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# MULTI-PARENT FAMILIES, REAL AND IMAGINED

*Courtney G. Joslin* & Douglas NeJaime***



## INTRODUCTION

Whether a child can have more than two parents has become a hot topic. Sources ranging from *The New Yorker* to *People* feature stories with multi-parent families.[1] Attention-grabbing court decisions also take up the question of whether and when a child can have more than two parents.[2] And recent parentage reforms at the state level have included multi-parent statutes.[3] Family law scholars, too, increasingly focus on the question. Before 2000, only a handful of law review articles addressed

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1. *See* Andrew Solomon, *How Polyamorists and Polygamists Are Challenging Family Norms*, NEW YORKER (Mar. 15, 2021), https://www.newyorker.com/magazine/2021/03/22/how-polyamorists-and-polygamists-are-challenging-family-norms [https://perma.cc/F5SQ-DWMK]; Rachel DeSantis & Amy Eskind, *Calif. Throuple Raising 2 Kids Say Their Unique Road to Parenthood Is 'Like Winning the Lottery*,' PEOPLE (Mar. 16, 2021, 5:03 PM), https://people.com/human-interest/calif-throuple-raising-2-kids-reveal-unique-road-to-parenthood-like-winning-the-lottery/ [https://perma.cc/TGV7-NE2Z].

2. *See, e.g.*, E.N. v T.R., 236 A.3d 670 (Md. 2020); *In re* M.C., 131 Cal. Rptr. 3d 194 (2011).

3. *See, e.g.*, CAL. FAM. CODE § 7612(c) (West 2022); WASH. REV. CODE § 26.26A.460(3) (2022); VT. STAT. ANN. tit. 15C, § 206(b) (2022); ME. STAT. tit. 19-A, § 1891(1) (2021); DEL. CODE ANN. tit. 13, § 8-201(c) (2022).

multi-parenthood,[4] but since 2010 more than twenty have extensively analyzed the issue.[5] Reflecting these developments, family law casebooks now devote entire sections to multi-parent families.[6]

4. *See generally* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315 (1994); Randy Frances Kandel, *Which Came First: The Mother or the Egg?: A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165 (1994); Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329 (1995); James B. Boskey, *The Sheep Really Has Five Legs: A Child's Right to an Entire Family*, N.J. LAW., Mar. 1996, at 33.

5. *See* Sacha M. Coupet, *"Ain't I a Parent?": The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 24 N.Y.U. REV. L. & SOC. CHANGE 595 (2010); Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217 (2010); Nancy D. Polikoff, *Response: And Baby Makes . . . How Many?: Using* In re M.C. *to Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple*, 100 GEO. L.J. 2015 (2012); Elizabeth A. Pfenson, *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); Ann E. Kinsey, *A Modern King Solomon's Dilemma: Why State Legislatures Should Give Courts the Discretion to Find That a Child Has More than Two Legal Parents*, 51 SAN DIEGO L. REV. 295 (2014); Emily B. Gelmann, *What About Susan?: Three's Company, Not a Crowd: The Importance of Allowing Third Parent Adoptions When Both Legal Parents Consent*, 30 WIS. J.L. GENDER & SOC'Y 57 (2015); Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715 (2015); Judith Daar, *Multi-Party Parenting in Genetics and Law: A View from Succession*, 49 FAM. L.Q. 71 (2015); Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and Same-Sex Marriage*, 64 EMORY L.J. 2047 (2015); Deborah L. Forman, *Exploring the Boundaries of Families Created with Known Sperm Providers: Who's In and Who's Out?*, 19 U. PA. J.L. & SOC. CHANGE 41, 93–94 (2016); Jason de Jesus, *When It Comes to Parents, Three's No Longer a Crowd: California's Answer to* In re M.C., 49 LOY. L.A. L. REV. 779 (2016); Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 NEV. L.J. 743 (2016); Michelle R. Gros, *Since You Brought It Up: Is Legally Separating a Child from a Nonbiological Third Party Who Has Essentially Become the Child's Psychological Parent Really in the Best Interests of the Child?*, 44 S.U. L. REV. 367 (2017); Haim Abraham, *A Family Is What You Make It?: Legal Recognition and Regulation of Multiple Parents*, 25 AM. U. J. GENDER SOC. POL'Y & LAW 405 (2017); June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9 (2017) [hereinafter Carbone & Cahn, *More Parents*]; Naomi Cahn & June Carbone, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399 (2018) [hereinafter Cahn & Carbone, *Three (or More) Parents*]; Tricia Kazinetz, Note, *You Can't Have One Without the Other: Why the Legalization of Same Sex Marriage Created a Need for Courts to Have Discretion in Granting Legal Parentage to More than Two Individuals*, 24 WIDENER L. REV 179 (2018); Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting*, 31 J. AM. ACAD. MATRIM. LAWS. 175 (2018); Mallory Ullrich, *Tri-Parenting on the Rise: Paving the Way for Tri-Parenting Families to Receive Recognition Through Preconception Agreements*, 71 RUTGERS U. L. REV. 909 (2019); Catherine Reagan, Note, *One Parent, Two Parents, Three Parents, More?: California's Third Parent Law Should Go Back to the Floor*, 52 U.C. DAVIS L. REV. 2165 (2019); Iris Siadatifard, Comment, *You, Me, and Dad?: An Update on the Progression of Multi-Parent Families and the Governing Hand of a Child's Best Interest*, 33 J. AM. ACAD. MATRIM. LAWS. 249 (2020); Jacqueline V. Gaines, *The Legal Quicksand 2+ Parents: The Need for a National Definition of a Legal Parent*, 46 U. DAYTON L. REV. 105 (2021).

Discussion of multi-parent families tends to treat the phenomenon as both new and rare.[7] In many ways, this is unsurprising. Today, access has expanded to various reproductive technologies and arrangements, including conception with third-party gametes and family formation through surrogacy agreements.[8] In some cases involving assisted reproduction, intended nonbiological parents treat a third person—for example, the individual who contributed genetic material—as a parent. And with the advent of mitochondrial replacement therapy (sometimes termed "three-person IVF"), multi-parent families may now consist of three genetic parents.[9]

Legal developments tend to reinforce the assumption that multi-parent families are novel and exceptional.[10] In the last decade, a handful of jurisdictions have enacted statutes expressly allowing courts to find that a child has more than two parents.[11] Other states are considering whether to adopt the 2017 Uniform Parentage Act (UPA), which includes a multi-parent option.[12] As the 2017 UPA demonstrates, these multi-parent provisions

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6. *See, e.g.*, DOUGLAS NEJAIME ET AL., FAMILY LAW IN A CHANGING AMERICA 862 (2021); D. KELLY WEISBERG, MODERN FAMILY LAW 797 (7th ed. 2020).

7. *See* Kinsey, *supra* note 5, at 303 ("With the increased use of [assisted reproductive technologies], it has become more common for children to have more than two parents."); Siadatifard, *supra* note 5, at 268 ("Within the past few years states have begun to acknowledge the existence of multiparent families."); Raymond C. O'Brien, *Assessing Assisted Reproductive Technology*, 27 CATH. U. J.L. & TECH. 1, 28–29 (2018) ("Just as surrogacy challenged traditional notions of parenthood, the possibility of a child with more than two parents—genetically or behaviorally—has arrived, prompting new issues . . . . Increasingly, this debate over the rights of multiple parents will become clearer as there are more cases presented before courts for judicial resolution."). Of course, not all scholarship treats multi-parent families as new and rare. For example, in 2008, Professor Susan Appleton argued against "both supporters' and opponents' characterizations of legally recognized multi-parentage as revolutionary." Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 15 (2008); *see also id.* at 22–23 ("In my view, these supporters overstate the need for reforms because they understate the extent to which such disaggregation has already occurred."); Gupta-Kagan, *supra* note 5, at 716–21 (attending to multi-parent families in the child welfare context); Carbone & Cahn, *More Parents*, *supra* note 5, at 17–20 (addressing "stepparent families" and "unmarried families").

8. *See, e.g.*, Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401 (2021) (chronicling the legal regulation of surrogacy in the United States).

9. David A. Prentice, *3-Parent Embryos, Gene Edited Babies and the Human Future*, 32 ISSUES L. & MED. 233, 236 (2017).

10. Siadatifard, *supra* note 5, at 268 ("Within the past few years states have begun to acknowledge the existence of multiparent families. As a result, state legislators have enacted statutes that recognize more than two legal parents. Although similar in the general idea, the legal recognition of multiparent families can be vastly different from de facto parentage.").

11. *See, e.g.*, COURTNEY G. JOSLIN ET AL., GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 7:14 (2021); CONN. GEN. STAT. § 46b-475(c) (2022) (effective Jan. 1, 2022) ("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."); S.B. 274, 2013–14 Leg. (Cal. 2013); S.B. 6037, 65th Leg., Reg. Sess. § 513(3) (Wash. 2018); VT. STAT. ANN. tit. 15C, § 206(b) (West 2022); ME. STAT. tit. 19-a, § 1891 (2021); DEL. CODE ANN. tit. 13, § 8-201(c) (2022).

12. UNIF. PARENTAGE ACT § 609 (UNIF. L. COMM'N 2017); S.B. 1133, 192d Gen. Ct. (Mass. 2021). In addition, some states permit so-called "third parent adoptions," by which a third person can become a parent through adoption without terminating or altering the rights of the child's existing two parents. *See, e.g.*, JOSLIN ET AL., *supra* note 11, § 5:12. California

usually appear within comprehensive parentage reforms aimed at accommodating LGBTQ+-parent families and other families created through assisted reproduction.[13] This subset of families has garnered most of the attention with respect to multi-parent arrangements.[14] To the extent commentators address other types of families, they tend to focus on cutting-edge and unique arrangements—for example, polyamorous families.[15]

The scientific, legal, and demographic developments that draw attention to multi-parent families are important. Yet, the descriptive assumptions embedded in many treatments of multi-parenthood—suggesting that it is a newly emergent phenomenon, that it is unusual and limited to an identified

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permits third parent adoptions by statute, CAL. FAM. CODE § 8617(b) (West 2022), while other states do so through case law.

13. *See* UNIF. PARENTAGE ACT prefatory note (UNIF. L. COMM'N 2017); *see also, e.g.*, MOVEMENT ADVANCEMENT PROJECT ET AL., SECURING LEGAL TIES FOR CHILDREN LIVING IN LGBT FAMILIES: A STATE STRATEGY AND POLICY GUIDE (2012), https://www.lgbtmap.org/file/securing-legal-ties.pdf [https://perma.cc/XR33-GU5C]; Press Release, GLBTQ Legal Advocs. & Defs., Rhode Islanders for Parentage Equality Coalition Launch (Dec. 17, 2019), https://www.glad.org/post/rhode-islanders-for-parentage-equality-launch/ [https://perma.cc/X67P-WTJ8].

14. *See, e.g.*, Quinn, *supra* note 5, at 175 ("With the increasing use of assisted reproductive technologies ('ART'), including gamete (sperm, egg, and embryo) donation and the use of gestational carriers and traditional surrogates, particularly coupled with the recognition of same-sex marriages and other societal factors, our world is facing a new frontier of [multi-parent] family formation. This new frontier includes the recognition of more than two legal parents for a child."); Kazinetz, *supra* note 5; Samantha Brennan & Bill Cameron, *How Many Parents Can a Child Have?: Philosophical Reflections on the 'Three Parent Case*,' 54 DIALOGUE 45 (2015) (focusing on families with same-sex parents); Gelmann, *supra* note 5; Kinsey, *supra* note 5, at 303 ("With the increased use of [assisted reproductive technologies], it has become more common for children to have more than two parents."); Laura Nicole Althouse, *Three's Company?: How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171, 173 (2008) ("This Article proposes a theoretical framework for granting legal recognition to three parents in the context of families headed by same-sex couples."); Judith Stacey, *Toward Equal Regard for Marriages and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331 (2003); Pamela Gatos, Note, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195 (2001); *see supra* note 1; *see also* Gabrielle Emanuel, *Three (Parents) Can Be a Crowd, but for Some It's a Family*, NPR (Mar. 30, 2014, 6:08 PM), https://www.npr.org/2014/03/30/296851662/three-parents-can-be-a-crowd-but-for-some-its-a-family [https://perma.cc/4A4N-5AAV] (discussing a three-parent family consisting of a lesbian couple and a sperm donor). To be sure, a number of articles on multi-parenthood do acknowledge that families featuring more than two parents can arise in a wider array of circumstances. *See, e.g.*, Carbone & Cahn, *Three (or More) Parents*, *supra* note 5; Abraham, *supra* note 5 (identifying five types of families in which children may have more than two parents); Gupta-Kagan, *supra* note 5; Coupet, *supra* note 5.

15. *See, e.g.*, Solomon, *supra* note 1; Briony Smith, *Polyamorous Parenting: The Surprising Benefits of the Ultimate Modern Family*, TODAY'S PARENT (June 11, 2020), https://www.todaysparent.com/family/parenting/polyamorous-parenting-the-surprising-benefits-of-the-ultimate-modern-family/ [https://perma.cc/EWX6-YW4P] (focusing on polyamorous multi-parent families); Mark Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 J.L. & SOC. DEVIANCE 150 (2013); *see also* Lanfear v. Ruggerio, 254 A.3d 168 (Vt. 2020); Appleton, *supra* note 7, at 12 (introducing a polygamous community as "one case in point" on controversy over a two-parent concept).

subset of families, and that the law has only recently begun to accommodate it—shape normative claims about the issue in problematic ways.

By addressing multi-parenthood as a novel issue implicating only a small subset of families, commentators tend to treat the society-wide consequences of multi-parent recognition as largely unknown and unknowable. Hence, commentators routinely speculate about the effects of adopting a multi-parent principle, worrying that the principle will bleed outside the small number of families imagined to be the primary beneficiaries, thereby threatening a wide range of other families adequately served by a two-parent framework.[16] Recognizing three parents in these "other" families, some fear, will create and exacerbate instability and conflict in children's lives. Children will be torn between multiple authority figures who disagree about child-rearing, and they will be shuttled between three or more households.[17] It is not only children but parents who will suffer, as parents will have to contend with the claims of third parties who inappropriately seek to inject themselves into the lives of other people's children. Critically, even scholars who write supportively of multi-parent recognition give significant weight to some of these concerns.[18] In this Essay, we show that the consequences of multi-parent recognition are more knowable than commentators assume. Multi-parent families arise, and have arisen, in a variety of family configurations. And courts and legislatures have accommodated multi-parent families for decades. In our account, multi-parent families include not only those that are deliberately created to include more than two parents from the outset, but also those that, over time, include three or more individuals with claims to be treated as parents. Multi-parent families, therefore, may exist when a child has two legal parents and one or more additional individuals who assert claims based on functional parent doctrines—that is, doctrines that extend parental rights to an individual based on the conduct of having formed a parent-child relationship and functioned

16. We focus on objections from commentators who generally endorse family law's accommodation of a range of family arrangements. We do not, therefore, address objections that are grounded in traditional gender norms and hostility to LGBTQ+ family formation. For an explanation of these arguments, see Appleton, *supra* note 7, at 21–22. Appleton herself worries that, if multi-parentage is used to add genetic parents "who are not fully contributing to childrearing," it might actually "offer a new opportunity for family law to reinscribe the continuing importance of gender and bionormativity." *Id.* at 54.

17. Gaines, *supra* note 5, at 121–22 ("The legal recognition of more than two parents simultaneously who live in separate households is not in a child's best interest because it increases the number of adults entitled to time with the child. It further stretches the child's time between multiple households. As a result, there will be potentially three or more houses that the child is shuttled to and from." (footnotes omitted)); *see also id.* at 122 ("There are many scheduling challenges under the current two-parent structure, arising from coordinating the schedules of two parents and a child with such items like school schedules; extracurricular activities; parents' work schedules; parties; holidays, birthdays, vacations, school breaks, and weekends. Adding a third adult or more will only complicate scheduling further.").

18. *See, e.g.*, Appleton, *supra* note 7; Carbone & Cahn, *More Parents*, *supra* note 5; Joanna L. Grossman, *California Allows Children to Have More than Two Legal Parents*, VERDICT (Oct. 15, 2013), http://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents [https://perma.cc/M9DZ-Z9EC].

as a parent, regardless of whether the person is a biological or adoptive parent.[19]

The fuller picture of multi-parenthood that we present allows us to ground the multi-parenthood debate in a descriptively accurate account of the phenomenon. This empirically grounded account responds to common objections, showing that speculative concerns about the effects of multi-parent recognition are either misplaced or overstated. Ultimately, an analysis of multi-parenthood rooted in the wide range of contexts in which the issue arises and in which courts have responded has the capacity to shift the conversation away from questions of *whether* to allow multi-parent recognition and instead toward questions of *how* to structure such recognition.

This piece is the first in a series on functional parenthood growing out of an empirical study of all electronically available cases from the last forty years decided under functional parent doctrines, including cases that feature more than two parental figures.[20] Our goal is to provide a more empirically grounded understanding of the circumstances under which a child may have functional parents, including situations in which a child has more than two parents, and an accurate assessment of the range of factual contexts in which courts may be asked to adjudicate the issue. We supply a more comprehensive and detailed empirical analysis of functional parent doctrines in other work, and we plan to provide an examination of multi-parent recognition on a national scale.[21] But this piece draws on findings from one jurisdiction with respect to multi-parent recognition. Our analysis of this set of cases challenges assumptions that undergird the existing theoretical dialogue about multi-parent families.

In Part I, we show how the growing family law literature on multi-parent arrangements envisions a paradigmatic scene—an LGBTQ+-parent family formed through assisted reproduction. We then show how this paradigmatic scene shapes concerns about legal rules that authorize recognition of more than two parents, leading scholars to treat the consequences of multi-parent recognition on a wider range of families as largely unknown and threatening.

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19. Across jurisdictions, these doctrines have different names (for example, de facto parent, in loco parentis, psychological parent, "holding out" parent, or, as discussed herein, transfer of parenthood by agreement) and different sources of authority (equitable, common law, and statutory). They also yield different rights and obligations—in some jurisdictions producing full legal parentage and in others leading to only some parental rights, such as standing to seek custody. *See* Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 122 COLUM. L. REV. (forthcoming 2023) (manuscript at *15–22) (on file with author).

20. *See id.* at *30–31 (discussing methodology).

21. *See id.* Our study is a comprehensive examination of cases decided under what we describe as "functional parent" doctrines. More than half of the cases in our dataset implicate multi-parenthood. We have excluded from our study other *status*-based grounds for according parental rights and responsibilities with regard to a child to more than two individuals. Our study does not, for example, include cases decided under stepparent or grandparent visitation statutes.

In Part II, we draw on evidence from our empirical study to challenge the dominance of the paradigmatic scene of multi-parent family formation. Using case law from West Virginia, we explore the kinds of families that feature multiple parents and the way the law accommodates these families, particularly in a jurisdiction that does not have a UPA-style multi-parent provision and has not been particularly accommodating of LGBTQ+ parents and others using assisted reproduction. Ultimately, we see that multi-parent families have existed for decades in families with children conceived through sexual procreation by different-sex couples. We also see that the law has long responded to this reality by allowing the vesting of parental rights in a third person, and that doing so can actually reduce conflict and increase stability in a child's life. From the child's perspective, multi-parent families may, on the whole, often be a virtue, not a harm. As the West Virginia Supreme Court declared in a leading decision, "Oh that all of the children whose fates we must decide would be so fortunate as to be too loved."[22]

## I. IMAGINED MULTI-PARENT FAMILIES

Scholarship on multi-parent families tends to envision a paradigmatic scene—one made possible by recent medical and legal developments, including expanded access to new forms of assisted reproduction and the social and legal recognition of LGBTQ+ families.[23] On this view, multi-parenthood implicates a family that is not only relatively novel but also relatively rare. While the number of families formed through assisted reproduction and by same-sex couples has grown dramatically in recent decades, these families still constitute only a small slice of the total population of families with children.[24]

The paradigmatic scene of multi-parenthood emerges through the descriptions and analyses that commentators offer to introduce and examine

22. *In re* Clifford K., 619 S.E.2d 138, 159 (W. Va. 2005). We refer to the Supreme Court of Appeals of West Virginia, which is the state's highest court, simply as the West Virginia Supreme Court.

23. *See, e.g.*, O'Brien, *supra* note 7, at 41 (discussing framing by Cahn and Carbone); Forman, *supra* note 5, at 75 (framing discussion around lesbian couples and known donors); Althouse, *supra* note 14 (focusing on same-sex couples who have children through assisted reproduction); Melanie B. Jacobs, *Why Just Two?: Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309 (2007) ("[A]ssisted reproductive technologies (ART) make it quite possible to have more than two mothers: the genetic mother, the gestational mother, and the intended mother. Similarly, it is possible to have two fathers: the sperm donor and the intended father.").

24. SHOSHANA K. GOLDBERG & KERITH J. CONRON, UCLA SCH. OF L. WILLIAMS INST., HOW MANY SAME-SEX COUPLES IN THE U.S. ARE RAISING CHILDREN? (2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Same-Sex-Parents-Jul-2018.pdf [https://perma.cc/CES7-F775]; *ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/art/artdata/index.html [https://perma.cc/7JXQ-AAZ6] (last visited Apr. 2, 2022).

the topic.[25] Scholars tend to cite cases, such as *Jacob v. Shultz-Jacob*[26] and *LaChapelle v. Mitten*,[27] that involve same-sex-parent families created through assisted reproduction.[28] These cited cases involving LGBTQ+ families formed through assisted reproduction include those in which all parties intend for there to be three parents from the outset as well as those in which the status of a gamete provider[29] or the person who gave birth is contested.[30] Relating the paradigmatic family to legal developments, scholarly accounts often highlight recent statutory changes like California's statute or the 2017 UPA that expressly permit the recognition of more than two legal parents.[31]

The scientific, demographic, and legal developments that garner the most attention are surely important. Indeed, we each have written about them at length.[32] But these developments have had an outsized role in shaping the discussion of multi-parenthood. The focus on LGBTQ+ families formed through assisted reproduction and recently enacted UPA-style multi-parent

25. *See, e.g.*, Noor Spanjer, *The Rise of Multi-Parenting: These Five People Are About to Have a Baby Together*, STUFF (Aug. 6, 2015), https://www.stuff.co.nz/life-style/life/70873407/the-rise-of-multi-parenting-these-five-people-are-about-to-have-a-baby-together [https://perma.cc/B5JQ-2F8A] ("Another new, lesser known family structure that has emerged is that of multi-parenting—or raising a child with more than two legal parents. For instance, a lesbian couple and a gay couple bringing up a child together as a single family, but in separate households."); Emanuel, *supra* note 14 (focusing on lesbian couple and known sperm donor); Quinn, *supra* note 5, at 175; Jacobs, *supra* note 23, at 309 (focusing on "heterosexual and homosexual couples us[ing] ART to have children"); Kinsey, *supra* note 5, at 296 ("Three nights a week Bill Delaneys' daughters spend the night with their fathers, a gay couple, and for the remainder of the week, the girls stay with their mothers, a lesbian couple.").

26. 923 A.2d 473 (Pa. Super. Ct. 2007).

27. 607 N.W.2d 151 (Minn. Ct. App. 2000).

28. *See, e.g.*, Appleton, *supra* note 7, at 17; Gelmann, *supra* note 5 at 60, 68–69 (citing, among other cases, *LaChapelle*, *Jacob*, *Sharon S. v. Superior Court*, and *Between A.A. and B.B. and C.C.*, all of which involve LGBTQ+ parents); Forman, *supra* note 5 (discussing *LaChapelle*); Stanley Kurtz, *Heather Has 3 Parents*, NAT'L REV. (Mar. 12, 2003, 2:00 PM), http://www.nationalreview.com/2003/03/heather-has-3-parents-stanley-kurtz/ [https://perma.cc/3MGL-6YKU] (discussing Canadian case with same-sex couple and sperm donor). Again, some scholars acknowledge a wider range of families in which multi-parenthood can arise. *See, e.g.*, Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 482–83 (2013) (addressing stepparents and open adoption, in addition to LGBTQ+ families); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 53–58 (2007) (discussing research showing prevalence of "community parenting"); Gupta-Kagan, *supra* note 5, at 716–21; Cahn & Carbone, *Three (or More) Parents*, *supra* note 5, at 17–20.

29. *Compare* Kurtz, *supra* note 28 (discussing Canadian case where the three parents jointly petitioned), *with* Appleton, *supra* note 7, at 17 (discussing *Jacob*).

30. *See, e.g.*, Frank G. v. Renee P.-F., 37 N.Y.S.3d 155 (N.Y. App. Div. 2016) (involving dispute between gay male intended parents and the woman who gave birth to the child, who was the sister of one of the intended parents).

31. *See, e.g.*, Pfenson, *supra* note 5, at 2058–60. Again, some scholars have taken a broader view of the relevant law. *See, e.g.*, Cahn & Carbone, *Three (or More) Parents*, *supra* note 5, at 20–34 (addressing not only recent legislation but also common law and equitable doctrines that raise the possibility of multi-parent recognition); Jacobs, *supra* note 5, at 227–30 (discussing Louisiana's "dual paternity" doctrine).

32. *See, e.g.*, Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260 (2017); Courtney G. Joslin, *Preface to the UPA (2017)*, 52 FAM. L.Q. 437 (2018).

laws generates an understanding of legally recognized multi-parent families as novel and rare. Moreover, by imagining that only a small and emergent group of families needs multi-parent recognition and that legal responses to these families are new, scholars tend to treat the society-wide impact of multi-parent recognition as largely unknown and unknowable.

Application of the principle to a broader array of families is typically posited as an unintended (and potentially inappropriate) spillover effect of a doctrine meant to apply to a different population of families. Because the concept is framed as new and emergent, identified concerns are speculative and theoretical. From this perspective, a small group of families formed by LGBTQ+ parents and through assisted reproduction may benefit from multi-parent recognition, but application of the principle more broadly may wreak havoc on other families.[33]

On this view, multi-parent recognition poses a threat to existing parents, undermining their parental authority in ways that implicate "the constitutional presumption that the parent knows what is best for the child and will make decisions for the child accordingly."[34] This view tends to assume that the existing parents are in fact regularly exercising parental authority over the child, such that the potential for recognition of a third parent is at odds with "the practical need for parental autonomy."[35] Some commentators articulate more specific threats to parental rights. For example, they fear that laws permitting multi-parent recognition will give perpetrators of domestic violence a legal basis to continue to threaten, harass, and abuse the legal parent.[36] Accordingly, legal parents "who choose to end relationships with non-parents should be trusted to make the best decision for themselves and their children in the absence of an unfit determination."[37]

Focusing more on administrability concerns, some fear that recognition of multi-parenthood may prove unworkable.[38] In a series of articles supporting multi-parent recognition, Professor Melanie Jacobs describes the concern that "there will be too many cooks in the kitchen."[39] Another commentator worries about "a lack of a centralized authority figure for children" with more than two parents.[40] As Professors Naomi Cahn and June Carbone articulate this dilemma in their work supporting multi-parent recognition, "managing more than two parents effectively makes formal equality among them challenging, if not impossible. The concern is not just that the third adult

33. *See, e.g.*, Pfenson, *supra* note 5, at 2060 ("Children may be more harmed than benefited by maintaining relationships with multiple adults because a child can only be emotionally dependent on a limited number of people.").

34. *Id.* at 2062–63.

35. *Id.* at 2063.

36. *See* Gaines, *supra* note 5, at 125.

37. *Id.*

38. *See, e.g.*, Carbone & Cahn, *More Parents*, *supra* note 5, at 39 (explaining that "[s]ome courts have rejected the possibility of three parents because of the uncertainties involved in determining the presumptions that would apply to custody and child support"); *see also infra* notes 37–45 and accompanying text.

39. Jacobs, *supra* note 23, at 326.

40. *See, e.g.*, Gaines, *supra* note 5, at 122–23.

will occupy a lesser position but that recognition of the third parent will alter the relationship between the first two."[41] Worse yet, Stanley Kurtz fears that multi-parenthood will make it "that much easier for any one parent to shirk his or her responsibilities."[42]

Perhaps the most pervasive concern with multi-parent recognition is that it would introduce instability and conflict into children's lives. At the most general level, multi-parenthood seems "profoundly destabilizing" because it would produce "too much change in a child's life."[43] Commentators tend to imagine that it is the legal recognition of the multi-parent family that results (often suddenly) in the child being spread across multiple households and pulled in various directions. These commentators also imagine that the issue arises only when families dissolve and only when the parties are in conflict with one another.

For example, Elizabeth Marquardt, a prominent critic of multi-parenthood, analogizes to studies on children of divorce, who "must grow up traveling between two worlds."[44] She worries that, like children of divorce, "the child will get shuffled between homes."[45] As another critic puts it, "children will be caught in three or four worlds."[46] "[H]ow," another asks, "could children be immersed in three different families, when it caused enough emotional damage when limited to two?"[47] The multi-parent family, on this view, is not imagined to feature a "homelife [that] is stable, predictable, and safe."[48]

Concern about sharing children across multiple households is part of a broader fear that multi-parent families create conflict in children's lives. Cahn and Carbone identify this commonly expressed critique of multi-parenthood: "[T]he greater the number of adults holding parental status, the greater the potential for conflict."[49] Marquardt argues that "[c]onflicts will undoubtedly arise when three parents confront the sticky, conflict-ridden reality of child-raising."[50] Worse yet, scholars fear that multi-parenthood doctrines invite state intervention, producing "nasty,

41. Cahn & Carbone, *Three (or More) Parents*, *supra* note 5, at 404. Cahn and Carbone conclude that while these concerns "matter[] . . . , it is not clear that recognition of three parents is necessarily worse than cases limiting recognition to two parents." *Id.*

42. Kurtz, *supra* note 28.

43. Malinda L. Seymore, *Inconceivable Families*, 100 N.C. L. REV. (forthcoming 2022) (manuscript at *43), https://ssrn.com/abstract=3912788 [https://perma.cc/R234-FXPW]. Seymore writes supportively of multi-parenthood.

44. Elizabeth Marquardt, Opinion, *When 3 Really Is a Crowd*, N.Y. TIMES (July 16, 2007), https://www.nytimes.com/2007/07/16/opinion/16marquardt.html [https://perma.cc/VGF3-BERK].

45. *Id.*

46. Gaines, *supra* note 5, at 122.

47. Sara Alpert, *The Past and Future State of De Facto Parents in New York*, 55 FAM. CT. REV. 458, 464 (2017).

48. Gaines, *supra* note 5, at 122.

49. Cahn & Carbone, *Three (Or More) Parents*, *supra* note 5, at 404; *see also* Appleton, *supra* note 7, at 41 ("As the parental community expands, . . . the possibilities for . . . disputes increase.").

50. Marquardt, *supra* note 44.

three-way custody battle[s]."[51] As Professor Katharine Baker worries, "The more parents there are with competing claims to a child, the higher the likelihood that the state will become involved in the day-to-day business of parenting."[52]

As Baker's assertion suggests, concerns about multi-parenthood rest on assumptions not only about the nature of multi-parent families, but also about the role of legal regulation. As Professor Joanna Grossman explains in a largely supportive treatment of California's multi-parent law, there are "potentially costs to children, whose attachments to adults may be stretched too thin by the legal recognition of additional ones."[53] Some commentators assume that it is the court decision itself, rather than the actual arrangements of the family, that leads a child to split time across multiple households.[54] This perspective overlooks situations in which the child already lives in multiple households, a reality a judicial decision may simply affirm, rather than create. Thus, contrary to the fears of some critics, an adjudication may simplify or solidify the child's existing situation in some cases. For example, the person seeking status as a third parent may be the head of the child's household. In some situations, a person who is parenting a child may need to establish parental rights in order to preserve the child's home and ward off attempts by a biological parent who seeks to remove the child from their long-standing home despite not having parented the child for years. In this sense, multi-parent recognition may safeguard the child's primary parent-child relationship—from state intervention as well as from the claims of other parents.

Commentators tend to imagine that the question of multi-parent recognition will typically arise at relationship dissolution, in the context of a child custody or child support dispute.[55] As Professor Susan Appleton observes in her supportive analysis of multi-parent recognition, even if some of the families in relevant cases are "intact," "the prospect of multi-parentage becomes much more controversial upon the community's dissolution."[56] At that point, one might expect "animosity, possessiveness, factual contests, and willingness to use children as pawns."[57] The tendency to focus on dissolution

51. *Id.*

52. Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 675 (2008).

53. Grossman, *supra* note 18.

54. *See, e.g.*, Pfenson, *supra* note 5, at 2053–54 ("Under this provision, a judge could deny a parent custody and visitation with the reasoning that shuffling the child between three or more homes would foreclose necessary stability for the child. An overtly or subconsciously biased judge could enlarge the circle of parents to include adults that the judge might want to be involved in the child's life by failing to resolve conflicting presumptions. Then, using the best interests standard, the judge could shrink the circle of parents with whom the child is permitted contact under the guise of seeking stability for the child, in reality preventing contact between the child and those adults that the judge disfavors for whatever reason.").

55. *See, e.g.*, *id.* at 2060 ("Children of divorce often feel caught between their parents; fractured family units resulting from break-ups would be all the more painful for children if they have three or four parents who they may feel are owed their allegiance . . . .").

56. Appleton, *supra* note 7, at 40.

57. *Id.* at 40–41.

not only obscures consensual multi-parent arrangements, but also neglects other crises that may prompt court involvement, including the death of a parent or child welfare intervention.[58]

Taken together, the message is clear: rather than help children and recognize the importance of parental relationships in children's lives, giving legal effect to multi-parent families may harm children and undermine the parental relationships that law should protect. This perspective grows out of the assumption that multi-parent recognition is a relatively new legal phenomenon intended to aid a relatively small subset of families. For other families, then, the consequences of multi-parent recognition are largely unknown—and worrying.

This perspective, however, obscures the range of actual families that in fact feature multiple parents and the array of circumstances in which the question can arise. It also overlooks the legal practices that long have recognized and supported multi-parent families. Multi-parent families exist across society. Multi-parent families include LGBTQ+ families and families formed through assisted reproduction. But multi-parent families include other families, too. The reality is that there have always been children who have had more than two parental figures in their lives.[59] For example, a child born to a different-sex married couple may be the genetic child of another man and may develop parental relationships with both the husband and the genetic father. *Michael H. v. Gerald D.*[60] presented such a fact pattern.[61] And while Justice Antonin Scalia famously wrote that he "hope[d]" "the facts of th[e] case [we]re . . . extraordinary," family law lawyers know they are not.[62]

Multi-parent families are not only long-standing; they are also relatively common. Even before *Michael H.*, the U.S. Supreme Court was confronted

58. *See infra* notes 74–85, 88–95 and accompanying text.

59. *See* Kessler, *supra* note 28, at 55 ("What has been less apparent in the discourses surrounding divorce, cohabitation, 'single-parenthood,' and gay family rights, however, is the extent to which children today may have significant family ties to *more than two* adults concurrently."); *see also* Kristina Brant, *Social Parents in the U.S.: The Caregiving Roles of Extended Family and Fictive Kin*, *in* SOCIAL PARENTHOOD IN COMPARATIVE PERSPECTIVE (Clare Huntington et al. eds., forthcoming 2023) (discussing history of multi-generational caregiving).

60. 491 U.S. 110 (1989).

61. *Id.* at 130. Indeed, the child at issue in *Michael H.* urged the Court to recognize and protect her relationships with both men. *See id.* ("[S]he claims a due process right to maintain filial relationships with both Michael and Gerald."). The Court famously declined this request. *See id.* at 118 ("California law, like nature itself, makes no provision for dual fatherhood.").

62. *Id.* at 113 (plurality opinion). To be sure, *Michael H.* and the scenario it presents have received sustained attention from scholars, and many have advocated for multi-parent recognition as an appropriate remedy. *See, e.g.*, Suzanne A. Kim, *Commentary on* Michael H. v. Gerald D., *in* FEMINIST JUDGMENTS: FAMILY LAW OPINIONS REWRITTEN 187 (Rachel Rebouché ed., 2020); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 387 (2012); Kessler, *supra* note 28, at 66; Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 834–37 (2006).

with cases that raised the prospect of two fathers.[63] Many stepparent families feature children who continue to have relationships (legal or otherwise) with their parents of origin, but subsequently develop parent-child relationships with a parent's new spouse. In other Supreme Court cases, like *Quilloin v. Walcott*,[64] biological fathers sought to maintain relationships with their children as the mothers' new husbands sought to adopt them.[65]

Other families also feature multiple parents. In addition to two legal parents, a grandparent, aunt or uncle, or other relative may be parenting a child.[66] A biological parent's new nonmarital partner may become a third parent. In some circumstances, a friend or neighbor may be parenting a child.[67] In most of these situations, the child already has two legal parents.[68] In these situations, recognition of the functional parent—be it the stepparent, or the new nonmarital partner, or the grandparent or uncle who is parenting the child—will result in the child having more than two people the law treats as parents or parent-like figures.

Like the families themselves, legal recognition of multi-parent families exists in many forms. It comes through recent legislative enactments expressly authorizing a court to find that the child has more than two parents, and it emerges from judicial decisions resolving disputes involving LGBTQ+ families and other families formed through assisted reproduction. But it comes through other legal mechanisms as well.[69] All states have rules in place that allow courts to allocate parental rights and/or responsibilities to more than two people. In many states, functional parent doctrines grant standing to seek custody or visitation to someone who has formed a parental relationship with the child.[70] All fifty states have third-party and/or grandparent visitation statutes that authorize courts to award visitation (and,

63. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979) (noting that both the stepfather and biological father sought parental rights); Quilloin v. Walcott, 434 U.S. 246 (1978) (stepfather sought to adopt child and biological father sought visitation); *see also* Bartlett, *supra* note 4, at 927 (discussing *Caban* and *Quilloin* as cases in which "the children understood themselves to have two" fathers).

64. 434 U.S. 246 (1978).

65. Again, some scholars have attended to the multi-parent possibilities presented by stepparent cases. *See, e.g.*, Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231, 231–32 (2007); Bartlett, *supra* note 4, at 925–27.

66. *See* Brant, *supra* note 59, at *6–12.

67. *See id.* at *9.

68. Although, in some cases, one or more of the legal parents may be largely absent from the child's day-to-day life, and indeed, in some cases, one of the legal parents may be deceased.

69. This Essay examines cases decided under doctrines that recognize people as parents based on the conduct of having functioned as a parent. *See supra* note 23. As noted above, we do not include in our study cases decided under doctrines that recognize people based on their status—whether it be status as a stepparent, a grandparent, or as a birth parent who relinquished custody. That said, we note these doctrines here to help sketch out a fuller picture of the range of circumstances under which a child might have parental relationships with more than two people.

70. Joslin & NeJaime, *supra* note 19, at *15–22; NeJaime, *supra* note 32, app. C; Courtney G. Joslin, *De Facto Parentage and the Modern Family*, FAM. ADVOC., Spring 2018, at 31.

in some states, custody) to a grandparent or other individual who is not a legal parent, even where the child has two living legal parents.[71] At least eight states have statutory provisions authorizing courts to award visitation to a stepparent upon dissolution of the marriage between the parent and the stepparent.[72] The majority of states today authorize "open adoptions."[73] Where pursued, an open adoption allows the birth parents to enter into an enforceable postadoption contact agreement with the adoptive parents. All states regulate foster placements. In such placements, the child typically continues to have legal parental relationships with their parents of origin (at least for some time) but is cared for primarily by some other person(s). All states also permit legal guardianship, "a judicially created relationship between a child and a caregiver that grants to the guardian specific powers and duties with regard to the child's care."[74] While the guardian is granted some parental rights and responsibilities, like the right to custody of the child and the ability to make medical decisions for the child, this authorization "does not sever the child's legal relationship with his or her parent."[75]

What would it mean to take a fuller range of families and legal developments into account in assessing the reality and consequences of multi-parent families? How would understandings of the phenomenon shift if we were to attend to multi-parent families that do not announce themselves as such? How would our view of appropriate legal responses change if we were to consider cases in which a court recognizes that a child has more than two parents, but does so in the absence of statutes explicitly authorizing such recognition?

The next part presents an account of multi-parent families and legal recognition from one jurisdiction—West Virginia. There are of course limitations in drawing on an examination of cases from one state. Among other things, in each state, there may be demographic and legal developments that are unique or out-of-step with developments we see elsewhere.[76] In

71. *See* Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1, 2–3 (2013) ("Over a period of twenty years, legislatures in all fifty states enacted statutes that allowed grandparents to seek court-ordered visitation . . . . The most common grandparent (or third-party) visitation statute specifically allows grandparents to seek visitation upon the divorce or separation of the parents (thirty-six states) or upon the death of the parent to whom the grandparent is related (thirty states).").

72. *Id.* at 7 (stating that jurisdictions with statutory provisions for stepparent visitation include: California, Illinois, Kansas, New Hampshire, Oregon, Tennessee, Virginia, and Wisconsin).

73. CHILD WELFARE INFO. GATEWAY, U.S. CHILD.'S BUREAU, POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES 2 (2019), https://www.childwelfare.gov/pubPDFs/cooperative.pdf [https://perma.cc/N9MC-STWL] (stating that, as of 2018, "[a]pproximately 29 States and the District of Columbia currently have statutes that allow written and enforceable agreements for contact after the finalization of an adoption.").

74. CHILD WELFARE INFO. GATEWAY, STANDBY GUARDIANSHIP 1 (2018), https://www.childwelfare.gov/pubPDFs/guardianship.pdf [https://perma.cc/J7AV-XHLM].

75. *Id.*

76. For example, West Virginia has been hit particularly hard by the opioid crisis. *See, e.g.*, *Opioid Summaries by State*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/

future work, we plan to provide a more comprehensive account of multi-parent families and their legal recognition based on our national empirical study. Still, a careful review of the law in one state illustrates shortcomings in the debate over multi-parenthood up to this point. Our examination shows that multi-parent families, as well as legal recognition of such families, are neither novel nor rare. It also shows how the speculative concerns raised with respect to multi-parent recognition are incomplete at best and inaccurate at worst.

## II. REAL MULTI-PARENT FAMILIES: LESSONS FROM WEST VIRGINIA

Data from our empirical study show that the reality of multi-parenthood is more complex and less novel than the existing narrative suggests. We also see that courts have accommodated multiple parents for a child even in the absence of express statutory authority for more than two parents. By analyzing this overlooked case law, we can test the speculative claims about the effects of multi-parenthood. Focusing on these families and cases allows us to see how multi-parent recognition may promote, rather than undermine, stability, and lessen, rather than exacerbate, conflict in children's lives.

We focus here on West Virginia, where a wide range of families feature multiple parents and where state law extends some parental rights to a third parent in a child's life. West Virginia has not enacted the Uniform Parentage Act, and certainly has not enacted the alternative provision included in the most recent iteration of the UPA from 2017 that expressly allows courts to find that a child has more than two legal parents.[77] West Virginia lacks comprehensive statutes governing assisted reproduction, and there is little case law from the state embracing LGBTQ+ families.[78] In other words, scant law in West Virginia expressly addresses the paradigmatic case imagined to implicate multi-parenthood.

Yet, West Virginia courts have developed and applied functional parent doctrines in ways that accommodate multi-parent families. Most importantly, the West Virginia Supreme Court has interpreted its custody statute[79] to allow a "psychological parent" to intervene in child custody proceedings in some circumstances. Describing this statute in its leading

drug-topics/opioids/opioid-summaries-by-state [https://perma.cc/B65Y-M9FP] (last visited Apr. 2, 2022) (listing West Virginia as the state with the highest "2018 Opioid-Involved Overdose Death Rate" per 100,000 people). In states hit hard by the opioid epidemic—including but not limited to West Virginia—a significant share of children are being raised by people other than their legal parents. *See, e.g.*, Brant, *supra* note 59, at 7 (noting that in one Kentucky county, the "proclaimed 'epicenter'" of the crisis, "a 2020 elementary school survey showed that 34.8 percent of students were being raised by a non-parental primary caregiver, without a biological parent present").

77. UNIF. PARENTAGE ACT § 613(c) (Alternative B) (UNIF. L. COMM'N 2017); *see also* Joslin, *supra* note 32.

78. NeJaime, *supra* note 32, app. A at 2366, app. B at 2369, app. D at 2375, app. E at 2380.

79. W. VA. CODE § 48-9-103 (2022) (providing that "[i]n exceptional cases the court may, in its discretion, grant permission to intervene to other persons . . . whose participation in the proceedings under this article it determines is likely to serve the child's best interests.").

psychological parent decision, *In re Clifford K.*,[80] the court explained that "to safeguard the best interests of children, the Legislature has recognized that, in certain circumstances, persons who are not a child's parent or legal guardian might also be proper parties to a custody proceeding."[81]

The *Clifford K.* court ultimately defined a psychological parent as:

> a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian.[82]

Even as the West Virginia Supreme Court, in *Clifford K.*, viewed the custody statute as providing the basis for involving a psychological parent in a custody proceeding, it found authority in a common law tradition that predated the statute.[83] As the court explained, "The psychological parent doctrine is an equitable theory and judge-made construct which permits courts, under appropriate circumstances, to recognize an individual who has maintained a parent-like relationship with a child and consequently has a right to continued visitation with that child."[84] Importantly, the court has emphasized the rights of not only the psychological parent but also the child, observing that "the equitable rights of the child" to continuity of care support the doctrine's existence and continued application.[85]

In addition to deciding cases under this psychological parent doctrine, West Virginia courts have also used their equitable powers to enforce parenting agreements between legal parents and people who were not the child's original legal parents.[86] In child welfare proceedings, courts have

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80. 619 S.E.2d 138 (W. Va. 2005).

81. *Id.* at 147.

82. *Id.* at 157.

83. *Id.* at 154–56 (relying on cases in which the court determined someone to be a "psychological parent" or a "functioning father").

84. *In re* K.H., 773 S.E.2d 20, 28 (W. Va. 2015).

85. *In re Brandon L.E.*, 394 S.E.2d 515, 523 (W. Va. 1990). The psychological parent concept aligns with decades of scientific research on child development. As the National Research Council explained more than two decades ago, "parenting" does not necessarily correlate with biological or legal relations and instead "capture[s] the focused and differentiated relationship that the young child has with the adult (or adults) who is (are) most emotionally invested in and consistently available to him or her . . . . Who fills this role is far less important than the quality of the relationship she or he establishes with the child. The hallmark of this important relationship is the readily observable fact that this special adult is not interchangeable with others." NAT'L RSCH. COUNCIL ET AL., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 226 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000).

86. A modern foundational case regarding this doctrine is *Overfield v. Collins*, 483 S.E.2d 27 (W. Va. 1996), in which the court stated:

> "When a natural parent transfers permanent custody of his or her child to a third person and thereafter attempts to regain custody of that child, the burden of proof shall rest exclusively upon the parent attempting to regain custody of his or her child

also relied on statutory provisions to allow people who are not legal parents, but who are functioning as parents, to intervene and, potentially, be granted custody of the children.[87]

Our examination of the twenty-eight electronically available published and unpublished West Virginia cases decided under these doctrines demonstrates that West Virginia's functional parent doctrines *are* multi-parent doctrines.[88] Twenty-seven of the twenty-eight cases we identified involve situations that feature children with more than two people who are, or are alleged to be, parents.[89]

Before proceeding, some clarification: we classify as multi-parent cases situations in which one of the original legal parents has passed away and another person *in addition to the surviving legal parent* is parenting the child. We consider these to be multi-parent cases because, even when a child's parent has died, that child is still considered, as a matter of law, to be a child

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> by proving with clear and convincing evidence (1) that he or she is fit; and (2) that a transfer of custody so as to disturb the child's existing environment would constitute a significant benefit to the child."

*Id.* at 36.

87. *See, e.g.*, W. VA. CODE § 49-1-204 (2022) (defining "custodian" for purposes of the "West Virginia Child Welfare Act" as a "person who has or shares actual physical possession or care and custody of a child, regardless of whether that person has been granted custody of the child by any contract or agreement"); *see also In re* T.B., No. 20-0369, 2020 WL 6482958, at *3 (W. Va. Nov. 4, 2020) ("Further, we have explained that '[a] person "who obtains physical custody *after* the initiation of abuse and neglect proceedings—such as a foster parent—does not enjoy the same statutory right of participation as is extended to parents and *pre-petition custodians*."'" (alteration in original)).

88. *See* Corey D. v. Travis R., 858 S.E.2d 857 (W. Va. 2021); *In re* D.P., No. 20-0499, 2021 WL 982769 (W. Va. Mar. 16, 2021); *In re T.B.*, 2020 WL 6482958; *In re* L.H., No. 17-0769, 2018 WL 317057 (W. Va. Jan. 8, 2018); *In re* K.R., No. 17-1012, 2018 WL 1709713 (W. Va. Apr. 9, 2018); *In re* J.C., No. 17-0362, 2017 WL 4772949 (W. Va. Oct. 23, 2017); *In re* L.H., No. 17-0102, 2017 WL 5157367 (W. Va. Nov. 7, 2017); Andra F. v. Anthony H., No. 15-0445, 2016 WL 700585 (W. Va. Feb. 16, 2016); *In re* K.H., 773 S.E.2d 20 (W. Va. 2015); J.E. v. L.A., No. 14-0137, 2015 WL 3751807 (W. Va. June 15, 2015); *In re* B.C., No. 14-1174, 2015 WL 3752039 (W. Va. June 15, 2015); Bobbie Jo R. v. Traci W., No. 11-1753, 2013 WL 2462173 (W. Va. June 7, 2013); *In re* J.K., No. 12-0629, 2012 WL 5851434 (W. Va. Nov. 19, 2012); *In re* N.A., 711 S.E.2d 280 (W. Va. 2011); *In re* Antonio R.A., 719 S.E.2d 850 (W. Va. 2011); *In re* Visitation and Custody of Senturi N.S.V., 652 S.E.2d 490 (W. Va. 2007); Overfield v. Collins, 483 S.E.2d 27 (W. Va. 1996); *In re Clifford K.*, 619 S.E.2d 138; *In re* Jade E.G., 575 S.E.2d 325 (W. Va. 2002); Baugh v. Merritt, 489 S.E.2d 775 (W. Va. 1997); Ortner v. Pritt, 419 S.E.2d 907 (W. Va. 1992); *In re* Jonathan G., 482 S.E.2d 893 (W. Va. 1996); Simmons v. Comer, 438 S.E.2d 530 (W. Va. 1993); Snyder v. Scheerer, 436 S.E.2d 299 (W. Va. 1993); *In re Brandon L.E.*, 394 S.E.2d 515; Honaker v. Burnside, 388 S.E.2d 322 (W. Va. 1989); *In re* Custody of Cottrill, 346 S.E.2d 47 (W. Va. 1986); State *ex rel.* R.H. v. Bloom, No. 17-0002, 2017 WL 1788946 (W. Va. May 5, 2017).

89. *See Bobbie Jo R.*, 2013 WL 2462173, at *1. The only case in this dataset that is not a multi-parent scenario is one of the "paradigmatic" cases. The case was an action seeking an order of "sibling" visitation as between children from different families conceived using sperm from the same anonymous sperm donor. In the action, the former same-sex partner of one of the birth parents sought to intervene, relying on the psychological parent doctrine. *Id.* at *1. Because the child at issue was conceived using "sperm [from an] anonymous donor . . . acquired from a commercial service," the child's only legal parent was the birth parent. *Id.* Thus, recognition of the birth parent's former partner as a functional parent would not have produced a multi-parent scenario.

of two legal parents.[90] Conventionally, the law would assume that a third person could not become the child's parent in the absence of an adoption. In any event, most of the cases involving a deceased parent feature situations in which the child had three or more parental figures *before* the legal parent's death. We also include situations in which the child has two legal parents but is being parented by someone else, either alone or alongside a legal parent or parents. We include such cases even if the legal parent or parents have little to no contact with the child. We consider these to be multi-parent cases because, even if the legal parents are practically out of the picture, the law generally continues to treat them as legal parents with rights and obligations, unless or until their parental rights are terminated by a court.

### *A. Who Are Multi-Parent Families in West Virginia?*

The West Virginia cases present a picture of multi-parent families that differs significantly from the paradigmatic scene envisioned in contemporary debates over multi-parent recognition. Only one of the twenty-seven cases involves an LGBTQ+-parent family.[91] It is not clear that any of the twenty-seven cases involve children conceived through assisted reproduction.[92] Instead, the cases out of West Virginia present a much richer and varied set of fact patterns. The cases broadly fall into three general categories.[93]

90. *See, e.g.*, *In re* Estate of Quintero, 569 N.W.2d 889 (Mich. Ct. App. 1997) (per curiam) (holding that children would have to disprove paternity of their presumed father, which they lacked standing to do, before they would be able to establish paternity of decedent, their alleged biological father, for purposes of inheritance); *cf.* L.R.B. v. Talladega Cnty. Dep't of Hum. Res., 223 So. 3d 923, 926 (Ala. Civ. App. 2016) ("[W]e are left to question whether, if a child's presumed father were to die, another man should be permitted to attempt to prove paternity simply because of the presumed father's death? We think not. In such a scenario, the presumption in favor of the deceased presumed father would continue, unless the presumed father could be shown to have relinquished his presumed fatherhood during his lifetime."). Indeed, after the death of a parent, the child may be receiving various protections by virtue of that parent-child relationship such as social security benefits. *See, e.g.*, SOC. SEC. ADMIN., BENEFITS FOR CHILDREN (2021), https://www.ssa.gov/pubs/EN-05-10085.pdf [https://perma.cc/DKR9-374E] ("During 2020, we paid an average of $2.8 billion of monthly benefits to four million children because one or both of their parents are disabled, retired, or deceased. These benefits provide necessities for family members and help make it possible for those children to complete high school. When a parent becomes disabled or dies, Social Security benefits help stabilize the family's financial future.").

91. *See In re Clifford K.*, 619 S.E.2d 138. As noted above, one other case involves LGBTQ+ parents. *See Bobbie Jo R.*, 2013 WL 2462173, at *1. But that case does not feature multi-parenthood, and therefore, is not hereafter included in our discussion of West Virginia multiparent cases. *See supra* note 76.

92. Although one case involved a child raised by a same-sex couple, it does not describe how the child at issue in the case was conceived. *See In re Clifford K.*, 619 S.E.2d at 144 ("Thereafter, Clifford K., petitioner below, was enlisted to help Christina S. conceive a child.").

93. Some cases, like *J.E. v. L.A.*, fall into more than one of these categories. 2015 WL 3751807.

In seven of the twenty-seven cases (26 percent), one of the child's legal and biological parents has passed away.[94] In five of those cases, the child had three or more parental figures before the legal parent's death.[95] In one of the other two cases, the third parent seemingly did not exercise custody until after the legal parent died.[96] In the remaining case, the factual record is too scant to draw a conclusion.[97]

*Clifford K.* illustrates the most common situation, in which the child has three parental figures even before the legal parent's death.[98] After the child's birth parent was killed, the court was faced with deciding whether to place the child with the child's psychological parent—a person who had lived with the child since birth—even though the child also had an involved biological father.[99] In a more recent case, *J.E. v. L.A.*,[100] the child's mother died when she was two.[101] From the time the child "was only a few months old," the child had lived in her grandmother's home "with the consent and encouragement of both biological parents."[102] After her mother's death, the child continued to reside with her grandmother with her father's "consent and encouragement."[103] By the time the court decided the case, the child had been living with her grandmother, who primarily cared for and financially supported her, for approximately six years.[104]

In a second group of cases, the legal parents had contact with their child, but the child was not living with either of the legal parents, and the legal parents were not making decisions for the child. That is, at least as a practical matter, the legal parents in these cases were not exercising either physical or legal custody of their children. Seventeen of the twenty-seven cases (63 percent) present facts that arguably fit within this category.[105] For example,

94. *See In re Clifford K.*, 619 S.E.2d 138; *In re* K.R., No. 17-1012, 2018 WL 1709713 (W. Va. Apr. 9, 2018); *In re* K.H., 773 S.E.2d 20 (W. Va. 2015); *J.E. v. L.A.*, 2015 WL 3751807; Ortner v. Pritt, 419 S.E.2d 907 (W. Va. 1992); Honaker v. Burnside, 388 S.E.2d 322 (W. Va. 1989); *In re* Custody of Cottrill, 346 S.E.2d 47 (W. Va. 1986).

95. *See In re Clifford K.*, 619 S.E.2d 138; *Honaker*, 388 S.E.2d 322; *J.E. v. L.A.*, 2015 WL 3751807; *In re K.R.*, 2018 WL 1709713; *In re Custody of Cottrill*, 346 S.E.2d 47.

96. *In re K.H.*, 773 S.E.2d at 22, 28.

97. *See Ortner*, 419 S.E.2d 907.

98. *In re Clifford K.*, 619 S.E.2d at 154.

99. *See id.* at 154–57.

100. No. 14-0137, 2015 WL 3751807 (W. Va. June 15, 2015).

101. *Id.* at *1.

102. *Id.* at *2.

103. *Id.*

104. *See id.* at *3 (noting that "[f]or approximately the past six years, throughout this child's life, respondent has provided for her day-to-day needs and substantially supported her financially.").

105. *See In re* Brandon L.E., 394 S.E.2d 515 (W. Va. 1990); Ortner v. Pritt, 419 S.E.2d 907 (W. Va. 1992); Overfield v. Collins, 483 S.E.2d 27 (W. Va. 1996); *In re* K.H., 773 S.E.2d 20 (W. Va. 2015); *J.E. v. L.A.*, 2015 WL 3751807; *In re* L.H., No. 17-0102, 2017 WL 5157367 (W. Va. Nov. 7, 2017); *In re* D.P., No. 20-0499, 2021 WL 982769 (W. Va. Mar. 16, 2021); Andra F. v. Anthony H., No. 15-0445, 2016 WL 700585 (W. Va. Feb. 16, 2016); *In re* Jonathan G., 482 S.E.2d 893 (W. Va. 1996); *In re* Antonio R.A., 719 S.E.2d 850 (W. Va. 2011); *In re* K.R., No. 17-1012, 2018 WL 1709713 (W. Va. Apr. 9, 2018); Baugh v. Merritt, 489 S.E.2d 775 (W. Va. 1997); *In re* Custody of Cottrill, 346 S.E.2d 47 (W. Va. 1986); *In re* J.C., No. 17-0362, 2017 WL 4772949 (W. Va. Oct. 23, 2017); *In re* T.B.,

in *Andra F. v. Anthony H.*,[106] the children lived with and were primarily cared for by their paternal grandparents for significant periods of time. While the father also technically lived in the house with his parents during some of this period, he "worked away from the home during the week and was at home [only] occasionally on weekends."[107] The father was later incarcerated. By the time of the hearing on placement of the children, the grandparents had been providing "daily care of the [child], including medical, dental, educational, bedtime routines, providing meals and bearing all of the financial obligations of the children *without assistance from the parents*" for almost two years.[108] In another case, *In re L.H.*,[109] a person the court described as a "Standing Grandmother" "reported that she had provided care for [the child] since birth, less approximately an eight-month period when Mother cared for [the child]."[110] The evidence also indicated that the mother went "long periods without contact" with the child, and provided no financial support for the child.[111] And the child's father resided in Arizona.[112]

A final common subset of cases consists of those in which the child has become child welfare involved.[113] Fourteen of the twenty-seven cases (52 percent) involve allegations of abuse or neglect.[114] In these cases, it is ordinarily the legal parent or parents, not the psychological parent, whose conduct is subject to state investigation. In only two of the fourteen cases was there an allegation that the person alleging to be a psychological parent was abusive or neglectful, and in those two cases, there were also abuse or neglect allegations against the legal parent.[115] By contrast, in twelve of the

No. 20-0369, 2020 WL 6482958 (W. Va. Nov. 4, 2020); Snyder v. Scheerer, 436 S.E.2d 299 (W. Va. 1993); State *ex rel.* R.H. v. Bloom, No. 17-0002, 2017 WL 1788946 (W. Va. May 5, 2017).

106. No. 15-0445, 2016 WL 700585 (W. Va. Feb. 16, 2016).

107. *Id.* at *1.

108. *Id.* at *4 (emphasis added). For her part, "shortly before ordering supervised visitation, [the mother] relocated and failed to provide any information about her living arrangements to the guardian or the family court." *Id.* at *5.

109. No. 17-0102, 2017 WL 5157367 (W. Va. Nov. 7, 2017).

110. *Id.* at *2.

111. *Id.*

112. *Id.*

113. We recognize that the term "child welfare," though commonly used by state and nonstate actors, is subject to increasing contestation. *See, e.g.*, Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 431 (2021).

114. *In re* Brandon L.E., 394 S.E.2d 515 (W. Va. 1990); *In re* Jonathan G., 482 S.E.2d 893 (W. Va. 1996); *In re* J.K., No. 12-0629, 2012 WL 5851434 (W. Va. Nov. 19, 2012); *In re* B.C., No. 14-1174, 2015 WL 3752039 (W. Va. June 15, 2015); *In re L.H.*, 2017 WL 5157367; *In re* L.H., No. 17-0769, 2018 WL 317057 (W. Va. Jan. 8, 2018); *In re* K.R., No. 17-1012, 2018 WL 1709713 (W. Va. Apr. 9, 2018); *In re* D.P., No. 20-0499, 2021 WL 982769 (W. Va. Mar. 16, 2021); *In re* Antonio R.A., 719 S.E.2d 850 (W. Va. 2011); J.E. v. L.A., No. 14-0137, 2015 WL 3751807 (W. Va. June 15, 2015); *In re* J.C., No. 17-0362, 2017 WL 4772949 (W. Va. Oct. 23, 2017); *In re* N.A., 711 S.E.2d 280 (W. Va. 2011); *In re* T.B., No. 20-0369, 2020 WL 6482958 (W. Va. Nov. 4, 2020); State *ex rel.* R.H. v. Bloom, No. 17-0002, 2017 WL 1788946 (W. Va. May 5, 2017).

115. *In re L.H.*, 2018 WL 317057, at *1 ("In February of 2015, the [West Virginia Department of Health and Human Resources] filed an abuse and neglect petition against

fourteen cases, there were allegations that one or more of the legal parents was abusive or neglectful and there were no allegations that the alleged psychological parent was abusive or neglectful.[116] To be clear, we are not making claims about the appropriateness of a child welfare proceeding in the first place. Indeed, especially in light of the race- and class-based inequalities that plague the child welfare system, we have serious concerns about the government's intervention.[117] Instead, we are focusing on the role of functional parents in these existing cases.

In many cases involving abuse and neglect allegations against the legal parent(s), the child lives with another individual who may become a functional parent. Often this person offers the child relative safety and stability. For instance, in one case, prior to the filing of the abuse and neglect petition against both parents,[118] the parents agreed to transfer custody of the

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petitioner and his girlfriend, the mother of L.H., alleging that the mother abused drugs during her pregnancy with the child."); *In re N.A.*, 711 S.E.2d 280. In the case, abuse and neglect allegations were made against the mother, the maternal grandparents who had been caring for the children, and the biological father of children who were not at issue in the appeal. No abuse or neglect allegations were made against the biological father of the child at issue in the appeal; this man did not know he was a biological father of the child until the action was initiated. *See id.*

116. *See, e.g.*, *In re Brandon L.E.*, 394 S.E.2d 515 (dependency proceeding in light of mother's diagnosis of Munchausen syndrome by proxy and evidence that she had medicated her son for diabetes and a seizure disorder, neither of which he had); *In re Jonathan G.*, 482 S.E.2d 893 (abuse and neglect proceeding after child's diagnosis with "shaken baby syndrome"); *In re Antonio R.A.*, 719 S.E.2d 850 (allegations as to mother; investigation concluded that the allegations "did not rise to the level of abuse or neglect"); *In re J.K.*, 2012 WL 5851434, at *1 (abuse and neglect proceeding in light of mother's drug use); *In re B.C.*, 2015 WL 3752039, at *1 (evidence of "acts of abuse by the[] mother, including striking [child] with belts, slapping [child] with the back of her hand and pulling that child's hair, and forcing [child] to shower with his clothes on in scalding hot water"); *J.E. v. L.A.*, 2015 WL 3751807, at *2 (evidence admitted by the family court "that petitioner [father] was convicted in 2012 of driving under the influence of alcohol ('DUI') and evidence of allegations that he sexually abused the child in 2013 and sexually abused an older daughter years earlier"); *In re L.H.*, 2017 WL 5157367, at *2 (continued use of drugs, including cocaine and opiates, by the mother); *In re K.R.*, 2018 WL 1709713, at *1, *3 (abuse and neglect petition was filed against the mother and her husband after "an incident in which the husband physically attacked the mother and brandished a knife while he threatened to kill her, all in the children's presence"); *In re D.P.*, 2021 WL 982769, at *1 (trial court found that the child's "mother had abused controlled substances while the child was in her care and the father failed to appropriately supervise the child or provide a safe and suitable home"); *In re J.C.*, 2017 WL 4772949, at *1 (dependency proceeding against father who had "been incarcerated on multiple felonies for approximately two years" and who was alleged to have "abandoned the child and failed to provide for her in any way"); *In re T.B.*, 2020 WL 6482958, at *1 (dependency action initiated based on "allegations of the parents' drug use"); *Bloom*, 2017 WL 1788946, at *1 (dependency action initiated alleging the mother and the father of two of the four children "had abandoned their children").

117. For excellent analyses of how this system disproportionately targets and, in turn, tears apart families of color, see DOROTHY E. ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 3 (2001).

118. *See In re* J.C., No. 17-0362, 2017 WL 4772949, at *1 n.2 (W. Va. Oct. 23, 2017) ("Here, the proceedings continued against the mother until her rights to a child not at issue in this appeal were eventually terminated in the same order from which petitioner now appeals.").

child to the child's maternal grandparents.[119] When the petition was filed, the father "had been incarcerated on multiple felonies for approximately two years."[120] During the proceeding, the mother's parental rights with respect to another child were terminated.[121] In at least some of the cases involving abuse and neglect allegations, the functional parent was caring for the child before the state initiated the proceeding against the legal parent(s).[122] For example, in one recent case, the child resided with her grandmother, prior to as well as during the abuse and neglect proceeding. According to the trial court, the grandmother "was a dedicated primary caregiver, had formed a strong bond with the child, and had cared for [the child] for a significant period of time."[123]

### *B. Child-Centered Reasoning in Multi-Parent Decisions*

An examination of West Virginia case law shows that courts are confronted with families in which recognition of a third (or fourth) parent would promote, rather than undermine, children's interests. That is, multi-parent recognition can make the lives of the children in these cases *more stable* and *less conflictual*—exactly the opposite of what many commentators assume multi-parent recognition will yield.

The courts themselves explicitly elevate the welfare of the child, seeing recognition of multiple parents as promoting the interests of the child, specifically in stability and continuity of care. Indeed, the West Virginia Supreme Court identified stability for the child as a key justification for the state's psychological parent doctrine. The lawsuit in the foundational case of *Clifford K.* was prompted by the biological mother's death.[124] The question before the court was whether to allow the child either to remain with his psychological parent (the biological mother's partner, who had been the child's nonadoptive, nonbiological parent), or to be placed with his grandfather (the biological mother's father).[125] The child also had a biological father who was a legal parent and entitled to custody.[126] The court ruled in favor of the psychological parent, explaining that "the aim of the

119. *Id.* at *1 ("[Father] previously executed a permanent custody agreement that granted the child's maternal grandparents permanent custody of the child."); *see also id.* at *2 n.3 ("The mother's custodial rights were also transferred to the grandparents by enforcement of their custody agreement. According to the parties, the permanency plan is for the child to remain in the legal custody of the grandparents, per the terms of the custody agreement.").

120. *Id.*

121. *Id.* at *2 n.3.

122. *See, e.g.*, *In re J.C.*, 2017 WL 4772949, at *1 (noting that, according to the West Virginia Department of Health and Human Resources, prior to the abuse and neglect proceeding, the father had "previously executed a permanent custody agreement that granted the child's maternal grandparents permanent custody of the child" and that the father was incarcerated at the time of the petition's filing); *In re T.B.*, 2020 WL 6482958, at *1 (noting that when the Child Protective Services (CPS) worker first interviewed the paternal grandfather, he stated that "he had cared for [the child] 'on and off for a couple of years'").

123. *In re* D.P., No. 20-0499, 2021 WL 982769, at *3 (W. Va. Mar. 16, 2021).

124. *In re* Clifford K., 619 S.E.2d 138, 144 (W. Va. 2005).

125. *Id.* at 144–45.

126. *Id.* at 154.

governing statute is to secure the best interests of the children whose custody is to be determined and to promote stability and certainty in their young lives."[127] Looking to the statutory language, the court emphasized the importance of "[c]ontinuity of existing parent-child attachments."[128] On the court's view, recognition of the psychological parent would "allow[] continuity of care by the person whom he currently regards as his parent and would thus provide stability and certainty in his life."[129]

In many of the cases, the child was in the custody of the functional parent at the outset of the litigation. Thus, in such cases, recognizing psychological parents and protecting their right to maintain a relationship with a child does not create a new household to which a child will be shuttled. Instead, doing so secures the child's primary home. For example, in *Clifford K.*, the court recognized that the "child has been in one home for a substantial period"—the home of the psychological parent—and disturbing that arrangement by shifting custody would harm the child's "sense of security."[130] Thus, as the court concluded, recognizing the child's psychological parent and entering "a formal custodial arrangement would . . . secure the familial environment to which the child has become accustomed and . . . accord parental status to the adult he already views in this capacity."[131] In situations of this kind, the recognition of a third parent does not create disruption. Instead, it promotes continuity.

In the *Andra F.* case discussed above, the court likewise affirmed the children's continued custodial placement with their grandparents.[132] In the case, the mother and father previously agreed that the father would be the primary residential parent even though both parents knew the father "lived with [his parents], . . . worked away from the home during the week and was at home occasionally on weekends."[133] Due to this consensual arrangement, according to the family court, the grandparents had for several years "clearly provided for the daily care of the children, including medical, dental, educational, bedtime routines, providing meals and bearing all of the financial obligations of the children without assistance from the parents."[134] Both the father, who by the time of the litigation was incarcerated, and the mother had essentially consented to the grandparents' role as "psychological parents." When the mother later sought custody of the children, the court

127. *Id.* at 159.

128. *Id.* (quoting W. VA. CODE § 48-9-102(a)(1), (3) (2004)).

129. *Id.* at 160; *see also* Snyder v. Scheerer, 436 S.E.2d 299, 304 (W. Va. 1993) ("While [we are] mindful of the natural parent's right to custody of his own child absent compelling circumstances necessitating a contrary result, we must also be cognizant of the fact that the right of a natural parent must not be examined in a vacuum; it must be tempered by the rights of the child and balanced against those rights in some fashion. . . . These concerns are indicative of our continuing emphasis on the best interests of the child as a guiding force in all custody matters, as well as a recognition that the child has his own individual rights.").

130. *In re Clifford K.*, 619 S.E.2d at 159.

131. *Id.* at 160.

132. Andra F. v. Anthony H., No. 15-0445, 2016 WL 700585, at *1 (W. Va. Feb. 16, 2016).

133. *Id.*

134. *Id.* at *4.

noted that she had "failed to object to [the grandparents'] role as primary caretakers for the children and knowingly left the children with them."[135] Ultimately, the court affirmed the children's continued placement with their grandparents.[136]

In another recent case, *L.H.*, which was also discussed above, parties who the court described as "Standing Grandparents" had provided the child with "the only safe and stable home he had known."[137] The father, who lived across the country, sought custody of the child. Refusing to vest custodial rights in the Standing Grandparents would remove the child from a stable home with the individuals who parented him since birth and instead send him to another state to live with his father, with whom—prior to the instant proceeding—the child had never lived.[138]

It is much rarer to see individuals seeking functional parent status who are not living with the child, and West Virginia courts typically do not credit the claims of such individuals.[139] For example, in a 2007 decision denying the claims of a couple alleging themselves to be psychological parents, the court explained that, while the couple had "provided some level of care for [the child]," they did not "reside in the same household" with the child and did not "routinely serve as additional parents to [the child]."[140]

In West Virginia, the psychological parent doctrine protects not just the *interests* but also the *rights* of the child. For example, the court invoked the "equitable rights of the child" in a 1990 case in which the child had "lived with or been taken care of by his maternal grandmother for the majority of his young life and almost exclusively" for the past three years.[141] To protect the child's rights with respect to his existing living arrangement with his grandmother, the court reversed the trial court's award of custody to the father, who had been absent from the child's life for several years.[142]

From this perspective, we see that courts 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. And, at least in the West Virginia cases, this additional parent often is, and has been, functioning as the child's *primary* parent. In all but three of the multi-parent cases, the alleged functional parent had functioned as the child's primary caregiver, sometimes in addition to but

135. *Id.*
136. *Id.* at *5.
137. *In re* L.H., No. 17-0102, 2017 WL 5157367, at *5 (W. Va. Nov. 7, 2017).
138. *Id.*
139. *In re* L.H., No. 17-0769, 2018 WL 317057, at *5 (W. Va. Jan. 8, 2018); *In re* Visitation and Custody of Senturi N.S.V., 652 S.E.2d 490, 499 (W. Va. 2007).
140. *In re Visitation and Custody of Senturi N.S.V.*, 652 S.E.2d at 499.
141. *See In re* Brandon L.E., 394 S.E.2d 515, 523 (W. Va. 1990).
142. *See id.* at 523–24. While both the mother and father were originally legal parents asserting rights to custody, the mother, who had been involuntarily committed, eventually consented to termination of her parental rights. *See id.* at 518.

often in the absence of a biological or legal parent.[143] Hence, in reality, the result of denying this relationship would be not only to disrupt the child's stable household, but also to sever an intact and important parent-child relationship. As the West Virginia Supreme Court explained in a case in which the child had been parented for several years by her aunt and uncle, "It is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians."[144] Accordingly, in such cases, the court continued, lower courts should issue orders that "foster the emotional adjustment of the children" and that seek to "maintain as much stability as possible in their lives."[145] Termination of these relationships can be traumatic because—from the perspective of the children—these relationships can be critically important.[146]

Of course, in some of the West Virginia cases, the psychological parent's request for custody is denied. Yet, even when courts decline to award custody to the psychological parent in deference to the superior rights of a legal parent, they often fashion remedies in ways that recognize and preserve the parental relationship between the child and the psychological parent. The 1989 *Honaker v. Burnside*[147] case illustrates this point. The child, who was six years old at the time of the court decision, lived with her biological mother and stepfather from the age of one.[148] As the court explained, "These familial surroundings are the only ones she ha[d] ever known, and it [wa]s undisputed that she ha[d] developed a close and loving relationship with her stepfather."[149] For his part, though, the biological father maintained a relationship with the child through visitation.[150] When the mother was killed in a car accident, the stepfather became the child's guardian.[151] The biological father then sought custody of the child.[152] Recognizing the superior rights of the biological father, the court granted the father's petition.[153] The court nonetheless acknowledged and took account of the fact that this change of custody would, as a psychologist testified, inflict "added trauma" on the child.[154] Accordingly, at the same time that it awarded custody to the father, the court also "provided for a transition period in an

143. This was not the case in *In re T.B.*, No. 20-0369, 2020 WL 6482958 (W. Va. Nov. 4, 2020); *In re L.H.*, 2018 WL 317057; and *Simmons v. Comer*, 438 S.E.2d 530 (W. Va. 1993).

144. Snyder v. Scheerer, 436 S.E.2d 299, 307 (W. Va. 1993) (quoting *In re* James M., 408 S.E.2d 400, 409 (W. Va. 1991)).

145. *Id.*

146. *Id.* at 308 (noting that "[t]he mission for these mothers [that is, the child's biological mother, and the child's aunt who served as her primary caretaker for a number of years] is the same").

147. 388 S.E.2d 322, 323 (W. Va. 1989).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 323–24.

152. *Id.* at 323.

153. *Id.*

154. *Id.* at 323–24.

attempt to lessen the trauma to [the child] of such a dramatic change in her life on the heels of the loss of her mother."[155]

Invoking "the need for stability in the child's life," the court explained that a failure to order continued contact with the child's stepfather (and half-brother) "would contribute to instability rather than provide stability."[156] "[T]he need for continued contact," the court explained, "is imperative in order to provide [the child] as stable an environment as possible."[157] Adopting a functional rather than formal understanding of family, the court held that "visitation rights with her stepfather . . . and her half-brother . . . should be conferred upon [the child] in order to ensure that she is not stripped of the right to continue a close relationship with the people she considers her family."[158] Thus, even as it provided less than custody to the stepfather, the court concluded its decision with the observation that the child's "future happiness and emotional security will rely heavily on the efforts of *these two fathers*."[159]

In another case, *In re K.H.*,[160] the court held that the child "and her psychological parent/grandmother [we]re entitled to continued visitation," even though the father was entitled to custody.[161] The grandmother had become the child's guardian after the child's mother died in a car accident when the child was one year old.[162] The father, who "had no contact with the child during the first year of her life,"[163] "became gradually more involved in the life of his daughter and sought additional custodial responsibilities."[164] In overturning the family court's conclusion that the grandmother did not qualify as a psychological parent, the court explained that "[f]rom the child's birth and over the course of the next eight years, the grandmother has served as a parent to [the child] in every conceivable capacity."[165]

Orders that vest custody in a legal parent but also provide for continued contact with psychological parents may arise in cases involving child welfare involvement. For example, in *In re D.P.*,[166] the court awarded "permanent placement with the child's father," but also ruled that the child's grandmother, with whom the child had lived before and during the abuse and

155. *Id.* at 324.

156. *Id.* at 326 (quoting Michael J. Lewinski, Note, *Visitation Beyond the Traditional Limitations*, 60 IND. L.J. 191, 219 (1984)).

157. *Id.*

158. *Id.*

159. *Id.* (emphasis added); *see also* Snyder v. Scheerer, 436 S.E.2d 299, 307–08 (W. Va. 1993) (transferring custody from the functional parents to the legal parent, but remanding with directions "that the Appellees [the child's aunt and uncle] be awarded extensive and meaningful visitation rights," and noting, in closing, that "[t]he mission for these mothers is the same").

160. 773 S.E.2d 20 (W. Va. 2015).

161. *Id.* at 32.

162. *Id.* at 22.

163. *Id.*

164. *Id.* at 28.

165. *Id.*

166. No. 20-0499, 2021 WL 982769 (W. Va. Mar. 16, 2021).

neglect proceeding against the mother and father, "receive regular visits and involvement in the child's life."[167] In another dependency-involved case, the court described the child as having "two sets of parents"—the child's biological parents and the child's foster parents, who had raised the child, born in April 1990, from December 1990 to October 1995, at which point the child was reunified with his biological parents.[168] The court had no trouble concluding that "both sets of parents, foster and biological, obviously loved and wanted this child."[169] In "recommending consideration of continued contact" between the child and the foster parents, the court stressed the guiding inquiry: "whether a strong emotional bond exists between the child and an individual such that cessation in contact might be harmful to the child, both in its transitory period of adjusting to a new custodial arrangement and in its long-term emotional development."[170]

Further, even when courts reject claims for custody or continued contact under the psychological parent doctrine, the individuals may have other avenues that facilitate the child's continued relationship with them. About half of the functional parent cases from West Virginia involve grandparents.[171] Thus, even if they were not recognized as functional parents entitled to custody, they would have a right under the West Virginia grandparent visitation law to seek "reasonable visitation."[172] The West Virginia Supreme Court has explicitly acknowledged this reality. Even as it denied standing to seek custody under the psychological parent doctrine to a child's grandmother, who had been the child's primary caregiver for a decade, the court cited the state's grandparent visitation statute in recognizing the importance of the child's "desire to have a continued relationship with his grandmother, who appears to have been his psychological parent for many years."[173]

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167. *Id.* at *4.

168. *In re* Jonathan G., 482 S.E.2d 893, 906 (W. Va. 1996). As the court noted, given that the foster parents had the child "with them for so long, providing him with love, constancy, and care in his earliest years, . . . [they] probably were more knowledgeable than anyone as to this child's needs." *Id.* at 729.

169. *Id.*

170. *Id.* at 912.

171. *See In re* Brandon L.E., 394 S.E.2d 515 (W. Va. 1990); Ortner v. Pritt, 419 S.E.2d 907 (W. Va. 1992); Overfield v. Collins, 483 S.E.2d 27 (W. Va. 1996); *In re* Antonio R.A., 719 S.E.2d 850 (W. Va. 2011); *In re* K.H., 773 S.E.2d 20 (W. Va. 2015); J.E. v. L.A., No. 14-0137, 2015 WL 3751807 (W. Va. June 15, 2015); Andra F. v. Anthony H., No. 15-0445, 2016 WL 700585 (W. Va. Feb. 16, 2016); *In re* K.R., No. 17-1012, 2018 WL 1709713 (W. Va. Apr. 9, 2018); *In re D.P.*, 2021 WL 982769; *In re* Custody of Cottrill, 346 S.E.2d 47 (W. Va. 1986); *In re* J.C., No. 17-0362, 2017 WL 4772949 (W. Va. Oct. 23, 2017); *In re* N.A., 711 S.E.2d 280 (W. Va. 2011); *In re* T.B., No. 20-0369, 2020 WL 6482958 (W. Va. Nov. 4, 2020); State *ex rel.* R.H. v. Bloom, No. 17-0002, 2017 WL 1788946 (W. Va. May 5, 2017); *see also In re* L.H., No. 17-0002, 2017 WL 5157367 (W. Va. Nov. 7, 2017) (involving "standing grandparents").

172. W. VA. CODE § 48-10-501 (2022) ("The circuit court or family court shall grant reasonable visitation to a grandparent upon a finding that visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship.").

173. *See In re Antonio R.A.*, 719 S.E.2d at 862.

From this perspective, concerns about pulling children too thin, or creating or exacerbating conflict in their lives, likely would not be mitigated by denying psychological parent status. In cases involving grandparents—again, about half of the West Virginia cases—contact would likely continue in any event.[174] The unresolved question in these cases is really just whether the grandparent who had been serving as the child's primary custodian would be able to continue to function in that role. Continued contact with the grandparent likely would be awarded.[175]

Seen from the perspective of West Virginia's psychological parent cases, multi-parent families do not look novel or rare. And legal recognition of multiple parental relationships does not look new. The paradigmatic scene of multi-parenthood imagined in contemporary commentary is barely present in the West Virginia case law. LGBTQ+ parents appear only once.[176] Assisted reproduction is nowhere mentioned. Instead, multi-parent families in West Virginia have existed for decades, and in forms that are more diverse than commonly assumed. Courts' accommodation of multi-parent families in West Virginia is longstanding. Courts have routinely applied the psychological parent doctrine, even when a child has two legal parents, to recognize a child's primary parental relationship. Seen from the perspective of West Virginia's case law, multi-parent recognition may not create or exacerbate conflict and instability in children's lives, but instead may secure critical parent-child relationships and provide permanency for a child who has faced instability and uncertainty.

## CONCLUSION

Broadening our lens from the rare and new paradigmatic case to the fuller array of cases in which multi-parenthood actually arises, the view from West Virginia allows us to see that courts have accommodated multi-parent families for decades. Bringing these overlooked cases to the fore, we can see that the speculative concerns about the effects of multi-parent recognition are either misplaced or overstated.

Uncovering this reality allows us to shift the conversation away from questions of *whether* to allow multi-parent recognition and instead toward questions of *how* to structure such recognition. Questions about how to structure multi-parent recognition include whether functional parents should have a status that is different from, and unequal to, that of legal parents, as is

174. *See, e.g.*, *id.*; *Overfield*, 483 S.E.2d at 38.

175. *See, e.g.*, *Overfield*, 483 S.E.2d at 38 ("Regardless of who ultimately is awarded custody of these children, the children should be able to continue in a caring and loving relationship with the person who is not awarded custody so as not to interrupt the continuity and the bonding that has occurred over these past many years."); s*ee also* W. VA. CODE ANN. § 48-10-501 (2022) ("The circuit court or family court shall grant reasonable visitation to a grandparent upon a finding that visitation would be in the best interests of the child and would not substantially interfere with the parent-child relationship.").

176. *See In re* Clifford K., 619 S.E.2d 138 (W. Va. 2005).

the case in West Virginia.[177] Or, as is true under the UPA, whether they should stand in parity with other legal parents. Even if multiple parents stand in parity, how should courts approach the questions of legal and residential custody, as well as support obligations?[178] Under either multi-parenthood approach, what showing should be required to establish a person as a functional parent? And does recognition of a functional parent impermissibly infringe on the rights of any other legal parents? These are some of the questions to which we will turn in subsequent work.

177. *See, e.g.*, Cahn & Carbone, *Three (or More) Parents*, *supra* note 5, at 407 ("The multiple-parent model is a good idea, however, only so long as it is applied to recognize the realities of multiple types of families and the need to accord differing—and unequal—rights to those deemed to be parents based on function. Fully developing what unequal parenthood means is a project that will unfold in the courts—and in families."); *see also* Laufer-Ukeles & Blecher-Prigat, *supra* note 28, at 454 ("Functional parenthood is different from formal biological or adoptive parenthood and should therefore be treated differently.").

178. *See, e.g.*, Cahn & Carbone, *Three (or More) Parents*, *supra* note 5, at 406 ("As the law recognizes multiple parenting roles, it should move away from a rigid insistence on parental equality to greater differentiation between equal and unequal parental relationships."); Appleton, *supra* note 7, at 45 ("[T]he advent of multi-parentage provides an opportunity to take a fresh look at the special challenges of shared decisionmaking."); Jacobs, *supra* note 23, at 326 (arguing for "relative rights of the parents" in multi-parent families).