# YOU CAN'T HAVE ONE WITHOUT THE OTHER: WHY THE LEGALIZATION OF SAME SEX MARRIAGE CREATED A NEED FOR COURTS TO HAVE DISCRETION IN GRANTING LEGAL PARENTAGE TO MORE THAN TWO INDIVIDUALS

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*"History and tradition guide and discipline [our] inquiry but do not set its outer boundaries."*[1]

## I. INTRODUCTION

Do courts have the discretion, when appropriate, to grant more than two individuals legal parental status of one child? Following the legalization of same sex marriage, is there a compelling need to give courts this type of discretion? In the United States, it is the states that retain police power, and such power is derived from the Tenth Amendment, which gives to the states the rights and powers "not delegated to the United States."[2] States are granted the power to establish and enforce laws protecting the welfare, safety, and health of the public.[3] Accordingly, the subject of domestic relations relating to the parent-child relationship belongs to the states, individually, and the laws governing this relationship vary significantly from state to state.[4]

The current law of most states is that a child may have only two legal parents.[5] This bright-line restriction leaves parents and children across the country unsure about the legal status of their relationship. The refusal of state legislatures to give courts more discretion in the area of parentage does not match the reality of what family units look like today. The reality

* Widener University Delaware Law School, J.D. 2018. The author owes a special thanks to the *Widener Law Review* staff for their hard work and dedication. This article is dedicated to the author's parents and sister who showed her the meaning and importance of family.

[1] Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

[2] U.S. CONST. amend. X.

[3] *See* Lochner v. New York, 198 U.S. 45, 53 (1905).

[4] *See, e.g.*, *Family Law in the 50 States*, AM. BAR ASS'N, https://www.americanbar.org/groups/family_law/resources/family_law_in_the_50_states.html (last visited Jan. 8, 2018); *see also* Ann E. Kinsey, *A Modern King Solomon's Dilemma: Why State Legislatures Should Give Courts the Discretion To Find that a Child Has More than Two Legal Parents*, 51 SAN DIEGO L. REV. 295, 310 (2014); *Family Law-State Statutes*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/table_family (last visited Jan. 8, 2018).

[5] *See* Kinsey, *supra* note 4, at 297; *see also* Gabrielle Emanuel, *Three (Parents) Can Be a Crowd, but for Some It's a Family*, NPR (Mar. 30, 2014, 6:08 PM), http://www.npr.org/2014/03/30/296851662/three-parents-can-be-a-crowd-but-for-some-its-a-family.

of today's modern family unit, which has significantly shifted from the traditional family unit, is that many children are being raised by more than two adults, and many courts do not offer a remedy when families seek legal recognition of their parental status.[6] The benefits of obtaining legal parental status include: "social security, inheritance and the authority to make medical decisions."[7] Also, government-recognized parenthood helps clarify financial responsibilities.[8]

As courts continue to "redefine and broaden" the term "parent," there are more and more situations that arise in which more than two individuals fit the expanded definitions and presumptions under state law.[9] Even though courts have responded by expanding the definition of "parent" to include more than two people, "they have maintained the rigid idea that a child can have only two *legal* parents."[10]

Our society has already witnessed a major shift in "history and tradition" in regards to the private choices within a family. In 2015, the Supreme Court of the United States held that same sex couples have a constitutional right to marry pursuant to the Fourteenth Amendment and the fundamental liberties implicit in substantive Due Process.[11] The *Obergefell* decision preceded a line of the Court's jurisprudence focusing on the individual's right to make choices about their private lives and the fundamental liberties contained within the Due Process Clause.[12] Inarguably, the *Obergefell* decision affects every aspect of family law, including the parent-child relationship.

What is left after the legalization of same-sex marriage? The answer is: a very confusing and incompatible combination of legal rights in regards to marriage, parentage, and family in general. Following *Obergefell*, every state continued to allow only two individuals to be legal parents of a child; however, "the statutory scheme [in some states] for determining parentage ma[de] it possible for more than two people to have so-called 'presumed parent' status.'"[13] This inconsistency between presumed parental status and actual legal status puts courts in the difficult position of picking and choosing between individuals, all of whom have presumed parental status

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[6] *See* Emanuel, *supra* note 5.

[7] *Id.*

[8] *Id.*

[9] Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage,* 15 J. AM. U. J. GENDER & SOC. POL'Y & L. 379, 381 (2007).

[10] *Id*. (emphasis added).

[11] Obergefell v. Hodges, 135 S. Ct. 2584, 2597, 2600, 2604 (2015).

[12] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562, 564 (2003) (holding that two adult males were free to engage in private sexual conduct pursuant to their liberty rights under the Due Process Clause of the Fourteenth Amendment).

[13] Joanna L. Grossman, *California Allows Children to Have More than Two Legal Parents*, VERDICT (Oct. 15, 2013), http://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents.

based on either marriage or conduct, to determine which two individuals should be granted legal status.

California was the first state to react to this inconsistency by passing Senate Bill 274, now section 7612(c) of the California Family Code.[14] This bill, which Governor Brown signed into law in 2013, allows California courts to find that a child has more than two legal parents if making such finding would not be detrimental to the child.[15] Senate Bill 274 was passed in response to a 2011 California case, *In re M.*C.[16] In that case, two women and one man satisfied the requirements under California's statutory scheme to be a presumed legal parent of the same child.[17] However, the California court was compelled to grant only two out of these three parents legal status due to California's statutory scheme.[18] However, the court challenged the legislature to reconsider the so-called "rule of two," which the legislature accepted.[19] Although the specific facts of *In re M.C.* do not make it the model case for expanding legal parentage, the case exemplifies the possibility that a bad case can generate good law.

Other state courts, such as Louisiana, Oregon, Washington, Massachusetts, and Alaska, have reacted to the evolving family by recognizing third-parent adoptions in individual cases.[20] In the District of Columbia and Delaware, semen or egg donors have been found to be "de facto parents," meaning "a child could, conceivably, have three parents."[21] Furthermore, in Pennsylvania, courts have held that more than two parents can have rights and responsibilities in regards to one child.[22] Most states, however, are loyal to the rule of two, adhering to the bright-line restriction that a child can only have two parents.[23]

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[14] CAL. FAM. CODE § 7612(c) (West 2017). To see the text of Senate Bill 274, see S. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB274.

[15] CAL. FAM. CODE § 7612(c) (West 2017).

[16] 123 Cal. Rptr. 3d. 856 (Cal. Ct. App. 2011).

[17] *Id.* at 876. Under the Uniform Parentage Act ("UPA"), which California had adopted by statute, biological mothers and "presumed parents" had legal status as parents. *Id.* at 867.

[18] *Id.* at 876-77.

[19] *See* S. 274, 2013-14 Leg., Reg. Sess. (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB274 ("This bill would authorize a court to find that more than 2 persons with a claim to parentage, as specified, are parents if the court finds that recognizing only 2 parents would be detrimental to the child.").

[20] *See* Nancy Polikoff, *Where Can a Child Have Three Parents?,* BEYOND (STRAIGHT AND GAY) MARRIAGE (July 14, 2012), http://beyondstraightandgaymarriage.blogspot.com/2012/07/where-can-child-have-three-parents.html; Le Trinh, *Where Can a Child Have More than Two Parents?,* FINDLAW (May 11, 2015, 10:05 AM), http://blogs.findlaw.com/law_and_life/2015/05/where-can-a-child-have-more-than-two-parents.html.

[21] *See* Trinh, *supra* note 20.

[22] *See* Jacob v. Shultz-Jacob, 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

[23] Trinh, *supra* note 20; *see also* Kinsey, *supra* note 4, at 298; Wald, *supra* note 9, at 381.

Undoubtedly, there is skepticism and criticism of expanding parentage to allow for more than two parent families. However, these skepticisms and criticisms should not be controlling over what is in the best interest of the child. Allowing courts to have discretion to grant more than two individuals legal parental status does not necessarily imply that courts should be forced to find that more than two parents have legal status. However, "recognition of parentage in more than two adults . . . would allow a more full consideration of best interests by the court than is allowed where some of the child's most significant adults are locked out of court."[24]

The standard for parentage issues, including child custody, is finding what is in the best interest of the child.[25] The current laws of most states do not reflect the evolving view of family, marriage, and the parent-child relationship.[26] Instead, states should follow California lead – with the passage of Senate Bill 274 – rather than drawing bright-line restrictions that create detrimental issues in cases where it is not in the child's best interest to have only two legal parents.

## II. PROPOSED RESOLUTION

State legislatures should follow California's lead and give courts the discretion to find that a child may have more than two legal parents if such a finding would be in the best interest of the child. Without such discretion, third parties are deprived of the right to be a legal parent of a child that they have raised and fostered a relationship with.[27] The proposed resolution to this issue is *not* to force courts to find that there are more than two legal parents whenever there are more than two individuals involved; rather, the main focus is to abolish a per se rule that keeps certain people out of court simply because the state legislatures have failed to delegate to courts the discretion to find that more than two individuals have legal status as parents.

## III. BACKGROUND

The history of laws relating to family, specifically the parent-child relationship and marriage, shows a significant shift in traditional views of

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[24] Wald, *supra* note 9, at 409-10.

[25] *Determining the Best Interest of the Child*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=1&view=Introduction (last visited Jan. 14, 2018).

[26] *See supra* note 5 and accompanying text.

[27] *See* Wald, *supra* note 9, at 410 ("The inflexible position of our state courts--that where there are three people standing in clear parental roles, each with valid claims to parentage based on either genetics plus parental conduct or membership in an intact marital family, there nevertheless can be only two legal parents--is based on an historical perspective that may no longer be valid.").

what makes up the family unit.[28] Although history and tradition are usually the starting point for evaluating a law, such considerations are not the end of the inquiry.[29] The legalization of same sex marriage is the biggest change in family law to date. It could be, and has been, argued that there is no history or tradition to support the modern day evolving family; however, the legalization of same sex marriage provides ample support that the view of the "traditional" family is no longer the same. Although many states would argue that there is a compelling need of maintaining a two-parent rule, there is also a compelling need to keep up with the evolution of family. Some states, such as California, have recognized this need and enacted a statute to give state courts the discretion to find that a child may have more than two legal parents "if the court finds that recognizing only two parents would be detrimental to the child."[30]

### *A. State Court Approaches*

The leading California case on the issue of allowing more than two parents legal status is *In Re M.C.*[31] In that case, a California court was faced with the dilemma that influences this note: what two individuals should a court choose as a child's parents when there are more than two individuals who have valid legal claim to such parentage?[32] Admittedly, the unfortunate facts of that case make it a poor illustration of the compelling need for courts to have this sort of discretion, but the facts are illustrative of how current state statutory schemes can create complicated issues.

In the case of *In Re M.C.*, the first, most obvious, party with a legal claim to the child was the child's biological mother, Melissa.[33] The second party was the biological mother's girlfriend, Irene, and the third party was the child's biological father, Jesus.[34] Melissa and Irene were married when the child was born, and the parties lived together for several months after.[35] Under the California statute, one could qualify as a presumed parent if (i) the person was married to the child's mother and the child was born during the marriage, or (ii) if the person received the child into his or her home and

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[28] 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, 880 (1984) ("Although the premise of the nuclear family underlies the legal norm of parental autonomy, an increasing number of children do not live in traditional nuclear families.").

[29] Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

[30] CAL. FAM. CODE § 7612(c) (West 2017).

[31] 123 Cal. Rptr. 3d. 856 (Cal. Ct. App.).

[32] *Id.* at 876 ("We are left with three individuals claiming legal status as parents: a biological mother . . . a statutorily "presumed mother" . . . and the constitutional equivalent, a *Kelsey S.* father. Only two of these individuals may retain that status.").

[33] *Id.* at 871.

[34] *Id.* at 871-76 (discussing each parties parental status).

[35] *Id*. at 871-72.

openly held that child out as his or her natural child.[36] Irene satisfied both of these requirements; therefore, she was presumed to be a parent, as set out in the statute.[37] Although Jesus, the child's biological father, did not qualify as a presumed parent under the California statute, the California Supreme Court applied the limited exception, known as the *Kelsey S. Father* doctrine, which was established in the case of *In Re Adoption of Kelsey S*.[38] In discussing the doctrine, which allows a court to find that an unwed father is a legal parent, the Supreme Court of California stated:

> The father's conduct both *before* and *after* the child's birth must be considered. Once he knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate "a willingness himself to assume full custody of the child—not merely to block adoption by others." A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child.[39]

After facing the reality that Melissa, Irene, and Jesus all had competing presumptions, or legal claims, to the child, the Court was forced by the state statute to find that only two of these individuals were legal parents.[40] Therefore, the Court had to take the next step to reconcile the competing presumptions and determine which of the presumed parents' relationships with the child were "founded on the weightier considerations of policy and logic."[41] What does the standard of "considerations of policy and logic" mean exactly? There was no discussion by the California Supreme Court on how the lower court should handle that standard on remand.

In response to *In Re M.C.*, California State Senator Mark Leno proposed Senate Bill 1476, which would have given California courts the discretion to find that a child has more than two legal parents after determining such a finding would be in the child's best interest.[42] The bill passed the Senate and the Assembly, but Governor Brown vetoed it on September 30, 2012.[43]

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[36] *In re* M.C., 123 Cal. Rptr. 3d at 871.
[37] *Id*. at 872.
[38] 823 P.2d 1216, 1236 (Cal. 1992).
[39] *Id.* at 1236-37.
[40] *In re* M.C., 123 Cal. Rptr. 3d. at 876-77.
[41] *Id.* at 877.
[42] S. 1476, 2013-14 Leg., Reg. Sess. (Cal. 2013), CAL. LEGIS. INFO., *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1476.
[43] *See SB 1476 Senate Bill Veto*, OFFICIAL CAL. LEGIS. INFO. (Sept. 30, 2012), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_vt_20120930.html.

The main reason behind the Governor's veto appears to be an uncertainty of what consequences would flow from such a law.[44] In his veto message, Governor Brown wrote, "I am sympathetic to the author's interest in protecting children. But I am troubled by the fact that some family law specialists believe the bill's ambiguities may have unintended consequences. I would like to take more time to consider all of the implications of this change."[45]

A little over one year later, Governor Brown signed California Senate Bill 274, now section 7612(c) of the California Family Code, into law.[46] Section 7612(c) "allows courts to recognize the rights and responsibilities of each parent if recognizing only two parents would be detrimental to the child."[47] Some of the notable benefits from the passage of this bill include: (1) protection of children "by recognizing the bonds they share with their parents"; (2) recognition of legal parenthood that gives children "the right to support from all parents, as well as access to health insurance, benefits, and inheritance rights"; (3) recognition that these families "can also reduce the state's financial responsibility for the child because all parents would have a financial obligation to support the child"; and (4) "in dependency actions, if a child has more than two parents, the legal recognition of those parents may keep the child out of foster care by giving the court more options for placement of the child."[48] Governor Brown did not explicitly comment on his change of heart in enacting Senate Bill 274 one year after vetoing Senate Bill 1476.[49]

Although California is the only state to *explicitly* allow for more than two legal parents, other states, such as Pennsylvania, recognize that a child can have more than two people who have the rights and responsibilities of parents, including custody of the child and child support obligations.[50] States that are willing to recognize that more than two people may have rights and responsibilities of parents are, in essence, finding that more than two people may be parents without calling those individuals legal parents.

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[44] *See SB 1476 Senate Bill Veto*, *supra* note 43.

[45] *Id.*

[46] *See* CAL. FAM. CODE § 7612(c) (West 2017).

[47] *Id.*; *see also Governor Signs Bill Protecting Children Who Have More Than Two Legal Parents,* NAT'L CENTER FOR LESBIAN RIGHTS, (Oct. 4, 2013), http://www.nclrights.org/press-room/press-release/governor-signs-bill-protecting-children-who-have-more-than-two-legal-parents/.

[48] *Legislation: Children with More than Two Parents,* NAT'L CENTER FOR LESBIAN RIGHTS, http://www.nclrights.org/cases-and-policy/policy-and-legislation/sb-274-children-with-more-than-two-parents-california/ (last visited Jan. 19, 2018).

[49] *See* Patrick McGreevy & Melanie Mason, *Brown Signs Bill to Allow Children More than Two Legal Parents*, L.A. TIMES (Oct. 4, 2013), http://articles.latimes.com/2013/oct/04/local/la-me-brown-bills-parents-20131005.

[50] *See e.g.*, Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007) (holding that two former lesbian partners and a sperm donor were all responsible for child support).

A very similar approach was taken by states prior to the legalization of same-sex marriage by the use of civil unions and domestic partnerships.[51] The family unit has traditionally been viewed as a sacred, private entity, and the laws of the states reflect this view;[52] however, with the increasing number of states who are willing give more than two people parental "rights and responsibilities" there is a compelling need for state legislatures to allow courts to grant such people legal parental status and call it what is truly is.

In 2007, a family court in Pennsylvania recognized that more than two individuals could have the rights and responsibilities of parents, which include custody of the child and child support obligations.[53] In that case, the children's biological mother's former same-sex partner filed a claim against the biological mother (her former partner) and the sperm donor, seeking full legal and physical custody of the mother's two biological and adopted children.[54] The biological mother also filed a claim against her former partner for child support.[55] The Court of Common Pleas awarded biological mother's former partner primary physical custody of one child and partial custody of other children, and former partner appealed.[56] In regards to the child support claim, the Court of Common Pleas denied former partner's request to join sperm donor as party, and former partner appealed.[57] Relevant to the issue at hand, the Superior Court held that the sperm donor was an "indispensable party" in the support action, thus resulting in all three parties (mother, former partner, and sperm donor) having rights and responsibilities to the children.[58] In conclusion, the Pennsylvania Superior Court affirmed the trial court's holding that the child's sperm donor and a two-women same sex couple were all liable for child support.[59]

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[51] *See generally* Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that Vermont was "constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law," and whether that be in the form of "inclusion within the marriage laws themselves or a parallel 'domestic partnership' system" was up to the Legislature).

[52] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that same-sex couples have a constitutional right to marry under the Fourteenth Amendment's Due Process Clause); Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a Connecticut law that forbade the use of contraceptives was unconstitutional because such a law intruded upon the right of marital privacy). Although these cases illustrate court's willingness to strike down such laws, the underlying laws at issue in each case reflect the view that a family is a "sacred, private entity."

[53] *See Jacob*, 923 A.2d at 475.

[54] *Id.* at 475-76.

[55] *Id.*

[56] *Id.*

[57] *Id.*

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

[59] *Jacob*, 923 A.2d at 482.

In 2004, a family court in Maine addressed a similar issue. In *C.E.W. v. D.E.W*,[60] after the child's biological mother and lesbian partner terminated their romantic relationship, the former lesbian partner "sought a declaration of her parental rights and responsibilities for the child" and "sought to equitably estop" the mother of the child from denying her "status and obligations as parent" of child."[61] The lower court held that the former lesbian partner was a de facto parent to the child, and therefore was entitled to be considered for an award of parental rights and responsibilities.[62] Following mother's appeal, the Supreme Judicial Court of Maine held that a child's biological mother's former lesbian partner was the child's de facto parent.[63] Carrying this argument to its logical end, the Court held that the lesbian partner was entitled to be considered for an award of parental rights and responsibilities.[64]

In addition to state court approaches, the Supreme Court of the United States has also considered the rights of an unwed biological father versus the rights of the child's biological mother's husband. The case of *Michael H. v. Gerald D*[65] occurred in California, and "[u]nder California law, a child born to a married woman living with her husband is presumed to be a child of the marriage."[66] The presumption of legitimacy could have been "rebutted only by the husband or wife, and then only in limited circumstances."[67]

The Court noted that the case presented "extraordinary" facts,[68] and involved two competing parental claims: Michael H., who was the child's biological father, versus Gerald D., who was married to the biological mother and thus protected by the marital presumption.[69] The Court ultimately held that it was not unconstitutional to favor the husband's parental rights over the unwed biological father, asserting that history and tradition were not on the side of the unwed father.[70]

Therefore, both state courts and the Supreme Court have weighed in on how the parent-child relationship should be handled by courts, as well as the possibility of expanding such relationship (or rights and responsibilities) to more than two individuals.

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[60] 845 A.2d 1146 (Me. 2004).

[61] *Id*. at 1147-48.

[62] *Id.* at 1148.

[63] *See id.* at 1152.

[64] *Id.* ("[Mother] has not challenged the Superior Court's conclusion that [her former partner] is the child's de facto parent, and that conclusion authorizes the court to consider an award of parental rights and responsibilities to [the former partner] as a parent based on its determination of the best interest of the child.").

[65] 491 U.S. 110 (1989).

[66] *Id*. at 113 (citing CAL. EVID. CODE § 621 (West Supp. 1989))

[67] *Id.*

[68] *Id.*

[69] *Id.* at 113-15.

[70] *See id*. at 124. ("[O]ur traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.").

### *B. Uniform Parentage Act*

Although there have been some federal statutes in the area of family law, the entire subject is essentially a state issue.[71] However, one example of an effort to cross state lines is the Uniform Parentage Act ("UPA").[72] The UPA "is a set of uniform rules for establishing parentage, which may be adopted by state legislatures on a state by state basis."[73] To date, eleven states have enacted the UPA and several other states adopted portions reflective of the Act.[74]

The UPA "modernizes the law for determining the parents of children."[75] Although initially established in 1973, the UPA was amended in 2002 with a purpose of providing "workable and sound rules for determining the parentage of a child."[76] The main purpose for the initial enactment of the UPA was to equalize the treatment of children born to married and unmarried couples; however, more specifically, the UPA "adopted certain presumptions of parentage, especially in regard to paternity."[77]

The National Conference put forth a modernized version of the UPA in 2000 "which squarely addresses technological changes, especially the development of DNA identification . . . ."[78] In 2002, further changes to the UPA were proposed, including extending the act to provide balanced coverage to questions of parentage arising in non-marital circumstances.[79]

The UPA has seven substantive articles.[80] Relevant to the issue of legal parentage is Article 2: Parent-Child Relationship.[81] In Article 2 of the

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[71] *See supra* notes 3-4; *see also* Kinsey, *supra* note 4, at 311.

[72] Kinsey, *supra* note 4, at 311.

[73] *Uniform Parentage Act Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/u/uniform-parentage-act/ (last visited Jan. 15, 2018).

[74] *Parentage Act*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act (last visited Jan. 15, 2018). Additionally, some states have adopted statutes similar to the UPA. Kinsey, *supra* note 4 at 312.

[75] *Parentage Act*, *supra* note 74.

[76] *Why States Should Adopt UPA*, UNIF. LAW COMM'N, http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPA (last visited Jan. 15, 2018).

[77] *Uniform Parentage Act*, THIS MATTERS, http://thismatter.com/money/wills-estates-trusts/uniform-parentage-act.htm (last visited Jan. 15, 2018).

[78] *Parentage Act Summary*, UNIF. LAW COMM'N, http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act (last visited Jan. 15, 2018).

[79] *Id*.

[80] *Id*.

[81] *Id*.

UPA, the legal status of a *father*[82] may be established by one of the following methods:

> (1) an unrebutted presumption of the man's paternity of the child . . .;
> (2) a man who has acknowledged paternity under Article 3,unless the acknowledgment has been rescinded or successfully challenged;
> (3) an adjudication of the man's paternity;
> (4) adoption of the child by the man;
> (5) the man's having consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child;
> (6) an adjudication confirming the man as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law].[83]

The genetic father or the presumed genetic father is the legal father in the first three of these categories, but is not necessarily the legal father in the latter three categories.[84]

Technology significantly altered "the combinations and permutations of the parent-child relationship, and the 2002 Uniform Parentage Act simply reflects that fact."[85] The 1973 Uniform Act identified the birth mother and the natural father as the legal parents, but "it did cut-off the legal fatherhood of the genetic sperm donor in an artificial insemination."[86]

As reflected in *In re M.C.* and the enumerated categories above, the UPA (as applied to states that have adopted the Act or partially adopted the Act), there is a strong possibility that more than two people will have legal claims to one child. Unfortunately, this explicit problem is built directly into the Act, and state statutory schemes that allow for more than two people to have legal claims but then contradict such a finding by cutting off the court's discretion to allow such a finding.[87] This problem was further exacerbated after the legalization of same-sex marriage in 2015.

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[82] As noted in *In re* M.C., 123 Cal. Rptr. 3d 856, 869 (Ct. App. 2011), the statute applies equally to women. ("The statute is written in masculine form but, where practicable to do so, the statutory presumptions regarding parentage apply equally to women." (citing Johnson v. Calvert, 851 P.2d 776 (Cal. 1993))).

[83] UNIF. PARENTAGE ACT, art. 2, § 201 (2002), *available at* http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf.

[84] *Parentage Act Summary*, *supra* note 78.

[85] *Id*.

[86] *Id*.

[87] For an illustration of how this type of controversy arises, see *In re* M.C., 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011).

Following the *Obergefell* decision, there are inarguably more individuals who will be protected by the marital presumption, as set out in the UPA and state statutes. More importantly, these same individuals genetically require a third party to be involved in the intimate decision of brining a child into the world.

### *C. The American Law Institute*

In addition to the suggestions set forth by the UPA, The American Law Institute ("ALI") also establishes working definitions to help guide the legal profession. The ALI is "the leading independent organization in the United States producing scholarly work to clarify, modernize, and improve the law." [88] The ALI also "drafts, discusses, revises, and publishes Restatements of the Law, Model Codes, and Principles of Law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education."[89]

Pertinent to the issue of legal parentage, the American Law Institute defines a parent as: (1) a legal parent; (2) a parent by estoppel; or (3) a de facto parent.[90] Specifically, section 2.03 of the ALI's Principles of Family Dissolution, Defining Categories of Parents, states "unless otherwise specified, a parent is either a legal parent, a parent by estoppel, or a de facto parent."[91] First, a legal parent is "an individual who is defined as a parent under other state law."[92] Second, the ALI defines a parent by estoppel as:

> [A]n individual who, though not a legal parent, is obligated to pay child support or lived with the child for at least two years and 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 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 lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as 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

[88] *About ALI*, AM. LAW INST., https://www.ali.org/about-ali/ (last visited Jan. 15, 2018).
[89] *Id.*
[90] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. LAW INST. 2002).
[91] *Id.*
[92] *Id.*

> rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or 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.[93]

Lastly, the ALI defines a de facto parent as:

> [A]n individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, lived with the child and, 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, regularly performed a majority of the caretaking functions for the child, or regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.[94]

Although the ALI is not binding law on any one state, it illustrates that there are newer understandings of parentage.

In conclusion, the background on modern-day state approaches to parentage is both complicated and restrictive. Over the past decade, there is somewhat of a trend in a few states to allow for the expansion of parentage to more than two individuals,[95] with California being the most expansive by enacting section 7612(c) of the California Family Code.[96] Although there are legal guides in the area of family law, including the UPA and ALI, the ultimate authority over domestic relations is left to states, with courts gaining authority or discretion through state legislatures.[97] Subsequent to the legalization of same-sex marriage, which results in an increase in both protection by marital presumptions and the assistance of third parties in bringing children into the world, state legislatures need to give courts more discretion to expand the number of individuals that can claim legal status as parents if doing so would be in the best interest of the child.

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[93] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (AM. LAW INST. 2002).

[94] *Id.*

[95] *See supra* Part A.

[96] *See supra* notes 47-50 and accompanying text.

[97] *See supra* notes 2-5.

## IV. ANALYSIS

### *A. Compelling Need to Expand Legal Parentage: Legalization of Same Sex Marriage and the Best Interest Standard*

Although the two-parent family is deeply rooted in the history and tradition of our country, there are several instances in which it becomes possible for more than two individuals to have legal claims as a parent to one child. First, as discussed above, there is the possibility of gaining legal parental status through concepts based on conduct.[98] Second, there is the possibility of gaining legal parental status under the marital presumption, as proposed by the UPA and adopted by several states.[99] Although same-sex couples have gained different forms of parentage, such as rights and responsibilities, prior to the legalization of same sex marriage,[100] courts showed reluctance to expand parentage beyond two individuals.[101] With the legalization of same sex marriage in *Obergefell*, courts need more flexibility and discretion when evaluating legal parental status.

Before the use of assisted reproduction techniques ("ART"), "the definition of mother was generally limited to birth mothers and adoptive mothers."[102] Today, however, technology has advanced immensely providing several different options for both opposite sex couples who cannot conceive a child, as well as same sex couples.[103] In addition to adoption, three methods exist in which a couple may choose to use a third-party-assisted ART method, which include: (1) sperm donation; (2) egg donation; and (3) surrogates and gestational carriers.[104] "A surrogate is a woman inseminated with sperm from the male partner of the couple," whereas, a gestational carrier "is implanted with an embryo that is not biologically related to her."[105]

Biology, alone, has been proven to be an insufficient nexus to the parent-child relationship.[106] States have proved willing to accept concepts based on behavior and conduct, such as de facto parents, parents by

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[98] *See supra* notes 90-94 and accompanying text.

[99] *See supra* Part B.

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

[101] *Id.*; *see also* Kinsey, *supra* note 4, at 299.

[102] JANET RICHARDS, MASTERING FAMILY LAW 201 (Russell L. Weaver ed. 2009).

[103] *See generally* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1188, 1254-55 (2016) (discussing the evolution and resistance to ART); *see also Infertility*, WOMEN'S HEALTH.GOV, https://www.womenshealth.gov/a-z-topics/infertility (last visited Feb. 5, 2018).

[104] *See Assisted Reproductive Technology (ART)*, NAT'L INST. OF HEALTH, https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/treatments/Pages/art.aspx (last visited Jan. 14, 2018).

[105] *Id.*

[106] *See generally* Michael H. v. Gerald D., 491 U.S. 110 (1989) (holding that an adulterous natural father does not have a constitutional right to paternity over the marital father).

estoppel, and in loco parentis status.[107] In 2000, the Supreme Court of New Jersey adopted a test, previously enunciated in *In re Custody of H.S.H.-K.*,[108] to determine whether an individual is a psychological parent and stated:

> [T]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation a petitioner's contribution to a child's support need not be monetary; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[109]

The Supreme Court of New Jersey also found that "[o]nce a third party has been determined to be a psychological parent to a child, under the previously described standards, he or she stands in parity with the legal parent. Custody and visitation issues between them are to be determined on a best interests standard."[110] As demonstrated by the enumerated list above, the focus of conduct-based parenthood is the relationship that has formed between the two individuals, and there is *no mention* of the number of individuals who may develop such a relationship.

The best interest standard is the gold standard in the province of family law; however, it is not easily definable nor does it provide specific guidance

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[107] *See supra* notes 93-94; *see also* Windham v. Griffin, 887 N.W.2d 710 (Neb. 2016) (holding that biological mother's cousin, with whom mother had placed child at birth, stood in loco parentis and that unsupervised visitation with mother's cousin was in child's best interests); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (holding that the children's biological mother's former lesbian partner was a psychological parent).

[108] 533 N.W.2d 419, 421 (Wis. 1995).

[109] *V.C.*, 748 A.2d at 551.

[110] *Id*. at 540-41. It is important to note that this case took place in 2000, years prior to the legalization of same sex marriage, yet it still exemplifies the issues surrounding same-sex couples and parentage. The legalization of same sex-marriage simply adds to this struggle by increasing the number of individuals who have such relationships, are protected by the marital presumption, and are utilizing third parties to have children.

for judges.[111] This somewhat vague and highly discretionary standard has given judges the ability to look at a family law issue from a very broad perspective. Unfortunately, the current strict adherence to the rule of two for families is inconsistent with the best interest standard.[112]

According to a recent Gallup poll, there are 390,000 married same-sex couples in the United States.[113] The issue of expanding legal parentage was in no way, shape, or form created by the legalization of same-sex marriage, but rather has existed for years for all families, not only families with same-sex partners. However, the legalization of marriage further exemplifies the issue. Courts should not be handicapped by state legislatures and forced to only recognize two legal parents when the reality of today's modern day families does not support such a restrictive approach.

### *B. Criticisms and the Response to Criticism including the Benefits of Expanding Parentage*

Due to the long rooted tradition of a two-parent family, the concept of expanding legal parental status to more than two individuals is not without criticism. Some of the general criticism include: logistical issues for courts and families, "unintended consequences" that would result in other areas of law, intensifying an already complex child custody regime, and the possibility of expanding parentage to several individuals.[114] The general

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[111] *See* 24A AM. JUR. 2D *Divorce and Separation* § 849 (2017) (discussing the best interest standard in divorce proceedings).

[112] Kinsey, *supra* note 4, at 299-300 ("Courts have continued to 'redefine and broaden' the term parent, and as a result, there are an increasing number of family structures in which more than two people fit the definition. Even though courts have responded by expanding the definition of parent to include more than two people, 'they have maintained the rigid idea that a child can have only two legal parents.' Despite expanding the definition of parent and granting rights to third parties, courts are doing so without granting parental status. Without recognition as a legal parent, a person may be seen in the law as a third party or 'legal stranger' who is not entitled to a relationship with a child with whom the individual has fostered a parental relationship." (footnotes omitted)).

[113] Hunter Schwartz, *There Are 390,000 Gay Marriages in the U.S.*, WASH. POST (April 28, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/04/28/heres-how-many-gay-marriages-the-supreme-court-could-make-way-for/?utm_term=.a2d31db4a78a.

[114] *See, e.g.*, Elizabeth Marquardt & John Culhane, *California Should Not Pass "Multiple Parents" Bill*, HUFFINGTON POST (Aug. 17, 2012, 12:29 PM), http://www.huffingtonpost.com/elizabeth-marquardt/multiple-parents-bill_b_1791709.html; *see also* Kinsey, *supra* note 4, at 329-30 (discussing, but not agreeing with, the criticisms to expanding parentage). *But see* Wald, *supra* note 9, at 410-11. Although there are criticisms, Deborah Wald pointed out the pitfalls of a bright line "rule of two" when she noted:

> Legal parentage does not guarantee custodial parentage, so assigning legal status to all the functional parents in a child's life would not necessarily require that a child be moved around among multiple homes for custody purposes. Instead, it would allow courts to engage in a best interests analysis that is never reached when some of the parties who have acted as parents are denied any legal recognition. It thereby would ensure that many more children would have

criticisms against expanding legal parentage are not without merit; however, the criticisms should not stand to completely bar the possibility of more than two individuals having a legal claim to be a parent of a child whom they have formed a parent-child relationship.

There are several ways to approach such criticisms. First, there may very well be unintended consequences from giving courts more discretion, and as stated above, this was a main concern of Governor Brown in his first veto of California Bill 1476.[115] However, I would argue that the fear of these unknown or unintended consequences is no reason at all to completely bar certain individuals who have developed close parent-child relationships and bonds from being found to have legal parental status.

Second, it may be argued that the area of domestic relations is already extremely complex; however, the fact that the courts will need to make difficult determinations in cases with more than two individuals seeking parentage is still no reason to completely bar it as a possibility.

Last, the major concern that such an expansion could lead to a slippery slope of multi-parent families is a valid concern. However, state legislatures are not encouraged to enact a law that will open the floodgates to any person in a child's life to claim legal parentage. Rather, legislatures should give courts the utmost discretion to allow for more than two individuals to seek legal parentage, *only* when doing so would be in the best interest of the child.

Although there are criticisms, many critics fail to recognize that there are also benefits to be reaped by the states. For example, allowing courts to have discretion to find that more than two individuals are legal parents would allow courts to also enforce child support against more than two people.[116] In *Jacob v. Shultz-Jacob*, the Pennsylvania Superior Court utilized this method in holding that the biological mother, former lesbian partner, and sperm donor were all on the hook for child support, but fell short of calling all three individuals legal parents.[117] In conjunction with child support assurance, there is a higher probability that children will avoid the need for public assistance if there are more individuals responsible for them.[118]

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> continued access to all the people with whom they have formed significant, parental attachments, and the public policies of respecting genetic connections and supporting marital families could still be served. The current insistence on resolving all parentage disputes in favor of a child having only two legally recognized parents is a 'lose-lose' proposition in these cases and should be reexamined.

Wald, *supra* note 9, at 410-11.

[115] *See supra* notes 43-45 and accompanying text.

[116] *See* Kinsey, *supra* note 4, at 331.

[117] 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

[118] *See* Kinsey, *supra* note 4, at 332.

Additional benefits, as discussed above in correlation with section 7612(c) of the California Family Code, include protection of children by recognizing the bonds they share with their parents; recognition of legal parenthood that gives children the right to support from all parents, as well as access to health insurance, benefits, and inheritance rights; recognition that these families can reduce the state's financial responsibility for the child because all parents would have a financial obligation to support the child; in dependency actions, if a child has more than two parents, the legal recognition of those parents may keep the child out of foster care by giving the court more options for placement of the child.[119]

### *C. Abolish Per Se Rule against More than Two Legal Parents*

Nothing in this note should be taken as promoting a court to force legal status upon more than two individuals when doing so would be to the detriment of the child; however, the ability to make the determination should be left to the sound discretion of the courts.[120]

The argument of moving away from a complete bar on allowing more than two legal parents is not a novel legal concept. In 1990, a woman brought a legal claim against her former lesbian partner who had been artificially inseminated.[121] The two women "agreed to share jointly all rights and responsibilities for the child as 'co-parents.'"[122] The New York Appellate Division rejected the former partner's claim that she stood in loco parentis to the child and deserved the title of parent under the New York Domestic Relation Law.[123] In a notable dissent, Judge Kooper stated:

> It need hardly be emphasized that when the courts become involved in family matters concerning relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided. The governing criterion, as always, is the best interests of the child. Accordingly, in construing the statutory term "parent", the court must strive to avoid rigid analysis and temper its inquiry by considering the best interests of the child under the circumstances presented.[124]

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[119] *Legislation: Children with More than Two Parents*, *supra* note 48.

[120] Wald, *supra* note 9, at 409 ("Where more than two people jointly use assisted reproductive technologies to procreate with the explicit intent that all of them be legal parents, there is no empirical reason why they could not all end up with full legal parental status.").

[121] Alison D. v. Virginia M., 552 N.Y.S.2d 321, 322 (N.Y. App. Div. 1990).

[122] *Id.*

[123] *Id*. at 323-24.

[124] *Id*. at 325 (Kooper, J., dissenting); *id*. at 326 ("[S]ince a liberal construction of the term 'parent' may further the best interests of the child, such an inquiry should not be

Other scholars have also criticized the current legal framework of "exclusive parenthood."[125]

### *D. Approaches Outside of the United States: The Canadian Approach*

In 2013, British Columbia became the only Canadian province and one of the few jurisdictions in the world to permit a child to have three legal parents from birth.[126] Section 30 of the British Columbia's new Family Law Act ("FLA") "serves as legislative acknowledgment of the changing nature of Canadian families in general . . . ."[127]

Although section 30 is a significant expansion, it has several limitations, which include: (1) "it is only available to couples who conceive using assisted reproduction"; (2) "it can only be utilized where the additional parent has a biological link to the child"; (3) "where it is used by 'couples', it is only available to those who are married or in marriage-like relationships"; (4) "it appears that [it] was intended to limit the number of parents a child can have to three, though it may be possible to increase the number through a creative, though likely unintended, interpretation of the provision"; (5) [it] is an 'all or nothing' provision;" and (6) "[it] provides no guidance to parties when conflict arises."[128] These restrictions result in a very limited type of family. The type of family that results from section 30 is "one in which a child being raised by same-sex parents will acquire a third legal parent who is both the child's other biological [parent] as well as an individual of the opposite sex.[129]

In conclusion, the Canadian approach illustrates both the desire to expand parentage beyond the nuclear-traditional two-parent system, as well as the hesitation to expand legal parentage too broadly.[130] Critics of Section 30 have argued that "[w]hile section 30 has significant progressive potential, it nonetheless falls short of the aspirations of those who have promoted multiple-parent recognition. Most notably, it fails to challenge

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automatically foreclosed because of the lack of a biological or formal legal relationship."); *id*. at 328 ("I am confident that the trial courts, in the sound exercise of their discretion, will not lightly infringe upon the favored rights of a natural parent and that a searching inquiry into the best interests of the child will forestall any unwarranted interference with that relationship.").

[125] Bartlett, *supra* note 28 ("The current legal framework of exclusive parenthood ignores children's need to maintain continuous contact with parent figures, including their natural parents, and underestimates their ability to manage multiple parenting relationships.").

[126] Fiona Kelly, *Multiple-parent Families Under British Columbia's New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting?,* 47 U. B.C. L. REV. 565, 566-67 (2014).

[127] *Id.* at 567 (footnote omitted).

[128] Kelly, *supra* note 126, at 581.

[129] *Id.* at 568.

[130] *See id.* at 592-95.

normative parenting in any meaningful way."[131] Section 30 of the FLA is comparable to the different state court approaches in the United States, which have held that an individual may have rights and responsibilities but not have legal parental status.[132]

## V. CONCLUSION

Even though some states recognize parentage based on behavior or conduct, the majority of state laws fail to reflect the evolution of modern day families and the legalization of same sex marriage.[133] Giving courts discretion to find more than two legal parents is the appropriate remedy for today's modern-day family.[134] Courts should have discretion to grant more than two parents legal status when doing so is in the child's best interest. Although there may be some unintended consequences, courts deserve the discretion to decide.

In conclusion, an assessment of laws affecting the parent-child relationship across the states shows the pitfalls of a bright line rule of a two-parent family, as well as the inconsistencies with major shifts in the family law arena, such as the legalization of same sex marriage. Although good facts make it much easier for statue legislatures to create law, the California case of *In Re M.C.* shows the compelling need to give state courts more discretion when evaluating the parent-child relationship.[135]

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[131] Kelly, *supra* note 126, at 595.
[132] *See supra* Part B (discussing different state approaches).
[133] *Id.*
[134] *See* Kinsey, *supra* note 4, at 336.
[135] *See supra* notes 31-49 and accompanying text.