

Article

Multi-Parent Custody

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In recent years, a number of jurisdictions have enacted laws recognizing that a child may have more than two legal parents (multi-parentage). Recognition of multi-parentage represents a significant change to the legal framework governing parentage—for most of U.S. history, it was well established that a child could have a maximum of two legal parents. While commentators undoubtedly will continue to debate the wisdom of multi-parentage recognition, it is clear both that multi-parentage has arrived and that its arrival raises many novel and important questions across a variety of areas of the law. Proponents and opponents of multi-parentage agree that child custody represents one of the core areas in which multi-parentage recognition will raise complicated questions that warrant careful consideration. It is inevitable that, just as child custody disputes arise in two-parent families, such disputes also will occur in multi-parent families. As a result, legislatures and courts soon will face the task of deciding how to approach custody disputes involving children who have more than two legal parents. This Article examines a number of the core initial questions that multi-parentage recognition will raise in the child custody context. These questions include: (1) whether parents who share an intact relationship and are involved in a dispute with another parent should be considered a single entity or separate entities for purposes of the custody determination; (2)

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whether legal standards employing presumptions in favor of joint custody, which have become increasingly popular in the two-parent custody context, should extend to multi-parent custody disputes; and (3) to what degree the law should encourage settlement and defer to agreements reached by the parties in multi-parent custody disputes. The Article concludes by setting forth detailed proposals regarding how lawmakers and courts should resolve these essential questions.

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INTRODUCTION

Multi-parentage occurs when the law recognizes that a child has more than two legal parents. While historically the law recognized a maximum of two legal parents for each child, in recent years laws recognizing that children may have more than two legal parents have gained significant traction.¹ A number of societal, medical, and legal developments help explain this trend. Today, many children exist in family structures that involve multiple individuals serving in parental roles. Births outside of marriage, divorce, and remarriage are all common occurrences in the United States.² The “traditional family structure” of married, biological parents and their children now represents only a minority of U.S. families.³ As a result, stepparents, non-marital partners of legal parents, and extended family members often play significant roles in children’s lives.⁴ In addition, the use of assisted reproduction has become increasingly common among both same-sex couples who wish to conceive children and different-sex couples who are confronting fertility issues.⁵ Advancements in assisted reproduction mean that five or more people may be directly involved in the conception of a child: the providers of the gametes used to conceive the child, the person who

1. See *infra* Part I.B.

2. See Joyce A. Martin et al., *Births: Final Data for 2019*, NAT'L VITAL STAT. REPS. 6 (Mar. 23, 2021), <https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-02-508.pdf> [<https://perma.cc/8CWZ-5J43>] (describing the rate of births outside of marriage); see also John Harrington & Cheyenne Buckingham, *Broken Hearts: A Rundown of the Divorce Capital of Every State*, USA TODAY (Feb. 2, 2018), <https://www.usatoday.com/story/money/economy/2018/02/02/broken-hearts-rundown-divorce-capital-every-state/1078283001> [<https://perma.cc/E582-MGWN>] (describing the divorce rates across all fifty states).

3. See *Parenting in America*, PEW RSCH. CTR. 15 (Dec. 17, 2015), <https://www.pewresearch.org/social-trends/2015/12/17/1-the-american-family-today> [<https://perma.cc/2SBY-CFBM>] (comparing the percentage of children born into a “traditional” structure today—46%—to the percentage in the 1960s—73%).

4. See Tiffany L. Palmer, *How Many Parents?*, FAM. ADVOC., Spring 2018, at 36, 36.

5. See Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 EMORY L.J. 2047, 2058–59 (2015) (explaining the rise of assisted reproduction among LGBTQ+ couples); see also Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2285–86 (2017) (“Married heterosexual couples who in previous generations would have gone without children found opportunities through [assisted reproductive technologies].”).

gestates the child, and the intended parents.⁶ Along with these societal and medical developments have come significant legal developments. The law has both expanded the categories of individuals who can utilize the traditional mechanisms available for parentage establishment and added additional parentage establishment mechanisms.⁷ Taken together, these changes have made it increasingly common for more than two people to seek recognition as a child's legal parents.

Recognizing this changing landscape for parents, children, and families, in recent years a handful of states have adopted statutes providing that, in appropriate circumstances, a child may have more than two legally recognized parents.⁸ In other states, legal recognition that a child may have more than two parents has occurred through judicial decision.⁹ The wisdom of recognizing multi-parentage has been debated for years,¹⁰ and the debate undoubtedly will continue as more legislatures consider adopting multi-parentage laws. At the same time, it is clear both that multi-parentage has arrived in the United States and that jurisdictions that recognize multi-parentage will be tasked with addressing a number of critical legal issues that flow from this recognition. One of the most significant, and controversial, questions that states will need to address relates to the standards that will govern custody determinations involving children who have more than two legal parents.

Custody-related fears have been a central feature of arguments against the recognition of multi-parentage. Opponents of multi-parentage recognition have argued that the legal recognition of more than two parents will inevitably lead to custody arrangements that harm children, and "many courts are concerned that recognizing parentage in more than two adults will lead to more frequent and complex custody battles."¹¹ Importantly, it is not only opponents of multi-parentage recognition who have

6. See Marvel, *supra* note 5, at 2058 ("Intended parents, sperm donors, egg donors, and surrogates may all be interested in playing a role in the life of a child created through assisted reproduction.").

7. See *infra* Part I.A.

8. See *infra* Part I.B.

9. See *infra* Part I.B.

10. See *infra* note 12 and accompanying text.

11. Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER, SOC. POL'Y & L. 379, 396 (2007).

raised custody-related issues—even scholars who support multi-parentage recognition have expressed concerns relating to custody determinations in this context.¹² The fears regarding potential harm to children resulting from custody determinations in the multi-parentage context relate to each of the two main types of custody rights. Namely, the right to make decisions relating to the child in a number of core areas, such as medical care, education, religion, and extracurricular activities (legal custody) and the right to have the child reside in one’s household (physical custody). Over the past several decades, it has become increasingly common for the law not only to recognize, but also to encourage, arrangements in which the legal parents share rights relating to decision-making, residential care, or both.¹³

In terms of multi-parent custody concerns relating to legal custody, there is a fear that “[t]he allocation of shared authority and responsibility among several parents may disrupt the child’s life”¹⁴ and that children will be harmed by having “too many cooks in the kitchen.”¹⁵ Specifically, the concern is that the greater the number of individuals with decision-making rights,

12. See, e.g., June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 39–41 (2017) (describing Professor Katherine Baker’s concerns that “the state will become involved in the day-to-day business of parenting”); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 326 (2007) (“Perhaps the most significant obstacle in recognizing multiple parentage is the concern that there will be too many cooks in the kitchen”); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN’S L.J. 329, 390 (1995) (“[E]ven advocates of multiple parenting recognize that there is some numeric limit on parents . . . both from an administrative standpoint as well as from the child’s perspective.”); 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, 924 (2019) (“Although little authority exists either supporting or criticizing the structure of tri-parenting families, there are general concerns regarding multiple parent families.”); see also Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 42 (2008) (“First, the prospect of a group of adults, perhaps feeling post-dissolution antagonism, collectively trying to decide how to rear a child justifiably sets off alarms, among multi-parentage’s supporters and detractors alike.”).

13. See *infra* Part I.B (detailing multi-parentage law across the country).

14. King, *supra* note 12, at 391.

15. Jacobs, *supra* note 12; see also Elizabeth A. Pfenson, Note, *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*, 88 NOTRE DAME L. REV. 2023 (2013); Ullrich, *supra* note 12, at 924–25.

the higher the likelihood that disagreements will arise.¹⁶ Children often suffer when their parents' relationship is marked by frequent disagreements and contentiousness regarding co-parenting decisions,¹⁷ and parents whose decisions are constantly being challenged or second-guessed may find that they are unable "to care for their children to the best of their ability."¹⁸ In addition, there is a fear that shared decision-making arrangements among multiple parents may result in greater state intervention in children's lives and more frequent litigation regarding custody, visitation, and child support¹⁹—occurrences that are widely considered harmful to children's well-being.²⁰ With regard to multi-parent custody concerns relating to physical custody, there is a concern that the children involved in these cases will be required to split their time among multiple households, and that this will lead to such children experiencing feelings of instability, insecurity, and lack of belonging.²¹ A related fear is

16. See Appleton, *supra* note 12, at 41 ("As the parental community expands, . . . the possibilities for such disputes increase, a point that supporters explicitly acknowledge." (footnote omitted)); see also Jacobs, *supra* note 12 and accompanying text; Ullrich, *supra* note 12 ("As three or more parties would have to agree on child rearing decisions . . . there is a greater chance of disagreement among the parents."); King, *supra* note 12, at 391 (describing the potential issues that may arise when a child has many parental figures).

17. See DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 774–75 (5th ed. 2019) (discussing the impact of family dissolution and long-term unresolved conflicts on childhood development and adjustment).

18. Ullrich, *supra* note 12; see also Pfenson, *supra* note 15, at 2060 ("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.").

19. See Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 675 (2008) ("The more people with claims to a child, the more courts have to make decisions with regard to what is in a child's best interest because the more likely it is that one of the parents will be challenging the parenting work of the others."); Ullrich, *supra* note 12, at 925 ("Critics also argue [that having] multiple parents magnifies the effect of state intervention . . . [on children].").

20. See, e.g., Baker, *supra* note 19, at 708 n.272.

21. See King, *supra* note 12, at 391 ("[A] child needs identifiable primary caretakers with whom he or she can bond. [A] problem potentially emerges when too many people share full parental authority."); see also Ullrich, *supra* note 12, at 924–25 ("The child would have to make sense of different values and styles of living between homes, a situation analogized to a 'good divorce' where the child can be negatively impacted.").

that multi-parent custody arrangements will result in children having greater difficulty forming strong bonds with any one of their parents due to having to split their time between multiple parents and households.²²

This Article addresses a number of the critical initial questions that are likely to arise as courts begin to make custody determinations in cases involving children with more than two legal parents. A preliminary logistical, yet consequential, question that undoubtedly will arise is whether parents who share an intact relationship and are involved in a custody dispute with another parent should be considered one entity or separate entities for purposes of the custody determination. In terms of questions regarding the substantive standards governing multi-parent custody disputes, a core, and likely controversial, issue is whether legal standards setting forth presumptions in favor of shared custody, which have become increasingly popular in the two-parent custody context, should apply to multi-parent custody disputes. While the first two questions, which relate to the categorization of the parties and the use of shared custody presumptions, will most directly affect the small minority of custody disputes that proceed to trial, the final questions the Article addresses are essential for custody disputes in which the parties are able to reach an agreement. These questions include whether the law should encourage settlement in multi-parent custody disputes to the same degree it does in two-parent custody disputes and whether courts should be as deferential to agreements reached by parents in the multi-parent custody context.

It is important to note that the scope of this Article is limited to custody determinations involving multiple individuals whom the law recognizes as a child's legal parents. It does not address questions relating to custody disputes involving multiple parties wherein not all of the parties are legal parents. Custody disputes that involve competing claims between legal parents and third parties generally employ different standards due to the superior constitutional rights of legal parents,²³ and there already exists

22. See Pamela Gatos, Note, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 216 (2001) ("Additionally, a child needs to bond with his or her primary caretakers, and this can be difficult when there are too many people filling that role.").

23. The exception to this would be cases involving third parties who satisfy a functional or equitable parenthood doctrine in a jurisdiction that does not

a wealth of scholarship addressing custody and visitation issues involving third parties.²⁴ Instead, the Article addresses more novel questions relating to whether and how the current legal standards governing custody disputes between legal parents, which were adopted at a time when children could have a maximum of only two legal parents, should be applied to multi-parent custody disputes.

The Article proceeds as follows. Part I sets forth the range of mechanisms through which an individual may establish legal parentage in the United States today, provides an overview of the current state of multi-parent recognition in the United States, and identifies several of the more common scenarios in which multi-parentage issues may arise. Part II begins by tracing the history and development of the law governing child custody disputes between legal parents. It then sets forth the current legal standards governing two-parent custody disputes and the standards (or lack thereof) that states have adopted specifically for multi-parent custody disputes. Part III identifies and analyzes several of the core initial questions that courts and legislatures will need to answer in the multi-parent custody context and offers a number of proposals regarding how to best approach these initial questions.

I. MULTI-PARENTAGE TODAY

A growing number of jurisdictions now recognize multi-parentage. Across these jurisdictions, a prerequisite for multi-parentage recognition is that each party has a basis for establishing legal parentage. In the two-party parentage context, there are a number of mechanisms through which parentage may be

treat such individuals as full legal parents for all purposes but does treat them as equivalent to legal parents for purposes of the custody determination. See Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 67 (2017) [hereinafter Feinberg *Whither*] (discussing how equitable parenthood doctrines vary widely across jurisdictions). The recommendations set forth in this Article are equally relevant to those cases.

24. See, e.g., Barbara A. Atwood, *Third-Party Custody, Parental Liberty, and Children's Interests*, FAM. ADVOC., Spring 2021, at 48 (describing current law impacting third-party custody). See generally Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COLO. L. REV. 941 (2019) (analyzing the legal history of "quasi-parenthood" and suggesting changes that better reflect contemporary American families).

established. In some jurisdictions that recognize multi-parentage, there are significant limitations regarding which of the existing parentage establishment mechanisms can be utilized to establish multi-parentage.²⁵ Other jurisdictions that recognize multi-parentage do not explicitly provide limitations regarding the parentage establishment mechanisms that may be utilized in the multi-parentage context.²⁶ As a result, to provide an understanding of the structure and function of current laws governing multi-parentage, it is necessary to first identify the various mechanisms through which legal parentage can be established in the United States today. This Part provides an overview of the existing bases for establishing parentage, sets forth the current state of the law governing multi-parentage, and identifies a number of the more common scenarios in which multi-parent families may arise.

A. CURRENT BASES FOR ESTABLISHING PARENTAGE

1. Giving Birth

The act of giving birth has long been, and continues to be, recognized as a basis for establishing legal parentage across jurisdictions.²⁷ In fact, today the only scenario in which legal parentage does not attach to the act of giving birth is when state law recognizes a surrogacy agreement as establishing the intended parents as the child's sole legal parents prior to or upon the child's birth.²⁸

2. The Marital Presumption

For an individual who did not give birth to the child, the most common way of establishing parentage is through the marital presumption, under which the spouse of the individual who gave birth is presumed to be the child's legal parent.²⁹ In most states, the person who gave birth, their spouse, and an alleged

25. See *infra* Part I.B.1.

26. See *infra* Part I.B.2.

27. See NeJaime, *supra* note 5, at 2300 (“Indeed, parentage laws across the country continue to provide that maternity may be established by giving birth.”).

28. See *infra* notes 75–77 (discussing states’ approaches to parentage establishment via gestational surrogacy).

29. Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1659 (2015).

biological father have standing to rebut the presumption.³⁰ Rebuttal usually requires, at a minimum, DNA test results indicating that the spouse of the person who gave birth does not share a genetic connection with the child.³¹ In many states, however, courts can refuse to admit DNA evidence or otherwise deny rebuttal if the court determines that rebuttal would be contrary to the child's best interests or that the party seeking to rebut the marital presumption should be estopped from doing so on equitable grounds.³²

Pursuant to the Supreme Court's 2015 decision in *Obergefell v. Hodges*, which mandated that states provide marriage rights to same-sex couples on the same terms accorded to different-sex couples,³³ it seems clear that state marital presumption laws must extend to same-sex spouses of individuals who give birth.³⁴ The Supreme Court's decision two years later in *Pavan v. Smith*, which held that if a state provides the different-sex spouses of individuals who give birth with the right to be listed on the child's birth certificate it must do the same for same-sex spouses, further supports the mandatory application of state marital presumption laws to same-sex spouses of individuals who give birth.³⁵ The vast majority of courts that have addressed the issue have reached the conclusion that state marital presumptions, even if written in gendered terms, apply equally to same-sex spouses.³⁶ In addition, a number of states have amended their

30. See Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 252 (2019).

31. *Id.* For an argument regarding the need to change the bases for rebuttal given the application of the marital presumption to same-sex couples, see generally *id.*

32. *Id.* at 252–53.

33. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

34. See *id.* at 652 (defining what was granted to the petitioners in *Obergefell* as “having their marriages deemed lawful on the *same terms and conditions* as marriages between persons of the opposite sex” (emphasis added)).

35. *Pavan v. Smith*, 137 S. Ct. 2075, 2077 (2017) (per curiam).

36. See Feinberg, *supra* note 30, at 256 n.57 (detailing court decisions extending the marital presumption of parentage to the “same-sex spouse of an individual who gives birth” following a “jurisdiction’s legalization of same-sex marriage”).

marital presumption laws so that gender-neutral terms are used to describe the spouse of the individual who gave birth.³⁷

3. Voluntary Acknowledgements of Parentage

For unmarried partners of individuals who give birth, voluntary acknowledgements of parentage (VAPs), which usually are executed at the hospital at the time of the child's birth,³⁸ are the most common way of establishing legal parentage.³⁹ Federal guidelines mandate that all birthing hospitals and birth records offices provide "a simple civil process for voluntarily acknowledging paternity"⁴⁰ of children who are "born out-of-wedlock."⁴¹ To establish a party's parentage through a VAP, the individual who gave birth and the person whose parentage the parties are seeking to establish must sign a document acknowledging that person's parentage.⁴² Notably, while many states' VAP forms or accompanying instructions state that in signing the VAP the parties are attesting under penalty of perjury that, to the best of their knowledge, the party seeking to establish parentage is the child's biological father,⁴³ states cannot require a person to submit to genetic testing before signing a VAP.⁴⁴ An unrescinded VAP must be "considered a legal finding of paternity,"⁴⁵ and

37. See NeJaime, *supra* note 5, at 2339 ("[A] handful of states have revised their statutory marital presumptions to recognize the *person* married to the mother.").

38. See, e.g., Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 919–20 (2006).

39. Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 467, 469 (2012).

40. 45 C.F.R. § 302.70(a)(5)(iii) (2023).

41. 45 C.F.R. § 303.5(g)(1)(i)–(ii) (2023). Federal law mandates only voluntary paternity establishment procedures, and thus this Article uses the term paternity, as opposed to parentage, in describing the federal rules. Otherwise, however, because a number of states have extended these procedures to parentage establishment for women and non-binary individuals, this Article uses the term voluntary acknowledgement of parentage. See *infra* note 51 and accompanying text.

42. See 45 C.F.R. § 303.5(g)(4) (2023) ("The State must require that a voluntary acknowledgement be signed by both parents, and that the parents' signatures be authenticated by a notary or witness(es).").

43. See Baker, *supra* note 29, at 1686 (noting that the VAP forms "routinely ask men to aver that they are the biological father of the child").

44. Harris, *supra* note 39, at 476 (citing 45 C.F.R. § 302.70(a)(5)(vii) (2009)).

45. 42 U.S.C. § 666(a)(5)(D)(ii).

states must give “full faith and credit” to VAPs validly executed in other states.⁴⁶

Either signatory may rescind the VAP within sixty days of its execution, but after that point it can be challenged only on the grounds of duress, material mistake of fact, or fraud.⁴⁷ Although the most frequent challenges to VAPs are based upon claims “that the [person who gave birth] committed fraud by misleading the man about his biological paternity or that there is a material mistake of fact because the man is not the biological father,”⁴⁸ proof that the man is not the child’s biological father will not necessarily result in the disestablishment of his parentage.⁴⁹ Some courts require evidence of fraud or mistake in addition to the genetic testing results or deny the challenge, despite the genetic testing results, where disestablishing the paternity of the man who executed the VAP would be inequitable under the circumstances or contrary to the best interests of the child.⁵⁰ While the federal guidelines set out voluntary acknowledgement procedures that extend only to establishing parentage for men, as of 2023, approximately eleven states have expanded voluntary acknowledgement procedures to women and non-binary individuals.⁵¹

4. Genetic Ties

In situations where a child has only one existing legal parent, the person who gave birth, an individual claiming to be the child’s biological father, or a child support agency can initiate legal proceedings to establish the alleged biological father’s parentage on the basis of DNA evidence.⁵² Federal law requires that state procedures “create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.”⁵³ In situations in which a second

46. *Id.* § 666(a)(5)(C)(iv).

47. *Id.* § 666(a)(5)(D)(ii)–(iii).

48. Harris, *supra* note 39, at 479.

49. *See id.* at 480–81.

50. *Id.* at 480–82.

51. COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL & TRANSGENDER FAMILY LAW § 5:22 (2022–2023 ed. 2022).

52. *See* Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 566–69 (2000).

53. 42 U.S.C. § 666(a)(5)(G).

individual is already recognized as a legal parent, an individual claiming parentage on the basis of genetic ties to the child may be able to bring an action to establish their parentage and rebut the parentage of the existing second legal parent. For example, as discussed above, procedures exist for biological fathers to seek rebuttal of the marital presumption or VAPs.

In recent years, some jurisdictions have expanded to women the types of genetics-based parentage establishment avenues traditionally available only to men.⁵⁴ This has arisen primarily in the context of gestational surrogacy arrangements in situations where the surrogacy agreement is not enforceable under the laws of the jurisdiction, but the court allows the intended mother to establish parentage through proof that she is the child's genetic mother.⁵⁵ In addition, a few courts have recognized similar claims in the context of same-sex couples who conceive children via reciprocal in vitro fertilization (IVF), an assisted reproductive procedure wherein an embryo is created using ova from one member of the same-sex couple and sperm from a third party and then transferred to the other member of the couple for gestation.⁵⁶ The trend in expanding genetics-based parentage grounds to women is likely to continue, as many states have adopted provisions in their parentage statutes indicating that, to the extent reasonable, the standards governing paternity determinations should apply to maternity determinations.⁵⁷

54. See Jessica Feinberg, *After Marriage Equality: Dual Fatherhood for Married Male Same-Sex Couples*, 54 UC DAVIS L. REV. 1507, 1535–36 (2021) (“[A] number of jurisdictions have provided for the rebuttal and disestablishment of the presumed legal parentage that attaches to the individual who gave birth . . . when there is a genetic intended mother seeking to establish maternity.”).

55. See *id.* at 1535–37 (“[T]he ability to rebut and disestablish the maternity of the person who gave birth through genetics-based avenues generally has been restricted to surrogacy arrangements that involve a genetic intended mother.”).

56. See JOSLIN ET AL., *supra* note 51, § 3:11; *Reciprocal IVF*, USC FERTILITY, <https://uscfertility.org/same-sex-family-building/reciprocal-ivf> [<https://perma.cc/JFH2-ALLY>].

57. See NeJaime, *supra* note 5, at 2294 (“In many states, such application has been aided by explicit gender-neutrality directives modeled on the UPA. The original UPA provides that in actions ‘to determine the existence or nonexistence of a mother and child relationship [.] [i]nsofar as practicable, the provisions . . . applicable to the father and child relationship apply.’”).

5. Consent to Assisted Reproduction

Under existing statutory or common law rules throughout the United States, a husband who consents to his wife's use of assisted reproduction with the intent to be the resulting child's parent is deemed a legal parent regardless of whether the child is conceived using the husband's sperm or donor sperm.⁵⁸ In some jurisdictions, the laws require that the consent be in writing or that the procedure be performed under the supervision of a physician.⁵⁹ Parentage established through consent to assisted reproduction laws generally is conclusive and irrefutable.⁶⁰ In terms of same-sex couples, courts that have addressed the issue have ruled that, under *Obergefell* and *Pavan*, spousal consent to assisted reproduction laws extend to same-sex spouses, and a number of states have explicitly adopted gender-neutral statutory language.⁶¹ In addition, a number of jurisdictions now have consent to assisted reproduction laws that extend to non-marital partners. As of 2023, at least seventeen jurisdictions have adopted consent to assisted reproduction laws that extend to an individual who consents to a non-marital partner's use of assisted reproduction with the intent to be the resulting child's parent.⁶² In fourteen of these jurisdictions, the law encompasses non-marital same-sex partners.⁶³

6. Surrogacy

Surrogacy typically involves an agreement between the surrogate and intended parents providing that the surrogate agrees to become pregnant through the use of assisted reproduction and to relinquish parental rights to the intended parents.⁶⁴ Only a

58. JOSLIN ET AL., *supra* note 51, § 3:3.

59. *Id.*

60. *Id.* § 3:4.

61. *Id.*; *see also* Appel v. Celia, No. CL-2017-0011789, 2018 WL 6794551, at *2–3 (Va. Cir. Ct. Feb. 8, 2018) (extending a Virginia statute conferring the right of parentage to husbands of mothers who conceived through assisted conception to same-sex spouses of gestational parents because *Obergefell* and *Pavan*'s reasoning establish that limiting a statute's application to different-sex couples is not compliant with constitutional requirements); *see also* NeJaime, *supra* note 5, app. A (listing twelve gender-neutral statutes).

62. JOSLIN ET AL., *supra* note 51, § 3:3.

63. *Id.*

64. Jenna Casolo et al., *Assisted Reproductive Technologies*, 20 GEO. J. GENDER & L. 313, 329 (2019); JOSLIN ET AL., *supra* note 51, § 4.1.

few jurisdictions statutorily recognize “traditional” or “genetic” surrogacy agreements in which the surrogate’s ovum is used to conceive the child⁶⁵ (meaning the surrogate shares both genetic and gestational ties to the child).⁶⁶ The other category of surrogacy, gestational surrogacy, represents approximately ninety-five percent of all surrogacy arrangements today.⁶⁷ In gestational surrogacy, the surrogate is not genetically connected to the child—genetic materials from the intended parent(s) or gamete donor(s) are used to create the embryo, which is then transferred to the surrogate.⁶⁸

Gestational surrogacy is a complex area of the law, and legal regulation varies dramatically by jurisdiction. Approximately half of states have statutes that explicitly address gestational surrogacy,⁶⁹ some states have only case law addressing gestational surrogacy,⁷⁰ and still other states have no statutory or case law governing gestational surrogacy.⁷¹ A few of the states with statutes addressing surrogacy consider all surrogacy contracts void and unenforceable.⁷² The rest of the jurisdictions with statutes addressing gestational surrogacy recognize surrogacy agreements under specified conditions.⁷³ In these states, the approaches to the categories of individuals who may enter into enforceable surrogacy agreements as intended parents range from permissive jurisdictions that place no marriage- or genetics-

65. JOSLIN ET AL., *supra* note 51, § 4:2.

66. *Id.* § 4:1.

67. Diane S. Hinson & Maureen McBrien, *Surrogacy Across America*, FAM. ADVOC., Fall 2011, at 32, 33.

68. *See, e.g.*, ROBERT JOHN KANE & LAWRENCE E. SINGER, *THE LAW OF MEDICAL PRACTICE IN ILLINOIS* § 35:9, at 987–88 (3d ed. 2019).

69. *See* NeJaime, *supra* note 5, app. E (listing twenty-two states with statutes either expressly restricting or permitting gestational surrogacy as of 2017).

70. JOSLIN ET AL., *supra* note 51, § 4:3.

71. *Id.* § 4:5, at 280.

72. *E.g.*, IND. CODE § 31-20-1-1 (2023) (“[I]t is against public policy to enforce any term of a surrogate agreement that requires a surrogate to . . . [b]ecome pregnant [or] . . . [w]aive parental rights or duties to a child.”); MICH. COMP. LAWS § 722.855 (2023) (“A surrogate parentage contract is void and unenforceable as contrary to public policy.”); N.D. CENT. CODE § 14-18-05 (2023) (“Any agreement in which a woman agrees to become a surrogate or to relinquish that woman’s rights and duties as a parent of a child conceived through assisted conception is void.”).

73. *See* JOSLIN ET AL., *supra* note 51, § 4:2 (summarizing limitations in state statutes regarding when surrogacy agreements are permissible and enforceable).

related restrictions on intended parents to restrictive jurisdictions in which eligibility is limited to very narrow categories of intended parents.⁷⁴ In a number of the jurisdictions that recognize gestational surrogacy agreements, courts can grant pre-birth parentage orders that identify the intended parents as the child's legal parents before the child is born.⁷⁵ In a few of the jurisdictions that recognize gestational surrogacy agreements, the intended parents must wait until the child is born to obtain an order establishing their legal parentage.⁷⁶ On the other end of the spectrum, a few states' gestational surrogacy statutes establish legal parentage for intended parents who enter into a valid surrogacy agreement without any requirement of judicial involvement.⁷⁷

7. Adoption

All states allow for the establishment of legal parentage through judicial adoption proceedings.⁷⁸ Most adoptions fall into one of three categories: (1) "[t]he adoption of children from the public foster care system by foster caregivers, kin, or adoptive parents chosen by the agency for the child"; (2) "[t]he domestic adoption of infants who reside in the United States and are adopted through private adoption agencies or independently"; or (3) "[i]ntercountry adoption of infants and children from other

74. See *The US Surrogacy Law Map*, CREATIVE FAM. CONNECTIONS (2023), <https://www.creativefamilyconnections.com/us-surrogacy-law-map> [<https://perma.cc/KVU5-XLBT>] (click on each state for details of that state's laws governing surrogacy agreements).

75. *Id.* There are currently twelve states, as of October 2023, in which "[s]urrogacy is permitted for all parents, pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate." *Id.*

76. JOSLIN ET AL., *supra* note 51, § 4:8, at 285.

77. *E.g.*, 750 ILL. COMP. STAT. 47/15(b) (2023); ME. STAT. tit. 19-A, § 1933(1) (2023); see also UNIF. PARENTAGE ACT § 809 (UNIF. L. COMM'N 2017) ("[O]n birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child.").

78. See *Court Jurisdiction and Venue for Adoption Petitions*, CHILD WELFARE INFO. GATEWAY 2 (2022), <https://www.childwelfare.gov/pubpdfs/jurisdiction.pdf> [<https://perma.cc/NY67-4BNE>] ("All 50 States, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands specify in their statutes one or more types of courts that have jurisdiction over adoption cases.").

countries by U.S. citizens.”⁷⁹ Generally, the parental rights of any existing legal parents must be terminated before the adoptive parent(s) can obtain legal parentage.⁸⁰ There are, however, a couple of common exceptions to this general rule.

Step- and second-parent adoption procedures allow an existing legal parent to maintain their status as the child’s legal parent when their spouse or non-marital partner adopts the child.⁸¹ Stepparent adoption procedures, in which the spouse of an existing legal parent adopts the child, are available in every jurisdiction.⁸² Following *Obergefell*, both different- and same-sex spouses of a child’s legal parent can utilize stepparent adoptions to establish parentage.⁸³ Second-parent adoption, which is recognized in a minority of jurisdictions, allows the non-marital partner of a child’s existing legal parent to adopt the child.⁸⁴ As of 2023, at least twenty jurisdictions have statutes or appellate case law providing for second-parent adoptions; a number of additional jurisdictions have allowed second-parent adoptions in at least some counties.⁸⁵ However, in jurisdictions that recognize a maximum of two legal parents, if the child already has a second legal parent, a step- or second-parent adoption cannot occur

79. *The Basics of Adoption Practice*, CHILD WELFARE INFO. GATEWAY 2 (2006), https://www.childwelfare.gov/pubPDFs/f_basicsbulletin.pdf [<https://perma.cc/TYP2-VHX4>].

80. See 2 ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* § 14:1, at 764–65 (3d ed. 2009) (“While they are living, the biological parents must either voluntarily relinquish their parental rights or have their rights involuntarily terminated in a separate proceeding or in a contested adoption proceeding prior to the court’s granting a final decree of adoption.” (footnotes omitted)).

81. See *Adoption by LGBT Parents*, NAT’L CTR. FOR LESBIAN RTS. 1 (June 2020), https://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf [<https://perma.cc/YR5-JKDG>] (describing step- and second-parent adoption procedures).

82. JOSLIN ET AL., *supra* note 51, § 5:2, at 354–55.

83. *Id.* (citing *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

84. See *id.* at 354–57 (explaining second-parent adoptions and listing jurisdictions that allow them).

85. See *Relationship & Parental Recognition: Second Parent & Stepparent Adoption*, MOVEMENT ADVANCEMENT PROJECT (June 7, 2022), <https://www.lgbtmap.org/img/maps/citations-adoption-second-parent.pdf> [<https://perma.cc/GQ9Y-HUMQ>] (listing the status of second-parent adoptions in each state).

unless that person's parental rights are terminated (either voluntarily or involuntarily).⁸⁶

8. Parental Functioning

Over the past several decades, parental functioning has emerged as a basis for the establishment of legal parentage.⁸⁷ Common function-based mechanisms for establishing parental rights include holding out provisions and equitable parenthood doctrines.⁸⁸ Holding out provisions, which were rooted originally in the 1973 Uniform Parentage Act, generally create a presumption of parentage for a man who receives a child into his home and holds the child out as his own.⁸⁹ Many states have adopted holding out provisions.⁹⁰ In some states, the holding out provision contains a durational requirement mandating that the holding out occurred for a minimum amount of time following the child's birth.⁹¹ Common factors that courts consider in determining whether someone has held the child out as their own include, *inter alia*, the person's words and actions acknowledging the child as their own, the person's demonstrated commitment to the child through physical, emotional, and financial support, and whether the person and child share a bond that is parental in nature.⁹² Courts in at least six states have held that such provisions, even when written in gendered terms, extend to women who have received the child into their home and held the child

86. Jessica Feinberg, *A Logical Step Forward: Extending Voluntary Acknowledgments of Parentage to Female Same-Sex Couples*, 30 YALE J.L. & FEMINISM 99, 103, 110–12 (2018) [hereinafter Feinberg *Logical Step Forward*].

87. See Feinberg *Whither*, *supra* note 23, at 56–66 (describing the evolution of equitable parenthood doctrines based on functional parenting).

88. See *id.* at 56, 86 (summarizing equitable parenthood doctrines and holding out provisions as “[a]venues for [e]stablishing [l]egal [p]arent [s]tatus”).

89. JOSLIN ET AL., *supra* note 51, § 5:22, at 390 (citing UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM’N 1973)).

90. See *id.*

91. See *id.* at 394–96 (noting twelve states have adopted the more recent durational provisions of the 2002 and 2017 Uniform Parentage Acts).

92. See *Chatterjee v. King*, 280 P.3d 283, 286 (N.M. 2012) (citing New Mexico’s “hold out provision” that includes an “established . . . personal, financial or custodial relationship with the child” as the basis for presuming a man to be a natural father); *E.C. v. J.V.*, 136 Cal. Rptr. 3d 339, 348 (Cal. Ct. App. 2012) (listing factors California courts consider to “determin[e] whether an alleged parent has held a child out as his or her natural child”); 160 AM. JUR. 3D *Proof of Facts* § 5 (2017) (listing ten common factors in determining whether someone “has held a child out as his or her natural child”).

out as their own for the requisite period of time.⁹³ Notably, the 2017 Uniform Parentage Act, which has been enacted in a handful of states as of 2023,⁹⁴ sets forth a holding out presumption that is written in gender-neutral terms.⁹⁵

Equitable parenthood doctrines—which are commonly referred to as *de facto*, psychological, or functional parenthood doctrines—developed as a method of providing rights relating to child custody and visitation to individuals who had functioned in a parental role to a child but had not attained formal legal parent status.⁹⁶ The most widely adopted test for determining whether an individual qualifies for relief under a state’s equitable parenthood doctrine

requires the petitioner to prove that: (1) the legal parent fostered and consented to the petitioner forming a parent-like relationship to the child; (2) the petitioner lived in a household with the child; (3) the petitioner “assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation;” and (4) “the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.”⁹⁷

93. JOSLIN ET AL., *supra* note 51, § 5:22, at 390.

94. See *Parentage Act Legislative Bill Tracking*, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f> [<https://perma.cc/A4TT-V28N>] (noting seven states have enacted the 2017 revision of the Uniform Parentage Act or substantially similar legislation).

95. UNIF. PARENTAGE ACT § 204(a) (UNIF. L. COMM’N 2017).

96. See Feinberg *Whither*, *supra* note 23, at 56 (“In an effort to avoid the harsh results stemming from the application of the traditional avenues of establishing legal parent status to nonbiological parents raising children in same-sex relationships, a number of courts and legislatures adopted doctrines to grant visitation or custody rights under certain circumstances to individuals who had functioned as a child’s parent, but who were unable to attain formal legal parent status under existing law.”).

97. *Id.* at 69 n.83 (quoting *Holtzman v. Knott (In re Custody of H.S.H.-K.)*, 533 N.W.2d 419, 421 (Wis. 1995)). The Uniform Parentage Act identifies the following elements of the *de facto* parentage doctrine:

(1) the individual resided with the child as a regular member of the child’s household for a significant period; (2) the individual engaged in consistent caretaking of the child; (3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation; (4) the individual held out the child as the individual’s child; (5) the individual established a bonded and dependent relationship with the child which is parental in nature; (6) another

In most of the jurisdictions that have adopted an equitable parenthood doctrine, an individual who qualifies as an equitable parent is entitled to certain rights relating to child custody or visitation but is not recognized as a legal parent.⁹⁸ Importantly, however, in recent years, a handful of jurisdictions have passed laws providing that satisfaction of the state's equitable parenthood doctrine is a basis for establishing full legal parentage.⁹⁹

B. CURRENT LAWS RECOGNIZING MULTI-PARENTAGE

1. Jurisdictions with Limited Multi-Parentage Recognition

There are several jurisdictions that statutorily recognize multi-parentage but provide for recognition only through certain parentage establishment mechanisms or limit the situations in which multi-parentage is recognized.¹⁰⁰ Louisiana's recognition of multi-parentage is limited to the recognition of two fathers and applies only in narrow circumstances.¹⁰¹ Specifically, Louisiana courts began in the 1970s to recognize the possibility of dual paternity in situations where the husband of the person who gave birth was presumed to be the child's father pursuant to the marital presumption, but another man was established as

parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and (7) continuing the relationship between the individual and the child is in the best interest of the child.

UNIF. PARENTAGE ACT § 609(d) (UNIF. L. COMM'N 2017).

98. See Feinberg *Whither*, *supra* note 23, at 66–68 (noting that only a few jurisdictions provide de facto parents with rights equal to those of legal parents in custody and visitation determinations, while “a significant number” impose a higher burden on de facto parents).

99. *E.g.*, CONN. GEN. STAT. § 46b-490(a) (2023); ME. STAT. tit. 19-A, § 1891(4)(B) (2023); VT. STAT. ANN. tit. 15C, § 501(a)(1) (2023); WASH. REV. CODE § 26.26A.440(4) (2023); DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6) (2023). It is unclear whether Washington, D.C. also falls within this category of jurisdictions. This is because “[t]he statute declares [only] that a de facto parent ‘shall be deemed a parent for purposes’ of a number of provisions that relate to child custody and child support; it is therefore unclear what the status means in other contexts.” JOSLIN ET AL., *supra* note 51, § 5:22, at 397 n.68 (quoting D.C. CODE § 16-831.03(b) (2023)).

100. See *infra* notes 101–13 (discussing the different approaches these jurisdictions take to recognizing multi-parentage).

101. See Carbone & Cahn, *supra* note 12, at 20–22 (describing Louisiana's dual paternity system and its applications).

the child's biological father.¹⁰² Current Louisiana statutory provisions allow the state to seek to establish the paternity of the biological father for the purpose of obtaining child support despite the child already having a presumed father,¹⁰³ and allow the child to establish the biological father's paternity without displacing the presumed father's legal parentage.¹⁰⁴

Delaware's recognition of multi-parentage is limited to situations in which a child already has at least two legal parents, and another individual is able to establish parentage through the state's equitable parenthood doctrine. Specifically, Delaware's de facto parentage statute, which confers full legal parentage,¹⁰⁵ requires as an element that the petitioner "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."¹⁰⁶ A number of Delaware courts have interpreted the language referring to the consent of the child's existing "parents" as indicating that multi-parentage can occur through satisfaction of the de facto parentage doctrine.¹⁰⁷ Washington, D.C., also has language in the

102. *Id.* at 20–21.

103. LA. STAT. ANN. § 46:236.1.2(D)(1) (2023) ("The department, except when it is not in the best interest of the child, may . . . take direct civil action, including actions to establish filiation against an alleged biological parent notwithstanding the existence of a legal presumption that another person is the parent of the child solely for the purpose of fulfilling its responsibility under this [family and child support] Section . . .").

104. LA. CIV. CODE ANN. art. 197, 2005 cmt. b (2023) (establishing the right of the child to establish paternity of the biological father despite the existence of the presumed father).

105. DEL. CODE ANN. tit. 13, § 8-201(a)(4), (b)(6) (2023).

106. *Id.* § 8-201(c)(1) (2023) (emphasis added).

107. *See, e.g.,* J.W.S., Jr. v. E.M.S., No. 11-08009, 2013 WL 6174814, at *5 (Del. Fam. Ct. May 29, 2013) (recognizing as a third legal parent an individual who satisfied the state's equitable parenthood doctrine); A.L. v. D.L., No. 12-07390, 2012 WL 6765564, at *5 (Del. Fam. Ct. Sept. 19, 2012) ("[T]he actual language of § 8–201(c) is unambiguous and does not prohibit [a child from having more than two parents]." (citing DEL. CODE ANN. tit. 13, § 8-201(c) (2012))); *see also In re* K.L.W., 492 P.3d 392, 398 (Colo. App. 2021) (interpreting Delaware's de facto parentage law to provide for multi-parentage). *But see* Bancroft v. Jameson (*In re* Bancroft), 19 A.3d 730, 750 (Del. Fam. Ct. July 15, 2010) (holding that the Delaware de facto parentage law is unconstitutional). Other Delaware courts have declined to follow *Bancroft*. *See, e.g.,* A.L. v. D.L., 2012 WL 6765564, at *5 (explicitly declining to follow the *Bancroft* court's interpretation that the Delaware "General Assembly did not intend for a child to ever have more than two parents").

consent element of its de facto parentage statute requiring that all existing legal parents supported the formation of the relationship between the petitioner and child,¹⁰⁸ but there is uncertainty regarding whether the statute provides full legal parentage to individuals who qualify as de facto parents.¹⁰⁹ As a result, it is unclear if Washington, D.C., like Delaware, provides for multi-parentage recognition through its de facto parentage statute.

Finally, Nevada recently enacted a statute that provides for the recognition of multi-parentage, but only through adoption.¹¹⁰ Specifically, the statute states that “[t]he court may determine that a child has a legal relationship with more than two persons who petition for the adoption of the child.”¹¹¹ The statute makes clear that the written consent of all of the existing legal parents is required in order for the adoption to occur.¹¹² Third-parent adoptions also have been granted by courts in several states that do not have statutes explicitly providing for multi-parentage recognition.¹¹³

2. Jurisdictions with Broader Multi-Parentage Recognition

A handful of states have adopted broad statutory provisions that grant courts the ability to recognize that a child has more than two legal parents without explicitly limiting multi-parentage recognition to certain parentage establishment mechanisms.

108. D.C. CODE § 16-831.01(1)(A)(iii), (1)(B)(iv) (2023) (setting forth as an element of its de facto parentage doctrine “the agreement of the child’s parent or, if there are 2 parents, both parents”).

109. JOSLIN ET AL., *supra* note 51, § 5:22, at 397 n.68 (discussing the lack of clarity provided by the D.C. statute because it only states that a de facto parent “shall be deemed a parent for purposes of a number of provisions that relate to child custody and child support” and does not specify beyond this (quoting D.C. CODE § 16-831.03(b) (2023))).

110. NEV. REV. STAT. § 127.030(7) (2023).

111. *Id.*

112. *See id.* § 127.040(1) (“[W]ritten consent to the specific adoption proposed by the petition . . . is required from: (a) [e]ach legal parent who is alive; and (b) [a]ny legal guardian. . .”).

113. *See* Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. REV. 307, 335–36 (2022).

These states include California,¹¹⁴ Maine,¹¹⁵ Vermont,¹¹⁶ Washington,¹¹⁷ and Connecticut.¹¹⁸ These five states recognize, in some form, each of the methods described above for establishing legal parentage,¹¹⁹ with the notable exception that California does not provide legal parentage pursuant to its equitable parenthood doctrine.¹²⁰

The statutes in California, Washington, and Connecticut state that courts can recognize multi-parentage only if failing to recognize more than two parents would be detrimental to the child.¹²¹ In determining detriment to the child, the statutes instruct courts, in these or similar words, to weigh “all relevant factors, including the harm if the child is removed from a stable placement with an individual who has fulfilled the child’s physical needs and psychological needs for care and affection and has assumed the role for a substantial period.”¹²² Vermont’s statute provides that courts can recognize multi-parentage when it is in

114. CAL. FAM. CODE § 7612(c) (West 2023) (“[A] court may find that more than two persons . . . are parents if the court finds that recognizing only two parents would be detrimental to the child.”).

115. ME. STAT. tit. 19-A, § 1853(2) (2023) (“[A] court may determine that a child has more than 2 parents.”).

116. VT. STAT. ANN. tit. 15C, § 206(b) (2023) (“[A] court may determine that a child has more than two parents if the court finds that it is in the best interests of the child to do so.”).

117. WASH. REV. CODE § 26.26A.460(3) (2023) (“The court may adjudicate a child to have more than two parents . . . if the court finds that failure to recognize more than two parents would be detrimental to the child.”).

118. CONN. GEN. STAT. § 46b-475(c) (2023) (“The court may adjudicate a child to have more than two parents . . . if the court finds that failure to recognize more than two parents would be detrimental to the child.”).

119. See *supra* Part I.A (identifying mechanisms through which legal parentage can be established); see also CAL. FAM. CODE § 7611 (West 2023) (codifying most of the methods to establish parentage described in this Article); ME. STAT. tit. 19-A, § 1851 (2023) (codifying all eight methods to establish parentage described in this Article); VT. STAT. ANN. tit. 15C, § 201 (2023) (same); WASH. REV. CODE §§ 26.26A.100, 26.26A.440(1)–(2) (2023) (same); CONN. GEN. STAT. § 46b-471 (2023) (same).

120. See *De Facto Parent*, CAL. DEP’T OF SOC. SERVS., <https://www.cdss.ca.gov/inforesources/caregiver-advocacy-network/rights-de-facto-parent> [<https://perma.cc/RE7X-ZKDH>] (“The status of de facto parent does not give a person the same rights and responsibilities as a parent or guardian.”).

121. See *supra* notes 114, 117–18 (quoting relevant portions of the states’ statutes).

122. WASH. REV. CODE § 26.26A.460(3) (2023); see also CONN. GEN. STAT. § 46b-475(c) (2023); CAL. FAM. CODE § 7612(c) (West 2023).

the child's best interests.¹²³ Although Maine's statute is unique in not explicitly requiring either a detriment or best interests determination in order for courts to recognize multi-parentage,¹²⁴ it is unlikely that a court would exercise its discretion to recognize multi-parentage absent a determination that it would further the best interests of the child.¹²⁵

C. MULTI-PARENT FAMILIES

While legal recognition of multi-parentage is a relatively recent phenomenon, there are a number of scenarios through which multi-parent families have, and will likely continue to, come to fruition.¹²⁶ Some of these scenarios involve the mutual consent of all of the parties, which may arise sometime after the child's birth or exist from the time of conception. For example, with regard to the former, a child's existing legal parents may consent to a third party, such as one of the existing parent's current spouse or partner, becoming the child's third legal parent through third-parent adoption proceedings.¹²⁷ Parental remarriage and re-partnering are common occurrences in the United States, and it is estimated that approximately one-third of children will live in a household with a stepparent at some point in their childhood.¹²⁸ Due to the close bonds that can be formed when a parent's spouse or partner shares a household with the child, there is often a desire to formalize the relationship through step- or second-parent adoption procedures.¹²⁹ However,

123. VT. STAT. ANN. tit. 15C, § 206(b) (2023).

124. See ME. STAT. tit. 19-A, § 1853(2) (2023) (stating no specific conditions for when a court may determine a child has more than two parents).

125. See E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1154 (2000) (describing courts' "parens patriae duties" to act in the best interests of a child (footnote omitted)).

126. See JOSLIN ET AL., *supra* note 51 § 5:23, at 400–01 (noting that "a growing number of jurisdictions" are beginning to recognize multi-parentage).

127. See Ian Lovett, *Measure Opens Door to Three Parents, or Four*, N.Y. TIMES (July 13, 2012), <https://www.nytimes.com/2012/07/14/us/a-california-bill-would-legalize-third-and-fourth-parent-adoptions.html> [<https://perma.cc/L35D-KGHB>] (discussing a California bill allowing for the post-birth establishment of multi-parentage with the consent of the child's current legal parents).

128. *E.g.*, ABRAMS ET AL., *supra* note 17, at 703.

129. See Brian H. Bix, *The Bogeyman of Three (or More) Parents* 4 (Univ. of Minn. L. Sch., Research Paper No. 08-22, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1196562 [<https://perma.cc/LTW5-SNGN>] ("In a world

prior to multi-parentage recognition, stepparent and second-parent adoption procedures could not occur unless either the child did not already have a second legal parent or the rights of that parent were terminated—a standard that undoubtedly prevented many such adoptions from occurring.¹³⁰ In states where multi-parentage recognition allows existing parents to consent to a third-parent adoption without losing their own parental rights, it is likely that a greater number of spouses and partners of existing legal parents will attain legal parentage.¹³¹ In addition, if states that adopt third-parent adoption procedures decide to extend eligibility beyond individuals who are the spouses or partners of one of the existing legal parents, there are likely parents who would consent to someone else who plays a significant role in the child's life, such as a grandparent, obtaining a third-parent adoption.¹³²

where divorce is relatively common and accepted, and remarriage of one or both parents far from rare, children frequently grow up with three or four parental figures.”); Palmer, *supra* note 4, at 36–37 (“Formal and affirmative recognition of legal parentage comes with significant financial rights and benefits . . .”).

130. See Feinberg *Logical Step Forward*, *supra* note 86, at 110–12 (describing step- and second-parent adoption procedures); Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 766 (1992) (discussing the high barrier to termination of parental rights).

131. See Lovett, *supra* note 127 (illustrating examples of families that would benefit from access to parental rights in states recognizing multi-parentage).

132. Step- and second-parent adoptions have been limited to spouses and partners of existing legal parents, while kinship caregivers generally have been excluded from utilizing adoption to establish themselves as a child's legal parent alongside an existing legal parent (i.e., without terminating the existing parents' rights). See Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 BYU J. PUB. L. 289, 315 (2008) (“Adoption generally does not countenance as parents persons who are not romantically intimate with each other, such as . . . two siblings, or a grandmother and her daughter . . .”); Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715, 729 (2015) (“The general rule is that absent ‘the functional equivalent of the traditional husband-wife relationship,’ two people cannot become parents to the same child via adoption.” (quoting *In re Adoption of Garrett*, 841 N.Y.S.2d 731, 732 (N.Y. Sur. Ct. 2007)); see also *In re Garrett*, 841 N.Y.S.2d at 733 (declining to expand the right to adopt to a natural parent and her brother); Sacha M. Coupet, “*Ain't I a Parent?*”: *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 650–56 (2010) (exploring the varying applicability of avenues to parentage for kinship caregivers). It is unclear whether a wider variety of individuals will be eligible for third-parent adoptions under expanded multi-parentage laws. The Nevada statute, for

In other multi-parentage situations, mutual consent among multiple parties to serve as the child's legal parents will have existed from the time of the child's conception.¹³³ This may arise, for example, in the context of assisted reproduction.¹³⁴ Advancements in assisted reproduction mean that five or more people may be directly involved in the conception of a child: the providers of the gametes used to conceive the child, the person who gestates the child, and the intended parents.¹³⁵ Several of the parties involved in the child's conception and birth may mutually agree to a multi-parentage arrangement and together request that the court recognize more than two individuals as the child's legal parents.¹³⁶ If each party has a basis for establishing legal parentage, then multi-parentage can occur if the court determines that the best interests or detriment standard is satisfied.¹³⁷ Mutual consent from the time of conception can also arise outside of the assisted reproduction context. In some cases, more than two parties may share a romantic relationship and may intend to raise any child conceived within the relationship as a family unit.¹³⁸ Similar to the assisted reproduction context, if each party has a basis for establishing parentage and the court finds that the best interests or detriment standard is satisfied, the court may determine that the child has more than two legal parents.¹³⁹ When all of the parties agree and together seek recognition of a multi-parent family structure, it likely will be easier

example, simply states that “[t]he court may determine that a child has a legal relationship with more than two persons who petition for the adoption of the child” without including a required relationship. NEV. REV. STAT. § 127.030(7) (2023).

133. See *supra* Parts I.A.5–6 (discussing assisted reproduction and gestational surrogacy).

134. See *supra* Part I.A.5 (summarizing the status of consent to assisted reproduction throughout the United States).

135. Marvel, *supra* note 5.

136. See, e.g., *A.A. v. B.B.* (2007), 83 O.R. 3d 561, 563–65 (Can. Ont. C.A.) (ruling on a parentage action brought by the members of a same-sex couple and the sperm provider, who mutually sought recognition as the child's three legal parents).

137. See *supra* notes 121–25 and accompanying text (describing state standards for the recognition of multi-parentage).

138. See, e.g., *Dawn M. v. Michael M.*, 47 N.Y.S.3d 898, 900 (N.Y. Sup. Ct. 2017) (describing a relationship comprised of three individuals seeking custody).

139. E.g., *id.* at 903 (granting custody to three individuals based on the determination that doing so furthered the best interests of the child).

for courts to determine that the case is one in which the detriment or best interests standard is satisfied.

While multi-parentage claims in which all parties agree likely will be the most straightforward, courts undoubtedly also will be tasked with determining whether to recognize multi-parentage in situations where the relevant parties are not in mutual agreement regarding who should be recognized as the child's legal parents. There are a number of circumstances in which disputes involving multiple parties, each of whom asserts legal parentage, have arisen. For example, members of a couple who pursued assisted reproduction to conceive a child and the third party who provided gametes and/or gestated the child may disagree as to whether the parties intended for the third party to be a co-parent, a donor or surrogate with no claim to legal parentage, or something in-between.¹⁴⁰ Each party may assert an independent basis for establishing legal parentage. Moreover, if the parties did not comply with the relevant requirements governing the creation of enforceable gamete donation or surrogacy agreements, or the jurisdiction does not recognize the validity of such agreements, multiple parties may have a basis for establishing legal parentage despite the fact that it is clear the parties never intended to create a multi-parent family structure.¹⁴¹ When this

140. See, e.g., *N.A.H. v. J.S.*, No. 1537 WDA 2017, 2018 WL 1354356, at *1–3 (Pa. Super. Ct. Mar. 16, 2018) (describing dispute between donor and mother as to the role of donor after the birth of the child); *Janssen v. Alicea*, 30 So. 3d 680, 681 (Fla. Dist. Ct. App. 2010) (same); *Browne v. D'Allea*, No. FA064004782S, 2007 WL 4636692, at *1 (Conn. Super. Ct. Dec. 7, 2007) (same); *C.O. v. W.S.*, 639 N.E.2d 523, 524 (Ohio Ct. C.P. 1994) (same); *Thomas S. v. Robin Y.* (*In re Thomas S.*), 618 N.Y.S.2d 356, 357–58 (N.Y. App. Div. 1994) (adjudicating a donor's rights to visitation after donor developed a supervised relationship with the child over six years); *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 532–33 (Cal. Ct. App. 1986) (describing dispute between donor and mother as to the role of donor after the birth of the child).

141. See, e.g., *In re Paternity & Maternity of Infant T.*, 991 N.E.2d 596, 597, 600–01 (Ind. Ct. App. 2013) (holding that because Indiana does not allow the person who gives birth to disestablish maternity unless another individual establishes maternity, the surrogate's parentage could not be disestablished even though the intended parents, the surrogate, and the surrogate's husband all agreed that the surrogate should not be recognized as the child's legal parent); see also Maria Cramer, *Couple Forced to Adopt Their Own Children After a Surrogate Pregnancy*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/us/michigan-surrogacy-law.html> [<https://perma.cc/SW2U-UEXB>] (describing a case in Michigan, a state which does not recognize surrogacy agreements, where the court denied the intended parents' request to be declared the

type of dispute arises in a jurisdiction that recognizes multi-parentage, the court may determine that the child has more than two legal parents, despite the lack of the agreement between the parties, if it finds that recognizing multi-parentage will further the child's best interests or failing to recognize multi-parentage will be detrimental to the child.¹⁴²

Disputes in which multiple parties assert claims of parentage also may arise outside of the assisted reproduction context.¹⁴³ For example, the child's biological father and the spouse or partner of the individual who gave birth may assert competing claims of parentage.¹⁴⁴ The biological father may seek to establish parentage, on genetics-based grounds, of a child born to an individual who was married to someone else at the time of the child's conception or birth.¹⁴⁵ In response, the spouse may claim legal parentage based on the marital presumption.¹⁴⁶ Similarly, biological fathers and individuals who have executed VAPs or held the child out as their own may set forth competing claims of legal parentage.¹⁴⁷ While prior to multi-parentage recognition the court would have to choose whether to recognize either the biological father or the gestating parent's spouse or partner as the child's other legal parent, courts in states that recognize

legal parents of a child born via gestational surrogacy and held that despite the fact that all parties remained in agreement that the intended parents should be recognized as the child's legal parents, the intended parents (who were also the child's biological parents) would have to pursue adoption in order to establish their parentage and disestablish the parentage of the surrogate and her husband); Chandrika Narayan, *Kansas Court Says Sperm Donor Must Pay Child Support*, CNN (Jan. 24, 2014), <https://www.cnn.com/2014/01/23/justice/kansas-sperm-donation/index.html> [<https://perma.cc/WA3C-HL5V>] (describing a Kansas case in which the state was allowed to establish the sperm donor's paternity for purposes of obtaining child support, despite the parties' agreement that he was a donor with no parental rights, due to lack of the required physician involvement under state's donor non-paternity law).

142. See *supra* notes 121–25 and accompanying text (describing state standards for establishing multi-parentage).

143. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 110 (1989) (involving a biological father claiming parental right against the biological mother and her spouse); *N.A.H. v. S.L.S.*, 9 P.3d 354, 357–58 (Colo. 2000) (same).

144. E.g., *Michael H.*, 491 U.S. at 110; *N.A.H.*, 9 P.3d at 357–58.

145. E.g., *Michael H.*, 491 U.S. at 113–14; *N.A.H.*, 9 P.3d at 357.

146. E.g., *Michael H.*, 491 U.S. at 113; *N.A.H.*, 9 P.3d at 357.

147. See, e.g., *J.W.S., Jr. v. E.M.S.*, No. CS11-01557, 2013 WL 6174814, at *4–5 (Del. Fam. Ct. May 29, 2013) (involving the competing claims between, on one side, a child's biological father, and, on the other side, the nonbiological father who raised the child and held her out as his own).

multi-parentage have the ability to recognize both individuals, along with the gestating parent, as legal parents.¹⁴⁸ Again, the court would need to determine that, despite the lack of agreement among the parties, recognizing multi-parentage would promote the best interests of the child or would be necessary to avoid detriment to the child.¹⁴⁹

Another scenario in which disputes involving multiple parties seeking parentage may arise is where a child already has two legally recognized parents, but the child has formed a bond that is parental in nature with a third party who has functioned as a parent.¹⁵⁰ The functional parent may seek recognition as a legal parent pursuant to an equitable parenthood doctrine.¹⁵¹ There are a variety of family structures in which this may occur. Equitable parenthood claims may arise when the relationship between a legal parent and their former spouse or partner who has not already established legal parentage, but who functioned as a parent to the child, deteriorates and the legal parent denies the functional parent access to the child.¹⁵² As discussed above, children often form close relationships that are parental in nature with the spouse or partner of an existing legal parent.¹⁵³

Besides spouses and partners, other family members or friends of a child's legal parents may take on a parental role in the child's life, which may involve co-parenting with one or both of the child's existing legal parents.¹⁵⁴ Although "kinship caregiving" occurs in all types of communities, it is particularly common in many minority communities for "relatives and close

148. See, e.g., *C.A. v. C.P.*, 240 Cal. Rptr. 3d 38, 40, 46–47 (Cal. Ct. App. 2018) (recognizing a biological father who satisfied the state's holding out provision as the third parent of a child born to a different-sex married couple over the objection of the married couple based on the determination that the failure to recognize three parents in the situation would be detrimental to the child).

149. *Id.*

150. See Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, 90 FORDHAM L. REV. 2561, 2584–85 (2022) (“[C]ourts in these cases are often asked to step in where the child’s psychological parent is already functioning as an additional parent.”).

151. *Id.* at 2584.

152. See Feinberg *Whither*, *supra* note 23, at 55–57 (explaining how nonbiological parents in same-sex relationships often relied on equitable parenthood claims in such situations).

153. See Bix, *supra* note 129 and accompanying text.

154. Coupet, *supra* note 132, at 604–06 (explaining the historical roots and prevalence of kinship caregiving in the United States).

friends [to] play a critical role in caring for children.”¹⁵⁵ In 2000, one in twelve children lived in a household maintained by a grandparent or other relative,¹⁵⁶ and Black and Asian children are twice as likely as white children to be living in this type of household.¹⁵⁷ While adoption laws and practices generally have not allowed kinship caregivers to adopt a child unless the rights of all existing legal parents are first terminated,¹⁵⁸ and it currently is unclear what categories of individuals will be eligible to pursue third-parent adoptions,¹⁵⁹ multi-parentage may occur if a kinship caregiver is able to establish legal parenthood through an equitable parenthood doctrine.¹⁶⁰ Although generally equitable parenthood claims arise when there is a dispute between the functional parent and legal parent(s), it is possible that in states that recognize multi-parentage but not kinship adoptions, the existing legal parents and the kinship caregiver could join together to request that the functional parent be recognized as an additional legal parent pursuant to an equitable parenthood doctrine.

As discussed above, to satisfy an equitable parenthood doctrine the petitioner generally would need to show that they shared a household with the child, assumed the obligations of parenthood, and developed a parental bond with the child with

155. Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 343 (2012); see also Coupet, *supra* note 132, at 595 (“Kinship caregivers—a group disproportionately populated by persons of color, particularly black grandmothers—have historically assumed parental roles, often together with a legal parent.”).

156. Coupet, *supra* note 132, at 603.

157. *At Grandmother’s House We Stay: One-in-Ten Children Are Living with a Grandparent*, PEW RSCH. CTR. 8 (Sept. 4, 2013), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2013/09/grandparents_report_final_2013.pdf [<https://perma.cc/K36U-MBB6>] (finding that white children have a 7% chance of living with or being cared for primarily by a grandparent, while this figure is 15% for Black and Asian children).

158. Gupta-Kagan, *supra* note 132, at 729 (“This vertical focus between generations differs from family law’s frequent focus on horizontal relationships, especially marriage or marriage-like relationships between adults. The general rule is that absent ‘the functional equivalent of the traditional husband-wife relationship,’ two people cannot become parents to the same child via adoption.”).

159. See Gupta-Kagan, *supra* note 132.

160. See *supra* notes 96–99 and accompanying text (describing equitable parenthood doctrines and their use as a basis for establishing parentage).

the support of the child's legal parent(s).¹⁶¹ While traditionally equitable parenthood doctrines only provided certain rights relating to custody or visitation, today in a growing number of states an individual who satisfies an equitable parenthood doctrine attains the status of legal parent.¹⁶² Due to the strict, child-centered nature of the requirements of equitable parenthood doctrines, there likely will be a strong argument that failing to recognize multi-parentage would be detrimental to the child in most situations where the doctrine is satisfied.

II. THE LAW GOVERNING CHILD CUSTODY DISPUTES BETWEEN LEGAL PARENTS

A. HISTORICAL STANDARDS GOVERNING CUSTODY DETERMINATIONS BETWEEN LEGAL PARENTS

The legal standards governing custody disputes between legal parents in the United States have evolved significantly over the years. In the eighteenth and early nineteenth centuries, fathers had an almost absolute right to custody.¹⁶³ This was based on the concept, derived from English common law, that children were the property of their fathers.¹⁶⁴ In the nineteenth century, this view started to change as men increasingly worked outside of the home and women took on more responsibility for the domestic sphere.¹⁶⁵ Courts began to focus their custody determinations on promoting the well-being of children, and a number of standards emerged to guide courts in their decision-making.¹⁶⁶

The tender years doctrine, the first major standard to gain widespread acceptance, set forth presumptions that custody of infants and young children should be given to the child's mother,

161. *Id.* at 69 n.83 (quoting *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995)); see also UNIF. PARENTAGE ACT, *supra* note 97 and accompanying text (quoting the identified elements of the de facto parentage doctrine in Section 609(d) of the Uniform Parentage Act).

162. See *supra* note 99 and accompanying text.

163. Angela Marie Caulley, *Equal Isn't Always Equitable: Reforming the Use of Joint Custody Presumptions in Judicial Child Custody Determinations*, 27 B.U. PUB. INT. L.J. 403, 409 (2018).

164. *Id.*

165. *Id.* at 409–10; J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 214 (2014).

166. See ABRAMS ET AL., *supra* note 17, at 793 (describing the various standards).

unless she was unfit, and custody of older children should be given to the parent of the same sex.¹⁶⁷ Maryland was the first state to adopt the tender years doctrine, which it did through judicial decision in 1830.¹⁶⁸ By the end of the nineteenth century, the tender years doctrine had emerged as the “new orthodoxy” in child custody disputes.¹⁶⁹ The doctrine had a long lifespan, maintaining widespread acceptance until the 1970s.¹⁷⁰ However, as the gender equality movement progressed, the problematic nature of a doctrine based upon gendered stereotypes and beliefs that mothers are more nurturing than fathers and more important than fathers to children’s early development became increasingly clear.¹⁷¹ Beginning in the 1970s, state courts began to strike down the tender years doctrine, holding that it “violated emerging constitutional law principles concerning gender equality.”¹⁷²

The concept that custody determinations should be made based upon an individualized assessment of what custody arrangement would further the best interests of the child emerged following the decline of the tender years doctrine.¹⁷³ Legislatures identified a variety of factors to help guide courts in determining which custody arrangement would promote the best interests of the child.¹⁷⁴ These factors related to, inter alia, the disposition and ability of each parent to care for the child and meet the child’s needs; the bonds between each parent and the child; the child’s adjustment to their home, school, and community; each parent’s health, moral fitness, and home environment; and the

167. *Id.*

168. Raymon Zapata, *Child Custody in Texas and the Best Interest Standard: In the Best Interest of Whom?*, 6 SCHOLAR: ST. MARY’S L. REV. ON MINORITY ISSUES 197, 200 (2003).

169. ABRAMS ET AL., *supra* note 17, at 793.

170. *Id.*

171. *Id.* at 794; Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 295–96 (1992) (“While the presumption generally benefits women who want custody of their young children, it also legitimates and reinforces gender-bound roles in American family life.”).

172. ABRAMS ET AL., *supra* note 17, at 793.

173. Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 HARV. WOMEN’S L.J. 173, 185 (2000).

174. Sack, *supra* note 171, at 296–97.

wishes of the parents and child.¹⁷⁵ Presumptions in favor of one parent over the other, however, continued to play a core role in courts' determinations of which custody arrangement would promote the child's best interests.¹⁷⁶ Specifically, in determining what custody arrangement would further the best interests of the child, courts relied heavily on considerations relating to which party served in the role of the child's primary caretaker prior to dissolution.¹⁷⁷ Some states enacted a presumption that the primary caretaker should receive custody, while other states relied on primary caretaking considerations as a key factor in the best interests analysis.¹⁷⁸ The notion that the child's interests would be best served by granting sole custody to the primary caretaker was based, in large part, on the work of child psychoanalysts Anna Freud, Joseph Goldstein, and Albert Solnit.¹⁷⁹ In their highly influential work, they expressed the view that "every child needs a single primary attachment figure and suffers detriment when the relationship with this figure is disrupted or the figure's authority is undermined."¹⁸⁰

Each of the historical custody approaches—the father's property-based right to custody, the tender years doctrine, and the primary caretaker presumption—focused on identifying the one parent who should receive custodial rights and "signaled the law's conviction that, after a marital breakup, children could properly be raised only by a sole custodial parent."¹⁸¹ Historically, there was a prevalent belief that joint custody

175. See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 402 (UNIF. L. COMM'N 1973); KY. REV. STAT. ANN. § 403.270 (West 2023).

176. Maritza Karmely, *Presumption Law in Action: Why States Should Not Be Seduced into Adopting a Joint Custody Presumption*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 324–25 (2016) (explaining the primary caretaker presumption and related state variations).

177. *Id.*; Lee E. Teitelbaum, *Rays of Light: Other Disciplines and Family Law*, 1 J.L. & FAM. STUD. 1, 2 (1999) (discussing the "widespread use of a presumption favoring custody in the parent who was the primary care giver before divorce").

178. Karmely, *supra* note 176.

179. Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for a Just and Workable Standard*, 33 FAM. L.Q. 815, 822 (1999) (discussing the psychoanalysts' theories and their impact on the primary caretaker presumption).

180. *Id.*

181. Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 156 (2014); Karmely, *supra* note 176, at 325.

arrangements were contrary to children's best interests.¹⁸² This was based on fears that joint custody arrangements would create instability for children, result in increased conflict between parents, and weaken the critical bond between the child and preferred caretaker.¹⁸³ As a result, courts historically disfavored joint custody arrangements.¹⁸⁴ The judicial resistance to joint custody arrangements often even extended to cases where the parents agreed that joint custody was in the child's best interests.¹⁸⁵

In the latter part of the twentieth century, however, as society's view of gender roles shifted, there became increasing support for moving away from the "winner-loser" model of custody determinations and toward a joint custody model that promoted both parents playing an active role in the child's life post-

182. Karmely, *supra* note 176, at 325 (noting courts' general presumption against joint custody prior to the 1970s).

183. See, e.g., *DeForest v. DeForest*, 228 N.W.2d 919, 925 (N.D. 1975) (reversing an award of joint custody on the basis of insufficient evidence to prove such an arrangement would provide stability for the child); *Mixson v. Mixson*, 171 S.E.2d 581, 586 (S.C. 1969) ("The best interest and welfare of the children demand that divided custody should be avoided if possible, and it will not be approved except under exceptional circumstances or for strong and convincing reasons."); *In re Marriage of Levsen*, 510 N.W.2d 892, 894 (Iowa Ct. App. 1993) (explaining the presumption against joint custody agreements as arising from their potential to place the child in an unstable situation); see also Appleton, *supra* note 12, at 43–44 (discussing how Goldstein, Freud, and Solnit's research contributed to courts' disfavoring of joint custody agreements); Carbone & Cahn, *supra* note 12, at 11 (discussing the contemporary shift away from the nineteenth and twentieth centuries' presumption for single-parent custody towards joint-custody agreements); J. Herbie DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 43 HOFSTRA L. REV. 1003, 1008–09 (2015) (discussing the prevailing belief among courts in the stability provided by a single parent household).

184. Caulley, *supra* note 163, at 418–19 (detailing how courts' application of the best interest doctrine "focused on winning and losing" and often resulted in judges using inappropriate methods in order to choose one custodial parent); Karmely, *supra* note 176, at 325 ("Prior to the 1970s, many states had a presumption *against* joint custody and would not authorize joint custody.").

185. DiFonzo, *supra* note 183, at 1008 ("Indeed, until the 1970s, judges routinely refused to permit divorcing parents from sharing custody even when they desired to do so."); LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 5:1 (2023) (explaining that until the 1970s, courts often rejected joint custody even if both parents advocated for it); Karmely, *supra* note 176, at 325 ("[H]istorically it was difficult to obtain such a custody order even if the parents agreed to joint custody.").

dissolution.¹⁸⁶ Fathers' rights groups played a major role in this movement.¹⁸⁷ Fathers' rights advocates argued that custody standards that focused on identifying one parent as the custodial parent, even when facially gender neutral, led to gendered results that heavily favored women.¹⁸⁸ The emergence of social science research indicating that fathers remained more involved in their children's lives in joint custody arrangements and that children benefitted from the continued involvement of their father in their lives lent further support to the concept of joint custody.¹⁸⁹

In 1979, California adopted a presumption that joint custody furthered the best interests of the child in situations where both parents agreed to the joint custody arrangement, and "[w]ithin three years, every state had considered joint custody legislation."¹⁹⁰ By 1984, laws recognizing joint custody had been enacted in thirty-two states.¹⁹¹ These statutes ranged from merely providing courts with the discretion to order joint custody to setting forth a presumption in favor of joint custody.¹⁹² The laws differed in a variety of important ways, including with regard to whether both parents had to request joint custody in order for

186. Caulley, *supra* note 163, at 422–23.

187. Carbone & Cahn, *supra* note 12, at 11 (discussing the active advocacy of the fathers' rights movement); Sean Hannon Williams, *Wild Flowers in the Swamp: Local Rules and Family Law*, 65 DRAKE L. REV. 781, 795–96 (2017) (discussing the advocacy of fathers' rights groups for joint custody presumptions).

188. Michael Abramowicz & Sarah Abramowicz, *Bifurcating Settlements*, 86 GEO. WASH. L. REV. 376, 399–400 (2018) ("One criticism was that, while formally gender neutral, the primary caretaker presumption unfairly favored mothers."); William C. Smith, *Dads Want Their Day*, 89 A.B.A. J. 38, 41 (2003) (describing fathers' rights groups' frustration in "what they perceive as the courts' unfair preference for mothers in custody cases").

189. Merle H. Weiner, *Thinking Outside the Custody Box: Moving Beyond Custody Law to Achieve Shared Parenting and Shared Custody*, 2016 U. ILL. L. REV. 1535, 1543–44 (2016) (discussing the role of social science research in custody-law reform).

190. Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 133–35 (2016) (citing June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1114 (1999)).

191. *Id.* at 121.

192. *Id.* at 121–22.

the court to grant it or apply a presumption in favor it¹⁹³ and whether the concept of joint custody referred to joint decision-making, joint residential care, or both.¹⁹⁴

B. MODERN LAWS GOVERNING CUSTODY DETERMINATIONS BETWEEN LEGAL PARENTS

Modern state law approaches to custody disputes between legal parents generally encourage parents to settle their disputes and reach an agreement regarding custody.¹⁹⁵ Mediation, “a process in which an impartial third party helps disputants work to resolve conflicts in a structured, non-adversarial setting,” is the form of alternative dispute resolution most commonly utilized in child custody disputes.¹⁹⁶ In many states, judges have the discretion to order parents involved in custody disputes to attend mediation.¹⁹⁷ In addition, a growing number of states now mandate that parents involved in a custody dispute first participate in mediation and attempt in good faith to reach an agreement before the court will hear the case.¹⁹⁸ Other states have established voluntary programs that provide mediation services if the parents opt in.¹⁹⁹ It is important to note, however, that due to concerns relating to safety and problematic power dynamics, states usually exempt cases involving domestic violence from mandatory mediation.²⁰⁰

Proponents of mediation for child custody have identified several benefits that mediation provides to both parents and

193. Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 539, 546 (1982).

194. *Id.* at 542–44 (noting state variations in the responsibilities divided among parents in joint-custody agreements).

195. 1 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 6:1 (2021) (“The mediation of domestic disputes involving custody and visitation has mushroomed in the past 25 years.”).

196. *Id.*

197. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.07 cmt. B. (2002) (Reporter’s Notes) (“Somewhat fewer than half the states explicitly allow the court to use its discretion whether to mandate mediation for custody or visitation issues.”).

198. *Id.* (“About one-fourth of the states mandate mediation for custody and visitation issues.”).

199. *Id.* (noting Michigan and Nebraska’s opt-in mediation systems).

200. *Id.* (explaining that most states prohibit mediation in cases involving domestic violence unless requested by the survivor).

children.²⁰¹ Mediation advocates argue that the process fosters cooperation between the parents and allows families to avoid the bitterness, stress, and expense that often accompanies litigation.²⁰² Mediation proponents also stress that parents generally are in a better position than judges to create custody arrangements that are well suited to their particular children and that parents are more likely to abide by orders which they had a part in creating.²⁰³ Whether through mediation or other methods, settlement is reached in over ninety percent of child custody cases.²⁰⁴ Although courts technically must review custody agreements reached by the parties to ensure that the agreement furthers the best interests of the child, courts generally are extremely deferential to such agreements and tend to “rubber stamp” them.²⁰⁵

While the parents reach an agreement in the vast majority of custody disputes, in a small percentage of custody cases the parents are unable to do so, and the court must make the custody determination.²⁰⁶ Today, every state employs some version of the best interests of the child standard to govern custody disputes between two fit legal parents.²⁰⁷ States’ best interests standards

201. HARALAMBIE, *supra* note 195, at § 6:2.

202. *Id.*

203. *Id.* (“While mediation settlements have been found to be similar to settlements arrived at through the adversary process, mediated agreements are more likely specifically to address the unique needs of the individual family.”); SARA R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* § 15:2 (2020–2021) (“An additional benefit of mediation in family law disputes is that parties ‘own’ the result and, therefore, will be more likely to abide by it.”); Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients’ Divorces on Their Children*, 67 *REVISTA JURÍDICA UNIERSIDAD DE PUERTO RICO* 137, 149 (1998) (discussing how buy-in from the meditation process likely leads to increased compliance with child support payments); Sukhsimranjit Singh, *Access to Justice and Dispute Resolution Across Cultures*, 88 *FORDHAM L. REV.* 2407, 2416 (2020) (“Arguments for using mediation are intuitive: parents know the interests of their children and mediation offers opportunities for reconciliation, benefiting long-term co-parenting relationships.”).

204. John A. Zervopoulos, *Psychological Testing and Texas Family Code*, 2017 *TXCLE ADVANCED FAM. L.* 33, *STATE BAR TEX.* (noting that ninety percent of custody cases either settle before trial or are uncontested).

205. See *ABRAMS ET AL.*, *supra* note 17, at 1119.

206. See Zervopoulos, *supra* note 204 and accompanying text.

207. *Chief Reporter’s Forward* to *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* (2002) (explaining that every state has adopted a version of the “elastic ‘best interests of the child’ standard”); Jessica Feinberg, *Consideration of*

generally instruct courts to weigh a variety of factors in determining what custody arrangement to order, including many of the historical factors discussed above. While the factors differ by state, common factors include: (1) the bonds that exist between the child and their parents, siblings, and other family or household members; (2) each parent's disposition and ability to care for the child; (3) continuity of caretaking; (4) the mental, physical, and emotional health of each parent and the child; (5) the home environment of each parent; (6) the child's adjustment to their home, school, and community; (7) the wishes of a child who is of sufficient age and maturity; (8) parental conduct that affects the child (some states consider parental conduct or morality without any qualification that it affect the child); (9) the "friendly parent factor," which considers each parent's willingness to foster a healthy relationship between the other parent and the child (unless the case involves domestic violence);²⁰⁸ (10) any history of a parent engaging in domestic or child abuse; (11) any parental history of substance abuse; and (12) any other factor the court deems relevant (the "catchall factor").²⁰⁹

Along with providing the "best interests" factors, statutes may also specify the jurisdiction's approach to joint custody arrangements. While the majority of states' statutes do not

Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?, 81 MO. L. REV. 331, 355 (2016) ("Every state has adopted some form of the best interests of the child standard to govern disputes involving two fit legal parents."); Alexa R. Schwartz, Note, *Too Many Chips on the Table: A Call for the Bifurcation of Money and Custody in Divorce*, 49 HOFSTRA L. REV. 865, 873 (2021) (explaining that all states have adopted a version of the best interests standard concerning the child's physical, emotional, and psychological needs).

208. Pruet & DiFonzo, *supra* note 181, at 157 ("Some statutes . . . declar[e] that the friendly parent provision does not apply in cases involving domestic violence.").

209. See, e.g., ALASKA STAT. § 25.24.150(c) (2023); COLO. REV. STAT. § 14-10-124 (2023); CONN. GEN. STAT. § 46b-56(c) (2023); FLA. STAT. § 61.13(3) (2023); LA. CIV. CODE ANN. art. 134(A) (2023); ME. STAT. tit. 19-A, § 1653(3) (2023); MICH. COMP. LAWS § 722.23 (2023); N.D. CENT. CODE § 14-09-06.2(1) (2023); VA. CODE ANN. § 20-124.3 (2023); see also UNIF. MARRIAGE & DIVORCE ACT § 402 (UNIF. L. COMM'N 1973) (offering a restatement of state law best interests factors); Rebecca E. Hatch & Leann Michael, *Gender Bias as Factor in Child Custody Cases*, in 131 AM. JUR. 3D *Proof of Facts* § 8 (2023) (summarizing common factors in state best interests laws); *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY (June 2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf [<https://perma.cc/FDJ9-KKQD>] (surveying factors in states' best interests laws).

expressly set forth a presumption in favor of any form of custody,²¹⁰ a substantial minority of jurisdictions' statutes set forth some form of an explicit presumption in favor of joint custody.²¹¹ States that have a presumption in favor of joint custody usually exempt cases involving domestic violence or identify domestic violence as a basis for rebutting the presumption.²¹² Beyond domestic violence, proof that the arrangement would be contrary to the child's best interests or detrimental to the child generally are bases for rebuttal of joint custody presumptions.²¹³ In some jurisdictions, the presumption is rebutted if a parent is determined to have engaged in certain types of misconduct or abuse or has been convicted of certain crimes.²¹⁴

Providing a clear and accurate picture of the number of states that truly employ a presumption in favor of joint custody is a complicated undertaking. One scholar's review of articles and websites addressing joint custody presumptions revealed

210. Cynthia R. Mabry, *Indissoluble Nonresidential Parenthood: Making It More than Semantics When Parents Share Parenting Responsibilities*, 26 BYU J. PUB. L. 229, 230 (2012). Some states go further than simply omitting a presumption and specify that there is no presumption in favor of any form of custody. *See, e.g.*, GA. CODE ANN. § 19-9-3(a)(1) (2023); MASS. GEN. LAWS ch. 208, § 31 (2023).

211. *See, e.g.*, ARK. CODE ANN. § 9-13-101(a)(1)(A)(iv) (2023); CAL. FAM. CODE § 3080 (West 2023); CONN. GEN. STAT. § 46b-56a(b) (2023); D.C. CODE § 16-914(a)(2) (2023); FLA. STAT. § 61.13(2)(c)(2) (2023); IDAHO CODE § 32-717B(4) (2023); LA. CIV. CODE ANN. art. 132 (2023); MINN. STAT. § 518.17(b)(9) (2022); MISS. CODE ANN. § 93-5-24(4) (2023); NEV. REV. STAT. §§ 125C.002, 125C.0025 (2023); N.M. STAT. ANN. § 40-4-9.1(A) (2023); UTAH CODE ANN. § 30-3-10(3) (LexisNexis 2023); W. VA. CODE §§ 48-1-241a, 48-9-206 (2022); WIS. STAT. § 767.41(2), (4) (2023); *see also* IOWA CODE § 598.41(2)(b) (2023) ("If the court does not grant joint custody under this subsection, the court shall cite clear and convincing evidence, pursuant to the factors in subsection 3, that joint custody is unreasonable and not in the best interest of the child . . .").

212. *See, e.g.*, ARK. CODE ANN. § 9-13-101(c)(1) (2023); D.C. CODE § 16-914 (2023); FLA. STAT. § 61.13(2)(c)(2) (2023); IDAHO CODE § 32-717B(5) (2023); LA. STAT. ANN. § 9:364 (2023); MINN. STAT. § 518.17 (2022); MISS. CODE ANN. § 93-5-24(9) (2023); UTAH CODE ANN. § 30-3-10 (LexisNexis 2023); WIS. STAT. § 767.41(2)(d)(2) (2023).

213. *See, e.g.*, ARK. CODE ANN. § 9-13-101 (2023); D.C. CODE § 16-914 (2023); FLA. STAT. § 61.13(2)(c) (2023); UTAH CODE ANN. § 30-3-10(4)(b) (LexisNexis 2023); WIS. STAT. § 767.41(2)(b) (2023); *see also* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 89 (2016) [hereinafter Carbone & Cahn *Nonmarriage*] ("[Shared custody] has become the preferred outcome in some jurisdictions, absent a showing of 'detriment' to the child.").

214. *See, e.g.*, ARK. CODE ANN. § 9-13-101(d) (2023); FLA. STAT. § 61.13(2)(c)(2) (2023).

that the information provided regarding the number of states employing such presumptions varied widely, with the numbers provided ranging anywhere from six to twenty.²¹⁵ There are a variety of reasons for this. For example, several of the states that employ presumptions in favor of joint custody restrict the presumption to situations in which both parents agree to it²¹⁶ or at least one parent requests it.²¹⁷ Given that courts already are extremely deferential to custody agreements reached between parents,²¹⁸ it is not clear that a state that restricts its joint custody presumption to cases where the parties agree to a joint custody arrangement should be counted within the category of states that employ joint custody presumptions.

Another significant contributor to the difficulty in accurately identifying how many states have presumptions in favor of joint custody is that states' definitions of what constitutes joint custody differ; some states have replaced custody with terms that do not clearly differentiate between custody and visitation, and not all states define joint custody.²¹⁹ As a result, definitions

215. Karmely, *supra* note 176, at 332.

216. *See, e.g.*, ALA. CODE § 30-3-152 (2023); CAL. FAM. CODE § 3080 (West 2023); CONN. GEN. STAT. § 46b-56a(b) (2023); MISS. CODE ANN. § 93-5-24(4) (2023); *see also* ME. STAT. tit. 19-A, § 1653(2)(A) (2023) (“When the parents have agreed to an award of shared parental rights and responsibilities or so agree in open court, the court shall make that award unless there is substantial evidence that it should not be ordered.”); NEV. REV. STAT. § 125C.002(1)(a), (b) (2023) (providing for a presumption in favor of joint legal custody and a preference in favor of joint physical custody either when the parents agree to the arrangement or when “[a] parent has demonstrated, or has attempted to demonstrate but has had his or her efforts frustrated by the other parent, an intent to establish a meaningful relationship with the minor child”); Karmely, *supra* note 176, at 332 (“Some jurisdictions mandate that there is a presumption for joint custody, but only when the parents agree to this arrangement.”).

217. *See, e.g.*, MINN. STAT. § 518.17(b)(9) (2022) (“The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child.”); *see also* IOWA CODE § 598.41(2)(a)–(b) (2023) (requiring that if only one parent requests joint custody and the court does not grant it, “the court shall cite clear and convincing evidence . . . that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and a parent should be severed”).

218. *See* ABRAMS ET AL., *supra* note 17, at 1119.

219. *See* Carbone & Cahn *Nonmarriage*, *supra* note 213, at 89 n.208 (“[S]ome states have moved away from the joint custody, sole custody, and visitation vocabulary in favor of parenting plans or other forms of cooperative custody.”); Karmely, *supra* note 176, at 332 (“[C]ustody laws are different in every

of joint custody may range from any arrangement in which the parents share legal custody, regardless of the degree to which they share physical custody, to only arrangements in which the parents share both legal custody and equal or close to equal physical custody.²²⁰ Moreover, several states that employ joint custody presumptions explicitly provide that the presumption applies only to joint legal custody and does not extend to joint physical custody.²²¹ The significant differences among the laws of states that employ joint custody presumptions, as well as the recognition that most states still have not adopted any express presumption in favor of joint custody, provide a more nuanced understanding of what often is perceived as a trend in the law toward the promotion of joint custody awards.²²²

At the same time, however, it is important to recognize that a growing number of state statutes, regardless of whether they set forth some form of a presumption in favor of joint custody, contain common language that could be interpreted as at least encouraging joint custody determinations. More specifically, a significant number of states' custody statutes indicate that state policy promotes "frequent and continuing" contact between the child and each parent or "encourage[s] parents to share in the rights and responsibilities of rearing their children," or both.²²³ In addition, all states authorize courts to issue joint custody orders, even those that do not express any presumption in favor of

jurisdiction and the terminology varies For example, certain statutes have clear definitions about what is meant by 'joint custody' or 'shared custody' while others do not.").

220. DiFonzo, *supra* note 183, at 1011–12.

221. See, e.g., MINN. STAT. § 518.17(b)(9) (2022) (setting forth a presumption of joint legal custody when at least one parent requests it); UTAH CODE ANN. § 30-3-10(3), (8) (LexisNexis 2023) (setting forth a presumption in favor of joint legal custody but stating that there is no presumption in favor of joint physical custody).

222. Karmely, *supra* note 176, at 332–34.

223. ALA. CODE § 30-3-150 (2023); see also CAL. FAM. CODE § 3020(b) (West 2023); FLA. STAT. § 61.13(2)(c)(1) (2023); GA. CODE ANN. § 19-9-1 (2023); IOWA CODE § 598.41(1)(a) (2023); ME. STAT. tit. 19-A, § 1653(1)(c) (2023); MO. REV. STAT. § 452.375(2)(4) (2023); MONT. CODE ANN. § 40-4-212(1)(l) (2021); N.H. REV. STAT. ANN. § 461-A:2(D)(a) (2023); N.J. STAT. ANN. § 9:2-4 (West 2023); OHIO REV. CODE ANN. § 3109.04(D)(1)(c) (West 2023); OKLA. STAT. tit. 43, § 110.1 (2023); OR. REV. STAT. § 107.149 (2021); TEX. FAM. CODE ANN. § 153.001(a)(1) (West 2023); VA. CODE ANN. § 20-124.2(B) (2023); W. VA. CODE, § 48-9-101(b) (2023).

joint custody or any language encouraging it.²²⁴ Overall, while the state of the law governing joint custody is complicated, the existence of explicit presumptions in some states combined with the language in a number of other states encouraging frequent and continuing contact with each parent reflects, at the least, a custody landscape that has moved away from the strong historical resistance to joint custody.

Given that all states now allow courts to issue joint custody awards, legislatures and courts have been tasked with identifying guiding factors to aid in the determination of whether joint custody is appropriate for the case at hand. Common factors include: (1) whether the parents can communicate effectively regarding the child; (2) whether each parent will support the other parent's relationship with the child, cooperate with the other parent on issues relating to the child, and show the other parent mutual respect; (3) whether each parent has actively cared for the child prior to separation; (4) whether each parent has established a close relationship with the child; (5) whether each parent is capable of providing adequate care for the child; (6) the extent to which one or both parents oppose joint custody; (7) a sufficiently mature child's wishes regarding joint custody; (8) the geographic locations of the parents; (9) the potential for disruption of the child's life in terms of school, social activities, and community; and (10) any parental history of domestic violence and the safety implications of a joint custody award.²²⁵ With regard to the last factor, many states go beyond simply listing domestic violence as a factor and instead employ a presumption against joint custody in cases involving domestic violence.²²⁶

Importantly, the structure of orders that fall under the general umbrella of joint custody awards differ significantly from case to case. Courts generally have significant discretion in

224. Carbone & Cahn, *supra* note 12, at 37.

225. See, e.g., IOWA CODE § 598.41(3) (2023) (listing factors to be considered in joint custody arrangement determinations); N.M. STAT. ANN. § 40-4-9.1(B) (2023) (same); see also Caulley, *supra* note 163, at 427 (describing the factors that “[c]ourts often look to . . . to determine whether joint custody is appropriate”); HARALAMBIE, *supra* note 195, § 4:23 (identifying the common factors to consider in determining the appropriateness of joint physical custody awards).

226. See, e.g., WIS. STAT. § 767.41(2)(d) (2023) (stating that, in custody matters where a party engaged in an episode or pattern of domestic abuse, “there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint . . . legal custody to that party”).

structuring joint custody orders. In terms of joint legal custody, the order may require the parents to reach an agreement on all major decisions and set forth procedures, such as mediation, that the parents must undertake if they cannot agree; provide one parent with final say in major decision-making but require that they consult with the other parent; split decision-making among the parents such that one parent has final say in certain areas and the other parent has final say in others; or provide for some other decision-making structure.²²⁷

In terms of joint physical custody, most states' statutes governing joint custody do not provide for an equal division of physical custody or an allocation formula.²²⁸ Rather, the statutes generally give each parent the right to "frequent and continuing" contact with the child and allow the court to determine what that means in each case.²²⁹ Thus, in some cases, a joint physical custody award may result in the parents sharing close to equal residential time with the child, and in other cases, it may mean that one parent shares the bulk of residential time with the child and the arrangement is akin to a "traditional sole custody/visitation" arrangement.²³⁰ Research indicates that courts order joint legal custody more often than joint physical custody and that mothers continue to receive primary physical custody more often than fathers.²³¹

227. See HARALAMBIE, *supra* note 195, § 4:22 (discussing various decision-making mechanisms in joint legal custody statutes).

228. Pruet & DiFonzo, *supra* note 181, at 157.

229. *Id.* But see ARK. CODE ANN. § 9-13-101(a)(5) (2023) (stating that "joint custody" means the approximate and reasonable equal division of time with the child by both parents"); W. VA. CODE § 48-9-206(a) (2023) ("[T]he court shall allocate custodial responsibility so that . . . the custodial time the child spends with each parent shall be equal (50-50).").

230. HARALAMBIE, *supra* note 195, § 4:23.

231. Julie E. Artis & Andrew V. Krebs, *Family Law and Social Change: Judicial Views of Joint Custody, 1998–2011*, 40 L. & SOC. INQUIRY 723, 726 (2015); see also Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 422–23 (2008) (discussing historic trends in physical and legal custody arrangements); Caulley, *supra* note 163, at 425–27 (describing the general trend among states to favor joint legal custody over joint physical custody and listing several state-specific examples); ELROD, *supra* note 185, at § 5:3 ("The most common form of joint custody is an award of joint legal custody with one parent designated as having primary residential custody."); Joan S. Meier & Vivek Sankaran, *Breaking Down the Silos that Harm Children: A Call to Child Welfare, Domestic Violence and Family Court Professionals*, 28 VA. J. SOC. POL'Y & L. 275, 291 n.82

Regardless of the structure of the custody award, the law's role in promoting co-parenting may continue even after the custody proceedings. In a number of jurisdictions, courts may require divorcing parents to attend post-dissolution parenting classes or participate in other forms of counseling.²³² Laws that provide courts with the discretion to require parents to undertake these types of post-dissolution activities seek to assist parents in becoming effective, well-functioning co-parents and to ease the post-dissolution transition for children.²³³ Overall, in reviewing the major modern developments within child custody laws, it is easy to understand why some family law scholars contend that "[t]he most significant trend in contemporary child custody law is toward greater active involvement by both parents in postseparation childrearing."²³⁴

C. CURRENT LAW GOVERNING MULTI-PARENTAGE CUSTODY DISPUTES

As discussed above, a handful of jurisdictions have enacted statutes providing for the recognition of multi-parentage.²³⁵ These statutes, however, say either very little or nothing regarding how courts should approach custody disputes involving children who have more than two legal parents. California's statute, which offers the most guidance, provides only that:

In cases where a child has more than two parents, the court shall allocate custody and visitation among the parents based on the best interest of the child, including, but not limited to, addressing the child's need for continuity and stability by preserving established patterns of care and emotional bonds. The court may order that not all parents share legal or physical custody of the child if the court finds that it would not be in the best interest of the child²³⁶

The other states that have enacted laws recognizing multi-parentage have not yet provided any guidance within their

(2021) ("While joint *legal* custody is common in family courts, there is no evidence that joint *physical* custody is common.").

232. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.07 Reporter's Notes cmt. a (Am. L. Inst. 2002).

233. *Id.*

234. DiFonzo, *supra* note 183, at 1011 (alteration in original) (quoting Pruett & DiFonzo, *supra* note 181).

235. *See supra* Part I.B (identifying states that have enacted statutes recognizing multi-parentage).

236. CAL. FAM. CODE § 3040(f) (West 2023).

statutes regarding how courts should approach multi-parent custody disputes.

III. INITIAL MULTI-PARENT CUSTODY QUESTIONS

Multi-parentage recognition will raise a number of important questions regarding the legal framework that governs child custody disputes. These questions include: (1) whether parents who share an intact relationship and are involved in a dispute with another parent should be considered a single entity or separate entities for purposes of the custody determination; (2) whether legal standards employing presumptions in favor of joint custody, which have become increasingly popular in the two-parent custody context, should extend to multi-parent custody disputes; and (3) to what degree the law should encourage settlement and defer to agreements reached by the parties in multi-parent custody disputes. This Part will examine and offer solutions to each of these questions in turn.

A. IDENTIFYING THE COMPETING PARTIES IN MULTI-PARENT CUSTODY DISPUTES

A core preliminary question for courts faced with resolving multi-parent custody disputes relates to how to categorize the parties. Specifically, the court must determine whether, for purposes of the custody dispute, each of the parents should be treated as a separate entity.²³⁷ The answer is straightforward in cases where no parent continues to share an intact relationship and household with another one of the parents. In these cases, each parent has a competing interest in the custody of the child and should be considered a separate entity for purposes of the custody determination. The answer is less straightforward, however, for multi-parent custody cases wherein some of the parents continue to share an intact relationship and household.

Historically, courts have been called upon to make custody determinations between legal parents only when the parents no longer share an intact relationship and household (if they ever

237. See, e.g., *Geen v. Geen*, 666 So. 2d 1192, 1197–98 (La. Ct. App. 1995) (Doucet, C.J., dissenting) (arguing the majority should have treated the married plaintiffs as one entity in a custody dispute with the child's third parent), *superseded by statute*, 2004 La. Acts 530, as recognized in *Miller v. Thibeaux*, 159 So. 3d 426, 433–34 (La. 2015).

did).²³⁸ This generally involves parents who were never married or parents who were married but are now divorcing or divorced.²³⁹ In the multi-parentage context, however, there will be disputes among legal parents in which some combination of the parents continue to share an intact relationship and household at the time of the custody determination.²⁴⁰ When this occurs, the court will have to decide whether to treat each of the parents as separate entities or, instead, whether to treat the parents who share an intact relationship and household as one entity for purposes of structuring the custody order.²⁴¹ The way in which courts answer this question is consequential—it will determine both the logistical issue of the number of different entities that custody rights will be divided among in the case and the substantive issue of whether the parents who share an intact relationship and household have custody rights that are independent from each other.

While the way this question is answered has significant implications for any multi-parent custody dispute in which some of the parents share an intact relationship and household, it has particular importance in situations where the parents who share an intact relationship and household are in a dispute with only one other parent or entity.²⁴² For this category of multi-parent custody cases, if the parents who share the intact relationship and household are treated as one entity, then the court would only have to divide custody between two competing entities. This is consequential because it would mean that in a significant

238. See ELROD, *supra* note 185, at § 1:1 (stating that even up to the 1970s, custody was “seldom litigated” due, in part, to low divorce rates).

239. See *id.* (“When parents divorce, or never marry and separate, one or both will seek to be granted legal custody and physical residency.”).

240. See, e.g., *Geen*, 666 So. 2d at 1193–94 (addressing a multi-parent custody dispute between, on one side, the mother and biological father, who shared a household and intact relationship, and, on the other side, the third parent—the mother’s former husband); Ullrich, *supra* note 12, at 924 (“[M]ultiple parents ‘will often include two of the parents living together and the third living separately’” (quoting Ann E. Kinsey, Comment, *A Modern King Solomon’s Dilemma: Why State Legislatures Should Give Courts the Discretion to Find That a Child Has More than Two Legal Parents*, 51 SAN DIEGO L. REV. 295, 329 (2014))).

241. See *Geen*, 666 So. 2d at 1197–98 (Doucet, C.J., dissenting) (arguing that the majority should have treated the married plaintiffs as one entity in a custody dispute with the child’s third parent).

242. The other entity could be either the one remaining parent or multiple remaining parents who themselves share an intact relationship.

portion of multi-parent custody disputes, contrary to the fears of multi-parentage opponents, courts would not be confronted with the task of creating novel or unfamiliar structures for custody awards. Determining custody rights between two entities is what courts do in traditional two-parent custody cases. In addition, current laws governing custody disputes between legal parents, and the social science research that influences such laws, are based on the assumption that custody rights will be distributed among two entities. As a result, as will be discussed in detail in the Section below,²⁴³ taking an approach that simply extends states' existing custody standards to multi-custody disputes likely would pose significantly fewer potential complications in multi-parent custody cases involving only two entities than in disputes involving three or more entities.

There are various factual contexts in which the question of whether a multi-parent custody dispute should nonetheless be treated as a two-entity dispute may arise. Some cases may involve two parents who share an intact relationship and household, and a third party who has been able to establish legal parentage against the couple's wishes. This could occur, for example, in situations where a child was born to a married couple, and the biological father was able to establish himself as the child's third parent despite the couple's opposition.²⁴⁴ In other cases, although the formation of the multi-parent family may have been consensual among all the parties, a custody dispute could later arise between parents who maintain an intact relationship and household, and another parent. This may happen, for instance, in three-parent families created through stepparent adoption.²⁴⁵ Although one of the original parents may have consented to the other original parent's spouse adopting the child, a disagreement may later arise between the couple and the other parent.²⁴⁶ A similar dispute structure could occur in

243. See *infra* Part III.B.

244. See, e.g., *C.A. v. C.P.*, 240 Cal. Rptr. 3d 38, 40, 46 (Cal. Ct. App. 2018).

245. See, e.g., *Geen*, 666 So. 2d at 1193–94 (ruling on a multi-parent custody dispute between, on one side, the mother and the man she later married, who was able to establish parentage based on his genetic ties to the child, and, on the other side, the man to whom the mother was married at the time of the child's birth, who was able to establish parentage pursuant to the marital presumption).

246. See Lovett, *supra* note 127 (describing a consensual stepparent adoption).

intentionally created multi-parent families involving intact couples and third party gamete providers or multi-party romantic relationships in which some of the relationships dissolve but others remain intact.²⁴⁷ Notably, the parents who share an intact relationship and household may not be romantically involved. One example is a multi-generational household shared by two original parents and a grandparent who undertook a third-parent adoption. If the original parents ended their relationship and one moved out, the other two parents (the remaining original parent and the grandparent) may still share an intact relationship and household. Situations involving multiple parents, but arguably only two entities, also could arise in families with four or more legal parents. This could occur, for instance, if two couples formed a multi-parent family structure and a custody dispute arose between the two couples.²⁴⁸

There are arguments to consider on each side regarding whether to categorize parents who share an intact relationship and household as a single entity for purposes of multi-parent custody disputes. On the one hand, each of the legal parents, regardless of their relationship to any of the other legal parents, is a separate individual who has an interest in obtaining custody rights. On the other hand, existing custody practices and the general nature of intact, same-household parental relationships support treating such parents as one entity. Courts generally do not distribute custody rights among parents who share an intact relationship and household.²⁴⁹ Instead, the legal system relies on parents who share an intact relationship and household to work out among themselves how they make decisions regarding the child and the ways in which they allocate the time they spend with their child. This recognizes the nature of intact, same-household parental relationships, where generally the parents share time with their children and are able to reach agreement on decisions relating to the child without requiring a judicial determination of each parent's rights in relation to those of the other parent. Importantly, a wide range of judicial decisions

247. *Cf.* Dawn M. v. Michael M., 47 N.Y.S.3d 989, 903 (N.Y. Sup. Ct. 2017) (ruling on a custody dispute involving a former throuple, two members of which continued to share a household).

248. *Elective Co-Parenting for LGBT Couples*, PATHWAYS FERTILITY, <https://ivfga.com/elective-co-parenting-for-lgbt-couples> [<https://perma.cc/R6FH-594L>] (describing elective co-parenting arrangements).

249. *See supra* note 238 and accompanying text.

across jurisdictions also reflect this recognition and treat parents who share an intact relationship and household as one entity in situations where a third party seeks custody of the child against the wishes of the parents.²⁵⁰

Moreover, treating each of the parents as a separate entity for purposes of the custody dispute may create problematic incentives and unfair results. Categorizing legal parents in intact relationships as separate entities in custody disputes may incentivize a child's existing legal parent to establish their partner as the child's third legal parent for the wrong reasons—namely, in order to gain a significant strategic advantage with regard to custody rights should a dispute with the other existing legal parent arise. It may also lead to unfair results. If legal and physical custody are split between each of the parents individually, then the parents who share an intact relationship and household will not only outnumber the other parent, which may prove consequential in terms of major decision-making rights, but they likely will also enjoy a proportionately greater share of physical time with the child. This is because if a parent shares a household with a partner who is also a legal parent, they will, for all intents and purposes, be able to experience physical custody during their designated time as well as during their partner's designated time. In addition to being arguably unfair to the parent outside of the intact relationship, whose proportional share of time with the child likely will be decreased, it also may discourage parents from consenting to the other parent's spouse or partner establishing legal parentage, even when they otherwise believe that it would promote the best interests of the child.

Overall, due to the nature of most intact parental relationships and the potential unfairness and problematic incentives that would flow from an alternative approach, the more just and logical approach is to begin with a presumption that parents who maintain an intact relationship and household are one entity for purposes of multi-parent custody disputes. Courts should,

250. See D. E. Ytreberg, Annotation, *Award of Custody of Child Where Contest Is Between Child's Parents and Grandparents*, 31 A.L.R.3d 1187 (2023) (detailing a number of custody cases in which grandparents sought custody over the wishes of the child's parents and describing such cases as involving two parties—the parents and the grandparent(s)); George L. Blum, Annotation, *Grandparents' Visitation Rights Where Child's Parents Are Living*, 71 A.L.R.5th 99, § 8 (2022) (describing cases wherein grandparents sought visitation against the wishes of parents who continue to reside together).

however, have leeway to depart from the presumption because the assumptions that underlie the presumption will not be accurate in every case. For example, there may be situations in which parents who do not share any type of partnership beyond their status as co-parents nonetheless maintain a common household for reasons relating to the child's well-being, logistics, or resources.²⁵¹ Although it likely will be rare, it is possible that some co-parents in this situation may primarily spend time with the child separately and may lack common goals and the ability to reach mutual agreement on major issues relating to the child. Because the assumptions that underlie treating parents in an intact relationship as a single entity would not be applicable, courts should categorize parents in this situation as separate entities despite the fact that they maintain a common household. Moreover, it is possible that the assumptions that support treating parents who share a household as a single entity will prove less widely applicable in the multi-parentage context due to the wider variety of relationship forms involved (including relationships that were never intimate in nature).

B. THE ROLE OF JOINT CUSTODY PRESUMPTIONS IN MULTI-PARENT CUSTODY DISPUTES

One of the most controversial questions likely to arise in the multi-parent custody context relates to joint custody. As detailed above, the current state of the law governing joint custody is difficult to summarize—definitions of joint custody are far from uniform and the details of the laws governing joint custody differ widely by state.²⁵² However, it is also clear that in recent decades, the trend in legal standards governing child custody disputes between parents has been away from sole custody presumptions and toward approaches that either employ no presumption or employ some form of a presumption in favor of joint custody.²⁵³ For the multi-parent custody disputes that involve multiple parents but only two entities with competing interests (detailed above),²⁵⁴ the notion of employing the

251. Joanne Kaufman, *Separated but Under the Same Roof*, N.Y. TIMES (Apr. 1, 2022), <https://www.nytimes.com/2022/04/01/realestate/separated-living-together.html> [<https://perma.cc/ZB69-JCU4>] (reporting on a couple who chose to continue living together for their children despite separating romantically).

252. See *supra* Part II.B.

253. See *supra* Parts II.A–B. See also Karmely, *supra* note 176, at 334.

254. See *supra* Part III.A.

jurisdiction's current approach to joint custody likely will be less controversial.²⁵⁵ This is because, in those cases, the court will be tasked with distributing decision-making and residential rights among only two entities, which is what courts already do in two-parent custody disputes. For multi-parent custody proceedings in which there are more than two entities with competing interests, however, the applicability of joint custody presumptions in states that have adopted them in the two-parent custody context likely will be a more controversial question.

Fears relating to the consequences of joint custody arrangements for children in multi-parent families have been a focal point of arguments against legal recognition of such families.²⁵⁶ Notably, even supporters of multi-parent recognition have expressed concerns regarding the potential negative consequences of joint custody arrangements for children who are the subject of multi-parent custody disputes.²⁵⁷ In terms of joint legal custody arrangements, there is a concern that providing multiple parents with decision-making rights will result in situations where the parents are unable to reach decisions on core matters relating to the child in an efficient and effective manner.²⁵⁸ In addition to creating disruption, instability, and stress for the child,²⁵⁹ an inability to reach decisions on essential matters relating to the child also likely would breed increased hostility among the parents.²⁶⁰ This is a critical consideration, since it is well established that children who are the subject of custody disputes have poorer outcomes when there exists ongoing strife and contention between their parents.²⁶¹ In terms of joint physical custody arrangements, there is the concern that requiring a child to split their time among multiple homes will result in insecurity, confusion, instability, and feelings of lack of belonging for the child.²⁶² A related concern is that a child who splits their time between multiple homes will be pulled in so many different

255. See *supra* Part III.A.

256. See *supra* note 11 and accompanying text. For counterarguments to many of these fears, see Joslin & Nejaime, *supra* note 150.

257. See *supra* note 12 and accompanying text.

258. King, *supra* note 12, at 390; Pfenson, *supra* note 15, at 2060.

259. King, *supra* note 12, at 391.

260. See Appleton, *supra* note 12, at 42.

261. See *supra* note 17 and accompanying text; Karmely, *supra* note 176, at 362.

262. King, *supra* note 12, at 391; Ullrich, *supra* note 12, at 924–25.

directions—physically, mentally, and emotionally—that they will have trouble forming strong bonds with any one of their parents.²⁶³ Lawmakers will need to determine whether these concerns warrant departing in multi-parent custody cases from any joint custody presumptions in place under the jurisdiction’s current law governing two-parent custody disputes.

The question of whether existing joint custody presumptions should extend to multi-parent custody disputes involving more than two entities is complicated. A great deal of the complexity inherent in the issue stems from the fact that, even as joint custody has attained greater popularity as a custody option, there remains a lack of consensus among researchers, scholars, and other experts regarding the wisdom of employing presumptions in favor of joint custody.²⁶⁴ Although there has been a substantial amount of social science research undertaken on issues relating to joint custody, this body of research has not yielded the type of definitive results that would provide unequivocal guidance to lawmakers regarding the optimal approach. The difficulties for lawmakers who wish to utilize social science research to guide their decisions regarding joint custody presumptions include, *inter alia*, that (1) the studies have reached differing results on a wide variety of issues, both minor and major;²⁶⁵ (2) there are researchers, scholars, and other experts with opposing views on many important joint custody issues, and they often allege serious flaws in previous studies relating to sample sizes and demographics, methods, scope, conclusions drawn from the

263. See Gatos, *supra* note 22, at 216; King, *supra* note 12, at 391; Pfenson, *supra* note 15, at 2060. For a contrary view based on an analysis of relevant cases in West Virginia, see Joslin & Nejaime, *supra* note 150, at 2584 (“[C]ourts are rarely confronted with a realistic concern that the legal recognition of multiple parents will cause children to be stretched too thin. Instead, courts in these cases are often asked to step in where the child’s psychological parent is already functioning as an additional parent.”).

264. See, e.g., Pruett & DiFonzo, *supra* note 181, at 153 (noting that “reaching a consensus about shared parenting policy has been elusive” and describing a report from a think tank consisting of thirty-two family law professionals in which the majority of participants favored a presumption of joint legal custody, but not physical custody); Weiner, *supra* note 189, at 1536 (“Debates about the best child custody law continue unabated.”).

265. See generally Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCH. 91 (2002) (describing differing conclusions reached by reviewers of existing social science research on joint custody).

data, etc.;²⁶⁶ and (3) many professionals and experts working in the area agree that additional research is needed to reach more definitive conclusions on a variety of joint custody issues.²⁶⁷

To further understand why there have been differing decisions among states regarding the use of joint custody presumptions, it is useful to identify the conclusions from the social science research on joint custody about which there is substantial consensus, as well as the areas about which there is still significant disagreement. In terms of areas of agreement, there is a general consensus that children usually benefit from maintaining contact with each of their parents following the dissolution of the parents' relationship.²⁶⁸ There also is general agreement that joint custody tends to work best and to promote children's

266. See, e.g., *In re Marriage of Hansen*, 733 N.W.2d 683, 694 (Iowa 2007) (identifying a variety of criticisms of joint custody studies); Baker, *supra* note 19, at 682 (“[M]ultiple causation problems make reliable empirical studies of family life almost impossible to design.”); Bauserman, *supra* note 265, at 92 (offering various criticisms of the social science research conducted by others and the conclusions drawn therefrom); Belinda Fehlberg et al., *Legislating for Shared Time Parenting After Separation: A Research Review*, 25 INT’L J.L., POLY & FAM. 318, 321–23, 331 (2011) (pointing out a number of flaws with the existing research); Gerald W. Hardcastle, *Joint Custody: A Family Court Judge’s Perspective*, 32 FAM. L.Q. 201, 207 (1998) (describing the various criticisms of social science research on joint custody); Karmely, *supra* note 176, at 331 (discussing the common criticism that much of the social science research on joint custody focuses on families who entered into the arrangement voluntarily rather than by court mandate); Linda Nielsen, *Shared Physical Custody: Does It Benefit Most Children?*, 28 J. AM. ACAD. MATRIM. LAWS. 79, 102 (2015) (reviewing and describing the limitations and flaws of forty joint custody studies); Pruett & DiFonzo, *supra* note 181, at 153 (“[Social science research] is not always interpreted or represented accurately in legal and policy advocacy processes.”).

267. See, e.g., Fehlberg et al., *supra* note 266, at 323–26 (identifying a number of areas for which there was insufficient research); Nicole E. Mahrer et al., *Does Shared Parenting Help or Hurt Children in High-Conflict Divorced Families?*, 59 J. DIVORCE & REMARRIAGE 324 (2018) (discussing the need for additional research regarding joint custody arrangements between parents who have a high degree of conflict); Pruett & DiFonzo, *supra* note 181, at 161–62 (identifying a number of important joint custody issues on which a thirty-two person think tank of family law experts agreed more research was needed); Bruce Smyth et al., *Legislating for Shared-Time Parenting After Parental Separation: Insights from Australia?*, 77 L. & CONTEMP. PROBS. 109, 113 (2014) (“Little is known about children’s outcomes in this intermediate (ambivalent) group”); Weiner, *supra* note 189, at 1536 (noting the “incomplete social science research” on joint custody).

268. See, e.g., *In re Marriage of Hansen*, 733 N.W.2d at 695; Fehlberg et al., *supra* note 266, at 320; Pruett & DiFonzo, *supra* note 181, at 153, 163.

well-being when parents have agreed to the arrangement and are able to cooperate and communicate effectively, and that joint custody tends to be less beneficial or harmful when the relationship between the parents involves a high degree of conflict.²⁶⁹ Relatedly, there is general consensus that, in situations that do not involve abuse or violence, the optimal result is for parents to reach an agreement regarding joint custody voluntarily and for courts to adopt that agreement as the formal custody order.²⁷⁰ Researchers, experts, and scholars also generally agree that joint custody usually will be harmful and inappropriate in cases involving domestic violence.²⁷¹

In terms of areas of disagreement, joint custody studies have been criticized for focusing on parents who voluntarily agreed to joint custody as opposed to parents who were unable to reach an agreement and had joint custody imposed on them by the court.²⁷² Because of the limited scope of many of these studies,

269. See, e.g., Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2072–73 (2016); Caulley, *supra* note 163, at 450; Fehlberg et al., *supra* note 266, at 320, 323; Jennifer E. McIntosh et al., *Responding to Concerns About a Study of Infant Overnight Care Postseparation, with Comments on Consensus: Reply to Warshak (2014)*, 21 PSYCH. PUB. POL’Y, & L. 111, 112 (2015); Pruett & DiFonzo, *supra* note 181, at 154, 162; Smyth et al., *supra* note 267, at 112–13.

270. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 958 (1979); Pruett & DiFonzo, *supra* note 181, at 167; Smyth et al., *supra* note 267, at 147.

271. See, e.g., Ruth Leah Perrin, *Overcoming Biased Views of Gender and Victimhood in Custody Evaluations When Domestic Violence Is Alleged*, 25 AM. U. J. GENDER SOC. POL’Y & L. 155, 265 (2017). There are differing opinions, however, regarding in what (if any) cases involving family violence joint custody is appropriate. See Pruett & DiFonzo, *supra* note 181, at 154 (noting the think tank’s view that “family violence usually precludes shared parenting,” but also noting that in some cases involving domestic violence joint custody may be appropriate).

272. See, e.g., Buchanan & Jahromi, *supra* note 231, at 425 (“[T]here is a very important caveat when it comes to recommending joint custody on the basis of these data. These studies of joint custody families are based primarily on families who have voluntarily chosen joint custody or who have been successful in sustaining this arrangement over time.”); Fehlberg et al., *supra* note 266, at 321 (pointing out the limitations of a review of existing research that did not distinguish between court-ordered and voluntarily-agreed-to custody arrangements); Hardcastle, *supra* note 266, at 207 (“Essentially, the research shortcomings were noted as follows: 1. Studies involved only parents who voluntarily chose joint custody”); Karmely, *supra* note 176, at 361 (“Though studies that reveal positive results for children after divorce have been heavily relied

there is continuing debate regarding whether the benefits of joint custody extend to court-imposed joint custody arrangements, and research regarding this issue has yielded varied results.²⁷³ In addition, there is disagreement regarding under what circumstances, if any, joint custody is appropriate or beneficial for children despite there being a high degree of conflict between the parents.²⁷⁴

upon by advocates for joint physical custody legislation, the flaws within the research continue to be well-established. Often times, joint physical custody studies only look at families *who have elected to enter* into a joint custody agreement and, therefore, have the capacity and motivation to sustain the joint physical custody arrangement.”).

273. See Buchanan & Jahromi, *supra* note 231, at 425; Judy Cashmore et al., *Shared Care Parenting Arrangements Since the 2006 Family Law Reforms*, SOC. POLY RSCH. CTR. 144–45 (2010), https://www.arts.unsw.edu.au/sites/default/files/documents/2_AG_Shared_Care.pdf [<https://perma.cc/6C6W-9B5S>]; Belinda Fehlberg et al., *Caring for Children After Parental Separation: Would Legislation for Shared Parenting Time Help Children?*, UNIV. OF OXFORD DEPT. OF SOC. POLY & INTERVENTION 2, 10–13 (2011), <https://www.nuffieldfoundation.org/wp-content/uploads/2011/05/Would-legislation-for-shared-parenting-time-help-childrenOXLAP-FPB-7.pdf> [<https://perma.cc/7TC8-Y9QG>]; Jennifer McIntosh et al., *Post-Separation Parenting Arrangements: Patterns and Developmental Outcomes: Studies of Two Risk Groups*, AUS. INST. OF FAM. STUD. (2011), <https://aifs.gov.au/publications/family-matters/issue-86/post-separation-parenting-arrangements> [<https://perma.cc/YPZ5-HD8Q>]; Nielsen, *supra* note 266, at 91; Pruett & DiFonzo, *supra* note 181, at 154, 162; Susan Steinman, *The Experience of Children in a Joint Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403 (1981); Susan B. Steinman et al., *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 J. AM. ACAD. CHILD PSYCHIATRY 554, 558 (1985).

274. See, e.g., Benjamin J. Albritton et al., *50/50 Possession: Wave of the Future or Judicial Tsunami?*, in 2018 ADVANCED FAM. L. 41-I (2018) (arguing that joint custody should not be ruled out in high conflict cases); Kelly Alison Behre, *Digging Beneath the Equality Language: The Influence of the Fathers’ Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 WM. & MARY J. WOMEN & L. 525, 533 (2015) (noting that fathers’ rights groups ignore “consistent research which warns that joint custody in high conflict families is more detrimental to children than less access to both parents”); Buchanan & Jahromi, *supra* note 231, at 420 (“Importantly, however, given the special importance to children’s well-being of a low conflict environment and effective parenting, many experts qualify the importance of continuing contact with both parents in the following way: contact with both parents (or, alternatively, with a noncustodial parent) is beneficial to children *if* interparental conflict is low and quality of parenting is good.”); Edward Kruk, *Arguments Against a Presumption of Shared Physical Custody in Family Law*, 59 J. DIVORCE & REMARRIAGE 388, 394–95 (2018) (discussing the conflicting

Moreover, while there is general agreement that children benefit from maintaining contact with each parent following dissolution, there is no consensus regarding how much contact is necessary for children to benefit.²⁷⁵ More specifically, it remains unclear whether a custody arrangement akin to the traditional sole custody/visitation model—where the non-custodial parent typically spends every other weekend, some holidays, and summer vacations with the child²⁷⁶—provides such benefit or

research findings); Nicole E. Mahrer et al., *supra* note 267, at 324 (“[T]here is no clear consensus regarding the effects of shared parenting on children’s adjustment in high-conflict families.”); Nielsen, *supra* note 266, at 136 (“[E]ven if the parents are in high conflict, most children still benefit from shared parenting if they have loving, meaningful relationship[s] with their parents.”); Debra Pogrud Stark et al., *Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal*, 26 MICH. J. GENDER & L. 1, 42, 58–59 (2019) (identifying studies finding that joint legal custody arrangements tended to benefit children regardless of the conflict level between the parents); Pruett & DiFonzo, *supra* note 181, at 154 (“Shared parenting in the midst of high conflict is generally not in children’s best interests. However, some families are able to manage the conflict on their own or with third-party assistance, such that shared parenting can be implemented without harm to the children, thus bolstering the case for individualized parenting time determinations.”); Smyth et al., *supra* note 267, at 113–14 (“There is a strong consensus among most parenting-time scholars that shared-time arrangements can work well for children in the first [cooperative-parenting] group but badly for children in the high-conflict group . . . [Parallel parenting] strategies can indeed be useful as interim measures, but the current weight of social-science evidence does not provide strong support for good outcomes for children when parents are unable to communicate effectively (or cooperate).” (footnotes omitted)).

275. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007) (stating that joint custody “research has not established the amount of contact necessary” and citing a number of studies indicating that even the relatively small amount of contact common in traditional visitation awards was sufficient and that it was the quality of the contact, not the amount, that was most important); Sanford L. Braver & Michael E. Lamb, *Shared Parenting After Parental Separation: The Views of 12 Experts*, 59 J. DIVORCE & REMARRIAGE 372, 386–87 (“12 experts largely agreed . . . that a minimum of 35% of the child’s time should be allocated to each parent for the child to reap the benefits of [shared parenting].”); Hardcastle, *supra* note 266, at 210 (“Research has not established the amount of contact necessary to maintain a ‘close relationship’ between the parent and child.”); Pruett & DiFonzo, *supra* note 181, at 154 (noting the conclusion of a think tank of thirty-two family law experts that “presumptions prescribing specific allocations of shared parenting time are unsupported because no prescription will fit all, or even the majority of, families’ particular circumstances”).

276. This amounts to approximately twenty percent of the time with the child. Jennifer Wolf, *Standard Child Visitation Schedules for Parents*, VERYWELL FAM., (Jan. 13, 2022), <https://www.verywellfamily.com/visitation>

whether something closer to an equal share of time with the child is necessary.²⁷⁷ Another area of contention relates to the longevity of joint custody arrangements, with some studies finding that parents in joint custody arrangements frequently ended up reverting to sole custody arrangements within a few years.²⁷⁸ There is also disagreement about whether other factors, such as resources and conflict levels, are more important predictors of children's well-being than the form of custody, and whether the benefits attributed to joint custody actually stem from the lower conflict levels and greater resources of parents who choose the arrangement.²⁷⁹ Finally, one of the most contentious joint

-schedule-options-for-non-custodial-parents-2997377 [https://perma.cc/2X9T-V5CE].

277. *In re Marriage of Hansen*, 733 N.W.2d at 695 (“[T]he research has not established the amount of contact necessary to maintain a ‘close relationship.’”); Lin Delaney & Lindsay Parvis, *The Commission on Child Custody Decision-Making – From Theory to Practice*, MD. B.J., Mar. 2016, at 4, 6 (“[A]n emerging consensus among social scientists . . . [is that] a minimum of 30 to 33 percent time with each parent is optimal”); Fehlberg et al., *supra* note 266, at 321 (“But the research is not clear on just how much time is needed or optimal for children.”); Pruett & DiFonzo, *supra* note 181, at 154 (“Child development professionals agreed that the current state of research supports no definitive conclusion about the impact of some overnights, frequent overnights, or no overnights, on long-term parent–child relationships and child well-being.”); Julia Tolmie et al., *Is 50:50 Shared Care a Desirable Norm Following Family Separation? Raising Questions About Current Family Law Practices in New Zealand*, 24 N.Z.U. L. REV. 136, 166 (2010) (“[T]here is no evidence at this point that parenting arrangements *must* be 50:50 to deliver this benefit.”).

278. Caulley, *supra* note 163, at 441–42; Hardcastle, *supra* note 266, at 211; Karmely, *supra* note 176, at 349.

279. Bauserman, *supra* note 265, at 92, 98 (describing some researchers' conclusions that level of conflict was a more important predictor of outcomes for children than the custody arrangement); Buchanan & Jahromi, *supra* note 231, at 419 (“The custody arrangement that children live in following parental divorce is not a strong or especially important predictor of children's subsequent mental, emotional, or behavioral well-being. Rather, research repeatedly shows that the best predictors . . . have to do first and foremost with the parenting and relationships they experience and secondly with the economic stability of their homes following divorce.” (footnotes omitted)); Fehlberg et al., *supra* note 266, at 332 (“[T]here is no clear evidence that any particular post separation parenting arrangement is most beneficial to children. Rather, there is consistent evidence that positive outcomes for children in shared time arrangements have more to do with the fact that families who opt for shared time parenting tend to be well-resourced and parent cooperatively, flexibly, and without reference to lawyers or courts.”); Emma Fransson et al., *Psychological Complaints Among Children in Joint Physical Custody and Other Family Types: Considering*

custody debates relates to the wisdom of joint physical custody arrangements for infants and toddlers.²⁸⁰ Many of the studies on this issue have focused on the effects of overnight visitation with non-custodial fathers, with some of the studies finding that frequent overnights were disruptive, stressful, and harmful to the well-being of young children and other studies reaching the opposite conclusion.²⁸¹

The lack of consensus within the social science research regarding various aspects of joint custody undoubtedly has contributed to the lack of uniformity in states' approaches to joint custody described above.²⁸² Proponents of joint custody presumptions rely heavily on the widely accepted conclusion from social science research that children benefit from maintaining a continuing, meaningful relationship with each parent.²⁸³

Parental Factors, 44 SCANDINAVIAN J. PUB. HEALTH 177 (2015) (discussing a study that found better outcomes for adolescents in joint custody arrangements and noting that the difference was not explained by "socioeconomic variables"); Nielsen, *supra* note 266, at 102, 137 (explaining that "unless the study controls for income and level of conflict, this leaves open the possibility that it was not the shared parenting per se that made the difference" and arguing that while "only 16 of the 40 studies included income and conflict as controls . . . [and] most shared parenting couples have higher incomes and less conflict than other separated parents, these two factors alone do not explain the better outcomes for shared parenting").

280. Nielsen, *supra* note 266, at 114 ("[S]hared parenting for these very young children is a particularly controversial issue . . ."); Pruett & DiFonzo, *supra* note 181, at 163 ("Embedded within the shared parenting research is a hotbed of controversy on the question of overnights for fathers with very young children who do not primarily reside with them.").

281. See Fehlberg et al., *supra* note 266, at 325 ("[T]hese new data suggest that shared time arrangements have special risks for children younger than 4 years."); McIntosh et al., *supra* note 269, at 113 (finding that infants and toddlers who had frequent overnights with a second parent had more issues with emotional regulation than those who had fewer overnight visits); Nielsen, *supra* note 266, at 136 (reviewing joint custody studies and finding that "regular and frequent overnights for infants and shared parenting for toddlers and other children under five is not linked to negative outcomes"). See generally William V. Fabricius & Go Woon Suh, *Should Infants and Toddlers Have Frequent Overnight Parenting Time with Fathers? The Policy Debate and New Data*, 23 PSYCH., PUB. POLY, & L. 68 (2017) (detailing studies on the topic and their differing findings).

282. See Pruett & DiFonzo, *supra* note 181, at 153 (highlighting disagreements among professionals with regards to presumptions in favor of joint custody).

283. See, e.g., Stephanie N. Barnes, Comment, *Strengthening the Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L.

They point out that joint custody presumptions will result in significantly more children obtaining the crucial benefits that derive from maintaining a meaningful relationship with each parent.²⁸⁴ Specifically, not only will joint custody presumptions result in more joint custody orders in disputed cases, but parents will also be more likely to agree to joint custody if they are bargaining in the shadow of laws that adopt such presumptions.²⁸⁵ A related benefit, according to proponents, is that joint custody presumptions encourage and promote cooperation and agreement among parents,²⁸⁶ which social science research indicates furthers the well-being of children.²⁸⁷ Supporters have also expressed the belief that joint custody presumptions will increase the financial support children receive because parents who feel more involved with their child's life will be more likely to comply

REV. 601, 623 (1999); Braver & Lamb, *supra* note at 275, at 380–81, 384–86; Karmely, *supra* note 176, at 329; Lindsey A. Waits, *For Better or for Worse: Joint Custody Should Be the Presumption in South Carolina*, 9 CHARLESTON L. REV. 473, 484, 492–93 (2015).

284. See Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 U. BALT. L. REV. 83, 111 (2011) (identifying proponents' belief that a joint custody presumption "recognizes the value of, and promotes, the child's relationship with both parents [and] is associated with better outcomes for children . . .").

285. See Andrew Shepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 716 (1985) (stating that if a joint custody presumption was in place, "parents would have far less incentive to oppose joint custody: if they fail to agree and wind up in court, the final order will probably be joint custody"); Warshak, *supra* note 284, at 111 ("Supporters of a joint physical custody presumption believe that it . . . is a determinate, win-win standard that will reduce litigation rates and hostile, manipulative negotiations . . ."); see also *infra* note 292 and accompanying text (expressing the problematic aspects of joint custody presumptions causing more parents to agree to such arrangements).

286. See Sanford L. Braver, *The Costs and Pitfalls of Individualizing Decisions and Incentivizing Conflict: A Comment on AFCC's Think Tank Report on Shared Parenting*, 52 FAM. CT. REV. 175, 178 (2014) (arguing that shared parenting presumptions minimize parental incentives to engage in conflict); Kruk, *supra* note 274, at 397 (arguing that joint custody presumptions "reduce litigation and ongoing conflict between parents"); Shepard, *supra* note 285, at 746 ("A state with a joint custody presumption, on the other hand, tells parents that they can 'win' by being decent and cooperating for the benefit of their child. . . . [T]he joint custody presumption fosters cooperation."); Waits, *supra* note 283, at 500; Warshak, *supra* note 284, at 11.

287. See *supra* note 269 and accompanying text.

with child support obligations.²⁸⁸ Moreover, some proponents, particularly fathers' rights groups, argue that presumptions in favor of joint custody are necessary to counteract what they perceive to be a continuing unfair and pervasive preference for mothers within the legal system.²⁸⁹ Finally, proponents have stressed that joint custody presumptions will lead to greater predictability in the outcomes of custody cases.²⁹⁰

On the other side, opponents of joint custody presumptions argue that each custody determination should be made based on the best interests of the child in light of the particular facts of the case.²⁹¹ They contend that using a proxy to determine what custody structure is in the child's best interests, instead of doing an independent analysis of the interests of the particular child whose custody is at issue, is contrary to the promotion of children's welfare.²⁹² Opponents also argue that the existence of a joint custody presumption pressures and coerces parents to agree to joint custody, even when a parent believes that the arrangement would be harmful to the child and/or the parent.²⁹³ These presumptions also can lead to problematic negotiating tactics—they provide leverage to a parent who is not genuinely interested in custody, but who uses the threat of joint custody to extract financial concessions from the other parent.²⁹⁴

Opponents further argue that joint custody presumptions will most directly impact the subset of cases for which joint custody is least appropriate or desirable—the small minority of

288. Melissa A. Tracy, *The Equally Shared Parenting Time Presumption—A Cure-All or a Quagmire for Tennessee Child Custody Law?*, 38 U. MEM. L. REV. 153, 174 (2007); Waits, *supra* note 283, at 484.

289. See Caulley, *supra* note 163, at 435; Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 408–09 (2005); Karmely, *supra* note 176, at 326–28; Waits, *supra* note 283, at 483–84.

290. Caulley, *supra* note 163, at 435; Karmely, *supra* note 176, at 328; Kruk, *supra* note 274, at 397; Waits, *supra* note 283, at 484.

291. See Caulley, *supra* note 163, at 443–44; Pruett & DiFonzo, *supra* note 181, at 153.

292. See Caulley, *supra* note 163, at 433 (“This custody model is strikingly at odds with the best interest of the child standard”); Pruett & DiFonzo, *supra* note 181, at 162 (“[P]articipants at the think tank cautioned that the nuances apparent in the current literature on parenting time call for parental agreement or individualized judicial assessments rather than decisions premised on legal presumptions.”).

293. Weiner, *supra* note 189, at 1570.

294. *Id.*

cases in which there is so much conflict and animosity between the parents that they are unable to reach an agreement.²⁹⁵ Opponents highlight the social science research regarding the harm to children of ongoing parental conflict.²⁹⁶ Opponents further stress that although joint custody presumptions often exempt from the presumption cases involving domestic violence or identify domestic violence as grounds for rebuttal of the presumption, current practices do not effectively identify cases in which domestic abuse has occurred.²⁹⁷ In addition, some courts issue joint custody awards despite the existence of domestic violence.²⁹⁸ These issues lead to joint custody awards in cases in which the arrangement is harmful and inappropriate.²⁹⁹

It is also important to note that there appears to be greater resistance to joint physical custody presumptions than to joint legal custody presumptions.³⁰⁰ Indeed, some advocates have adopted the position that there should be a presumption in favor of joint legal custody, but that physical custody should be determined based solely on the best interests of the child without any presumption.³⁰¹ A think tank of thirty-two family law experts, for example, determined that this was the optimal approach, reasoning that “joint decision making is already common across many countries and jurisdictions and can more easily be circumscribed and managed for many families than can shared

295. Buchanan & Jahromi, *supra* note 231, at 348–49; Caulley, *supra* note 163, at 437; Fehlberg et al., *supra* note 266, at 332; Darya Hakimpour, *Distributing Children as Property: The Best Interest of the Children or the Best Interest of the Parents?*, 37 CHILD’S LEGAL RTS. J. 128, 163–64 (2017); Karmely, *supra* note 176, at 330.

296. Caulley, *supra* note 163, at 425; Fehlberg et al., *supra* note 266, at 332; Hakimpour, *supra* note 295, at 163–64; Karmely, *supra* note 176, at 358–60.

297. Weiner, *supra* note 189, at 1569.

298. Karmely, *supra* note 176, at 355–58.

299. See Karmely, *supra* note 176, at 362; Weiner, *supra* note 189, at 1569–70.

300. Cf. Pruett & DiFonzo, *supra* note 181, at 153, 163 (describing the think tank’s conclusion that joint physical custody arrangements should be made on a case-by-case basis, without any presumption).

301. *Id.* at 153–54 (describing the think tank’s conclusions that there should be a presumption in favor of joint legal custody, but not joint physical custody); Buchanan & Jahromi, *supra* note 231, at 439 (“Although there appear to be potential benefits of and little harm from presumptions for joint *legal* custody, a presumption for joint *physical* custody in high conflict cases would not serve children well.”).

parenting time.”³⁰² As noted above, a couple of states have taken this approach, adopting a presumption in favor of joint legal custody but not joint physical custody,³⁰³ and joint legal custody awards are issued more often than joint physical custody awards.³⁰⁴

Taken together, the complicated state of the social science research, the lack of consensus regarding the wisdom of joint custody presumptions in the two-parent custody context, and the fears about multi-parentage leading to custody arrangements that harm children, highlight the complexity involved in deciding whether existing joint custody presumptions should extend to multi-parent disputes involving more than two entities. Adding an additional layer of difficulty is the fact that even though legislators in some states may strongly believe that the existing research supports joint custody presumptions in the two-parent custody context, joint custody studies have focused on two-parent families, and often, even more narrowly, on different-sex parents and father involvement.³⁰⁵ The relative novelty of multi-parent recognition means that currently there is a dearth of research about child custody arrangements in families with multiple legal parents.

302. Pruett & DiFonzo, *supra* note 181, at 167.

303. See *supra* note 221 and accompanying text (listing state statutes which have adopted a presumption in favor of joint legal custody but not joint physical custody).

304. See *supra* note 231 and accompanying text (listing studies that have found that joint legal custody awards are issued more frequently than physical custody awards).

305. See Shawn McCall, Comment, *Bringing Specificity to Child Custody Provisions in California*, 49 GOLDEN GATE U. L. REV. 141, 157 (2019) (“[S]ocial science is admittedly skewed towards looking at the effects of adding fathers’ involvement into parenting . . .”); Jessica Pearson & Nancy Thoennes, *Custody After Divorce: Demographic and Attitudinal Patterns*, 60 AM. J. ORTHOPSYCHIATRY 233, 242 (1990) (“Much research on the adjustment of children following divorce stresses the important effects of living in single-parent families and of father absences.”); Pruett & DiFonzo, *supra* note 181, at 162, 168 (explaining that “parent involvement research after separation has typically focused on fathers” and “we know very little empirically about how a [joint custody] presumption would apply to same-sex couples, nonbiological parents, never-married partners who had no significant partnership before having a child together, and so on”); Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children*, 47 FAM. L.Q. 353, 367 (2013) (“Father involvement with his children post-divorce is one of the more heavily researched areas in the past two decades.”).

Notably, the trend within the limited scholarship to date addressing custody standards in multi-parent disputes involves proposals that take a position squarely against presumptions in favor of joint custody. Specifically, citing the fears discussed above regarding shared custody in the multi-parentage context, the proposed standards not only lack a presumption in favor of joint custody, but also include some form of a presumption in favor of *primary* or *sole* custody to one of the parents.³⁰⁶ For example, June Carbone and Naomi Cahn have proposed that courts employ a primary caretaker presumption in multi-parent custody disputes.³⁰⁷ They argue that this is the optimal approach because, *inter alia*, when there are multiple parents involved in the dispute, they usually will not each have equally strong bonds with the child and likely will have difficulty in reaching agreement on matters relating to the child.³⁰⁸ Under this proposal, rebuttal of the primary caretaker presumption could occur “only where three or more adults have agreed to assumption of equal rights and responsibilities for a child at the child’s birth, and have in fact assumed comparable responsibility for the child for at least two years after the child’s birth.”³⁰⁹ Similarly, other articles that have addressed multi-parent custody disputes have proposed that “[i]n cases where there has been one primary parent, that parent would receive custody and the other parent(s) would receive visitation”³¹⁰ or that “primary parents who engage in the bulk of daily responsibility for the child . . . should have greater rights and responsibility regarding the raising of the child than a third—or fourth—parent who contributes less.”³¹¹

While those who favor a presumption in the multi-parentage context—whether in favor of sole or joint custody—undoubtedly will attempt to utilize aspects of the existing social science research to support their position, the best approach is to eschew

306. See *infra* notes 307–11 and accompanying text. See also Jacobs, *supra* note 12, at 333 (arguing that in the multi-parentage context parents should have relative rights and “parents who contribute more caretaking should have a greater say in custody matters than parents who contribute less”).

307. Carbone & Cahn, *supra* note 12, at 12.

308. *Id.* at 44.

309. *Id.* at 47.

310. Gatos, *supra* note 22, at 213.

311. Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 *CARDOZO J.L. & GENDER* 217, 223 (2010).

any presumptions in favor of one form of custody in multi-parent, multi-entity custody disputes. Even in the two-parent custody context, there is continuing disagreement among experts regarding a number of critical issues and general recognition that additional research is necessary.³¹² Moreover, because legal recognition of multi-parentage is a recent phenomenon, there is not yet a significant body of research regarding joint custody arrangements in multi-parent families. It would be a mistake to assume that the conclusions stemming from the research on custody forms in two-parent families is equally applicable to multi-parent families. Not only will multi-parent custody disputes differ from two-parent disputes in that they will involve more parties, but they also will involve a significantly wider variety of inter-parent relationships than those often seen in two-parent disputes. For example, unlike most two-parent custody disputes, multi-parent custody disputes may involve inter-parent relationships that were never romantic or intimate in nature. Additional social science research that encompasses multi-parent families should be undertaken to aid lawmakers in determining the appropriateness of a presumption in favor of one form of custody in multi-parent custody disputes. Until there is a significant body of research on multi-parent families, states should adopt a “no-presumption approach” and custody determinations involving multi-parent, multi-entity families should be based purely on an analysis of the best interests of the particular child in question.

The no-presumption approach means that for the majority of states, the applicable legal standards will not change in multi-parent custody disputes. In the minority of states that do currently employ a joint custody presumption in the two-parent custody context, multi-parent cases that involve more than two entities should be exempted from the presumption.³¹³ The one exception to this should be the category of state joint custody presumptions that extend only to situations where the parents have agreed to the arrangement—this type of presumption is a reflection of the general deference courts give to custody agreements reached by parents.³¹⁴ As will be discussed below, this

312. See *supra* notes 269, 283–99 and accompanying text (identifying various disagreements among experts relating to joint custody).

313. See *supra* Part III.A (explaining the difference between multi-parent disputes that involve only two entities and multi-parent disputes that involve more than two entities).

314. See *supra* note 205 and accompanying text.

general deference should extend to agreements reached in the multi-parent custody context.

Extending to the multi-parent custody context existing statutory provisions that do not explicitly set forth a presumption in favor of joint custody, but provide that it is the state's policy to promote "frequent and continuing" contact between the child and each parent or to "encourage parents to share the rights and responsibilities of child rearing" is less of a concern.³¹⁵ This is especially true if such provisions are interpreted to refer to legal parents who have formed a parental bond with their child. There is a wide body of social science research indicating that it is harmful to sever the relationship between a child and an individual who they view as a parent.³¹⁶ Moreover, promoting frequent and continuing contact between the child and each parent is not the same as presuming that the parents should share legal or physical custody of the child. Frequent and continuing contact may occur through visitation, as opposed to shared physical custody, and such contact can occur regardless of whether the parents share legal decision-making rights.

With regard to the factors set forth for courts to consider in determining what custody form to award, the existing factors utilized by courts in two-parent custody cases should extend to multi-parent cases. Specifically, in determining what custody arrangement would promote the best interests of the child, it would be logical for courts in multi-parent cases to consider factors relating to the parents' relationship, such as whether the parents can communicate effectively, cooperate, show each other mutual respect, and support each other's relationship with the child, and the extent to which any of the parents oppose joint custody.³¹⁷ Courts should also consider, just as they do in the two-parent custody context, factors that relate to the relationship between each parent and the child, such as whether each parent has actively cared for and formed a close relationship with the child prior to separation and the wishes of a sufficiently

315. See *supra* note 223 and accompanying text (listing state statutes that contain this type of language).

316. Feinberg *Whither*, *supra* note 23, at 56–57 (noting that children "may suffer significant short- and long-term harm when the relationship they share with an individual whom they view as a parent is severed").

317. See *supra* note 225 and accompanying text (discussing the common factors that courts consider in determining whether joint custody is appropriate).

mature child.³¹⁸ Logistical concerns relating to issues such as the geographic locations of the parents and the potential disruption of the child's daily life are also key considerations in the multi-parent custody context—perhaps even more so than in the two-parent custody context since a multi-parent custody dispute may involve the potential of a child spending time at more than two homes.³¹⁹ Finally, in any custody dispute it is essential for courts to consider any history of domestic violence and the safety implications of a joint custody award, and to apply any existing presumptions against joint custody in cases involving domestic violence.³²⁰

C. ENCOURAGING AND DEFERRING TO SETTLEMENTS IN MULTI-PARENT CUSTODY DISPUTES

The prior two questions, relating to how to classify the parties and the role of joint custody presumptions in multi-parent custody disputes, will most directly affect what likely will be only a small proportion of multi-parent custody cases—those in which the parties are unable to reach an agreement. Like the parties in the vast majority of custody disputes and legal disputes overall, in most multi-parent custody cases the parties likely will reach a settlement agreement. As discussed above, modern state law approaches to custody disputes between legal parents often encourage the parents to settle their dispute through mediation or other mechanisms, and there is generally a great deal of judicial deference to custody agreements reached by parents.³²¹ It is thus important to consider how the law should approach dispute resolution in multi-parent custody cases. Two core, related questions that will arise in this context are (1) whether the law should encourage settlement through mediation or other mechanisms in multi-parent custody cases to the same degree it does in two-parent custody cases and (2) whether courts should be as deferential to agreements reached by the parties in multi-parent

318. *Id.*

319. *Id.*

320. *See supra* note 226 and accompanying text (highlighting the importance of courts considering whether there is a history of domestic violence between the parties when determining whether joint custody is appropriate).

321. *See supra* notes 197–99 and accompanying text (explaining that many states encourage mediation as a means for parents to settle their custody disputes).

custody cases as they are to agreements reached by the parties in two-parent custody cases.

Legislatures and courts should answer both questions in the affirmative. There is significant consensus among experts that “[s]upporting self-determination by parents whenever it is safe for the parents and children to do so is an optimal goal for professionals in family law.”³²² Mechanisms like mediation that promote agreement provide a number of benefits to children and parents involved in custody disputes and, as a result, mediation has become a core aspect of child custody procedures in many states. The justifications for enacting laws and procedures that encourage or mandate mediation in two-parent custody cases are equally relevant to multi-parent custody cases. One of the primary reasons for adopting legal standards that encourage or require mediation in custody cases is the belief that the process fosters cooperation between the parents,³²³ and, as discussed above, the ability of the parents to cooperate in matters relating to the child is essential to the well-being of the children involved in custody disputes.³²⁴ There is no reason to think that this justification for mediation does not extend with equal force to multi-parent custody disputes. It is only logical that children with multiple parents, just like children with only two parents, will benefit when their parents are able to communicate effectively, cooperate, and display mutual respect. Another benefit of mechanisms that promote agreement between parents involved in custody disputes is that they result in fewer families experiencing the bitterness, stress, emotional trauma, and expense that often accompany litigation.³²⁵ This benefit is in no way dependent on there being only two parents involved in the dispute and clearly would extend to the multi-parent custody context. The same is true of another substantial benefit of mechanisms that encourage settlement—that the parties are more likely to

322. Pruet & DiFonzo, *supra* note 181, at 167. See also Smyth et al., *supra* note 267, at 147 (“The point so stressed by Robert Mnookin, that the best arrangements are generally those that parents negotiate for themselves, is now well established.”).

323. See *supra* note 203 and accompanying text (describing studies that have found that mediation generally results in better outcomes for children).

324. See *supra* note 269 and accompanying text.

325. See *supra* note 203 and accompanying text.

be satisfied with and abide by orders in which they had a part in creating.³²⁶

Finally, utilizing mechanisms that facilitate agreement in parental custody disputes is the optimal approach because parents generally have a unique understanding of the needs of their children.³²⁷ As a result, parents usually are in a better position than judges to create custody structures that are well suited to their children and familial situation.³²⁸ This supports answering in the affirmative not only the question of whether mechanisms encouraging settlement should extend to multi-parent disputes, but also the question of whether the judicial deference generally given to agreements reached by the parents should extend to multi-parent custody cases.

There likely will be arguments against providing judicial deference to custody agreements in multi-parent disputes raised by commentators who fear that joint custody arrangements involving more than two entities will harm children.³²⁹ These commentators will argue that courts should scrutinize such agreements more closely than agreements reached in two-parent custody disputes. There is no reason, however, to assume that the parents in multi-parent families will have less knowledge of their children or understanding of what custody structure will promote the well-being of their children than other parents. In fact, relying on the parents to structure an appropriate custody arrangement may be even more important in the multi-parent context, where judges are less likely to have familiarity with the type of family structure involved in the case. This is not to say that courts should be completely deferential to any agreement reached by the parents in a custody dispute. Regardless of the number of parents, there is always the possibility that, for one reason or another, the agreement reached by the parents will be

326. *Id.*

327. *See supra* note 203; *see also* Mnookin & Kornhauser, *supra* note 270, at 958 (“[P]arents will know more about the child than will the judge, since they have better access to information about the child’s circumstances and desires.”).

328. *See supra* note 203; *see also* Mnookin & Kornhauser, *supra* note 270, at 958 (“Indeed, a custody decision privately negotiated by those who will be responsible for care after the divorce seems much more likely than a judicial decision to match the parents’ capacities and desires with the child’s needs.”); Smyth et al., *supra* note 267, at 147 (“[T]hat the best arrangements are generally those that parents negotiate for themselves, is now well established.”).

329. *See supra* notes 14–22 and accompanying text.

contrary to the best interests of the child. It is the court's role in any custody case, whether it involves two parents or multiple parents, to reject such agreements. However, there is no persuasive justification for courts to categorically scrutinize agreements reached in the multi-parent custody context more closely than agreements reached in the two-parent custody context.

CONCLUSION

Legal recognition that a child may have more than two parents is becoming a reality in the United States. This exciting development will bring with it many crucial questions for legislatures and courts to resolve, especially as it relates to child custody disputes. Some of the most pressing and consequential issues that will arise in the multi-parent custody context relate to how to categorize the parties, whether to extend existing presumptions in favor of joint custody to multi-parent disputes, and to what degree the law should encourage settlement and defer to agreements reached by the parties in multi-parent custody disputes. These issues warrant careful analysis and consideration. The manner in which courts and lawmakers choose to approach custody issues in the multi-parent context will have significant implications for the increasing number of children and adults involved in multi-parent family structures.