together, with equal rights and responsibilities as parents. Adoption is the clearer, and thus preferred, legal avenue for recognition of such parent-child relationships, but adoption is sometimes not legally available or possible, especially if . . . the adults are both women, or both men.

[81] *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282–83, 291 (Cal. Ct. App. 1998). In this case, five people were responsible for the birth of the child: the egg donor, semen donor, gestational surrogate, and the married couple who contracted with the parties and intended to parent the child. *Id.* at 282. After the pregnancy, the husband filed for divorce and disclaimed parentage of the child. *Id.* The appeals court determined that the married couple, who caused the child's birth by their conduct and intended to be her parents, were the legal parents of the child. *Id.* at 291.

[82] 851 P. 2d 776, 778–79 (Cal. 1993).

[83] *Id.* at 778.

[84] *Id.* at 781–82.

[85] *Id.* at 781 & n.8 (emphasis added).

Anna at all.[86] Disaggregating parentage to endow individuals with parental rights that better correspond to their relationship with the child would enable families to preserve all relevant parental relationships while not creating too much intrusion into the primary family unit.

IV. RECOGNIZING MULTIPLE PARENTS FOR FAMILIES WHO USE ART

Increasingly, there are situations in which children are actively parented by more than two adults, yet only two have full legal recognition as a parent. Additionally, children born through ART often have more than two potential parents.[87] In order to consider multiple parentage, it seems appropriate to rethink parentage from the inside out: what does "parent" mean?

Often, a legal parent engages in the full panoply of parental responsibilities, such as providing support, shelter, medical care, education and benefits from a relationship with the child and the opportunity to influence the child's social, educational, religious, and moral development. Other "legal parents" are parents in name only; they provide no financial or emotional support (or only provide child support pursuant to garnishment of wages), nor do they have any interaction with the child. Still other persons, such as nonbiological lesbian mothers, engage in the responsibilities of parentage and enjoy many benefits yet have no legal status as parents and thus enjoy no legal protections of their relationships with the children they have parented; those children also enjoy no protection over similar relationships that they may have formed.

Based on current legal approaches, it is also possible that people who would historically have been legal parents, such as birth mothers or biological fathers, have no legal status because of surrogacy agreements or statutes concerning sperm donation. By disaggregating the strands of parentage, it becomes possible to recognize the many individuals who play a role in the child's life. Moreover, identifying these individuals as legal parents protects both the adults and children by protecting a greater realm of family autonomy and ensures that these parents are not mere third parties without legal parental

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[86] Young, *supra* note 18, at 544. Professor Young explains that the dispute between Anna and the Calverts arose in part because the Calverts had not purchased an insurance policy for Anna, as promised. *Id.* at 543 (citation omitted). Professor Young notes that "the legal framework transformed (and arguably distorted) these problems into a question of rights over the child's custody . . . [and o]nce the parties framed the issue in terms of exclusive parenting rights, the inevitable inference is that the 'other mother' (usually the gestational mother) disappears from view altogether." *Id.* at 544.

[87] See *supra* notes 81–86 and accompanying text which discusses cases where courts were asked to determine parentage among several possible individuals.

protection.[88] As *Troxel* makes clear, without the protection of parental status, third parties may not have their custodial relationships protected.[89]

Perhaps the most significant obstacle in recognizing multiple parentage is the concern 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 a child, so how will three (or four or more) negotiate the difficulties of custody, visitation, and the like.[90] By rethinking parentage and its attendant attributes, we cannot only recognize multiple parentage but must also recognize the relative rights of parents. Thus, a parent who engages in the bulk of daily responsibility for the child, and often has the most benefit (from the close contact), should have greater rights regarding the raising of the child than a parent who contributes less financial and emotional support and has a more tenuous relationship with the child. Most importantly, despite the difficulties of managing multiple parenthood, children will benefit from greater security of maintaining care giving relationships and/or knowledge of their genetic identity.[91]

In this section, I explore some of the contexts in which multiple parenthood can be applied to protect a child and all of the relevant parental adults in her life. Then, I briefly discuss some considerations in making multiple parenthood work, such as relative rights of the parents. Finally, I note that there may be appropriate instances in which to recognize the contributions

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[88] See *supra* Part II (discussing parental autonomy).

[89] Professor David Meyer has observed that even when courts recognize that certain nonparent care givers are psychological parents and "may be permitted to preserve a 'parent-like' relationship with the child in this way, these care givers continue to occupy the status of a nonparent." *Partners, Care Givers, and Constitutional Substance of Parenthood* in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTES PRINCIPLES OF THE LAW OF FAMILY DISOLUTION 47, 47–50 (Robin Fretwell Wilson ed., 2006).

[90] *See supra* note 1. I realize, too, that legal determinations of parentage for more than two adults has implications well beyond custody, visitation, and support. Inheritance and other benefit schemes may be affected. Of interest, however, is the Uniform Probate Code section 2-114 which merely states that a parent child relationship may be established under the Uniform Parentage Act or applicable state law. UNIFORM PROBATE CODE § 2-114(a), 8 U.L.A. 91 (1998). Moreover, section 2-114(b) specifies that when a child is adopted by a stepparent, the child still maintains the right to inherit through the other biological parent, *id.* § 2-114(b), 8 U.L.A. 91; so, if a child is adopted by her stepfather, she may inherit from her mother, stepfather, and biological father. Thus, there is some indication that multiple parentage can also work in the inheritance context.

[91] Meyer, *Partners, Care Givers, and Constitutional Substance of Parenthood* in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTES PRINCIPLES OF THE LAW OF FAMILY DISOLUTION, *supra* note 89, at 47, 66 ("[A]lthough it cannot be doubted that spreading parental authority among a wider circle of parents would carry significant and genuine costs . . . these costs must be balanced against the benefits to children from the greater continuity and security of care giving relationships.")

of some genetic parents, such as sperm and egg donors, without according them full parental status.

A. Recognizing Multiple Parents

Multiple parentage is not merely academic: there are a number of cases in which courts have protected a child's relationship with more than two parental figures. The cases are sparse, however, and generally reinforce a two parent paradigm coupled with rights for a third party and do not afford full parental recognition to all three parties. A legitimate framework of multiple parentage would enable more courts to effect a parenting plan that legally recognizes the de facto reality of many families.

In January 2007, an Ontario appeals court moved beyond the exclusive realm of the two-parent paradigm and ruled that a child may have three legal parents: two mothers and a father.[92] The five-year-old boy has three functional, active parents: his biological mother and father, and the biological mother's lesbian partner.[93] All three adults specifically contemplated a multiple-parenting arrangement and jointly sought to have legal parentage established for the nonbiological lesbian partner.[94] Since adoption by the lesbian partner would have terminated the rights of the biological father, adoption was not an option for the family.[95] Although Canada's parentage laws (much like ours) 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.[96] 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."[97] Application of the ALI Principles, discussed in the next section, would have provided for the same result, because the ALI provides that two legal parents may agree that a third individual may assume full parenting responsibilities, rendering that individual a parent by estoppel.[98]

American courts have also recognized rights for more than two parents in a variety of situations, although the decisions fall short of recognizing three legal parents.[99] In *LaChappelle v. Mitten*, a Minnesota appeals court enforced a

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[92] A. (A.) v. B. (B.), 2007 CarswellOnt 2, 5 (Ont. C.A.).

[93] *Id.* at 2.

[94] *Id.* at 5.

[95] 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's parent. *Id.* at 4.

[96] *Id.* at 13.

[97] *Id.* at 12; *see also id.* at 13 ("There is no other way to fill this deficiency except through the exercise of the *parens patriae* jurisdiction.").

[98] *See infra* note 141 and accompanying text.

[99] For example, in *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986), the court refused to recognize de facto parent status for a mother's friend with whom she had co-parented the child, and instead, limited her rights to a visitation

private agreement which recognized the legal rights of a biological mother, her former lesbian partner, and the child's biological father.[100] Relying on the child's best interests, the court held that it was not unreasonable to enforce an agreement that provides for joint legal custody of the child by the biological mother, Mitten, and her former lesbian partner, Ohanian, as well as various rights for the biological father, LaChappelle.[101] The initial pre-birth agreement of the parties provided that "Mitten and Ohanian would have physical and legal custody of the child and that LaChappelle and his partner would be entitled to a 'significant relationship.'"[102]

A year or so after the child's birth, however, the couple terminated LaChappelle's visitation.[103] Prior to terminating LaChappelle's visitation rights, the couple had successfully petitioned for adoption.[104] LaChappelle moved to vacate the adoption and to have his paternity adjudicated,[105] and the adoption was vacated.[106] Soon thereafter, Mitten and Ohanian ended their relationship and Mitten sought sole physical and legal custody as well as permission to relocate to a different state.[107] The trial court, concerned that the child maintain a relationship with Ohanian and LaChappelle, would not permit Mitten to relocate with the child and retain primary physical custody and as a result awarded joint legal custody to Ohanian.[108] Upholding the ruling of the trial court, the appeals court enforced an agreement whereby LaChappelle did not seek joint legal custody, Mitten and Ohanian would share legal custody, and "LaChappelle would have various rights to the child. Any rights

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award. However, the court upheld the paternity adjudication and visitation rights for a known sperm donor who had visited with child, but denied the donor custodial rights and granted sole legal and physical custody to the mother. *Id.* at 537–38.

[100] LaChappelle v. Mitten, 607 N.W.2d 151, 160 (Minn. Ct. App. 2000).

[101] *Id.*

[102] *Id.* at 157.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* Once the adoption was vacated, the court no longer had to consider LaChappelle's paternity request as a request to establish parental rights in a third person; instead, only Mitten was a legal parent and by adjudicating paternity for LaChappelle, the court comported with the traditional paradigm of one legal mother and one legal father. Ohanian was merely a third party.

[107] *Id.*

[108] *Id.* at 160–61. The court found that Ohanian had standing to sue for joint legal custody as a third party. *Id.* at 159. She was not referred to as a parent in the opinion nor did the court refer to doctrines of equitable parenthood. This case was decided on March 14, 2000, several months before the United States Supreme Court's *Troxel* decision. Post-*Troxel*, it is unclear whether the Minnesota Court of Appeals would have enforced an order of joint legal custody pursuant to the third-party visitation statute, especially without conferring parental status on Ohanian. *Id.*

LaChappelle has under the agreement with Mitten and Ohanian are not those of a joint legal custodian."[109]

By enforcing the parties' agreements, the court likely acted in the child's best interests and ensured the child continued contact with three adults who had served in parenting roles. Specifically, denying legal custody to LaChappelle seems consistent with the facts: he had not initially requested joint legal custody, had not assumed primary custody, and had a smaller parenting role than Mitten and Ohanian. Granting Ohanian custodial rights as a third party protects her interest in maintaining a relationship with the child, but not as well as conferring parental status. Had the trial court not vacated the adoption and still permitted LaChappelle to establish his paternity, the court would truly have embraced multiple parentage. By denying Ohanian parental rights, her interests will always be subordinate to Mitten's, the legal parent, and in light of *Troxel*, could potentially be curtailed further if another custody disagreement arises.

In *Thomas S. v. Robin Y.*, the New York appellate court similarly disaggregated the rights of parentage to permit a known sperm donor to maintain an action for an order of filiation and visitation.[110] Robin was inseminated with the sperm of a known donor, Thomas, and gave birth to a daughter, Ry.[111] Robin and her partner, Sandra R., paid all of the expenses associated with Ry's birth and resided together as a family.[112] Thomas had limited visits with Ry for the first few years of her life and then, with Robin and Sandra's encouragement, had greater visitation.[113] When Ry was nine, Thomas sought to establish a parental relationship with Ry, which Robin and Sandra considered a breach of their initial agreement.[114] They refused to permit visitation for a period and Thomas brought an action for filiation and visitation.[115]

Although testing revealed that Thomas was Ry's biological father, the trial court refused to enter an order of paternity, stating that Thomas was an outsider attacking the family and, moreover, even if paternity were adjudicated, the court would not grant the father custody.[116] The appellate court disagreed with the trial court's conclusions both regarding the paternity decision and its emphasis on custody.[117] The court found that an order of

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[109] *Id.* at 161. The court specifically refuted Mitten's contention that the child had three legal custodians. *Id.*

[110] 618 N.Y.S.2d 356, 357 (N.Y. App. Div. 1994).

[111] *Id.* at 357–58.

[112] *Id.* at 358.

[113] *Id.* The court noted that over time, the parties developed a "comfortable relationship with one another" and that photos "depict a warm and amicable relationship" between Thomas and Ry. *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 360.

paternity did not of itself confer custodial rights, as those are to be determined in a later proceeding.[118] Moreover, the court noted that Thomas was not seeking custodial rights but visitation and that the "gratuitous interjection of custody, in particular, raises the very threat to the relationship between Ry and her mothers that [Robin] and the dissent posit in support of termination of [Thomas'] parental rights."[119]

In this manner, the court refuted the all-or-nothing approach to parentage and acknowledged that legal recognition of Thomas' paternity would enable him to maintain his relationship with Ry.[120] While seemingly a recognition of parental rights for three parties, the court noted that Sandra had not adopted Ry and that the issue of rights for a gay partner vis-a-vis a biological parent were not presented.[121] Even though the court certainly recognized the parental role Sandra played, she had no legal status as a parent and the court was not asked to establish parentage for a third parent.

A third example in which a court did not confer parental rights on three parties is the *Baby M* surrogacy case.[122] The Sterns wanted a child, but Elizabeth Stern had multiple sclerosis and feared a pregnancy could be too dangerous.[123] The Sterns contracted with MaryBeth Whitehead to serve as a surrogate.[124] Despite Whitehead's desire to keep the baby, Melissa, after her birth, she did turn Melissa over to the Sterns.[125] Shortly thereafter, though, Whitehead became very distraught and "stricken with unbearable sadness" and requested to take Melissa for one week.[126] The Sterns were "surprised and frightened" by Whitehead's despair and feared she would act on suicidal thoughts, so they gave Melissa to Whitehead for the visit.[127] Whitehead fled with Melissa, who was not returned to the Sterns for four months.[128] Before recovering Melissa, the Sterns sought enforcement of the surrogacy contract, including a termination of Whitehead's parental rights, and further sought to have Mrs. Stern adopt Melissa.[129] After Melissa's reunion with the Sterns, the trial court enforced the surrogacy contract, terminated Whitehead's parental

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[118] *Id.* at 367.

[119] *Id.* at 361.

[120] *Id.* The dissent, however, saw Thomas' petition as an all-or-nothing approach and wrote that once the paternity declaration is granted, even if Thomas is not awarded visitation, "the constant, frightening potential for it is a burden that this child, who is already aware that her family is vulnerable to attack on a number of fronts, should not have to bear." *Id.* at 368 (Ellerin, J., dissenting).

[121] *Id.* at 361.

[122] *In re* Baby M., 537 A.2d 1227, 1240 (N.J. 1988).

[123] *Id.* at 1235.

[124] *Id.* at 1236.

[125] *Id.*

[126] *Id.* at 1236–37.

[127] *Id.*

[128] *Id.*

[129] *Id.*

rights, granted Mrs. Stern's adoption petition, and further awarded custody of Melissa to the Sterns.[130]

The Supreme Court of New Jersey, however, held that surrogacy contracts for money are invalid because they conflict with existing statutes and public policy.[131] As a result, the court found that the surrogacy contract's provision requiring termination of Whitehead's parental rights violated New Jersey law and was unenforceable.[132] In addition, because the termination of Whitehead's parental rights was invalid, Mrs. Stern's adoption of Melissa was similarly invalid.[133] Once the surrogacy contract was deemed invalid and the court determined that there was no lawful basis upon which to terminate Whitehead's parental rights, the court proceeded to determine custody of Melissa and noted that this was a custody dispute between two couples whose claims were entitled to equal weight.[134]

The court awarded custody of Melissa to the Sterns[135] and visitation rights to Whitehead "at some point" to be determined by the trial court on remand.[136] Whitehead's parental rights were not terminated, although certainly she had fewer rights than she had hoped to have at the conclusion of these proceedings. Mrs. Stern was granted joint custody of Melissa with her husband, but she was not entitled to adopt Melissa nor establish legal parentage. Ideally, Mrs. Stern would have been able to adopt Melissa and establish a full legal parent-child relationship while still affording Whitehead some ability to pursue limited visitation with Melissa in the future. Strict adherence to the two-parent paradigm did not necessarily best protect Melissa, who is being raised by a parent without full parental rights (and further denies Melissa the rights that flow from legal parentage, such as certain benefits, inheritance, and the like).

Each of the cases above illustrates a scenario in which the actions of more than two adults resulted in the birth of a child, and those adults had differing degrees of involvement with that child after birth. Courts in these and other cases have, to some degree, disaggregated parental rights to recognize the presence of the three adults. LaChappelle and Thomas were recognized as biological fathers and were granted limited visitation rights; Marybeth

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[130] *Id.* at 1237–38.

[131] *Id.* at 1240. Specifically, the court held that the particular "contract conflict[ed] with (1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions." *Id.*

[132] *Id.* at 1242–44 (reviewing applicable statutes).

[133] *Id.* at 1244.

[134] *Id.* at 1256.

[135] *Id.* at 1259.

[136] *Id.* at 1263. At the initial trial, a recommendation was made to preclude Whitehead from visiting Melissa for at least five years. The New Jersey Supreme Court noted that such a recommendation was highly unusual but that if the facts support a long suspension, it was to be ordered. *Id.*

Whitehead retained her parental rights, but was denied custody,[137] in part due to fleeing with the child. Despite recognizing the parental rights of the biological parents in these cases, the courts did not also recognize parental rights in the nonbiological partner parent: Ohanian, Sandra R., and Elizabeth Stern were deemed to have certain custodial rights, but no legal parental status. The courts fudged the multiple parenthood issue and did not recognize legal parentage for more than two parents. In the next section, I discuss how courts should apply multiple parentage.

B. Making De Facto Multiple Parenthood a Legal Reality—All Parents Are Not Equal

Scholarly support for multiple parenthood is not new. In 1984, Professor Katharine Bartlett wrote a seminal article in which she challenged the exclusivity of parenthood.[138] In her article, Bartlett proposes the recognition of de facto parents and stresses the importance for children of continuity of relationships with adults who have served as their caretakers or with whom they have otherwise established an intimate bond.[139] Bartlett notes that concerns of broadening access to parenthood include "diluting the individual autonomy of parents" and "increas[ing] the number of adults making claim to a child and enhanc[ing] the indeterminacy that already exists in child custody law."[140] In response to these concerns, Bartlett suggests limiting multiple parentage so that nonparents can exercise parental rights only when there has been an interruption in the child's relationship with her legal parent.[141] In this way, Bartlett does not advocate multiple parenthood in which the full panoply of parental rights for more than two parents is simultaneously recognized.

Professor Alison Young has also advocated for a reconception of family that goes beyond the traditional nuclear paradigm.[142] Like Bartlett, Young describes the nuclear family as an exclusive family; unlike Bartlett, Young sees potential for a much more inclusive definition of family that recognizes a "core" and simultaneously embraces multiple individuals who have played a parenting or creation role in the child's life.[143] Young recognizes that there are many two-parent families that are not traditional nuclear families and that other individuals should be included within the family. By articulating a more inclusive vision of family, Young anticipates that numerous individuals can

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[137] Whitehead was granted unsupervised visitation on remand. *In re* Baby M., 542 A.2d 52, 53 (N.J. Super. Ct. Ch. Div. 1988).

[138] Bartlett, *supra* note 1, at 883.

[139] *Id.* at 944.

[140] *Id.* at 945.

[141] *Id.* at 946 ("Absent the failure of the premise of the nuclear family underlying traditional exclusive parenthood, the state should not intervene in families to create new parental rights.")

[142] Young, *supra* note 18, at 508–09.

[143] *Id.* at 516–18.

participate in a child's upbringing. As a means by which to manage the relationships, Young recognizes a "core unit" or "parents" who have support obligations and the like but advocates permitting legal recognition of other individuals who "could generate significant links and support systems for children."[144] With her principle of a core family unit, Young anticipates that a child can have more than two legal parents, but recognizes that one or two parents will generally have more decision-making authority than other parents.

In considering the recognition of multiple parenthood, I suggest recognizing relative rights for parents, which is similar to Professor Young's proposal of recognizing a core family unit and additional parental figures. My premise, in essence, is that parents who contribute more caretaking should have a greater say in custody matters than parents who contribute less. While perhaps sounding unfair, that represents, to a large extent, our current custodial system for primary physical custodians after divorce or in the paternity context. Many parents share joint legal custody and have an equal say in decision making, but true joint physical custody is less common. A similar principle can apply to more than two parents. In the Ontario case discussed earlier,[145] the lesbian couple with whom the child resides has greater daily decision-making authority than the father who is not a primary custodian. All three parents, however, have their parental status legally recognized.[146]

For multiple parenthood to work, definitions of parent beyond biology and adoption must become the norm. I do not mean to suggest that every child should have nonbiological or nonadoptive parents or that every child should have more than two parents, but rather, when families do not comport with the traditional nuclear family, I advocate that courts confer legal parentage on people who have functioned as parents and/or intended to be parents. In the case of anonymous gamete donation, I argue that some status should be recognized, but that in the absence of a parenting plan or agreement, the genetic donor should have limited rights, which I address in the next section.

The ALI Principles provide a good starting place for defining parentage beyond biology and adoption. The Principles are not perfect, as they also employ certain bright-line rules for defining parent by estoppel and de facto parenthood, especially in regard to the length of time an individual has resided with the child. Yet adoption of the Principles, or a modified version, is attractive in that the Principles recognize several categories of parents and render many traditionally nonlegal parental care givers as legal parents. In addition to traditional legal parentage established by biology or adoption, the ALI confers parental status on parents by estoppel[147] and de facto parents.[148]

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[144] *Id.* at 518.

[145] A.A. v. B.B., 2007 O.A.C. 2, Docket Number C39998, at 2.

[146] *Id.* at 12–13.

[147] A parent by estoppel is one who, with the agreement of a legal parent or parents, has lived with the child since birth, or for at least two years if not since birth, and has assumed full parenting responsibilities. For a complete definition of parent by estoppel, *see supra* note 78.

Parents by estoppel have greater rights than de facto parents and are treated on par with legal parents.[149]

The ALI Principles not only envision a more inclusive model of family, they specifically contemplate the possibility of multiple parentage.[150] For example, part of the definition of a parent by estoppel includes establishing that relationship if a person "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*)."[151] A comment to the ALI Principles also notes that parent by estoppel status should be recognized only when it is in the child's best interests.[152] Further comments caution that if a child already has two legal parents, the case for recognizing an additional parent is weaker, but the court must consider the strength of emotional bonds to the child.[153] The ALI Principles thus address the express possibility of recognizing more than two legal parents. Furthermore, the ALI Principles contemplate that a biological parent may not be a legal parent but can have an agreement with the legal parent or parents under which s/he reserves certain parental rights or responsibilities.[154] This disaggregation of parental rights recognizes the importance of the biological connection between a parent and child, and further recognizes parenthood for more than two individuals.

An advantage of adopting the ALI definitions of parent is that persons meeting the criteria of parent by estoppel and de facto parent will have standing to pursue custody and visitation claims, will not be seen as third-party legal strangers, and can overcome the hurdle of parental autonomy because they will be within the legally recognized family circle.[155] A second advantage

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[148] 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 to perform care taking functions, has regularly cared for the child. For a complete definition of de facto parent, *see supra* note 79.

[149] "A parent by estoppel is afforded all of the privileges of a legal parent under this Chapter, including . . . the benefit of the presumptive allocation of custodial time . . . *and priority over a de facto parent and a nonparent in the allocation of primary custodial responsibility* . . . ." ALI PRINCIPLES § 2.03(1)(b) (emphasis added).

[150] "The ALI's approach creates the possibility that a child might have three or more parents all at the same time." Meyer, *Partners, Care Givers, and Constitutional Substance of Parenthood* in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTES PRINCIPLES OF THE LAW OF FAMILY DISOLUTION, *supra* note 89, at 47, 51.

[151] ALI PRINCIPLES § 2.03(1)(b)(iv) (emphasis added).

[152] *Id.* § 2.03(1)(b) cmt..

[153] *Id.*

[154] *Id.* § 2.04(1)(d).

[155] The ALI Principles provide that legal parents, parents by estoppel, and de facto parents are parties entitled to bring an action and are similarly entitled "to be notified of and participate as a party in an action filed by another." *Id.* § 2.04(1).

of the definitions is a recognition of relative rights of the parents. Under the ALI Principles, parents by estoppel have rights equivalent to those of legal parents.[156] De facto parents, however, have rights secondary to legal parents and parents by estoppel in the context of custodial decision making.[157] While still recognized as parents, de facto parents' rights to custody are subordinate to legal parents and parents by estoppel.

All of the approaches to multiple parenthood discussed above rely on broadened definitions of parent and an acknowledgment that children may have more than two parents. Even though de facto parents do not have rights equal to legal parents or parents by estoppel, they are still entitled to bring custody and/or visitation actions, are entitled to notice of proceedings, and are thus within the purview of parental preference and are not relegated to third-party status. Multiple parenthood does not necessarily mean "full" parental rights for more than two parents; it does provide children and caregivers with continuity of relationships and a protection of the relationship, even if the relationship is not a primary custodial relationship.

C. All "Parents" Are Not Parents Entitled to Parental Rights

All parents are not equally entitled to the full panoply of parental rights. In rethinking parentage and the various attributes of parentage, it is important to also consider those individuals who might properly be denied certain parental rights, such as sperm and egg donors. The UPA provides that sperm and egg donors have no parental rights regarding the children born from use of the sperm or egg. One of the main reasons for this is the concern of the intended parents that the biological father or mother will seek custodial or

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[156] *See supra* note 147.

[157] For example, section 2.08 "Allocation of Custodial Responsibility," and section 2.09 "Allocation of Significant Decisionmaking Responsibility" both refer to legal parents and parents by estoppel, but do not address the rights of de facto parents to shared custody. Similarly, section 2.09(4) specifically authorizes that even if a legal parent or parent by estoppel is not allocated decision-making responsibility, "any legal parent and any parent by estoppel should have access to the child's school and health-care records to which legal parents have access by other law . . . ." ALI PRINCIPLES § 2.09(4).

Moreover, section 2.21(1) "Allocations of Responsibility to Individuals Other Than Legal Parents" provides that a court "should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility" unless the legal parent or parent by estoppel has not performed a reasonable share of parenting or "the available alternatives would cause harm to the child," and "it should limit or deny an allocation otherwise to be made if, in light of the number of other individuals to be allocated responsibility, the allocation would be impractical in light of the objectives of this Chapter." ALI PRINCIPLES § 2.21.

visitation rights with the child and interfere with their parental autonomy.[158] Disaggregating rights to recognize the biological tie of the sperm or egg donor, while still preserving the legal rights of the intended parent(s), requires further research and exploration. In framing a dialogue about parentage and roles, however, we must consider the role biology should play in conferring or denying some sort of protected status. There are legitimate reasons to deny custody and visitation to sperm and egg donors who have contracted away those rights and then change their mind, or donors who donate genetic material on the condition of anonymity and the assurance of no parental responsibility. An issue that requires more research is the effect on donor-conceived children and their rights to know their genetic parent(s).

The issue of whether sperm and egg donors *should* have anonymity is a source of current debate. While some fertility experts are in favor of anonymity to protect customers from being caught up in potential custody battles, other customers would like access to donor information, both for genetic medical history purposes as well as giving children the opportunity to contact their genetic parent and learn more about their genetic identity.[159] One journalist has commented that ". . . it's wrong when an industry stokes the genetic anxieties of would-be parents yet fails to provide the support to help us all figure out how to deal with the ways in which genetics do affect family ties."[160]

The impact of anonymous donations on the children who are born from sperm and egg donation is just being realized. In a particularly compelling article, Katrina Clark, an eighteen-year-old college student conceived through sperm donation, writes:

> I was angry at the idea that where donor conception is concerned, everyone focuses on the "parents"—the adults who can make choices about their own lives. The recipient gets sympathy for wanting to have a child. The donor gets a guarantee of anonymity and absolution from any responsibility for the offspring of his "donation." As long as these adults are happy, then donor conception is a success, right?
>
> Not so. The children born of these transactions are people, too. Those of us in the first documented generation of donor babies—conceived in the late 1980s and early '90s, when sperm banks became more common and donor insemination began to flourish—are coming of age, and we have something to say.
>
> I'm here to tell you that emotionally, many of us are not keeping up. We didn't ask to be born into this situation, with its limitations and confusion. It's hypocritical of parents and medical professionals to assume that

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[158] *See e.g.*, Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993); Lamaritata v. Lucas, 823 So.2d 316, 317 (Fla. Dist. Ct. App. 2002) (distinguishing sperm donor from "parent" with standing to seek visitation).

[159] Amy Harmon, *Are You My Sperm Donor? Few Clinics Will Say,* N.Y. TIMES, Jan. 20, 2006, at A1.

[160] Liza Mundy, *It's All in the Genes, Except When It Isn't*, WASH. POST, Dec. 17, 2006, at B1.

> biological roots won't matter to the "products" of the cryobanks' service, when the longing for a biological relationship is what brings customers to the banks in the first place.[161]

Ms. Clark's poignant telling of her experience searching for her biological father is similar to the experiences of many adopted children who seek to know their genetic history. And as birth registries and "open adoption" become more widely accepted, it is useful to consider similar registries for children born from anonymous sperm or egg donors.[162]

In the paternity context, Professor Cynthia Mabry has voiced concern that children have access to their genetic identity, arguing that: "Children gain a fuller sense of self-esteem and identity when they know their parentage."[163] I, too, have previously argued that even if biological fathers are not granted full parental rights, they should have some limited access to the child and the child to them, for purposes of preserving genetic connection and identity.[164] Ms. Clark's story makes clear the importance to children of knowing their genetic identity. The family law and medical communities are just starting to understand the emotional impact on donor-conceived children. We have already put in place legal mechanisms by which to protect intended parents and donors, but we should also put in place mechanisms which protect children. While it is possible to maintain the current legal regime in which sperm and egg donors are not granted any parental rights or obligations with respect to custody and child support, perhaps donors should be required to provide contact information, health histories, and perhaps even a picture.

I am not suggesting that a sperm or egg donor should assume all of the rights and responsibilities of parentage: ART is often predicated on the assumption that the donor and the mother or couple agree that the donor is not a parent entitled to custody or required to pay support. But as Ms. Clark highlights, it is unfair to children born through ART to completely eliminate the genetic donor. Disaggregating biological parentage from legal parentage would enable children to have access to information about their background while providing assurances to legal parents that their ability to raise their child

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[161] Katrina Clark, *My Father Was an Anonymous Sperm Donor*, WASH. POST, Sunday, Dec. 17, 2006, at B01.

[162] Young, *supra* note 18, at 549–53 (discussing a registry for open adoption in several Canadian provinces and describing how a similar system could apply to sperm donors).

[163] Cynthia R. Mabry, *Who is the Baby's Daddy (And Why is it Important for the Child to Know)?*, 34 U. BALT. L. REV. 211, 238 (2005). Writing about mothers who do not reveal information pertaining to their child's fathers, Mabry argues that the child suffers and feels embarrassed: "They suffer when they yearn to know not only their father's identity but also him as a person." *Id.*

[164] Jacobs, *My Two Dads, supra* note 3, at 822 ("[T]o reject biology as a basis of parenthood . . . completely ignores the importance of genetic identity and heritage . . . for a child.")

as they see fit is not compromised. One option is a system whereby genetic parents can provide information about their medical histories, contact information, and the like, such as adoption registries. A registry system would permit donor-conceived children to learn more about their genetic identity and history without causing an undue burden on the parents' custodial rights.

Another option is to contractually permit the biological parent to retain limited rights, but not the right to custody.[165] As noted above, the ALI Principles recognize the possibility of limited parental rights for biological parents while permitting other persons to assume full legal parental status.[166] Unfortunately, the current two-parent paradigm may exacerbate tensions between donors and users because of the all-or-nothing aspect of parentage. Preserving biological parentage to provide the child with access to her history and identity, should become the norm and not the exception. Legislative acceptance of multiple categories of parent, such as embraced by the ALI, would enable judges more latitude to recognize the particular contributions of particular parents and accord the appropriate deference depending upon the degree of parent-child relationship that has been established. Such a system would provide greater guidance to parties using ART and enable them to craft arrangements that better serve all parties' needs and, hopefully, avoid litigation.

The *LaChappelle* and *Thomas S.* cases discussed earlier illustrate courts that have adjudicated parentage but denied custodial rights; a system in which judges disaggregate the rights of parentage to confer legal parentage and limited rights, but specifically deny custodial rights, would assure the other legal parent(s) that they will not lose custody. While this may seem an infringement on the parents' rights, the child's interests should be paramount. As Justice Stevens explained in his *Troxel* dissent, the child's liberty interest in continuing a relationship should not be pushed aside for a rigid adherence to parental autonomy.[167]

V. CONCLUSION

Legal recognition of multiple parenthood recognizes the de facto reality of many families. Multiple parenthood permits children to benefit from maintaining relationships with long-term or intended caregivers and to have the ability to know their genetic identity and background. Redefinition embraces multiple models of family, not merely the traditional two-parent nuclear family. Broader definitions of parentage enable courts to recognize more than two parents for a child.

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[165] See cases cited *supra* notes 99–121 and accompanying text (discussing *LaChappelle* and *Thomas S.*, in which known sperm donors were legal fathers without full custodial rights).

[166] *See supra* text accompanying note 155.

[167] *See* Troxel v. Granville, 530 U.S. 57, 88–90 (2000) (Stevens, J., dissenting).

Disaggregating parental rights allows courts to balance multiple parental interests and accord weight to parents based on their demonstrated commitment to the child. Most importantly, disaggregation of parental rights to recognize multiple parentage provides children with more continuous relationships with caregivers, access to their genetic history, and protection of their nontraditional families.