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# **A Changing Family Requires Changing Laws: A Framework for Allowing More than Two Legal Parents In New Jersey**

**Jonathan Reda**

## **Introduction**

New Jersey law should allow for more than two legal parents. Assisted reproductive technologies (ART), same-sex marriage, and other societal factors have changed parenting relationships. The nuclear family consisting of a married opposite-sex couple with biological children is not the only type of family structure that exists.<sup>1</sup> For example, a recent New Jersey case involved a married, male, same-sex couple that conceived and raised a child with their female friend.<sup>2</sup> The female friend was not merely a donor or surrogate but an equal parent with the two married men.<sup>3</sup> The child understood that she had two dads and a mom. But the law does not recognize the husband of the genetic father as a legal parent, even though he acted as equal parent since the child was born.

Assisted reproductive technologies (ART) allow for a greater variety of family arrangements. One woman can donate her egg, that egg can be fertilized by a donor's sperm, and then the egg can be implanted into a different woman who gives birth to the child.<sup>4</sup> Who are

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<sup>1</sup> Angela Chen, *The Rise of the 3-Parent Family*, THE ATLANTIC (Sept. 24, 2020, 12:40 PM), <https://www.theatlantic.com/family/archive/2020/09/how-build-three-parent-family-david-jay/616421/>; Gretchen Livingston, *Fewer than half of U.S. kids today live in a 'traditional' family*, PEW RESEARCH CENTER (Dec. 22, 2014), <https://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/>.

<sup>2</sup> D.G. v. K.S., 133 A.3d 703 (N.J. Super. Ct. Ch. Div. 2015).

<sup>3</sup> *Id.* at 707-708.

<sup>4</sup> Third-party Reproduction: Sperm, Egg, and Embryo Donation and Surrogacy, American Society for Reproductive Medicine, <https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and->

the parents of the child? The egg donor is genetically related, the sperm donor is genetically related, and the women who carried and gave birth to the child has a biological connection. Maybe all three want to raise the child together, but what if they all have spouses? Technology makes these configurations possible, but the further families get away from the nuclear structure, the murkier their legal rights become regarding their children.<sup>5</sup>

This comment is not about creating new family structures or destroying the nuclear family; it is about giving legal certainty and clarity to families that already exist. The best interest of the child would be to protect their existing and emerging parental relationships.<sup>6</sup> Children should not have to question whether the person they see as their parent is legally their parent.<sup>7</sup> It would be in the best interest of the child to establish parentage at birth through a pre-conception agreement.<sup>8</sup> The intent to be a parent and share the legal responsibilities with the other parents before the conception of a child should be sufficient to establish parentage. This comment will mainly focus on families with more than two parents that decide to conceive and raise a child together. The issue of parentage in step-families, while important, is beyond the scope of this comment because this comment focuses on the situation in which three-people agree to be parents before the conception of the child, not when someone comes into a child's life after the child is born.

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[booklets/documents/fact-sheets-and-info-booklets/third-party-reproduction-sperm-egg-and-embryo-donation-and-surrogacy/](#) (last visited Apr. 16, 2021).

<sup>5</sup> See generally Douglas NeJaime, *The Nature of Parenthood*, 126 *YALE L.J.* 2260 (2017).

<sup>6</sup> See generally Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 *NEV. L.J.* 743 (2016).

<sup>7</sup> Emily B. Gelmann, *What About Susan? Three's Company, Not a Crowd: The Importance of Allowing Third Parent Adoptions When Both Legal Parents Consent*, 30 *WIS. J.L. GENDER & SOC'Y* 57, 71-72 (2015).

<sup>8</sup> Mallory Ullrich, *Tri-Parenting on the Rise: Paving the Way for Tri-Parenting Families to Receive Legal Recognition Through Preconception Agreements*, 71 *RUTGERS U.L. REV.* 909, 933-35 (2019).

In Part I, this comment will explain ART, how it allows for greater family arrangements, and how New Jersey passed legislation to attempt to adapt to these changes. In Part II, this comment will explore equitable doctrines that recognize parental rights for third parties, how courts apply them to families with more than two parents, and why they are important but not equal to legal parenthood. In Part III, this comment explores current laws that recognize more than two parents. This section discusses the few states in the United States that recognize more than two parents and also looks at two Canadian provinces that offer another approach to parentage of more than two parents. This section also addresses constitutional concerns with recognizing more than two legal parents. Finally, in Part IV, this comment lays out a framework to recognize more than two legal parents in New Jersey.

## I. Different Family Arrangements

This section focuses on how family structures changed and continue to change because of social and ART advancements. The traditional two-parent nuclear family is still common but shrinking.<sup>9</sup> While traditional nuclear families decline, marriage equality in all fifty states led to an increase in same-sex marriages.<sup>10</sup> Same-sex married couples began to have children of their own.<sup>11</sup> Because of technological advancements in ART, same-sex couples have a plethora

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<sup>9</sup> *Parenting in America: The American Family Today*, PEW RESEARCH CENTER (Dec 17, 2015), <https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/>.

<sup>10</sup> Mike Schneider, *Gay marriages rise 5 years after Supreme Court ruling*, ASSOCIATED PRESS (Sept. 17, 2020), <https://apnews.com/article/couples-relationships-gays-and-lesbians-archive-census-2020-587455c1d71f6363b2d272253f916b88#:~:text=Since%202014%2C%20the%20year%20before,Census%20Bureau's%20American%20Community%20Survey.>

<sup>11</sup> Fifteen Percent of Same-Sex Couples Have Children in Their Household: Same-Sex Couples are More Likely to Adopt or Foster Children, United States Census Bureau (Sept. 17, 2020) <https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html#:~:text=Same%2Dsex%20couples%20also%20tended,have%20adopted%20children%20or%20step%20children.>

of options as to how they want to structure their families.<sup>12</sup> Furthermore, ART usage extends beyond same-sex families and allows many opposite-sex family structures to conceive children. New Jersey, recognizing the change in ART, developed a legal framework to recognize gestational surrogacy agreements that utilize ART.

The American family changed over the past several decades.<sup>13</sup> As of 2014 two parent households were still the dominant family structure but composed only sixty-nine percent of households down from eighty-seven percent in 1960.<sup>14</sup> The rate of single parent households increased from nine percent in 1960 to twenty-six percent in 2014.<sup>15</sup> The shift in family arrangements may be due to greater economic resources that make it possible for a person to choose to raise a child by themselves.<sup>16</sup>

Families are expanding into new formations. *Obergefell v. Hodges*<sup>17</sup> recognized same-sex marriage as legal in all fifty states.<sup>18</sup> After that decision same-sex couples increasingly got married and started having children.<sup>19</sup> As of 2020, about fourteen percent of same sex couples had at least one child.<sup>20</sup> But how same-sex couples go about having children is much more

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<sup>12</sup> Third-party Reproduction: Sperm, Egg, and Embryo Donation and Surrogacy, American Society for Reproductive Medicine, <https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/third-party-reproduction-sperm-egg-and-embryo-donation-and-surrogacy/> (last visited Apr. 16, 2021).

<sup>13</sup> Parenting in America, *supra* note 9.

<sup>14</sup> Parenting in America, *supra* note 9.

<sup>15</sup> Parenting in America, *supra* note 9.

<sup>16</sup> Stephanie Kramer, *U.S. has world's highest rate of children living in single-parent households*, PEW RESEARCH CENTER (Dec. 12, 2019) <https://www.pewresearch.org/fact-tank/2019/12/12/u-s-children-more-likely-than-children-in-other-countries-to-live-with-just-one-parent/>.

<sup>17</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>18</sup> *Id.*

<sup>19</sup> Some states have not been welcoming of change and some made it harder for same-sex couples to have children or be recognized as parents. Emily R. Lipps, *Janice M. v. Margaret K.: Eliminating Same-Sex Parents' Rights to Raise Their Children By Eliminating The De Facto Parent Doctrine*, 68 MD. L. REV. 691 (2009).

<sup>20</sup> Fifteen Percent of Same-Sex Couples Have Children in Their Household: Same-Sex Couples are More Likely to Adopt or Foster Children, United States Census Bureau (Sept. 17, 2020) <https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html#:~:text=Same%2Dsex%20couples%20also%20tended.have%20adopted%20children%20or%20step%20children.>

varied than opposite sex couples for obvious biological reasons. About twenty-six percent of children in with same sex parents have a relationship with both biological parents.<sup>21</sup> This opens the possibility of having three parental figures in the child’s life and shows the need for a legal framework to recognize more than two parents if that is the intent of the parents and in the best interest of the child.

Same-sex couples are by no means the only family arrangement that would benefit from legal recognition of more than two parents. ART and other reproductive technologies changed how any group of people can create a family.

#### **A. Assisted Reproductive Technology (ART)**

This section focuses on the development, use, and cost of ART. Developments in ART allow for different family arrangements and structures. Sexual intercourse is no longer the only way to conceive a child. While ART is revolutionary it can also be cost prohibitive.<sup>22</sup> New Jersey residents use ART at a higher rate than average in the United States.<sup>23</sup> Therefore New Jersey parentage law needs to account for the different possible family structures.

New Jersey law defines ART as “procreative laboratory procedures involving human eggs or pre-embryos, including, but not limited to: in vitro fertilization; embryo transfer; gamete transfer; pronuclear stage transfer; and zygote transfer.”<sup>24</sup> This definition excludes methods that only involve sperm, like some artificial insemination procedures. New Jersey’s definition is

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<sup>21</sup> *Id.*

<sup>22</sup> *The Real Cost of IVF-IVF Treatment Costs Explained*, RMANETWORK.COM, <https://rmanetwork.com/blog/cost-of-ivf-treatment-costs-explained/> (last visited Apr. 16, 2021).

<sup>23</sup> Ctr. Disease Control and Prevention, *State-Specific Assisted Reproductive Technology Surveillance*, <https://www.cdc.gov/art/state-specific-surveillance/index.html> (Oct. 9, 2019).

<sup>24</sup> N.J. Stat. Ann. §9:17-62 (2020).

consistent with the Center for Disease Control’s (CDC) definition of ART.<sup>25</sup> The Uniform Parentage Act and other jurisdictions, like Ontario (which will be discussed later), define ART more broadly, with ART consisting of any “method of conceiving other than by sexual intercourse.”<sup>26</sup> The difference in definitions of ART is significant. Some ART procedures can be prohibitively expensive with in vitro fertilization costing between \$10,000 and \$15,000.<sup>27</sup> But artificial insemination can be much more affordable, costing around \$300 to \$1000 per cycle.<sup>28</sup> Therefore legislation protecting or expanding parentage to individuals who use ART may only apply to those with more wealth if the definition of ART does not encompass cheaper procedures like artificial insemination.

Nationally about two percent of children are born using ART.<sup>29</sup> But in New Jersey, about four percent of children are born using ART.<sup>30</sup> One possible reason for New Jersey’s higher than average rate of ART use could be attributed to New Jersey’s higher median income compared to the rest of the country<sup>31</sup> and women in New Jersey deciding to have children later in life.<sup>32</sup> Since

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<sup>25</sup> Ctr. Disease Control and Prevention, *What is Assisted Reproductive Technology?*, <https://www.cdc.gov/art/whatis.html> (Oct. 8, 2019).

<sup>26</sup> Children’s Law Reform Act, R.S.O. 1990, c. C.12, s.1 (Can.); Uniform Parentage Act §102(4)(Unif. Law Comm’n 2017).

<sup>27</sup> *The Real Cost of IVF-IVF Treatment Costs Explained*, RMANETWORK.COM, <https://rmanetwork.com/blog/cost-of-ivf-treatment-costs-explained/> (last visited Mar. 7, 2021).

<sup>28</sup> *Artificial Insemination Cost*, ADVANCE REPRODUCTIVE MEDICINE, <https://infertilitydocs.com/artificial-insemination-cost/#:~:text=The%20cost%20of%20artificial%20insemination.and%20less%20for%20intracervical%20insemination> (last visited Mar. 7, 2021).

<sup>29</sup> Ctr. Disease Control and Prevention, *State-Specific Assisted Reproductive Technology Surveillance*, <https://www.cdc.gov/art/state-specific-surveillance/index.html> (Oct. 9, 2019).

<sup>30</sup> Ctr. Disease Control and Prevention, *State-Specific Assisted Reproductive Technology Surveillance*, <https://www.cdc.gov/art/state-specific-surveillance/index.html> (Oct. 9, 2019).

<sup>31</sup> *Median household income in New Jersey from 1990 to 2019*, STATISTA, <https://www.statista.com/statistics/205972/median-household-income-in-new-jersey/> (last visited Mar. 7, 2021).

<sup>32</sup> *N.J. women having 1<sup>st</sup> child later in life*, NJ.COM, [https://www.nj.com/healthfit/2016/01/women\\_having\\_1st\\_child\\_later\\_-\\_but\\_2nd\\_kid\\_sooner.html](https://www.nj.com/healthfit/2016/01/women_having_1st_child_later_-_but_2nd_kid_sooner.html) (Jan. 16, 2019).

New Jersey residents are using ART at a greater rate they have the possibility to configure unique family formations that that the law may not fully recognize.

ART opens possibilities for a variety of different family arrangements. New Jersey passed legislation to protect some of the family structures that ART can enable.<sup>33</sup>

## **B. New Jersey Gestational Surrogacy Act**

New Jersey's Gestational Surrogacy Act established a legal framework to protect gestational surrogacy agreements.<sup>34</sup> Through ART, multiple people can be involved in the conception of a child, so it is vital that the legal rights of everyone involved are clear. The Act protects intended parents, surrogates, and donors.<sup>35</sup> While not allowing the establishment of more than two parents, the Act is a positive step for the protection of New Jersey families and a willingness to adapt to future changes.

New Jersey has recently shown a willingness to accept the changing landscape of reproductive technologies and protect new family structures. In 2018, New Jersey passed the New Jersey Gestational Carrier Act which established a framework to recognize gestational surrogacy agreements.<sup>36</sup> Gestational surrogacy means that a donor egg is fertilized and implanted into the surrogate as opposed to traditional surrogacy which requires the surrogate's own egg to be fertilized.<sup>37</sup> A gestational surrogate is not genetically related to the child.<sup>38</sup> In

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<sup>33</sup> See *infra* Part I.B.

<sup>34</sup> N.J. Stat. Ann. §9:17-61 (2020).

<sup>35</sup> N.J. Stat. Ann. §9:17-61 (2020).

<sup>36</sup> N.J. Stat. Ann. §9:17-61 (2020).

<sup>37</sup> *Traditional vs. Gestational Surrogacy – What's Best for my Family?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my-family/#:~:text=The%20main%20difference%20between%20gestational,biological%20link%20to%20the%20baby> (last visited Mar. 7, 2021).

<sup>38</sup> *Traditional vs. Gestational Surrogacy – What's Best for my Family?*, SURROGATE.COM, <https://surrogate.com/about-surrogacy/types-of-surrogacy/traditional-vs-gestational-surrogacy-whats-best-for-my->

total gestational surrogacy utilizing ART can cost between \$90,000 and \$175,000 in New Jersey.<sup>39</sup>

The purpose of the Act is to promote the best interest of the children, protect all parties involved, and update the law to keep up with advances in reproductive technology.<sup>40</sup> The Act allows for parentage to be established at birth by honoring the intent of the parties through a written gestational carrier agreement.<sup>41</sup> The gestational surrogate's intent is to conceive, carry, and give birth to a child through ART and immediately surrender the child to the intended parents after giving birth.<sup>42</sup> The legal parents of the child conceived pursuant to the gestational agreement will be the intended parents.<sup>43</sup> The intended parents do not need to have any genetic relationship to the child and will assume all legal responsibilities and duties once the child is born.<sup>44</sup>

Under the Act, a gestational carrier agreement is enforceable if it satisfies the following requirements: (1) it is in writing; (2) signed by gestational carrier, any spouse or partner to the gestational carrier, and each intended parent; (3) the gestational carrier undergoes a medical and psychological screening prior to conception; (4) the intended parents undergo a psychological screening; (5) the gestational carrier and intended parents are represented by separate attorneys; (6) the agreement has express terms that the gestational carrier will surrender the child resulting from conception through ART; (7) the agreement has express terms that the intended parents will

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[family/#:~:text=The%20main%20difference%20between%20gestational.biological%20link%20to%20the%20baby](#) (last visited Mar. 7, 2021).

<sup>39</sup> *How Much is a Surrogate in NJ?*, NBSURROGACY.COM, <http://www.nbsurrogacy.com/surrogate-cost-nj/>.

<sup>40</sup> N.J. Stat. Ann. §9:17-61 (2020).

<sup>41</sup> N.J. Stat. Ann. §9:17-65 (2020).

<sup>42</sup> N.J. Stat. Ann. §9:17-65 (2020).

<sup>43</sup> N.J. Stat. Ann. §9:17-67(g) (2020).

<sup>44</sup> N.J. Stat. Ann. §9:17-65(b)(3)(b) (2020).

assume parental responsibilities immediately; and (8) contains provisions for the financial responsibilities of the parties.<sup>45</sup>

The parties establish parentage by filing a complaint in Family Court for an order of parentage after the carrier becomes pregnant pursuant to the gestational carrier agreement.<sup>46</sup> The complaint must contain an affidavit that the parties entered into a gestational carrier agreement, an affidavit by the attorneys of the parties, and an affidavit by the medical facility stating that conception was achieved in accordance with the agreement.<sup>47</sup> If the parties complied with the Act then the intended parents will be named the legal parents of the child.<sup>48</sup> But even if the requirements of a gestational carrier agreement are not met, the courts can assign parentage based on the intent of the parties.<sup>49</sup>

Interestingly, there are no express provisions in the Act setting a maximum number of intended parents. The Act only states that all intended parents must execute the agreement.<sup>50</sup> The only limit seems to be that the gestational carrier and her spouse or partner could not also be intended parents since surrendering the child and all parental rights is required for an enforceable gestational carrier agreement.<sup>51</sup> But recently the New Jersey Law Revision Commission issued a report with proposed changes to the New Jersey Parentage Act that would explicitly allow for more than two parents.<sup>52</sup> This report and the proposed changes will be discussed in Section Three

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<sup>45</sup> N.J. Stat. Ann. §9:17-65 (2020).

<sup>46</sup> N.J. Stat. Ann. §9:17-67(a) (2020).

<sup>47</sup> N.J. Stat. Ann. §9:17-67(b)(1-3) (2020).

<sup>48</sup> N.J. Stat. Ann. §9:17-67(f) (2020).

<sup>49</sup> N.J. Stat. Ann. §9:17-65(d) (2020).

<sup>50</sup> N.J. Stat. Ann. §9:17-65(a)(1) (2020).

<sup>51</sup> N.J. Stat. Ann. §9:17-63(a)(3) (2020).

<sup>52</sup> New Jersey Law Revision Commission, Tentative Report Regarding Proposed Changes to the New Jersey Parentage Act, N.J.S 9:17-38 *et seq.* (Apr. 5, 2021), <https://www.njlrc.org/projects/2019/6/5/new-jersey-adult-guardianship-and-protective-proceedings-jurisdiction-act-z35cb-bear6-bnshg-9p9yw-baja2-htd8m-z6rfr-pkcyf-45je7> [hereinafter Law Revision].

of this comment. As social structures and technology change, the law must protect new family arrangements. Same-sex and opposite-sex couples can utilize ART to create families. Some of these families may want to have a donor or surrogate involved with the child and act as a family together. Other families who cannot afford ART could still conceive a child through sexual intercourse but choose to have a third-party act as a third parent. Family arrangements are not as predictable as they were in years past and the law should accommodate those new forms. Many courts in the United States have used their equitable power to fill some of the legislative gaps and recognize that third parties who are traditionally legal strangers to a child may be entitled to some parental rights.

## II. Equitable Doctrines Recognizing Parents

Many states, including New Jersey, have recognized that a third party who is a legal stranger to a child may, by the legal parent's actions, develop a parental relationship with that child. Courts in these states have adopted equitable doctrines to recognize this relationship.<sup>53</sup> De facto parentage and psychological parentage recognize that parental bonds can be forged between third parties and children.<sup>54</sup> Breaking those bonds would harm the children.

The Supreme Court of New Jersey recognized psychological parents in *V.C. v. M.J.B.*<sup>55</sup> A third party can be recognized as a psychological parent if “the legal parent . . . consent[s] to and foster[s] the relationship between the third party and the child; the third party . . . lived with

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<sup>53</sup> *Smith v. Guest*, 16 A.3d 920 (Del. 2011) (recognizing a de facto parent); *Thorndike v. Lisio*, 154 A.3d 624 (ME. 2017) (recognizing a de facto parent); *Conover v. Conover*, 146 A. 3d 433 (Md. 2016) (recognizing a de facto parent).

<sup>54</sup> *V.C. v. M.J.B.*, 163 N.J. 200, 221 (2000) (“At the heart of psychological parent cases is the recognition that children have a strong interest in maintaining ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.”).

<sup>55</sup> *Id.* at 223.

the child; the third party . . . perform[ed] parental functions for the child to a significant degree; and most important, a parent-child bond must be forged.”<sup>56</sup> In *V.C. v. M.J.B.*, two women entered into a relationship and acted as parents to M.J.B.’s twins.<sup>57</sup> M.J.B. was artificially inseminated by a sperm donor shortly after their relationship began.<sup>58</sup> V.C. and M.J.B. both acted as parents to the twins.<sup>59</sup> The court recognized the parental bond that V.C. formed with the children and V.C. clearly satisfied the factors to be recognized as a psychological parent.<sup>60</sup> V.C. acted as a mother to the twins with M.J.B.’s clear consent and “[o]nce the parent-child bond is forged, the rights and duties of the parent should be crafted to reflect that reality.”<sup>61</sup>

Psychological parentage, however, does not completely solve the problem of securing the parental relationships forged by third parties. A psychological parent does not equal a legal parent despite the New Jersey Supreme Court stating that a psychological parent “stands in parity with the legal parent.”<sup>62</sup> While the court held that visitation “will be the presumptive rule” when there is a conflict between a legal parent and psychological parent, custody decisions will favor the legal parent.<sup>63</sup> When seeking custody “under ordinary circumstances when the evidence concerning the child’s best interest (as between a legal parent and psychological parent) is in equipoise, custody will be awarded to the legal parent.”<sup>64</sup>

While these equitable doctrines are an important step to recognizing that parentage can transcend biological bonds, they fall short and create a second class of parents. A recent New Jersey case illustrates a gap in New Jersey family law and how it fails to fully recognize the

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 207-08.

<sup>58</sup> *Id.*

<sup>59</sup> *V.C. v. M.J.B.*, 163 N.J. 200, 207 (2000).

<sup>60</sup> *Id.* at 229.

<sup>61</sup> *Id.* at 229.

<sup>62</sup> *Id.* at 227.

<sup>63</sup> *Id.* at 228.

<sup>64</sup> *V.C. v. M.J.B.*, 163 N.J. 200, 228 (2000).

changes in family structures.<sup>65</sup> D.G. and S.H. were a male same-sex couple and they decided to have a child with their female friend K.S.<sup>66</sup> The three adults agreed to a “tri-parenting relationship” which means that they would all be co-parents to the child.<sup>67</sup> They used D.G.’s sperm and K.S. was impregnated using the “Baster Method” which was an in-home conception method, not ART.<sup>68</sup> The child O.S.H. was born in 2009 and, although not biologically related, they agreed to give the child S.H.’s surname.<sup>69</sup> For about five years the tri-parenting arrangement was working for the whole family.<sup>70</sup> The arrangement ran into trouble when K.S. wanted to relocate with O.S.H. to California. D.G. and S.H. wanted O.S.H. to remain in New Jersey.<sup>71</sup> Unfortunately, they could not resolve their dispute, so they turned to the courts.

The court determined that S.H. satisfied the four elements of a psychological parent to O.S.H.<sup>72</sup> First, the legal parents consented to and fostered the relationship between S.H. and the child. O.S.H. S.H., D.G., and K.S. all agreed to act as co-parents.<sup>73</sup> It could not be disputed that the D.G. and K.S. consented to and fostered a relationship between S.H. and O.S.H.<sup>74</sup> Second, the third party, S.H., lived with the child.<sup>75</sup> Custody of O.S.H. was split between K.S.’s New Jersey and Costa Rican homes and D.G. and S.H.’s Manhattan condominium.<sup>76</sup> O.S.H.’s time at each home fluctuated but S.H. did live with the child.<sup>77</sup> Third, S.H. performed significant parental functions for O.S.H.<sup>78</sup> The court recognized that S.H. took “responsibility for the

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<sup>65</sup> D.G. v. K.S., 133 A.3d 703 (N.J. Super. Ct. Ch. Div. 2015).

<sup>66</sup> *Id.* at 707.

<sup>67</sup> *Id.* at 707-08.

<sup>68</sup> *Id.* at 708.

<sup>69</sup> *Id.*

<sup>70</sup> D.G. v. K.S., 133 A.3d 703, 709 (N.J. Super. Ct. Ch. Div. 2015).

<sup>71</sup> *Id.* at 709.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 710.

<sup>74</sup> *Id.*

<sup>75</sup> D.G. v. K.S., 133 A.3d 703, 710 (N.J. Super. Ct. Ch. Div. 2015).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 711.

<sup>78</sup> *Id.* at 710.

child’s care, education, and development,” including preparing healthy meals and caring for O.S.H. when she was sick.<sup>79</sup> Finally, a parent-child bond was forged.<sup>80</sup> S.H. spent a significant amount of time with O.S.H. over six years and O.S.H. refers to S.H. as “papa.”<sup>81</sup>

Despite being “a loving and caring man who has been involved in many aspects of the child’s life since her birth[,]” S.H. is not a legal parent since New Jersey law does not recognize more than two legal parents.<sup>82</sup> Legal parentage could only be established in New Jersey by genetic contribution, adoption, or gestational primacy.<sup>83</sup>

Ultimately custody was awarded to all three of the parents.<sup>84</sup> But even though S.H. won joint custody and he will be able to maintain a relationship with his child, S.H. was told that he is not a full parent.<sup>85</sup> His continued custody of his child is in part because he is married to and lives with the biological father. Custody was split between K.S., D.G. and S.H.<sup>86</sup> If something were to happen to their relationship the best interest of the child may automatically favor D.G. S.H. does not get the moniker of parent. S.H. looks like a parent and acts like a parent, he should be called a parent.

A recent case from New York illustrates another way that the family is changing even without any reproductive technologies. A similar family structure could easily take place in New Jersey. Dawn M. and Michael M. were a married couple who tried and failed to have a child even with a help of a fertility doctor.<sup>87</sup> Eventually they became good friends with Audria G. who

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 711.

<sup>81</sup> D.G. v. K.S., 133 A.3d 703, 711 (N.J. Super. Ct. Ch. Div. 2015).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 726.

<sup>84</sup> *Id.* at 723.

<sup>85</sup> *Id.* at 711.

<sup>86</sup> *Id.*

<sup>87</sup> Dawn M. v. Michael M., 2017 NYLJ LEXIS 653, at \*2 (N.Y. Sup. Ct. Mar. 14, 2017).

lived in their apartment building.<sup>88</sup> Their friendship grew as Audria G. moved in with Dawn M. and Michael M. and the friendship grew into a romantic relationship.<sup>89</sup> The three considered themselves a family and wanted to raise a child together.<sup>90</sup> Since Dawn M. previously had difficulty conceiving a child they decided Michael M. and Audria G. would conceive a child through sexual intercourse.<sup>91</sup> They agreed to raise the child together as co-equal parents.<sup>92</sup> Audria G. gave birth to their child, J.M., and the three worked together as parents.<sup>93</sup>

Unfortunately, the marriage between Dawn M. and Michael M. fell apart.<sup>94</sup> Dawn M. and Audria G. moved in together with J.M.<sup>95</sup> Michael M. and Audria G. agreed to joint custody with Audria G. having residential custody and Michael M. having liberal visitation.<sup>96</sup> Although Dawn M. lived with and saw J.M. daily, she wanted to secure her visitation rights.<sup>97</sup>

The judge found that J.M. loved his two moms and his dad.<sup>98</sup> Although Michael M. opposed tri-custody, J.M. had no idea about the proceedings and enjoyed his current living arrangement.<sup>99</sup> It was in the best interest of J.M. to recognize Dawn M. as a de facto parent.<sup>100</sup> The court concluded that the possibility of Dawn M. being removed from J.M.'s life could have terrible consequences for J.M. so it was important to ensure Dawn M's legal right to visitation.<sup>101</sup> The biological mother and father encouraged and planned for Dawn M. to be another mother to

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at \*2-3.

<sup>90</sup> *Id.* at \*3.

<sup>91</sup> *Id.* at \*3.

<sup>92</sup> *Id.*

<sup>93</sup> Dawn M. v. Michael M., 2017 NYLJ LEXIS 653, at \*3-4 (N.Y. Sup. Ct. Mar. 14, 2017).

<sup>94</sup> *Id.* at \*4.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at \*5-6.

<sup>99</sup> Dawn M. v. Michael M., 2017 NYLJ LEXIS 653, at \*6 (N.Y. Sup. Ct. Mar. 14, 2017).

<sup>100</sup> *Id.* at \*9.

<sup>101</sup> *Id.* at \*9.

J.M. and the judge concluded by saying that even though Michael M., who now opposed Dawn M.'s parental rights, could not foresee the unusual circumstances he would be in, they are all “responsible for the natural and foreseeable consequences of his or her actions especially when the best interest of a child is involved.”<sup>102</sup>

Equitable doctrines like de facto and psychological parents demonstrate the reality of changing family structures and need to give them legal recognition. Whether a family uses ART or sexual intercourse to conceive a child, every parent’s relationship with the child should be preserved. Some states and foreign jurisdictions have passed legislation securing the rights of more than two parents instead of relying on equitable doctrines.

### **III. Existing Laws the Recognize More Than Two Legal Parents**

A few jurisdictions passed legislation that allow courts to recognize more than two legal parents. In the United States, the Uniform Parentage Act (UPA) and several states allow courts to declare a third legal parent in limited situations. The New Jersey Law Revision Commission published a report proposing that New Jersey amend its Parentage Act to allow more than two legal parents in certain circumstances.<sup>103</sup> Ontario enacted a progressive parentage framework that allows recognition of multiple parents based on the intent of the parents and the best interest of the child.<sup>104</sup> Another Canadian province, British Columbia enacted a framework that allows for a third parent if the birth mother is one of the legal parents.<sup>105</sup> Each approach offers different avenues to protect new family forms and shows the need to have legislatures establish a clear framework to recognize more than two parents.

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<sup>102</sup> *Id.* at \*11.

<sup>103</sup> Law Revision *supra* note 52.

<sup>104</sup> Children’s Law Reform Act, R.S.O. 1990, c. C.12 (Can.).

<sup>105</sup> Family Law Act, S.B.C. 2011, c. 25, s. 30 (Can.).

## A. United States

Several states and the Uniform Law Commission's UPA address the issue of more than two legal parents. The Uniform Law Commission acknowledged the trend towards states accepting that a child may have more than two legal parents and drafted a section which would allow courts to recognize more than two legal parents.<sup>106</sup> That states that recognize more than two legal parents have taken different approaches with some states codifying the equitable doctrines discussed above or creating another avenue towards legal parentage in addition to the equitable doctrines.<sup>107</sup> Either way, states are increasingly aware that changing family structures lead to the possibility that recognizing more than two parents is necessary.

The UPA § 613 recognizes the trend toward recognizing more than two legal parents and drafted a section to allow legislatures to consider whether to join this trend.<sup>108</sup> Section 613 includes two possible subsections regarding the number of possible legal parents, alternative A and alternative B, the latter of which allows courts to recognize more than two parents if a "failure to recognize more than two parents would be detrimental to the child."<sup>109</sup> Under this subsection the court should consider the harm of removing the child from a stable home where the child's physical and emotional needs are met among any other relevant factors.<sup>110</sup> The comments for this section recognizes that the courts could only find more than two parents through "a narrow, limited approach . . . ."<sup>111</sup>

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<sup>106</sup> Uniform Parentage Act §613(c) (Unif. Law Comm'n 2017).

<sup>107</sup> *Compare* Me. Stat. tit. 19-A, §1891 (2020) (codifying de facto parentage) *with* Cal. Fam. Code §7612(c) (2020) (allowing for a third legal parent).

<sup>108</sup> Uniform Parentage Act §613 (Unif. Law Comm'n 2017).

<sup>109</sup> Uniform Parentage Act §613(c).

<sup>110</sup> Uniform Parentage Act §613(c).

<sup>111</sup> Uniform Parentage Act §613(c).

California’s Uniform Parentage Act § 7612(c) is substantially the same as the UPA’s § 613(c), alternative B and grants the power to recognize more than two legal parents when “recognizing only two parents would be detrimental to the child.”<sup>112</sup> When determining whether a child has more than two legal parents the court must carefully consider the relevant factors in the child’s life.<sup>113</sup> The analysis is focused on the child’s needs and the role the potential parent played in the child’s life.<sup>114</sup>

In 2015, Maine passed a law that allowed a court to find that a third party is a third legal parent<sup>115</sup> or that they are a de facto parent.<sup>116</sup> This approach gives the courts some discretion in determining the extent of the parent-child relationship. Delaware and Washington D.C. passed legislation giving the courts the ability to declare a third legal parent.<sup>117</sup>

Under these laws, parentage for more than two people cannot be established until after the child the born and the potential parent has assumed a parental role. This creates considerable ambiguity in the legal status of many potential parents. Granting legal parentage to a third party is ultimately at the discretion of the courts even if all parties consent, although intent of the parties would be considered.<sup>118</sup>

Recently, the New Jersey Law Revision Commission published a report proposing changes to the New Jersey Parentage Act that includes allowing more than two legal parents and codifying psychological parentage.<sup>119</sup> Section 5 and section 17 of the report would allow a

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<sup>112</sup> Cal. Fam. Code §7612(c) (2020).

<sup>113</sup> Cal. Fam. Code §7612(c) (2020).

<sup>114</sup> Cal. Fam. Code §7612(c) (2020).

<sup>115</sup> Me. Stat. tit. 19-A, §1653 (2020).

<sup>116</sup> Me. Stat. tit. 19-A, §1891 (2020).

<sup>117</sup> Del. Code Ann. tit. 13, § 8- 201(a)(4), (b)(6), (c); D.C. Code § 16-909(e).

<sup>118</sup> K.M. v. E.G., 117 P.3d 673, 678 (Cal. 2005).

<sup>119</sup> Law Revision *supra* note 52.

sperm or egg donor to be a legal parent along with the donee and the donee's spouse.<sup>120</sup> Further, the report would amend New Jersey's Gestational Surrogacy Act and allow parentage to be established per the surrogacy agreement which would allow more than two legal parents.<sup>121</sup> Like Maine, the report also codifies the requirements to establish psychological parentage.<sup>122</sup>

Foreign jurisdictions, including our northern neighbors, have addressed the issue of changing family dynamics and how family law should adapt. Associate Justice of the Supreme Court Stephen Breyer wrote that it would be wise to look to other countries and see how they have tackled similar issues.<sup>123</sup> The Canadian provinces of Ontario and British Columbia have both implemented unique and progressive approaches to changing family structures. Law makers and legal scholars should look at their laws "not as warring values but simply as common phenomena."<sup>124</sup>

#### **A. Ontario**

This section discusses Ontario's amendment to their Children's Law Reform Act (CLRA). Ontario adapted to the change in society and reproductive technologies by amending their CLRA to allow for pre-conception agreements recognizing more than two legal parents. Before Ontario changed their laws, the Ontario Court of Appeals recognized the legislative gap which did not provide for more than two parents for a child born using new technology and with

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<sup>120</sup> Law Revision *supra* note 52 at §§ 5(b), 17(c).

<sup>121</sup> Law Revision *supra* note 52 at §6.

<sup>122</sup> Law Revision *supra* note 52 at §18.

<sup>123</sup> Stephen Breyer, *America's Courts Can't Ignore the World*, THE ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/toc/2018/10/>.

<sup>124</sup> Breyer *supra* note 90.

a different family structure but used their equity power to fill the gap.<sup>125</sup> Ontario's CLRA provides a progressive framework for fully accepting new and changing families.

Before this law, the Ontario Court of Appeals recognized that the current laws did not keep up with the changing families.<sup>126</sup> So, in 2007 the Ontario Court of Appeal decided that a five-year-old had two moms and a dad.<sup>127</sup> The women were in a relationship and the man was the sperm donor.<sup>128</sup> The three raised the child together as parents.<sup>129</sup> Even though the law did not foresee such an arrangement the court declared all three of them legal parents.<sup>130</sup> The court noted that at the time the CLRA did not foresee or anticipate changes in technology or family structures since it was passed nearly thirty years ago.<sup>131</sup> The CLRA limited a declaration of parentage to genetic parents.<sup>132</sup> But even with the gap in legislation the court decided that the intent of the legislation to treat all children equally and ensure the best interest of the child.<sup>133</sup> Therefore, recognizing the child's second mom would be treating the child equally by affording the second, non-biological mother full parental right under the CLRA and it would be in the best interest of the child.<sup>134</sup>

In 2016 Ontario changed their parentage laws to allow for more than two legal parents and to adapt to the technological and social changes recognized by the Court of Appeals nearly a decade previous. Under the amendments to Ontario's Children's Law Reform Act, there are several ways to recognize more than two legal parents. First, section 9 allows for up to four

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<sup>125</sup> AA v. BB (2007), ONCA 2, para. 21 (Can. Ont. C.A.).

<sup>126</sup> *Id.* at para. 21. AA v. BB (2007), ONCA 2, para. 21 (Can. Ont. C.A.).

<sup>127</sup> *Id.* at para. 41.

<sup>128</sup> *Id.* at para. 1.

<sup>129</sup> *Id.*

<sup>130</sup> AA v. BB (2007), ONCA 2, para. 41 (Can. Ont. C.A.). *Id.* at para. 41.

<sup>131</sup> *Id.* at para. 21

<sup>132</sup> *Id.* at 24.

<sup>133</sup> *Id.* at 38.

<sup>134</sup> *Id.*

people to be a party to a pre-conception agreement.<sup>135</sup> This section allows for parentage to be established based on the intent of the parties.<sup>136</sup> This section, however, precludes the use of a surrogate and the birth parent must be one of the intended parents.<sup>137</sup> This section does allow either conception through sexual intercourse, assisted reproduction, or artificial insemination.<sup>138</sup> If the child is to be conceived through sexual intercourse the biological father must be a party to the agreement.<sup>139</sup> If the child is to be conceived through assisted reproduction or artificial insemination by a donor, the spouse of the birth parent must expressly sign on to the agreement or reject it before conception.<sup>140</sup>

Second, section 10 allows for up to four people to be intended parents in a surrogacy agreement.<sup>141</sup> This section is similar to New Jersey's gestational carrier law, besides the express allowance of more than two parents and the inclusion of traditional surrogacy. Also, unlike the New Jersey law, the surrogacy agreement is not enforceable but is only evidence of the parties' intent giving the courts some discretion in determining parentage.<sup>142</sup> After the child is born the birth mother must relinquish parentage within seven days or the intended parents can apply for a declaration of parentage if the birth mother does not or is unable to relinquish parentage.<sup>143</sup> The court shall consider the best interests of the child when declaring parentage.<sup>144</sup> So no matter what the agreement says the court still has discretion to allow or not allow the agreement.

Finally, section 11 allows for more than four intended parents in a surrogacy agreement.<sup>145</sup> This

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<sup>135</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 9 (Can.).

<sup>136</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 9 (Can.).

<sup>137</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 9(2)(b) (Can.).

<sup>138</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 9(2)(c-d) (Can.).

<sup>139</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 9(2)(c) (Can.).

<sup>140</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 9(2)(d) (Can.).

<sup>141</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 10 (Can.).

<sup>142</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 10(9)(a-b) (Can.).

<sup>143</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 10(6)(a-c) (Can.).

<sup>144</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 10(8) (Can.).

<sup>145</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 11 (Can.).

section has the same requirements as section 10 but may allow a court to declare more than four people as legal parents.<sup>146</sup> The court will still consider the best interest of the child.<sup>147</sup>

Under the CLRA there not many family arrangements unaccounted for and the Ontario courts are willing to fill in legislative gaps if it is in the best interest of the child. Ontario is not the only Canadian province that amended their laws to allow for more than two parents. British Columbia while allowing more than two parents, does so in a more restricted way.

## **B. British Columbia**

British Columbia's Family Law Act allows for three legal parents in only a few scenarios centered on the birth mother. In 2014 British Columbia passed the Family Law Act which recognizes three parents in only a few circumstances.<sup>148</sup> Section 30 of British Columbia's Family Law Act allows for three legal parents of a child conceived through assisted reproduction.<sup>149</sup> The intended parents must include the birth mother.<sup>150</sup> There are three possible configurations under this law: one other intended parent and the birth mother, two other intended parents and the birth mother, or the birth mother, her spouse or person "in a marriage-like relationship with the potential birth mother", and a donor who agrees to be a co-equal parent.<sup>151</sup> While the law intended to address the changing family, requiring the birth mother to be a legal parent reinforces the view that biology is a necessary part of a family.<sup>152</sup>

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<sup>146</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 11(1) (Can.).

<sup>147</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 11(4) (Can.).

<sup>148</sup> Family Law Act, S.B.C. 2011, c. 25, s. 30 (Can.).

<sup>149</sup> Family Law Act, S.B.C. 2011, c. 25, s. 30 (Can.).

<sup>150</sup> Family Law Act, S.B.C. 2011, c. 25, s. 30(1)(c)(i) (Can.).

<sup>151</sup> Family Law Act, S.B.C. 2011, c. 25, s. 30(1)(b)(i-ii) (Can.).

<sup>152</sup> Fiona Kelly, *Multiple-Parent Families Under British Columbia's New Family Law Act: A Challenge to the Supremacy of the Nuclear Family or a Method by Which to Preserve Biological Ties and Opposite-Sex Parenting*, 47 U.B.C.L. REV. 565, 595 (2014).

This section only discusses four states, Ontario, and British Columbia because acknowledging more than two legal parents is currently extremely rare. In other states without legislative guidance, the courts have recognized some equitable doctrines in certain situations.<sup>153</sup> Since these jurisdictions have recognized more than two legal parents there has been no recorded dramatic increase in families with more than two legal parents. While there is a trend toward recognizing more than two parents some analogous jurisdictions have not been as progressive. For example, the United Kingdom is very clear that a child can only have two legal parents.<sup>154</sup>

Legislatures, courts, and legal scholars recognize a trend toward recognizing more than two parents. The Uniform Parentage Act offers one framework for states to adopt to create a narrow pathway for more than two legal parents and the four states that have passed similar laws recognizing more than two parents demonstrate how it works in practice. The revisions proposed for New Jersey's Parentage Act offer another approach to allow more than two parents with the use of surrogacy or egg/sperm donation. The United States is not the only country addressing changing family structures, so Ontario and British Columbia demonstrate two other ways that more than two legal parents could be recognized. Regardless of what framework New Jersey or other states adopt there is a possibility that recognizing more than two parents could be unconstitutional.

### **C. Constitutional Concerns**

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<sup>153</sup> See *In re Custody of B.M.H.*, 315 P.3d 470 (Wash. 2013); *Marquez v. Caudill*, 656 S.E.2d 737 (S.C. 2008); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

<sup>154</sup> Human Fertilisation and Embryology Authority, *Becoming the legal parents of your children*, <https://www.hfea.gov.uk/treatments/explore-all-treatments/becoming-the-legal-parents-of-your-child/> (last visited Mar. 7, 2021).

This section will show that the U.S. Constitution does not prohibit states from recognizing more than two legal parents. While parents have a liberty interest in raising their children without government interference, parents can also voluntarily surrender and share part of that interest with a third-party acting as another parent to their child. The government is not interfering with their liberty interest, they are enforcing a parenting decision that is in the best interest of the child.

Professor Jeffrey Parness expressed concerns that states recognizing more than two legal parents could violate the Constitution.<sup>155</sup> The U.S. Supreme Court recognized a fundamental right for parents to make childrearing decisions without government interference guaranteed by the Due Process Clause of the 14<sup>th</sup> Amendment.<sup>156</sup> The parental rights guaranteed by the U.S. Constitution pertain to legal parents' ability to make decisions related to "the care, custody, and control of their children."<sup>157</sup> If a third or fourth parent is added, then the rights to make decisions about and for the child would be divided between the parents and each parent would have less control over their child. Professor Parness argued this division of rights may be an unconstitutional infringement on some of the parents' fundamental rights.<sup>158</sup> The fear is that state action that extends parentage to more than two parents could be struck down by the federal courts and leave these families with more than two parents in legally murky territory.<sup>159</sup>

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<sup>155</sup> See generally Jeffrey A. Parness, *Unconstitutional Parenthood*, 104 MARQ. L. REV. 183 (2020); Jeffrey A. Parness, *The Constitutional Limits on Custodial and Support Parentage by Consent*, 56 IDAHO L. REV. 421 (2020); see also Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger to be a Parent Over the Objections of the Child's Biological Parent*, 21 REGENT U.L. REV. 1 (2008-2009).

<sup>156</sup> U.S. CONST. amend. XIV, §1.

<sup>157</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>158</sup> *Unconstitutional Parenthood* *supra* note 154 at 225.

<sup>159</sup> *Unconstitutional Parenthood* *supra* note 154 at 225.

Family law is predominantly in the domain of state authority,<sup>160</sup> but the Supreme Court has recognized a broad fundamental right of parents to raise their children how the parents see fit and the Court has prescribed some constitutional limits to state family law.<sup>161</sup> The Court, while not offering much guidance, addressed the rights of third parties in relation to legal parents in *Troxel v. Granville* and prohibited states from enacting overly broad third party visitation statutes. In *Troxel*, the Court held that a Washington law that allowed any person to petition the court for visitation rights was an unconstitutional infringement of the fundamental right of parents to make childrearing decisions because the law was too broad and accorded no special weight to the decision of the legal parents.<sup>162</sup> Tommie Granville and Brad Troxel had two daughters.<sup>163</sup> Tommie Granville limited the visitation of the grandparents to one visit per month.<sup>164</sup> The grandparents petitioned the court for more time.<sup>165</sup> Following the applicable state law, the judge determined that it was in the best interest of the grandchildren to see their grandparents more and awarded the grandparents greater visitation.<sup>166</sup>

Without elaborating a standard, the plurality reasoned that when determining the best interest of the child in a dispute between a fit parent and a third party “the court must accord at least some weight to the parent’s own determination.”<sup>167</sup> State actors cannot substitute the decisions of a fit parent for their decisions because of mere disagreement.<sup>168</sup> The fundamental

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<sup>160</sup> Linda D. Elrod, *The Federalization of Family Law*, AMERICAN BAR ASSOCIATION (July 1, 2009), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol36\\_2009/summer2009/the\\_federalization\\_of\\_family\\_law/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law/).

<sup>161</sup> See e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); see also Michael J. Higdon, *Constitutional Parentage*, 103 IOWA L. REV. 1483 (2018).

<sup>162</sup> *Troxel*, 530 U.S. at 72-73.

<sup>163</sup> *Id.* at 60.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 61.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 70.

<sup>168</sup> *Id.* at 65.

right of parents to make childrearing decisions prevents such an overreach.<sup>169</sup> The law was struck down because of its overly broad applicability but the Court did not decide if “the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.”<sup>170</sup> The Court determined that the Washington state law went too far and crossed the line into unconstitutionality, but they did not specify the location of the line. The Court offered no guidance beyond requiring some weight be given to the decision of the legal parent or parents.<sup>171</sup>

Although decided a few months before *Troxel*,<sup>172</sup> the New Jersey Supreme Court indirectly touched on this issue of deference to the legal parent when it decided *V.C. v. M.J.B.* The court accorded deference to the legal parent’s decision to allow the legal stranger to become a parental figure to their child.<sup>173</sup> In *Troxel* the legal parent allowed the grandparents to have a limited role as grandparents, but in *V.C.* the legal parent allowed her partner to act as a parent. A grandparent’s access to their grandchildren is limited to the access granted by the legal parent which the Washington court could not disregard without according some deference. But the legal parent in *V.C.* willing shared parental responsibilities, it was the legal parent’s choice to split up her fundamental parental rights.<sup>174</sup> The court did not replace the determination of the legal parent with their own, the court gave deference to both the past and present intent of the legal parent.<sup>175</sup>

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<sup>169</sup> *Troxel v. Granville*, 530 U.S. 57, 72 (2000).

<sup>170</sup> *Id.* at 73.

<sup>171</sup> *Id.* at 72.

<sup>172</sup> *Troxel v. Granville* was decided on June 5, 2000 while *V.C. v. M.J.B.* was decided on April 6, 2000.

<sup>173</sup> *V.C. v. M.J.B.*, 163 N.J. 200, 227 (2000).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

Parents have a fundamental right to raise their children and that right includes allowing another individual to act as a parent. Based on the existing laws allowing more than two parents, New Jersey should adopt its own statutory scheme to recognize more than two parents.

#### **IV. Analysis**

This paper argues that New Jersey should recognize pre-conception agreements that allow more than two legal parents. In the absence of a written agreement, the law should adopt an intent test similar to California. Such an approach would recognize and protect all parent-child relationships.

First, the New Jersey Gestational Carrier Act should be amended as proposed by the New Jersey Law Revision Commission to allow for the gestational carrier to be a legal parent if that is the intent of the parties. Parentage should not simply be based on a genetic link and the intent to be a parent should play a more legally significant role.<sup>176</sup> The proposed changes in the New Jersey Law Revision Commission's report would allow for parentage to be established according to the surrogacy agreement which would allow for more than two legal parents.<sup>177</sup> All the other written requirements of New Jersey Gestational Carrier Act would be maintained so a written document can clearly express the intent of the parties and parentage could be established at birth which could prevent costly litigation if relationships sour. But the law should go further than the Law Revision Committee's proposal and allow that in the absence of a writing or the writing is deficient then a court should still be able to award legal parentage if it finds it is the best interest of the child. In the alternative, New Jersey could follow the UPA's approach by only

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<sup>176</sup> Nola Cammu, *Intent to Parent is What Makes a Parent? A Comparative Analysis of the Role of Intent in Multi-Parenthood Recognition*, 32 CAN. J. FAM. L. 281, 283 (2019).

<sup>177</sup> Law Revision *supra* note 52.

recognizing the third parent if not doing so would be detrimental to the child. Without a writing, the higher standard of the UPA would be appropriate to prevent an erroneous decision.

Second, New Jersey should allow pre-conception agreements that recognize more than two legal parents even without the use of ART. New Jersey's definition of ART is restricted to the more expensive procedures and leaves out families that do not use any ART but still want to form a family. Since ART and surrogacy are extremely expensive and allowing more than two legal parents in only those circumstances would limit the application to wealthier individuals.<sup>178</sup>

The Law Revision Commission's proposed changes partially solve this issue by allowing egg and sperm donors to be legal parents with the donee and the donee's spouse. This proposed change would allow the father in *D.G. v. K.S.* to be a legal parent because they used artificial insemination to conceive a child.<sup>179</sup> But Dawn M. would still not be a legal parent (even though *Dawn M. v. Michael M.* was a New York case it is the type of family that NJ law should accommodate).<sup>180</sup> That family decided to start a family together through sexual intercourse but their intent to be co-equal parents was clear. Allowing binding preconception agreements, regardless of the method of concept, would protect parents like Dawn M. This framework would closely resemble section 9 of Ontario's Children's Law Reform Act.<sup>181</sup> Let the families chose and firmly establish who the parents are.

Although honoring the intent of the parents should be in the best interests of the child there should be some judicial review, like is required in the New Jersey Gestational Carrier Act.<sup>182</sup> The courts should honor the intent of the parents unless there is clear evidence of some

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<sup>178</sup> Ullrich, *supra* note 5, at 933.

<sup>179</sup> *D.G.*, 133 A.3d at 708.

<sup>180</sup> *Dawn M.*, 2017 NYLJ LEXIS 653, at \*3.

<sup>181</sup> Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 9 (Can.).

<sup>182</sup> N.J. Stat. Ann. §9:17-67 (2020).

sort of nefarious or illegal purpose, but the agreements, if satisfying all criteria, should be presumptively valid.

By allowing pre-conception agreements New Jersey could, at least in part, prevent the *ad hoc* parentage decisions that California and the other states that recognize more than two parents allows.<sup>183</sup> Instead of the courts recognizing parentage later in the parental relationship, possibly when relationships have deteriorated with conflicting testimony, New Jersey courts would have the parties' intentions written out. But the California law can still offer another way to grant legal parentage based on intent and the reality of the family dynamic. Like courts are already doing, they can assess if the third party is acting as a parent and allow for a third parent if not doing so would be detrimental to the child.<sup>184</sup> This would also cover families with three parents if the third parent became a part of the family post-conception or post-birth of the child although this situation is different from the pre-conception agreements that are the focus of this comment. The courts would have discretion to grant legal parentage, psychological parentage, or not parental rights.

There is a concern that adding more than two parents would complicate and “confuse” the child.<sup>185</sup> Some groups worry about destroying the nuclear family and non-traditional family forms may harm children.<sup>186</sup> As the decision-making must be made between three or possibly more individuals, it may be harder to come to an agreement and strain the family relationship.<sup>187</sup> Two scholars write that much of the concern around the confusion of recognizing more than two

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<sup>183</sup> See generally Catherine Reagan, *One Parent, Two Parent, More? California's Third Parent Law Should Go Back to the Floor*, 52 U.C. DAVIS L. REV. 2165 (2019).

<sup>184</sup> Cal. Fam. Code §7612(c) (2020).

<sup>185</sup> Ullrich, *supra* note 5, at 925.

<sup>186</sup> Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & The Evolving Legal Recognition of Tri-Parenting*, 31 J. AM. ACAD. MATRIMONIAL LAW. 175, 203-04 (2018).

<sup>187</sup> *Id.*

legal parents involves the problem of how to equally divide parental rights.<sup>188</sup> The solution would be to not necessarily equally divide the parental rights.<sup>189</sup> Let the family decide how they want to split up the parental rights if they can come to an agreement or the custody decisions should mirror how they were split up pre-separation.<sup>190</sup> But custody agreements can always be changed to reflect the best interest of the child. Maybe a same-sex couple acts as the primary caretakers with the third parent taking a lesser role in the day-to-day care of the child but this third parent is more affluent and contributes a greater amount monetarily. If things were to fall apart, it would be in the best interest of the child to continue that same family dynamic. Let the primary caretakers of the child take primary custody. It would be unnecessary, disruptive, and confusing to the child to force equal parental rights onto the parties involved.<sup>191</sup> Parties could possibly include in writing how they wish to divide parental rights further saving time if the relationship devolves into litigation.

More than two legal parents could offer more financial support for the child and lead to better outcomes.<sup>192</sup> Like the shared custodial arrangements, financial obligations do not have to be equal. If a parent has more to contribute or chooses to contribute more than perhaps it would be in the best interest of the child to impose unequal child support obligations.<sup>193</sup>

There is not much research on families with more than two legal parents, but research shows that children do better with stable homes.<sup>194</sup> Studies that look at step-families may be comparable by showing how well children do with more than two parental figures. Step-family

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<sup>188</sup> June Carbone and Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 10-11 (2017).

<sup>189</sup> Carbone, *supra* note 150, at 11.

<sup>190</sup> Carbone, *supra* note 150, at 12.

<sup>191</sup> Carbone, *supra* note 150, at 52-53.

<sup>192</sup> See generally Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217 (2010).

<sup>193</sup> Carbone, *supra* note 150, at 52.

<sup>194</sup> Lewis, *supra* note 3, at 770.

studies show that step-parents can reduce the stress from divorce and remarriage by bringing stability and making the child feel part of a big family.<sup>195</sup> Not accepting or recognizing the third parent would be more traumatic by taking away a parent the child already formed a bond with. It is an unsupported assumption that adding a third parent will cause more conflict or confuse the child. The children in *D.G v. K.S.* and *Dawn M v. Michael M.* knew who their parents were, and they knew they were loved.<sup>196</sup>

## V. Conclusion

Two decades ago, Justice O'Connor wrote that it is "difficult to speak of the average American family."<sup>197</sup> The idea of a "traditional family" is changing<sup>198</sup> so state legislatures should be proactive and adapt to these changes. The nuclear family is not the household that most American children live in.<sup>199</sup> The nuclear family is a heteronormative view of what a family can and should be, but society has changed, technology has changed, and new family structures should be celebrated not feared. New Jersey has already shown a willingness to pass legislation that adapts to the changing parental landscape, but more is required to protect all New Jersey families. The New Jersey legislature should allow for more than two legal parents if there is a preconception agreement, or the best interests of the child are served by honoring the intent of the recognized legal parents.

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<sup>195</sup> Ellen C. Berg, The Effects of Perceived Closeness to Custodial Parents, Stepparents and Nonresident Parents on Adolescent Self-Esteem, 40 J. Divorce & Remarriage 69 (2004); Paul C. Holinger, A Step-Child's Guide to Step-Parenting, Psychology Today (Nov. 30, 2016), <https://www.psychologytoday.com/us/blog/great-kids-great-parents/201611/step-childs-guide-step-parenting>.

<sup>196</sup> *D.G.*, 133 A.3d at 723; *Dawn M.*, 2017 NYLJ LEXIS 653, at \*5-6.

<sup>197</sup> *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

<sup>198</sup> *Chen*, *supra* note 1.

<sup>199</sup> *Livingston*, *supra* note 1.