A FAMILY IS WHAT YOU MAKE IT? LEGAL RECOGNITION AND REGULATION OF MULTIPLE PARENTS

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ABSTRACT

Multiparental family structures, in which there are more than two parents, are becoming increasingly common. Thus, they defy the social and legal conception of the nuclear family. Yet, despite the growing number of multiparental families, their legal status in most jurisdictions is not recognized, leaving various issues unaddressed and potentially risking the children's best interests. This paper examines how the legislatures and courts of California, Canada, and the U.K. recognize and regulate multiparental families. It shows that the treatment of multiparental families varies from non-recognition of any status, through regulation of the multiparental family, to the recognition of the multiparental family based on parental agreements. The paper identifies five distinct categories of multiparental family structures, and suggests that the allocation of parental status should be made possible to each of these structures. To do so, it is suggested that the allocation of parental status will not be determined by traditional doctrines. Rather, it should be guided by both the intentions of the parties to the parental agreement, and the child's best interests.

I. INTRODUCTION

For many years, the "traditional" family structure, namely a heterosexual, monogamous couple and their biological children, has not been the only family structure in Western societies. Rising divorce rates,[1] stepfamilies, cohabitation, co-parenting, assisted reproductive technologies, LGBT families, and open adoptions have all contributed to this development. Due to this departure from a single model of family structure, it is not surprising that the definition of the nuclear family has been a subject of debate in recent years.[2]

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1. *Divorce Rates Data, 1858 to Now: How Has It Changed?*, THE GUARDIAN, (Feb. 6, 2014), *www.theguardian.com/news/datablog/2010/jan/28/divorce-rates-marriage-ons*; Christopher Ingraham, *Divorce is Actually on the Rise, and It's the Baby Boomer's Fault*, WASH. POST (Mar. 27, 2014), *www.washingtonpost.com/blogs/wonkblog/wp/2014/03/27/divorce-is-actually-on-the-rise-and-its-the-baby-boomers-fault*.

2. *See generally* Sally Bould, *Familial Caretaking: A Middle-Range Definition of*

Changes to what society perceives as a family have impacted how "parent" is defined. New lifestyles and social practices have not only led to the establishment of various family structures but also prompted multiple adults to simultaneously seek the much-coveted label of "parents." Although legislatures and courts have been open to different approaches to the definition of parenthood, so far they have been somewhat reluctant to forego the notion that a child can have two legal parents at most at any given time. As will be established below, this lack of recognition leaves the multiparental families in a socially and legally vulnerable position.[3] Its members do not enjoy the same certainty about their rights and obligations "traditional" families do. Consequently, the child's best interests are endangered.

However, this "rule of two"[4] has been challenged recently to various degrees in courts and amongst legislatures. Similarly, several legal scholars have advocated for the recognition of multiparental families. They addressed the questions of whether multiparents should be awarded legal status, and the form in which these family structures should be recognized.[5] Nonetheless, they have not taken into account the various types of multiparental families. In some instances, the structure chosen by the multiparents is egalitarian, meaning that they all perceive themselves as having the same status, rights, and obligations. In other cases, the model is hierarchal, with some individuals holding full parental status, rights, and obligations, while others have a more limited standing. By omitting from their consideration both egalitarian and hierarchal structures, even those who advocated for recognition of multiparents did not offer a solution that captures this socio-legal phenomenon in its entirety.

Family in the Context of Social Policy, 14 J. FAM. ISSUES 133, 134 (1993); Stuart Bridge, *Marriage and Divorce: The Regulation of Intimacy,* FAMILY LAW: ISSUES, DEBATES, POLICY, (Johnathan Herring ed., 2001); William C. Duncan, *Don't Ever Take a Fence Down: The Functional Definition of Family – Displacing Marriage in Family Law*, 3 J.L. & FAM. STUD. 57, 57-58 (2001); Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family"* 26 GONZ. L. REV. 91, 92 (1991).

3. *See infra* p. 18–19 and note 73.

4. *See* Elizabeth Marquardt, *When 3 Really Is a Crowd*, N.Y. TIMES, (July 6, 2007), www.nytimes.com/2007/07/16/opinion/16marquardt.html?_r=0.

5. *See generally* Katharine Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 654 (2008) [hereinafter *Bionormativity*]; Katharine 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, 880-882 (1984) [hereinafter *Rethinking Parenthood*]; Melanie Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007) [hereinafter *Why Just Two?*].

This paper provides a novel comprehensive categorization of the various multiparental family structures, and examines how legislatures and courts in California, British Columbia, and England recognize and regulate multiparental families.[6] The analysis section shows that the states' treatment varies from *non-recognition* of any status, through *regulation* of the multiparental family (i.e. determining who is a parent, what constitutes parenthood, and what is the scope of each parent's rights and responsibilities), to their *recognition* by giving legal force to parental agreements. Moreover, the paper indicates that even in those jurisdictions that do allocate parental status to multiparents, not all multiparental structures are recognized. Each jurisdiction awards status on either an egalitarian or hierarchal model, but does not cater for both.

Drawing on these findings, the paper suggests that the method of allocation of parental status should be flexible enough to cater for all five multiparental structures. Therefore, the traditional doctrines of allocation of parental status should be abandoned. Instead, the focus should be on the intentions of the parties to a parental agreement, as well as the child's best interests. Parental agreements of multiparental families should be *recognized* by the state as long as the family members are in agreement as to each-other's parental status, leaving the power to form a family and determine rights and responsibilities in the hands of individuals. However, if they are in disagreement, then the family should be *regulated* by the state, placing more emphasis on the child's best interests.

This paper proceeds as follows. First, a discussion of the three different parental statuses, and how they are allocated, frames the basic concepts that are relevant to the paper. Second, the various ways in which a child can have multiparents are illustrated. Third, the question of why multiparents should be recognized is addressed. Fourth, an analysis of the instances in which legislatures and courts have recognized multiparents to various degrees, focusing mainly on British Columbia, California, and England is undertaken. Lastly, a new approach to the recognition and regulation of multiparents is suggested, according to which allocation of parental status should be guided by the intended-parents' intentions and the child's best interests.

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6. These jurisdictions were chosen as they all allocate parental status to multiparents, but to different extents. In England, only parental responsibilities could be allocated to more than two individuals, based on the intentions of the holders of parenthood status. In contrast, both in California and in British Columbia can the parenthood status be awarded to more than two individuals. Yet, in California this process is regulated by the courts, whereas in British Columbia it is completely subject to the intentions of the multiparents.

II. DEFINING AND ALLOCATING PARENTAL STATUSES

Traditionally courts and legislators maintained a strict division between those who can be legal parents and those who cannot. By distinguishing between parents and strangers, the former were given exclusive status.[7] Moreover, this distinction has traditionally been instigated by, and consequently led to the replication of, the rule of two, which prescribes that only two individuals would have the legal status of parents at a given moment.[8]

Two matters require our attention in order to proceed with the main thesis of this paper. First, we must distinguish between the three legal parental statuses – 'parentage', 'parenthood', and 'parental responsibilities' – as these terms are crucial to the understanding of the core issues. Second, we need to examine the five main approaches for allocation of legal parental status: marital presumption, psychological approach, functional approach, genetic/biological approaches, and intention-based approach.

A. Parentage, Parenthood, and Parental Responsibilities

As for the three parental statuses, it will be useful to turn to Andrew Bainham's definitions.[9] He defines '*parentage*' as the socially perceived genetic link between the child and her parents. It is the indicator of the child's genetic origins, and as such it is set at the time of conception and is constant from that point on.[10] Conversely, '*parenthood*' is the continuing

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7. Troxel v. Granville, 530 U.S. 57, 73 (2000); X, Y & Z v. United Kingdom, 3 Eur. Ct. H.R. 341, 355 (1997) (De Meyer, J.) ("It is self-evident that a person who is manifestly not the father of a child has no right to be recognized as her father"); *Rethinking Parenthood*, *supra* note 5, at 879.

8. *See* Michael H. v Gerald D., 491 U.S. 110, 118 (1989); *In re* M.C., 123 Cal. Rptr. 3d 856, 861, 877 (Cal. Ct. App. 2011); K.M. v. E.G., 117 P.3d 673, 681 (Cal. 2005); Deborah Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 381 (2007); Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights*, 71 OHIO ST. L.J. 127, 129 (2010); Sacha M. Coupet, *"Ain't I a Parent?": Exclusion of Kinship Caregivers from the Debate over Expansion of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE, 595, 595 (2010); 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, 330 (2014).

9. Andrew Bainham, *Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions*, *in* WHAT IS A PARENT? A SOCIO-LEGAL ANALYSIS 28-29 (1999).

10. *See id*.

relationship between a child and her social parents.[11] Therefore, parenthood is a flexible definition; at one point in time a child can have X as a parent, and at another point in time Y might be the parent. Lastly, Bainham defines '*parental responsibilities*' as "all the rights, duties, powers, responsibilities and authority, which by law a parent of a child has in relation to the child and his property,"[12] which can be shared between an unlimited number of individuals, each having a degree of responsibility.[13]

Therefore, it can be concluded that the definition of 'parents' is dependent upon the purpose of the investigation. If it is conferring legal obligations, then parental responsibilities are sufficient. However, if the legal status or genetic link go to the core of the investigation, then the ideas of parenthood and parentage should guide us. The character of these definitions necessitates distinction between the two: parentage is factual; parental responsibilities are legal; and parenthood is both social and legal.

B. Five Approaches to Parental Status Allocation

In practice, parental status is conferred by relying upon the marital presumption, psychological approach, functional approach, genetic/biological approaches, or intention-based approach.[14] These approaches are not necessarily applied in a way that maintains the theoretical rationales of the three parental statuses. Nor are they necessarily mutually exclusive. However, as I will show below, the intention-based approach most aptly captures the nature of the relationships in multiparental families.[15] Furthermore, parental intention has a role in most of the approaches for allocation of parental status.

Take the marital presumption for example. This presumption means that a child born in wedlock will be considered the husband's child unless

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11. *See id*. at 44.

12. Children Act 1989, c. 41, § 3(1) (UK); *cf*. Children Act 1995, c. 36, § 1-2 (Scot.); Family Law Act, S.B.C. 2011, c. 25 art. 41 (Can.); SONIA HARRIS-SHORT & JOANNA MILES, FAMILY LAW: TEXT, CASES, AND MATERIALS 660 (2nd ed., 2011); ELAINE SUTHERLAND, J.K. MASON, & ALEXANDER MCCALL SMITH, *Is Anything Left of Parental Rights?*, *in* FAMILY RIGHTS, FAMILY LAW AND MEDICAL ETHICS (1990); Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 697 (2001); *Rethinking Parenthood*, *supra* note 5, at 880-81; Coupet, *supra* note 8, at 614.

13. Bainham, *supra* note 9, at 44.

14. Wald, *supra* note 8, at 381.

15. *See* Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64(3) BUFF. L. REV. 465, 485-95 (2016) (discussing additional advantages of the intent-based approach).

contradictory evidence exists.[16] This is true even if the child was born only two weeks after the couple married.[17] The existence of this presumption is rather unsurprising, since for many years family life could only exist within the framework of marriage,[18] and other methods of determining parentage (like DNA testing) were not available. By constructing this presumption, the law was able to protect the family from instability, and more importantly prevent the unwarranted status of "illegitimate children."[19] It is also the easier administrative choice, as it is a fairly simple bright-line rule.[20]

Examining the marital presumption vis-à-vis the institution of marriage, as it was understood many centuries ago, suggests that this presumption made social and legal sense. While initially marriage was perceived as a private matter of factual character (i.e., in order to be married a couple did not have to undergo a ceremony, but rather they needed to live together as man and wife), over the years the Church and Canon Law succeeded in assimilating their notions of marriage into social practice.[21] Marriage became a public matter, regulated by the Church and the State, with legal consequences. It also began being perceived as a civil contract,[22] and in the heart of the agreement to marry was the purpose of having and raising children.[23] In other words, by agreeing to enter into marriage, the husband and wife agreed to support and raise the children born from that marriage. The marital presumption was the means of enforcing this agreement,

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16. *In re Findlay*, 170 N.E. 471, 472 (N.Y. 1930); RCA 13/66 Plonit (minor) v. Ploni, PD 20(2) 512, 515-16 (1966) (Isr.); Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 COLUM. J. GENDER & L. 495, 498-99 (1993).

17. Katharine Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 23 (2004) [hereinafter *Bargaining or Biology?*].

18. Jens Scherpe, *Protection of Partners in Informal Long-Term Relationships* 7(3) INT'L L. FORUM DU DROIT INT'L 206, 207 (2005).

19. *Bargaining or Biology?*, *supra* note 17, at 6.

20. Rita Alta Charo, *And Baby Makes Three – or Four, or Five, or Six: Redefining the Family after the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231, 242 (2000).

21. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 27-28 (1989).

22. Goodright v. Moss (1777), 98 Eng. Rep. 1257, 1257 (KB); Maynard v. Hill, 125 U.S. 190, 210-11 (1888); 46 Martin Luther et al., *Martin Luther's Works, 261-62 (1986)*; JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Ian Shapiro ed., 2003); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L. J. 597, 640-42 (2002).

23. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 443 (1796); *Bargaining or Biology?*, *supra* note 17, at 24.

regardless of genetic connection to the father.[24] From this perspective the marital presumption is not an arbitrary rule, but a manifestation of the husband and wife's intentions. Only when it was proven that these intentions were not upheld within the marriage, could the presumption fail. Thus, it is clear that intent has a role in the marital presumption. This is not to say that such intent necessarily exists in each and every marriage today. It is merely the presumption that is based on the assumption that such intent exists.

That said, with more children being born outside wedlock and rising divorce rates, it has been suggested that the substance of family life, rather than the form, should have legal consequences.[25] Put differently, the parenting functions and perceptions should have meaning, not the legal status of the family members in relation to each other.

One method of evaluating the substance of family life as an indicator for conferring parental rights and responsibilities is the functional approach. According to this approach, the courts should recognize an individual as a parent if she acted as one in a regular way.[26] This could be done by considering the different elements in the day to day family life, such as whether the adult and child live together, if the former assumed parental obligations without expecting financial compensation, the length of time and intensity of the parent-like relationship, and the formation of reliance or dependence.[27]

As the definition of this approach suggests, functional parenting is a voluntary matter. A person must act intentionally as a parent for a significant period of time in order to be recognized as a parent; and the more

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24. *Bargaining or Biology?*, *supra* note 17, at 24.

25. Leslie J. Harris, *Reconsidering Criteria for Legal Fatherhood*, 461 UTAH L. REV. 461, 482 (1996); *see generally* Bridge, *supra* note 2; ERIC CLIVE, *Marriage: An Unnecessary Legal Concept?*, in MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES 71 (1980).

26. Melanie Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U.L. REV. 433, 435 (2005) [hereinafter *Applying Intent-Based Parentage*].

27. Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); Perkins v. Perkins, 383 A.2d 634, 634-36 (Conn. Super. Ct. 1977); C.C.A. v. J.M.A., 744 So. 2d 515, 517 (Fla. Dist. Ct. App. 1999); Wade v. Wade, 536 So. 2d 1158, 1160 (Fla. Dist. Ct. App. 1988); Wright v. Newman, 467 S.E.2d 533, 535 (Ga. 1996); Rideout v. Riendeau, 761 A.2d 291 (Me. 2000); *In re* Parentage of L.B., 122 P.3d 161, 176-77 (Wash. 2005); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995); Susan Frelich Appleton, *Parents by the Numbers: Should Only Two Always Do*, 37 HOFSTRA L. REV. 11, 29-33 (2008); Nancy D. Polikoff, *Response: And Baby Makes How Many – Using In re M.C. to Consider Parentage of a Child Conceived through Sexual Intercourse and Born to a Lesbian Couple*, 100 GEO. L.J. 2015, 2032-2033 (2012) [hereinafter *Response: And Baby Makes*].

responsibilities taken the more likely it is that the court will give a legal consequence to these actions. Hence, it is fair to argue that the functional approach has a strong element of intention.[28] Indeed, it is not common to find a situation in which an individual is acting like a parent without the intent to perform as one. Of course, if a person is compelled to fulfill some parental roles by matter of law, it is possible that the intent to perform as a parent will be lacking. However, these situations occur *a posteriori* to the recognition of parenthood and parental responsibilities, so they are irrelevant in this respect for the purposes of this paper.

An interesting issue, which arises in the context of the functional approach, is that of recognition of parental responsibilities by implicit contract. At times, courts apply the functional approach in order to identify a contract-like obligation to assume parental responsibilities.[29] Here, the intent is not merely an underlying principle, but the focal point of the proceedings. By borrowing notions from contract law, acting as a parent indicates to the court the intent to assume parental responsibilities. Once more it is visible that intent is a cardinal factor in the functional approach.

Another method of evaluating the substance of family life as an indicator for conferring parental rights and responsibilities is the psychological approach.[30] Once more, the parenting functions are a proxy for the recognition of parenthood and allocation of parental responsibilities. However, the emphasis lies on the perception of the adults and children, and whether they see themselves as a family and identify as parents and children. This self-perception and identification could have direct manifestation (the child calls an individual her "mom" or "dad"), and indirect manifestations (the individuals fulfill parental roles, like doing the laundry, taking the child to the doctor, etc.). They do not need to live in the same house for such identification and attachment to occur.[31] Yet, they do need to have a

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28. *Kristine H.*, 117 P.3d at 696; *Applying Intent-Based Parentage*, *supra* note 27, at 437-38; Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-traditional Families*, 78 GEO. L.J. 459, 464 (1990) [hereinafter *Two Mothers*]; Storrow, *supra* note 22 at 640-42; Katharine K. Baker, *Quacking Like A Duck? Functional Parenthood Doctrine and Same-Sex Parents*, 92 CHI.-KENT L. REV. 135, 145-60 (2017).

29. Clevenger v. Clevenger, 11 Cal. Rptr. 707 (Cal. Ct. App. 1961); RCA 8256/99 Plonit v. Ploni, PD 58(2) 213, 233-36 (2003) (Isr.); *Bargaining or Biology?*, *supra* note 17, at 31.

30. Storrow, *supra* note 22, at 640-42.

31. ALLISON JAMES, *Parents: A Children's Perspective*, *in* WHAT IS A PARENT? A SOCIO-LEGAL ANALYSIS 190 (1999); *cf.* Irene Levin, *Children's Perceptions of Their Family*, *in* CHILDHOOD AND PARENTHOOD: PROCEEDINGS OF ISA COMMITTEE FOR

continuing mutual relationship, which fulfils the child's psychological and physical needs.[32]

Again, it is possible to see how intent has a meaningful role. Although the psychological approach is focused on feelings and emotions, it does not overlook the actions that caused them, which are used as objective indications of the existence of a psychological connection. These actions are very similar to those that are examined in the functional approach. Therefore, here too it will be hard to find cases in which a person will act as a parent without the intention of doing so. Indeed, it might be even harder, because the focus is on the creation of deep feelings and emotions, and not just function. Hence, intent is a cardinal aspect of the psychological approach as well.[33]

While the marital presumption, functional, and psychological approaches maintain the distinction between the notions of parentage and parenthood, the genetic/biological approaches conflates them as they allocate parenthood according to parentage. The genetic approach focuses on the genetic contribution to the child's DNA. The biological approach adds another layer, and considers not just DNA but also general biological contribution to the child's birth. In this sense, the genetic parents can also be described as the biological parents, but the reverse is not necessarily true. Hence, it seems that the main contribution of the biological approach is in its use in assisted reproductive technologies ("ART"), where there is a need to distinguish between the genetic parents and the gestational parent.[34] Even when the latter has no genetic relation to the child, s/he could be considered as a biological parent.

Both the genetic and biological approaches provide a bright-line rule that ensures that every child has at least two parents.[35] The sources of this rule have various origins. For instance, in England it could be traced to the British Poor Laws, allowing reimbursement from fathers whose children

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FAMILY RESEARCH CONFERENCE ON CHILDREN AND FAMILIES 281-83 (Julia Brannen & Margaret O'Brien eds., 1994).

32. JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 38 (2nd ed., 1979); *Rethinking Parenthood*, *supra* note 5, at 883, 944-48.

33. Charo, *supra* note 20, at 246.

34. *See id*. (noting in this context that the term "parent" is used, and not mother, as in some cases involving transgender, transsexual or intersex individuals it would be inaccurate to simply describe the genetic and gestational parent as a mother).

35. *Bionormativity*, *supra* note 5, at 653.

received financial assistance.[36] Contrastingly, in the U.S. some states used paternal support as punishment for bastardy or fornication.[37] In both countries, it seems, intent was not a consideration in the recognition of parenthood and parental obligations. This is true to this day. Since genetics and biology are the sole indicators used to determine parenthood and parental rights in these approaches, intent serves no purpose in them. Indeed, an individual could be a genetic or a biological parent without intending to become one, for example, if birth control measures failed. Furthermore, when these approaches are applied intent is not examined. So even if one could argue that intent exists post-conception by choosing not to have an abortion, it is supposedly irrelevant, notwithstanding that only the gestational parent has the power to abort.

Lastly, in some instances parental status is allocated according to the intention-based approach. This approach is rather straightforward: parental status is determined according to the individual's intention to assume such a role. However, unlike the previous approaches, in which intention was a factor but it was not necessarily examined to determine parental status, here intentions are considered directly. This approach is mainly applied to determine parenthood and parental responsibilities in cases of assisted reproduction.[38] For instance, in some jurisdictions if a woman consents to her partner's insemination she will be that child's parent if she initially intended to be the parent.[39] Similarly, some courts have ruled that a sperm donor is the child's father by means of apparent consent.[40]

The table below aids in clarifying the relationship between the methods of allocating parental statuses, and the statuses themselves. It shows that if the marital presumption, genetic or biological approaches are used, then parentage will be conferred, and consequently parenthood status and/or parental responsibilities might also be allocated. In contrast, if the

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36. *Id.* at 657-58.

37. HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 109 (1971).

38. JANET L. DOLGIN, DEFINING THE FAMILY 239-43 (1997); *Bargaining or Biology?*, *supra* note 17, at 26-30; *Applying Intent-Based Parentage*, *supra* note 26, 437-48; Storrow, *supra* note 22, at 640-42.

39. *Cf.* D.C. CODE §16-909(e)(1) (2016); N.M STAT. ANN. § 40-11A-703 (2009); WASH. REV. CODE § 26.26.710 (2011); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); E.N.O. v. L.M.M, 711 N.E.2d 886, 891-92 (Mass. 1999); *In re* Karin T. v. Michael T., 484 N.Y.S.2d 780 (N.Y. Fam. Ct. 1985); Shineovich v. Shineovich, 214 P.3d 29, 39 (Or. Ct. App. 2009); J.A.L. v. E.P.H., 682 A.2d 1314, 1316 (Pa. Super 1996); RFA 4890/14 Plonit v. Plonit (2014) (Nevo) (Isr.).

40. *See*, *e.g.*, *In re* R.C., 775 P.2d 27, 27, 35 (Colo. 1989); C.M. v. C.C., 377 A.2d 821, 821-22 (N.J. Sup. Ct. 1977).

psychological, functional, or intention-based approaches are used, then only parenthood status and/or parental responsibilities will necessarily be awarded. Lastly, the table illustrates that intent is or was an integral part of the marital presumption, psychological, functional, and intention-based approaches, and is non-existing in the genetic and biological approaches.

Status Allocation Method	*Parental Status Conferred*	*Intent*
Marital Presumption	Necessarily: parentage Consequently: parenthood and/or parental responsibilities	Historical/Tacit
Psychological	Necessarily: parenthood and/or parental responsibilities	Tacit
Functional	Necessarily: parenthood and/or parental responsibilities	Tacit
Genetic	Necessarily: parentage Consequently: parenthood and/or parental responsibilities	None
Biological	Necessarily: parentage Consequently: parenthood and/or parental responsibilities	None
Intention-Based	Necessarily: parenthood and/or parental responsibilities	Explicit

III. WHO COULD BE MULTIPARENTS?

Multiparental family structures are of a diverse nature. Some multiparental family structures are a consequence of new reproductive technologies, others of new social and legal practices, while some multiparental structures come in old and familiar forms. Moreover, multiparents can be found in both heterosexual and LGBT headed families. The following subsections will present the five main multiparental family structures: ART, co-parenting, stepfamilies, open adoptions, and extended kinship care.

In this respect three issues are noteworthy. First, the following subsections describe who *can* be considered as multiparents from a social perspective, not according to existing legislation or case law. The question of who *should* be recognized as multiparents, and who *are* indeed recognized as multiparents under the law, will be discussed later.

Second, multiparental families could be of a hierarchal or egalitarian parental status character. For instance, in open adoption and kinship carers it is more likely to find a division between the "core" parents, who take an active role most of the time, and "secondary" parents. In contrast, co-parenting could lead to an egalitarian division of parental care.

Third, we must keep in mind that the multiparental family structures described below might not be distinct, and that some overlapping may occur. For example, there is the possibility that alongside the parents who used assisted reproductive technologies we can identify adoptive parents and co-parents. However, in the context of the following subsections I will illustrate

who are the potential multiparents while disregarding possible overlaps unless they are unavoidable. With these remarks in mind, we can move to discuss the various categories of multiparental families.

A. Assisted Reproductive Technology Families

The first type of multiparental structures is that of families that are established through the use of assisted reproductive technology ("ART"). This term refers to many different types of assisted reproductive treatments, ranging from fertility medication, through some form of handling sperm and eggs (such as artificial insemination, in-vitro fertilization ("IVF"), and surrogacy), to selection and manipulation of the genetic material. Not all ART treatments lead to a possibility of multiparents. If there are only two intended parents who are the sole providers of the genetic material, and one of the intended parent is also the gestational parent, then theoretically there should only be two parents – much like unassisted reproduction.

However, ART is complex by its nature, and therefore it is a fertile environment in which the multiparents phenomenon can occur. In some cases, the intended parents require sperm or egg donation, or the help of a surrogate mother. Here the intended parents might not both be the genetic parents, or there may be another biological parent (i.e. the surrogate) alongside the two genetic parents. Additionally, there might be more than two intended parents, e.g. when a lesbian couple decide to have a child with a known sperm donor who takes an active role in the child's life. But there might even be cases in which there are three genetic parents. Since the 1990s, scientists have been successful in using ooplasm transfer[41] and mitochondrial replacement[42] in ART.[43] These procedures involve using genetic materials from three different people – the sperm donor, the healthy egg donor, and the damaged egg donor – and they can require the help of a surrogate. Consequently, children who are born via this procedure will have three genetic parents and potentially an additional biological parent. Thus, in theory, children born in such circumstances can have multiparents.

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41. Injecting a small amount of ooplasm from eggs of fertile women to the eggs of unfertile women. *See* Jacques Cohen et al., *Ooplasmic Transfer in Mature Human Oocytes*, 4 MOLECULAR HUM. REPROD. no. 3, 1998, at 269-80.

42. Replacing damaged mtDNA with healthy mtDNA. *See* Françoise Baylis, *The Ethics of Creating Children with Three Genetic Parents*, 26 REPROD. BIOMEDICINE ONLINE 531, 531-32 (2013).

43. Recently, England advanced a new regulation that will allow mitochondrial donations, but it will only recognize two legal parents. *See* The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015, SI 572, art. 3, ¶ 15, 17 (Eng.).

B. Co-Parenting Families

The second type of multiparental structure is co-parenting. The term 'co-parenting' describes a situation in which individuals jointly raise children without being in a romantic or legally recognized relationship. Such arrangements occur either after spousal separation, or as a result of a choice to raise children without prior or subsequent romantic involvement. It is important to note in this context that co-parenting is used by members of the LGBTQ community and heterosexuals as individuals, as couples, or in other combinations. In the latter case there are more than two individuals involved. Thus, according to the intention-based, functional, or psychological approaches, the child could have multiparents, and the number of family members and complexity of the family structure can vary considerably.

For example, assume Adam and Brian are a gay couple who decide to have a child with Christina using Adam's sperm. The three agree on the various issues regarding childrearing, from the child's name, custody arrangements, and financial support, up to breakup or new relationships. As a result, Dorian is born. He spends half of his week with Adam and Brian, and the other half with Christina, and alternates between the two homes every other weekend. After a year Christina falls in love and marries Eliot, and together they have Fiona. All four adults take an active role in raising the two children, which now have three fathers and one mother. Although this example can be developed even further,[44] it is sufficiently established for our purposes. We can now see that co-parenting does not only illustrate how "it takes a village to raise a child",[45] but also that it sometimes creates the village.

C. Stepfamilies

The third type of structure is stepfamilies. As aforementioned, in some instances after spousal breakup one or both of the parents meet new spouses, who participate in the day-to-day upbringing of the children. Here there might be a positive cooperation between the "original" parents and the "new" parents.[46] In this case the parental responsibilities will be shared according

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44. *See generally* JOHN EEKELAAR, *Parenthood, Social Engineering and Rights*, *in* CONSTITUTING FAMILIES: A STUDY IN GOVERNANCE 83 (Derek Morgan et. al. eds., 1994); Annemarie Vaccaro, *Toward Inclusivity in Family Narratives: Counter-Stories from Queer Multi-Parent Families*, 6(4) J. GLBT FAM. STUD., 425, 429-32 (2010).

45. *See generally* HILLARY RODHAM CLINTON, IT TAKES A VILLAGE (Simon & Schuster, 1996).

46. I use the terms "original" and "new" parents to distinguish between the individuals that were initially legally recognized as the parents and the new spouses who

to some sort of an agreement between the parents. But it may very well be that an "original" parent will not take an active role in the child's life, and the "new" parent will assume that role. Whichever situation may apply, the fact that the new spouses fulfil parental roles can lead to a situation where the child has multiparents.

D. Open Adoption Families

The fourth structure is open adoptions. The way an adoption is categorized determines whether the child might have multiparents. A closed adoption is supposed to sever all ties – legal and social – between the "original" parents and the child.[47] Therefore, in most cases of closed adoptions a child will have two parents at most at any given time. In an open adoption, however, there can be various degrees of relationship between the "original" parents and the child, from unilateral transmission of information to the "original" parents, through some form of visitation, to the existence of some parental rights and responsibilities of the "original" parents.[48] It is in the latter situation where there is a potential for multiparenting. It is also important to note that in very few and rare cases there have been reports of three adoptive parents, both in closed and open adoptions.[49] In these cases it is clear that we are dealing with multiparents.

E. Kinship Carer Families

The fifth and last type of multiparental family structures is extended kinship carers. As their title suggests, extended kinship carers are either members of the extended family or other friends who share a close and intimate relationship with the family. The care is a result of voluntary agreement between the parents and the carers. The care is provided with no expectation of monetary compensation and the extended kinship carers may be, *inter alia*, grandparents, godparents, aunts and uncles, friends, neighbors,

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take on parental responsibilities.

47. *See, e.g.*, CAL. FAM. CODE §§ 7660-7666 (West 2017); Adoption Act, R.S.C. 1996, c. 38 (Can.); Adoption & Children Act 2002, c. 46, (Eng.).

48. *See, e.g.*, Adoption Act, R.S.C. 1996, c. 38 (Can.); Down Lisburn Health and Soc. Servs. Tr. v. H, [2006] UKHL 36 (Eng); Children Adoption Act 5741-1981 § 16 (1) (Isr.); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 424 (2008).

49. Samantha Brennan & Bill Cameron, *How Many Parents Can a Child Have? Philosophical Reflections on the "Three Parents Case"*, *in* SELECTED WORKS OF SAMANTHA BRENNAN 14-15 (Western University ed. 2013); Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J.C.R. & C.L. 201, 243 (2009).

and tribe members.[50] These carers can, in certain situations, may be considered parents alongside the "original" parents.

IV. WHY SHOULD MULTIPARENTS BE RECOGNIZED?

So far, the paper has reviewed the three parental statuses, the approaches for their allocation, and who could be multiparents. But before proceeding any further, it is important to address a debatable aspect of this paper, which is why multiparents should be recognized. In this section the arguments opposing recognition of multiparents will be examined and refuted. These arguments could be generally divided into three categories: inducing heavy strain on the administrative system, infringing on the idea of the family as an institution, and endangering the child's best interests. All three arguments share one main fault. They all promote an approach of total non-recognition of multiparents, but the justifications they provide do not support this absolute stance. Even if we were to say that these arguments have some merit, their internal logic does not exclude the recognition of multiparents as an exception to the general rule. Hence, the main purpose of these arguments – total non-recognition of multiparents – could not be supported by them.

A. Administrative Strain?

The first strain of arguments opposing the recognition of multiparents suggests that with the recognition of any additional parent, beyond the traditional two, greater administrative strain is induced.[51] This strain could be described as direct if, for example, multiparents will impose a greater burden on the courts when settling conflicts regarding such matters as custody, visitation, and financial support.[52] Yet, it could also be described as indirect. If the recognition of multiparents will make it easier for an individual parent "to shirk his or her responsibilities,"[53] then the state might

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50. Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 84 (2004); Vaccaro, *supra* note 44, at 432.

51. Marquardt, *supra* note 4; *see generally* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005).

52. Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 635–36 (2002); June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1297 (2005); Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217, 223 (2010) [hereinafter *More Parents, More Money*]; Marquardt, *supra* note 4; Wald, *supra* note 8, at 380-81.

53. Stanley Kurtz, *Heather Has 3 Parents*, NAT. REV. ONLINE (Mar. 12, 2003) www.nationalreview.com/article/206153/heather-has-3-parents-stanley-kurtz.

have to take over those responsibilities, or at the very least spend resources on their enforcement.

However, it seems doubtful that the administrative strain imposed by multiparents is significantly more strenuous than that which is imposed on public authorities when dealing with any two-parent dispute. Furthermore, even if multiparental family structure disputes are more complex, an issue that so far was not established empirically, this fact by itself does not justify non-recognition of multiparents in the first place. In regards to custody disputes particularly, the difficulties arising cannot justify differential treatment between "traditional" and multiparental families. Moreover, it is not at all clear that multiparenting makes it easier to shirk parental responsibilities.[54] In fact, multiparents might require less state intervention than two parents and single parents for two reasons. First, the former can self-enforce each other's parental obligations.[55] Second, the larger number of individuals that are responsible for a child make it less likely that the state will need to support her.[56]

B. Protecting the "Traditional" Family?

The second strain of arguments opposing the recognition of multiparents claims that this recognition will undermine the "traditional" understandings of the family as an institution.[57] The fear is that the "traditional" family will lose its social and legal dominance. For instance, once the multiparental relationship between the parents and the children is recognized, then the parents will push for "the rights and protections of marriage."[58] Alternatively, the protection of the "traditional" family as a whole and complete unit could be compromised. It was argued that by the ability to recognize multiparents the family members' right to privacy and autonomy could be compromised, as courts could use their power to "force" an additional parent on the family.[59]

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54. Brian Bix, *The Bogeyman of Three (or More) Parents*, MINN. LEGAL STUDIES RESEARCH PAPER No. 08-22, 3 (2008).

55. *See* Vaccaro, *supra* note 44, at 434 (highlighting the testimony of one multiparent).

56. Laura T. Kessler, *Community Parenting*, 27 WASH. U.J.L. & POL'Y 47, 72 (2007); Kinsey, *supra* note 8.

57. Duncan, *supra* note 2, at 77; Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1228-33 (2001).

58. Marquardt, *supra* note 4.

59. Appleton, *supra* note 27, at 29-30; Bix, *supra* note 54, at 6-7; Diane M. Goodman, *Why Can't Children Have Three Parents*, 34 L.A. LAW. 36 (2011); John De

Still, there is no reason to believe that the survival of the "traditional" family is dependent on the non-recognition of multiparental families, just as it was not dependent on (or affected by) recognition of single-parent and same-sex families.[60] Moreover, there might not be any value worth maintaining in the "traditional" family structure itself.[61] Furthermore, it is not uncommon for children today to live outside the nuclear family, or in a family structure that does not include two parents;[62] notwithstanding a growing trend of a kinship network made of several households, which take part in child rearing.[63] This indicates that the "traditional" family ideal is far from how it is practiced in real life. Additionally, arguing that recognizing multiparents will encourage the recognition of polyamorous or polygamous relationships is both baseless and ignorant of the nature of multiparental families.[64] These structures are of a diverse nature, yet they are almost always composed of individuals who are not all involved in a romantic relationship.[65] Non-recognition of all multiparental families due to the fear that a very small minority of them will pursue additional rights seems disproportional and ill-informed. Lastly, regarding the courts infringement of the privacy and autonomy of the family unit, this is not a novel notion. First, privacy and autonomy should not be used as an *a priori* reason for not recognizing multiparents, as such reasoning could not be justified. Rather, they should be balanced against other rights and interests, in accordance with the unique circumstances of each case. Second, if individuals choose to form

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Witt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 FAM. L.Q. 163, 184-87 (2002); Fiona Kelly, *Nuclear Norms or Fluid Families? Incorporating Lesbian and Gay Parents and Their Children into Canadian Family Law*, 21 CAN. J. FAM. L. 133, 172 (2004); David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood* 54 AM. J. COMP. L. 125, 126-32 (2006).

60. Nancy Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FEMINIST STUD. 231, 223-24 (2007) [hereinafter Dowd 2007]; Nancy Dowd, *Law, Culture and Family: The Transformative Power of Culture and the Limits of Law*. 78 CHI.-KENT L. REV. 785, 786 (2002); *see generally* Yoav Dotan, *The Boundaries of Social Transformation through Litigation: Women's and LGBT Rights in Israel, 1970-2010*, 48(1) ISR. L. REV. 3 (2015).

61. *See generally* GARY BECKER, A TREATISE ON THE FAMILY 227–306 (1981); STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1992); MARTHA. A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

62. Kessler, *supra* note 56, at 53; Hannah Richardson, *Nuclear Family 'In Decline', Figures Show*, BBC NEWS, (July 2, 2010) www.bbc.co.uk/news/10487318.

63. Kessler, *supra* note 56, at 59.

64. Kinsey, *supra* note 8, at 335.

65. *See generally* Vaccaro, *supra* note 44, at 434.

a multiparental family, then privacy and autonomy justify its recognition.

C. The Child's Best Interests?

The third strand of arguments against the recognition of multiparents focuses on the child's best interests. In cases involving multiparental recognition, the child's best interests has played a significant role.[66] As shall be demonstrated below, recognition of multiparents does not harm the child's best interests *a priori*. On the contrary, not recognizing multiparents as a general rule will seemingly have a negative effect.

But first, it is important to define what the child's best interests standard is. The child's best interests is considered to be a vague standard, which has the potential to be interpreted in many different ways.[67] Thus, it is hard to extract one clear definition that will be applicable in various situations, let alone remain unchanged over time.[68] However, despite the fact that there is no universal definition of this standard, some general observations can be made. This standard has been interpreted as primarily concerning the child's psychological interests, but there has also been consideration of other interests, such as economical, educational and medical needs.[69] In this regard, courts have examined the level of attachment between the parent and the child, alongside the child's perspective and wishes.[70] Hence, an examination of the child's best interests entails the same principles of the psychological and functional approaches, and if the child is old enough to express herself then the principles of the intention-based approach are also considered.

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66. *See, e.g.*, CAL. FAM. CODE § 7612(c) (West 2017); A.A. v B.B. (2007), 83 O.R. 3d 561 (Can. Ont.); A v. B and Another [2012] EWCA Civ 285 (Eng.); M.L. v. R.W. [2011] EWHC 2455 (Fam) (Eng.); *Re* W.B. (children) (contact) [2011] EWHC 3431 (Fam) (Eng.); *Re* D (contact and parental responsibility: lesbian mothers and known father) [2006] EWHC 2 (Fam) (Eng.); Coupet, *supra* note 8, at 595.

67. Katharine Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project*, 36 FAM. L.Q. 11, 13 (2002).

68. *Bionormativity*, *supra* note 5, at 682; Dolgin, *supra* note 38, at 238-43; Naomi R. Cahn, *Reframing Child Custody Decision Making*, 58 OHIO ST. L.J. 1, 5-14, 58 (1997).

69. Coupet, *supra* note 8, at 642; Robert Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6(1) PSYCHOL. SCI. PUB. INT. 1, 6 (2005); *cf.* 2007 O.A.C. 2, 83 O.R. (3d) 561 (Can.); A v. B and Another [2012] EWCA Civ 285 (Eng.); [2011] EWHC 3431 (Fam) (Eng.); [2006] EWHC 2 (Fam) (Eng.).

70. Coupet, *supra* note 8, at 642; *cf.* 2007 O.A.C. 2, 83 O.R. (3d) 561 (Can.); [2011] EWHC 3431 (Fam) (Eng.); [2006] EWHC 2 (Fam) (Eng.).

With the complex nature of the "child's best interests" standard in mind we can now turn to the main reservation that has been made in the context of recognizing multiparents. It has been argued that due to the nature of multiparenting households, there will be "too many cooks in the kitchen", causing decision making to be extremely difficult.[71] It has also been argued that the family will often include more than two households, shuffling the children between different homes and ideologies, forcing them to grow up too fast.[72]

These arguments appear to assume that all multiparental families are necessarily dysfunctional. But this assumption is far too wide and unsubstantiated. In fact, multiparental families might not only work well despite having "many cooks", but perhaps even better than families that only have two. Furthermore, the claim that the mere existence of two homes in a child's life causes distress is an ungrounded and unproven presumption, not to mention that "traditional" families are not the ideal stress-free single-ideology households they are portrayed as. Notwithstanding the fact that multiparenting can take place in a single household[73] (even if not all parents live there), having more than one home could be a positive experience.

A child's best interests may be served by recognition of multiparents for two main reasons. First, without such recognition the family unit is vulnerable with many issues left uncertain, such as custody, citizenship, holding and succession of property, social support, and legitimacy.[74] Not

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71. Buss, *supra* note 52, at 635–36; Carbone, *supra* note 52, at 1297; *More Parents, More Money*, *supra* note 52, at 223; Kinsey, *supra* note 8, at 329; Marquardt, *supra* note 4.

72. Marquardt, *supra* note 4, at 1.

73. Vaccaro, *supra* note 44, at 429.

74. Nicholas Bamforth, *Same-Sex Partnerships: Some Comparative Constitutional Lessons*, 12 EUR. HUM. RTS. L. REV. 47, 60 (2007); Kinsey, *supra* note 8, at 329-37; Kavanagh, *supra* note 50, at 90; FA (Tel-Aviv) 37745-03-14 Nilli v. Orit, NEVO, at 1 (Apr. 27, 2014) (Isr.). In *Nilli*, a family court in Israel gave effect to a co-parenting agreement and ordered visitation rights to Nilli, who donated her eggs to her lesbian partner Orit, which were fertilized with Alon's sperm. Orit and Alon were registered as the parents on the birth certificate, and the three signed a co-parenting agreement in which they declared they will act as equal parents despite the lack of formal legal recognition of Nilli as a parent. After Nilli and Orit's relationship ended, Nilli continued seeing the children and assisting in their daily care, until Orit and Alon stopped the visitations. The court recognized the *lacuna* in current legislation regarding multiparents, and declared it would be unreasonable to ignore the parties' co-parenting agreement. The court added that not recognizing this agreement will not only harm the parties, but that it is also contradictory to the children's best interests, legal stability and certainty. Yet, the court only ordered visitations and did not recognize Nilli's parenthood.

recognizing multiparents therefore works against the child's best interests while preserving the ideal of the hetero-normative monogamous family.[75] Second, in some circumstances, non-recognition of multiparents may result in the child going into foster care – which is doubtfully in the child's best interest.[76] It is safe to assume that any child will be better off with the person who has been parenting her than to go through foster care and adoption.

Considering the above, arguing that as a general rule, multiparental families should not be recognized, or that the child's best interests negate the possibility of recognizing multiparents in every circumstance, seems far-fetched. There is no inherent disadvantage in the recognition of multiparents.[77] Furthermore, it is not only the hallmark of democratic societies, but also their duty, to accommodate the needs of different lifestyles "in a reasonable and fair manner."[78] As such, societies should strive to ensure that the best interests of the child do not become a tool for conforming all families to the "perfect" family ideal, but rather to provide equal protection of various forms of families. In the following section the manner in which such recognition currently takes place will be examined.

V. THE SPECTRUM OF RECOGNITION AND REGULATION: FROM SOCIAL LABEL TO LEGAL STATUS

In recent years, the strict divide between 'parents' and 'strangers' has been eroding. With such notions as presumed parents, in loco parentis, de facto parents, and parents by estoppel, courts and legislatures recognize individuals who fulfill the role of a parent and have some, if not all, parental rights and responsibilities.[79] More significantly, there is a growing trend of

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75. *See Two Mothers*, *supra* note 28, at 573 (explaining that family law still often fails to recognize and protect the child-carers relationships despite the fact such recognition is in the child's best interests, as she comes to depend on and attached to the carers); Laura Ann Rosenbury, *Rights and Realities*, 94 VA. L. REV. BRIEF 39, 43 (2008); Coupet, *supra* note 8, at 321.

76. Kinsey, *supra* note 8, at 331.

77. *See generally* A v. B and Another [2012] EWCA (Civ) 285, 285 (Eng.).

78. Minister of Home Affairs v. Fourie [2006] 1 S.A. 524, at 95 (S. Afr.).

79. DEL. CODE ANN. t.13, § 8-201 (2009); D.C. CODE § 16-831.01 (2012); Elisa B. v. Superior Court, 117 P.3d 660, 664-65 (Cal. 2005); Adoption of Kelsey S, 823 P.2d 1216, 1217 (Cal. 1992); Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986); Nunn v. Nunn, 791 N.E.2d 779, 783 (Ind. Ct. App. 2003); C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004); Miller v. Miller, 478 A.2d 351 (N.J. 1984); T.B. v. L.R.M., 786 A.2d 913, 916-19 (Pa. 2001); *Re* PC (Change of Surname) [1997] 2 FLR 730 (Eng.); MARIEL DIMSEY, *Multi-Parent Families in the 21st Century*, in EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW 101, 108-09 (Katharina Boele-Woelki ed., 2008).

allocation of parental statuses for more than two parents.[80]

The allocation of parental status to multiparents by courts and legislatures is not binary, but rather could be described as a spectrum.[81] On one side of the spectrum there are individuals who are considered complete strangers. Then, there are those who enjoy the social label of "parents" without legal consequences attached.[82] Further along are those who have parental

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80. *See* CAL. FAM. CODE § 7612(c) (West 2017) (allowing for the recognition of more than two parents when not doing so would be detrimental to the child); *see also* ME. REV. STAT. ANN. tit. 19-A, § 1853 (2015) (granting courts the authority to recognize more than two parents); *see also* Family Law Act, S.B.C. 2011, c. 25 § 44 (Can.) (permitting "two or more of a child's guardians [to] make an agreement respecting . . . the allocation of parental responsibilities . . . "); *see also* Care of Children Act (2004) § 23 (N.Z.) (allowing parental guardians to appoint additional guardians for a child); *see also* State of La. *ex rel.* Dep't. of Soc. Serv., Off. of Fam. Support v. Howard, 898 So.2d 443, 444; (La. Ct. App. 1st Cir. 2004) (discussing the concept of dual paternity, where a child is allowed to seek support from its biological father); *see also* Smith v. Cole, 553 So.2d 847, 854 (La. 1989) (holding that even if a child already has a guardian, that does not mean that the biological father can escape his parental responsibilities); *see also* Geen v. Geen, 666 So.2d 1192, 1196-97 (La. Ct. App. 3d. Cir. 1995) (holding that biological parents are not the default option when determining the best interests of a child, even when they get married); *see also* State *ex rel.* Crook v. Mendoza, 491 N.W.2d 62, 6364 (Neb. Ct. App. 1992) (discussing the relationship between the biological father and the custodial father and how both can be required to support the child); *see also* Jacob v. Shultz-Jacob, 923 A.2d 473, 480-81 (Pa. Super. Ct. 2007) (discussing the idea that "stepparents who have held a child out as their own are liable for support; biological parents who have exercised the rights appurtenant to that status can be no less bound."); *see also* A.A. v B.B. (2007), 83 O.R. 3d 561 (Can. Ont.) (recognizing that a child can have two fathers, two mothers, or any combination thereof); *see also* McAllister v. McAllister, 779 N.W.2d 652, 658, 660 (N.D. 2010) (holding that the best interest of the child was to allow visitation rights by a third parent); *see also* K.A.F. v. D.L.M., 96 A.3d 975, 981-82 (N.J. App. Div. 2014) (recognizing that a child's best interests might involve more than two parents); *see also* Dawn M. v. Michael M., 55 Misc.3d 86547865, 47 N.Y.S.3d 898, 900-02 (N.Y.S. Suffolk County 2017) (holding that "tri-custody" was in the best interests of the child); *see also* In re Parentage of J.B.R Child, 336 P.3d 648, 654 (Wash. Ct. App. 2014) (holding that multiple parents can be in the best interest of the child); *see also* Killingbeck v. Killingbeck, 711 N.W.2d 759, 773-74 (Mich. Ct. App. 2005) (recognizing the rights of biological and psychological parents); *see generally* COMMON CORE AND BETTER LAW IN EUROPEAN FAMILY LAW 389-412 (Katharine Boele-Woelki ed., 2005); KATHARINA BOELE-WOELKI ET AL., PRINCIPLES OF EUROPEAN FAMILY LAW REGARDING PARENTAL RESPONSIBILITIES, 32, 66 (2007).

81. Meyer, *supra* note 59, at 131-32; Murray, *supra* note 48, at 398-99; Barbara Bennet Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parent's Rights*, 14 CARDOZO L. REV. 1747, 1781-82 (1993).

82. *E.g.* A v. B and Another [2012] EWCA Civ 285 (Eng.).

responsibilities, but the legal status of parenthood is not conferred to them.[83]

This instance along the spectrum indicates the point from which legal rights and obligations are conferred. Closer to the other end of the spectrum are individuals who are awarded the legal status of parenthood, but do not have full parental responsibilities.[84] Finally, there are those who hold both parental responsibilities and the status of parenthood.[85]

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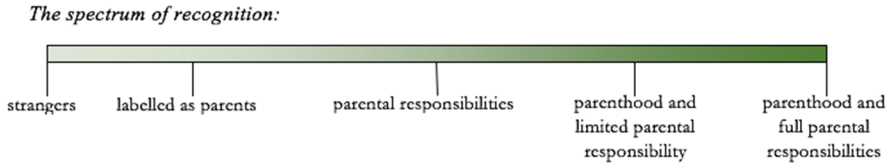
83. *See id*. (providing an example of England sperm donors being recognized as having limited parental responsibilities stemming from their parenting, but their parenthood was not recognized as such); *Re* D (contact and parental responsibility: lesbian mothers and known father) [2006] EWCA Civ 285 (Fam) (Eng.); *Re* W.B. (children) (contact) [2011] EWHC 3431 (Fam) (Eng.). Conversely, in Louisiana, courts recognize "dual paternity", where a child has both a presumed father and a biological father. Such dual recognition does not affect the presumed father status or responsibilities, while imposing financial responsibilities on the biological father (which may have some parental rights). State, Dep't of Soc. Servs. *ex rel.* P.B. v. Reed, 10-410 (La. App. 5 Cir. 2010) 52 So. 3d 145, 147; W.R.M. v. H.C.V., 2006-0702 (La. 3/6/07), 951 So. 2d 172, 173; *Howard*, 898 So. 2d at 444; State, Dep't of Soc. Servs., Office of Family Support *ex rel.* Munson v. Washington, 32,550 (La. App. 2 Cir. 12/8/99) 747 So. 2d 1245, 1247; *Cole*, 553 So. 2d at 854-55; Warren v. Richard, 296 So.2d 813, 813-814 (La.1974). Multiparental recognition, which stems from the will to ensure financial security, can also be found in Israel. There the courts have found that if a stepparent died in the line of duty, the stepchild may be recognized as their orphan for the sake of receiving remuneration even if both biological parents are alive. i.e., for the purpose of remuneration, the children may have three parents. SFA (District – Jerusalem) 1093/74 Raya Kolan v. Remuneration Officer, 1976(2) 429 (1976) (Isr.); SFA (Magistrate – Rishon Letzion) 41988-03-11 R.A. v. Remuneration Officer Nevo (Feb. 3, 2013) (Isr.)

84. In Florida, a Miami-Dade Circuit Court judge ordered three parents to be registered as such on a birth certificate (the genetic parents and the lesbian partner of the genetic mother); notwithstanding, the court stated that the father will have only limited visitation rights and no other subsequent responsibilities. *See* Susan Brinkmann, *Florida Allows Three Parent-Adoption*, WOMEN OF GRACE (Feb. 13, 2013), www.womenofgrace.com/blog/?p=19406.

85. For instance, the Pennsylvania Superior Court found that a child who was born to a lesbian couple and a known sperm donor has three parents, all of which have parental rights and responsibilities. This was made on the basis that one is the biological mother, her partner was the *in loco parentis*, and that equitable estoppel applies to the sperm donor in light of his involvement in the child's life alongside his statutory liability as the biological father. *Jacob*, 923 A.2d at 776-77, 780-81. Perhaps a more ground-breaking case is *A.A. v. B.B*. in which a lesbian couple (A.A. and C.C.) together with a sperm donation from their friend (B.B.) had D.D. (2007), 83 O.R. 3d 561 (Can. Ont.). Although the couple were to be the primary caregivers, the three wanted B.B. to remain involved in the child's life. The Court of Appeal for Ontario stated that it is in the child's best interests that all three adults enjoy an equal status of legal parenthood.



It is important to distinguish in this context between recognition of multiparents and their regulation. These two terms are often conflated, and indeed they are fairly similar in content and character. However, they have some unique features. *Recognizing* multiparents requires the state to have a more passive role than *regulating* multiparents, as recognition reflects the individuals' choices while regulation requires the state to act as an administrator that is constructing the family structure. Consider the following example: Three individuals decide to be egalitarian multiparents of a child not yet conceived, meaning that they will all have parenthood status and equal parental responsibilities. If upon birth all three are allocated this status (for example by registering them in the birth certificate as parents), then the state simply recognized the multiparents intentions. If, however, in order to confer parental status, the multiparents have to go to court, and it has full discretion to decide if and what status will be conferred, then the state is regulating the establishment of the multiparental family.

England is an exemplary jurisdiction which legally recognizes multiparents by allowing the simultaneous allocation of parental responsibilities to more than two individuals.[86] However, it does not confer parenthood status to more than two individuals. In the context of parenthood, a woman giving birth will be considered the mother, unless the child was adopted or a parental order was made.[87] The legal father will be, in most cases, the genetic father. Conversely, in ART, or if the birth mother is married, the legal father could be one of several: the husband, an agreed father who has no genetic link to the child nor is married to the mother, or even a second female parent and no father.[88] Nonetheless, there could only be two individuals with parenthood status at most in any given moment.

86. Children Act 1989, c. 41, § 2, 4ZA, 4A (Eng.).

87. Human Fertilisation and Embryology Act (2008), § 27(1), 33(1) (Eng.) [hereinafter HFEA]; Adoption & Children Act 2002, c. 38, § 14(Eng.); HARRIS-SHORT & MILES, *supra* note 12, at 589, 624; NIGEL LOWE, & GILLIAN DOUGLAS, BROMLEY'S FAMILY LAW 281 (2007).

88. HFEA §§ 35-47 (Eng.); Adoption & Children Act 2002, c. 46, (Eng.); §§ 50-51; HARRIS-SHORT & MILES, *supra* note 12, at 590, 626-30; LOWE & DOUGLAS, *supra* note 87, at 248-51.

England's policy of allocating parental responsibilities is a good example of catering for a hierarchal multiparental family structure where there are core and secondary parents.

That said, the recognition of multiparents only occurs when all parents agree on each other's parental status. When parental status is disputed, the establishment of the multiparental family is regulated by courts and a hierarchal model is likely to be constructed. One case that illustrates this point is *Re D*. In this case, a lesbian couple (A and C) and a sperm donor (B) were all given parental responsibilities for the biological child of A and B. A has parenthood status and parental responsibilities because she is the biological mother, and C has them by means of a joint residence order. B was granted limited parental responsibilities, and consequently the social "label" of a parent. But he does not have the legal status of parenthood. As Black J stated:

> As Mr. B expressly recognises, Ms. A and Ms. C are [the child's] day to day parents and he has no role in her day to day care, whether in relation to decision making or otherwise. He will, however, be kept informed of all major decisions taken by Ms. A and Ms. C in relation to her. He will thus be recognised as a parent by the grant of parental responsibility but it will be a parent of a very different sort—no less important, just very different.[89]

Despite Black J's attempt to portray Mr. B's status as equal to that of Ms. A and Ms. C, it is secondary to theirs. It should be noted, that *Re D* is a case in which the court regulated the multiparental family rather than simply recognizing it. This is mainly because A, B, and C were in disagreement about the scope of parental responsibilities B should hold. If they were all in agreement then they could have applied for a court order, in which case the Court's discretion would have been more limited.

Similar issues arise in the *A v. B* case.[90] Here, A offered to be the sperm donor for B and C, his lesbian friends (who were in a relationship). Because B comes from a religious family, the three decided that it would be best if she, B, and A would marry, but that the child will be raised by B and C. They also agreed that A's fatherhood would be recognized, but that his parental role would be secondary. After conception, cracks began to appear in the relationship of the three adults. After M was born, A applied for a defined contact order, and B and C applied for a joint residence order and a specific

89. *See Re D* [2006] EWCA Civ 285 (Fam) (Eng.).

90. A v. B and Another [2012] EWCA Civ 285 (Eng.).

issue order relating to A's exercise of parental responsibility. Again, we can see how the court was willing to confer parental status based on the hierarchal model. Thorp LJ stated:

> [I]n the present case some would say that the primary carer is the full-time nanny. However, let me rank the three parents in the context of care. Clearly, B and C are primary carers. Clearly, A is only presently on the threshold of providing secondary care.[91]

The English courts' recognition and regulation of multiparental family structures according to a hierarchal model is not surprising. As mentioned above, in England there could only be two holders of parenthood at any given moment. This policy places the holder of the parenthood status in a superior position to any of the other parents for several reasons. First, parental responsibilities are less permanent than parenthood, as they have an expiration date – when the child reaches majority and the parents lose their parental responsibilities.[92] A similar result occurs if the child dies, is adopted or when a parental order is made.[93] Contrastingly, parenthood could come to an end by means of adoption or parental order only. Without such intervention, the familial link will always exist. Second, the social parental label is arguably different. Parenthood is a status only parents enjoy, whereas non-parents can potentially have parental responsibilities. As such, although both legal instruments produce some sort of parenting status, the social value attached to each instrument is different – parenthood is more exclusive and coveted.

California has taken an approach that differs from the English courts when allocating parental status to multiparents. Section 7612(c) of the California Family Code allows courts to acknowledge multiparents when prescribing parental status to only two parents would be detrimental to the child. Thus, under California law it is possible to have more than two individuals with parenthood status.[94] According to the Bill introducing the new legislation:

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91. *Id.*

92. LOWE & DOUGLAS, *supra* note 87, at 391.

93. HFEA § 54 (Eng.); Adoption & Children Act 2002, c. 38, § 46. (Eng.); LOWE & DOUGLAS, *supra* note 87, at 431.

94. This legislation passed to abrogate *In re M.C.*, in which the California Supreme Court held that the juvenile court erred when it failed to resolve the competing presumptions of three presumed parents (a biological mother, her lesbian partner, and the biological father) such that the child had only two legal parents. S.B. 274, 2013-14 Reg. Sess. (Cal. 2013); *see generally In re* M.C., 123 Cal. Rptr. 3d 856 (Cal. Ct. App. 2011).

> Most children have two parents, but in rare cases, children have more than two people who are that child's parent *in every way* . . . It is the intent of the Legislature that this bill will only apply in the rare case where a child *truly* has more than two parents.[95]

Hence, the courts do not simply recognize multiparents, they regulate them and have wide discretion over the decision whether to confer parental status or not. Unlike the English legislation, it is not possible for the holders of parenthood status to agree to the allocation of parental responsibilities to other individuals. These individuals can partake in the parenting enterprise, but their relationship with the children will receive limited legal protection at best.[96] Therefore, California is a vivid example of jurisdictions that acknowledges only egalitarian multiparental families, in which all parents have the same legal parenthood status.

There are several disadvantages to this form of regulation. First, as the regulation of multiparents pivots on the courts' application and interpretation of the term 'detrimental' in Section 7612(c) of the California Family Code, it is possible that such interpretation will be very strict and narrow, making the allocation of legal status to multiparental families all but impossible.[97] Second, if Bill 274's approach is adopted, conferring parental status on multiparents may only be possible if the adults fit into the ideal of a heteronormative pattern of parenthood. In this sense, multiparents will be awarded parental status only if they already share the parenting equally, live in the same house, etc.[98] Future relationships, or non heteronormative

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95. *See Cal. S.B. 274* (emphasis added).

96. *Why Just Two?*, *supra* note 5, at 325; Paula Roach, *Parent-Child Relationship Trumps Biology: California's Definition of Parent in the Context of Same-Sex Relationships*, 43 CAL. W.L. REV. 235, 241 (2006); Michele Sacks Lowenstein and Elizabeth M. Brown, *Step Parent Child Custody Rights*, LOWENSTEIN BROWN (2015), www.lowensteinbrown.com/step-parent-rights-child-custody.php (last visited Apr. 25, 2016).

97. Several cases suggest that the Californian courts might be heading toward a narrow interpretation, according to which only those situations in which a parental relationship is already formed, either in the form of psychological attachment or of functional care, it will be detrimental for the child that more than two parents will be recognized as such. *See* Martinez v. Vaziri, 246 Cal. App. 4th 373, 387-89 (2016); *In re* Alexander P., 1 Cal. App. 5th 1262, 1283-84 (2016); *In re* Donovan L. v. Shannon L., No. D068304, 2016 Cal. App. 4th LEXIS 105, *12 (Feb. 11, 2016); *In re* D.G. v. F.G., No. B258378, 2015 Cal. App. Unpub. LEXIS 2414, *6 (Apr. 16, 2015). However, it remains to be seen whether the courts will adopt this approach or diverge from it.

98. Notably, one court mentioned that an individual does not have to live with the

relationships, might not be given legal protection. Such an approach does not accommodate all types of multiparental families. For instance, it is unclear whether a stepparent will be awarded parenthood status alongside the "original" parents, as it is hard to say that stepparents fit the meaning of "rare cases" described in the Bill. It could also be argued they are not "the child's parents in every way". Perhaps this could only occur when the child has three genetic or biological parents. Similarly, it is unclear whether secondary parenting will be perceived as fulfilling the requirement of being the child's parent in every way, or that only primary parenting could qualify.

A third example of a jurisdiction that legally acknowledges multiparents is British Columbia. In the context of conferring parenthood status, it seems that British Columbia has gone even further than California as it allocates parental statuses based on parental agreements and hence recognizes multiparents rather than regulating them. If there is a written agreement that is made before the child is conceived through ART, then the parenthood of all parties to such agreement will be recognized.[99] British Columbia recognizes multiparental relationships that have not yet been constituted. There is no requirement of psychological attachment, or actual parental care. Rather, conferring parental status hinges purely on the intentions of the parents. Therefore, on a spectrum varying from pure recognition of multiparents without any discretion on the part of the state, to strictly regulating multiparents with ultimate discretion to the state, British Columbia is closer to the former and California is closer to the latter.

Nonetheless, British Columbia is closer than England to the regulating end of the spectrum in regards to allocation of parental responsibilities. In general, parental responsibilities are only allocated to guardians, and guardians are generally only parents with recognized parenthood.[100] However, a person can become a child's guardian, and thus gain parental responsibilities, if she is the child's parent or by means of a court order.[101] It is not possible to become a guardian by agreement unless such agreement is concluded between already recognized parents.[102] In other words, there is a possibility to have more than two individuals with parental responsibilities simultaneously, but it is relatively heavily regulated.

It is important to point out the advantages arising in this context. Recognition of multiparents is possible for both hierarchal and egalitarian

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child to be considered as a parent. *See In re Alexander P.*, 1 Cal. App. 5th at 1280.

99. Family Law Act, S.B.C. 2011, c. 25 § 30 (Can.).

100. *Id.* §§ 39-40(2).

101. *Id.* §§ 50-51.

102. *Id.* § 50.

multiparental family structures, although it is done via two separate legal means. Full parenthood, with registration of that status in an official registry, is possible only for multiparents who signed an agreement prior to the child's conception, and the conception was achieved through ART. Conversely, allocation of parental rights without parental status is achieved via guardianship. Notably, the value of this status is debatable, as the scope of parental responsibilities could be limited by the guardians or the court.[103]

Yet, there is one main disadvantage to the British Columbia model. The requirements for recognition of parenthood – a written agreement, prior to conception, through ART – are too strict to cover all the instances in which multiparenting can occur. For example, not all co-parenting agreements are written,[104] nor are all of these arrangements "executed" via ART. Putting it bluntly, some may prefer using a cup and syringe in their home,[105] without understanding the legal implication of this form of insemination. Hence, in the British Columbia model there was a clear choice of form over substance.

As the above-mentioned examples show, while the concepts of parentage, parenthood, and parental responsibilities have traditionally identified only two parents, there is a growing trend of allocation of parental status to more than two adults. Furthermore, it seems that although the treatment of multiparents varies from one jurisdiction to the next, from an empirical standpoint the allocation of parental responsibilities to more than two individuals is far more common[106] than an explicit recognition of multiparents who have equal parenthood status.[107] Moreover, in most cases in which multiparents were recognized, parental responsibilities were not allocated equally; there were the primary parents with full parental responsibilities and legally recognized parenthood, and secondary parents with limited responsibilities.[108]

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103. *Id.* §§ 44–45.

104. *See, e.g., Re* D (contact and parental responsibility: lesbian mothers and known father) [2006] EWCA (Fam) Civ 285 (Eng.); A v. B and Another [2012] EWCA Civ 285 (Eng.); *Re* WB (children) (contact) [2011] EWHC (Fam) 3431 (Eng.).

105. Mali Kempner, *Children Under Contract*, (2012, 04:48), reshet.tv/Shows/Hasipur/videomarklist,200555 (last visited Feb. 19, 2016).

106. *See supra* notes 79–82 (referencing the case in England, Israel, Louisiana and Pennsylvania).

107. *See* Brinkman, *supra* note 83; Brinkman, *supra* note 84 (noting the Miami ruling recognized three adults as having the same parenthood status, but not the same rights and responsibilities, whereas in Ontario and California full equal recognition was made possible).

108. *See supra* notes 81–83.

VI. RECOGNITION VS. REGULATION: SUGGESTION FOR NORMATIVE GUIDELINES

In those jurisdictions where multiparents are legally acknowledged, the child's best interests are the leading consideration when allocating parental status. Yet, it is far too ambiguous to act as sole guiding principle. That said, a bright-line rule should be avoided while striving to accommodate multiparental families, as it will ultimately lead to non-recognition of some of these family structures. Therefore, the question remains – what should be the criteria for the recognition of multiparents?

Katharine Bartlett argues that multiparents should be recognized if: (a) the parents are not married; (b) they initiate the relationship out of the child's best interests; and (c) they fulfil the functional and psychological roles of parents.[109] Her approach revolves more around the regulation of multiparental family structures than simply their recognition. Bartlett supports legal acknowledgement of multiparents, but only for those who fit her criteria. If this approach was adopted, a married lesbian couple could not be awarded parental status alongside the sperm donor, even if they intended the latter to take an equal parental role. Thus, Bartlett's approach fails to capture all multiparental family structures.

Similarly, Alison Young argues that multiparents should have legal status, regardless of their marital status, but that parents must be divided into primary and secondary caretakers.[110] This means that one or two primary caretakers will have parenthood status and full parental responsibilities, while the secondary caretakers will have only limited parental responsibilities.[111] Hence, Young's approach allows for more multiparental family structures to be acknowledged than Bartlett's. However, the distinction between primary and secondary carers is problematic. First, it ignores family structures, in which the division of parental responsibilities is intentionally unequal. Second, it echoes the gendered flaws of the

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109. *See Rethinking Parenthood*, *supra* note 5, at 944, 946, 948.

110. Alison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER, SOC. POL'Y & L. 505, 515-18 (1998). A similar argument is made by Jane Carbone and Naomi Cahn, who claim that there should be a presumption for a hierarchal multiparental family model that could be rebutted if there is a pre-birth agreement to have equal status coupled with post-birth equal sharing of child-raring burdens June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 46-7 (2017).

111. Similar approaches, which support recognition of multiparents only if a hierarchy of parental rights and responsibilities exist, have been argued by the following: Kavanagh *supra* note 50, at 95, 114-17; *Bionormativity*, *supra* note 5, at 655; Kessler, *supra* note 56, at 74-75; *Why Just Two?*, *supra* note 5, at 312-13, 334-35.

heterosexual family structure, in which women are the primary carers and men are the secondary carers.[112] Third, even if there are primary and secondary carers, it does not mean that their rights and obligations should be different — as is the case in heteronormative family structures.

The difficulties arising from a strictly hierarchal approach have led some scholars to suggest that we should strive to identify the family structure without conforming it to a specific ideal.[113] By acknowledging both hierarchal and egalitarian multiparental family structures, the law could accommodate the wide range of multiparental families, thus ensuring equality, autonomy, and the child's best interests. Therefore, it is necessary and warranted that the approach through which parental status is allocated should be able to cater for the needs of the entire spectrum of multiparental families. Thus, there should be no *a-priori* restriction on the form and substance of the multiparental family.

Furthermore, examining the five approaches to the allocation of parental status suggests that only the intention-based approach can correctly capture all types of multiparental families. The marital status approach and the genetic/biological approaches for allocation of parental status are out of sync with current social realities and medical advances. Considering the vast numbers of children who are born out of wedlock, and the fact that not all couples can (or want to) marry, relying solely on the marital presumption seems unpractical and discriminative.[114] Furthermore, ART and adoption illustrate that the fact that a genetic or biological connection exists between an individual and a child is not sufficient or necessary for the determination of parenthood and parental responsibilities.[115] This does not mean genetics and biology should have no role at all, but in the context of multiparents they should not be the ultimate criteria.

Similarly, the functional and psychological approaches for the allocation of parenthood and parental rights provide less stability and predictability for parents and children due to their confined nature. Functional and psychological parenthood can only be established post-birth and after a significant period of time.[116] Moreover, under these approaches the

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112. *See* Appleton, *supra* note 27, at 65-67; Dowd 2007, *supra* note 60, at 235-36; Murray, *supra* note 48, at 453.

113. *See* Appleton, *supra* note 27, at 58-59; Dowd 2007, *supra* note 60, at 246-47.

114. *See, e.g., Response: And Baby Makes*, *supra* note 27, at 2048.

115. *See Id.* at 2048-49.

116. *In re* Thomas S. v. Robin Y., 618 N.Y.S.2d 356, 362 (N.Y. App. Div. 1994), app. dismissed, 86 N.Y.2d 779 (1995); Storrow, *supra* note 22, at 640; *Applying Intent-Based Parentage*, *supra* note 26, at 437-38.

relationship with a legally unrecognized parent can be severed by the legally recognized parent, thus undermining his or her legal standing in the eyes of the courts and compromising the child's best interests.[117] This is especially true for multiparental families, in which not all intended parents necessarily share the same functions or have equal psychological attachment with the children.[118] Without giving effect to the multiparents' intentions, non-recognized parents are at risk of losing their parental status both by state intervention and in cases where the relationship with the legally recognized parents becomes unsettled.[119]

Conversely, the intention-based approach can capture the various categories of relationships that are characteristic of multiparental family structures.[120] It can capture both pre- and post-birth intent,[121] and it is not limited to a set number of parents, or to a strict hierarchal or egalitarian family structures. Additionally, by overlooking the intent of the individuals who are acting as parents, a different family structure is imposed on them. This imposition infringes on the family's autonomy, and in some regards their privacy, since the family becomes a matter of public debate, where not just the best interests of family members are considered but also societal interests.[122] Hence, the family members' dignity is infringed, as the family structure is condemned to be unrecognized by the law and therefore perceived as illegitimate by society.[123] Consequently, multiparental families are not only devoid of rights, they are deprived of honor and respect. Therefore, the intention-based approach provides better protection to the

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117. Robert E. Rains, *Three Parents? Jacob v. Shultz-Jacob, 923 A.2d 473, 2007 Pa Super Lexis 957 (Pa Super 2007)*, 20 DENNING L.J. 197, 207 (2008).

118. Kinsey, *supra* note 8, at 336-39.

119. *See* cases cited *supra* note 74.

120. Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107, 110, 137 (2014).

121. *Applying Intent-Based Parentage*, *supra* note 26, at 437-39.

122. *See* Zvi Triger, *Introducing the Political Family: A New Road Map for Critical Family Law*, 13(1) THEORETICAL INQUIRIES L. 361, 374-75 (2012). *Contra* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. & REF. 835, 835 (1984) (criticizing privacy as a justification for non-intervention).

123. MAX RHEINSTEIN, *The Family and the Law*, *in* 4 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE FAMILY LAW 13 (2004); Glendon, *supra* note 20, at 9-10; Marjorie Maguire Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 299-301 (1990); Jonathan Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 388-89 (1991).

family members' dignity and autonomy, and consequently the child's best interests,[124] notwithstanding the fact that it provides better legal certainty in the determination of allocation of parental status.

Yet, some might criticize the intention-based approach as not being clearly structured, and thus it is open to different interpretations by the courts. Subsequently, it could be argued that the intention-based approach will fail to provide sufficient predictability and security for multiparental families.[125] In this respect the genetic/biological approaches and the marital presumption approach are both clearer and more decisive. Still, due to the many possible variations of multiparental families, an open and flexible norm is more adequate than a strict, bright-line rule. Moreover, the ability to identify intentions – be that by means of a written contract, implied contract, or other methods of deduction – makes an intention-based approach not as vague as can be imagined on first sight.

Another argument that has been made against the application of the intention-based approach is that the courts should refuse to enforce parenting contracts due to public policy considerations.[126] The argument is that parental status should not be viewed as a commodity that can be negotiated and conferred via agreements,[127] and that non-recognition of such agreements can prevent cases in which fathers are trying to relinquish their parental responsibilities.[128] Considering that in most families there is a

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124. Bamforth, *supra* note 74, at 55-58; Goodman, *supra* note 59, at 36; Hill, *supra* note 123, at 364, 403-04; Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465, 465 (2016); Nancy Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 L. & CONTEMP. PROBS. 195, 220 (2014).

125. Appleton, *supra* note 27, at 54; Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54(1) U. CHI. L. REV. 1, 11-21 (1987); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB., 226, 260 (1975); Storrow, *supra* note 22, at 639-40.

126. *See* Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1050 (2015).

127. Similar arguments were made in the context of adoption and surrogacy. *See* Elizabeth S. Anderson, *Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales*, 8 HEALTH CARE ANALYSIS, 19 (2000); *China, and Children as a Commodity*, L.A. TIMES (Jan. 31, 2010), http://articles.latimes.com/2010/jan/31/opinion/la-ed-china31-2010jan31; Geoffrey York, *Profit-Driven Adoptions Turn Children into a Commodity*, GLOBE & MAIL (May 29, 2012), www.theglobeandmail.com/news/world/profit-driven-adoptions-turn-children-into-a-commodity/article4217172/.

128. Budnick v. Silverman, 805 So. 2d 1112, 1113 (Fla. Dist. Ct. App. 2002); Ferguson v. McKiernan, 855 A.2d 121, 122-23 (Pa. 2002); *Bionormativity*, *supra* note

power imbalance between the family members,[129] parental agreements could lead to less than satisfactory results.

Nonetheless, in cases where the intention of the multiparents was at the heart of the dispute, the courts have encouraged the use of parental agreements as a means to ensure that both the parties and the courts have a better understanding of the relationship at hand.[130] Furthermore, in ART several courts and legislatures have given effect to such agreements,[131] and in fact many forms of ART will be rendered impossible if public policy was indeed to rule out the possibility of using parental agreements. For instance, sperm donors will necessarily be considered as the fathers, and surrogates as the mothers. Accordingly, the more concerning matter of public policy is the prevention of an unbridgeable gap between those legally recognized as parents and those who are actually fulfilling this role. In addition, contracts regarding parenthood and parental rights are not the only contracts that are enforceable in the context of family law. Property division agreements are held valid and enforced in some jurisdictions.[132] Indeed, contract law and

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5, at 701-02. *But see* Joseph Cullen Ayer, *Legitimacy and Marriage*, 16(1) HARV. L. REV. 22 (1902).

129. Murray, *supra* note 48, at 445.

130. *Re* D (contact and parental responsibility: lesbian mothers and known father) [2006] EWCA (Civ) 285 (Fam) (Eng.); A v. B and Another [2012] EWCA (Civ) 285 (Eng.); *Re* WB (children) (contact) [2011] EWHC 3431 (Fam) (Eng.).

131. They recognized, for example, that a sperm donor only provides the genetic material, and has no other legal connection with the child. *See, e.g.,* Family Law Act, S.B.C. 2011, c. 25 § 24 (Can.); Family Law Act, S.A. 2003, c. F-4.5 § 7 (Can.); HFEA § 35-41 (Eng.); Quebec Civil Code, S.Q. 1991 § 538.2 (Que.). Furthermore, in a number of common law countries, and in the Netherlands, allocation of parental responsibilities by agreement is allowed regardless of sex and number of other individuals who have those responsibilities. *See, e.g.,* Family Law Act 1975 § 61D(s), 64C (Austl.); *In re* Mark: an application relating to parental responsibilities, [2003] FamCA 822 [Austl.]; Children Act 1989, c. 41, § 2, 4A (Eng.); Civil Partnership Act 2004 , c. 33, § 75(2) (Eng.); Care of Children Act (2004) § 23 (N.Z.). However, Denmark, Finland, Iceland, Norway and Sweden, for example, do not give effect to such agreements. NORDFORSK, LEGISLATION ON BIOTECHNOLOGY IN THE NORDIC COUNTRIES – AN OVERVIEW 7-8 (2014).

132. *See, e.g.*, Family Law Act 1975 § 90A-C (Austl); Family Law Act, R.S.O. 1990, c F.3, § 52 (Can.); Property Relations Act 5773-1973 (Isr.); *Hall v. Hall*, 222 Cal. App. 3d 578, 578 (Cal. 1990). However, not all jurisdictions enforce these agreements. For example, in England they cannot be enforced unless a court makes an order that reflect the terms of the agreement; and this will not be done if the agreement is unfair. *Radmacher v. Granatino* [2010] UKSC 42, [2011] 1 AC 534 (Eng.). Nonetheless, the Law Commission has recommended that legislation be introduced to make pre-nuptial and post-nuptial agreements enforceable. THE LAW COMMISSION, MATRIMONIAL PROPERTY, NEEDS AND AGREEMENTS 27 (2014).

notions derived therefrom are used in family law, and such use should not be disqualified *a priori* in the context of parental recognition.

It should be noted that parental agreements do not apply contract law notions as if they are pure commercial transactions. There are considerations that are unique to the family law context that influence contractual obligations, namely the child's best interests.[133] It is this principle that determines how notions such as enforcement, mistake, deception and withdrawal should apply – if at all. For example, prior to conception it seems unreasonable to enforce a parenting agreement, forcing an individual to provide genetic material or carry a child.[134] However, post-birth it might be reasonable to enforce a parenting agreement. This could result in paying child support, visitation rights, or even recognition of parenthood and full parental responsibilities, depending on the particular circumstances. Similarly, post-birth an individual cannot unilaterally withdraw from the parenting agreement, thus causing the loss of her or any other individual's parental status. The intentions of the parents culminate in the conception of the child, and in this sense the conception makes the agreement binding not just between the intended parents but also, and more importantly, between them and the child.

Considering all of the above-mentioned arguments, the intention-based approach is preferable. It promotes dignity and autonomy by preventing the imposition of an ideal family structure on an existing family unit. Moreover, it provides greater security and predictability to the family members, as they can trust that their intentions will be respected and awarded legal meaning. Lastly, such an approach is better equipped to deal with the realities of contemporary society, in which there is no singular family structure. The adoption of an intention-based approach is, in a sense, an "organic" development, stemming from the shift from genetics, biology, and marriage as the main indicators for parenthood and parental responsibilities.[135] There may very well still be the possibility that more than two individuals will claim exclusive parental rights,[136] and the court could decide whether such rights should be awarded exclusively to one, two, three or more individuals. However, this does not mean that in each and every family there will be more than two parents.

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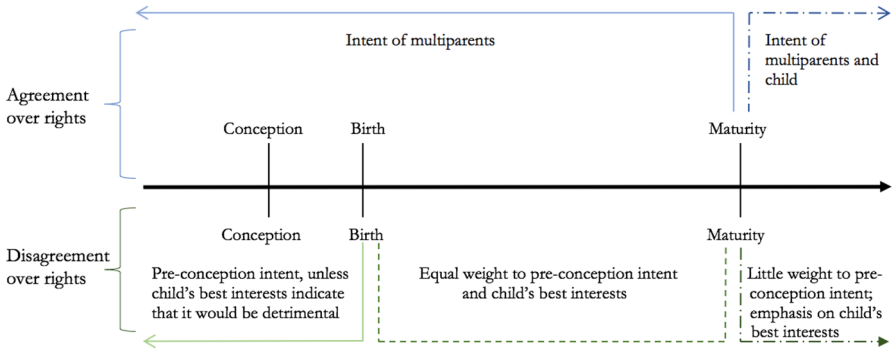
133. Zalesne, *supra* note 126, at 1081.

134. *See, e.g.,* HCJ 4077/12 Plonit v. Minister of Health (Versa, 2013) (Isr.) (noting the specific decisions of Justice Robinstein in paragraphs 48-52 and Justice Amit in paragraphs 14-26).

135. Kinsey, *supra* note 8, at 306-07.

136. *Id.* at 333-34.

Note, the allocation of parental status should be addressed differently depending on two factors: First, is there agreement or disagreement among the multiparents in regard to each-other's parental status; and second, the timing in which the allocation of parental status is requested – pre-birth, post-birth, or post a stage of maturity, in which the child is mature enough to express her opinion. The figure below clarifies how these two factors influence the allocation of parental status.



It is reasonable that as long as there is agreement between the family members about the parental statuses, the state's intervention should be minimal. Pre-conception, the intent of the multiparents should determine each parent's status, rights, and obligations. In this scenario, individuals can both opt in or out of parental status. Take, for example, a situation in which there is a sperm donor and a lesbian couple. Pre-conception, the couple and donor could agree on any form of division of status, rights, and obligations. The family model could be egalitarian, hierarchal, and there might even be situation in which both the sperm donor and the non-genetic mother have no parental standing. Similarly, post-conception but pre-maturity, it is possible for an additional individual to opt-in to multiparenthood. Again, the state should not regulate multiparental families, but merely recognize them. This is the case as maintaining minimal intervention will promote the multiparental family members' equality, preserve their autonomy, and ensure the child's best interests. When the child reaches maturity and additional individuals wish to opt-in to multiparenthood, her intentions must also be considered. However, if some of the multiparents wish to opt-out of their status at any point past conception, the state must regulate this scenario, even if there is agreement among the family members. Unlike opting in to multiparenthood, opting-out could risk the child's best interests. Therefore, it cannot simply be a matter left at the hands of the family members. This notion is not unfamiliar. When individuals wish to give a child up for

adoption, change custody arrangements or child support, the state regulates the process to ensure the child's best interests are protected. These are instances of single or dual parents opting-out, and states are already experienced in dealing with these situations. Therefore, there is nothing novel in applying the same logic and treatment to the multiparental family.

The story is quite different if there is disagreement about the parental statuses. Under these circumstances, the child's best interests might be at risk, thus state intervention and regulation may become necessary and justified.[137] That said, such intervention and regulation is not unique to multiparental families. Indeed, whenever there is disagreement about parental status courts intervene to protect the child's best interests – whether it is a "traditional" family structures or not.[138]

That said, it would be wise to apply a somewhat different treatment to disputes that occur pre-birth, post-birth, and post-maturity. Pre-birth, the main consideration should be the multiparents' pre-conception intent, and the child's bests interests should be a secondary factor. The reason is twofold. First, pre-*conception* intent is preferable to pre-*birth* intent. By choosing the former over the latter it becomes possible to identify who intended – explicitly or implicitly – to bring the child into the world. Hence, it is justified to bind these individuals according to their initial intent, as it will ensure the child's best interests as well as equality between the multiparents. The justification is not as strong when it comes to pre-birth intent, as in such a case the individuals who were not a part of the conception process are not on equal footing with those who were.[139]

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137. *Cf.* Ferguson v. McKiernan, 855 A.2d 121, 123 (Pa. 2004).

138. Scherpe, *supra* note 18, at 211 (noting that state regulation is intended to protect the weaker family members, primarily the child, but also other parents. However, by doing so it infringes the family members' autonomy. It has been suggested that in such instances it will be justified infringing the right to autonomy if the need to protect the weaker party is significantly stronger).

139. Consider the following examples. In an open adoption multiparental family structure there are the genetic and biological mother, and two adoptive parents. In most cases, the genetic and biological mother has pre-conception intent, while the adoptive parents do not. If before the child is born the mother changes her mind, and decides not to give the child up for adoption, it hardly seems justified to compel her to do so. The adoptive parents, in such a scenario, have less of a standing against the genetic and biological mother, as they do not have pre-conception intent. In contrast, imagine a multiparental family structure that is established through ART. This family includes a genetic father, his spouse, and a biological mother, while the egg donor is not intended to be the genetic mother. Under this description, all three have pre-conception intent even though the spouse has no genetic or biological link to the child, and it therefore justified to impose on all three the parental status they intended to hold.

Second, the multiparents' pre-conception intent should be adhered to only to the extent that such adherence will not be detrimental to the child, in which case the child's best interests should guide the courts in the allocation of parental status. Note, from the perspective of the child and her best interests, the family unit has not crystallized yet; the child has not become dependent upon or attached to any individuals. In these cases it is important to protect the weaker party without forcing a foreign ideology on the family unit by fitting it in a family structure that resembles a "traditional" structure.[140] This could be done even if the resulting family unit is composed of a single parent, same-sex parents, or multiparents.

Conversely, post-birth but pre-maturity, the child's best interests vary substantially, since she might have grown attached to (or dependent on) all the individuals who fulfilled parental roles during her upbringing. Hence, there is greater justification to focus equally on the multiparents' pre-conception intent as well as the child's best interests.

Last, in post-maturity the weight of the multiparents' pre-conception intent should be small, and the emphasis should be placed on the child's best interests. When disagreement about parental status arises in this stage of a child's life, after many years of parental care, the initial pre-conception intentions seem almost irrelevant. Rather, it is the actual parenting that took place, as well as the emotional bonds between the family members, should guide the courts in determining the parental status. At this stage, the courts need to consider not only the multiparents conception of the family structure, but the child's understanding of it too.

Following the suggestions outlined above will allow courts and legislatures to capture, and cater for, the five categories of multiparental families: ART, co-parenting, stepfamilies, open adoptions, and kinship carers. This is true regardless to these families' intent on being egalitarian or hierarchal. As such, these suggestions provide extensive protection to both the integrity of the family unit and the child's best interests.

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140. Coupet, *supra* note 8, at 649 (explaining such a balance of contrasting rights already exists in ART where, for instance, a sperm donor or a surrogate mother are not considered parents although they have a genetic or biological connection to the child); *e.g.*, N.H. REV. STAT. ANN. § 168-B:12 (2015); Family Law Act B.C. § 24; Family Law Act, S.A. 2003, c. F-4.5 § 7 (Can.); Québec Civil Code, S.Q. 1991, c. CCQ, § 538.2 (Can.); Assisted Human Reproduction Act, S.C. 2004, c. 2, § 3 (Can.); Children's Act 2005, c. 19 § 297(1) (S. Afr.); Surrogacy Arrangements Act, 5756-1996 §§ 10-12 (Isr.); Family Code of Ukraine 2002 § 123(3) (Ukr.); *see* HFEA §§ 35-41 (Eng.). *Compare* HFEA § 33 (Eng.), *with* NORDFORSK, *supra* note 130, at 8.

VII. CONCLUSION

This paper analyzed the legal attitudes regarding recognition and regulation of multiparents, and suggested a new approach to this issue. It was illustrated that some courts and legislatures have begun allocating parental statuses to multiparents. Yet, conferring parental status to multiparents could be described as a spectrum – from merely recognizing the social label of parents, through the allocation of parental responsibilities, to a recognition of parenthood status. Arguments opposing conferring legal status to multiparents were confronted and dismissed. A new approach to the recognition of multiparents was suggested, which is guided by the multiparents' intent and the child's best interests. Particularly, it was suggested that recognition of multiparents should not be confined to any particular family structure, but rather it should provide for a spectrum of recognition and regulation in order to accommodate the various forms of multiparental families and thus guarantee the child's best interests.

The nexus between changing social norms and legal advances is strong. Changing social norms necessitate legal advances;[141] and legal advances have an impact on social norms and institutions[142] such as the family, even if this impact is somewhat limited. The recognition of multiparental family structures is a good example of this nexus. The growing number of multiparental families has led to the unavoidable need for their recognition, and at the same time such legal recognition may encourage multiparental families to form.

This paper demonstrates that the allocation of legal parental status to multiparents is an expanding phenomenon, emerging in different countries and continents, promoting social and normative change while protecting the most fundamental and influential aspect of every person – family life. Only time will tell if, when, and how other jurisdictions will join this trend.[143] It

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141. *See* Glendon, *supra* note 21, at 4; Haim Abraham, *Parenting, Surrogacy, and the State*, 9 HEBREW U. J. OF LEGIS. 171, 200 (2017).

142. Eden Sarid, *Don't Be A Drag, Just Be A Queen—How Drag Queens Protect their Intellectual Property without Law*, 10 FIU L. Rev., 133, 179 (2014).

143. Recently, Ontario passed a bill that allows for the recognition of up to four multiparents from birth without a court order, if they have signed a pre-conception parentage agreement. All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), S.O. 2016 c. 23 § 9-10 (Can.). Furthermore, if the child was conceived through surrogacy a court can declare she has more than four multiparents. *Id.* § 11. Soon, Australia might also recognize multiparents, as the Family Law Council advised the federal government to recognize more than two legal parents. *See generally* FAMILY LAW COUNCIL, REPORT ON PARENTAGE AND THE FAMILY LAW ACT (2013). The Netherlands might also be joining this trend. A recent report submitted to the

is already clear that multiparental families have the potential to change how we think about what it means to be a family.

Netherlands' Minister of Justice advocates conferring parental status to up to four legal parents, who together form a maximum of two separate households. CHILDREN SHOULD BE ABLE TO HAVE UP TO FOUR LEGAL PARENTS: REPORT DUTCHNEWS.NL (2016), www.dutchnews.nl/news/archives/2016/12/dutch-family-law-needs-overhauling-to-reflect-multi-parent-families-report (last visited Oct. 24, 2017).