

TOO MANY COOKS IN THE KITCHEN?: THE
POTENTIAL CONCERNS OF FINDING MORE
PARENTS AND FEWER LEGAL STRANGERS
IN CALIFORNIA’S RECENTLY-
PROPOSED MULTIPLE-PARENTS BILL

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“When it comes to parenting, three’s a crowd.”¹

INTRODUCTION

While “family life” remains an important source of joy for the vast majority of Americans,² the shape and structure of American family units have changed rapidly such that many American families today would have been almost inconceivable even fifty years ago.³ Just over one-third of Americans say that the institution of marriage is becom-

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1 Elizabeth Marquardt & John Culhane, *California Should Not Pass “Multiple Parents” Bill*, HUFFPOST LOS ANGELES (Aug. 17, 2012), http://www.huffingtonpost.com/elizabeth-marquardt/multiple-parents-bill_b_1791709.html.

2 98% of Americans say that family is, if not *the* most important element of their lives, at least one of the most important. *The Decline of Marriage and Rise of New Families*, PEW RESEARCH CENTER (Nov. 18, 2010) [hereinafter *Decline of Marriage Research*], <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/> (specifically noting that 76% say family is the most important element and that 22% say family is one of the most important elements of life).

3 *Id.*; see *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality opinion); Robin Fretwell Wilson, *Introduction*, in *RECONCEIVING THE FAMILY I* (Robin Fretwell Wilson ed., 2006) (“The family has undergone almost revolutionary reconfigurations over the past generation. . . . [T]he pace of these changes has become almost frenetic.”).

ing obsolete, and increasingly fewer Americans think that the traditional family structure of one father and one mother living together with their biological children is worth pursuing.⁴ As of 2008, only 52% of Americans adults were married.⁵ A large majority of Americans no longer think of marriage as the only way to form a new family—86% of Americans identify a single parent and child as a family, 80% identify an unmarried couple living together with a child as a family, and 63% agree that a gay or lesbian couple raising a child together constitutes a family.⁶ Families, once established, are becoming increasingly more fluid—more than 40% of American adults have at least one step-relative in their family.⁷

In this developing cultural landscape, fewer women feel the need to wait until they are married to bear children,⁸ and, as of 2010, roughly 27% of American fathers lived apart from at least one of their children.⁹ Multi-partner fertility (having children with more than one partner) has become more prevalent, and accordingly children live in an increasingly diverse array of households.¹⁰

While family units come in a variety of shapes and sizes, there are a number of ways for a child to enter the world as well. Individuals or couples wishing to have a child have many options open to them,

4 While 61% of Americans would agree that “a child needs both mother and father to grow up happily,” only 43% say that cohabiting outside of marriage, unmarried couples raising children, and more gay couples raising children are “bad for society.” *Decline of Marriage Research*, *supra* note 2.

5 *Id.*

6 *Id.* These numbers are likely to increase in the next ten to twenty years—Americans sixty-five and older are more likely to say that those living in non-traditional arrangements are not families, while younger adults tend to be more open to alternative arrangements. *Id.*

7 *A Portrait of Stepfamilies*, PEW RESEARCH CENTER (Jan. 13, 2011), <http://www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies/>.

8 In 2008, 41% of babies were born to mothers who were unmarried. *Decline of Marriage Research*, *supra* note 2. However, 61% of Americans still say that the trend toward single motherhood without a male partner to assist them in raising their children is a bad development for society. *Id.* Adults of the Millennial Generation particularly value parenthood far more than they value marriage—52% of this age group say that being a good parent is “one of the most important things” in life, while only 30% say that having a successful marriage is. Wendy Wang & Paul Taylor, *For Millennials, Parenthood Trumps Marriage*, PEW RESEARCH CENTER (Mar. 9, 2011), <http://www.pewsocialtrends.org/2011/03/09/for-millennials-parenthood-trumps-marriage/>.

9 Gretchen Livingston & Kim Parker, *A Tale of Two Fathers: More Are Active, but More Are Absent*, PEW RESEARCH CENTER (June 15, 2011), <http://www.pewsocialtrends.org/2011/06/15/a-tale-of-two-fathers/>. These fathers have varying degrees of contact with their children. *Id.*

10 Almost 20% of biological fathers have reportedly fathered children with more than one woman. *Id.*

including purchasing donor eggs or sperm, arranging for a traditional or gestational surrogate, procuring embryo donations, or some combination thereof.¹¹ An estimated 30,000–60,000 children are conceived in the United States annually through sperm donations.¹² Over 1% of all children born in the United States every year are conceived using artificial reproductive technologies, which include methods described above as well as methods in which eggs are removed from a woman's ovaries, combined with sperm in a laboratory, and then returned to that woman or another host.¹³

In cases where an egg from one person is combined with the sperm from another and implanted into a surrogate, with the intention that the resulting child will be placed with an entirely different set of parents, what a court should do when the surrogate wants to keep the baby¹⁴ or when one or both of the intended parents back out¹⁵ can be an entirely open question. Determinations of parenthood and appropriate custodial arrangements can also be difficult when children are conceived “the natural way.” Courts routinely face situations in which a married woman has a child by another man,¹⁶ or where a lesbian woman and a male friend conceive with the intention that she raise the child with her partner (with or without the man's involvement).¹⁷

11 See Elizabeth Marquardt et al., *My Daddy's Name Is Donor: A New Study of Young Adults Conceived Through Sperm Donation*, INST. FOR AM. VALUES (2010), available at http://www.familyscholars.org/assets/Donor_FINAL.pdf (describing the developing international artificial insemination industry).

12 *Id.*

13 *What Is Assisted Reproductive Technology?*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/art/> (last visited Jan. Feb. 7, 2013).

14 See Stephanie Saul, *Building a Baby, with Few Ground Rules*, N.Y. TIMES, Dec. 12, 2009, at A1, available at <http://www.nytimes.com/2009/12/13/us/13surrogacy.html?pagewanted=all> (describing a situation in which an intended mother selected an egg donor, sperm donor, and gestational surrogate and welcomed twins home when they were born, only to be required to relinquish them one month later after the surrogate mother, who had learned of the intended mother's mental illness, obtained a court order to retrieve them).

15 See *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (treating both intended parents as natural parents when the intended father filed for divorce and alleged there were no children of the marriage six days before the surrogate gave birth to a child genetically unrelated to herself or the intended parents).

16 See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

17 See *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007); Kevin Gray, *Florida Judge Approves Birth Certificate Listing Three Parents*, NBC NEWS (Feb. 7, 2013), http://usnews.nbcnews.com/_news/2013/02/07/16889720-florida-judge-approves-birth-certificate-listing-three-parents?lite (reporting that a Florida judge approved a birth certificate listing three parents where a lesbian couple used the donated sperm of one woman's hair dresser, who then wanted to remain involved in raising the child).

Determining who a child's parents are has been and remains a very important endeavor undertaken by courts, as state law is largely built on a system that prefers parents over non-parents in making custody determinations and confers certain rights and responsibilities only on the very limited number of people that the state recognizes as "parents."¹⁸ Traditionally, this limited number has been two, but some judges have responded to the unique families that come into their courtrooms by increasing that number.

Legislators have considered ways to increase the flexibility that judges have when adjudicating family structures. One such legislator, California State Senator Mark Leno, who was moved by a particularly messy dependency action that turned on the court's determination of a child's parentage,¹⁹ introduced Senate Bill No. 1476 (the "Bill") in early 2012 in an attempt to provide for more equitable outcomes in family court proceedings.²⁰ The Bill was designed to give courts the authority to find that children could, in situations of conflicting presumptions of parenthood, have more than two parents if such a finding would be required to protect the best interests of the child.²¹ In formulating the Bill, Senator Leno relied on movements toward official recognition of multiple parenthood occurring in the statehouses and courthouses of the District of Columbia, Delaware, Maine, and Pennsylvania.²² This Bill was ultimately vetoed by Governor Edmund G. Brown, Jr., in September, 2012,²³ but the issues raised by the Bill are by no means settled. It is likely that a largely similar bill may be passed in the near future given certain proposals in academia and the growing sense among some that judges need more ways to deal with complex family units.

18 See Katharine K. Baker, *Asymmetric Parenthood*, in RECONCEIVING THE FAMILY, *supra* note 3, 121, 127 ("Traditionally, whoever had rights had responsibilities and the only people who had rights and responsibilities were parents."); David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, in RECONCEIVING THE FAMILY, *supra* note 3, 47, 49.

19 See *In re M.C.*, 123 Cal. Rptr. 3d 856 (Ct. App. 2011).

20 S.B. 1476, 2012 Leg., Reg. Sess. (Cal. 2012) [hereinafter *Senate Bill 1476*], available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB1476&search_keywords=.

21 S. JUDICIARY COMM., BILL ANALYSIS, S.B. 1476, 2012 Leg., Reg. Sess., at 3 (Cal. May 8, 2012) [hereinafter *Senate Bill 1476 May 8 Analysis*], available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_cfa_20120507_170523_sen_comm.html.

22 See *infra* Part II.

23 *S.B.-1476 Family Law: Parentage—Status*, CAL. LEGIS. INFO. [hereinafter *Senate Bill 1476 Veto Message*], available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_vt_20120930.html (last visited Mar. 17, 2013).

This Note explores issues surrounding the concept of multiple parenthood, looking closely at Senator Leno's Bill and also the movements in other states cited by Senator Leno for support. It argues that allowing courts to find that a child has more than two parents—with all of the attendant rights and responsibilities of parenthood—raises constitutional concerns as well as very serious practical problems affecting the health and well-being of the child. Part I of the Note examines the relevant legal doctrines informing the issue of parenthood, looking first at the constitutional framework of parenthood, second at presumptions of parenthood that have traditionally provided for determinations of paternity and maternity, and third at other doctrines that have developed to provide rights and responsibilities to those adults other than natural parents (including *in loco parentis*, parenthood by estoppel, de facto parenthood, and third party or grandparent visitation statutes). Part I further introduces the “best interests” standard, state child support systems, and the reasoning behind both, in order to provide background to a discussion of the practical impact of the Bill. Part II then examines how these doctrines have been employed and wielded in the District of Columbia, Delaware, Maine, and Pennsylvania. Part III focuses on California and the Bill, providing an analysis of the Bill's application of the best interests standard, the concept of child support, and the nature of its provision for multiple parents. Part IV examines the likely practical effects of such legislation and suggests that providing for a child to have more than two parents may create unintended negative consequences. The Note concludes that the expansion of rights for one class of people (those seeking parenthood status) results in a decrease in the rights of natural or adoptive parents, ultimately harming the child more than anyone else.

I. RELEVANT LEGAL DOCTRINES

A. *The Constitutional Rights of Families, Parents, and Children*

The “sanctity” of the family unit is “deeply rooted in this Nation's history and tradition.”²⁴ Parents have a fundamental liberty interest in the care, custody, and control of their children; this liberty interest “is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court]” and is protected by the Due Process Clause

24 Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

of the Fourteenth Amendment.²⁵ Parents' fundamental rights include directing the upbringing and education of their children²⁶ and "the right, coupled with the high duty, to recognize and prepare [the child] for additional obligations"²⁷ as well. Recognizing that historically the legal concept of family had some connection to property law, in *Parham v. J.R.*, the Supreme Court squarely rested the modern legal concept of family on the "presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," and, more importantly, that "natural bonds of affection lead parents to act in the best interests of their children."²⁸ Due to these presumptions and the historic respect that the State has had for the integrity of the family unit, so long as a parent is not unfit there is normally no reason for the State to question his or her decisions.²⁹ Parents also have a fundamental right to control with whom their child associates and develops relationships as a derivative of their right to control the child's upbringing.³⁰ Courts cannot infringe on these fundamental parental rights merely because they might think a better decision could have been made.³¹

On a few occasions the Supreme Court has taken up the constitutionality of what it means to be a legally-recognized parent in the first place. While biology plays a major role in the determination of parenthood, it is not conclusive. In *Lehr v. Robertson*, the Court held that biology alone does not necessarily afford a natural parent consti-

25 See *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . .").

26 See *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923); see also *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role . . . is now established beyond debate as an enduring American tradition."); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

27 *Pierce*, 268 U.S. at 535.

28 *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

29 *Troxel*, 530 U.S. at 68–69.

30 *Id.* at 78 (Souter, J., concurring) ("*Meyer's* repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by any party at any time a judge believed he could make a better decision than the objecting parent had done." (footnote omitted) (internal quotation marks omitted)). "The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children . . ." *Id.*

31 *Id.* at 72–73 (plurality opinion).

tutionally-protected rights.³² The Court explained that the “significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring”—an opportunity that must be grasped before it can be enjoyed.³³ Biology alone does not always establish a male’s legal parenthood—in *Michael H. v. Gerald D.*, the Court found that states could have overriding policy interests that justify denying a so-called natural father the right to a parent-child relationship when another man was presumed to be the child’s father.³⁴ The Supreme Court has not defined parenthood in terms of one’s function in the child’s life or intent to be a parent, but an increasing number of state courts fill the gap that was left when the Supreme Court rejected determinations of parenthood by biology alone with theories of functionality and intent.³⁵

The rights of children have received less attention from the Supreme Court than the rights and responsibilities of parents. On one occasion the Court dismissed out of hand the idea that a child might have a right to maintain filial relationships with more than two parents, arguing that whatever the psychological benefit of such arrangements to a child may be, the history and traditions of the

32 *Lehr v. Robertson*, 463 U.S. 248 (1983); see *Stanley v. Illinois*, 405 U.S. 645 (1972).

33 *Lehr*, 463 U.S. at 262.

34 *Michael H. v. Gerald D.*, 491 U.S. 110, 129–30 (1989) (plurality opinion); see *infra* notes 52–54 and accompanying text. However, the question of whether more than two parents can have constitutionally-protected relationships with a child is far from settled, as Justice Brennan noted in his dissenting opinion. *Michael H.*, 491 U.S. at 136 (Brennan, J., dissenting) (“Five members of the Court refuse to foreclose the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child’s conception and birth.” (internal quotation marks omitted)).

35 For a discussion of the concept of functional parenthood, see *infra* Part I.C. Courts generally resort to concepts of intent to determine parenthood only in cases of artificial insemination and surrogacy, most often in the context of same-sex couples. See *supra* notes 14–15 and accompanying text; see also Elizabeth Marquardt, *One Parent or Five: A Global Look at Today’s New Intentional Families*, INST. FOR AM. VALUES (2011), available at <http://www.familyscholars.org/assets/One-Parent-or-Five.pdf> (looking at a variety of “intentional” parenting arrangements between individuals, couples, and even groups of adults). Courts and legislators approach the concept of parenthood by intent with caution and apply it only to aforementioned cases motivated by the obvious policy concern that such a doctrine could facilitate irresponsible sexual activity at the expense of the resulting child. See also Meyer, *supra* note 18 (considering the nature of parenthood as contemplated by the Constitution and concluding that the state is able to constitutionally create certain new parenting roles).

nation do not support the finding of such a constitutional right.³⁶ Yet eleven years later, in his dissent in *Troxel v. Granville*, Justice Stevens suggested that children have liberty interests in established familial structures worthy of constitutional protection.³⁷ Children may have constitutional liberty interests that at times conflict with those of their parents, but the Supreme Court has yet to explore this idea fully.³⁸

Family law largely remains governed by state law with some constitutional parameters. These next Sections examine various doctrines that have been developed and applied in a variety of ways to family structures.

B. Presuming Parenthood: The Uniform Parentage Act and Presumptions in State Law

The presumption of parenthood dates back to the common law, where it operated to presume that the husband of a woman who had given birth was the father of the child.³⁹ Traditionally, the presumption of parenthood only operated to establish paternity; maternity was established by a woman's giving birth. This strong paternal presumption could only be rebutted where there was proof that a husband was sterile or impotent or where the husband had no access to his wife during the relevant period.⁴⁰ The existence of the presumption in state law stems from a policy desiring to promote peace and tranquility in family units by eliminating inquiries into paternity that would be destructive to family integrity and privacy.⁴¹ Because of the degree to

36 *Michael H.*, 491 U.S. at 130–31 (plurality opinion).

37 *Troxel v. Granville*, 530 U.S. 57, 86, 88 (2000) (Stevens, J., dissenting) (“[T]o the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.”).

38 *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004). For extensive discussion of the rights of children and how such a focus could impact a child's relationship with adults, see JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006).

39 *Michael H.*, 491 U.S. at 124 (plurality opinion). “The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child” *Id.* at 119 (quoting *Michael H. v. Gerard D.*, 236 Cal. Rptr. 810, 816 (Cal. Ct. App. 1987)) (internal quotation marks omitted).

40 *See id.* at 124. A husband would conclusively not have had access to his wife if, for example, he was at sea or at war.

41 *See id.* at 120, 124–25. The original policy motivating the presumption was a reluctance to find children illegitimate, but as illegitimacy has become less relevant presumptions are now justified on other grounds. *Id.* at 124–25.

which legislative policy determines presumptions, states have a certain degree of flexibility in determining their presumptions without fear of treading upon constitutional rights.⁴² Presumptions streamline the process of determining a child's parents, remove unnecessary litigation, and allow family units to rely on their arrangements without fear that their relationships will be called into doubt. Moreover, in the vast majority of cases, the presumed parents are indeed the biological parents.

In 1973, the National Conference of Commissioners on Uniform State Laws promulgated the first version of the Uniform Parentage Act (UPA), after which presumptions in many state codes are modeled.⁴³ The UPA was revised twice—first to clarify methods of identifying fathers, and second so that children of unmarried parents would be treated the same as children of married parents.⁴⁴ Under the regime of the UPA and most states,⁴⁵ a parent-child relationship can be established several ways, including by adjudication of a court or by adoption decree.⁴⁶ A woman's parent-child relationship can be established by proof that she gave birth to the child.⁴⁷ A man's parent-child relationship can be established by an effective acknowledgement of paternity or, more commonly, by an un-rebutted presumption of paternity.⁴⁸ A man is presumed to be the father of a child if he was married to the mother and the child was born during the marriage or immediately after the marriage ended, if he married the mother after the birth of the child and then voluntarily asserted paternity, or if, for the first two years of the child's life, he resided with the child and "openly held out the child as his own."⁴⁹

The most current version of the UPA is meant to be gender-neutral, so provisions that pertain to determinations of paternity also apply to determinations of maternity.⁵⁰ In states that have adopted

42 *Id.* at 129–30 (“It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.”).

43 *Bancroft v. Jameson*, 19 A.3d 730, 733 (Del. Fam. Ct. 2010).

44 *Id.* at 734. As noted by the *Bancroft* court, in every round of revisions the UPA continues to focus on two adults entering some form of agreement from the beginning that results in the birth of a child. *Id.* at 739.

45 *See, e.g.*, CAL. FAM. CODE § 7611 (West 2004 & Supp. 2013); COLO. REV. STAT. ANN. § 19-4-105(1)(d) (West 2005 & Supp. 2011); 750 ILL. COMP. STAT. ANN. 45/5(a)(1)–(2) (2003).

46 UNIF. PARENTAGE ACT § 201 (1973) (amended 2002).

47 *Id.* § 201(a)(1).

48 *Id.* § 201(b).

49 *Id.* § 204(a)(3)–(5).

50 *Id.* § 106.

this section of the UPA, this provision is particularly relevant for same-sex couples. Otherwise, “cases involving disputed maternity are extraordinarily rare.”⁵¹

In *Michael H. v. Gerald D.*, the Supreme Court took up the constitutionality of presumptions of parenthood.⁵² In that case, under the existing California statute, a child born to a married woman was presumed to be the child of her husband, despite the fact that a paternity test showed a 98.07% probability that her adulterous lover was the child’s father.⁵³ The Court held that it was constitutional for California to maintain a system of presumptions such that occasionally natural fathers like the one in *Michael H.* would be denied the constitutional right to have a relationship with their child.⁵⁴

The most common way for an adult to gain legal recognition as a parent is through a presumption. Presumptions invite controversy, though, as sometimes multiple presumptions can arise and conflict with one another, resulting in claims of parenthood by more than two people.⁵⁵

C. Other Avenues for Gaining the Rights and Responsibilities Usually Reserved for Parents

Over time, courts and scholars have developed various doctrines that award parental rights or responsibilities to those other than the natural, adoptive, or presumed parents. These doctrines enjoy varying levels of acceptance throughout the fifty states. This Section describes these doctrines, their motivations, and what they accomplish.

1. In Loco Parentis

When a person has *in loco parentis* status, he or she is said to stand in the place of a legal parent. At common law, the doctrine of *in loco*

51 *Id.* § 106 cmt. However, as surrogacy gains in popularity, courts are called upon to resolve maternity disputes with increasing frequency. See *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (resolving a maternity dispute between a husband and wife and the surrogate in whom the couple’s fertilized egg had been implanted against the surrogate).

52 *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion); see *supra* note 36 and accompanying text.

53 *Michael H.*, 491 U.S. at 113–16. Under existing California law blood tests could only be used to rebut a presumption if a motion was made within two years of the child’s birth by either the husband or wife. *Id.* at 115.

54 *Id.* at 129–30.

55 For more on the role of presumptions, see the discussion of *In re M.C.*, *infra* Part III.A.

parentis was historically used in the educational context: the teacher was thought to stand in the place of the parent and was therefore able to punish the child for infractions committed while at school.⁵⁶ The doctrine has since been expanded to parental rights contexts, as courts use it to seek equitable outcomes. One Pennsylvania court has succinctly articulated the *in loco parentis* doctrine:

[A] person may put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. This status . . . embodies two ideas; first, the assumption of a parental status, and second, the discharge of parental duties. The rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child.⁵⁷

Once an *in loco parentis* relationship has been found, a court can confer parental rights and obligations on that party, including visitation rights, the duty of child support, and even the right to custody.⁵⁸ Notably, a court cannot find an *in loco parentis* relationship without intent on the part of the third party to enter into a *parental* relationship—assumption of only a few duties is not enough.⁵⁹

2. Parenthood by Estoppel

The concepts of parenthood by estoppel and de facto parenthood⁶⁰ were first systematically expounded in the *Principles of the Law of Family Dissolution* (“the *Principles*”),⁶¹ a major work by the American Law Institute (“ALI”) that was eleven years in the making.⁶² Because of the novelty of their ideas and the influence that the ALI has had on the development of American law with other works such as the *Restatements*, the concepts found in the *Principles* will likely continue to influence the American family law landscape.⁶³

56 See Tyler Stoehr, Note, *Letting the Legislature Decide: Why the Court’s Use of In Loco Parentis Ought to Be Praised, Not Condemned*, 2011 BYU L. REV. 1695, 1697–1700 (2011).

57 *Spells v. Spells*, 378 A.2d 879, 881–82 (Pa. Super. Ct. 1977) (citation omitted) (internal quotation marks omitted).

58 See Bryce Levine, Note, *Divorce and the Modern Family: Providing In Loco Parentis Stepparents Standing to Sue for Custody of Their Stepchildren in a Dissolution Proceeding*, 25 HOFSTRA L. REV. 315, 324, 326 (1996).

59 See *id.* at 325–26.

60 See *infra* Part I.C.3.

61 AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* (2002) [hereinafter ALI *PRINCIPLES*].

62 See RECONCEIVING THE FAMILY, *supra* note 3, at 1.

63 See *id.* at 1–3; see also Meyer, *supra* note 18, at 47 (“The *Principles*’ approach . . . proposes not merely to tinker with the criteria for selecting a child’s

According to the ALI's proposals, a child's "parents" would include his or her parents,⁶⁴ parents by estoppel, and de facto parents.⁶⁵ Under this regime someone can become a parent by estoppel in any of four ways: he or she (i) is obligated to pay child support, (ii) lived with the child for at least two years, either believing that he or she was the parent and acting accordingly or continuing to act as a parent even after finding out that he or she was not, (iii) lived with the child since birth holding himself or herself out as the parent and acting accordingly, or (iv) lived with the child for two years holding himself or herself out as the parent pursuant to an agreement with the legal parent.⁶⁶ This category of parenthood is meant to keep legal parents from preventing a non-biological, non-legal, functional parent from exercising custodial rights after that legal parent facilitated or permitted the relationship.⁶⁷ The *Principles* specifically note that a child can have parents by estoppel in addition to two legal parents,⁶⁸ and other legal parents would enjoy no preferential treatment over a parent by estoppel.⁶⁹ Parents by estoppel would be liable for child support, but interestingly, parents by estoppel would not be required to pay child support if two legal parents were already responsible under the ALI's regime.⁷⁰ Parents by estoppel could, therefore, enjoy parental rights without incurring corresponding parental responsibilities.

3. De Facto Parenthood

De facto parents are those adults other than legal parents or parents by estoppel who, subject to certain qualifications, had a relationship with the child worthy of being maintained and recognized by the courts. The main purpose of the de facto standard is to provide continuing contact between a child and an adult with whom the child may have formed a deep and meaningful relationship.⁷¹ In the *Principles*,

custodian or the nature of custodial rights, but to rethink the very idea of parenthood.”).

64 In the ALI's regime, a child's legal parent is “any individual recognized as a parent under other state law.” ALI PRINCIPLES, *supra* note 61, § 2.03(1)(a).

65 *Id.* § 2.03(1).

66 *Id.* § 2.03(1)(b).

67 See Baker, *supra* note 18, at 123.

68 ALI PRINCIPLES, *supra* note 61, § 2.03(1)(b)(iv).

69 *Id.* § 2.08(1).

70 *Id.* § 3.03(2)(c); see Baker, *supra* note 18, at 123, 125, 126.

71 See ALI PRINCIPLES, *supra* note 61, § 2.08(1)(h) (stating that, in allocating custodial responsibility among parents, the court should “avoid substantial and almost certain harm to the child”). But see Robin Fretwell Wilson, *Trusting Mothers: A Critique*

the drafters propose a three-prong test for determining whether a former live-in partner is a de facto parent: (i) one must live with the child for “a significant period of time not less than two years,”⁷² (ii) regularly perform at least as many caretaking functions for the child as the custodial parent,⁷³ and (iii) the child’s custodial parent must agree to the development of a parent-child relationship with that person.⁷⁴ Notably, the standard does not require a showing that continuing contact be in the best interests of the child.⁷⁵

De facto parenthood confers on individuals certain parental rights and responsibilities, including custodial rights and the responsibility of making significant decisions for the child, such as those decisions regarding the child’s education, health care, and religious upbringing.⁷⁶ Under the ALI’s standard, after the adults’ relationship ends, the de facto parent (like any other parent) would receive a share of time with the child determined pursuant to the approximation standard—an amount of time proportional to the caretaking performed⁷⁷—even over the objection of the natural parent.⁷⁸ De facto parents occupy somewhat of a lesser status compared to legal parents and parents by estoppel, however, as they cannot be awarded the majority of custodial responsibility of a child over the objection of legal parents and parents by estoppel.⁷⁹ De facto parents would not be responsible for child support, however, increasing the rights of this class of persons without proportionately heightening their responsibil-

of the American Law Institute’s Treatment of De Facto Parents, 38 HOFSTRA L. REV. 1103, 1117 (2010) (criticizing the ALI for “blindly assum[ing] that the loss of contact will negatively affect a child” without requiring that the court inquire into the closeness of the relationship).

72 ALI PRINCIPLES, *supra* note 61, § 2.03(1)(c)(i).

73 *Id.* § 2.03(1)(c)(ii)(A)–(B). Caretaking functions include those tasks that “involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others,” including things like feeding, washing, protecting, providing transportation, toilet training, disciplining, supervising homework, and taking the child to the doctor. *Id.* § 2.03(5).

74 *Id.* § 2.03(1)(c)(ii). Notably, the custodial parent’s agreement can be implied. *Id.* § 2.03 cmt. c(iii). This requirement is dispensed with if the parent is absent or virtually absent from the child’s life. *Id.*

75 See Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI’s Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY, *supra* note 3, at 90, 94.

76 See ALI PRINCIPLES, *supra* note 61, §§ 2.08, cmt. a; 2.09, cmts. a–b; 2.18.

77 *Id.* § 2.08(1). The approximation rule is a rejection of the ever-popular best interests of the child standard. *Id.* at cmt. b.

78 See Wilson, *supra* note 75, at 99 (finding this problematic as some relationships end *because of a partner’s poor interactions with children*).

79 ALI PRINCIPLES, *supra* note 61, § 2.18(1)(a).

ities.⁸⁰ De facto parents are expected to continue their relationship with the child and to continue to parent the child as much as possible.

In the ALI's regime, all parents—including legal parents, parents by estoppel, de facto parents, biological parents who are not legal parents but have agreements with a legal parent, and other individuals with custodial responsibility—have a right to be notified of and included in certain proceedings brought by others.⁸¹ Further, an even wider net of individuals may receive a judicial allocation of custodial responsibility by filing a proposed parenting plan for the child.⁸²

The ALI proposal has at best received mixed reviews in the courts and has not been adopted in any significant way by any state.⁸³ The *Principles* intentionally create the possibility that a child can have more than two parents at any given time—a possibility that has undoubtedly contributed to the wariness with which courts and legislators approach the *Principles*.⁸⁴ Scholars have also criticized the *Principles* for infringing too much on a legal parent's rights.⁸⁵

4. Third Party and Grandparent Visitation Statutes

Non-parental visitation rights have no foundation in the common law, which held that visitation with extended family was a moral obligation but not a legal right.⁸⁶ Each of the fifty states has enacted non-parental—or third party—visitation statutes of some variety.⁸⁷ The nationwide enactment of these statutes was due to the states' recogni-

80 See Baker, *supra* note 18, at 122 (“Functional relationship does not give rise to obligation. . . .”).

81 ALI PRINCIPLES, *supra* note 61, § 2.04.

82 *Id.* § 2.05 (using the term “individual” throughout instead of “parent”).

83 See Wilson, *supra* note 71, at 1140 (finding that, of cases that cite to them, four percent of majority opinions embrace the *Principles*, eight percent use them as a starting point for more refined tests, twenty-four percent decline to accept the test for various reasons, and twenty-four percent use the *Principles* as support for an outcome the court would have reached anyway). For a detailed analysis of each case citing the *Principles* and its outcome, see *id.* at 1135–42 & apps. A–D.

84 See Meyer, *supra* note 18, at 51 (“No cap is imposed on the number of parents a child might have”); see also *supra* note 83.

85 See Baker, *supra* note 18, at 130 (“[T]he *Principles* also endorse an expanded view of state power. The state has the right to protect a child’s emotional well-being by ensuring the continuation of certain relationships even if the custodial parent(s) want to end or diminish the strength of those relationships. With this expansion of state power comes a diminishment of negative parental rights—that is, the right to be free of state interference in the parent-child relationship.” (footnote omitted)).

86 See Natalie Reed, Note, *Third-Party Visitation Statutes: Why Are Some Families More Equal than Others?*, 78 S. CAL. L. REV. 1529, 1533 (2005).

87 See, e.g., CAL. FAM. CODE ANN. § 3104 (West 2004 & Supp. 2013) (addressing rights of grandparents); 750 ILL. COMP. STAT. ANN. 5/607 (West 2009 & Supp. 2011)

tion of the “changing realities of the American family” and the idea that “children should have the opportunity to benefit from relationships with statutorily specified persons.”⁸⁸ Grandparents and other relatives are important figures in the lives of most children, and “[b]ecause grandparents and other relatives undertake duties of a parental nature in many households, States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties.”⁸⁹ Unlike doctrines such as de facto parenthood and parenthood by estoppel, third party visitation statutes award visitation rights but do not give the party any new special status as a parental equivalent, leaving the third party with something more like a “second-tier status.”⁹⁰

However, the provision of visitation rights must be balanced against the rights of the parents, as the Court in *Troxel v. Granville* ultimately found.⁹¹ In that case, where the State of Washington had passed a law permitting “any person” to petition a court for visitation rights “at any time,” and authorized that court to grant the visitation rights whenever visitation “may serve the best interest of the child,”⁹² the Court found that the statute “unconstitutionally infringe[d] on that fundamental parental right.”⁹³ The “breathtakingly broad”⁹⁴ statute failed because it allowed Washington trial courts to bypass the *Parham* presumption that a fit parent will act in the best interest of his or her child.⁹⁵ One might hope that parents will always seek to maintain relationships between their children and those adults with whom their children might have a unique bond, but continuing such relationships is not always beneficial and absent extraordinary circumstances it is generally presumed that a parent will make parenting

(addressing rights of grandparents, great-grandparents, and siblings); N.Y. DOM. REL. LAW § 72 (McKinney 2012) (addressing rights of grandparents).

88 *Troxel v. Granville*, 530 U.S. 57, 64 (2000) (plurality opinion); see Susan Tomaine, Comment, *Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 CATH. U. L. REV. 731, 744–48 (2001) (describing the response of the United States Congress and President Clinton to increased lobbying by grandparent groups in the 1980s and 1990s).

89 *Troxel*, 530 U.S. at 64.

90 Sonya C. Garza, *The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927, 951–52 (2009).

91 *Troxel*, 530 U.S. at 64; see *supra* Part I.A.

92 *Troxel*, 530 U.S. at 60.

93 *Id.* at 67.

94 *Id.*

95 *Id.* at 69; see *supra* note 28 and accompanying text.

decisions in light of what is best for his or her child.⁹⁶ In the wake of *Troxel* most state visitation statutes define limited circumstances in which third parties (generally grandparents) have standing to petition the court for visitation and articulate specific standards to guide judges' determinations.⁹⁷

The doctrines described in this section allow courts to provide adults other than biological parents with parental rights and responsibilities. The doctrines, as laid out here, are meant to represent these concepts generally, though they have taken slightly different forms in each state that has employed them.

D. *The Best Interests of the Child Standard*

Unlike the doctrines just discussed, the best interests of the child standard is not a doctrine providing that courts should find that certain adults are parents who have parental rights. Rather, it is a standard used by courts for over thirty years to resolve custody disputes between existing warring parents who cannot agree on what should be done about their children.⁹⁸

The Uniform Marriage and Divorce Act suggests that courts consider five factors in determining a child's best interests:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.⁹⁹

96 See *Troxel*, 530 U.S. at 70 ("In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance.").

97 See Tomaine, *supra* note 88, at 741–43; see also Lauren Worssek, Note, *It Really Does Take a Village: Recognizing the Total Caregiving Network by Moving Toward a Functional Perspective in Family Law After Troxel v. Granville*, 30 WASH. U. J.L. & POL'Y 589, 601–08 (2009) (surveying the current state of third-party visitation statutes nationwide after *Troxel*).

98 See Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 450 (2005).

99 UNIF. MARRIAGE & DIVORCE ACT § 402 (1973).

The Act further suggests that courts should not consider “conduct of a proposed custodian that does not affect his relationship to the child” when making their decision as to custody.¹⁰⁰

The best interests standard developed against a historical backdrop when judges preferred to award custody to mothers under the “tender years doctrine,” assuming that mothers were more nurturing in nature and therefore better suited to the care and rearing of young children.¹⁰¹ The best interests standard is therefore a movement away from presumptions in favor of a particular sex and a movement toward considering the particular facts and circumstances of each child’s situation. Scholars have criticized the best interests standard, largely because of its indeterminacy, potential for abuse by a biased factfinder, and reliance on expert testimony.¹⁰²

In response to some of these criticisms, scholars, psychologists, and social scientists have proposed alternatives to the best interests standard, though these alternate proposals have not been adopted as widely by courts. In the *Principles*, the ALI suggested that courts adopt a preference for awarding custody based on an approximation of the past allocation of parenting responsibilities.¹⁰³ So, in cases of married parents, the allocation of custody time post-divorce would roughly approximate the allocation of time pre-divorce. West Virginia and Minnesota both adopted a “primary caretaker” standard, which would award sole custody to whichever parent had been the child’s primary caretaker.¹⁰⁴ Goldstein, Freud, and Solnit suggested the “least detri-

100 *Id.*; see also 750 ILL. COMP. STAT. ANN. 5/602 (West 2009 & Supp. 2011) (including consideration of past instances of violence and abuse as well as the “willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child”).

101 See Peskind, *supra* note 98, at 453–54. Before this, until the late nineteenth century, English law mandated that children be automatically placed with their father in the event of a custody dispute. *Id.* at 452.

102 See, e.g., ALI PRINCIPLES, *supra* note 61, at 2; Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 5 (1987); Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. CONTEMP. PROBS. 226, 226–27 (1975); Peskind, *supra* note 98, at 459–60.

103 ALI PRINCIPLES, *supra* note 61, § 2.08. The ALI’s rule is not a pure primary caretaker rule, which would give sole custody to the primary caretaker moving forward.

104 See W. VA. CODE § 48-9-101 (2012). Minnesota ultimately rejected a primary caretaker presumption as the only factor to consider in custody determinations, possibly due in part to an explosion of litigation following institution of the regime, and also because the standard generally resulted in disguised biases in favor of women. See Peskind, *supra* note 98, at 468–70; see also Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 448

mental . . . alternative” standard, which promotes a more realistic assessment of the situation and prioritizes the child’s psychological development.¹⁰⁵ Critics of this standard note that it provides no more determinacy than the best interests standard, and further encourages negative litigation where each parent tries to highlight the flaws of the other.¹⁰⁶ Finally, legislators tend to favor presumptions toward joint custody (not necessarily equal custody) in custody determinations absent evidence that joint custody would be detrimental to the child.¹⁰⁷

E. *Child Support*

As a part of their duty to care for their children, parents must provide them with support.¹⁰⁸ The legal concept of a parent’s child support obligations dates back to the Elizabethan Poor Laws in England, as well as the writings of John Locke and Jeremy Bentham.¹⁰⁹ Early American courts awarded child support that reflected the family’s income and prior standard of living; however, these awards were only available for applicants who were dependent and without fault.¹¹⁰ In the 1980s, Congress mandated the development of numerical child

(1990) (noting that although the primary caretaker standard is facially neutral, it favors mothers).

105 See Peskind, *supra* note 98, at 470–71 (citing JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 53–64 (1973)).

106 See *id.* at 471.

107 See, e.g., IDAHO CODE ANN. § 32-717B(4) (2006) (“[A]bsent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor child or children.”). Oregon, for example, presumes that joint custody is preferable only when “both parents agree to the terms and conditions of the order.” OR. REV. STAT. § 107.169(3) (2011).

It is important to note that custody of a child can be divided into physical custody and legal custody. Legal custody involves the “right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child’s life and welfare.” *McCarty v. McCarty*, 807 A.2d 1211, 1213 (Md. Ct. Spec. App. 2002). Physical custody involves the “right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody.” *Id.* Depending on the parties’ particular circumstances, a court might award joint legal custody but sole physical custody, or vice versa. *Id.* at 1211 (awarding joint legal custody to the mother and father but sole physical custody to the mother).

108 See *supra* notes 25–27 and accompanying text.

109 Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 48, 76, 81 (1998).

110 *Id.* at 51–52. Child support still remains ideologically connected to public assistance law. *Id.* at 57.

support guidelines to be calculated as each state saw fit.¹¹¹ State formulations can be categorized into two types: percentage-of-obligor-income formulas and income-share formulas.¹¹²

Child support is meant to provide for the welfare of the child and to maintain the child's new standard of living as close to the marital standard of living as possible. But regardless of which formula is used, custodial parents, and consequently their children, generally end up with a standard of living below that of the marital household. Given the nature of finite resources and the fact that the same incomes are used to support two households instead of one, child support guidelines cannot ensure that children will always be provided for— "[c]hildren who were poor before family dissolution (or nonformation) will remain poor."¹¹³ Professor Marsha Garrison argues that the child support models of the fifty states reflect principles of personal autonomy, as a parent is thought to be entitled to his or her own income except to the extent that he or she is unavoidably obligated to the child.¹¹⁴ For that reason, child support has traditionally been limited to the child's two legal parents.

This Part has described the constitutional framework surrounding issues of parenthood and some of the ways—both traditional and novel—that courts have given parental rights and responsibilities to those other than a child's biological parents. The remainder of this Note examines how Senator Leno's Bill makes use of these doctrines as well as how various jurisdictions cited by Senator Leno for support employ them.

II. JUDICIAL AND LEGISLATIVE UTILIZATION OF THESE DOCTRINES IN VARIOUS STATES

With various doctrines providing rights and responsibilities to non-parents in mind, this Part discusses how these doctrines have been

111 *Id.* at 57.

112 *Id.* at 60–61. Professor Garrison argues that both of these approaches can be thought of as "continuity-of-expenditure" models, as opposed to "equal-outcomes," "utilitarian," and "minimum-income" approaches, which no state has adopted. *Id.* at 59. In the "percentage-of-obligor-income" formula, the amount is derived from a calculation of the income of the obligor, the number of children to be supported, and typical expenditure patterns of intact families. *Id.* at 60. The "income-shares" formula also considers the number of children to be supported, along with the incomes of both parents and particular child care costs incurred by the custodial parent. *Id.* at 61. Child support awards can vary further due to parental negotiation. *Id.* at 64.

113 *Id.* at 65; *see also id.* at 117.

114 *Id.* at 70, 86–89.

applied to families in the District of Columbia, Delaware, Maine, and Pennsylvania. To be sure, these doctrines have been taken up, evaluated, and employed in various ways by other states as well, but this Note focuses specifically on California and the jurisdictions cited by Senator Leno in support of his Bill.

A. *The District of Columbia*

In 2007, the District of Columbia took the first step toward multiple parenthood when it allowed de facto parents to seek custody.¹¹⁵ The need for development of legal doctrines giving parental rights to adults other than a child's biological parents was likely acutely felt in the District, where the percentage of multigenerational households is significantly above the national level.¹¹⁶ One must meet either of two sets of criteria to be a "de facto parent" in the District of Columbia: either (i) the individual must have lived with the child at the time of the child's birth or adoption or (ii) have lived with the child for at least ten of the twelve months immediately preceding the filing of the complaint and have formed a "strong emotional bond . . . with the encouragement and intent of the child's parent that a parent-child relationship form" between them.¹¹⁷ In either case, the individual must have "taken on full and permanent responsibilities as the child's parent" and "held [himself or herself] out as the child's parent . . . or, if there are 2 parents, both parents."¹¹⁸ Notably, by definition there can be at least one de facto parent in addition to two parents.¹¹⁹ De facto parents can seek custody and are otherwise treated as parents.¹²⁰

This statute blends concepts of de facto parenthood and parenthood by estoppel and further makes the status more easily

115 D.C. CODE §§ 16-831.01; 16-831.03 (LexisNexis 2001 & Supp. 2012); *see supra* Part I.C.3.

116 Nationally, 5.6% of households are multigenerational, meaning the family household contains three or more generations. Daphne A. Lofquist, *Multigenerational Households: 2009–2011*, U.S. CENSUS BUREAU 1, 1 (Oct. 2012). In the District of Columbia, an estimated 7.1% of households are multigenerational. *Id.* at 3 tbl.1. In many multigenerational homes, grandparents take an active role in raising their grandchildren. *GrandFacts*, AARP, <http://www.aarp.org/relationships/friends-family/grandfacts-sheets/> (last visited Mar. 15, 2013).

117 §§ 16-831.01(1)(B)(ii)–(iii).

118 *Id.* §§ 16-831.01(1)(A)(ii)–(iii).

119 It is important to note that the District of Columbia further allows third parties (i.e., non-parents that do not qualify as de facto parents) to seek custody of a child as well so long as the "primary" parent consents to the motion. *Id.* § 16-831.02(a)(1)(A).

120 *Id.* § 16-831.03.

attainable than the standard suggested in the *Principles*.¹²¹ The District of Columbia's standard lessens the amount of time that one must live with a child before attaining de facto parenthood status from two years to ten months, but raises the threshold commitment from the individual from performing as many caretaking functions as the custodial parent to assuming full and complete responsibilities.¹²² Unlike the standard in the *Principles*, the District of Columbia requires that a child have a strong, emotional, parent-like relationship with the child encouraged by the custodial parent.¹²³ Like the doctrine of parenthood by estoppel, the District of Columbia requires that the adult hold himself or herself out as the child's parent, rather than simply assume responsibilities and develop a close relationship.¹²⁴ Unlike the ALI's de facto parenthood proposal, but similar to the parenthood by estoppel proposal, de facto parents in the District of Columbia can seek full custody of the child to the exclusion of other parents.¹²⁵

B. Delaware

Delaware originally recognized two kinds of parent-child relationships: the mother-child relationship and the father-child relationship. These relationships could be formed by giving birth to a child, by adjudication, by adoption, or by an un-rebutted presumption.¹²⁶ In 2009, Delaware added another kind of parent-child relationship to its statutory scheme: the de facto parent-child relationship. This relationship is (legally) formed by a court's determination that a man or woman is a de facto parent of the child.¹²⁷ De facto parent status is attained if one "[h]as had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent," exercises parental responsibility for the child, and acts in a parental role for enough time to establish "a bonded and dependent relation-

121 See *supra* Part I.C.3.

122 See *supra* notes 72–73 and accompanying text.

123 See *supra* note 71 and accompanying text.

124 See *supra* note 66 and accompanying text.

125 See *supra* notes 69, 79 and accompanying text.

126 DEL. CODE ANN. tit. 13, § 8-201 (2009).

127 *Id.* §§ 8-201(a)(4), (b)(6). Like the Bill in California proposed by Senator Leno, see *infra* Part III.B, this legislation came about in direct response to a case in which a lesbian woman was denied joint custody of a child that only her partner had adopted. See *Smith v. Gordon*, 968 A.2d 1, 1 (Del. 2009); Nancy D. 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, 223–25 (2009).

ship with the child that is parental in nature.”¹²⁸ The adults seeking parental status need not have any particular kind of relationship with the existing legal parents.¹²⁹

Delaware’s de facto parent statute authorizes a court to find three or more parents of a child, and support by at least one of the child’s existing parents is necessary for attainment of the de facto status. In Delaware, by attaining de facto parent status one attains all of the rights, privileges, and liabilities heretofore reserved for natural parents. The required showing to become a de facto parent in Delaware is significantly lower than it is in the *Principles*. Delaware does not require that the adult live with the child for any minimum amount of time or demand a demonstration of any minimum amount of parental responsibility.¹³⁰ However, unlike the *Principles*, Delaware requires that the adult have a unique and bonded relationship with the child.¹³¹

This statute has been held unconstitutional by at least one Delaware court. In *Bancroft v. Jameson*, decided in 2010, a family court held that the de facto parent statute was overbroad and therefore violated the biological parents’ constitutional rights.¹³² The court found that Delaware’s de facto parent statute “sounds the alarm of the caveat expressed by United States Supreme Court Justice Sandra Day O’Connor, when she said in *Troxel*, the question places ‘a substantial burden on the traditional parent-child relationship . . . and can present questions of constitutional import.’”¹³³ The court held that even though other Delaware courts had accepted the theory of de facto parenthood in order to protect the best interests of child, the codified Delaware statute was unconstitutional.¹³⁴ The decision has not been appealed.

C. Maine

In 2004 in Maine, the Supreme Judicial Court (Maine’s highest court) recognized that de facto parents could, in particular circum-

128 DEL. CODE ANN. tit. 13, § 8-201(c) (2009).

129 As in, they need not have been that parent’s partner or relative per se in order to qualify. See William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. LEGIS. 263, 264 (2010) (outlining the foundations of de facto parenthood).

130 See *supra* notes 72–73 and accompanying text.

131 See *supra* notes 71, 75 and accompanying text.

132 *Bancroft v. Jameson*, 19 A.3d 730, 750 (Del. Fam. Ct. 2010).

133 *Id.* at 740 (quoting *Troxel v. Granville*, 530 U.S. 57, 64–65 (2000) (plurality opinion)).

134 *Id.* at 748–50.

stances, be awarded certain parental rights and responsibilities.¹³⁵ In *C.E.W. v. D.E.W.*,¹³⁶ two lesbian women “agreed that D.E.W. would conceive a child using artificial insemination.”¹³⁷ After the child was born, and then again after they split up, both women signed parenting agreements “detailing their intention to maintain equal parental rights and responsibilities for the child.”¹³⁸ The parties stipulated that the non-biological mother was a de facto parent, but disagreed as to what rights and responsibilities could be awarded to such a person.¹³⁹ The court held that it could, “in limited circumstances, entertain an award of parental rights and responsibilities to a de facto parent based on a determination of the child’s best interest.”¹⁴⁰ However, given that the parties stipulated C.E.W.’s status as a de facto parent, the court did not “address the separate and more fundamental question of by what standard the determination of de facto parenthood should be made” and noted the weighty liberty interests of natural and adoptive parents that would be implicated by determinations of de facto parenthood.¹⁴¹ The hesitant tone characterizing the decision betrays the court’s unwillingness to embrace wholesale the doctrine of de facto parenthood. Though others have characterized this case as recognizing de facto parents and third party parents by extension,¹⁴² the court only does so reluctantly, and because the parties had already stipulated to one’s de facto parent status. It is important to note that this has been the only court so far to award the full range of parental rights envisioned by the ALI,¹⁴³ and it did so reluctantly, noting specifically that it did not intend to officially adopt the ALI’s standards.¹⁴⁴

135 *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004).

136 845 A.2d 1146.

137 *Id.* at 1147.

138 *Id.*

139 *Id.* at 1148, 1151.

140 *Id.* at 1151.

141 *See id.* at 1151–52.

142 *See Senate Bill 1476 May 8 Analysis*, *supra* note 21, at 2–3.

143 Wilson, *supra* note 71, at 1143. Generally other courts awarding the same rights have reasoned that the award must serve the child’s best interests or have applied other, more robust, tests. *Id.*; *see supra* note 83; *see also* Wilson, *supra* note 71, at 1144–58 (discussing courts that, based on the *Principles*, award full rights, require an additional showing of best interests, require proof of harm, place greater weight on the custodial parent’s right to decide, reject the ALI’s approach, and circumscribe the approach).

144 *C.E.W.*, 845 A.2d at 1152 n.13.

D. Pennsylvania

In a still more dramatic ruling in 2007, a Superior Court of Pennsylvania (the state's intermediate appellate court) ruled that three individuals had obligations to support a child and that all three were further entitled to at least partial custody. In *Jacob v. Shultz-Jacob*,¹⁴⁵ Jodilynn and Jennifer entered into a civil union and lived together for approximately nine years.¹⁴⁶ During that time, Jodilynn adopted two of her nephews and had two children by her long-time friend Carl, who agreed to act as her sperm donor.¹⁴⁷ Carl remained involved in the children's lives from the time they were born.¹⁴⁸ In a custody action the Superior Court affirmed an award of shared legal custody of all four children to Jodilynn, Jennifer, and Carl.¹⁴⁹ Jennifer received primary physical custody of one of the children with visitation by Jodilynn, Jodilynn was awarded primary physical custody of the other three children with visitation by Jennifer, and Carl was awarded partial physical custody of one weekend a month with his biological children.¹⁵⁰ The court determined that Jennifer had *in loco parentis* status, which gave her the opportunity to prove that her relationship with the children should be maintained over the natural parents' objections, but that the status did not "elevate a third party to parity with a natural parent in determining the merits of [a] custody dispute."¹⁵¹ Despite the fact that everyone—including Carl—originally thought of Carl as a mere sperm donor, the court found that he was a biological parent who had exercised rights appurtenant to that status and could not avoid financial responsibility for his two children.¹⁵² The trial court in this case had refused to hold Carl liable for child support in addition to Jodilynn and Jennifer because that would have created an "untenable situation[] never having been anticipated by Pennsylvania law."¹⁵³ The Superior Court did not see such a concern as problematic and held that, "in the absence of legislative mandates, the courts must construct a fair, workable[,] and responsible basis for the protection of children."¹⁵⁴

145 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

146 *Id.* at 476.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.* at 477.

152 *Id.* at 480.

153 *Id.* at 482.

154 *Id.*

In its attempt at a “fair, workable[,] and responsible” response to the situation before it, the Superior Court utilized the doctrine of *in loco parentis* instead of finding that all three were parents outright and did not find that an adult with *in loco parentis* status had the same standing in a custody dispute as legal parents. The novelty of this case is twofold: the Superior Court essentially disregarded the intent of the parties, finding that Carl—not Jennifer—was the other legal parent, and the court was willing to demand child support from Jennifer—the *in loco parentis* individual—in addition to two legal parents (Carl and Jodilynn). In this way the Pennsylvania court extended the concept of child support even further than did the ALI, which had not suggested requiring support from parents by estoppel when two parents were already responsible, or from de facto parents in any case.¹⁵⁵ The case was not appealed.

While it is true that the two statutes in the District of Columbia and Delaware and the two cases from Maine and Pennsylvania have employed doctrines in family law in slightly progressive ways, they have not all been as well-received as Senator Leno might like to suggest. In fact, one of the cited statutes has since been found unconstitutional.¹⁵⁶

III. PRESUMPTIONS, PARENTHOOD, AND THE STATUS OF CHILDREN IN CALIFORNIA

Part III focuses on how California courts have used these doctrines and the potential impact of Senator Leno’s proposed Bill on California law. Supporters of the Bill claim that it is a natural extension of the movements in the District of Columbia, Delaware, Maine, and Pennsylvania,¹⁵⁷ but as this Part will show, these supporters overstate the similarities between these other measures and Senate Bill 1476.

A. *California’s Presumptions of Parenthood and Their Inherent Tensions as Exemplified in In re M.C.*

California largely adopted the Uniform Parentage Act (“UPA”) in 1994.¹⁵⁸ The “parent and child relationship” is defined as “the legal relationship existing between a child and the child’s natural or adop-

155 See *supra* notes 70, 80 and accompanying text; see also *supra* Part I.D (discussing child support standards).

156 See *supra* notes 132–134 and accompanying text. However, the statute is still technically in effect, as the so-holding court was only a family court.

157 See *Senate Bill 1476 May 8 Analysis*, *supra* note 21, at 2–3.

158 Part 3 of California’s Family Code begins: “[t]his part may be cited as the Uniform Parentage Act.” CAL. FAM. CODE § 7600 (West 2012).

tive parents incident to which the law confers or imposes rights, privileges, duties, and obligations,” and includes both the mother and child and the father and child relationships.¹⁵⁹ Like the UPA, the California Family Code provides that a parent and child relationship can be established by proof of a woman’s having given birth, proof of adoption, or by certain rebuttable presumptions.¹⁶⁰ A man is presumed to be the father of a child if he was married to the mother and the child was born during the marriage or immediately after the end of the marriage.¹⁶¹ The presumption exists if he married the mother after the birth of the child and was named on the child’s birth certificate or is already obligated to provide support for the child (per judicial decree), or if “[h]e receives the child into his home and openly holds out the child as his natural child.”¹⁶² Unlike the UPA, no gender-neutral provisions that apply determinations of paternity to determinations of maternity exist in the California Family Code; however, this principle has developed in California case law.¹⁶³

Presumptions are on the whole very useful and efficient things,¹⁶⁴ yet given their inherently inconclusive, rebuttable nature, sometimes they conflict, especially under gender-neutral readings of these statutes. California anticipated the possibility of such conflict in Section 7612, which provides that if two or more presumptions arise that conflict with each other, “the presumption which on the facts is founded on the weightier considerations of policy and logic controls.”¹⁶⁵ The California legislature has never explained which considerations of policy and logic are the weightiest and should control.

This tension in the law came to a head in California in the case of *In re M.C.*¹⁶⁶ In June of 2008, a woman named Melissa V. became pregnant with M.C. during a brief relationship with a man named Jesus Perez.¹⁶⁷ Jesus was supportive of Melissa and invited her to live with him and his family, which she did for the first few months of her pregnancy.¹⁶⁸ When she was just a few months pregnant, Melissa moved out of Jesus’ home and reconciled with her registered domestic partner Irene V., with whom she had had a falling out shortly

159 *Id.* § 7601.

160 *Id.* § 7610.

161 *Id.* § 7611(a)–(b).

162 *Id.* § 7611(c)–(d).

163 *See In re M.C.*, 123 Cal. Rptr. 3d 856, 870 (Cal. Ct. App. 2011).

164 *See supra* Part I.B.

165 CAL. FAM. CODE § 7612(b) (West 2012).

166 123 Cal. Rptr. 3d 856.

167 *Id.* at 861.

168 *Id.*

before becoming involved with Jesus.¹⁶⁹ From its beginning two years before, Melissa and Irene's relationship was marked with physical and verbal abuse (due in part to Melissa's mental illness and drug and alcohol abuse),¹⁷⁰ but in October of 2008, Melissa and Irene married.¹⁷¹ When M.C. was born in March of 2009 she was given the surnames of both Melissa and Irene,¹⁷² and the three of them lived together for about three to four weeks before Melissa and M.C. moved out.¹⁷³ In May Irene filed a request for custody and visitation seeking joint legal and physical custody of M.C.¹⁷⁴ In September M.C. was taken into protective custody after Melissa's new boyfriend, Jose A., stabbed Irene in the neck and back in an attempt to scare her away from pursuing custody of M.C., presumably with Melissa's encouragement.¹⁷⁵ Meanwhile, Jesus, who had not been provided any contact information by Melissa when she left, moved to Oklahoma for work.¹⁷⁶ When Melissa reached out to him in June of 2009 asking for financial assistance, he sent her money a few times and connected her with his family in California, who visited with Melissa and M.C. regularly.¹⁷⁷

After a stint in foster care resulting from some of Melissa's substance abuse problems, M.C. was temporarily placed with Melissa's parents while the California Department of Children and Family Services ("DCFS") brought a dependency action.¹⁷⁸ After a two-day hearing, the juvenile court found Melissa to be M.C.'s biological mother, Jesus to be M.C.'s presumed father, and Irene to be M.C.'s presumed mother, and all three were granted reunification services.¹⁷⁹ On appeal, the court agreed with the juvenile court's findings of fact, but held that only two parties could claim legal status as parents.¹⁸⁰ The court remanded the matter and instructed the juvenile court to

169 *Id.* at 861–62.

170 *Id.* at 861.

171 *Id.* at 862. Melissa and Irene married in California during the period of time when same-sex marriage was legal there. *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.* at 862–63.

176 *Id.* at 862.

177 *Id.*

178 *Id.* at 861, 866.

179 *Id.* at 866. These services include access to state-sponsored programs designed to help adults be better parents. Often, parents are required by courts to participate in these programs and risk being found unfit or losing some or their rights if they do not.

180 *Id.* at 876.

resolve the conflicting presumptions in light of section 7612 of California's Family Code,¹⁸¹ which stipulates that "[i]f two or more presumptions arise . . . [that] conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls."¹⁸² While the appeals court "empathize[d] with the desire to leave all options open," it noted that the California Supreme Court has continued "to reject the notion of dual paternity or maternity where its recognition would result in three parents."¹⁸³

B. Senate Bill 1476

California State Senator Mark Leno introduced Senate Bill 1476 on February 24, 2012,¹⁸⁴ less than a year after the decision in *In re M.C.*¹⁸⁵ The story of M.C.'s traumatic first two years of life inspired Leno to draft a bill that would give courts the authority to find that children like M.C. could, in situations of conflicting presumptions, have more than two parents, if such a finding would be required to protect the best interests of the child.¹⁸⁶

With only a few small changes to the existing law, Senate Bill 1476 ("the Bill") would have fundamentally altered California's Family Code by pushing the concept of legal parenthood further away from the traditional model of one father and one mother and their biological children than ever before in the United States.¹⁸⁷ The Bill would have broadened the traditional use of the best interests analysis in a way that radically expands judicial discretion. Section 7612(b), which currently provides that if two or more presumptions or claims of

181 *Id.* at 877.

182 CAL. FAM. CODE § 7612(b) (West 2012). The court noted that § 7612(a) provides that certain presumptions are rebuttable "in an appropriate action only by clear and convincing evidence," meaning that these presumptions are not always rebuttable. *In re M.C.*, 123 Cal. Rptr. 3d at 876 (citing CAL. FAM. CODE § 7612(a)). Appropriate actions include those in which "another candidate is vying for parental rights" and seeks to rebut another candidate's status as a presumed parent. *In re Nicholas H.*, 46 P.3d 932, 941 (Cal. 2002). If there is no clear and convincing evidence that a candidate is unfit to retain their status, the analysis proceeds under section 7612(b). *In re M.C.*, 123 Cal. Rptr. 3d at 876-77. As of that time the court had not found that any of the three were unfit to be parents. *Id.*

183 *In re M.C.*, 123 Cal. Rptr. 3d at 877 (citing *Elisa B. v. Superior Court*, 117 P.3d 660, 666 (Cal. 2005)).

184 *Senate Bill 1476*, *supra* note 20. This Bill was vetoed by Governor Edmund G. Brown, Jr., on September 30, 2012. *Senate Bill 1476 Veto Message*, *supra* note 23.

185 123 Cal. Rptr. 3d 856.

186 *Senate Bill 1476 May 8 Analysis*, *supra* note 21, at 3.

187 Discussion of international legal systems recognizing family structures of more than two parents is beyond the scope of this Note.

parenthood arise that conflict with each other, “the presumption which on the facts is founded on the weightier considerations of policy and logic controls,”¹⁸⁸ would have been undercut by an additional sentence providing that a court could “[i]n an appropriate action . . . find that a child has more than two natural or adoptive parents *if required to serve the best interest of the child.*”¹⁸⁹ Section 3040, which determines the order of preference that a court should consider before awarding custody,¹⁹⁰ would have been modified to allow the court to allocate custody and visitation among more than two parents if such a determination would be in the best interests of the child.¹⁹¹ The Bill would also expand the class of people owing child support. A proposed modification to Section 4052.5 instructed courts to divide child support obligations among the parents based on their respective incomes and the amount of time they spend with the child.¹⁹² Ultimately, and most importantly, the Bill would have authorized a court to determine that a child has a parent-child relationship with more than two adults.¹⁹³

1. Analysis of the Bill’s Application of the Best Interests Standard

In California, as elsewhere, the best interests standard comes into play in proceedings for the legal separation of married parents and other actions to determine custody between parents who were not married.¹⁹⁴ But Senator Leno’s Bill brings the best interests standard into an additional context: in determinations of who a child’s parents actually are.¹⁹⁵ Employing the best interests standard in determinations of custody and visitation is a reasonable application of the stan-

188 CAL. FAM. CODE § 7612(b) (West 2012).

189 *Senate Bill 1476*, *supra* note 20, § 55 (emphasis added). This amendment further would have instructed the court to consider several additional factors in determining the child’s best interest under that section. *Id.*

190 CAL. FAM. CODE § 3040.

191 *Senate Bill 1476*, *supra* note 20, § 5. The Bill would have specifically directed the court to consider stability for the child among other best interests factors and provided that not all parents need necessarily share legal or physical custody of the child. *Id.*

192 *Id.* § 2. Specifically, the Bill provided that, absent special circumstances, the statewide uniform guideline should apply, and that “[n]othing in this section shall be construed to require reprogramming of the California Child Support Automation System . . . , [or] a change to the statewide uniform guideline for determining child support.” *Id.*

193 *Id.*

194 CAL. FAM. CODE § 3021.

195 *See supra* note 189 and accompanying text.

dard, and indeed precisely what the standard was developed for;¹⁹⁶ the application is unusual only in that the court would have three or more parties to evaluate rather than just two.

Senator Leno's attempt to bring the best interests standard into determinations of parenthood betrays a fundamental misunderstanding of the doctrine. The best interests standard and competing proposals such as the primary caretaker standard, the least detrimental alternative standard, and joint custody all endeavor to sort out what arrangement should be developed to provide for a child whose parents, because of a break-up or other custody dispute, can no longer live together with the child.¹⁹⁷ No other jurisdiction or model has suggested using the best interests standard to determine who a child's parents are, not even Delaware or the District of Columbia.¹⁹⁸

Determinations of parenthood no longer depend solely on the basis of biology, but biology still remains a substantial factor in the determination.¹⁹⁹ Generally, adults other than biological parents are not determined to be a child's legal *parents* unless a sperm or egg donor is involved, the child was adopted by only one parent who was in a relationship with another person, there is no known biological parent, or that parent has repudiated the child or otherwise failed to grasp his or her status.²⁰⁰ The Supreme Court has yet to define parenthood in terms of one's functional status alone, and only two states have codified functional parenthood.²⁰¹ Intent to bring a child into being comes into play in determinations of parenthood only in rare cases.²⁰²

196 *See supra* Part I.D.

197 *Id.*

198 *But see* VA. CODE ANN. § 63.2-1203(A) (2007) (providing that, in the case of a second parent adoption, if the non-custodial parent refuses to give consent to the adoption (or, refuses to allow their parental rights to be terminated), a court may grant the petition and terminate parental rights without the non-custodial parent's consent if the evidence shows that consent "is withheld contrary to the best interests of the child").

199 *See supra* notes 32–35 and accompanying text.

200 *See supra* notes 14–15, 17, 33 and accompanying text.

201 *See supra* Parts II.A–B. D.C. and Delaware have codified functional parenthood in addition to and not to the exclusion of biological parenthood and traditional presumptions of parenthood. Case law in Maine and Pennsylvania supports movement toward parenthood as defined by one's functional status. *See supra* Parts II.C–D.

202 *See supra* notes 14–15, 17 and accompanying text; *cf. supra* Part II.C (discussing *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004), where the court found that the natural mother's lesbian partner's intent to be a legal parent was not dispositive where the sperm donor remained involved in the child's life, and finding instead that the partner had *in loco parentis* standing).

Movement away from objective markers to determine paternity and maternity toward flexible standards like the best interests standard leads to increased judicial discretion, which may result in abuse of that discretion. If the best interests standard was used to resolve conflicting presumptions, then courts would be welcome to find, for example, that wealthy, privileged, and stable individuals are a child's parents and responsible for the child's care and upbringing rather than other less well off, less stable vying adults. The discretion to find that a minor is the child of one party rather than another on the basis of the best interests standard invites judicial abuse, as judges would inevitably bring their own biases to bear in determinations and could pick the person that they think would do a better job parenting—in violation of the concept of fundamental parental rights.²⁰³

Senator Leno's Bill welcomes determinations that a child has more than two parents, yet specifically provides that not all parents must be awarded custody and visitation.²⁰⁴ Traditionally, a parent is only completely denied visitation if they are unfit or if they have given up their rights to the child.²⁰⁵ Under this provision, a judge could deny a parent custody and visitation with the reasoning that shuffling the child between three or more homes would foreclose necessary stability for the child.²⁰⁶ An overtly or subconsciously biased judge could enlarge the circle of parents to include adults that the judge might want to be involved in the child's life by failing to resolve conflicting presumptions. Then, using the best interests standard, the judge could shrink the circle of parents with whom the child is permitted contact under the guise of seeking stability for the child, in reality

203 See *Bancroft v. Jameson*, 19 A.3d 730, 741 (Del. Fam. Ct. 2010) (noting that one of the “trio of sacred rules” regarding parents is that the parental right “is not to be abrogated where a non-parent is able to provide an easier or more luxurious life”). Of course, judges making custody determinations regularly rely on their own sense of which parent would do a better job in making their decisions. However, custody determinations stand in stark contrast with determinations of parenthood, as determinations of parenthood are largely final while custody determinations are subject to change as the parties' situations change. See *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982) (discussing the fundamental liberty interest of parents at stake in termination of parental rights proceedings arising from the permanency of threatened loss).

204 *Senate Bill 1476*, *supra* note 20, § 1.

205 Indeed, in that case their rights could be terminated.

206 *Senate Bill 1476*, *supra* note 20, § 1 (“In cases where a child has more than two legal parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, stability for the child. This may mean that not all parents share legal or physical custody of the child.”).

preventing contact between the child and those adults that the judge disfavors for whatever reason.²⁰⁷

In a fundamental way, applying the best interests standard to determinations of parenthood rather than adjudications between parents rejects the *Parham* presumption that the “*natural* bonds of affection lead parents to act in the best interests of their children.”²⁰⁸ There is “normally . . . no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”²⁰⁹ Parents are presumed, under *Parham*, to make decisions in their child’s best interests largely because of their “natural” (or biological) bonds of affection. Under the Bill, the judge would be able to determine which adults are in the child’s best interests to have as parents, a determination much more invasive than deciding which adults should remain in the child’s life under third-party visitation statutes. American family law operates under the assumption that the parent, and not the judge, knows what is in the child’s best interests. The judge is only called upon to wrestle with the question of what is in the best interest of the child when the parents themselves cannot agree and choose to seek a judicial determination or when the parties are unfit, not to determine who parents are.

2. Analysis of the Bill’s Impact on Child Support

Senator Leno’s desire to make sure that children are provided for is commendable, but making as many adults liable for the well-being of a child as possible is a policy decision that has been considered and rejected consistently over the course of American family law. California’s child support formula follows the “income-share” formula, considering the parents’ total income, the number of children, and the

207 In the event that a judge actively seeks to find that another adult is a parent in order to avoid awarding parental rights and responsibilities to a parent that the judge is displeased with for whatever reason, as suggested about the judge in *In re M.C.* by Professor Polikoff, 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, 2049 (2012), other avenues exist through the juvenile welfare system for removing a child from the home of an abusive or neglectful adult. Short of behavior warranting a finding of unfitness, however, the judge must defer to the judgment of the parent under the *Parham* presumption. Multiple-parent legislation enacted for the purpose of allowing judges to behave as such would be an inappropriate grant of power to family judges.

208 *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (emphasis added); see *supra* note 28 and accompanying text.

209 *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (plurality opinion).

amount of time that the children spend with each party.²¹⁰ Courts are to implement these guidelines, keeping in mind that parents' principal obligations include supporting their minor child and that the interests of the child should remain the court's top priority.²¹¹ While spreading the burden of providing support for a child between three or more parents would typically mean that more money is making its way to the child and the child might be kept from relying on state resources,²¹² the goal of child support has never been simply to keep a child from being poor.²¹³ Such a motivation would be reason to find even extended family members liable for support, but historically child support has been limited to a child's two parents out of respect for the family's autonomy and the autonomy of the earning parent.²¹⁴ The Pennsylvania court in *Jacob v. Shultz-Jacob*²¹⁵ was anomalous in its finding that an adult with *in loco parentis* standing was responsible for supporting the child in addition to two legal parents.²¹⁶ The desire to provide the maximum possible material support for a child should not motivate a court or legislature to change the nature of parenthood by recognizing more than two parents. Of course, if a court were authorized to find more than two parents, then it would be reasonable for a court to enlarge the class of those responsible for the child to correspond with the class of those enjoying parental rights.²¹⁷

210 CAL. FAM. CODE § 4055 (West 2004).

211 *Id.* § 4053.

212 See *Senate Bill 1476 May 8 Analysis*, *supra* note 21, at 7 ("Recognizing these families can also reduce the state's financial responsibility for the child because all parents have the obligation to support the child. In dependency actions, if a child has more than two parents, legal acknowledgement of more than two of those parents may keep the child out of foster care by giving the court more options for placement.").

213 See *supra* note 113 and accompanying text.

214 See *supra* note 114 and accompanying text. *But see* WIS. STAT. ANN. § 49.90(1)(a)(2) (West 2011) (requiring parents of dependents under the age of eighteen to maintain the children of those dependents to the extent that the dependent cannot and the (grand)parent is able to).

215 923 A.2d 473 (Pa. Super. Ct. 2007).

216 See *supra* Part II.D.

217 Notably, as discussed above, in the *Principles* the ALI does not make de facto parents and parents by estoppel (when there are already two legal parents) liable for child support, though they would award parental rights to these parents. The *Principles* contains no explanation of why it would enlarge the rights of this group of people without enlarging their corresponding responsibilities. See generally Baker, *supra* note 18 (discussing the imbalance inherent to the ALI's proposals).

3. Analysis of the Bill's Provision for Multiple (More than Two) Parents

The most radical feature of this proposal is that it allows a child in California to have more than two legal parents by supposing that it could be in the best interests of a child to have more than two. In his attempt to provide avenues for equitable outcomes in cases where presumptions of parenthood conflict and the adults involved seek judicial intervention, Senator Leno and his Bill threaten to undercut foundational principles of family law. The Bill invokes similar principles to those which characterize the movements in the District of Columbia, Delaware, Maine, and Pennsylvania, as noted by supporters of the Bill,²¹⁸ and is also sympathetic to the *Principles*, in its bending of the concept of parenthood in an attempt to pursue equitable outcomes for children. Yet it is fundamentally different from these doctrines in that it approaches multiple parenthood through the avenue of once-conflicting presumptions rather than through the after-the-fact doctrines discussed above that require action (such as participating in childrearing) or the development of emotional connections.

Despite potential vagueness problems, California's current method of resolving conflicting presumptions in favor of the one "which on the facts is founded on the weightier considerations of policy and logic"²¹⁹ is constitutionally appropriate under the reasoning of *Michael H. v. Gerald D.*²²⁰ It is constitutionally permissible to deny certain individuals parental standing in some instances in the furtherance of some stated policy goal, such as maintaining predictability, stability, and as much integrity in family units as possible.²²¹ It is within a state's prerogative to change these presumptions in a variety of ways, and allow presumptions to be rebutted with greater or lesser showings in determination proceedings, but the Supreme Court has not insinuated that more than two presumptions could appropriately exist simultaneously.²²²

218 *Senate Bill 1476 May 8 Analysis*, *supra* note 21, at 2–3.

219 CAL. FAM. CODE § 7612(b) (West 2004).

220 491 U.S. 110 (1989).

221 *See supra* notes 34, 54 and accompanying text.

222 *See Michael H.*, 491 U.S. at 128–29 (1989) (plurality opinion). Individual Justices of the Court haven't foreclosed the possibility that arrangements where a child maintains parent-like relationships with other adults might be constitutionally permissible; however, this perspective has yet to be affirmed by a majority of the court. *See Troxel v. Granville*, 530 U.S. 57, 86, 88–89 (2000) (Stevens, J., dissenting); *Michael H.*, 491 U.S. at 136 (Brennan, J., dissenting); *cf. Michael H.*, 491 U.S. at 123 n.3 (plurality opinion) ("Perhaps the concept [of the family unit] can be expanded [beyond the traditional structure], but it will bear no resemblance to traditionally respected rela-

The case of *In re M.C.*, which gave rise to the Bill, is worthy of further analysis. It is important to note that, there, it was not the case that Melissa, Irene, and Jesus together intended that Melissa conceive and that all three would raise M.C. Rather, at each stage Melissa participated in a couple—first she coupled with Irene, an arrangement she left to couple with Jesus, leaving again to couple with Irene, whom she left for Jose.²²³ Melissa sought to raise her child as a single mother or participate with a single partner in the raising of M.C. at every step; the trouble in this case comes with the fact that Melissa's family structures shifted so quickly that the law could not catch up, resulting in conflicting presumptions.²²⁴

The appropriate remedy in this case, and in others like it, is to work with equitable doctrines or to tweak existing presumptions in order to bring about the best outcome, not to change the nature of parenthood by providing for more than two adults to raise a child together with all of the legal rights and responsibilities of legal parenthood. Doctrines such as *in loco parentis*, parenthood by estoppel, de facto parenthood, and especially third-party visitation provide platforms for ensuring that in special cases those adults who are not parents, but who occupy unique and important places in a child's life, can retain a legal right to interact with them.

Historically, courts have recognized the right of two parents to raise their children. Social perspectives on families have changed substantially in the last hundred years, but

[a]lthough the concept of parent has expanded from two persons, male and female, creating a child through their biological union, to two persons of the same sex creating a child through their committed intentions and using assisted reproduction, all of these relationships have in common a biological nexus of two parents leading to a child's birth. The two individuals who in every case were involved in the creation of that child . . . are the only two persons who have been recognized as a parent to the child.²²⁵

Senator Leno's endeavor to adjust family law to better meet the needs of California families is commendable and understandable, as family structures are changing and many families no longer conform to the traditional heterosexual-married-couple-with-biological-children

tionships—and will thus cease to have any constitutional significance—if it is stretched so far as to include the relationship established between a married woman, her lover, and their child . . .”).

223 See *supra* notes 166–177 and accompanying text.

224 *In re M.C.*, 123 Cal. Rptr. 3d 856, 871–78 (Cal. Ct. App. 2011).

225 *Bancroft v. Jameson*, 19 A.3d 730, 749 (Del. Fam. Ct. 2010).

model.²²⁶ But changing the nature of parental presumptions and expanding the number of parents that a child can have should be a step that is taken, if at all, only after careful deliberation and consideration of constitutional issues involved as well as the impact on California's children.²²⁷ The next Part examines the practical concerns of multiple parenthood and issues likely to arise that could negatively impact a child's development.

IV. THE PRACTICAL IMPACT OF HAVING MORE THAN TWO PARENTS ON CHILDREN

Despite fundamental changes in the last fifty years,²²⁸ family units remain the “essential building blocks” of modern American society.²²⁹ State governments and local communities should do everything in their power to support these family units, but before they do anything else, courts, legislatures, and interested parties must make sure that parents are able to effectively raise their children.²³⁰

Social scientists, legal scholars, and Supreme Court Justices alike have all noted that parental autonomy is crucial to the American familial model.²³¹ Autonomy is directly linked to concepts of authority, which a caregiver needs in order “to do the job to the best of her

226 See Baker, *supra* note 18, at 141 (“Changes in both social norms and technology have altered, fundamentally, how people become and function as parents. It defies reality to assume that children will be cared or provided for within the confines of a binary biological norm. The binary biological model may still express our ideal but it does not reflect our world.”); Ian Lovett, *Measure Opens Door to Three Parents, or Four*, N.Y. TIMES, July 13, 2012, at A9, available at http://www.nytimes.com/2012/07/14/us/a-california-bill-would-legalize-third-and-fourth-parent-adoptions.html?page-wanted=all&_r=0. Lovett quotes Professor Nancy Polikoff as saying, “[t]his is about looking at the reality of children’s lives, which are heterogeneous, as opposed to maintaining a fiction of homogeneity . . . Families are different from one another. If the law will not acknowledge that, then it’s not responding to the needs of children who do not fit into the one-size-fits-all box.” *Id.*

227 See Debra J. Saunders, *Leno’s Law: Extra Parent Could Split Baby More Ways*, TOWNHALL.COM, at 2 (Aug. 5, 2012), http://townhall.com/columnists/debraj-saunders/2012/08/05/lenos_law_extra_parent_could_split_baby_more_ways (“[L]awmakers should be very humble when they tinker with family law.”); Wilson, *supra* note 75, at 92 (“Before any decisionmaker implements the ALI’s proposed treatment of Ex Live-In Partners, they should be convinced that the ALI has met its burden of demonstrating that this creation and enlargement of parental rights would benefit children more than it would harm them.”).

228 See *supra* notes 3–10 and accompanying text.

229 MARGARET F. BRINIG, FAMILY, LAW, AND COMMUNITY 119 (2010).

230 *Id.* at 98.

231 Indeed, as Professor Brinig noted, autonomy is one of the primary underlying reasons for the presumption of paternity and the presumption that parents act with

or his abilities.”²³² Continuously second-guessing and challenging decisions results in stunted parenting,²³³ and indeed this need for authority is the historic justification for preventing judges from meddling with parental decisions unless that parent is demonstrably unfit. Some suggest that parents become more motivated to care for their children when they can be sure that their decisions will not be interfered with.²³⁴

Authority is not just a concept relevant to a parent’s interaction with the State—parents need authority even in their own family units in order to foster personal development in their children.²³⁵ This need for parental autonomy underlies the Supreme Court’s decision in *Troxel* to prevent extended family members from gaining too big of a stake in a parent-child relationship.²³⁶ A parent’s bond with his or her child is “central to the lives of both parents and children, is intense and intimate, and requires privacy to flourish.”²³⁷ Children and families need healthy communities in order to thrive,²³⁸ but that truism does not extend so far as to justify expanding the number of adults in a child’s nuclear family.²³⁹ The vast majority of custodial parents voluntarily expand their extended family networks to associate their children with ex-partners, extended family members, and other enriching adults, and decrease their networks again if they think that such contact will be detrimental to the child.²⁴⁰ If it is necessary to a child’s health and well-being to continue to interact with a parent’s former partner, courts should defer to the parent to make that decision under the *Parham* presumption and only interfere if the parent is

their children’s best interests in mind, as well as the reason for demarcating where the government should refrain from interfering at all. *Id.* at 122.

232 Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 979 (1999); *see also id.* at 979–80, 1029 (discussing parents’ need for autonomy in order to be effective parents, whether they are biological or adoptive).

233 BRINIG, *supra* note 229, at 120 (“When others—putative fathers, grandparents, well-meaning strangers—cannot second-guess decisions, families can thrive.”).

234 *See id.* at 118–21; Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2430–31, 2450–51 (1995).

235 BRINIG, *supra* note 229, at 98 (arguing that “[w]hen third parties claim ‘rights,’ they undermine marriages and parenting”).

236 *See supra* notes 91–96 and accompanying text.

237 Scott & Scott, *supra* note 234, at 2476.

238 BRINIG, *supra* note 229, at 98; *see also* Margaret F. Brinig, *Troxel and the Limits of Community*, 32 RUTGERS L.J. 733 (2001) (discussing the ways that communities can strengthen marriages and families, but also the ways in which communities can inhibit effective parenting).

239 *See* BRINIG, *supra* note 229, at 142 (discussing various studies finding broad kin networks problematic).

240 *See* Wilson, *supra* note 75, at 98.

found to be unfit. Legislators and courts should not expand the class of parents as a way of forcing parents to associate their children with individuals that the parent might appropriately wish to cut out.

Children may be more harmed than benefited by maintaining relationships with multiple adults because a child can only be emotionally dependent on a limited number of people. “[H]anding out new parental rights is a zero-sum game: where a right is enlarged for one party, it is diminished for the other.”²⁴¹ Children of divorce often feel caught between their parents; fractured family units resulting from break-ups would be all the more painful for children if they have three or four parents who they may feel are owed their allegiance—a child might feel caught not just between two worlds, but between three or four. Professor Margaret Brinig analyzes a child’s relationship with multiple interested adults in light of Michael Heller’s commons/anti-commons theory²⁴²: a child’s time, loyalty, and emotional energy are finite resources. If too many parents attempt to manage the child’s development, the tragedy of the commons occurs—no parent can effectively accomplish his or her task without being undercut by someone else. By the same token, if too many parents are able to veto another parent’s decisions the tragedy of the anti-commons occurs—the ability of many to veto prevents any development.

Research suggests that larger networks of family are not always preferable—Professors Kristen Harknett and Jean Knab found that smaller and denser kin networks seemed to be superior to broader, weaker kin networks.²⁴³ That study focused on multi-partner fertility, or the experience of having children with more than one partner, but results shed light on situations involving three parents as well. Though having children with multiple partners increased the number of parents (and accordingly extended families) for any given group of minor children sharing one common parent, the “larger kin networks do not translate into greater availability of social network support in financial, housing, and child-care areas.”²⁴⁴ These findings call into

241 Wilson, *supra* note 71, at 1115; see *Troxel v. Granville*, 530 U.S. 57, 64 (2000) (plurality opinion) (“The extension of statutory rights in this area to persons other than a child’s parents, however, comes with an obvious cost. For example, the State’s recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship.”); *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (plurality opinion); Baker, *supra* note 18, at 131–32 (discussing how negative and positive parental rights can cut against each other in a diminishing manner).

242 BRINIG, *supra* note 229, at 137–38.

243 See Kristen Harknett & Jean Knab, *More Kin, Less Support: Multipartnered Fertility and Perceived Support Among Mothers*, 69 J. MARRIAGE & FAM. 237 (2007).

244 *Id.* at 249.

question the suggestion that more parents would provide more emotional and physical resources for children, and suggest instead that an increased number of parental relationships results in watered-down relationships.

Recent scholarship has cast serious doubt on the concept that continuing contact between a child and adults with whom he or she was close is always beneficial to the child. Maintaining contact with adults after family unit dissolution or non-formation can bring new dangers as new partners of each parent are brought into close proximity of the child.²⁴⁵ Adults (and men in particular) do not invest in or engage with non-biological children to the same degree as they do in their own biological children.²⁴⁶ Regardless of biological connection, children face increased risk of abuse by adults who did not reside with them from their infancy.²⁴⁷ While children who live in households with their married biological parents still “generally fare better than teenagers living in any other family type,”²⁴⁸ simply having more parents involved is not necessarily better for children. Professors Manning and Lamb found that teenagers whose mothers were living with or married to a new partner were not uniformly advantaged compared to their peers living in single-mother families.²⁴⁹ Other studies have suggested that “the gains children realize from living with nongenetic caretakers may not be as great as we would otherwise suppose, and may represent only modest welfare increases over living alone with their mothers.”²⁵⁰ These findings are in keeping with the *Parham* presumption that parents know what is best for their children and will act in accordance with that knowledge. Scholarship on the issue remains unsettled as to whether biology, evolutionary impulses, or raising a

245 See generally Wilson, *supra* note 71 (arguing that expanding the rights of ex-partners pursuant to the ALI’s schema will likely result in increased physical and sexual abuse and neglect).

246 See Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal?: Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 224 (2003) (examining results from a study analyzing father involvement in “blended families,” through the lens of the relationship to the father-figure); Wilson, *supra* note 75, at 103–06 (reviewing studies that “suggest that biology produces real differences in investment and outcomes for children”).

247 Wilson, *supra* note 75, at 115.

248 Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 885 (2003); see Hofferth & Anderson, *supra* note 246, at 230 (noting how fathers who have lived with children longer fare better in the familial relationships).

249 Manning & Lamb, *supra* note 248, at 890.

250 Wilson, *supra* note 75, at 106.

child from infancy gives rise to the presumption, but the presumption nonetheless exists.²⁵¹

As the class of people eligible for custodial rights grows, so, too, would the amount of litigation. As adults are given more avenues of attaining the status of parenthood, courts would be required to adjudicate disputes more frequently, especially as disagreements over child-rearing occur.²⁵² Married and cohabiting parents are forced to mediate their disagreements over child-rearing if for no other reason than to keep the peace in the household; the more parents a child has, the less likely those parents would be to peaceably sort out their differences and the more likely they would be to seek judicial intervention.²⁵³ Courts prefer to stay out of adjudications of parenting style as much as possible due mainly to the *Parham* presumption that parents know what is best for their children. Judges recognize that they lack the specialized knowledge necessary to make informed decisions—parents generally know the most about what their child needs. Courts are unwilling to adjudicate such matters unless a parent is shown to be unfit. Families, and children especially, need stability in order to be healthy. Breaking down traditional concepts of parenthood and presumptions of parenthood decreases familial stability, as family units would be subject to questioning and even potential reorganization by courts.²⁵⁴

Judicial records are replete with cases where parental animosity has prevented parents from making the best decisions for their children, and in such cases provision of visitation and even parental rights-like shares of custody to ex-partners and other third parties is surely a positive thing for the child.²⁵⁵ However, state legal regimes must balance these cases against three things: the constitutional presumption that the parent knows what is best for the child and will

251 Hofferth & Anderson, *supra* note 246, at 214–18 (discussing various theories leading to increased paternal investment).

252 See Baker, *supra* note 18, at 133 (“Giving de facto parents rights increases the state’s involvement in the child rearing process. The more people who can claim relationship rights, the more people there are who can petition a court to alter or solidify a custodial arrangement, and the more courts end up deciding what is in a child’s best interest.”); Wilson, *supra* note 75, at 100 (suggesting that litigation would be encouraged once courts begin conferring substantive rights on ex live-in partners).

253 See Duncan, *supra* note 129, at 269.

254 *Id.* at 263.

255 See Wilson, *supra* note 75, at 92 (“No one doubts that some children will be made better off by preserving a connection with a de facto parent. But this gain may not be as great as we might think it would be by extrapolating from biological parents.” (footnote omitted)).

make decisions for the child accordingly,²⁵⁶ the practical need for parental autonomy, and the reality that more than two parents involved in a child's life will be more likely to lead to trouble than to peaceable resolution and development.

CONCLUSION

Senator Leno's Bill was ultimately vetoed by Governor Edmund G. Brown, Jr.²⁵⁷ It is likely that a largely similar bill will be passed in the near future—something in which Shannon Minter, the Legal Director of the National Center for Lesbian Rights, expressed confidence.²⁵⁸ This Bill and others like it come from good intentions—few disagree that provision for children and the myriad of families in which children find themselves is a positive thing. Ultimately, however, this Bill would have negatively impacted children in California by watering down the concept of parenthood so as to make the task of raising productive, healthy children that much more difficult for parents to achieve. The Bill attempts to “put[] the best interest of the child above all else,”²⁵⁹ but this Note argues that children would be best served by limiting the number of parents a child has to two so that those parents are able to act in the best interests of their child. Before moving further into the realm of state-sanctioned multiple parenthood, at a minimum more research and thought is necessary to evaluate the potential impacts on children.

256 See *supra* notes 28–29 and accompanying text.

257 *Senate Bill 1476 Veto Message*, *supra* note 23.

258 Cheryl Wetzstein, *Two Parents of Child Could Become 3 Under Bill: Brown's Veto Seen as Just a Delay in Letting Courts Decide*, WASH. TIMES (Oct. 10, 2012), <http://www.washingtontimes.com/news/2012/oct/10/two-parents-of-child-could-become-3-under-bill>.

259 ASSEMBLY COMM. ON JUDICIARY, BILL ANALYSIS, S.B. 1476, 2012 Leg., Reg. Sess., at 8 (Cal., June 26, 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1451-1500/sb_1476_cfa_20120625_111935_asm_comm.html.

